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6

7 **STATE WATER RESOURCES CONTROL BOARD**

8 CALIFORNIA FARM BUREAU)
FEDERATION,)
9)
Petitioner,)
10)
v.)
11)
CENTRAL VALLEY REGIONAL WATER)
QUALITY CONTROL BOARD,)
12)
Respondent.)
13)
14)

**APPEAL OF CENTRAL VALLEY
REGIONAL WATER QUALITY
CONTROL BOARD'S
RESOLUTION NO. R5-2006-0053
RENEWING THE WAIVER OF
WASTE DISCHARGE
REQUIREMENTS FOR
DISCHARGES FROM IRRIGATED
LANDS**

15 **I. NAME, ADDRESS, CONTACT INFORMATION OF THE PETITIONER**

16 Petitioner is the California Farm Bureau Federation (“Farm Bureau”), acting on behalf of
17 its member County Farm Bureaus within the jurisdiction of the Central Valley Regional Water
18 Quality Control Board (“RWQCB”) and, through them, tens of thousands of individual family
19 farmers and ranchers whose operations are directly affected by the adoption of the actions that
20 are the subject of this petition. Farm Bureau’s address is 2300 River Plaza Drive, Sacramento,
21 CA 95833. Communications regarding this petition should be directed to John Hewitt, Associate
22 Counsel, California Farm Bureau Federation, at the above address, or at telephone number (916)
23 561-5614; by facsimile (916) 561-5691; or via electronic-mail jhewitt@cfbf.com.

24 **II. PETITION CHALLENGES A DISCRETE PROVISION OF RESOLUTION**
25 **NO. R5-2006-0053**

26 The action being petitioned is the adoption of a discrete provision of the RWQCB’s Order
27 No. R5-2006-0053 *Coalition Group Conditional Waiver Of Waste Discharge Requirements For*
28 *Discharges From Irrigated Lands* (“Conditional Waiver”). The objectionable provision sets

1 forth a draconian deadline after which no person, for any reason, can join a Coalition Group to
2 obtain regulatory coverage under the Conditional Waiver (Attachment B A.9.). A copy of
3 Resolution No. R5-2006-0053 and its respective attachments are included with this petition.

4 **III. DATE THE RWQCB ACTED**

5 The RWQCB adopted Resolution No. R5-2006-0053 at its public meeting on June 22,
6 2006. However, the official transcripts of the proceedings first became available on July 17,
7 2006, only days before the deadline to file an appeal as described in California Code of
8 Regulations § 2050. As such, Farm Bureau reserves the right to supplement this petition as
9 necessary.

10 **IV. STATEMENT OF REASONS THE RWQCB'S ACTION WAS INAPPROPRIATE**
11 **AND IMPROPER**

12 Farm Bureau appeals the discrete provision of Resolution No. R5-2006-0053 that sets
13 forth a prohibition on joining a Coalition Group after December 31, 2006 because it was
14 improperly noticed, the public was precluded from being able to provide any comment, and its
15 adoption is otherwise arbitrary and capricious. As such, the RWQCB's decision was
16 inappropriate and improper.

17 **V. HOW THE PETITIONER IS AGGRIEVED**

18 Farm Bureau's members throughout the Central Valley are aggrieved because they were
19 precluded from providing any input into an important policy decision made by the RWQCB.
20 Additionally, the RWQCB's inclusion of this sign-up deadline will unnecessarily force thousands
21 of farmers and ranchers to guess, prior to December 31, 2006, the future applicability of a
22 regulatory program to their farms or ranches. This arbitrary deadline may result in individuals
23 unnecessarily subjecting themselves to a regulatory program that they currently have no
24 obligation to be a part of in order to prospectively protect themselves if their future farming
25 practices may result in a discharge subject to the Conditional Waiver.

26 **VI. THE SPECIFIC ACTION FARM BUREAU REQUESTS**

27 **A. Farm Bureau Requests This Petition Be Held In Abeyance**

28 Farm Bureau hereby requests that the State Water Resources Control Board ("SWRCB")

1 hold this petition challenging the discrete provision of Resolution No. R5-2006-0053 in abeyance
2 until September 1, 2006 unless otherwise notified by petitioner. Statements by the RWQCB in
3 the public forum during its June 23, 2006 meeting, correspondence with the RWQCB staff, and a
4 published meeting agenda for the RWQCB's August 3, 2006 hearing indicate the RWQCB
5 intends to address the "cut-off" date issue. As such, Farm Bureau would like to afford the
6 RWQCB an opportunity to correct the procedural and substantive shortcomings of Resolution
7 No. R5-2006-0053 addressed herein.

8 **B. Farm Bureau Requests The Removal Of The Offensive Provision**

9 In the event that the RWQCB fails to correct the procedural and substantive shortcomings
10 of Resolution No. R5-2006-0053 at its August 2006 meeting, or shortly thereafter, Farm Bureau
11 requests the SWRCB to strike, or remand the Conditional Waiver to the RWQCB to strike, the
12 offensive provision in Resolution No. R5-2006-0053, Attachment B A.9 in its entirety.

13 **VII. POINTS AND AUTHORITIES**

14 **A. The RWQCB Improperly Included the "Cut-Off" Date for Coalition Group**
15 **Sign-ups**

16 The inclusion of the December 31, 2006 cut-off date for individuals to join a Coalition
17 Group was impermissibly included in the Conditional Waiver because neither Farm Bureau nor
18 any other party was ever provided an opportunity to address the issue and the record is devoid of
19 any findings to support the necessity of the provision's inclusion.

20 After the close of public comment and during the discussion of the pending motion, one
21 RWQCB Member offered the following novel idea:

22 We're issuing all these 13267 letter [sic], and that's great . . . I think if we're issuing
23 these letters, we ought to make them have an individual waiver at this point . . . and
24 we're not going to have any of these, oh, I'm late but I'm going to join now. I mean,
25 that's silly . . . maybe we can incorporate a deadline for joining these coalitions, too,
26 so that we know who's working and who's not.

27 RWQCB June 22, 2006 Transcript at 283-284.

28 As the discussion continued, the initial impressions and preliminary thoughts of one
RWQCB Member transformed into an amendment to the pending motion which was ultimately
adopted and included in the final resolution. This change occurred without any opportunity for

1 the public to comment, without public notification, and in the absence of any supporting factual
2 findings. As one RWQCB Member stated, “So I think I’ve suggested, you know, having a
3 deadline for when people can continue to join these coalitions.” RWQCB June 22, 2006
4 Transcript at 283-284. “Before you call for the vote, can we have a clarification . . . that you
5 can’t join a coalition after a certain date . . . That’s right.” RWQCB June 22, 2006 Transcript at
6 307. The language as adopted reads: “After 31 December 2006 no additional Dischargers may
7 join a Coalition Group to obtain coverage under this Order.” Resolution No. R5-2006-0053
8 Attachment B A.9.

9 The RWQCB in granting a conditional waiver can apply conditions. California Water
10 Code § 13269. However, like all other provisions included in the Conditional Waiver and
11 consistent with the statutes and regulations governing adjudicatory proceedings, the RWQCB had
12 the obligation to notify and allow the Farm Bureau and the other parties to the proceeding the
13 opportunity to comment on any language that could affect our rights or the rights of our
14 members. Nowhere in any of the circulated drafts of the Conditional Waiver nor in any of the
15 staff presentations that preceded Farm Bureau’s opportunity to comment was there event a hint of
16 the inclusion of a cut-off date for Coalition Group sign-ups.

17 The Board voted to prohibit the addition of new participants to Coalition Groups
18 after 31 December 2006. At the time of the vote, no exact wording concerning
19 this matter had been developed for review by the Board members or the public,
and there was no opportunity for public discussion of the proposal.

20 RWQCB August 3-4, 2006 agenda material for item 6 at page 5 (copy attached)

21 Ironically, one RWQCB member questioned the legitimacy of including this cut-off date
22 provision at this time, and staff counsel, in response, stated, “I think the November version, right,
23 included a – that option. And it has been – so it has been part of public comments and
24 consideration.” RWQCB June 22, 2006 Transcript at 297. This rationalization is flawed for two
25 specific reasons. First, there was no discussion of this topic in November, either during the
26 RWQCB’s public hearing or in its written documents that were subject to public comment.
27 Furthermore, there was no discussion of the cut-off date in the most recent draft iterations of the
28 Conditional Waiver, or by staff in meetings with stakeholders, or in any other manner that would

1 have effectively put parties on notice.

2 Second, even if there was a passing reference to the issue made in November, as
3 suggested by RWQCB counsel, that is legally inadequate to support its adoption in the June 2006
4 Conditional Waiver because as described the SWRCB's Chief Counsel, the waiver process is
5 quasi- adjudicatory.

6 In light of the significant individual determinations that are part of a waiver
7 procedure-including monitoring requirement, fee assessments, and reporting
8 requirements-the better result is to consider these as quasi-adjudicative, and to
apply the procedural safeguards attendant to such actions.

9 *Procedural Requirements And Appellate Review Of Waivers Of Waste Discharge*
10 *Requirements.* Memorandum from SWRCB Chief Counsel Criag M. Wilson to Water Quality
Attorneys. June 2, 2005 at 4-5

11 It was never made clear what legal authority RWQCB counsel relied on in attempting to
12 support the inclusion of the offensive provision. However, to the extent RWQCB counsel was
13 relying on Government Code § 11125.7, it is inapposite because it applies to regulatory
14 proceedings that are quasi-legislative, **not** quasi-judicial as is the case here. The statute reads:

15 Except as otherwise provided in this section, the state body shall provide an
16 opportunity for members of the public to directly address the state body on each
17 agenda item before or during the state body's discussion or consideration of the
18 item. This section is not applicable if the agenda item has already been considered
19 . . . **This section is not applicable to decisions regarding proceedings held
pursuant to Chapter 5 (commencing with Section 11500), relating to
administrative adjudication, or to the conduct of those proceedings.**

20 Emphasis added. Government Code § 11125.7.

21 Thus, to the extent the RWQCB relies on the exemption in Government Code § 11125.7,
22 it is inapplicable. By not providing notice and an opportunity to comment to the parties, the
23 RWQCB impermissibly included the cut-off date in its resolution.

24 **B. The RWQCB's Inclusion Of The "Cut-Off" Date is Arbitrary and Capricious**

25 In addition to improperly failing to notify parties of the substantive change of including a
26 cut-off date on Coalition Group sign-ups, the RWQCB's inclusion of this provision is
27 unsupportable by any facts contained in the record or in Resolution No. R5-2006-0053. "The
28 findings must be sufficient to . . . determine that the agency necessarily found necessary facts to

1 support its determination of the issues.” *Kirby v. Alcoholic Beverage Control Appeals Board*, 3
2 Cal.App.3d 209 (1969). Indeed, the facts in the record all point to the cut-off date for Coalition
3 Group sign-ups as being bad policy.

4 First, the cut-off date does not provide any exceptions after December 31, 2006 for
5 individuals to sign up in a coalition group. There are innumerable situations and circumstances
6 that may arise where an individual who did not fall under the scope of the Conditional Waiver
7 program may now need to seek its regulatory coverage. For example, one RWQCB member in
8 dialog with a member of the public during the June 23 public comment sessions noted the
9 following shortcomings of their previous day’s decision:

10 What happens to someone even that loses his ability to be under a waiver and then
11 improves and comes fully into compliance? Does he have at some point the
12 opportunity to rejoin the coalition?[] There’s another one . . . You have a transfer
13 of property, a new person . . . someone that’s not a discharger now that changes
14 his farming practices and in fact becomes a discharger.

15 RWQCB June 23, 2006 Transcript at 5-7.

16 Additional situations may include, but are not limited to:

- 17 • Farming/livestock changes such as changes in cropping patterns, crop protection
18 tools, livestock management, or technological advancements;
- 19 • Irrigation changes such as the addition of new property, infrastructure, or changes in
20 equipment;
- 21 • Physical changes such as the addition or removal of natural or drainage facilities or
22 upland land use changes that result in surface runoff;
- 23 • Property ownership/management changes such as a transfer of title, addition or
24 deletion of tenants, or legally responsible parties.

25 The inclusion of this cut-off date will have the undesirable practical effect of requiring
26 massive numbers of individuals to obtain individual waivers or permits, a situation clearly not
27 desired by the RWQCB. “If we had everybody fill out their own WDRs [waste discharge
28 reports], it would be a disaster.” RWQCB June 22, 2006 Transcript at 267, lines 9-10. It also
fails to recognize that irrigation practices and responsibility on the approximately 7.5 million
acres of irrigated lands throughout the Central Valley change on a seasonal, if not daily, basis.

1 As explained in the recently adopted waiver, “[w]hether an individual discharge of waste from
2 irrigated lands may affect the quality of the waters of the State depends on the quantity of the
3 discharge, quantity of the waste, the quality of the waste, the extent of treatment, soil
4 characteristics, distance to surface water, depth to groundwater, crop type, management practices
5 and other site specific factors.” (Resolution No. R5-2006-0053 at 2, ¶ 7.)

6 In addition to not being supported by the record, the inclusion of the cut-off date for Coalition
7 Groups to enroll new members is bad public policy. The Irrigated Lands Program was devised to
8 establish area-wide, watershed, or commodity groups that would work together to address water
9 quality in a given area. Establishing an arbitrary deadline to join a coalition undermines this
10 philosophy by establishing a bifurcated regulatory system. That bifurcated system, where
11 thousands may be forced to file WDRs, will increase the costs for both RWQCB staff and
12 individual farmers and ranchers because of the loss of economies of scale as well as the problem
13 solving synergy that is developed by farmers and ranchers with similar goals and objectives
14 within local watersheds.

15 For all of the reasons stated above, the inclusion of a cut-off date for farmers and ranchers
16 to join Coalition Groups was impermissibly included in Resolution No. R5-2006-0053, the
17 provision is unsupported by the facts in the record and it is bad public policy.

18 **VIII. COPIES OF PETITION SERVED ON REGIONAL BOARD**

19 Petitioner has served a copy of this petition on the RWQCB, as indicated in the attached
20 proof of service.

21 **IX. FARM BUREAU WAS UNABLE TO RAISE THIS ISSUE OR OBJECT BEFORE**
22 **THE RWQCB**

23 Farm Bureau and other interested parties were unable to raise this issue or object to its
24 inclusion because it was not properly noticed and it was inserted after the close of public
25 comment. As such, Farm Bureau and other interested parties could not provide the RWQCB any
26 meaningful input on the adverse ramifications of such a policy.

27 **X. REQUEST FOR A HEARING**

28 Farm Bureau hereby reserves the right to request a hearing on this matter if the RWQCB

1 does not amend the offensive provision of Resolution No. R5-2006-0053 by September 1, 2006.

2 **XI. COPY OF REQUEST TO REGIONAL BOARD TO PREPARE**
3 **ADMINISTRATIVE RECORD**

4 Petitioner has attached a copy of its letter to the Central Valley Regional Water Quality
5 Control Board joining in the Agricultural Water Quality Coalition's request for preparation of the
6 record.

7 DATED: July 21, 2006

Respectfully Submitted,

8 CALIFORNIA FARM BUREAU FEDERATION

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10 BY: /s/ John Hewitt for
11 BRENDA WASHINGTON DAVIS

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DECLARATION OF SERVICE

I am a citizen of the United States and employed in the County of Sacramento; I am over the age of eighteen years and not a party to the within entitled action; my business address is 2300 River Plaza Drive, Sacramento, California 95833.

On July 21, 2006, I served the within: APPEAL OF CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD'S RESOLUTION NO. R5-2006-0053 RENEWING THE WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS on the party (ies) in this action, by placing a true copy thereof in an appropriate, sealed envelope(s), addressed as follows:

Elizabeth Miller Jennings, Senior Staff Counsel
State Water Resources Control Board
Office of the Chief Counsel
P.O. Box 100
Sacramento, CA 95812-0100

(X) (By Mail) I placed such sealed envelope(s), with postage thereon fully prepaid for first-class mail, for collection and mailing at California Farm Bureau Federation, Sacramento, California, following ordinary business practices. I am readily familiar with the practice of California Farm Bureau Federation for collection and processing of correspondence - said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

(X) (By Electronic Mail) By agreement of the parties to accept electronic transmission, I served a true copy of the aforementioned document(s) on the party(ies) at bjennings@waterboards.ca.gov.

() (By Federal Express) I placed a copy of the aforementioned document(s) in the appropriate Federal Express packaging, with the appropriate Federal Express Airbill completely filled out, addressed to the addressee(s) listed above, in the collection box at California Farm Bureau Federation, Sacramento, California, following ordinary business practices. I am readily familiar with the practice of California Farm Bureau Federation for collection and processing of Federal Express packages - said practice being that in the ordinary course of business, the packages are deposited at the nearest Federal Express office in a timely manner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed July 21, 2006 at Sacramento, California.

Pamela K. Hotz