

STAFF REPORT

ORDERS ADOPTING CONDITIONAL WAIVERS OF WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS

28 November 2005 - Board Meeting

INTRODUCTION

On 11 July 2003, the Central Valley Regional Water Quality Control Board (Central Valley Water Board) adopted:

- Resolution No. R5-2003-0105 *Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands Within the Central Valley Region* (2003 Conditional Waivers),
- Monitoring and Reporting Program (MRP) Order No. R5-2003-0826 for Coalition Groups,
- MRP Order No. R5-2003-0827 for Individual Dischargers, and
- Resolution No. R5-2003-0103 *Approving an Initial Study and Adopting a Negative Declaration for the Conditional Waivers*.

The 2003 Conditional Waivers provide an option for owners and operators of irrigated lands, including water districts, nursery owners, and managed wetland operators, to comply with the California Water Code (Water Code). The 2003 Conditional Waivers and MRPs set the minimum requirements for these entities to comply with the Water Code. The 2003 Conditional Waivers expire on 31 December 2005. Staff is proposing that the Central Valley Water Board consider adoption of the *Coalition Group Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands* (Coalition Group Order) and the *Individual Discharger Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands* (Individual Discharger Order), which would change the 2003 Conditional Waivers with numerous revisions. The Coalition Group Order and Individual Discharger Order, along with their respective Attachments A and B, are hereafter collectively referred to as Proposed Orders.

This Staff Report describes proposed revisions to the 2003 Conditional Waivers, staff outreach efforts and process, the tentative renewal documents sent out for public comment on 5 October 2005 (Tentative Renewal Documents), and the major changes proposed from the 2003 Conditional Waivers to the Tentative Renewal Documents and from those to the Proposed Orders. The Tentative Renewal Documents included two proposed Orders, each with Attachments A and B, and the three corresponding MRPs. The Proposed Orders include two proposed Orders each with only Attachments A and B.

OUTREACH EFFORTS TO RENEW CONDITIONAL WAIVERS

In April 2005, Central Valley Water Board staff began an extensive outreach effort by meeting with Water Districts, Coalition Groups, DeltaKeeper, the Department of Pesticide Regulation (DPR), Department of Food and Agriculture (DFA), and the California Farm Bureau. These meetings were listening sessions to solicit feedback on how the Irrigated Lands Conditional Waiver Program (Program) has worked in the last two years and to hear any specific modifications that stakeholders would like staff to consider during the renewal process.

Comments received at these meetings were both broad ranging and very specific. Issues included, among others, the expiration date of the new Conditional Waivers; definition of who is a Discharger; clarification of irrigated pasture; data sharing amongst State agencies; Agricultural Commissioner Memorandum of Understanding; roles of DFA and DPR in the Conditional Waiver process; characterization of agriculture's effects on water quality; appropriate Conditional Waiver approaches to water quality problems; impairment strategies; timely submission of Exceedance Reports; and specific management practices to correct water quality impairments.

MRP Revision Process

Although the MRPs do not expire, Central Valley Water Board staff provided a preliminary draft MRP in April 2005 for Water Districts enrolled in the Individual Discharger Conditional Waiver. On 19 April, staff held a meeting with five Irrigation Districts in the San Joaquin Valley to discuss the draft MRP. These Districts requested that Board staff tour their Districts to gain a better understanding of system operations to help craft the MRP. After the tours, Board staff modified the draft MRP and provided the Water Districts an opportunity to preview it on 10 August. Water Districts provided comments on this draft MRP, and staff evaluated and considered these comments. On 3 October, staff provided a response to the comments received on the 10 August draft Water District MRP, and on 5 October, circulated a revised proposed Water District MRP with the Tentative Renewal Documents.

On 6 May 2005, staff circulated for public comment a draft revised MRP for Coalition Groups. The revision process began based on discussions in the Technical Issues Committee (TIC). The due date for comments on the draft revised MRP was 3 June 2005. Staff had not received any comments on the draft revised MRP, so on 2 June, staff circulated for public comment a second revised MRP for Coalition Groups. Most of the additional revisions resulted from discussions in the Management Practices Working Group. The due date for comments on the second revised MRP was 17 June 2005.

Staff received comments from seven Coalition Groups, two laboratories, and the DPR on the proposed revised MRP. On 21 July, staff circulated a summary of comments received and responses to the comments, along with the proposed final Coalition Group MRP. On 15 August 2005, the Executive Officer issued MRP Order No. R5-2005-0833 for Coalition Groups, which replaced MRP Order No. R5-2003-0826.

Workshops

During late August and early September, staff conducted three public workshops to provide information on the renewal process and to gather feedback regarding the Program and renewal process. The workshops were held in Modesto on 29 August, in Colusa on 1 September, and in Tulare on 8 September.

On 5 October, staff circulated the Tentative Renewal Documents for a 30-day public review and comment period, with comments due by 4 November. Beginning two weeks after the start of this 30-day period, staff conducted four public workshops to explain the changes staff propose in the Program and listen to comments on the Tentative Renewal Documents. The workshops were held on 18 October in Tulare, during the 20 October Central Valley Water Board meeting in Rancho Cordova, on 25 October in Colusa, and on 27 October in Modesto.

During the workshops, staff discussed how they arrived at the proposed changes by evaluating the comments received during the meetings with stakeholders and the earlier public workshops, the analytical results from the Phase I and II UC Davis Cooperative Extension sampling, and the monitoring conducted by Coalition Groups, Individual Dischargers, and Water Districts under the Program. In addition, staff described the elements of the Tentative Renewal Documents that are consistent with the 2003 Conditional Waivers and how the Proposed Orders implement the *NonPoint Source Implementation and Enforcement Policy* and consider the Irrigated Lands Programs in other Regions. Staff also summarized the major proposed changes, which are discussed in more detail in the next section.

Staff received many comments during these workshops. In order to more fully discuss some of the major comments received, staff conducted a meeting on 31 October with representatives from Coalition Groups, California Farm Bureau, and DFA to discuss revisions proposed to address the comments, and to hear any additional comments on the Tentative Renewal Documents.

MAJOR PROPOSED CHANGES FROM 2003 CONDITIONAL WAIVERS, COMMENTS RECEIVED, AND STAFF RESPONSES

The following items are the major additions to or changes from the 2003 Conditional Waivers that staff included in the Tentative Renewal Documents and the rationale for the changes. Staff described these proposed changes and rationale during the October public workshops. Staff received “form letters” from 115 stakeholders and 30 comment letters from various stakeholders, including Coalition Groups, Agricultural Commissioners, Farm Bureau, and others. Attached is the *Summary of Comments and Responses to Comments* regarding the Tentative Renewal Documents. The discussion below includes staff’s proposed changes based on the comments from the Tentative Renewal Documents to the Proposed Orders being considered for adoption.

- *Direct enrollment of Coalition Group members* – The Tentative Renewal Documents required Coalition Group members to enroll directly with Central Valley Water Board beginning on 1 January 2007, phased in over that year, based on the number of irrigated acres. Direct enrollment reinforces grower responsibility as a Discharger and provides accountability for the Program. Direct enrollment also allows the Central Valley Water Board to conduct more efficient enforcement against growers who are not complying with the Water Code.

Coalition Groups continue to assert that the Central Valley Water Board does not need the names of the members of the Coalition Groups, as long as the Coalition Groups are complying with the 2003 Conditional Waiver’s terms and conditions, and that the Executive Officer can only request the Membership List when there is an exceedance of a water quality standard. There is a misunderstanding about when the Executive Officer can request the Membership List. Neither the 2003 Conditional Waivers nor State Water Resources Control Board (State Water Board) Order WQO 2004-0003 contains any conditions or limitations on when the Executive Officer can request the Membership List. The Central Valley Water Board amended the Conditional Waivers on 12 March 2004 to include the required language in WQO 2004-0003. On 26 August, using this provision of the 2003 Conditional Waivers, the Executive Officer requested the Membership Lists from the Coalition Groups, which received a considerable amount of opposition.

Given the discussions regarding the 26 August letter, staff proposed in the Tentative Renewal Documents that each grower be required to enroll directly with the Central Valley Water Board on a time schedule based on number irrigated acres or type of entity. Staff received many comments that the direct enrollment is not necessary because the Coalition Groups are complying with the 2003 Conditional Waivers, it violates the trust needed to make the Program work, and it takes away the Coalition Group's leadership role and their role to act on behalf of the growers. These comments on direct enrollment are similar to those provided in the past on this issue.

Based on the comments received, staff has modified the Proposed Coalition Group Order and Conditional Waiver to remove the direct enrollment requirement and instead require each Coalition Group to maintain, revise, and submit its Membership List annually by 15 July and when requested by the Executive Officer. This is consistent with the 2003 Conditional Waivers, which state that the Membership List is due upon request of the Executive Officer.

As staff has discussed in the workshops and other meetings, the Central Valley Water Board must know who is engaged with the Program because: 1) Water Code Section 13269 mandates Regional and State Water Boards to require compliance with the conditions of waivers; 2) the only way the Program can be credible, accountable and defensible is to know who is enrolled; 3) the Central Valley Water Board cannot enforce the Water Code directly on the Coalition Groups; 4) the Central Valley Water Board cannot delegate authority to enforce the Orders and Waivers to Coalition Groups; and 5) the Water Code contains requirements for Dischargers, not Coalition Groups.

- *Water Quality Plan* – The Tentative Renewal Documents for Coalition Groups required that Coalition Group members develop a Farm Water Quality Plan that would identify appropriate management practices to protect water quality. These plans would be maintained on-site and be made available upon request to staff of the Central Valley Water Board, DPR, and/or Agricultural Commissioners. The Farm Water Quality Plan would substantiate that growers are aware of management practices to use to protect water quality from potential water quality impairments due to their operations. If water quality exceedances are found within an area, Farm Water Quality Plans could be examined to find management practices that may be implemented to resolve the exceedance.

During the workshops, the main comments were that 1) the money spent on classes to learn how to prepare the plan and the actual cost of preparing the plan was money that could be better spent on monitoring, 2) the requirement assumes a water quality problem and is not specific to known water quality concerns, and 3) it defeats the purpose of having a Coalition Group representing the growers. Based on these comments, staff proposes modifications to this requirement.

In the proposed Coalition Group Order, staff proposes that Coalition Groups develop, maintain, and implement Water Quality Plan(s) (no longer called Farm Water Quality Plan), for water bodies and/or areas of water quality concern. Areas of water quality concern are defined as water bodies that are listed under Clean Water Act section 303(d) as being impaired, or water bodies or areas where sampling data show toxicity or exceedances of receiving water limitations. The Water Quality Plan as proposed will identify the management practices that may be implemented to

achieve receiving water limitations and will provide a schedule to implement those management practices. The Coalition Groups will have flexibility to determine how to develop the Water Quality Plan, such as basing it on regional/watershed areas, crop or commodity, or specific to a geographical/hydrological area due to physical parameters. By 1 March 2006, Coalition Groups would be required to submit a list of water bodies and/or areas of water quality concern within their boundary. After staff concurrence with the list, the Coalition Groups will have 160 days to prepare the Water Quality Plan(s).

- *Table of Receiving Water Limits* – The Tentative Renewal Documents included Table 1 in Attachment A that lists receiving water limitations for Coalition Groups to compare sample results and determine if an Exceedance Report must be submitted. Resolution No. R5-2003-0105 listed the water quality objectives for inland surface waters from both Basin Plans in a narrative form. Table 1 was added due to requests from Coalition Groups for information on what constitutes an exceedance and was intended to give guidance on this issue.

Comments on Attachment A primarily regarded staff's interpretation of narrative water quality objectives in the Basin Plans. Many commenters said that by listing those limits in the table, staff was bypassing the Basin Plan amendment process. The 2003 Conditional Waivers and the Tentative Renewal Documents require compliance with receiving water limitations through an iterative process. The Dischargers must comply with MRPs, and where exceedances of receiving water limitations are found, the Dischargers must take certain actions, including reports, further monitoring, and implementation of management practices to address the cause of the exceedance. Attachment A listed receiving water limitations that are based on water quality objectives in the Basin Plans, and Table 1 listed the numeric levels intended to be used to determine whether an exceedance has occurred. Staff does not agree that any Central Valley Water Board process was bypassed.

Based on the comments received regarding Table 1 in Attachment A, staff has removed all of the limits that interpret a narrative water quality objective and has replaced those with references to the Basin Plan. Table 1 now includes as receiving water limitations only promulgated narrative and numeric water quality objectives.

- *Monitoring and Reporting Programs* - Staff received many comments on the MRPs included in the Tentative Renewal Documents regarding 1) strategy for resampling when water quality exceedances occur, 2) rationale for the list of required monitoring parameters, 3) quantitation limits that are required for various analytes, and 4) progression of monitoring site selection in the Long-Term Monitoring Strategy. Other comments were based on the proposed monitoring requirements for Water Districts. Some of the comments included the suggestion to discuss the various MRP issues in the Technical Issues Committee, which has worked through other technical issues associated with the Program. Staff concluded that there are some issues related to the MRPs for Coalition Groups, Individual Dischargers and Water Districts that are not easily resolved and that merit further consideration. Therefore, staff is no longer proposing that the Board adopt revised or new MRPs. Since the MRPs do not expire, the existing ones will remain in effect until rescinded or revised.

The complexity of the issues associated with the MRPs warrants a greater opportunity for comment and more participation in the development of appropriate language to include. The Technical Issues Committee will be spending the next few months discussing the MRPs and developing recommended language for the Program's monitoring requirements. A schedule for discussion of the MRP topics will be determined at the 6 December 2005 Technical Issues Committee meeting.

OTHER PROPOSED CHANGES FROM 2003 CONDITIONAL WAIVERS, COMMENTS RECEIVED (IF ANY), AND STAFF RESPONSES

The following items are the other additions to or changes from the 2003 Conditional Waivers that staff included in the Tentative Renewal Documents and the rationale for the changes. Staff described most of these proposed changes and rationale during the October public workshops. For those items on which staff received comments, the discussion below includes staff's proposed changes based on the comments from the Tentative Renewal Documents to the Proposed Orders being considered for adoption.

- *CEQA Findings* - CEQA Guidelines require that when a lead agency has adopted a negative declaration for a project, the agency is not required to prepare a subsequent environmental document unless the lead agency determines there are substantial changes to the project that involve new significant environmental impacts, substantial changes with respect to the circumstances of the project, or new information that was not previously known shows that the proposed project will have significant effects. The Proposed Orders include findings that state none of these circumstances apply and includes justification for these findings.
- *Changes in Water Code Section 13269* – The Tentative Renewal Documents and Proposed Orders add language due to changes in Water Code Section 13269 since the adoption of the 2003 Conditional Waivers. As revised since 2003, Section 13269 requires that any waiver be consistent with any applicable water quality control plan and be in the public interest. Section 13269, as revised since 2003, also states that the conditions of the waiver must include monitoring requirements to support the development and implementation of the waiver program and to verify the adequacy and effectiveness of the waiver conditions, unless such monitoring is waived. Monitoring and reporting programs were included in the 2003 Conditional Waivers and have been revised or are in the process of being revised. Section 13269 also authorizes the Central Valley Water Board to include as a condition the payment of an annual fee established by the State Water Board. The State Water Board has established a fee schedule, so the Proposed Orders require the payment of the appropriate fee.
- *Changes Based on Nonpoint Source Policy* – The State Water Board adopted the *Non Point Source (NPS) Implementation and Enforcement Policy* (NPS Policy) in May 2004. The Tentative Renewal Documents and Proposed Orders describe the NPS Policy, including some of its key elements, and are consistent with the NPS Policy. Among other key elements, the NPS Policy requires that an NPS control implementation program's ultimate purpose shall be explicitly stated, and that the implementation program must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

Orders Adopting Conditional Waivers of
Waste Discharge Requirements for Discharges From Irrigated Lands

- *Changes to Describe Water Quality Criteria* – The Tentative Renewal Documents and Proposed Orders describe water quality criteria based on the United States Environmental Protection Agency National Toxics Rule (NTR) dated 5 February 1993 and the California Toxics Rule (CTR) updated on 13 February 2001. The State Water Board *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (known as the State Implementation Plan or SIP) states that implementation of the NTR and CTR for agricultural nonpoint sources of pollution shall be consistent with the State’s NPS Policy.
- *Definition Changes* – The Tentative Renewal Documents and Proposed Orders Attachment A revises the definition for “irrigated lands” so that it includes row, vineyard, pasture, and greenhouse operations with permeable floors not regulated by other discharge permits, in addition to field and tree crops, commercial nurseries, nursery stock production, managed wetlands and rice production that are included in the existing definition. All of these operations could degrade water quality, so should be covered under the Program. In addition, Attachment A includes five new definitions and revises three others, besides the one for “irrigated lands.”
- *What is Not Intended to be Covered* – The Proposed Orders include additional information and clarification on what the Coalition Group Conditional Waiver is **not** intended to cover or address, including application of soil amendments or fertilizers to land, irrigated lands receiving liquid waste, and small irrigated areas for personal use. (See Proposed Order conditions 45, 46, and 47)
- *Two Orders Instead of One* – There is a proposed Order for Coalition Groups and a proposed Order for Individual Dischargers. This allows for different expiration dates and specific findings for each Conditional Waiver and addresses other differences between Coalition Groups and Individual Dischargers.
- *Three Monitoring Programs* – The Tentative Renewal Documents proposed a different Monitoring Program for Water Districts that enroll as Individual Dischargers due to their unique responsibilities to convey water and collect drainage from irrigated lands. The existing monitoring program for the Individual Discharger does not fit the operations of Water Districts. As noted earlier, staff received comments on the MRPs, but will work with the Technical Issues Committee to resolve these and propose revised MRPs in the future.
- *“Rescission” of Conditional Waivers* - There have been concerns expressed over “rescinding” the Conditional Waivers because this could be perceived as completely rescinding the Program, all the Notices of Applicability issued by the Executive Officer, and all progress made in the Program since 2003. This is not the case. Although staff explained that “rescinding” previous orders when a new order is adopted is standard procedure for the Central Valley Water Board and does not rescind the Program, many commentators still expressed apprehension over the term. Therefore, staff now proposes not to rescind the 2003 Conditional Waivers and simply allow them to expire on 31 December 2005. The Proposed Orders are now proposed to become effective beginning on 1 January 2006.
- *Management Plan* - Staff received comments regarding the public review portion of the Management Plan submittal requirement (Tentative Renewal Document Attachment B, Condition

B.9d). Commenters recommended removing this portion of the condition and also stated that it is not clear when the Executive Officer would request a Management Plan. Staff does not propose any changes to the Management Plan Condition, which is the same as in the 2003 Conditional Waivers. To comply with Water Code Section 13269, management plans must be submitted as necessary to assure compliance with the Basin Plans and the conditions of the Proposed Orders. The Proposed Orders require the submittal of management plans only upon finding an exceedance of a receiving water limitation. The Central Valley Water Board has the authority to require such reports merely based upon the suspicion of a discharge and has chosen for purposes of the Conditional Waivers to limit the request for such reports only to certain circumstances. The submittal of the Management Plan is subject to Condition B.10 of the Proposed Orders Attachment B, which pertains to public inspection of materials submitted and requires the Water Board to protect trade secrets from public disclosure.

- “No New Discharges” - Staff received comments regarding the condition pertaining to “no new discharges” (Tentative Renewal Document Attachment B, Condition A.8). The concern is that this condition would prohibit growers from changing crop types, pesticides or irrigation practices. Staff does not propose any changes to this condition. The portion of the condition that refers to not allowing the discharge of waste not specifically regulated by the Coalition Group Conditional Waiver is broad enough that it does not prevent growers from changing crops or practices. The condition describes waste specifically regulated by the Coalition Group Conditional Waiver.

SUMMARY

Throughout the extensive outreach efforts, data and information evaluations, and conditional waiver renewal process, staff has worked with stakeholders to clarify, modify, and improve the Conditional Waivers. Central Valley Water Board staff appreciates stakeholder efforts to work with staff to overcome Program challenges and improve the Program. The Orders proposed for adoption are the result of a collaborative effort with stakeholders. While not all stakeholders are satisfied with the Proposed Orders, the Proposed Orders are in compliance with the Water Code, consistent with State and Regional Water Board orders and policies, and consistent with the Sacramento County Superior Court’s ruling.

RECOMMENDATION

Staff recommends that the Central Valley Water Board adopt the proposed *Coalition Group Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands* and the proposed *Individual Discharger Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands*.

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