

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION

**IN THE MATTER OF THE ADOPTION OF A CONDITIONAL
WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR
DISCHARGES FROM IRRIGATED LANDS**

CHAIR'S ORDER ON OBJECTIONS TO HEARING PROCESS

On December 21, 2011, Theresa A. Dunham, on behalf of numerous agricultural entities¹, and on December 22, 2011, Kari E. Fisher, on behalf of the Farm Bureau², each submitted a letter to Jeffrey Young, the Chair of the Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board) objecting to certain aspects of the hearing process for adoption of a conditional waiver of waste discharge requirements for discharges of waste from irrigated lands. Ms. Dunham's letter requests that the Central Coast Water Board "conduct workshops for the newly appointed Board members" and "conduct a new, comprehensive public hearing on this matter." Ms. Fisher's letter requests that the Central Coast Water Board "allow a full workshop and hearing to occur prior to a hearing in which the Board will vote." They each make other assertions and requests.

For the reasons set forth herein, the requests are partially granted in that the Central Coast Water Board will hold a workshop for the matter on February 1, 2012 at its regularly scheduled meeting. The other process assertions and requests are discussed herein.

BACKGROUND

The State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Water Boards) are the principal state agencies with primary responsibility for the coordination and control of water quality pursuant to the Porter-Cologne Water Quality Control Act (Porter-Cologne Act, codified in Water Code Division 7). Water Code section 13260 requires persons who discharge waste to submit a report of waste discharge and pay a fee prior to obtaining waste discharge

¹ Specifically, Farmers for Water Quality, whose members include the California Strawberry Commission, Grower-Shipper Association of Central California, Monterey County Farm Bureau, Santa Cruz County Farm Bureau, Grower-Shipper Association of Santa Barbara & San Luis Obispo Counties, San Benito County Farm Bureau, San Luis Obispo County Farm Bureau, and Western Growers.

² Specifically, the California Farm Bureau Federation, the Santa Barbara County Farm Bureau, the San Luis Obispo County Farm Bureau, the Monterey County Farm Bureau, the San Benito County Farm Bureau, the Santa Cruz County Farm Bureau, the Santa Clara County Farm Bureau, and the San Mateo County Farm Bureau

requirements. Water Code section 13263 authorizes the regional boards to issue waste discharge requirements, but there is no right to discharge. Water Code section 13269 authorizes the regional water boards to conditionally waive the requirements to submit a report of waste discharge and obtain waste discharge requirements. Such waivers must be consistent with applicable state and regional board water quality control plans and must be in the public interest. A waiver may not exceed five years in duration, but may be renewed.

On July 9, 2004, the Central Coast Regional Water Quality Control Board (Central Coast Water Board) adopted Resolution No. R3-2004-0117 establishing a Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (2004 Order) pursuant to Water Code section 13269. The 2004 Order expired on July 9, 2009, and the Central Coast Water Board renewed it for a term of one year until July 10, 2010 (Order No. R3-2009-0050). On July 8, 2010, the Central Coast Water Board renewed the 2004 Agricultural Order again for an additional eight months until March 31, 2011 (Order No. R3-2010-0040). Subsequently, the Executive Officer, pursuant to authority delegated by the Central Coast Water Board, extended the 2010 Order twice, until September 30, 2012.

The Central Coast Water Board intended to consider renewal and revisions to the Agricultural Order in March 2011, but no longer had a quorum of Board members eligible to vote on the matter. This situation continued until November 10, 2011, when three new Board members eligible to participate in the matter were appointed by the Governor. The Water Board intends to consider adoption of a renewed Agricultural Order at its March 2012 meeting.

The Central Coast Water Board has provided an extensive and unprecedented process leading to the March 2012 hearing. The Water Board staff began outreach on this matter in December 2008. Staff has held dozens of meetings with interested persons since 2009, held several staff-level workshops and a California Environmental Quality Act scoping meeting. Staff has provided four versions of revised Orders that have all been subject to the opportunity for written comments. The Water Board held two public workshops in the northern and central-southern parts of the Region, two multi-hour hearings, and provided five opportunities to submit written comments. Due to a lack of a quorum, the Water Board held the hearings on March 17, 2011 and May 4, 2011 (a continuation of the March hearing) as panel hearings as allowed under Water Code section 11328.14. The written record for this matter was originally closed on January 3, 2011. At the panel hearing of May 4, 2011, the Chair of the Board directed staff to allow a written proposal by agricultural interests represented by Ms. Dunham, into the record, to provide an addendum to the staff report discussing the agricultural proposal, and to allow additional public comment on the agricultural proposal and the staff report. The Water Board panel chose at that time not to make a recommendation to the full Water Board, but rather defer the final decision for the full Central Coast Water Board at a hearing when a quorum was present.

1. The panel hearing process is consistent with California Water Code section 13228.14.

Ms. Dunham asserts that the Water Board had not complied with Water Code section 13228.14, which authorizes the Water Board's use of panel hearings.

Section 13228.14 states:

- (a) Any hearing or investigation by a regional board relating to investigating the quality of waters of the state, prescribing waste discharge requirements, issuing cease and desist orders, requiring the cleanup or abatement of waste, or imposing administrative civil liabilities or penalties may be conducted by a panel of three or more members of the regional board, but any final action in the matter shall be taken by the regional board. Due notice of any hearing shall be given to all affected persons. After a hearing, the panel shall report its proposed decision and order to the regional board and shall supply a copy to all parties who appeared at the hearing and requested a copy.
- (b) No party who appears before the panel is precluded from appearing before the regional board at any subsequent hearing relating to the matter. Members of the panel are not disqualified from sitting as members of the regional board in deciding the matter.
- (c) The regional board, after making an independent review of the record and taking additional evidence as may be necessary, may adopt, with or without revision, or reject, the proposed decision and order of the panel.

Ms. Dunham asserts that section 13228.14 does not apply to consideration of the Conditional Waiver. While waivers of waste discharge requirements are not explicitly mentioned, the use of the panel hearing process is within the scope of section 13228.14 because the process involves investigating the quality of waters of the state.

Ms. Dunham asserts that the panel hearing process is not complete because the panel has not reported its proposed decision and order to the regional board. As noted above, the panel decided not to propose a decision and order to the full Board, but rather chose to provide additional information into the record at the request of the agricultural interests represented by Ms. Dunham. It is unclear from Ms. Dunham's letter how the decision by the panel not to propose an order to the full Board would harm Ms. Dunham's clients because rather than making a decision on the record before it at the time, the Board chose to allow new information into the record. The Board panel also discussed at the hearing on May 4, 2011, bringing the matter back when there was a quorum of the Board available to participate. Now that a quorum of Board members is available to vote on the matter, the Board will hold a hearing of all eligible Board members and the record will include the

additional information. All interested persons will have an opportunity to participate in that hearing and a quorum of Central Coast Water Board members will make an independent review of the record and consider adoption of an Agricultural Order.

2. The Central Coast Water Board's hearing process does not prevent newly appointed Board members from being fully informed with respect to issues associated with the Conditional Waiver.

Ms. Dunham asserts that the process prevents new Water Board members from being fully informed with respect to the issues. Ms. Dunham asserts that "[d]ue to restrictive interpretation of ex parte rules by the Central Coast Water Board's counsel, the new Board members may be briefed by Central Coast Water Board staff, but cannot be briefed by other members of the public." She asserts that the new Board members will be making their decision based on two to three minute input from affected parties. She requests that the Central Coast Water Board conduct workshops for newly appointed Board members and conduct a new, comprehensive public hearing on this matter that allow affected persons the opportunity to present and rebut evidence on all elements of the staff's recommended proposal.

Ms. Fisher also asserts that the process is insufficient and requests a "full workshop and hearing".

Ms. Dunham mischaracterizes the ex parte rules because it is not the Board's counsel's interpretation of the ex parte rules that is restrictive; rather it is state law that limits ex parte communications in adjudicative matters. The Administrative Procedure Act's prohibition on ex parte communications is very broad.³ Generally, the prohibition extends to any person attempting to communicate with a board member about an issue in a pending adjudicative proceeding, which includes waivers. The Administrative Procedure Act broadly defines person to include "an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character." As a result, essentially anyone expressing an interest in a water board action and attempting to communicate with a board member is subject to the prohibition on ex parte communications in adjudicative proceedings. With limited exceptions, if the communication involves any issue in the proceeding, be it a factual issue, a legal issue, or a policy issue, it is subject to the ex parte communications prohibition. The Administrative Procedure Act provides exceptions to the prohibition for communications between board members and Water Board staff, including an exception regarding nonprosecutorial matters.⁴

³ Gov't Code § 11430.10.

⁴ Gov't Code § 11430.30(c)(1) and (2). Subdivision (c)(2) provides a specific exemption from the ex parte rules in nonprosecutorial matters for employees of the regional water quality control boards to advise the presiding officer, in this case includes all the Board members.

The ex parte rule does not prejudice interested persons, rather it assures that constitutional principles of due process and fundamental fairness are followed. Ex parte communications are fundamentally offensive in adjudicative proceedings because they involve an opportunity by one party to influence the decision maker outside the presence of opposing parties, thus violating due process requirements. In addition, ex parte communications would not be reflected in the record, and as a result decision makers could make decisions based on different records since different decision makers would hear different information. The record also would not be complete.

Ms. Dunham and Ms. Fisher mischaracterize the past process and are incorrect about the future process. The Board members will not be making their decision based on a few minutes of testimony at the hearing in March 2012, but on a full written and oral record developed during the last nearly three years as described above. This process has been considerably more extensive and inclusive than nearly any other action taken by the Central Coast Water Board. In the typical adjudicative matter, the staff of the Water Board notices an item for consideration approximately two to three months prior to the hearing, the Water Board provides an opportunity for interested persons to submit written comments and evidence, the staff prepares responses to those comments and makes proposed revisions to the item based on the comments, and the Water Board provides an opportunity for oral comments at a hearing before it makes a decision on the matter. In this case, the Water Board has held two workshops and two hearings, has had discussions on relevant agricultural water quality issues at numerous other meetings that are also part of the record, and provided many opportunities to submit written comments and evidence. The staff prepared four drafts and held workshops and provided an opportunity for written comments on multiple drafts. The Water Board also allowed the agricultural interests to submit additional written materials after the close of the public comment period and allowed additional written comments on those submittals.

Contrary to the assertions, newly appointed Board members will not be "greatly hindered." All Water Board members have been provided the record. They understand the importance of this matter and the new Board members have indicated to the Chair that they will be fully prepared to consider the matter at the March meeting, which will be more than four months after their appointment to the Board.

Contrary to the assertions, the March 2012 hearing will not be limited in scope as stated. As the Water Board typically does, it will notice the public hearing and indicate that the Chair will limit the comment time, but will also give interested persons the opportunity to request additional time, which has typically been granted. In this case, there is an extensive oral and written record. As with any proceeding

before the Regional Boards and the State Water Board, interested persons are expected to summarize their written submittals.

Contrary to the assertions, it is not necessary for "transparency or due process" to provide additional workshops or to postpone this matter. As noted above, interested persons have been provided extensive opportunity to submit written and oral comments on this matter. All Board members have been provided the record and have ample time to be prepared prior to the March 2012 hearing. However, due to the length of time since this matter has been on hold pending Board appointments, I have directed the Executive Officer to notice a workshop on this matter at the February meeting of the Central Coast Water Board to allow Board members an additional opportunity to hear from the public and affected persons on this matter, in advance of the March 2012 hearing.

Upon consideration of the letters objecting to the process IT IS ORDERED that:

1. The assertion that the panel hearing process is incomplete or violates due process is rejected.
2. The request to hold an additional workshop is granted. A three hour workshop will be held on February 1, 2012, in Salinas.
3. Comments by interested persons at the March 2012 hearing will not be limited to comments on the agricultural proposal and addendum to the staff report, but time for comments will be limited consistent with normal Board process.
4. The written record is closed; no new written comments or evidence will be accepted into the record.

Date: January 8, 2012

A handwritten signature in black ink, appearing to read "Jeffrey Young", written over a horizontal line.

Jeffrey Young
Chair, Central Coast
Regional Water Quality Control Board