



California Water Law Symposium 2006
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Waste Discharge Requirements: Beyond the Point Source
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1. Facts

- a. Agricultural runoff is major source of pollution statewide. Farm runoff contaminates surface and drinking water supplies for millions of Californians in the Central Valley, San Francisco Bay Area and Southern California.
- b. Recent U.C. Davis studies of Central Valley waters affected by agricultural runoff showed nearly all (97-100%) tested sites violate water quality standards. Up to 80% of those sites are also toxic. Similar studies along the Central Coast found 100% of the samples from a channel carrying agricultural runoff to local waters were toxic to aquatic life.
- c. Agricultural pesticides, pathogens, nitrates and salts have been detected in drinking water supplies serving 16.5 million people in 46 California counties.
- d. The Department of Pesticide Regulation found pesticides in 96% of Central Valley locations tested; over half of these violated standards for aquatic life and drinking water consumption.
- e. A recent USGS study found two nervous system pesticides in all rainfall samples collected around Modesto, underscoring how widespread these toxic chemicals are in the environment.
- f. According to the U.S. EPA's 2002 list of impaired water bodies, over 635 miles of rivers and streams in the Central Valley, including the Sacramento and San Joaquin Rivers and Delta, are so polluted by agricultural pesticides that they are unsafe for uses such as fishing, swimming, and/or drinking. Along the Central Coast, over half of contaminated waters are impaired because of agricultural runoff.
- g. California's vast Delta ecosystem is crashing rapidly. Recent University of California studies of bellwether species such as striped bass found that all of the fish tested all had at least two problems with gastric inflammations, parasitic infestations, infections or liver lesions. Scientists determined the fish had been exposed to poisons, parasites or disease.
- h. These findings were consistent with earlier work that found nerve damage and developmental abnormalities among newborn bass. Again, scientists attributed these problems to a chemical stew of pesticides, herbicides and cancer-causing elements in Delta waters.
- i. Clean water is in increasingly short supply in California. Drastic declines in ecosystem health and water quality require significantly greater efforts to comply with the law.

2. Legal Tools

- a. Implementation of current law – CWA Section 303(d) List; questions re: public access
- b. Administrative process – use when implementation of current law stalls (petitions); develop courses of action (stakeholder process, e.g. Central Coast)
- c. Litigation – to implement law, test interpretations
- d. Lobbying – changing the law through the legislative or budget process
- e. Funding – ensuring the law can be implemented by securing sufficient funds
- f. Media – enhances utility of all the legal tools

3. Law

- a. Federal law (CWA) exempts irrigated agriculture from permit requirements, but CWA Section 303(d) does require waters impaired by agricultural runoff to be formally identified. (*Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002 *cert. denied* 123 S.Ct. 2573 (June 16, 2003).) Identified waters must be cleaned up pursuant to state law.
- b. Unlike federal law, California law requires polluted runoff to be regulated through a form of “permits,” called “waste discharge requirements” (WDRs) or “waivers of WDRs, with conditions.” This law, the Porter-Cologne Water Quality Control Act, Water Code §§ 13000 *et seq.* 13000, commands that “the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.”
- c. Porter-Cologne requires all who discharge contaminants into state waters (including groundwater) to: (a) file a report of the discharge and, as needed, (b) implement waste discharge requirements that ensure that those discharges do not impact use of the state’s waters. The local regional water board then determines whether the discharge should be regulated through waste discharge requirements, or through a waiver of waste discharge requirements accompanied by conditions.
- d. Nothing was done to implement or even acknowledge this requirement with respect to polluted runoff until the early 1980s. At that time, most of the regional water boards (including the Central Valley) added to their Basin Plans a waiver of waste discharge requirements for agricultural runoff with essentially no conditions, based on the assumption that such pollution did not significantly affect water quality.
- e. Unlike NPDES permits, these waivers were not subject to regular review, and so they stayed in place until rescinded by a change in state law through SB 390 (1999). SB 390 rescinded, as of 1/1/03, all waivers of waste discharge requirements in all regions, thereby forcing their review for the first time in decades. It also made the waivers subject to five-year reviews.
- f. In late 2000, environmental, fishing and public health groups requested and formally petitioned the Central Valley Regional Board to rescind the two decades-old waiver for agricultural runoff, and instead regulate the pollution with waste discharge requirements (WDRs). The petition argued that the main condition of the waiver – that irrigators must prevent concentrations of pollutants toxic to fish or wildlife – was clearly and regularly being violated.
- g. In October 2003 Governor Davis, on his last day in office, signed SB 923, which (a) clearly authorized the State and Regional Boards to collect fees from dischargers of

polluted runoff operating under waivers in order to pay for the costs of the program, (b) required waivers to include basic monitoring requirements, and (c) changed the standard for approving waivers of WDRs from “not against the public interest” to “in the public interest.” The new law went into effect on January 1, 2004.

4. Results

- a. Different regions handle agricultural runoff differently:
 - i. Central Coast – Region 3
 - ii. Ventura County – Region 4
 - iii. Central Valley – Region 5
 - iv. Other regions
- b. Goals – (i) full compliance with state and federal law, and (ii) clean water.

5. Next Steps

- a. Existing waivers do not meet Water Code Section 13000 requirement that “the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.”
- b. Waiver provision in Section 13269 significantly over-utilized. The use of waivers for agricultural runoff is not “in the public interest,” given facts of clear impacts caused by the polluted runoff.
 - i. Particularly true for areas listed as “impaired” under 303(d) list.
 - ii. Waiver provision should either be used appropriately – *i.e.*, for truly low-impact, minor discharges – or should include all of the tools associated with WDRs.
 - iii. Funding, notification, and enforcement tools in WDRs are lacking in waivers. The lack of progress statewide in implementing programs, and certainly in achieving clean water, illustrates results of that gap.
- c. California’s system of mandatory controls on agricultural runoff goes beyond what is required elsewhere in the country, but is still inadequate to prevent further contamination of the state’s limited supply of clean water. The state must either limit the use of waivers to cases where they are truly “in the public interest,” or amend Porter-Cologne to provide the State and Regional Water Boards with the tools they need to ensure a ready supply of clean water for all the people of the state.