

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2004 - 0003

In the Matter of the Petitions of

**AGRICULTURAL WATER QUALITY COALITION, ET AL.;
DELTAKEEPER, ET AL.; CALIFORNIA FARM BUREAU FEDERATION;
CALIFORNIA RICE COMMISSION; SAN JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER AUTHORITY; NORTHERN CALIFORNIA WATER
ASSOCIATION AND DUCKS UNLIMITED, INC.; STEVINSON WATER DISTRICT**

For Review of Conditional Waiver of Waste Discharge Requirements for Discharges From Irrigated Lands, Resolution No. R5-2002-0201; Conditional Waiver of Waste Discharge Requirements for Discharges From Irrigated Lands, Resolution No. R5-2003-0105; Monitoring and Reporting Program for Coalition Groups, Order No. R5-2003-0826; Rescission of Prior Conditional Waivers, Resolution No. R5-2003-0102; Monitoring and Reporting Program for Individual Dischargers, Order No. R5-2003-0827; Monitoring Program Order No. R5-2003-0826; Rescission of Prior Conditional Waivers, Resolution No. R5-2003-0102; Monitoring and Reporting Program for Coalition Groups, Order No. R5-2003-0826; Monitoring and Reporting Program for Individual Dischargers, Order No. R5-2003-0827; Adoption of Negative Declaration, Resolution No. R5-2003-0103

Issued by the
California Regional Water Quality Control Board,
Central Valley Region

SWRCB/OCC FILES A-1536, A-1536(a), A-1586, AND A-1586(a) THROUGH A-1586(f)

BY THE BOARD:

On July 11, 2003, the Central Valley Regional Water Quality Control Board (Regional Board) issued a conditional waiver of waste discharge requirements (Waiver) in Resolution No. R5-2003-0105, for discharges from irrigated lands throughout the Central Valley Region. Along with the Waiver, the Regional Board adopted Monitoring and Reporting Program Order No. R5-2003-0826 for Coalition Groups, Monitoring and Reporting Program 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 Waiver. The Waiver replaces an earlier waiver that was in place since 1982.¹

The Waiver provides a regulatory program for agricultural discharges that operates in lieu of waste discharge requirements.² It allows participation by individual farmers (Individual Dischargers) and by groups of farmers (Coalition Groups). Individual Dischargers and Coalition Groups may seek coverage under the Waiver by submitting a Notice of Intent (NOI). Enrollees must also prepare Management Plans for controlling their discharges and Monitoring Plans.

On August 8 and 11, 2003, the State Water Resources Control Board (State Board) received seven petitions for review of the permit from various groupings of agricultural interests and environmental groups.³ The petitions regarding both the December 2002 waiver and the current Waiver are legally and factually related, and have therefore been consolidated for purposes of review.⁴

I. BACKGROUND

There is ample evidence in the record that discharges of waste from irrigated agricultural activities can have significant effects on the quality of waters throughout the Central Valley.⁵ Impacts from farming activities can result in the discharge of waste including pesticide residue, earthen materials, and inorganic and organic materials into surface waters. Discharges from agricultural sources have in fact caused impairment of water bodies in the Central Valley Region. These impairments and the pollutants causing the impairments are listed in this Board's "section 303(d) list."⁶ Listed pollutants named as having agricultural sources are chlorpyrifos,

¹ As is explained below, in December 2002, the Regional Board also adopted a waiver that was subsequently revoked, and which was never operational. In response to that action, the State Water Resources Control Board (State Board) received two petitions (A-1536 and A-1536(a)). Those petitions are considered herein.

² The Waiver is adopted pursuant to Water Code section 13269, which provides for a conditional waiver of waste discharge requirements.

³ Two of the petitioners requested a stay of the requirement that Coalition Groups must provide a Membership List pending issuance of this order. The stay requests were granted in Board Order WQ 2003-0016.

⁴ Cal. Code Regs., tit. 23, § 2054.

⁵ The specific discharges regulated by the Waiver and discussed herein are irrigation return water and agricultural storm water runoff.

⁶ This list is compiled pursuant to Clean Water Act § 303(d); 33 U.S.C.A. § 1313(d).

diazinon, ammonia, pathogens, azinphos-methyl, carbofuran/furadan, Group A pesticides, malathion, methyl parathion, molinate/ordam, DDT, DDE, electrical conductivity, sedimentation/siltation, molybdenum, toxaphene, selenium, boron, PCBs, nutrients, low dissolved oxygen, temperature, and unknown toxicity.

In 1982, the Regional Board issued a waiver of waste discharge requirements in Resolution No. 82-036 for irrigation return water and storm water runoff. The 1982 waiver was very brief and contained no affirmative monitoring or reporting requirements for farmers.⁷

We also note that discharges of waste from irrigated agriculture and agricultural storm water runoff historically have not been subject to the same type of regulation as are other discharges of waste. The federal Clean Water Act, which established the National Pollutant Discharge Elimination System (NPDES) permitting system for discharges of pollutants to navigable water, creates a complete exemption for irrigation return flows and agricultural storm water runoff.⁸ When the Porter-Cologne Water Quality Control Act was first added to the California Water Code⁹, the assumption was that most agricultural discharges would be waived from requirements to file reports of waste discharge or to be subject to direct regulation:

“Although farmers as well as other persons are theoretically required . . . to file reports of waste discharges with the regional boards, it has not been the general practice of the regional boards to request such reports or to issue waste discharge requirements covering agricultural operations and other land use, except in cases such as feeder lots or dairies, involving substantial discharges of waste. This bill adds section 13269, which will expressly authorize regional boards to waive the filing of reports or the prescription of waste discharge requirements where such waiver is not against the public interest.”¹⁰

The Waiver, with its accompanying monitoring requirements, is a significant change in the manner of regulating agricultural discharges. A change in regulatory approach was

⁷ The relevant provisions in Resolution No. 82-036 were that waste discharge requirements for irrigation return water were waived if the discharger was “operating to minimize sediment to meet Basin Plan turbidity objectives and to prevent concentrations of materials toxic to fish or wildlife.” Requirements for storm water runoff were waived “where no water quality problems are contemplated and no federal [national pollutant discharge elimination system (NPDES)] permit is required.”

⁸ Clean Water Act § 502(14); 33 U.S.C.A. § 1362(14).

⁹ Wat. Code § 13000 et seq.

¹⁰ Final Report of the Study Panel to the California State Water Resources Control Board, March 1969, Assembly Journal, at p. 3.

required by an amendment to the statute governing waivers, which is discussed below. It is important to emphasize that, regardless of the various contentions heard in these matters, there can be no doubt that the new Waiver and its requirements do result in a veritable “sea change” in the manner in which discharges from irrigated agriculture are being regulated. In considering the propriety of the Waiver, we consider a variety of factors, including the threat to water quality posed by agricultural discharges, the difficulty of regulating an industry made up of approximately 25,000 farming enterprises throughout the region, and the fact that this industry historically has not been regulated under state law and is still not regulated under federal law in the same manner as other industries.

When the 1982 waiver was adopted, the Water Code provision concerning waivers of waste discharge requirements allowed a waiver where it was “not against the public interest.”¹¹ In 1999, Water Code section 13269 was amended to terminate existing waivers not specifically readopted on or before January 1, 2003, and to require that all new waivers not exceed five-year terms, which are subject to renewal. This statutory amendment, known as SB 390, resulted in a major review of all existing waivers, and a requirement to consider adopting waste discharge requirements or new waivers.¹² Whenever a new waiver or waste discharge requirements were adopted, the necessity of an environmental documentation prepared pursuant to the California Environmental Quality Act (CEQA) had to be considered.¹³ Following the adoption of the Waiver, section 13269 was again amended. Effective January 1, 2004, the statute provides that waivers must be consistent with water quality control plans and be in the public interest, that they must include monitoring provisions, and that the State Board is authorized to adopt annual fees for recipients of waivers.¹⁴

¹¹ Former Wat. Code § 13269.

¹² For example, the Regional Board’s 1982 waiver resolution included 23 categories of discharges, of which two are the subject of this order.

¹³ Waivers are allowed under state law only where NPDES permitting requirements do not apply. The exemption from CEQA compliance for NPDES permits in Water Code section 13389 therefore is not available.

¹⁴ This most recent amendment is known as SB 923. These provisions became effective following adoption of the Waiver, and thus the provisions requiring consistency with water quality control plans and monitoring requirements were not applicable. However, we do note them and consider that in light of our review after their effective date we will endeavor to assure compliance therewith.

II. ADOPTION OF THE WAIVER, MONITORING REQUIREMENTS AND CEQA DOCUMENT

In December 2002, in light of the impending termination of the 1982 waiver, the Regional Board adopted a waiver of waste discharge requirements for discharges from irrigated lands in Resolution No. R5-2002-0201. The Regional Board also adopted Resolution No. R5-2002-0228, approving a negative declaration as a CEQA document. The Agricultural Water Coalition and a coalition of environmental groups each filed petitions.¹⁵ Following receipt of these petitions, the State Board invited the participants to attempt mediation of the issues. That did not succeed, but the Regional Board in the meantime decided that it would consider revising the waiver on its own.

In July 2003, the Regional Board rescinded the December 2002 waiver and adopted the Waiver and Monitoring and Reporting Programs that we review in this Order. The Regional Board also considered again and approved the Negative Declaration. In this Order, the State Board reviews each of the documents adopted and approved in July 2003 and the entire record before the Regional Board.

III. OVERVIEW OF THE WAIVER, MONITORING REQUIREMENTS AND CEQA DOCUMENT

The purpose of the Waiver is to improve and protect water quality through a program to manage discharges from irrigated lands that cause or contribute to conditions of pollution or nuisance or that cause or contribute to exceedances of water quality standards.¹⁶ Dischargers of agricultural wastes may comply with the Waiver as part of a Coalition Group or as an Individual Discharger, and the requirements vary depending on this choice.

To obtain coverage under the Waiver, Coalition Groups must submit several Technical Reports, which must be signed by an authorized representative under penalty of perjury.¹⁷ They must also comply with the Coalition Group Monitoring and Reporting Program. Participants who are part of a Coalition Group must implement management practices “to

¹⁵ The agricultural petition (A-1536) challenged the waiver and the environmental petition (A-1536(a)) challenged both the waiver and the CEQA document.

¹⁶ Waiver, finding 2.

¹⁷ Requirements for Coalitions Groups are set forth in Attachment B to the Waiver.

improve and protect water quality and to achieve compliance with applicable water quality objectives.”¹⁸ Other conditions include allowing Regional Board staff, upon reasonable notification, access to property to assess compliance, limitations on new discharges, and maintenance of management practices in good working order. The Technical Reports for Coalition Groups include a Notice of Intent (NOI) and a General Report, which were due November 1, 2003, and which describe the Group. These documents are discussed further, *infra*. Coalition Groups must also submit Monitoring and Reporting Program Plans. When a discharge is causing or contributing to an exceedance of water quality standards, the Coalition Group or Participant must notify the Regional Board and, upon the Regional Board’s request, submit a Management Plan. Other reports include a Watershed Evaluation Report and Annual Monitoring and Reporting Program Reports.

Individual Dischargers who are not part of a Coalition Group must comply with Attachment C to the Waiver. Individual Dischargers must submit comparable documents to Coalition Groups, including Technical Reports with a certification under penalty of perjury, an NOI and General Report, a Monitoring and Reporting Program Plan in compliance with the Monitoring and Reporting Program Order for Individual Dischargers, and a Watershed Evaluation Report.

The Monitoring and Reporting Program Orders for Coalition Groups (R5-2003-0826) and for Individual Dischargers (R5-2003-0827) are comparable, although the Group monitoring requirements include a more thorough, and lengthy, watershed approach. The Individual Discharger requirements mandate development and implementation of a plan that includes water quality and flow monitoring, toxicity testing if necessary, pesticide use evaluation, and evaluation of the effectiveness of management practices. Individual Dischargers must monitor for at least eleven water quality indicator parameters, and, if used, four pesticides and five metals. A Farm Evaluation Report and the Monitoring and Reporting Program Plan are due April 1, 2004, and an Annual Monitoring Report is due each March 1. The Program for Coalition Groups requires development and implementation of a plan with the same components as the individual plans, but the monitoring approach is phased and much more comprehensive.

¹⁸ Waiver, Att. B, A.5.

Phase 1 includes analyses of physical parameters, drinking water constituents, pesticide use evaluation, and toxicity testing. Monitoring parameters must include all pollutants identified for downstream waters on the State Board's 303(d) list and discharged to land or surface water within the watershed, all pesticides listed in the Regional Board's Basin Plan if used in the watershed, general water quality parameters, and several types of toxicity testing, including Toxicity Identification Evaluation (TIE). Phase 1 may last for two years. Phase 2 will be designed based on the results of Phase 1 monitoring, and will address general water quality parameters, pesticides (including chemical analysis), and wastes that include constituents found to be causing toxicity. Phase 2 also involves collecting information on management practices and their effectiveness. Phase 2 may also last two years. The final phase, Phase 3, requires Coalition Groups to determine statistically significant changes in waste concentrations based on various management practices. It requires monitoring general water quality parameters, Pesticide Use Evaluation, and data collection on pesticide mixing, loading, and application practices, pest management practices, management practices to address waste, and cultural practices. The list of constituents that must be tested through the three phases is much more inclusive than for Individual Dischargers, and includes nine physical parameters, six drinking water parameters, two toxicity tests, five pesticides, eight metals, and three nutrients. The entire monitoring program may last ten years.

In support of the Waiver, the Regional Board adopted a Negative Declaration. The Regional Board found that adoption of the Waiver will not have a significant impact on the environment because the conditions of the waiver will result in improvements in the quality of the waters of the state. In addition to the Negative Declaration that was adopted, the State Board is funding preparation of an Environmental Impact Report (EIR) that may lead to future actions for the regulation of discharges from irrigated agriculture. The EIR is expected to be complete in early 2008.

IV. CONTENTIONS AND FINDINGS¹⁹

Following adoption of the Waiver and related documents in July 2003, the State Board received six petitions from various entities representing agricultural interests. Several of these petitions were in turn filed on behalf of numerous associations of farmers. The six petitioners are jointly referred to in this Order as the agricultural petitioners.²⁰ The various agricultural petitioners made some contentions in common and some raised issues not shared by other petitioners. The State Board also received a petition from a coalition of environmental groups (File A-1586(f)). The environmental petitioners made several contentions that challenge the Waiver and related documents. In some instances both sides make opposing arguments regarding the same requirements, and those opposing arguments will be addressed together.

Contention: Several of the agricultural petitioners challenge the requirement that Coalition Groups must identify each individual farming operation within the group.

Finding: A prerequisite to obtaining coverage as a Coalition Group under the Waiver is submission of an NOI that includes a Membership Document.²¹ The Membership Document must provide information for each Participant who has knowingly elected to be part of the Coalition Group, including the name of the owner or operator, farm assessor parcel number(s), Section, Township and Range, and the closest downstream surface water body. Contact information for Participants, including telephone number and address, is to be maintained by the Coalition Group and provided to the Regional Board upon written request.²²

¹⁹ This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.)

²⁰ The agricultural petitions are made up of the Agricultural Water Quality Coalition (File A-1586), the California Farm Bureau Federation (File A-1586(a)), the California Rice Commission (File A-1586(b)), the San Joaquin River Exchange Contractors (File A-1586(c)), the Northern California Water Association (File A-1586(d)), and Stevinson Water District (File A-1586(e)).

²¹ The requirement to submit the Membership Document as part of the NOI by November 1, 2003, was stayed in Order WQ 2003-0016.

²² In the papers submitted regarding this issue, there was disagreement over whether the Waiver required, or should have required, Participants to “opt in,” i.e. affirmatively sign up to join a Coalition Group, as opposed to “opting out,” i.e. providing written notification that the individual did **not** want to join the Group. The wording of the requirement is clear—members of the Coalition Group must be included on the list to obtain coverage under the Waiver as part of the Group. It is that “affirmative” requirement that we will address herein. The idea that a Group would maintain a list of only those individuals who are not in the Group frankly makes no sense.

The agricultural petitioners make two claims regarding this requirement. First, they argue that the requirement will create a deterrent from joining Coalition Groups. Second, they claim that the task is too momentous to obtain a detailed listing of all owners and operators who are part of the Group. Much of the argument put forth by the Agricultural Water Quality Coalition is focused on what may have been a misunderstanding during the months leading up to adoption of the Waiver, as to whether the intent was to list all members of the Group, and therefore the difficulty in complying with this requirement by November 1. In light of the stay issued as to this requirement, these arguments regarding the time to comply are no longer relevant.

We will address the issue of the task of compiling the list first. Of utmost concern to this Board is the need for an effective and efficient regulatory program for discharges from irrigated agriculture. We note that in the Central Valley there are an estimated 25,000 farming operations and that, until now, this entire industry has been largely unregulated by the Regional Board. We strongly believe that in light of this number of operations, it is to the benefit of both the regulators and the regulated community to encourage the formation of Coalition Groups. Not only will communication and regulation be more simple with a smaller number of regulated entities, but the monitoring requirements for Groups are much greater and will provide much more useful information. We much prefer to see the Groups' resources used for developing adequate plans and reports than to be used to ensure that each Participant is fully named and described at this time.

We are also cognizant that the Coalition Groups may need some time to insure full participation by all owners and operators within their watershed areas. While we fully support the inclusion of this important source of waste discharges in the regulatory fold, we cannot ignore the fact that the federal government and most other state governments have chosen to exempt irrigated agriculture from the regulatory programs for waste discharges into public waters. Unfortunately, the record is replete with fears and with threats of litigation against individual farmers. At this point in time, the emphasis of the Waiver is properly on developing management practices and monitoring programs. In fact, during the stay hearing, the Regional Board staff acknowledged that they would not even be reviewing the list of participants in Coalition Groups.

In response to the agricultural petitioners' contentions, the Regional Board and environmental groups respond that the information is necessary, both legally and from a policy perspective. We do not agree that there is a legal requirement that all dischargers subject to a waiver must be individually listed. For example, there are waivers for dischargers to septic systems. We do not envision a requirement that all of the millions of Californians who own homes with septic tanks would have to submit a notice to the respective Regional Board. But we do agree that, from a policy perspective, a Coalition Group must have information concerning its membership in order to fully implement the requirements of the Waiver. Such information is also in the public interest because it allows the Regional Board to have access to the information that will enable it to determine compliance with the waiver and to take appropriate actions, including enforcement or issuance of waste discharge requirements. At a minimum, the Coalition Groups must maintain a list of all farmers who have knowingly elected to join the group, contact information, and information that the Regional Board needs to determine the location of each Participant. We will allow the Coalition Groups six months from the date of this Order to collect this information. We will not require that all of the information be transmitted to the Regional Board, since Board staff acknowledge that they will not review all such information immediately, but it must be available upon request and the Regional Board should request information if monitoring information shows that water quality standards are exceeded or if there is other evidence of violations of the Waiver.

Contention: Several of the agricultural petitioners claim that the monitoring requirements are too stringent, while the environmental petitioners claim these requirements are too lenient.

Finding: These contentions mostly address the various requirements in the three-phase monitoring program for Coalition Groups. The agricultural petitioners claim that numerous of the requirements are either too detailed or not realistic. For example, the petitioners claim that the requirement to test for constituents that are listed on the 303(d) List for "downstream" water bodies could include the entire San Francisco Bay. They also claim that constituents should be limited to those that are reasonably believed to be present. The environmental petitioners claim that neither monitoring program is inclusive enough, and that

comprehensive monitoring of more constituents should begin in Phase 1 of the Coalition Group monitoring requirements.

We have reviewed the monitoring requirements for Coalition Groups and have determined that they reflect a comprehensive and reasonable approach for a watershed-based monitoring program. The record supports the broad array of constituents and parameters that are included in Phase 1 monitoring.²³ The record supports the potential of these constituents and waste products being present in agricultural waste water. Pursuant to Water Code section 13267, the Regional Board only need to “suspect” that the waste is discharged to require monitoring. It is not necessary to document its presence in each Participant’s waste before requiring monitoring. It is important to note that the Coalition Group requirements are not the same as the Individual Discharger approach, which is appropriately focused on the individual farming operation. The record supports that by choosing the watershed approach, even with its more robust monitoring program, the entire program will save individual farmers significant expenses compared to the Individual Discharger requirements. In response to agricultural petitioners who claim that the Individual Discharger monitoring requirements are too expensive, we strongly encourage farmers to join Coalition Groups. We have reviewed those monitoring requirements and their estimated cost, and determine that the costs are reasonable in light of the need for the information to evaluate impacts to water quality. As we have stated, this Waiver constitutes a new regulatory approach for irrigated agriculture and it is appropriately flexible and based on a lengthy period of monitoring. The monitoring requirements, which leave much discretion of the design to the Coalition Groups, are appropriately comprehensive and should lead to a final product that is based on the results of actual monitoring of the farming operations²⁴.

We also find that neither of the monitoring requirements is too limited, and that the phased program for Coalition Groups is appropriate. The Waiver applies to approximately 25,000 farmers, most of whom have not been subject to monitoring requirements before. In light of this situation, it is entirely appropriate for the Regional Board to adopt a phased approach, to

²³ The one exception, the requirement to test for Trihalomethanes, is discussed below.

²⁴ In the example cited above, the Coalition Groups will determine which waters are “downstream.” The requirements clearly allow for a reasonable interpretation of that requirement, and not necessarily all waters to and including the Bay.

provide incentives to encourage a watershed approach, and to limit the constituents monitored for. The monitoring requirements must be consistent with Water Code section 13267, which requires that the costs of the monitoring bear a reasonable relationship to the need for the reports and the benefits to be obtained. We find that in this case the Regional Board appropriately considered these factors and mandated a reasonable monitoring program. In approving monitoring plans, the Regional Board should ensure that the proposals provide adequate monitoring stations and frequency to be able to properly evaluate the water quality and any impacts from discharges.

We will address one contention that agricultural petitioners made about details of the monitoring requirements for Coalition Groups. Petitioners request removal of chlorine residual byproducts²⁵ from the list of minimum requirements for constituents to be monitored. These chemicals are commonly referred to as Trihalomethanes, or THMs, and are usually associated with chlorine disinfection processes, such as from publicly owned treatment plants. The Regional Board responded to this contention by stating that Department of Water Resources monitoring has detected concentrations of “THM formation potential” in waters diverted from the Delta increasing by 1000 to 1500 micrograms per liter. We recognize that waters that leach from agricultural lands may have a high organic content, which can lead to the formation of THMs when subjected to chlorination. But there is no evidence in the record that THMs may be released from agricultural lands. Therefore, it is not appropriate to require monitoring for THMs by agricultural dischargers.

Contention: Various petitioners challenge the concept of the Waiver. The environmental petitioners claim that a waiver was inappropriate and that the Regional Board should instead have adopted waste discharge requirements. Some of the agricultural petitioners claim that because of its detailed provisions, the Waiver is “in effect” waste discharge requirements, and that a simpler waiver should instead have been adopted.

Finding: The Regional Board is granted discretion in adopting either waste discharge requirements or a waiver to regulate discharges of waste that may affect waters of the state. Pursuant to Water Code section 13263, regional boards are authorized to adopt waste

²⁵ The specific chemicals referred to are Chloroform, Bromoform, Dibromochloromethane, and Bromodichloromethane.

discharge requirements for discharges. Waste discharge requirements must implement relevant water quality control plans, and must consider several factors including the beneficial uses to be protected and water quality objectives reasonably required.²⁶ Water Code section 13269 authorizes waivers of waste discharge requirements if they are not against the public interest. Waivers must be conditional and, starting in 2004, must also be “consistent with any applicable state or regional water quality control plan.”²⁷ Both waivers and waste discharge requirements are fully enforceable.²⁸

The Regional Board clearly acted within its discretion in adopting a conditional waiver that includes conditions protective of water quality and consistent with the Regional Board’s water quality control plans (Basin Plans) in the form of a waiver rather than as waste discharge requirements.²⁹ The Regional Board fully explained its rationale and considered numerous factors including the need for a greater regulatory program, the large number of dischargers within the region, the historical regulation of agriculture, and the cost to both the regulated community and the state. We agree that it is in the public interest to regulate the discharges from irrigated agriculture throughout the Central Valley through a Waiver that employs best management practices, encourages a watershed approach, and includes sufficient monitoring requirements. We agree with the Regional Board that this is an appropriate interim regulatory system³⁰ pending receipt of further monitoring data from both the dischargers and a study this Board is funding, as well as completion of the EIR that this Board is also funding. We disagree with contentions from both sides, that the Waiver is “in effect” waste discharge requirements, and that the Waiver is not in the public interest. We expect that where the Regional Board determines, based on the monitoring data it receives, that management practices are not effective to protect water quality, it will issue waste discharge requirements. In order to ensure that there is sufficient progress and that the Waiver is resulting in adequate monitoring

²⁶ Wat. Code § 13263.

²⁷ Chapter 801, Statutes of 2003 (SB 923), which amends Wat. Code § 13269.

²⁸ Wat. Code § 13350, subd. (1)(2).

²⁹ While the Waiver was adopted prior to the effective date of SB 923, there are numerous provisions referring to the Basin Plans, and even an attachment including all relevant provisions thereof. The environmental petitioners’ claim that the Waiver is not consistent with the Basin Plans is simply without basis.

³⁰ The Waiver expires in December 2005.

and improved practices, this Order requires the Regional Board submit a report in May 2004 and to appear before this Board at six-month intervals, starting in July 2004, to report on such progress. In the event that the State Board concludes that there is not adequate progress, waste discharge requirements will be established for agricultural discharges in the Central Valley.

The environmental petitioners also contend that the regulatory program will need additional funding and that fees can only be levied if waste discharge requirements are adopted. SB 923, which went into effect January 1, does allow this Board or the Regional Board to impose fees for dischargers subject to waivers. Therefore, the adoption of the Waiver is not a deterrent to imposing fees. We are cognizant that we have not yet included waivers in our fee schedule. Even if a waiver fee were imposed, in light of the current state spending restrictions, the Regional Board would not at this time be able to hire additional staff to conduct the program. This Board plans to consider the issue of imposing fees for dischargers subject to the Waiver in a separate rulemaking proceeding if it is possible to augment staff.³¹ In any event, however, the fact that the Regional Board chose to issue a waiver in lieu of waste discharge requirements does not prevent the funding of the regulatory program through fees.

Contention: Some of the agricultural petitioners contend that the provisions allowing inspections of their farms and submission of information concerning farming practices violate their rights to withhold consent to their property and to protect trade secrets.

Finding: The requirements that the petitioners complain of are standard in most regulatory actions by the State Board and regional boards. Persons subject to the Waiver must “allow Regional Board staff, upon reasonable notification, access onto the affected property, to determine compliance with the conditions of this Waiver.”³² It is appropriate that where a discharger seeks the right to discharge waste to waters of the state, that it should be expected to consent to reasonable access to its property³³. In any event, in its response the Regional Board states that Individual Dischargers and Participants may, within the requirements of this language, deny access and require the Regional Board staff to obtain a warrant pursuant to Water Code

³¹ If we do so in the future, we will also address any further requirements for identification of Participants of Coalition Groups at that time.

³² Waiver, Att. B.7.

section 13267. Therefore, the Waiver does not restrict any right of the Individual Dischargers and Participants to deny access.

The claim that Individual Dischargers and Participants could be required to disclose trade secrets is also without merit. The Waiver requires submission of relevant and appropriate documents. The procedure for protecting trade secrets is set forth in Water Code section 13267(b)(2). The requirements in the Waiver do not change or diminish the protection of trade secrets. Should an Individual Discharger or Participant include a legitimate trade secret in a submission, it must follow the procedure set forth in the statute to protect that trade secret.³⁴

Contention: The California Rice Commission contends that rice growers should be subject to a separate waiver.

Finding: The rice farmers in the Sacramento Valley have been subject to a program for the control of two rice herbicides for several years. In light of this existing program, the Rice Commission claims that a separate waiver, directed at the existing program, is more appropriate. The Regional Board responds that it has had extensive discussions about a separate rice waiver, that a timeline has been established, but that there are still outstanding issues that have not been resolved in order to adopt a separate waiver. This Board believes that a decision whether to issue a separate rice permit is appropriately within the discretion of the Regional Board. In light of the fact that the separate waiver is not yet prepared, it was appropriate for the Regional Board to include rice farmers within the Waiver in the interim.

Contention: The environmental petitioners claim that the Regional Board did not comply with CEQA.

Finding: The Regional Board adopted a Negative Declaration in support of the Waiver. The environmental petitioners claim that a full EIR was required. Of greatest concern to the petitioners is the propriety of the Regional Board's finding that adoption of the Waiver will not have a significant impact on the environment because the conditions of the Waiver will result

³³ Wat. Code § 13263, subd. (g) provides: "All discharges of waste into waters of the state are privileges, not rights."

³⁴ The Regional Board is subject to the Public Records Act, and must make documents it receives available to the public with certain exceptions, including "trade secrets." Gov. Code § 6250 et seq. Where a person claims that a document discloses a trade secret, he or she must document such claim, consistent with the Public Records Act and the case law thereunder.

in improvements in the quality of the waters of the state.³⁵ In reaching this conclusion, the Regional Board considered numerous studies and reports on the impacts of agricultural discharges to waters of the state.

In challenging this determination, the environmental petitioners claim that there is no evidence that the conditions of the Waiver will be effective in reducing the current impacts “to a level in which there is no potential to degrade the quality of the environment, contribute to cumulative adverse impact, or substantially affect human health.”³⁶ The petitioners also claim that “the project” may result in severe impacts.

A critical issue in considering compliance with CEQA is the “baseline.” Pursuant to CEQA, an EIR is required where a “project” may have a significant adverse effect on the environment.³⁷ The “project” is “the whole of an action” that may result in a direct physical change in the environment.³⁸ The CEQA regulations address the appropriate baseline to be used in determining whether a project may have a significant effect on the environment.³⁹ The regional boards are granted discretion to establish the baseline, but it is generally considered to be the environmental setting as it exists at the time the environmental analysis is performed.⁴⁰ We have held before: “The baseline refers to the point of reference, also referred to as existing physical conditions or the existing environment, against which changes are measured to determine if a project may have a significant adverse effect.”⁴¹ As applied to Water Board cases, therefore, the baseline occurs at the beginning of the environmental review process.⁴² In this case, the baseline is the conditions as they were when the Regional Board commenced work on the Waiver and accompanying environmental documents in late 2002. The Regional Board

³⁵ Resolution No. R5-2003-0103, No. 4.

³⁶ Environmental groups’ petition, at page 31.

³⁷ Cal. Code Regs., tit. 14, §§ 15002 and 15064.

³⁸ Cal. Code Regs., tit. 14, § 15378.

³⁹ The lead agency (in this case, the Regional Board) is required to prepare an Initial Study, which includes a description of the “environmental setting.” Cal. Code Regs., tit. 14, § 15063, subd. (d)(2). The Initial Study is used to determine whether an EIR is required, or a Negative Declaration may suffice. Cal. Code Regs., tit. 14, § 15070.

⁴⁰ Cal. Code Regs., tit. 14, §§ 15125 and 15126.2.

⁴¹ Board Order WR 2001-07, at page 3.

⁴² See, also, *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99.

determined that the new waiver, which includes much more stringent monitoring and management practice requirements than the waiver that had been in effect since 1982, would result in improved water quality. We find that that determination was appropriate and reasonable.

The environmental group petitioners claim that the evidence in the record regarding serious impacts to water quality from existing farming practices is, in itself, grounds for requiring an EIR. The court, in *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, rejected a similar claim against adoption of a negative declaration. The court there held that the county properly used the environmental setting at the beginning of the environmental review in determining that an EIR was not necessary because the currently proposed project would not result in impacts beyond those that already existed.

We note that, in any event, this Board is currently funding an EIR that will support a long-term regulatory approach to discharges from irrigated agriculture. Even if an EIR were legally required, it would be appropriate to continue regulation under the current Waiver pending completion of the EIR rather than having no regulatory tool to replace the expired waiver.⁴³

V. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Board acted appropriately in adopting the Waiver, Monitoring Requirements, and Negative Declaration, with the exceptions noted below.
2. It is not appropriate at this time to require Coalition Groups to identify their members. The Coalition Groups shall compile lists of Participants who have knowingly elected to participate, contact information, and information on location within six months of this Order. The Regional Board should request membership information where monitoring data show exceedance of water quality standards or there is evidence of other violations of the Waiver.

⁴³ The environmental petitioners argue that the Negative Declaration was not adequate, but also that the Regional Board should have adopted waste discharge requirements. Clearly adoption of waste discharge requirements would have also required a CEQA document. Thus, applying the petitioners' CEQA argument, this Board could not have in fact required waste discharge requirements at this time since the CEQA document was not adequate. The environmental petitioners certainly do not ask that the Boards take no action to regulate agricultural discharges pending completion of the EIR, but that would be the effect of granting relief on this contention.

Upon request by the Regional Board, such information shall be submitted by the Coalition Groups by the deadline stated by the Regional Board, which shall not be more than thirty days.

3. Agricultural dischargers should not be required to monitor for Trihalomethanes.

VI. ORDER

IT IS HEREBY ORDERED that:

1. The requirements in Resolution No. R5-2003-0105, Attachment B.1.c, for Coalition Groups are revised as follows:

“The Coalition Group shall, by July 22, 2004, maintain a Membership Document with information concerning each Participant who has knowingly elected to be a member of the Coalition Group. The Membership Document shall include, at a minimum, a list of the Participants, information on contacting each Participant, and information sufficient to locate the fields or parcels of each Participant that are within the Coalition Group. The Regional Board may further specify the information to be included. This information shall be provided to the Regional Board upon request, within the time specified by the Regional Board, which time shall not exceed thirty days.”

2. The following constituents are deleted from Table 1 of Monitoring and Report Program Order No. R5-2003-0105: Chloroform, Bromoform, Dibromochloromethane, and Bromodichlormethane.

3. The Regional Board shall submit a brief written report to the State Board in May 2004 describing the number of monitoring reports received and the watersheds covered. In July 2004, a representative of the Regional Board staff shall appear before the State Board and the Regional Board and report on the monitoring programs and results and the management plans and practices, and the status of any other Regional Board proceedings with respect to the Waiver, at a joint workshop meeting. The State and Regional Boards will provide public notice of the meeting date. Following the July meeting, the Regional Board shall report progress on these issues to the State Board at six-month intervals until directed otherwise by the State Board or its Executive Director.

4. In all other respects, the petitions are denied.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 2004.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board