

**STAFF REPORT**

**ORDERS ADOPTING CONDITIONAL WAIVERS OF  
WASTE DISCHARGE REQUIREMENTS  
FOR  
DISCHARGES FROM IRRIGATED LANDS**

**22 June 2006 – Central Valley Water Board Meeting**

**INTRODUCTION**

On 11 July 2003, the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Water Board) adopted:

- Resolution No. R5-2003-0105 *Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands Within the Central Valley Region* (2003 Conditional Waivers),
- Monitoring and Reporting Program (MRP) Order No. R5-2003-0826 for Coalition Groups,
- MRP 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 Conditional Waivers*.

The 2003 Conditional Waivers provide an option for owners and operators of irrigated lands, including water districts, nursery owners, and managed wetland operators, to comply with the California Water Code (Water Code). The 2003 Conditional Waivers and MRPs set the minimum requirements for these entities to comply with the Water Code. The 2003 Conditional Waivers have been amended on five separate dates since they were originally adopted. In November 2005, the Central Valley Water Board extended the expiration date of the 2003 Conditional Waivers to 30 June 2006. Staff is proposing that the Central Valley Water Board consider adoption of the *Coalition Group Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands* (Tentative Coalition Group Order) and the *Individual Discharger Conditional Waiver Of Waste Discharge Requirements For Discharges From Irrigated Lands* (Tentative Individual Discharger Order), which would change the 2003 Conditional Waivers.

This Staff Report describes the stakeholder processes, proposed revisions to the 2003 Conditional Waivers, and the tentative documents sent out for public comment on 19 April 2006 (April 2006 Tentative Orders). The April 2006 Tentative Orders include the two proposed Orders, each with Attachments A and B.

**STAKEHOLDER PROCESSES**

Staff's efforts to collaborate with stakeholders have been ongoing since the Irrigated Lands Conditional Waiver Program's (Program) inception. This Staff Report will discuss only the efforts during the past 18 months when staff began working on renewing the 2003 Conditional Waivers, which were set to expire on 31 December 2005. In April 2005, Central Valley Water Board staff began an extensive outreach effort by meeting with Water Districts, Coalition Groups, Environmental Groups, the Department of Pesticide Regulation (DPR), the Department of Food and Agriculture (DFA), and the California Farm Bureau Federation (Farm Bureau). These meetings were listening sessions to solicit

feedback on how the Program has worked and to hear any specific modifications that stakeholders would like staff to consider during the renewal of the 2003 Conditional Waivers.

During this time, staff also continued to evaluate analytical results from the Phase I and II UC Davis Cooperative Extension sampling and the monitoring conducted by Coalition Groups and Water Districts under the Program. In addition, staff considered the Irrigated Lands Programs in other Regions, policies of the State Water Resources Control Board (State Water Board), such as the *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Policy), and effects of changes in the Water Code to evaluate other potential changes to the 2003 Conditional Waivers.

Based on the meetings with stakeholders, evaluation of analytical data, consideration of other Regions' Programs, and review of State Water Board policies and changes in the Water Code, staff prepared tentatively proposed changes to the 2003 Conditional Waivers. During late August and early September 2005, staff conducted three public workshops to introduce these potential changes and to gather feedback regarding the tentatively proposed changes, and the Program and renewal process, prior to providing officially proposed tentative Orders. Based on all the feedback received, on 5 October 2005, staff circulated tentative documents (October 2005 Tentative Orders) for a 30-day public review and comment period and proposed to renew the 2003 Conditional Waivers. Beginning two weeks after the start of this 30-day period, staff conducted four public workshops to explain the changes staff proposed and receive feedback on those proposed changes.

Staff received many comments during these workshops and during the public comment period. In order to more fully discuss some of the major comments received, staff conducted a meeting on 31 October with representatives from Coalition Groups, Farm Bureau, and DFA and on 14 November with Agricultural Commissioners of the Central Valley and DPR to discuss possible revisions to address the comments, and to hear any additional comments on the October 2005 Tentative Orders.

On 28 November 2005, the Central Valley Water Board voted to extend the 2003 Conditional Waivers to 30 June 2006 so that staff could continue the collaborative process with stakeholders to work through remaining issues. As shown in Table 1, during the period April 2005 through April 2006, staff worked more than 28,000 staff hours on public outreach and education to address issues, explain Conditional Waiver requirements, and discuss the renewal of the 2003 Conditional Waivers. This includes outreach meetings, Policy Advisory Committee meetings, meetings regarding the proposed De Minimis Conditional Waiver, meetings with irrigation districts and tours of irrigation district facilities, public workshops on proposed Conditional Waiver changes and documents, Policy Working Group (PWG) and PWG subcommittee meetings, and presentations to conferences and/or annual meetings. This total number of staff hours does not include any staff time spent in Technical Issues Committee (TIC) or TIC focus group meetings.

#### ***Technical Issues Committee***

On a parallel track with the outreach efforts on the 2003 Conditional Waivers, staff was also receiving comments on the MRPs. Based on the complexity of the comments received and issues raised that could not be easily resolved, and the consideration that the MRPs do not expire, staff did not propose that the Central Valley Water Board adopt new MRP Orders at the November 2005 meeting. The complexity of the issues associated with the Coalition Group MRP warrants a greater opportunity for comment and

more participation in the development of appropriate language to include. Since November 2005, the TIC has continued to meet monthly, and focus groups of the TIC have met at a greater frequency to discuss the MRP and develop recommended language for the Program's monitoring requirements to present to staff for consideration. Staff will evaluate language recommended by the TIC and prepare revised draft MRPs. Based on the efforts of the TIC and its focus groups, draft MRPs will likely be available for public review and comment in late Summer 2006.

### ***Policy Working Group***

The Policy Working Group was formed to conduct a facilitated, collaborative discussion to attempt to reach agreement, or at least understanding, amongst stakeholders on conditional waiver requirements. On 31 January 2006, staff invited key stakeholders to participate in this working group. The stakeholders were individuals representing various interests.

The Policy Working Group met four times between 15 February and 6 April 2006. Attendance at these meetings generally increased with each meeting. The key topics of discussion at the first meeting were to determine which issues the Policy Working Group would try to address and to begin framing those issues. Attendees agreed to begin with two issues: Coalition Group membership lists and the definition of who is a discharger. A subcommittee of the Policy Working Group was formed and met in person and on the phone several times to resolve issues with respect to membership list submittals and the definition of a discharger. The following sections provide a detailed discussion of these two issues.

## **PARTICIPANT INFORMATION SUBMITTAL**

### ***Background***

During the Policy Working Group discussions, there was general agreement among attendees to use the term "participant" in place of "member", but there was not full agreement on submittal of participant lists to the Water Board. The issue of participant information submittals is not new. The 2003 Conditional Waiver, as revised on 24 July 2003, contained the following condition for Coalition Groups (Attachment B, Condition B.1.c):

"The NOI shall include a Membership Document. This membership document shall provide information for each individual Discharger, who has knowingly elected to be part of the Coalition Group including: the owner/operator, farm assessor parcel number(s), Section, Township and Range and closest downstream surface water body. The Coalition Group shall maintain necessary information to contact the Individual Dischargers including phone number(s) and mailing addresses. This information shall be made available to the Regional Board upon written notice, if necessary, to address a specific water quality issue that is not adequately addressed by the Coalition Group."

In August 2003, the 2003 Conditional Waivers were petitioned to the State Water Board. In January 2004, the State Water Board issued Order WQO 2004-0003, which upheld the condition quoted above with revisions. Footnote 22 of WQO 2004-0003 states in part, "...The idea that a Group would maintain a list of only those individuals who are not in the Group frankly makes no sense." WQO 2004-0003 revised the Membership Document requirement 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 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.”

In February 2004, various stakeholders filed petitions for peremptory writ of mandate in Sacramento County Superior Court (Court). Part of this lawsuit included the complaint that the provisions of the 2003 Conditional Waivers could deprive farmers of trade secret and private property protections. The Central Valley Water Board made minor revisions to the 2003 Conditional Waivers based on the May 2005 Court ruling, but did not change the language requiring Coalition Groups to maintain a “Membership Document” and to submit the list upon the request of the Executive Officer.

In August 2005, the Executive Officer requested each Coalition Group to provide its Membership Document within 30 days, as required by the 2003 Conditional Waivers. On 16 September 2005, the Executive Officer extended the deadline to 1 November 2005 to allow time for Coalition Groups to meet with staff to discuss alternatives for providing the necessary information. That letter also deleted the request for Coalition Groups to submit names of growers that the Groups had contacted or informed about the Program. As of the date of this Staff Report, five of the eight Coalition Groups have submitted alternative documents to the Executive Officer’s September 2005 request. Of the five submittals, only two have been deemed complete as discussed below.

#### ***Status of Membership Document Request***

Some Coalition Groups want to be allowed to provide information on those who are not participating rather than who are participating. There are legal and policy issues associated with the submittal of non-participant information in lieu of enrolled participants, which will be discussed in the next subsection.

To date, only five of the eight Coalition Groups have submitted alternative information to meet the submittal requirements received through the August 2005 Executive Officer request. The alternatives have been provided in the form of maps, lists of non-participants, and lists of growers that did not respond to Coalition Group solicitation efforts. Unfortunately, the staff and Coalition Groups did not clarify the minimum data needs and format for maps, resulting in significant staff resources being expended to create lists from the maps. The lead staff person tasked with evaluating GIS information provided by the Coalition Groups to determine Coalition Group participant and non-participants has spent approximately 1,500 hours working with the alternative information submitted by five Coalition Groups.

Due to the lack of specificity about data needs and format subsequent to the Executive Officer’s letter, the alternative information submitted varied by Coalition Group and included submissions such as GIS maps with Coalition Group boundaries and areas within the boundaries that are not participating; participant and non-responder lists; county assessor lists with Coalition Group members’ names removed; an electronic PDF map of the Coalition Group area with parcels color coded to depict participating and non-participating parcels; and GIS maps showing Coalition Group boundaries and

depicting participating agricultural parcels and non-participating parcels. Working with the various types and quality of data submitted by the Coalition Group has allowed staff to identify the types of information needed to most efficiently and effectively identify non-participants and support program compliance efforts, as summarized at the bottom of Table 2 of this Staff Report.

In assessing staff time invested, it should be recognized that even if member information had been provided pursuant to the Executive Officer's request, staff would have needed to work with the data to identify non-participating parcels. Further, if the Coalition Groups had provided just a list, time would have been required to develop GIS layers. Staff planned to develop GIS information as a tool for this program as time and resources allowed, but the nature of the alternative submittals in the form of maps caused staff to invest more time developing GIS information focused on participant status than was initially contemplated.

The range of responses to the August 2005 Membership Document request and 16 September letter runs full spectrum. To date, two Coalition Groups have submitted information of sufficient quantity and quality for staff to identify non-participating parcels and owners with an adequate level of accuracy. One Coalition Group needs to submit GIS maps for two additional counties to complete its submission. One Coalition Group will provide the final portion of its alternative submission 15 June 2006, but due to the format and data not included in this Group's submission, it required a significant amount of staff time to develop the additional information needed to identify non-participating parcels within the Coalition Group boundaries. One Coalition Group submitted information for its subwatersheds that varied in format, type of information, and level of completeness such that staff cannot develop non-participant information for all of the subwatersheds. Three Coalition Groups have submitted no information at all. A summary and assessment of the information submitted by the Coalition Groups is presented in Table 2 of the Staff Report.

### ***Issues***

In 2003, the Central Valley Water Board adopted the requirement to maintain and submit a "Membership Document" (whether submitted as part of the NOI or as requested by the Executive Officer), and the State Water Board and Sacramento County Superior Court upheld this requirement. This shows that the requirement not only is legal, but also is appropriate and supported by the implementing agencies.

The membership language contained in the April 2006 Tentative Order is the language, with minor revisions, agreed to by the Policy Working Group. Based on comments received on this issue and previous Water Board direction to provide alternatives for its consideration, the Water Board may want to consider alternatives to the language proposed in the April 2006 Tentative Orders. Alternatives are discussed below.

Water Code Section 13269 mandates that the Water Board require compliance with the conditions of conditional waivers. This is not possible if the Water Board does not know who is enrolled in the Program. The Central Valley Water Board cannot delegate authority under the Water Code to enforce the conditions of Conditional Waivers. Therefore, if the Central Valley Water Board does not know who is a participant of a Coalition Group, then it cannot know who has complied with the Water Code through the Conditional Waivers. When the Central Valley Water Board knows who has knowingly

elected to participate in the Program and who is complying with the Water Code, then the Program will be accountable and defensible.

***Alternatives for Participant or Membership Information***

The Policy Working Group subcommittee prepared proposed language to address the issue of participant information submittals. Staff modified this language to make it applicable only to existing Coalition Groups and then included it in the April 2006 Tentative Conditional Waiver, which was circulated for public comment. Subsequently, the Executive Officer determined that the language proposed in the April 2006 Tentative Order is not completely consistent with the discussions in the Policy Working Group. The Participant submittal conditions in Attachment B of the Tentative Coalition Group Order did not require that if a Coalition Group submits a list, it must be a list of participants, and it did not include the requirement that Coalition Groups maintain a Participant List (consistent with the 2003 Conditional Waivers).

Consistent with previous Water Board direction, staff has set forth below several alternatives to the April 2006 Tentative Order with respect to submittal of Coalition Group participant information. Central Valley Water Board may consider one of the following alternatives or another alternative with respect to submittal of participant information. Alternative I is the April 2006 Tentative Order language with language added to address comments of the California Rice Commission. Alternative II, continues the requirement of the 2003 Conditional Waivers that the Coalition Groups maintain a list of participants and contains revisions to assure that if a list is submitted, the list must contain participants that knowingly elect to participate in the Coalition Group. The other alternatives address issues that have been raised in comments and in the Water Board's previous consideration of this issue.

**Alternative I**

*As proposed in the Tentative Coalition Group Order, with added language with respect to the California Rice Commission Coalition Group, which is part of this agenda package.*

5. Each Coalition Group existing as of the effective date of this Conditional Waiver shall submit a list(s) or map(s) sufficient for the Central Valley Water Board to identify which landowners and/or operators of irrigated lands that discharge waste to waters of the State are knowingly participating in the Coalition Group or those that are not participating in the Coalition Group as detailed below:
  - a) A list(s) shall include: a) assessor parcel number, b) parcel size, c) parcel owner or operator name, and d) parcel owner or operator mailing address. To the extent information required by this section may not be disclosed pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage.
  - b) A map shall be an electronic map (in GIS format specified by the Executive Officer) that is in adequate detail to allow the Central Valley Water Board to efficiently determine, when used in conjunction with County Assessor GIS map information, the following information: a) assessor parcel number; b) parcel size; c) parcel owner or operator name; d) parcel owner or operator mailing address, and e) whether the owner or operator of the parcel is participating in the Coalition Group. To the extent information required by this section may not be disclosed

pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage.

The initial documentation shall be submitted in writing or electronically to the Central Valley Water Board by **30 September 2006**. Thereafter, by **31 July of each year**, the Coalition Group shall submit updated Participant information since the last update. The information provided by a Coalition Group to comply with this condition is subject to public disclosure unless subject to an exemption under applicable law, including the California Public Records Act.

## Alternative II

*As proposed in the Tentative Coalition Group Order, with added language 1) with respect to the California Rice Commission Coalition Group, 2) to require that if a Coalition Group submits a list, it must be a list of participants, and 3) to add the requirement that Coalition Groups maintain a Participant List (consistent with the 2003 Conditional Waivers).*

5. The Coalition Group shall maintain a Participant List with information concerning each Participant who has knowingly elected to be a member of the Coalition Group. The Participant List shall include, at a minimum, a) an assessor parcel number, b) parcel size, c) parcel owner or operator name, and d) parcel owner or operator mailing address.
6. Each Coalition Group existing as of the effective date of this Conditional Waiver shall submit either 1) a list of landowners and/or operators of irrigated lands that discharge waste to waters of the State, who are knowingly participating in the Coalition Group or 2) map(s) sufficient for the Central Valley Water Board to identify which landowners and/or operators of irrigated lands that discharge waste to waters of the State are knowingly participating in the Coalition Group or those that are not participating in the Coalition Group as detailed below:
  - a) A list(s) shall include: a) assessor parcel number, b) parcel size, c) parcel owner or operator name, and d) parcel owner or operator mailing address. To the extent information required by this section may not be disclosed pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage.
  - b) A map shall be an electronic map (in GIS format specified by the Executive Officer) that is in adequate detail to allow the Central Valley Water Board to efficiently determine, when used in conjunction with County Assessor GIS map information, the following information: a) assessor parcel number; b) parcel size; c) parcel owner or operator name; d) parcel owner or operator mailing address, and e) whether the owner or operator of the parcel is participating in the Coalition Group. To the extent information required by this section may not be disclosed pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage.

The initial documentation shall be submitted in writing or electronically to the Central Valley Water Board by **30 September 2006**. Thereafter, by **31 July of each year**, the Coalition Group shall submit

updated Participant information since the last update. The information provided by a Coalition Group to comply with this condition is subject to public disclosure unless subject to an exemption under applicable law, including the California Public Records Act.

### **Alternative III**

*Language as proposed in the Tentative Coalition Group Order [Alternative I above] with an added condition to allow the Executive Officer to require participant lists if submittal of maps is insufficient for staff to develop a participant list in a timely and efficient manner.*

If the Executive Officer determines that a map submittal does not contain adequate detail to allow the Central Valley Water Board to efficiently determine the information described in Condition A.6.b, the Coalition Group shall submit the Participant List described in Condition A.5 within the time frame specified by the Executive Officer.

### **Alternative IV**

*Require Coalition Groups to submit a Participant List annually. This alternative was circulated in the November 2005 Tentative Conditional Waiver. The deadline was adjusted due to Conditional Waiver extension. This alternative would replace Attachment B, Conditions A.5 and A.6 in the April 2006 Tentative Order.*

Starting **15 September 2006**, the Coalition Group shall submit a list of participants who have knowingly elected to join the Coalition Group. The list shall be updated annually to reflect current members and shall include each member's name, address, number of irrigated acres, and information sufficient to locate each member's irrigated lands or all parcels that are within a Coalition Group boundary. The Central Valley Water Board or Executive Officer may further specify the information to be included. The list of participants shall be provided in writing or electronically to the Central Valley Water Board annually on **15 July** and at any other time upon request of the Executive Officer. To the extent information required by this section may not be disclosed pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage.

### **Alternative V**

*Require the Coalition Groups to maintain a Participant List and submit the list as requested by the Water Board's Executive Officer. This alternative is the current condition in the 2003 Conditional Waiver (with minor editorial modifications). This alternative would replace Attachment B, Conditions A.5 and A.6 in the April 2006 Tentative Order.*

The Coalition Group shall maintain a Participant List with information concerning each Participant who has knowingly elected to be a member of the Coalition Group. The Participant List shall include, at a minimum, a list of Participants, information on contacting each Participant, and information sufficient to locate the fields or parcels of each Participant that are within a Coalition Group. The Water Board may further specify the information to be included. This information shall be provided to the Water Board upon request, within the time specified by the Water Board, which time shall not exceed 30 days. To the extent information

required by this section may not be disclosed pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage.

## **DISCHARGER DEFINITION**

The Water Code applies to those persons who discharge waste “that could affect the quality of the waters of the state.” The 2003 Conditional Waivers provide a method to regulate those persons who discharge waste from irrigated lands that could affect the quality of surface waters of the State within the Central Valley Region. Since the inception of the Program, growers and Coalition Groups have requested clarification on what discharges fall within the scope of the Conditional Waivers. Some irrigators of agricultural land do not discharge waste to waters of the State within the scope of the Conditional Waivers. The Conditional Waivers currently apply only to discharges of waste to surface waters of the State and not to groundwater. They apply to discharges of irrigation water and storm water from irrigated lands. The most common questions relate to whether the receiving waters of the waste is a “waters of the State” and whether the person is subject to the Conditional Waiver if discharges occur very infrequently and only in the case of large storm events.

Water Board staff has provided significant information about the scope of the Conditional Waivers to assist growers. When the Program began, staff provided thousands of copies of fact sheets and fliers to provide the definition of “discharger” and to help growers determine whether or not they were dischargers. In addition to the fliers and fact sheets, staff conducted numerous meetings throughout the Central Valley Region to respond to questions regarding the fact sheets, fliers, and 2003 Conditional Waivers. While the term “discharger” is not specifically defined in the Water Code, the Water Board typically uses this term to encompass the Water Board’s authority to regulate persons who discharge waste that could affect the quality of the waters of the State. The Water Board uses this term in regards to compliance with conditional waivers, not “participant” or “member.” Staff continues to receive comments regarding the use of the term “discharger” and what this term means to those enrolled in the Program.

To address this issue, staff has proposed changes in the findings of the April 2006 Tentative Orders to clarify the scope of the Conditional Waivers. These are not changes of the definition of “discharger,” and the requirement to comply with the Water Code still applies only to “dischargers.” The changes to the findings regard the scope of who may comply with the Water Code by enrolling in the Conditional Waivers, and they clarify the scope the Central Valley Water Board intended with its adoption of the 2003 Conditional Waivers.

One of these changes is a new finding that clarifies that a discharge of waste to surface waters of the State depends on numerous factors and that it is the responsibility of the potential discharger to determine whether or not they discharge waste to waters of the State within the scope of the Conditional Waivers. The Executive Officer has developed a Fact Sheet to assist owners and operators of irrigated lands to determine whether or not there is a discharge of waste from their lands that is within the scope of the Conditional Waivers, including discharges during storm events. This document is in Appendix A of this Staff Report.

## **PROPOSED CHANGES FROM 2003 CONDITIONAL WAIVERS**

The April 2006 Tentative Orders propose several changes to the 2003 Conditional Waivers. The following subsections summarize the more substantive changes proposed in the April 2006 Tentative Orders. On 26 April 2006, staff posted a version of the Tentative Coalition Group Order on the Central Valley Water Board website that shows the proposed changes from the 2003 Conditional Waivers in highlight and strikethrough, with annotations to the 2003 Conditional Waiver. A more detailed summary of the differences between the 2003 Conditional Waivers and the April 2006 Tentative Orders is found in Table 3 of this Staff Report (substantive changes) and Table 4 (other differences).

### *Participant Information*

The changes with respect to Coalition Group participant information are discussed in detail in the previous portion of this Staff Report.

### *Water Code Changes Since 2003*

The April 2006 Tentative Orders add language due to changes in Water Code Section 13269 since the adoption of the 2003 Conditional Waivers. As revised since 2003, Section 13269 requires that any waiver be consistent with any applicable water quality control plan and be in the public interest. Section 13269, as revised since 2003, also states that the conditions of the waiver must include monitoring requirements to support the development and implementation of the waiver program and to verify the adequacy and effectiveness of the waiver conditions, unless such monitoring is waived. MRPs were included in the 2003 Conditional Waivers and have been revised or are in the process of being revised.

### *Revision of the NPS Policy in 2004*

The State Water Board adopted a revised NPS Policy in May 2004. The April 2006 Tentative Orders describe the new NPS Policy, including some of its key elements, and are consistent with the NPS Policy. Among other key elements, the NPS Policy requires that an NPS control implementation program's ultimate purpose shall be explicitly stated, and that the implementation program must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements. The NPS Policy also states that the implementation program should provide the "identification of participant dischargers."

### *Adoption of the fee schedule in 2005*

Section 13269 authorizes the Central Valley Water Board to include as a condition the payment of an annual fee established by the State Water Board. The State Water Board has established a fee schedule, and the April 2006 Tentative Orders require the payment of the appropriate fee.

### *Updates to the California Toxics Rule (CTR), National Toxics Rule (NTR), and State Implementation Policy (SIP), of which the SIP was revised in 2005*

The April 2006 Tentative Orders describe water quality criteria based on the United States Environmental Protection Agency NTR dated 5 February 1993 and the CTR updated on 13 February 2001. The State Water Board *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (known as the State Implementation Plan or SIP) states that implementation of the NTR and CTR for agricultural nonpoint sources of pollution shall be consistent with the State's NPS Policy. The SIP was revised on 24 February 2005.

*Separate Coalition Group and Individual Discharger Orders*

There is a Tentative Coalition Group Order and a Tentative Individual Discharger Order. This allows for specific findings for each Conditional Waiver and addresses other differences between Coalition Groups and Individual Dischargers.

*Clarifications or updates for definitions, terminology, and Environmental Impact Report (EIR) status*

The April 2006 Tentative Orders Attachment A adds five new definitions (i.e., “discharges of waste from irrigated lands,” “exceedance,” “liquid waste,” “water district,” and “water quality standards”) and revises seven others (i.e., “discharger,” “irrigated lands,” “monitoring,” “receiving waters,” “subsurface drainage,” “waste,” and “waters of the State”). The definitions of “exceedance” and “water quality standards” were not proposed in the November 2005 Tentative Orders but were added to the April 2006 Tentative Orders. These additions and revisions are to clarify the intent and scope of the Conditional Waivers. Work towards completing the EIR continues and the findings have been updated to reflect the ongoing process.

*Revised California Environmental Quality Act (CEQA) Findings*

CEQA Guidelines require that when a lead agency has adopted a negative declaration for a project, the agency is not required to prepare a subsequent environmental document unless the lead agency determines there are substantial changes to the project that involve new significant environmental impacts, substantial changes with respect to the circumstances of the project, or new information that was not previously known shows that the proposed project will have significant effects. The April 2006 Tentative Orders include findings that state none of these circumstances apply and includes justification for these findings.

*Clarify what the Conditional Waivers are not intended to cover*

The April 2006 Tentative Orders include additional information and clarification on what is not intended to be covered or addressed, including application of soil amendments, fertilizers, or pesticides to land, irrigated lands receiving liquid waste, and small irrigated areas for personal use.

*No new discharges*

Staff has previously received comments regarding the condition pertaining to “no new discharges”. The concern is that this condition would prohibit growers from changing crop types, pesticides or irrigation practices. Staff does not propose any changes to this condition. The portion of the condition that refers to not allowing the discharge of waste not specifically regulated by the Tentative Coalition Group Order is broad enough that it does not prevent growers from changing crops or practices. The condition describes waste specifically regulated by the Tentative Coalition Group Order.

**COMMENTS RECEIVED**

Staff received 19 letters with comments on the April 2006 Tentative Orders. Appendix B to this Staff Report is the *Summary of Comment Letters and Staff Responses Regarding April 2006 Tentative Conditional Waivers of Waste Discharge Requirements For Discharges From Irrigated Lands* (Response to Comments). The majority of comments on the April 2006 Tentative Orders addressed the following items. See Response to Comments and Cost Information document.

- Support for 5-year Conditional Waiver Order
- Oppose increased fees
- Perform cost or economic impact analysis to comply with Program
- Clarify definitions, including “discharger,” “discharges of waste from irrigated lands,” “operational spill,” and “water district”
- Oppose removing non-commercial irrigated lands from Waiver
- Support for De Minimis Waiver
- Support need for 18.5 PYs to oversee the Program
- Adopt General WDRs
- Support inclusion of managed wetlands
- Promulgate Fact Sheet referenced in Finding No. 44
- Delete water quality standards and clarify implementation of narrative objectives
- Prepare a new environmental document
- Program is a failure

## **SUMMARY OF JUNE 2006 TENTATIVE ORDERS PROPOSED FOR WATER BOARD ADOPTION**

Based on the comments received and the Response to Comments, staff proposes changes to the April 2006 Tentative Orders, which are shown in revision mode in the Tentative Orders that are part of this agenda package. These documents are hereafter referred to as June 2006 Tentative Orders. The proposed revisions include revisions in response to comments and minor editorial corrections. The revisions were circulated for public review with the agenda materials. This portion of the Staff Report summarizes the reasons for the revisions.

*Antidegradation Analysis:* Changes have been made in Finding 23 in response to comments to clarify the application of State Water Board Resolution No. 68-16 (the “Antidegradation” policy). In addition, Attachment B, Conditions A.8 and C in the April 2006 Tentative Orders have been revised to clarify that dischargers must implement management practices that comply with Resolution No. 68-16. To be consistent with Resolution No. 68-16, the management practices must implement best practical treatment or control of the discharge to reduce the discharges of waste to the extent feasible and to assure compliance with water quality standards, protection of beneficial uses, and prevention of pollution and nuisance. This revision also implements the State Water Board’s NPS Policy and the Basin Plans.

*California Environmental Quality Act:* In response to comments, Findings 61 through 64 of the April 2006 Tentative Orders have been revised to explain further why a new or subsequent environmental document is not required for this Water Board action. The “project” subject to CEQA is the Water Board’s adoption of Conditional Waivers, and it is not a new project, but a renewal of an existing project. The action of the Water Board does not cause impacts to waters of the State. The Conditional Waivers set forth conditions to protect waters of the State.

*Endangered Species Act:* In response to comments, Finding 26 and Attachment B, Condition A.16 have been revised to clarify the application of the federal and state Endangered Species Act. The Conditional Waivers do not authorize the take of threatened or endangered species. Dischargers may have obligations under the federal or state Endangered Species Acts.

*Expiration Date/Reopener:* In response to comments, Order Item 10 of the April 2006 Tentative Order was revised to provide for a re-opener when the EIR is completed.

*Participant Lists:* Attachment B of the April 2006 Tentative Coalition Group Order has been revised for consistency, to correct grammar and Condition numbers, and to add a condition to address issues with respect to the California Rice Commission Coalition Group, as discussed below. Alternatives have been provided in this Staff report, including Alternative II that would (1) clarify that, as in the past, Coalition Groups must maintain a Participant List and (2) *to require that if a Coalition Group submits a list, it must be a list of participants*

*California Rice Commission:* Finding 14 and Attachment B, Condition A.6 of the April 2006 Tentative Order have been revised as a result of comments provided by the California Rice Commission (CRC), which notes that the CRC is prohibited by law from disclosing the names and addresses of CRC members. The Central Valley Water Board acknowledges that the CRC has formed a commodity-specific Coalition Group under the Program and cannot submit a Participant List. To address this comment, Attachment B, Condition A.6 of the April 2006 Tentative Order has been revised to state in part "...To the extent information required by this section may not be disclosed pursuant to Food and Agricultural Code Sections 71089 and 71124(a), the Coalition Group must provide a detailed area map(s) that clearly delineates the coverage area and acreage."

A concern has been raised about how the staff will enforce the conditions of the Conditional Waiver without knowing the names and addresses of the CRC participants. One hundred percent of the rice growers must be members of the CRC, the Water Board has an existing, effective and successful Rice Pesticide Program, and the Water Board can obtain direct grower information from Agricultural Commissioners and others in the rice growing areas. CRC stated that, as it has done in the past, it will continue to provide area maps that clearly delineate the rice acreage in the Sacramento Valley that is within the CRC's Coalition Group coverage area. These maps are an important part of Coalition Group oversight and assist in determining whether water quality exceedances are due to a discharge from rice or other croplands.

The Rice Pesticide Program has been implemented over many years and has significantly improved water quality for five pesticides. Over the past three and a half years, the CRC has expanded this program to address additional water quality questions under the Conditional Waiver. Staff believes that the Water Board can effectively enforce the conditions of the Conditional Waiver for rice growers, if needed, without receiving the information from the CRC that they are prohibited from disclosing. If at some point in the future this model is not effective in addressing water quality concerns or fails to implement appropriate management practices to improve and protect water quality, the Executive Officer and/or the Water Board can withdraw Conditional Waiver coverage and require that a new Coalition Group be formed to represent rice growers in the Sacramento Valley or that the rice growers

join an existing Coalition Group. The same is true for any Coalition Groups that is not fully implementing the terms and conditions of the Conditional Waiver.

*Water Code Section 13269:* In response to comments, Finding 35 of the April 2006 Tentative Orders has been revised to clarify the reasons why the conditional waivers are in the public interest, consistent with Water Code section 13269.

*Water Quality Standards:* Attachment A, page 1, and Attachment B, Condition C.2 of the April 2006 Tentative Order has been revised to clarify the implementation of water quality standards and how the water quality will be monitored consistent with the applicable water quality standards. As a condition of the Conditional Waivers, dischargers and Coalition Groups must comply with water quality standards and must implement management practices to assure compliance. The comments indicate some misunderstanding about how the Water Board intends to implement water quality standards. The Basin Plans set forth beneficial uses and numeric and narrative water quality objectives to protect those uses. Federal regulations set forth water quality criteria. Together those are called “water quality standards.” Some water quality standards apply to protect only certain beneficial uses or apply only in specific locations. Beneficial uses may also vary by location and water body. Because the Conditional Waivers are general and not specific to a certain location or discharger, it is not feasible to set forth the standards that apply in each location in the Tentative Orders. The MRPs will set forth the waste constituents and monitoring parameters that apply within the individual Coalition Group areas.

The 2003 Conditional Waivers required Coalition Groups and dischargers to comply with water quality standards and implement management practices. The condition with respect to management practices was not written clearly. In response to comments noting this lack of clarity, Attachment B Conditions A.8 and C of the April 2006 Tentative Orders have been revised to clarify that management practices are a condition of the Conditional Waivers and that they must be consistent with the State Water Board Antidegradation Policy and comply with water quality standards, protect beneficial uses, and prevent pollution and nuisance. These clarification address compliance with applicable Basin Plans and State Water Board policies, including the NPS Policy and the Antidegradation Policy.

*Definitions:* There are six definitions in Attachment A with proposed modifications. The changes are based on the need for consistency within the April 2006 Tentative Orders and comments received by stakeholders.

*Other clarifying edits:* In response to comments and based on experience with the 2003 Conditional Waivers, staff has made editorial revisions for clarification in Findings 28, 41, and 46; Attachment A, Definitions 2, 3, 4, 13, 15, and 16; Attachment B, first paragraph; and Condition D of the April 2006 Tentative Orders.

Changes to Findings 30, 32, 38, 43, and 52, Order Items 4 and 9, and Attachment B are for consistency and to correct grammar.

The changes proposed in the June 2006 Individual Discharger Tentative Order are for consistency in terms and intent with the June 2006 Coalition Group Tentative Order.

**CENTRAL VALLEY WATER BOARD STAFF CONTACTS**

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