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--- submitted via e-mail to commentletters@waterboards.ca.gov ---

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#28

OWTS Policy
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State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812

Comment Letter – OWTS Policy Documents

On behalf of its 31 member counties, the Regional Council of Rural Counties (RCRC) appreciates this opportunity to provide you with written comments regarding the SWRCB's draft "Water Quality Control Policy for Siting, Design, Operation, and Maintenance of Onsite Wastewater Treatment Systems (OWTS)" dated March 20, 2012.

Consistent with its mission is to enhance and protect the quality of life in its member counties by fostering local control of its natural and manmade resources, RCRC has been actively involved in the SWRCB's OWTS regulatory development process since the passage of AB 885 in 2000. As the SWRCB well knows, this has been a long and somewhat tortuous twelve-year process.

Because our member counties will be disproportionately impacted by any new State mandates regarding OWTS regulation, RCRC was at the forefront of public opposition to proposed regulations that were issued by the SWRCB in 2008. These proposed regulations were inflexible; they were unnecessarily intrusive; and, they were unreasonably costly with a projected 10-year price tag of over one billion dollars.

As noted in our previous written comments about the revised draft OWTS Policy that was released for public comment in November of last year, RCRC is pleased to see that the SWRCB has now abandoned many of the more egregious regulatory provisions that

were being considered previously. There are, however, remaining areas of concern that we believe still need to be addressed.

In our November 11, 2011 comment letter, RCRC expressed support for several key SWRCB policy objectives that were being presented at various Workshops that were held throughout the State late last year. We continue to support these objectives as summarized below:

- ▶ Continuing local control of county-specific OWTS regulatory policies
- ▶ Minimizing administrative costs to local government agencies
- ▶ Limiting new water quality monitoring costs by using available existing data
- ▶ Focusing regulatory efforts on known problem areas of the State
- ▶ Providing financial assistance to homeowners through local agencies

In our November comment letter, we also said that the proposed draft Policy needed to be modified in order to ensure that these and other related objectives would, in fact, be met once the Policy was implemented. To this end, we suggested various Policy changes that addressed several specific areas of concern. We are pleased to see that the most recent version of the Policy has been modified to address some of these concerns. However, we believe that some additional changes are still needed in order to fully achieve the objectives itemized above.

Suggested changes include the following:

1. Add a Requirement that RWQCBs Complete a Cost-Benefit Study Prior to Imposing Any New Requirements on Local Agencies Beyond Those in the Policy Itself. As the Policy is written, Regional Water Quality Control Boards (RWQCBs) will have the authority to determine whether or not counties will be allowed to continue their existing local on-site programs. With this authority, RWQCBs can impose various requirements on local agencies as conditions of approval. We are particularly concerned that RWQCBs may impose requirements for the establishment of costly new water quality monitoring efforts as a condition of local program approval. Since counties do not have available funding for this, it is possible that many otherwise acceptable Tier 2 programs could be rejected. To avoid this situation, RCRC would like to see a requirement added to the Policy stating that RWQCBs need to undertake a detailed cost-benefit analysis for the imposition of any new local agency requirements beyond those already required in the Policy itself. This analysis, similar to that which is already required in Section 13267 of the Water Code, would provide an assessment of whether or not the burden associated with any new and unanticipated county-specific requirement is commensurate with the

associated water quality benefits. This analysis would provide helpful information to the SWRCB when it is called up to help resolve conflicts between counties and RWQCBs.

2. Add Language to Avoid the Imposition of Unnecessarily Restrictive Tier 2 Siting and Design Requirements as a Condition of Local Program Approval. To be successful, we believe that the Policy must provide RWQCBs with clear legal authority to approve local programs that reasonably protect water quality, but which may not strictly conform with other existing strictures that were promulgated without due consideration of their applicability to OWTS. Since RWQCBs will have authority to determine the long-term effectiveness of the proposed Policy, RCRC believes that the SWRCB needs to do everything it can to be sure that future RWQCB actions are consistent with stated Policy objectives. Along these same lines, the Policy should also identify the various criteria that the SWRCB will use as the basis for adjudicating any disputes between local government and RWQCBs.
3. Add a Requirement that Future Basin Plan Amendments Be Consistent with Policy Objectives. The proposed Policy gives RWQCBs unrestricted authority to override all Policy provisions by adopting Basin Plan amendments that conflict with Policy objectives. To address this, the Policy should simply require that all future Basin Plan amendments be consistent with stated Policy objectives.
4. Restrict the Authority of SWRCB and RWQCBs to Arbitrarily Revoke Discharge Waivers for OWTS. Section 12.1 of the Policy says that a discharge waiver for any OWTS (or any category of OWTS) can be revoked at any time by the SWRCB or any RWQCB. There are no requirements that OWTS owners be provided advance notice that their waiver will be revoked and there are no provisions for any sort of due process providing homeowners with the right to appeal such decisions. The Policy should require reasonable cause prior to any waiver revocation and OWTS owners must be provided an opportunity to contest the justification for any such action. If applicable notification and appeal procedures are already provided elsewhere in the Water Code, they should be clearly referenced in the Policy.
5. Eliminate Excessive Requirements Being Imposed on Local Government as a Condition of Local Program Approval. The Policy includes a list of requirements that local agencies must meet in order to be eligible for "local control" authority. RCRC believes that many of these requirements are excessive and unnecessary. Compliance with all of the proposed requirements will be costly to local governments and many counties simply do not have the resources to take on new unfunded mandates. Without any financial support from the State, many small counties with limited staff resources will be forced to curtail other important public health related activities in order to conform to Policy requirements. To avoid this,

- 6 → the Tier 2 submittal process for local program approval must be streamlined and on-going reporting requirements to the RWQCBs must be reduced in both scope and content. For example, Section 9.2.6 of the Policy should be deleted since counties do not have the authority to determine septage disposal locations and the willingness of wastewater treatment plant operators to accept or reject septic tank pumpings. Similarly, it should be made clear in the Policy that the mandatory monitoring and inspection requirements in Section 9.4.6 do not apply to mound systems, to sand filter systems, or to drip systems. ← 22
- 7 → 6. Modify Criteria for Required Connection to Public Sewer Systems. To be considered for Tier 2 Local Program approval, Section 9.4.9 of the Policy says that counties must require sewer connections for all properties located within 200 feet of an existing sewer line. It is recommended that this requirement apply only to new OWTS (not replacement systems). It is further recommended that flexibility be provided to exclude properties that are located outside of existing district boundaries and, also, to allow for the installation of new OWTS if there is insufficient treatment plant capacity to handle increased sewer flows.
- 8 → 7. Eliminate Inappropriate Tier 1 Land Use Restrictions for New Subdivisions. RCRC believes that the proposed Tier 1 density limit for new subdivisions (see Section 7.8) should be deleted. We believe that this restriction inappropriately infringes on local government’s exclusive land use authority and we believe that the required CEQA analysis for all new subdivisions will provide for adequate assessment and mitigation of any groundwater quality impacts that may result from OWTS-related project approvals.
- 9 → 8. Modify Tier 1 Siting and Design Criteria to Be Less Restrictive. Tier 1 siting and design criteria, in combination, are unnecessarily restrictive and without scientific basis. At a minimum, it is recommended that that a 3-foot soil depth and 3-foot separation to groundwater be allowed for soils with a percolation rate of between 30 and 90 minutes per inch. Similarly a 5-foot separation is recommended for soil with percolation rates of between 5 and 30 minutes per inch.
- 21 → 9. Eliminate Prescriptive Standards for Tier 2 Local Programs. As proposed, the Policy includes restrictive and inflexible prescriptive standards that must be included in all Tier 2 local management programs—regardless of any mitigating factors that may be recommended by local agencies to provide adequate water quality protection. These “one-size-fits-all” standards are contrary to overall Policy objectives and inappropriately limit the ability of local government (with approval from RWQCBs) to creatively and responsibly address challenging site conditions. The proposed standards, including slope restrictions and certain setback requirements, will be particularly problematic for replacement systems and for new systems on existing

21 → lots because it may be physically impossible or unnecessarily costly for property owners to meet prescribed standards. To address these concerns, RCRC recommends that prescriptive Tier 2 standards in Section 9.4 of the Policy only apply to new OWTS located on residential lots created after the effective date of the Policy. It is also recommended that the Policy clearly indicate that mound systems can be effectively used to achieve the specified two-foot minimum separation from groundwater.

10 → 10. Eliminate Excessive Monitoring and Inspection Requirements for Tier 3 Systems Adjacent to Impaired Water Bodies. The monitoring and sampling requirements specified in Sections 10.14 and 10.15 seems excessive, particularly for properties located in areas without phone service. For example, monthly inspections are being required, but there are no exemptions for homes that may be unoccupied for part of the year. Also, quarterly sampling for total coliform is unnecessarily protective, particularly if visual observation confirms proper system functioning. It is suggested that the sampling frequency be reduced to require only annual testing.

11 → 11. Require RWQCBs to Solicit Local Government and Homeowner Input on Future 303(d) Impaired Water Body Listings. Section 5.6 requires the SWRCB to evaluate whether or not OWTS are contributing to the impairment of a water body when adding new water bodies to future 303(d) listings. This determination is significant because it will determine whether or not property owners will be subject to costly Tier 3 upgrade requirements and/or subject to exclusion from the Policy's discharge waiver. In order for this decision-making to be based on the best available information, the proposed evaluative process in Section 5.6 must be expanded to include mechanisms that will ensure participation by local government and by impacted homeowners. To accomplish this, RCRC believes that all impacted property owners (within 600 feet of the candidate water body) must be contacted prior to any decisions being made in this regard. The Policy should require meaningful engagement of local government so that the two parties can collaboratively assess the relative significance of all potential sources of nutrient and pathogen pollutant discharges into candidate 303(d) water bodies. Then, as part of the Section 5.6 evaluation process, the SWRCB should be required to consider all input provided by homeowners and local government as part of its deliberative process. Additionally, the Policy should specifically require that local government representatives and all potentially impacted homeowners be notified when relevant SWRCB hearings are scheduled and they should be allowed to comment directly to Board members.

12 → 12. Provide a Mechanism that Will Allow Qualified Homeowners to Apply for Exemptions from Future Tier 3 Requirements. As new water bodies are added to the State's 303(d) listing of impaired water bodies, many existing homeowners could be

required to add advanced treatment systems to their OWTS (for the removal of pathogens and/or nutrients). While this may be appropriate if the OWTS is contributing significantly to the cited impairment, RCRC believes that there should be a mechanism in the Policy that will allow homeowners to apply for an exemption from this requirement if they are able to demonstrate that their system is not contributing to the nearby impairment. Also, it is suggested that discharge waivers not be automatically revoked, per Section 10.4.1, if homeowners have previously installed a supplemental treatment system designed to reduce pollutant discharges.

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13. Consider the Deletion of Woods Creek from the Policy's Attachment 2 "Listing of Impaired Water Bodies Subject to Tier 3". Consistent with the request from Tuolumne County, RCRC supports the deletion of Woods Creek from the referenced Attachment 2 listing because OWTS adjacent to this water body are not considered significant contributors to the pathogen impairment of this water body.

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14. Modify Tier 4 Corrective Action Requirements to Allow Ample Time for Repair and Add Tier 4 Requirements for Reasonable RWQCB Response Times. The three-month time frame specified in Section 11.6 will not be sufficient for many OWTS repairs and should be deleted. Also, for Tier 1 systems, Section 11.5 requires RWQCB authorization for any repairs that do not strictly conform to Tier 1 prescriptive standards. The Policy needs to prescribe a relatively short timeframe for the requisite RWQCB response in order to ensure prompt corrective action. If a response from the RWQCB is not received within the designated time period, homeowners should be given automatic authorization to proceed with proposed system repairs and/or replacement.

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15. Allow for Regulatory Exemptions if Adequate State Funding is Unavailable to Eligible Homeowners. AB 885 clearly states that it was the intent of the Legislature to provide financial assistance to qualified homeowners in order to help offset the costs of regulatory compliance. We are pleased to see that the latest Policy now includes a mechanism to provide needed financial assistance to qualified homeowners. However, there is no assurance that adequate funding will be available when needed. Considering this, we believe that the Policy must include provisions that will allow counties and RWQCBs to conditionally exempt homeowners from costly regulatory compliance if financial assistance from the State is not available and if such exemptions are considered to be in the best interest of the State. Without an allowance for exemptions, it is possible that some residents could be forced to abandon their homes because of their inability to afford costly OWTS upgrades.

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RCRC recommends that the Policy changes suggested above be made prior to final Policy adoption in order to avoid costly over-regulation beyond that which is required to

meet AB 885 statutory requirements. Without suggested changes, many of our counties with increasingly limited resources will be subject to new financial burdens and a significant number of property owners throughout the State will be subject to regulatory hurdles that provide minimal or no benefit to water quality.

RCRC remains concerned about apparent inadequacies of the **Substitute Environmental Document (SED)** that was prepared to evaluate the potential environmental effects of the proposed Policy. As previously stated, RCRC believes that the SED needs to be amended to address the following:

- 16 ➔ The SED fails to evaluate the costs or water quality benefits on a statewide basis. Instead, all areas of analysis seem to narrowly focus on individual systems, providing little or no information about cumulative impacts. Based on the SED, there is no way to know what the statewide costs of compliance will be and there is no way to assess the degree to which statewide water quality benefits will result from these costs.
- 17 ➔ The SED fails to consider lost property values for existing homes and unimproved lots that are located adjacent to 303(d)-listed impaired water bodies. It similarly fails to consider reduced property values for unimproved property that is adjacent to currently unlisted water bodies that may be subject to future 303(d) listing.
- 18 ➔ The SED seems to presume that all (or virtually all) counties will implement a RWQCB-approved Tier 2 Program. Depending on RWQCB approval requirements, some counties may not be able to implement a Tier 2 Program. To address this very real possibility, the scope of the SED must be expanded to more fully address this situation. Without an approved Tier 2 Program, all new and replacement OWTS will need to comply with highly restrictive Tier 1 standards in order to qualify for a discharge waiver. The associated costs and other impacts on property owners could be quite significant. Along with these impacts, the expanded impact analysis should address the ability of RWQCB to adequately administer a Tier 1 program without local agency support.
- 19 ➔ The SED selects 15 different local agencies as a basis for evaluating statewide regulatory impacts. In Section 5.5, the SED says that these 15 agencies constitute a “representative sample” of local regulating agencies. This simply is not true and the selected agencies are not at all representative of all 31 RCRC member counties.
- 20 ➔ Section 8.1.3 “Local Agency Requirements” fails to meaningfully document the level of effort (and associated costs) that will be required of local governments to comply with the proposed Policy. To justify this omission, the SED says that

20 → such an estimate would be “speculative” because of variances between local agencies. However, no effort was made to obtain relevant information from impacted jurisdictions and many agencies have provided the SWRCB with statements that the required level of effort would be considerable. The Section also understates the level of effort that will be required to prepare Tier 2 program applications and deal with any suggested modifications from the RWQCBs. In many cases this will involve time-consuming local public hearings and changes to existing OWTS ordinances.

RCRC would like to thank you in advance for your continuing willingness to consider the concerns of rural counties. As you well know, the full impact of the proposed Policy will not be realized until several years from now when RWQCBs will be asked to consider approval of local agency programs. Because of the uncertainty surrounding this critical process, we are understandably concerned that excessive and costly requirements may well be placed on local agencies as conditions of local program approval. If this situation does indeed develop, we are hopeful that your Board will take the necessary actions to work with local agencies and help ensure that the stated Policy objectives are not unduly compromised.



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