

Agenda Item 7b.
Meeting Date: August 27-28, 2015

LEGAL UPDATE

It has been busy month with respect to water-related litigation. Below are summaries of three key State Water Resources Control Board cases that we are monitoring, with a discussion of their relevance to the Delta.

1) *Monterey Coastkeeper, et al. v. State Water Resources Control Bd.*

Background

In 2004, the Central Coast Regional Water Quality Control Board (Regional Board) adopted its first conditional waiver of waste discharge requirements that governed discharges from irrigated lands within that region. The 2004 waiver encouraged cooperative surface-water monitoring and reporting requirements, which were intended (through an “iterative process”) to provide the Regional Board with water-quality data to refine and strengthen subsequent waivers (i.e., to target pollutants of concern). In 2012, after a multi-year stakeholder process, the Regional Board adopted the subsequent Conditional Waiver of Waste Discharge Requirements (Agricultural Waiver) at issue in this litigation.

Five petitioners (including the Farm Bureau and environmental organizations) petitioned the State Water Resources Control Board (State Water Board) for review. At the conclusion of that review, the State Water Board ultimately upheld most of the Agricultural Waiver, but amended several requirements, including replacing a nitrogen balance ratio requirement with an expanded nitrogen-application reporting protocol (Modified Agricultural Waiver) in 2013.¹ The environmental petitioners sued the State Water Board in Sacramento Superior Court, alleging that the modifications weakened the Agricultural Waiver. They sought a writ of mandate ordering the Water Board to set aside the Modified Agricultural Waiver because it allegedly violated the Water Code, regional Basin Plan, the State’s Non-Point Source and Anti-degradation Policies, the Administrative Procedures Act, and CEQA.

Court Ruling

The court granted the writ, found in favor of the petitioners on key issues (Water Code, Basin Plan and Non-Point Source violations), and remanded the Modified Agricultural Waiver back to the State Water Board for re-formulation. On the remaining issues (Anti-degradation, APA and CEQA), it ordered the State Water Board to conduct more analysis. The court repeatedly stated that it expected better water-quality improvement results from the iterative process than the monitoring and compliance verification requirements of the Modified Agricultural Waiver would achieve. It held that the Modified Agricultural Waiver lacked sufficiently specific, quantifiable, and enforceable measures and feedback mechanisms needed to meet water quality objectives. The court ordered the State Water Board to include verifiable assessment mechanisms regarding the effectiveness of farm-management practices, in order to measure progress towards water-quality improvement in the short-term and achievement of water quality objectives in the long-term.

¹ The 2012 Agricultural Waiver and the Modified Agricultural Waiver were, for the most part, consistent in approach with respect to encouraging cooperative monitoring, preparation of Farm Plans, and reporting of monitoring reports and corollary management practices.

Procedural Next Steps

The State Water Board has 60 days from the date that the court formally enters its judgment and writ to appeal. The parties are currently in the process of negotiating the final form of judgment and writ. We will update the Council on this case's procedural status at its next meeting (e.g., when the 60-day clock begins to run, whether the State Water Board has signaled an intent to appeal, etc.).

Importance for the Delta and the Stewardship Council

The Delta Plan (Chapter 6) addresses the need to improve surface, ground and drinking water quality in the Delta by recommending near-term and intermediate-term actions to meet the coequal goals, protect the beneficial uses of Delta water, restore aquatic habitats, and sustain native plants and animals. Because the Central Coast and Delta regions each support sizeable agricultural economies,² they deal with similar agriculture-related water-quality issues. Court-approved discharge regulatory approaches in the Central Coast Region could certainly inform approaches in the Delta.

In 2012, the Central Valley Regional Water Board adopted Waste Discharge Requirements (WDR) for growers within the Eastern San Joaquin River Watershed, and the State Water Board is currently reviewing petitions from environmental justice and environmental organizations as well as water districts and the Farm Bureau. While the two regions took different regulatory approaches to the issue of waste discharge from irrigated lands, this court's focus on monitoring, compliance verification and feedback mechanisms to improve water quality should influence the State Water Board's (and ultimately, a court's) review of the Central Valley Board's WDRs as well.

2) *West Side Irrigation Dist., et al. v. State Water Resources Control Bd.* *Byron-Bethany Irrigation Dist., et al. v. State Water Resources Control Bd.*

On July 10, 2015, Sacramento Superior Court Judge Chang issued a temporary restraining order against the State Water Board, enjoining it from enforcing coercive curtailment notices against the petitioning water districts without first engaging in due process/pre-deprivation hearings. Less than a week later, the State Water Board issued revised curtailment notices that removed the coercive language in favor of informational language. On August 3, 2015, Judge Chang approved the revised notices, denied the districts' request for a preliminary injunction, and allowed the State Water Board's administrative curtailment process to continue.

The districts' challenges to the Water Board's authority to curtail senior (i.e., pre-1914) water will either be consolidated in Alameda or Santa Clara County Superior Court. In the meantime, the State Water Board has issued penalties or cease and desist orders against two of the litigating districts for allegedly diverting water after receiving the warning that, due to the drought, no water was available under their relatively senior rights. The Byron-Bethany Irrigation District, hit with a \$1.5 million fine from the Water Board, is the first to

² The Central Coast region has approximately 435,000 acres of irrigated land; approximately 3,000 agricultural operations generating waste discharges; and more than 17,000 miles of surface waters and 4,000 square miles of groundwater basins that may be affected by waste discharges.

request an administrative hearing to challenge its fine. That hearing is scheduled for October 28, 2015 at the State Water Board.

We will monitor and update the Council as warranted on administrative and litigation developments on these Delta curtailment cases.

3) *California Sportfishing Protection Alliance v. State Water Resources Control Bd., et al.*

Background

Last year, the US Bureau of Reclamation (Reclamation) miscalculated the volume of cold water available in Shasta Dam. Its releases, therefore, were unable to maintain proper river temperature downstream for salmon in the Sacramento River. As a result, only 5% of 2014 brood stock survived. This year, Reclamation has been stretching its releases in order to maintain cold water during peak spawning season over the next few months. In the meantime, however, the State Water Board and Reclamation have been under pressure to relax flow and water-quality standards in order to generate additional supply for agricultural and urban uses (e.g., drinking water) downstream.

In response, the State Water Board has issued “Temporary Urgency Change Orders,” temporarily relaxing dry-year flow and water-quality standards (including temperature and dissolved oxygen standards) upstream and in the Delta. Delta-specific temporary urgency change orders include relaxation of: Suisun Bay-Delta outflow and salinity standards; inflow from the San Joaquin and Sacramento Rivers through the Delta; and ultimately, outflow from the State and Central Valley Water Projects. According to a recent Public Policy Institute of California report, these changes shifted more than 1 million acre-feet of water from habitat support to agricultural and urban uses.

Litigation

Environmental groups, led by the California Sportfishing Protection Alliance have sued the Water Board in Alameda County Superior Court (August 4, 2015), and Reclamation, the State Water Board and Department of Water Resources (DWR) in Federal court (Fresno) (June 3, 2015) for failing to comply with water quality standards governing the Bay-Delta estuary, among other claims, when issuing the temporary urgency change orders and managing releases.

Procedural Next Steps

State Water Board and DWR motions to dismiss the federal case will be heard on September 17, 2015. (The calendar for the state-court case is not yet published.) We will monitor developments in these cases and report back to the Council as warranted.