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November 10, 2011

State Water Resources Control Board  
Division of Water Quality  
OWTS Policy  
Sacramento, CA 95814  
Delivered via email to: [owts\\_commentletters@waterboards.ca.gov](mailto:owts_commentletters@waterboards.ca.gov)

**Re: Public Comment Draft OWTS Policy**

Dear Board Members and Staff:

I am writing on behalf of the North Bay Association of REALTORS®, a trade association representing nearly 3,000 members in Sonoma, Napa, Lake and Mendocino Counties. The purpose of this letter is to submit our recommendations and concerns on the Public Comment Draft of the Water Quality Control Policy for Siting, Design, Operation, and Maintenance of Onsite Wastewater Treatment Systems (hereinafter “Policy”), which was released by the Board on September 30, 2011. The North Bay Association of REALTORS® (NorBAR) serves as an advocate for existing and prospective homeowners, in addition to our real estate professionals, and it is in this vein that we make our comments.

Our counties have some of the largest concentrations of OWTS households in California. Consequently, we have a special understanding of these issues and a firm conviction for a fair and effective OWTS policy that ensures we protect public and environmental health without unduly burdening individual OWTS owners. To this end, we have been actively engaged in the process of regulatory implementation of AB 885 from the beginning. We appreciate the Board’s responsiveness to our concerns in the past and sincerely hope you will consider and incorporate our following suggestions into the Policy.

**I. Allow local government flexibility to pursue OWTS policies that meet local needs.**

First, we would like to recognize the Board and staff for your responsiveness to our core concerns regarding local control of OWTS policies. California is a large state that encompasses diverse geography and local conditions. A one-size-fits-all solution to OWTS regulation would unduly burden many property owners, while not necessarily addressing public and environmental health concerns. While the Policy has generally embraced this principle, there are several issues we have with specific provisions of the Policy.



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A. Allow Local Variance under Tier 3

Compliance with inspection and supplemental treatment components requirements of Tier 3 will be extremely costly to families with OWTS. Due to the high cost, it is imperative that properties are not needlessly subjected to the Tier 3 requirements. We would respectfully ask for three changes under Tier 3.

**Section 10** states that the Advanced Protection Management Program is the minimum required management program for all local agencies near an impaired water body. Subsections 10.2.2., 10.2.3, and 10.6 impose supplemental treatment requirements on new and existing OWTS within a certain distance of an impaired water body where there is not an adopted TMDL. Again, these requirements will be an extreme burden to families. Adoption of TMDLs can take many years, and given limited state resources, many impaired water bodies will not have one (or even a truncated assessment) completed within the five year window set forth in this section. The local soil and geographical conditions near impaired water bodies vary widely across the California. There may be locations where it is unreasonable to assume an OWTS nearly 600 feet away is contributing to water body impairment. This section should be amended to reflect the Policy's general deference to local control. Local agencies should have the ability to reduce the distance triggering advanced treatment requirements when it is appropriate based on the local conditions.

Accordingly, we respectfully request that you insert the following subsection under Section 10:

*Notwithstanding any provision of this section, a local agency may adopt shorter distances than those contained in Subsections 10.2.2, 10.2.3, and 10.6 for purposes of triggering the advanced treatment requirements contained in Subsections 10.7 and 10.8, provided the local agency determines the shorter distance will not substantially increase risk to water quality or public health, given the local conditions, including, but not limited to soil conditions, natural ground slope.*

**Subsections 10.2.2 and 10.2.3** provide that where no TMDL or assessment is completed within the time Period specified in 10.2.1, an OWTS that has any part of its dispersal system discharging within 100 linear feet of a specifically designated 303(d) listed water body for pathogens<sup>1</sup> or 600 linear feet of a 303(d) listed water body for nitrates<sup>2</sup> must comply with advanced treatment requirements. These provisions will almost surely be overbroad because, by definition, there is no evidence that OWTS are contributing to the impairment of the water body in question (since there is no TMDL or assessment). In rural areas with sparse population, the much greater likelihood is that the OWTS are *not* the source of the impairment.

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<sup>1</sup> Subsection 10.2.2

<sup>2</sup> Subsection 10.2.3



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Rural/sparsely populated areas around impaired water bodies should be exempt from advanced treatment requirements under Tier 3 to reflect this reality and to provide better congruence between the burdens of compliance and the plausible public benefits of the requirements.

**Subsections 10.7 and 10.8** contain the advanced treatment requirements for Tier 3 OWTS where there is no TMDL or assessment. However, where homeowners voluntarily obtain a report of inspection by a qualified professional, a finding that their OWTS is not contributing to water body impairment should exempt them from advanced treatment requirements. Subsection 10.3 already allows homeowners to submit such reports to Regional Water Boards to inform the TMDL process.

NorBAR respectfully requests that the Board amend Subsection 10.3 to allow local agencies to waive advanced treatment requirements where the homeowner provides a report that meets the criteria in Subsection 10.3 and concludes that their OWTS does not contribute to water body impairment.

#### B. Keep Land Use Planning Local

**Subsection 7.8** requires that the average density for any new subdivision project implemented under Tier 1 shall not exceed one single family dwelling unit, or its equivalent, per 2.5 acres for those units that rely on OWTS. Lot size minimums and other local land use planning should not be dictated through this policy. AB 885 is very clear about what the Legislature intended that, “Nothing in this chapter shall be construed to limit the land use authority of any city, county, or city and county.”<sup>3</sup> By setting a default under Tier 1, the Board would be requiring local agencies to act affirmatively to change that default. This clearly represents a limitation of local authority by disregarding local jurisdictions’ current standards. The Legislature recognized that land use decisions are better made on the local level by those with an in-depth understanding of the local geographic, environmental and demographic needs. Mandating a 2.5 acre lot size will also be regressive by effectively preventing many low to moderate housing developments and increasing housing costs generally.

NorBAR respectfully requests that Subsection 7.8 be removed from the Policy and that any land use planning requirements be removed from Section 7.0.

#### C. Default Percolation and Application Rates Should be Revised

**Section 8.0** includes percolation and application rates which are very conservative and inapplicable to the North Bay. It is inappropriate for the Tier 1 default standards (e.g. the standards that will apply in the absences of an approved Tier 2 Local Agency Management Program) to provide one-size-fits-all percolation/application rates. If a local agency does not

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<sup>3</sup> Water Code 13291.7



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institute a Management Program, these default percolation rates would ultimately require larger, more expensive systems that are environmentally unnecessary and inappropriate for many smaller parcels. Current local standards provide the appropriate percolation/application benchmarks.

The Policy should be amended to remove the default percolation and application rates in Tables 1 and 2 as well as references to statewide standards for percolation/application rates contained in Section 8.<sup>4</sup>

## **II. Do Not Single out Home Transfers for Special Requirements.**

NorBAR would like to recognize the Board and staff for creating a policy framework that does not single out home transfers for additional inspection or replacement requirements. Burdening the transfer of homes with additional requirements would be regressive and would provide little benefit to public and environmental health because only a small percentage of homes are sold in a given year. At the current rate of home sales, it would take nearly 25 years before a simple majority of homes are sold, and it would take approximately twice that long before the great majority of homes would come into compliance with a point-of-transfer mandate. This is too inefficient at addressing those few OWTS that are actually causing health concerns.

**Subsection 9.2.3** of the Policy requires Local Agency Management Programs to provide an education and/or outreach program including informational materials to inform property buyers of OWTS locations and enforcement. We think this requirement is too narrow because such a program would reach only a small percentage of all homes with OWTS each year. It is vital that all homeowners understand how this Policy and Local Agency Management Programs impact them.

Accordingly, we respectfully request that the Board continue its recognition that home transfers present a poor point to impose special requirements and replace the *buyer* education/outreach component with *homeowner* education/outreach.

## **III. Minimize Costs on OWTS Owners and Ensure Financing is Available to Cover the Costs of Compliance**

The costs of compliance with this policy will be substantial for many homeowners. The State Water Board has estimated these costs to a homeowner will range from \$1,300-\$6,800 for Tier 1 compliance to \$5,000->\$22,000 for Tier 3 compliance.<sup>5</sup> The \$5,000 figure for Tier 3 represents

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<sup>4</sup> In the alternative, the Board should allow greater flexibility in percolation rates of up to 120 minutes per inch and the application rate conversions should be increased to represent more realistic rates.

<sup>5</sup> State Water Resources Control Board, OWTS Policy Preliminary Substitute Environmental Document (September 30, 2011), at 7.

the estimated cost of conducting an assessment of whether the OWTS is contributing to the pollution of an impaired water body. This is a substantial cost to determine that there is no impact to impaired water bodies. We must note that these statewide estimates significantly understate the actual costs that families in our North Bay communities would face. The Policy should minimize the costs on homeowners, especially for inspecting systems that are not contributing to water body impairment. AB 885 provides that:

“It is the intent of the Legislature to assist private property owners with existing systems who incur costs as a result of the implementation of the regulations established under this section by encouraging the state board to make loans under Chapter 6.5 (commencing with Section 13475) to local agencies to assist private property owners whose cost of compliance with these regulations exceeds one-half of one percent of the current assessed value of the property on which the onsite sewage system is located.”<sup>6</sup>

While the Preliminary Substitute Environmental Document states that the State and the EPA have worked to set aside funds to make low interest loans, the OWTS Policy should expressly reflect the Board’s policy of making funds available for any inspection, repair, and replacement of OWTS required by the Policy. In implementing this policy it is vital that homeowners are not penalized or forced from their homes for having insufficient capital to make costly inspections and improvements.

#### **IV. Definition of a “Major repair” for a Septic Tank is Susceptible to Misunderstanding**

**Section 1.0** defines a “major repair” for a septic tank to include “any repair required to the tank for a baffle failure or tank structural integrity failure such that either wastewater is exfiltrating or groundwater is infiltrating.” Including the language about a baffle failure adds unneeded confusion. OWTS owners and local agencies may misunderstand this language to mean that a baffle failure is automatically a major repair, even where there is no wastewater exfiltration or groundwater infiltration. The purpose classifying repairs required to prevent exfiltration/infiltration as major repairs would be better achieved by simplifying the provision as follows:

Major repair means either:...(2) for a septic tank, any repair required to the tank ~~for a baffle failure or tank structural integrity failure such that either~~ to stop wastewater from exfiltrating or groundwater infiltrating *the septic tank*.

#### **V. Provide Reasonable Constraints to Future Board Decision-making**

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<sup>6</sup> Water Code § 13291.5

A policy with great impact on homeowners and health should be upfront and transparent. Therefore, the Board should constrain grants of future discretionary authority given to the State or Regional Boards.

**Subsection 4.3** provides the Regional Water Board with the duty to review and approve or deny a Local Agency Management Program submitted pursuant to Tier 2. The Regional Water Board is allowed to request additional information from the local agency and is required to provide a written explanation of the reasons for the disapproval. However, the Policy is not clear on the acceptable grounds for disapproval. The approval of a Local Agency Management Program should be ministerial, such that the Regional Water Board shall approve all plans meeting the requirements of Tier 2. If the Regional Water Board is allowed to deny Local Agency Management Programs for any reason, then the local control built into the structure of the policy is illusory. For this reason, we respectfully request that you add the following sentence at the end of Subsection 4.3:

*The Regional Water Board may only deny Local Agency Management Programs for failure to comply with the requirements set forth in Tier 2 (Section 9) of this policy.*

**Subsection 5.6** grants the State Water Board the power to, at the time of approving a [303(d)] Impaired Water Bodies List, identify water bodies that are “likely” to have OWTS “subsequently” determined to be a contributing source of pathogens or nitrates. These water bodies would then trigger the requirements of Subsection 10.2, which would include supplemental treatment for OWTS within specified distances. Subsection 5.6 provides little concrete direction to the Board and provides for wide latitude in triggering additional costs to homeowners without any requirement for empirical evidence.

We respectfully request that Subsection 5.6 be removed from the Policy.<sup>7</sup>

**Subsection 6.2.3** would allow a Regional Water Board to deny coverage to OWTS under Tier 0 if, “In the opinion of the Regional Water Board [the OWTS is] not able to adequately protect the water quality of the waters of the State...” This subsection does not provide any requirement for a reasoned basis for a Regional Board’s “opinion.” Additionally, Subsection 6.2.2 already provides the Regional Boards and local agencies the authority to deny coverage under Tier 0 to any OWTS that is causing a nuisance or pollution. We respectfully request that Subsection 6.2.3 be amended as follows:

~~In the opinion of the~~ *Determined by the Regional Water Board, based on verified data, not able to be unable to adequately protect the water quality of the waters of*

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<sup>7</sup> In the alternative, we would request that the Policy require a preliminary showing of impairment based on empirical evidence from water testing.



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the State and should therefore submit a report of waste discharge to receive Region specific waste discharge requirements or waiver of waste discharge requirements so as to be protective.

In Closing, we would like to thank the Board and staff for the opportunity to provide our comments on this important matter. If you have any questions regarding our comments please contact Ezrahc Chaaban, our Director of Governmental Affairs, at 707-324-6610 or via email at ezrahc@norbarrealtor.com.

Sincerely,

A handwritten signature in cursive script that reads 'Susan Archer'.

Susan Archer,  
President, North Bay Association of REALTORS®