

CALIFORNIA WATER TM

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Reporter

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FEATURE ARTICLE

SOUTH DELTA SALINITY STANDARDS PROMPT FINANCIAL CONTRIBUTIONS FOR THE DEVELOPMENT OF THE CENTRAL VALLEY SALINITY MANAGEMENT PLAN

By Tess Dunham

The Central Valley Regional Water Quality Control Board (Regional Water Board) recently adopted new permit limitations in two National Pollutant Discharge Elimination System (NPDES) permits for wastewater treatment facilities requiring dischargers to help financially support the development of the Central Valley Salinity Management Plan. On May 4, 2007, the Regional Water Board adopted permit provisions into NPDES permits for the City of Tracy (Tracy) and the Mountain House Community Services District (MHCSD) that allows both permittees the ability to avoid meeting stringent effluent limitations that are equal to the South Delta Salinity Standards as long as the permittees are implementing source control programs, looking for alternative, lower salinity water supply sources (if applicable), and participating financially in the development of the Central Valley Salinity Management Plan at a level commensurate with their contributions of salinity to the Southern Delta. The permit limitations for salinity, as adopted by the Regional Water Board, come after almost a year's worth of negotiation, discussion and consideration of how best to blend NPDES permit requirements with the practical realities of addressing salt concentrations in wastewater permits that discharge to the South Delta.

Background

South Delta Salinity Standards

The state's Water Quality Control Plan for the Bay-Delta (Basin Plan) currently contains numeric water quality objectives for electrical conductivity

(EC) that are set at 700 umhos/cm (1 Apr – 31 Aug) and 1000 umhos/cm (1 Sep – 31 Mar) to protect the agricultural beneficial uses in the South Delta. The water quality objectives were originally adopted in the Basin Plan in 1991, and were retained in the 1995 Basin Plan. The South Delta salinity objectives have been the center of much discussion, debate and controversy over the years following adoption of the Basin Plan. As compliance with the objectives are primarily related to the Department of Water Resources and the Bureau of Reclamation's water project operations for the State Water Project and the Central Valley Project, the State Water Resources Control Board (State Water Board) has historically utilized its water rights authority to implement the Bay-Delta salinity objectives. The decision of record that implements the objectives is D-1641, which was adopted by the State Water Board in December 1999 and revised in March 2000.

The basin plans, as adopted in 1991 and 1995, considered a number of inter-related conditions that caused the salinity problems in the South Delta, including water diversions upstream of the Delta, water diversions within the Delta for export and local use, high levels of salinity in irrigation return flows, groundwater inflow, seasonal flow variations, and tidal conditions. While municipal discharges into the Delta may impact EC levels, the State Water Board's decisions on the 1991 and 1995 Basin Plans did not consider or identify treated wastewater as a source of salinity into the South Delta. The State Water Board's inadvertent failure to consider the impact of treated wastewater in the 1991 and 1995 Basin Plans led the State Water Board, in part, to remove the

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Regional Water Board's effluent limitation that was adopted to apply the more restrictive irrigation season objective of 700 umhos/cm (1 Apr – 31 Aug) in a wastewater permit for the City of Manteca that was adopted in March of 2004. (*In re Matter of the Petition of City of Manteca* Order WQ 2005-005.) Since the City of Manteca wastewater permit was adopted and the State Water Board's Order on the matter issued, there have not been NPDES wastewater permits subject to the South Delta standards presented to the Regional Water Board.

The State Water Board has recently adopted a revised Basin Plan for the Delta that does identify municipal discharges as a potential source of salinity into the South Delta. The Basin Plan also provides that the State Water Board will conduct a series of workshops to receive information regarding the South Delta salinity standards, the causes of salinity, measures needed to implement salinity and other factors. Based on this review, the State Water Board may decide to adopt new salinity standards for the South Delta that are either more restrictive or less restrictive than the ones currently in place. This review is currently underway. In the meantime, the Regional Water Board is legally required to adopt NPDES permits for wastewater agencies that implement the South Delta salinity standards as currently contained in the most recent Basin Plan.

NPDES Permit Requirements

Where there is an adopted numeric objective and the discharge will cause or have reasonable potential to cause, or contribute to an excursion above the numeric objective, the Regional Water Board is required (via federal regulation) to adopt a permit that contains an effluent limitation for that pollutant. The term effluent limitation is defined in the Federal Clean Water Act to mean:

any restriction established by a State or the Administrator on quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(33 U.S.C. § 1362(11).) Although subject to legal debate and interpretation, the Regional Water Board

has determined in this instance that the NPDES permits for Tracy and MHCS D must include numeric effluent limitations to comply with the federal regulations.

However, the Regional Water Board also recognized that neither entity could meet final effluent limitations based strictly on the South Delta salinity standards, and may never be able to meet such standards. As a result, the Regional Water Board explored a number of different options in an attempt to meet the federal regulatory requirements, protect the permittees from mandatory minimum penalties that would attach to violations of strict effluent limitations, and still require the dischargers to control and improve salinity levels in the effluent.

NPDES Permits for Tracy and MHCS D

In August of 2006, the Regional Water Board put forward and recommended tentative permits for Tracy and MHCS D that did not include final effluent limits for salinity. Instead, Regional Water Board staff recommended interim limits based on each facility's current level of performance and required both Tracy and MHCS D to implement salinity reduction measures. Although the two permittees and other wastewater entities supported this approach, the Regional Water Board received considerable testimony opposed to this approach. In particular, the Regional Water Board appeared to be swayed by testimony received from the South Delta Water Agency (SDWA). The SDWA was concerned with the additional salt loading into the South Delta and the impact on the agricultural beneficial uses. SDWA also stressed the fact that there were adopted numeric objectives for EC that the Regional Water Board was legally obligated to implement and enforce in NPDES permits.

Based on the testimony received from SDWA and others, the Regional Water Board members were hesitant to adopt either permit without first obtaining further information regarding the impacts of the two combined discharges. In addition, the Regional Water Board members expressed some concern with adopting NPDES wastewater permits that did not have final limitations, or at least enforceable provisions to ensure that measurable steps were being taken to reduce salinity in wastewater effluent. On the other hand, the Regional Water Board members also appeared to be sympathetic to the plight of the wastewater agencies and their concerns about not be-

ing able to meet final effluent limitations without the construction of reverse osmosis facilities.

Reverse osmosis is considered to be a problematic solution, at least at this time, because it is expensive to build, expensive to operate and maintain, requires the use of a considerable amount of energy and creates brine for which there are few disposal alternatives. To date, both the state Water Board and the Regional Water Board have been hesitant to adopt effluent limitations that would force wastewater dischargers to build reverse osmosis treatment in large part due to the cost as compared to the actual environmental impact caused by the wastewater agencies. For example, the State Water Board opined in its Manteca decision that:

(1) assuring compliance with the 700 umhos/cm EC limitation in the City's permit for April through August would probably require construction and operation of a reverse osmosis treatment plant for at least a portion of the City's effluent at a very large cost; and (2) because of the relatively high salinity of the receiving water and the relatively small portion of flow provided by the City's discharge, the City's use of reverse osmosis would have relatively little effect on the EC of the water in the river.

(State Water Board Order WQO 2005-0005 at p. 12.) The facts for Tracy and MHCS D are very similar to those for Manteca and although the State Water Board's Order for Manteca was not precedential, the Regional Water Board has considered the State Water Board's viewpoint on this issue.

In lieu of adopting the permits as recommended by Regional Water Board staff at the August 2006 hearing, the Regional Water Board held the permits over and directed Regional Water Board staff to work with the dischargers, the Department of Water Resources and other interested stakeholders to model the affects of the combined discharges in the southern Delta. The Regional Water Board also requested that staff develop some alternative approaches for the inclusion of permit limitations related to salinity. Between the August 2006 hearing and March 2007, which is when the Tracy and MHCS D revised tentative orders were released for public comment, the Regional Water Board staff worked with the identified parties to come up with the information as requested by the Regional Water Board.

Tracy and MHCS D Salinity Options as Circulated in March 2007

In March of 2007, the Regional Water Board released the Tracy and MHCS D permits with revisions based on the information obtained through the modeling and based on the Regional Water Board's further thought process on how to address the larger, valley-wide salinity issues. The Regional Water Board proposed its preferred language in the draft permits and also provided an attachment that contained three additional options. The draft permits contained an enforceable effluent limitation for EC that was set equal to the South Delta salinity objectives as adopted into the 1991 and 1995 Basin Plans: 700 umhos/cm (1 Apr – 31 Aug) and 1000 umhos/cm (1 Sept – 31 Mar). However, the effluent limitations did not apply as long as Tracy and MHCS D developed and implemented salinity source control programs that were approved by the Regional Water Board's Executive Officer, and as long as the agencies participated financially in the development of the Central Valley Salinity Management Plan when requested by the Regional Water Board Executive Officer. Tracy's draft limitation also required the city to implement all reasonable steps to obtain alternative, lower salinity water supply sources. This specific provision was not applicable to MHCS D.

The additional options circulated by the Regional Water Board staff as an attachment included: an option that would reference effluent limitations in a finding but would not contain an actual enforceable effluent limitation; an option for a year-round enforceable effluent limitation set equal to the irrigation season number objective of 700 umhos/cm EC with a five-year compliance schedule; and, a third option that established seasonal effluent limitations for EC set equal to the adopted numeric objectives as contained in the Basin Plan: 700 umhos/cm (1 Apr – 31 Aug) and 1000 umhos/cm (1 Sept – 31 Mar).

As expected, the wastewater entities submitted comments in opposition to the Regional Water Board's preferred option as expressed in the draft permits, which included the requirement for financial contribution. In particular, the entities were concerned with the subjective nature of the limitations as well as the open-ended nature of the requirement for financial contribution. The wastewater industry in general was concerned with the potential implication of requiring wastewater NPDES permit holders to

fund the Central Valley Regional Water Board's efforts to develop a salinity management plan. This was particularly a concern because the process to develop a Central Valley Salinity Management Plan is still in the very early stages and is anticipated to be a long-term, multi-year process that includes major updates to the Central Valley's Basin Plans. Also, the actual amount of funding necessary for this process is yet to be determined.

In addition to receiving comments in opposition from the wastewater entities, the Regional Water Board received comments in opposition to this approach from both the SDWA and the environmental organization, California Sportfishing Protection Alliance (CSPA). Opposition from these two organizations were primarily focused on the fact the permit limitation as proposed for EC did not create an enforceable provision that limited discharges to levels equal to the South Delta salinity objectives. In addition, CSPA argued that the EC limit was an illegal "pay-to-pollute" requirement that established an illegal tax.

The Regional Water Board received various comments on the other options proposed, however, the primary focus and attention was on the option as proposed in the draft permit, which required financial contributions for the development of a Central Valley Salinity Management Plan to avoid the strict application of salinity effluent limits.

Regional Water Board's May Decision

On May 4, 2007, the Regional Water Board held its long-awaited hearings on the revised NPDES permits for Tracy and MHCSD. To streamline the process, the Regional Water Board used the hearing on the Tracy permit as the primary forum for discussion on the salinity limitations. The hearing record for the Tracy permit was then included and adopted into the MHCSD record so that the same issues would not need to be revisited in the MHCSD specific hearing. It was made very clear from the Regional Water Board staff's presentation that they considered the salinity issues as to be discussed in the Tracy hearing as the Regional Water Board's opportunity to provide staff with policy direction on how the Regional Water Board would like to address salinity in NPDES permits.

During the course of the hearing, the wastewater agencies continued to oppose the application of strin-

gent effluent limitations for salinity and raised significant concerns regarding the financial contribution language. SDWA continued to raise its opposition against any approach that did not fully implement the adopted numeric objectives for the South Delta.

The Regional Water Board members spent a considerable amount of time discussing the draft permit language as recommended by staff. Several Regional Water Board members expressed concerns with the open-ended nature of the financial contribution language while others advocated that this approach was necessary to jump-start and seriously push forward the development of a long-term, valley-wide salinity management plan. The Regional Water Board recognized that the adoption of effluent limitations as expressed in these permits would be the beginning of more requirements similar to this in other types of permits. However, the Regional Water Board as a whole identified the need for all in the valley to help develop the policy because all in the valley are partly responsible for the problem.

The Regional Water Board members also spent some time discussing the potential implication of effluent limits requiring wastewater agencies to build and operate reverse osmosis facilities to treat wastewater to remove salinity. The Regional Water Board determined as a whole that reverse osmosis was still not a viable option at this time, but several members were clear to note that their decision that day did not preclude the possibility of such a requirement in the future. The primary issue of concern for the Regional Water Board, as related to reverse osmosis, was not so much the potential cost, but the need to first develop and identify viable alternatives for the disposal of the brine. A representative from Region 9 of the United States Environmental Protection Agency testified on the issue and suggested that deep well injection may be an appropriate method for brine disposal.

In the end, the Regional Water Board adopted unanimously, with the exception of one abstention, the draft permit language as proposed by staff with some minor modifications. The most significant modification made by the Regional Water Board to accommodate wastewater agency concerns was to add language to the financial contribution provision that would tie the agency's financial contribution to a level that is commensurate with the agency's salt loading. In the case of Tracy and MHCSD, the dischargers' financial participation would be set at a

level commensurate with its contribution of salinity to the South Delta. While the Regional Water Board's adoption of the financial participation was not ideal, the additional language helped to provide some parameter on the amount of money that a wastewater agency may be asked to contribute to fund this effort.

Conclusion and Implications

At this writing, it is yet to be seen if the effluent limitations as adopted will be appealed to the State Water Board by the wastewater agencies, SDWA, CSPA, or any other interested party. While the wastewater agencies are not wild about the financial contribution language, there is a risk that the State Water Board may decide that final effluent limitations without the mitigating language are required, despite the State Water Board's previous decision in the City of Manteca matter. The deadline for filing an appeal is June 5, 2007. Regardless of the legal maneuvering that may occur, it appears evident that the Regional Water Board will continue to use its quasi-judicial authority through permit adoptions to fund its quasi-

legislative policy efforts. The actual levels of funding have yet to be determined.

It should also be noted that these provisions are in effect only as long as the permits are in effect. NPDES permits are adopted for a term of five years. At the end of five years, NPDES permits are typically administratively extended until the Regional Water Board can adopt a new permit. In other words, in 2012 the effluent limit language will be up for review and may change drastically as the Central Valley Regional Water Board and the State Water Board work toward the development of a Central Valley Salinity Management Plan.

In the meantime, the Regional Water Board is expected to adopt similar permit terms in waste discharge requirements for land disposal, industrial discharge permits for food processing facilities, conditional waivers for irrigated agriculture, and other permit mechanisms available to the Regional Water Board. As a result, it can be anticipated that the regulated community tagged with this financial obligation will continue to question the validity of this approach.

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