

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – COLORADO RIVER BASIN REGIONAL WATER BOARD
JANUARY 10, 2012**

ITEM 6

SUBJECT

CONSIDERATION OF A RESOLUTION DISAPPROVING AN AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE COLORADO RIVER BASIN REGION TO ESTABLISH A CONDITIONAL PROHIBITION AND IMPLEMENTATION PLAN FOR AGRICULTURAL WASTEWATER DISCHARGES ORIGINATING WITHIN THE PALO VERDE VALLEY AND THE PALO VERDE MESA, RIVERSIDE AND IMPERIAL COUNTIES, CALIFORNIA

DISCUSSION

On January 20, 2011, the Colorado River Basin Regional Water Quality Control Board (Colorado River Basin Water Board) adopted [Resolution No. R7-2011-0014](#) amending the Water Quality Control Plan for the Colorado River Basin Region (Basin Plan) to establish a conditional prohibition and implementation plan for agricultural wastewater discharges originating within the Palo Verde Valley and the Palo Verde Mesa ([Attachment A](#)). The intent of this conditional prohibition was to ensure agricultural wastewater discharges and drain maintenance discharges do not adversely affect the beneficial uses of the Palo Verde Valley Drains, and the Palo Verde Valley Lagoon and Outfall Drain. Agricultural discharges addressed in this conditional prohibition include:

- (1) storm water runoff from irrigated lands; and
- (2) irrigation return water, which includes surface discharges (also known as "tailwater"), and subsurface discharges (known as "tile water" in tiled areas, and "seepage" in areas not tiled).

Most agricultural discharges in the Palo Verde Valley and the Palo Verde Mesa collect in open drains dug at least one foot below the groundwater level of adjacent fields. These drains are tributary to the Palo Verde Outfall Drain, which discharges into an old channel of the Colorado River that flows about eight miles before joining the active river channel.

The conditional prohibition requires responsible parties to implement management practices that address their agricultural wastewater and drain maintenance discharges. As such, the amendment establishes:

- conditions/requirements for entities with existing or potential agricultural wastewater discharges in the Palo Verde area,
- conditions/requirements for Palo Verde Irrigation District (PVID), and individuals who operate and maintain drains that discharge wastewater and/or wastes, and
- specified requirements for compliance programs.

The conditional prohibition does not ban drain operation and maintenance activities, nor does it limit the quantity of agricultural wastewater discharged into drains and ultimately into the Colorado River. Additionally, the prohibition does not regulate or restrict the amount of water

applied to private lands for agricultural purposes, such as to furrows, beds, and other ancillary structures, nor does it limit the lawful application of soil amendments, fertilizers, herbicides, fumigants or pesticides. Finally, the conditional prohibition does not apply to discharges from irrigated lands of five acres or less used for gardens, vineyards, orchards, pastures and greenhouses to produce crops and/or animals for personal consumption. This exemption includes irrigated lands used as golf courses or polo fields.

Responsible parties subject to the requirements of this conditional prohibition include:

- (1) farmland owners, renters/lessees, and operators/growers in the Palo Verde Valley and Palo Verde Mesa, who discharge or may discharge agricultural wastewater that could affect the quality of waters of the state; and
- (2) PVID and other agencies/individuals who conduct drain operation and maintenance activities that could affect the quality of state waters.

Most responsible parties fall under the first category: farmland owners, renters/lessees, and operators/growers. PVID is the main entity in the second category because PVID is the drain management agency for the area. Separate and distinct requirements are established for each of the two types of responsible parties.

Implementation

The “Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program” (NPS Policy) adopted by the State Water Board in 2004 provides that the three administrative permitting tools available to address point sources of waste discharge—Waste Discharge Requirements (WDRs), waivers of WDRs, and basin plan prohibitions--may also be used to address nonpoint sources of waste discharge. In addition, the NPS Policy reiterates the statutory authority in California Water Code (CWC) Section 13243, which allows regional water boards to amend a basin plan to prohibit a particular discharge or a particular type of discharge, or to conditionally prohibit a discharge. Moreover, the NPS Policy provides that regional water boards may use conditional basin plan prohibitions as the primary administrative tool for implementation programs.

Although this Basin Plan amendment is consistent with these NPS Policy provisions and the California Water Code in that it would use a conditional prohibition as the primary administrative permitting tool to regulate agricultural discharges for the Palo Verde area, it diverges to a certain extent from the general practices of other regional water boards, which issue WDRs or waivers of WDRs as the primary administrative permitting tool to regulate agricultural discharges. Although at least one other regional water board (Central Valley Region) has adopted conditional prohibitions in its basin plan, the conditional prohibitions for agricultural discharges are usually expressed as not applying if the discharge is regulated by WDRs or waivers of WDRs, or if certain water quality conditions or performance goals are met through the implementation of approved management practices.

Consistent with the NPS Policy, the proposed conditional prohibition controls agricultural and drain maintenance wastewater discharges in the Palo Verde Valley and Palo Verde Mesa through the development and implementation of NPS pollution control programs referred to in the prohibition as group or individual “compliance programs.” Alternatively, responsible parties may elect to have their discharges regulated through individual WDRs.

Group compliance programs are developed by responsible parties that form their own compliance group for self-management, or join a compliance group to be organized and managed by PVID. Individual compliance programs are developed by individual responsible parties who choose not to join a group. Responsible parties who elect to have their discharges regulated through individual WDRs must submit an individual report of waste discharge pursuant to CWC Section 13260 for issuance of WDRs by the Regional Water Board pursuant to CWC Section 13263.

All group and individual compliance programs address the following five key elements, as required by the NPS Policy:

- Element 1. Statement of Goals/Purposes — Addresses NPS water quality problems and threats in a manner that achieves and maintains compliance with water quality objectives and beneficial uses, including the State Water Board's antidegradation requirements.
- Element 2. Identification of Management Practices (MPs) — Describes MPs and other elements to be implemented that ensure attainment of goals and purposes, and describes processes used: (1) to select or develop MPs, and (2) to ensure and verify proper MP implementation.
- Element 3. Time Schedule for Compliance — Provides a specific time schedule and quantifiable milestones to measure progress toward reaching the specified requirements.
- Element 4. Surveillance Program — Includes a compliance monitoring and reporting program (MRP) to determine whether the Compliance Program is achieving its stated goals and purposes, or if additional or different MPs, or other actions, are required. Regional Water Board oversight will track and monitor compliance.
- Element 5. Consequences for Failure — Potential consequences for inadequate or ineffective programs that fail to achieve their goals and purposes. Consequences are provided by the Regional Water Board in advance and may include program revision and/or enforcement action.

POLICY ISSUE

Although consistent with the NPS Policy, should the State Water Board approve use of a conditional prohibition as the appropriate primary administrative tool for regulating the discharges from irrigated agriculture?

If so, should the State Water Board approve this proposed amendment to the Basin Plan to establish a conditional prohibition and implementation plan for agricultural wastewater discharges originating within the Palo Verde Valley and the Palo Verde Mesa?

FISCAL IMPACT

Until recently, regulation of discharges from irrigated lands was funded primarily by the State General Fund (GF). This funding mechanism changed in fiscal year 2011-12 when the State Budget Act shifted the GF portion of this funding to the Waste Discharge Permit Fund (WDPF). Revenues to the WDPF are generated primarily through the assessment of fees. The Regional

Water Boards' Irrigated Lands programs are now funded exclusively through fee assessments. The Water Code authorizes permit fees only for WDRs and waivers of WDRs. As a result, there is no direct funding mechanism to implement this prohibition, other than the limited federal funding provided by the federal Clean Water Act Section 319(h) nonpoint source program. Therefore, there is a risk that additional funding might need to be diverted from other critical programs, such as TMDL implementation funding, which could potentially impact the viability and reduce the effectiveness of those programs.

REGIONAL WATER BOARD IMPACT

Yes, approval of this resolution will amend the Basin Plan.

STAFF RECOMMENDATION

That the State Water Board:

1. Does not approve the amendment to the Basin Plan due to the policy implications and potentially adverse fiscal impacts.
2. Return the amendment to the Colorado River Basin Water Board with instructions to reconsider the nonpoint source administrative implementation tools available to regulate the agricultural discharges in the Palo Verde area in light of these policy implications and potentially adverse fiscal impacts.

If the State Water Board decides to approve this amendment, such State Water Board action on this item will assist the Water Boards with Objective 1.3. of the 2008-2012 Strategic Plan Update, which states: Take appropriate enforcement actions and innovative approaches as needed to protect and restore all surface waters. In particular, approval and implementation of this item will help fulfill Action 1.3.2, which states: The Water Boards will work collaboratively to pilot enforcement programs and other innovative approaches to protect and restore surface water quality, initially focusing on facilitating compliance with the regulatory program requirements for irrigated agriculture.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2012-

DISAPPROVING AN AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE COLORADO RIVER BASIN REGION TO ESTABLISH A CONDITIONAL PROHIBITION FOR AGRICULTURAL WASTEWATER DISCHARGES ORIGINATING WITHIN THE PALO VERDE VALLEY AND THE PALO VERDE MESA, AND TO INCORPORATE AN IMPLEMENTATION PLAN

WHEREAS:

1. On January 20, 2011, the Colorado River Basin Regional Water Quality Control Board (Colorado River Basin Water Board) adopted [Resolution No. R7-2011-0014](#) amending the Water Quality Control Plan for the Colorado River Basin Region (Basin Plan) to establish a conditional prohibition for agricultural wastewater discharges originating within the Palo Verde Valley and the Palo Verde Mesa, and to incorporate an implementation plan ([Attachment A](#)).
2. The conditional prohibition will protect the following beneficial uses of the Palo Verde Drains, and the Palo Verde Lagoon and Outfall Drain:
 - Recreation (REC I);
 - Water Non-Contact Recreation (REC II);
 - Warm Freshwater Habitat (WARM);
 - Wildlife Habitat (WILD);
 - Preservation of Rare, and
 - Threatened or Endangered Species (RARE).
3. The Colorado River Basin Water Board found the Basin Plan amendment would not have a significant adverse effect on the environment and is consistent with the “Statement of Policy with Respect to Maintaining High Quality of Waters in California” ([State Water Board Resolution No. 68-16](#)) and the federal Antidegradation Policy (40 CFR section 131.12) in that it does not allow degradation of water quality, but requires restoration of water quality and attainment of water quality standards.
4. The Colorado River Basin Water Board found the analysis contained in the Staff Report and the California Environmental Quality Act (CEQA) substitute environmental documentation for the proposed Basin Plan amendment, including the CEQA Checklist and the responses to comments, complies with the requirements of the State Water Resource Control Board’s (State Water Board) certified regulatory CEQA process, as set forth in the California Code of Regulations, Title 23, section 3775 et seq. The State Water Board has reviewed the substitute environmental documentation for the Basin Plan amendment and concurs with the Colorado River Basin Water Board’s findings.

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5. Water Code section 13240 specifies that Regional Water Quality Control Boards may revise Basin Plans. Water Code section 13242 requires a program of implementation to achieve water quality objectives. In addition, Water Code section 13243 authorizes Regional Water Quality Control Boards to specify certain conditions or areas where the discharges of certain types of waste will not be permitted.
6. The State Water Board also finds that the regulatory action meets the "Necessity" standard of the Administrative Procedure Act, Government Code section 11353, subdivision (b)(2)(C), because the amendment will ensure that agricultural wastewater discharges do not adversely affect the beneficial uses defined in the Basin Plan for the Palo Verde area.
7. Water Code section 13245 specifies that the State Water Board must approve any Basin Plan amendment before it becomes effective. In this instance, the State Water Board finds that it is premature to approve the Basin Plan amendment because, while the proposed regulatory regime for irrigated agriculture discharges in the Palo Verde Valley would impose requirements comparable to other regional water boards' conditional waivers for irrigated agriculture, it would result in a disparate fee structure for agricultural discharges from different regions.
8. Before approving such a disparity, the State Water Board remands the matter to the Colorado River Basin Water Board to consider and, if appropriate, to attempt to justify such a disparate impact. On remand, the Colorado River Basin Water Board shall consider comparable regulatory requirements that do not result in disparate fees..

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Disapproves the amendment to the Basin Plan adopted under Colorado River Basin Water Board Resolution No. R7-2011-0014.
2. Remands the matter back to the Colorado River Basin Water Board for further consideration in accordance with this resolution and Water Code section 13245.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 10, 2012.

Jeanine Townsend
Clerk to the Board