

Attachment 6

Responses to Comments on the July 2020 version of the Proposed Amendments to the Water Quality Control Plan for the Central Coastal Basin to Improve and Clarify Waste Discharge Prohibition Language

Introduction

On July 9, 2020, the Executive Officer of the Central Coast Regional Water Quality Control Board (Central Coast Water Board) received a late comment letter from Theresa A. Dunham with Kahn, Soares & Conway, LLP regarding the Draft Project Report for Amending the *Water Quality Control Plan for the Central Coastal Basin* ("Basin Plan") to improve and clarify Waste Discharge Prohibition Language (Draft Amendments), which was to be considered by the Central Coast Water Board at its July 17, 2020 meeting. The comment letter was accepted into the record by the Central Coast Water Board Chair and is attached as an Appendix to this Response to Comment document. The Basin Plan amendment item was subsequently removed from the July 17, 2020 Board Meeting agenda to allow staff time to consider the comments included in the comment letter.

Below are the Central Coast Water Board staff responses to the comments included in the comment letter.

Part 1: Comments Relating to Proposed Amendments to Basin Plan Section 5.4.1

Comment 1.1:

"The explicit purpose for this revision, as stated in the Draft Project Report, is to avoid the need of providing notice to a discharger of such a violation prior to bringing an enforcement action. (Draft Amendments, page 6.)"

"Use of the Central Coast Water Board's discharge prohibition authority to avoid issuing a notice of violation prior to bringing an enforcement action is also highly improper and violates the rules of statutory construction."

Response 1.1: Staff revised the proposed prohibition language to explicitly state that the prohibitions only apply to unauthorized discharges or discharges that are not exempt from regulation by the California Water Code or the Basin Plan.

Comment 1.2:

"Application of the discharge prohibition authority in such a broad manner exceeds the statutory intent and purpose of Water Code section 13243. While the Central Coast Water Board has the authority to reasonably regulate and protect water quality, that authority is not without limitation."

“Thus, when one considers the language of Water Code section 13243 taken together with the statutory provisions of 13260 et seq., Porter-Cologne does not support blanket prohibitions as part of a regional water board’s authority to limit waste discharges into waters of the state in certain conditions or areas, and especially to avoid notice provisions.”

Response 1.2: Staff revised proposed prohibition language in section 5.4.1 of the Basin Plan to specify specific types of waste discharges (i.e., sediment, well development water, and construction dewatering water).

Part 2. Comments Relating to the Proposed Amendments to Basin Plan Section 4.8.5.1

Comment 2.1:

“...revision is being proposed to expand the land discharge prohibitions from streams to all waters of the state, including rivers, wetlands, lakes, estuaries, and the ocean. (Draft Amendments, page 10.) No reasoning or justification is provided for the elimination of reference to violation of best management practices associated with timber harvesting, construction or soil disturbing activities.”

“the Draft Amendments are overly broad and provide the Central Coast Water Board with enforcement for discharges of such materials even if management practices are implemented to the fullest extent possible.”

Response 2.1:

The proposed amendments to Land Disturbance Prohibitions (section 4.8.5.1) from “into any stream in the basin” to “into any waters of the State” clarifies the prohibition’s intent to prohibit discharges from soil disturbance activities that have deleterious effects on fish, wildlife, and other beneficial uses applies to many surface waterbody types including streams, rivers, estuaries, lakes, and wetlands. The proposed amendment more accurately describes the waterbodies whose beneficial uses can be affected by waste discharges associated with soil disturbance activities.

The proposed amendment reflects that best management practices are implemented through permits or other orders issued by the Regional Water Board or State Water Board, or through management agency agreements. A discharger that complies with such an order regulating the discharge or complies with a management agency agreement without causing, or threatening to cause, a condition of pollution or nuisance is not subject to the prohibition.

Staff revised the language in the Land Disturbance Prohibitions (section 4.8.5.1) to explicitly state “unless authorized, or exempt by the California Water Code or the Basin Plan...” to ensure clarity regarding the applicability of this proposed amendment. A discharger complying with a Regional Water Board or State Water Board order

regulating the discharge or a discharge that is exempt from obtaining waste discharge requirements pursuant to the California Water Code or the Basin Plan is not subject to the prohibition.

Comment 2.2:

“the Draft Amendments provide no discussion or explanation as to how the Draft Amendments interact with the State Water Resources Control Board’s new state policy for *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State*.”

Response 2.2:

The *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State* [Procedures] define the wetlands that are waters of the State, and this definition will be used when implementing the land disturbance prohibition. The Procedures also establish application procedures when seeking permits for discharges of dredged or fill materials to waters of the State. Under the Procedures, a person must file an application with the Water Boards for any activity that could result in the discharge of dredged or fill material to waters of the State, unless the proposed discharge is an activity or in an area excluded from the application procedures. As stated in the Procedures, “[t]hese exclusions do not, however, affect the Water Board’s authority to issue or waive waste discharge requirements (WDRs) or take other actions for the [excluded] activities or areas to the extent authorized by the Water Code.” Thus, discharges from activities or in areas excluded from the Procedures’ application requirement may still be subject to Water Board regulation.

Therefore, if a discharger obtains a permit for the discharge of dredged or fill material to waters of the State, or is regulated by another State Water Board or Regional Water Board permit, the discharge is authorized. However, for dischargers that discharge wastes that are subject to regulation pursuant to the Procedures and fail to file a complete application, the discharge would be in violation of the proposed Basin Plan amendment that prohibits discharges from land disturbance activities into waters of the State.

Comment 2.3:

“the expansion of this prohibition would undermine waste discharge requirements that include schedules of compliance for meeting certain requirements -- eliminating the applicability of any time schedule that was otherwise adopted.”

Response 2.3:

The land disturbance prohibition applies to unauthorized discharges or discharges that are not exempt by the California Water Code or the Basin Plan and staff has revised the prohibition to explicitly state this (see response 2.1).

Comment 2.4:

“The Draft Amendments ... broadens the prohibition to any discharge from any activity. (Draft Amendments, page 10.) Such an expansion of this provision is unreasonable.”

Response 2.4:

The proposed amendment to the Land Disturbance Prohibition shown on page 10 of the June 23, 2020 version of the Project Report was revised. The clause “from any activity” is not in the 2022 version of the proposed Basin Plan amendments. Instead, proposed amendments to section 4.8.5.1 state “from soil disturbance activities.”

Appendix. Reproduction of the comment letter emailed to the Executive Officer of the Central Coast Water Board, on July 9, 2020.

THERESA A. DUNHAM EMAIL: (916) 448-3826 tdunham@kscsacramento.com

July 7, 2020

Via Electronic Mail Only

Matt Keeling, Executive Officer
California Regional Water Quality Control Board Central Coast Region
895 Aerovista Place, Suite 101 San Luis Obispo, CA 93401
Matt.Keeling@waterboards.ca.gov

Dear Mr. Keeling:

On behalf of Grower-Shipper of Central California, Grower-Shipper of San Luis Obispo and Santa Barbara Counties, Monterey County Farm Bureau, Western Growers Association Western Plant Health Association and California Farm Bureau Federation (Ag Association Partners), we submit the following comments on the Draft Project Report for Amending the Water Quality Control Plan for the Central Coastal Basin ("Basin Plan") to improve and clarify Waste Discharge Prohibition Language (Draft Amendments), which will be considered by the Central Coast Regional Water Quality Control Board (Central Coast Water Board) at its July 17, 2020 meeting. While we recognize that the written comment period for the Proposed Amendments has passed, we respectfully request that the Chair of the Central Coast Water Board consider accepting the written comments provided here.

Specifically, the Ag Association Partners write to share their concerns with the Proposed Amendments. The proposed changes and alleged clarifications regarding discharge prohibitions improperly expand Central Coast Water Board authority beyond what is intended in Water Code section 13243.

I. The Proposed Amendments to Basin Plan Section 5.4.1 Violate the Intent and Purpose of the Porter Cologne Water Quality Control Act (Porter-Cologne)

In an unprecedented move, the Central Coast Water Board attempts to use its discharge prohibition authority as legal justification for prohibiting discharges to *all* waters of the state unless the discharge is compliant with a waste discharge requirements or a waiver from waste discharge requirements. The explicit purpose for this revision, as stated in the Draft Project Report, is to avoid the need of providing notice to a discharger of such a violation prior to bring an enforcement action. (Draft Amendments, page 6.)

Application of the discharge prohibition authority in such a broad manner exceeds the statutory intent and purpose of Water Code section 13243. While the Central Coast Water Board has the authority to reasonably regulate and protect water quality, that authority is not without limitation. Water Code section 13243 restricts the Central Coast Water Board's power to limit discharges of waste to certain conditions or areas in the region. The power to "specify certain conditions or areas where the discharge of waste . . . will not be permitted" does not include the authority to completely prohibit *all* discharges of waste to all inland waters -- unless a WDR or waiver has been obtained. (Wat. Code § 13243; see also Draft Amendments, pages 7-9; *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1024 "Administrative regulations may not exceed the scope of authority conferred by the Legislature."].)

Use of the Central Coast Water Board's discharge prohibition authority to avoid issuing a notice of violation prior to bringing an enforcement action is also highly improper and violates the rules of statutory construction. Water Code sections 13260, 13263, 13264 and 13265 set up specific requirements for the issuance of waste discharge requirements as well as enforcement provisions for those that fail to comply. First, Water Code section 13260 requires that a report of waste discharge be filed prior to discharge of waste to a water of the state¹. Then, a regional water board issues waste discharge requirements (or a waiver from such requirements) pursuant to Water Code section 13263 after proper notice and hearing. Discharging waste in the absence of being authorized is prohibited pursuant to Water Code section 13264 and may result in legal action being taken to prohibit the discharge. (See, e.g., Wat. Code § 13264(b), ["The Attorney General, at the request of a regional board, shall petition the superior court for the issuance of a temporary restraining order, preliminary injunction, or permanent injunction, or combination thereof, as may be appropriate, prohibiting any person who is violating or threatening to violate this section from doing any of the following, whichever is applicable: (1) Discharging the waste or fluid. . . ."].) The only caveat is that the person discharging waste in violation of section 13264 must first receive notice in writing that such a violation is occurring. (Wat. Code, § 13265(a), ["Any person discharge waste in violation of Section 13264, after such violation has been called to his attention in writing by the regional board, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."].)

Footnote 1. Regional boards also maintain discretion to issue waste discharge requirements without first obtaining a report of waste discharge. (Wat. Code, § 13263(d).)

By skipping the provisions of Water Code sections 13264 and 13265 and allowing direct enforcement for "violating a discharge prohibition," the Draft Amendments would essentially eviscerate the statute and eliminate the intent and purpose of these provisions. This violates the rules of statutory construction by making these statutory provisions superfluous. (See *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, 435 [statutes must "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."]; *Dept. Of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 14 [it is well-

settled that courts avoid agency interpretations “that render statutory language surplusage.”].) Thus, when one considers the language of Water Code section 13243 taken together with the statutory provisions of 13260 et seq., Porter-Cologne does not support blanket prohibitions as part of a regional water board’s authority to limit waste discharges into waters of the state in certain conditions or areas, and especially to avoid notice provisions.

In summary, the Draft Amendments would give the Central Coast Water Board authority to bring an enforcement action against *any* individual for discharging without a permit. (Draft Amendments, page 8.) This directly undermines the intent and purposes of Porter-Cologne’s notice requirements associated with the issuance of waste discharge requirements. (See Wat. Code § 13265(a); see also Wat. Code § 13167.5(a) [Thirty-day public comment period required prior to adoption of waste discharge requirements].) As noted in the Draft Amendments, the Central Coast Water Board “is not able to take formal enforcement action” against dischargers not subject to waste discharge requirements until it “[n]otifies the discharger in writing of the violation and only then may impose formal enforcement action if the discharge continues *after* that notification.” (Draft Amendments, page 6.) Indeed, the Draft Report concedes that “formal enforcement action is more difficult in [these] cases due to an absence of [outright] prohibitions in the Basin Plan.” (Draft Amendments, page 6.) The “difficulty” in enforcing these cases against individual dischargers without due process is by legislative design. The Draft Amendments would circumvent due process that is built into Porter-Cologne’s requirement that discharges that occur without properly issued waste discharge requirements be called to the attention of the discharger in writing before civil or criminal penalties are levied against the individual. (Wat. Code § 13265(a).)

II. The Proposed Amendments to Basin Plan Section 4.8.5.1 Improperly Broadens the Land Disturbance Prohibitions

In addition to the broad prohibitions being proposed, the Draft Amendments also propose to amend the land disturbance provisions in section 4.8.5.1 of the Basin Plan. The current provisions are tied to discharges of silt, soil, etc. as it relates to timber harvesting, construction and other soil disturbance activities, and applies if the discharge occurs in violation of best management practices. The Draft Amendments greatly expand this prohibition to state as follows: “The discharge of sand, silt, clay, or other inorganic or organic earthen materials waters of the state from any activity in a manner that: 1. Unreasonably affects or threatens to affect beneficial uses, or 2. Creates or threatens to create a condition of pollution or nuisance is prohibited.” (Draft Amendments, page 10.)

According to the Draft Amendments, the revision is being proposed to expand the land discharge prohibitions from streams to all waters of the state, including rivers, wetlands, lakes, estuaries, and the ocean. (Draft Amendments, page 10.) No reasoning or justification is provided for the elimination of reference to violation of best management practices associated with timber harvesting, construction or soil disturbing activities. Further, the Draft Amendments provide no discussion or explanation as to how the Draft

Amendments interact with the State Water Resources Control Board's new state policy for *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State*.

It appears to us that the unstated purpose of these Draft Amendments may be the same as that for the broad prohibitions, i.e., ability to bring an enforcement action without providing notice in advance of a violation. To the extent that is the intended purpose, the arguments provided above apply to these Draft Amendments as well.

Further, the expansion of this prohibition would undermine waste discharge requirements that include schedules of compliance for meeting certain requirements -- eliminating the applicability of any time schedule that was otherwise adopted. The Draft Amendments create an explicit prohibition that do not recognize that the Central Coast Water Board may adopt schedules of compliance for discharges of all types that allow the continued discharge of a pollutant (including sand, silt, and clay) that may be considered pollution for a certain period of time. This means that even if permitted under waste discharge requirements, such discharges would still be prohibited by the Basin Plan and potentially subject to enforcement.

The Draft Amendments also eliminate reference to use of best management practices and instead broadens the prohibition to any discharge from any activity. (Draft Amendments, page 10.) Such an expansion of this provision is unreasonable. Erosion of sediment is a natural process, and a by-product of many beneficial activities that are part of human activity (e.g., forestry, agriculture, construction, etc.). We all agree that management practices need to be employed to control such discharges to protect fish and wildlife in our surface waters. However, the Draft Amendments are overly broad and provide the Central Coast Water Board with enforcement for discharges of such materials even if management practices are implemented to the fullest extent possible. Allowing for such enforcement actions violates one of the principle tenants of Porter-Cologne, which is to regulate activities "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000; see also Wat. Code §13001, ["The state and regional boards in any power granted in this division shall conform to and implement the policies of this chapter ..."].)

III. Conclusion

Based on the concerns expressed above, the Central Coast Water Board should reject the Draft Amendments to Basin Plan sections 5.4.1 and 4.8.5.1.

Sincerely,

Theresa A. Dunham

KAHN, SOARES & CONWAY, LLP
1415 L Street, Suite 400
Sacramento, California 95814
916-448-3826
916-718-5774 (cell)
www.ksclawyers.com

cc:

Steve Saiz, Central Coast Water Board (Steve.Saiz@waterboards.ca.gov)
Tammie Olson, Central Coast Water Board (Tammie.Olson@waterboards.ca.gov)
Stephanie Yu, Office of Chief Counsel (Stephanie.Yu@waterboards.ca.gov)
Emel Wadhwani, Office of Chief Counsel (Emel.Wadhwani@waterboards.ca.gov)
Abby Taylor-Silva, Grower Shipper of Central California
Claire Wineman, Grower Shipper of San Luis Obispo and Santa Barbara Counties
Norman C. Groot, Monterey County Farm Bureau
Gail Delihant, Western Growers Association
Renee Pinel, Western Plant Health Association
Kari Fisher, California Farm Bureau Federation