



March 15, 2011

Regional Water Quality Control Board
Central Coast Region
895 Aerovista Place, Suite 101
San Luis Obispo, California 93401

RE: The Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands Expires On March 31, 2011

Dear Board Members:

The Environmental Defense Center (EDC), Monterey Coastkeeper (MCK), Santa Barbara Channelkeeper (SBCK) and San Luis Obispo Coastkeeper (SLOCK) offer these comments for your March 17, 2011, hearing in Watsonville.

On July 8, 2010, your Board renewed the existing Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Irrigated Ag Order R3-2010-0040 or "Conditional Waiver"). Order R3-2010-0040 expires on March 31, 2011. Unless your Board renews Order R3-2010-0040 prior to April 1, all dischargers enrolled under the existing Conditional Waiver will be required to submit reports of waste discharge per California Water Code Section 13260. Your Board must then prescribe waste discharge requirements (WDRs) for each individual discharger, per Water Code Section 13263.

Your agenda for March 17 states: "If there is no quorum, the Board may conduct this item as a panel hearing of at least 3 board members. Following the hearing, the panel will make a recommendation for consideration by the full Board at a later date." To reiterate, if that "later date" is after March 31, the provisions of Water Code Sections 13260 and 13263 will be triggered, and the full burden of WDRs will fall on the regulated community.

It has come to our attention that the Executive Officer may intend to avoid this situation by "administratively" renewing the Conditional Waiver, on authority delegated under Water Code Section 13223. As described below, however, your Board *may not*

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delegate authority to the Executive Officer for the purpose of renewing Order R3-2010-0040.¹

Water Code Section 13223

Water Code Section 13223 states:

(a) Each regional board may delegate any of its powers and duties vested in it by this division to its executive officer excepting only the following: (1) the promulgation of any regulation; (2) the issuance, modification, or revocation of any water quality control plan, water quality objectives, or waste discharge requirement

Government Code Section 11342.600 states:

“Regulation” means every rule, regulation, *order*, or standard of general application or the amendment, supplement, or revision of any rule, regulation, *order*, or standard adopted by any state agency to *implement, interpret, or make specific the law enforced or administered by it*, or to govern its procedure.

(Emphasis added.)

The Conditional Waiver is clearly a “regulation” as contemplated by Water Code Section 13223(a)(1) and as defined by the plain language of Government Code Section 11342.600. To illustrate, Order R3-2010-0040 states:

The intent of this Conditional Waiver is to *regulate* discharges from irrigated lands to ensure that such discharges are not causing or contributing to exceedances of any Regional, State, or Federal numeric or narrative water quality standard.

(Emphasis added.) “The Conditional Waiver provides an alternative *regulatory* option to adoption of WDRs for all Dischargers.” (*Id.*, emphasis added.) “Waste *specifically regulated* under this Order includes” (*Id.*, emphasis added.)

Even if the clear meaning of “regulation” is ignored, Water Code Section 13223(a)(2) prohibits the Executive Officer from adopting a conditional waiver. If the Executive Officer is specifically precluded from issuing, modifying or revoking a WDR, it makes no sense that he or she would be authorized to *waive* a WDR. For example, under that nonsensical scenario, the Executive Officer would be delegated the authority to supersede the Regional Board; the Regional Board could issue a WDR, and the Executive Officer could then

¹ Please note that although Water Code Section 13269(a)(2) allows the State Board or a Regional Board to “renew” an existing conditional waiver, the order effectuating “renewal” is a new and separate document, as described by its unique order number (for example, Order R3-2004- 0117, Order R3-2009-0050, Order R3-2010-0040, Order R3-2011-0006, etc.) and constitutes a new action by the Board.

immediately waive the WDR. Under that scenario, adoption of a waiver can essentially be considered “revocation” of a WDR, which is prohibited by Section 13223(a)(2).²

Inadequate Notice

Even if the Executive Officer does have the delegated authority to renew a conditional waiver, his options are limited on March 17. Water Code Section 13269(f) states:

Prior to renewing any waiver for a specific type of discharge established under this section, the state board or a regional board shall review the terms of the waiver policy at a public hearing. At the hearing, the state board or a regional board shall determine whether the discharge for which the waiver policy was established should be subject to general or individual waste discharge requirements.

The purpose of your March 17 hearing is to “consider adoption of a *revised* conditional waiver.” (March 1, 2011, Public Notice for Agenda Item 14, at p. 1.) Specifically:

Water Board staff has proposed to renew the current [Conditional Waiver] *with revisions* to control the discharges of wastes, including nitrate, pesticides, and sediment, to surface or ground water and protect beneficial uses of these waters.

(*Id.*, emphasis added.) The possibility of the *Executive Officer* wielding delegated authority to adopt a renewed conditional waiver *without revisions* is not agendized and has not been properly noticed. Therefore, it is not an option for your March 17 hearing.

Staff Recommendation

Finally, even if the Executive Officer is delegated the authority to adopt a conditional waiver of WDRs, it would be paradoxical to “administratively” renew the existing Order R3-2010-0040 verbatim. If staff represents the Executive Officer, and staff is recommending adoption of (revised) Order R3-2011-0006, and that is the only option agendized for March 17, then the Executive Officer should simply adopt Order R3-2011-0006.

² Also see the January 3, 2011, letter from Somach Simmons & Dunn, on behalf of the California Strawberry Commission, at page 7:

Although revisions to conditional waivers adopted pursuant to Water Code section 13269 are not specifically enumerated in Water Code section 13223(a), revisions to waivers are akin to revisions in waste discharge requirements. Specifically, changing the status of a discharger from a lower tier to a higher tier fundamentally alters the burdens and regulatory requirements placed on that discharger-much like a revision to waste discharge requirements. Considering the potential changing regulatory burden and fundamental due process concerns, such an action should not be delegated to the [Executive Officer].

Conclusion

We have urged your Board to adopt a conditional waiver program that contains robust regulatory provisions to ensure that our waters are protected from agricultural discharges while also ensuring that agriculture remains sustainable and productive. Staff's February 2010 Draft Order accomplished those objectives. Staff's March 2011 Draft Order can accomplish those objectives, with certain revisions and enhancements (as detailed in our companion letter dated March 11, 2011).

Renewing Order R3-2010-0040 without revisions will not accomplish those objectives, and it will represent a step backward for this regulatory process. Moreover, renewing Order R3-2010-0040 without revisions is not an option available to your Board or staff on March 17. You may not delegate authority to adopt a conditional waiver to the Executive Officer, and even if it was possible, you have not agendized the verbatim renewal of Order R3-2010-0040 for March 17.

Unless your Board adopts Order R3-2011-0006, or adopts it as modified by our recommendations, the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands will expire on March 31 and WDRs will be required. In that eventuality, our organizations stand ready to assist your Board and staff in preparing and enforcing the WDRs that must be issued after April 1.

If you have any questions about this letter, please do not hesitate to contact us. Thank you for your time.

Sincerely,



Nathan G. Alley
Staff Attorney
Environmental Defense Center



Steve Shimek
Executive Director
Monterey Coastkeeper

Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands

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Kira Redmond
Executive Director
Santa Barbara Channelkeeper

A handwritten signature in black ink, appearing to read "Gordon Hensley". The signature is written in a cursive style with a large initial "G".

Gordon Hensley
Executive Director
San Luis Obispo Coastkeeper