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April 18, 2014

Ms. Betty Yee
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114
betty.yee@waterboards.ca.gov

Subject: Policy for Variances and Exceptions from Water Quality Objectives for Salinity

Dear Ms. Yee:

Valley Water Management Company, a non-profit corporation providing oil field waste treatment and disposal services to small independent oil producers in the Kern County, appreciates the notice regarding the proposed Variance and Exemption Policy and provides the following comments developed in consultation with the company's regulatory and legal advisors.

1. The Salinity Variance and Exception is unnecessarily limited to electrical conductivity (EC), total dissolved solids (TDS), chloride, sulfate, and sodium. The proposed policy needs to recognize that the universe of salinity is broader than these 5 constituents. The Merriam Webster dictionary includes within the definition of salt "any of various compounds that result from the replacement of part or all of the acid hydrogen of an acid by a metal or a group acting like a metal: an ionic crystalline compound." Thus, the policy needs to expand the list to specifically or at least potentially include other salinity components, including but not limited to boron, potassium, and manganese, to the extent that these constituents present compliance concerns for Central Valley dischargers.

2. Alternatively, the general Variance policy for non-priority pollutants needs to also include an Exception for non-priority pollutants. Dischargers under WDRs or waivers should have the same ability to get an exception for non-priority pollutants as NPDES dischargers.

3. The proposed policy appears to be largely focused on Publicly Owned Treatment Works (POTWs), even though there are many other dischargers that would need access to the temporary regulatory relief being offered. Many other discharges, including food processing and produced water discharges, have high salinity levels or high levels of other non-priority pollutants that need to utilize the proposed policy. Additional clarity is needed to emphasize that this policy is for all discharges despite the POTW focus of the Technical Report, case studies, and other analyses.

4. The proposed policy should recognize at the end of section 1.1 that the Exception Program can be implemented more quickly than variances since there is no need for U.S. EPA review and approval.

5. The conclusion in Section 1.3 that "because re-evaluation of water quality standards that underlie effluent limitations is not an action leading to compliance with the limitations, compliance schedules are not an appropriate regulatory mechanism when the water quality standards may be revised so that the more stringent permit limitations are no longer applicable" seems to be inconsistent with State Water Board holdings. In the Vacaville order, No. 2002-0015 at page 76, the State Water Board stated: "7. Where a Regional Board has evidence that a use does not exist and likely is not feasibly attainable, the Regional Board should avoid enforcing permit limits to protect the use at least until the Regional Board either amends the basin plan to dedesignate the use, or determines that the use cannot legally be dedesignated." (Emphasis added.) Providing a compliance schedule would be one method to "avoid enforcing permit limits" and is certainly allowed under state law. *See* Water Code sections 13050(j); 13242(b), and 13263(c).

6. Because the water quality objectives for salinity are mostly interpretations of a narrative objective, or are incorporated by reference Maximum Contaminant Levels (MCLs) to protect a municipal drinking water (MUN) use, the Regional Board should utilize flexibility in interpreting those objectives to lessen the need for a variance or exemption. For instance, the MCLs should be applied as annual averages as they are in the drinking water program. Where MCLs are set forth in a range of numbers as they are for TDS and EC, the Regional Board should not automatically set limits based on the lowest number in the range. State law requires *reasonable* protection, not full protection of all uses. Water Code §13000. In addition, compliance could be determined at the point of use of the water, not as an end-of-pipe effluent limitation, to allow for dilution and mixing in the receiving surface water or aquifer since none of the MCLs are set to protect aquatic life or recreational (fishable/swimmable) uses.

7. The policy should specify that not all dischargers have the ability to do pollution prevention plans. This concept may work well for POTWs, but many industrial dischargers have no ability to modify the waste streams they treat or dispose of. Similarly, there may not be many ways to create or implement a salinity reduction program for some discharges. For these reasons, there needs to be flexibility incorporated into the requirements associated with these plans and programs.

8. Section 4.2.2. must recognize the differences between state and federal law and recognize that both allow for a consideration of economics and/or attainability. Under state law, both Water Code section 13241 and 13263 *require* that certain factors, including economic considerations, be considered when adopting water quality objectives and waste discharge requirements. In addition, the Clean Water Act and federal regulations discuss the concept of "*when attainable*" – and certain objectives and effluent limits set to meet those objectives may be unattainable based on economic considerations. While EPA 304(a) criteria guidance are set without consideration of costs, water quality standards must take into account "use and value"

and economic considerations under state law when adopted. Water Code section 13241; 40 C.F.R. 131.6(e). EPA has an obligation to ensure that standards are adopted in accordance with state law (which in California includes a consideration of economics). 40 C.F.R. §131.5(a)(3). In addition, where NPDES permit limits are more stringent than required by federal law to protect uses not mandated by the CWA (e.g., fishable/swimmable uses) and protect additional uses under state law (e.g., MUN, Groundwater Recharge), then economics can be considered in setting effluent limitations. *See City of Burbank v. SWRCB,* 35 Cal. 4th 613, 618, 628 (2005).

9. Section 4.5.1. should be titled "General Variance/Exemption Authority for Non-Priority Pollutants" and expanded to include WDRs/waivers in the ability to get exemptions for these additional constituents. The legal authority in this section should also be expanded to include the following: "Water quality objectives and WDRs may contain a time schedule. (Wat. Code §§ 13242, 13263.)"

10. In the discussion on page 26 of "End-of-pipe treatment," there is another alternative to source control, source water replacement and end-of-pipe treatment and that is blending the discharge with low-salt water to dilute the salinity levels. However, while this might be available for some small discharges, this is likely not a reasonable beneficial use of potable water for large dischargers or in a drought situation.

11. On page 29 at the end of the page, it is not clear why the report concludes "[i]f the general variance authority is not adopted, then a *Salinity Variance Program* is not recommended." The two seem to be able to be adopted separately or together.

12. On page 40 and potentially elsewhere, it states that variances should be limited to "a time as short as possible." As short as possible could mean no time schedule at all. Thus, the word "possible" should be changed to "feasible," which is defined as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. 14 C.C.R. §15364.

13. A large problem with this policy is the stated requirement on page 40, page 52, and elsewhere that the variance or exemption applicant must prepare documents in compliance with the California Environmental Quality Act (CEQA). Requiring each applicant to perform a CEQA analysis for each variance/exemption would cost an enormous amount of time and money and is wholly unnecessary. On page A-16, the Regional Board has performed its environmental checklist to evaluate this program and has determined that the policy will not and could not have any significant effect on the environment. This is because the variance/exemption maintains the status quo of the discharge instead of requiring extraordinary upgrades that might be needed to meet effluent limitations based on the current interpretations of the applicable water quality objectives. For this reason, the policy should state that there are several categorical exemptions that would apply to avoid the need to perform a CEQA analysis on every variance/exemption request, namely under 14 C.C.R. section 15301, which includes permitting of existing facilities involving negligible or no expansion of use, and potentially sections 15307/15308 for the protection of the

environment/natural resources since there is no relaxation of standards allowing for degradation, only permitting flexibility on how and when those standards must be met, assuming they are not modified during the CV-SALTS process. Moreover, when a variance/exemption is granted as part of a permit modification/issuance, then that action is exempt from CEQA under Water Code section 13389. These exemptions recognized in 14 C.C.R. 15061(b)(1) and (2), along with the common sense "seen with certainty" exception in 14 C.C.R. 15061(b)(3), weigh against the need for each applicant to provide a duplicate environmental analysis under CEQA.

14. On page 41 in section C.(1), it seems to presume that a variance will only be for a single constituent, which may not be the case. An (s) should be added to constituent and water quality standard here and in other sections that seem to only reference a single pollutant or standard.

15. Any required pollution prevention plan (e.g., page 43, section G.(2)), or salinity reduction plan (e.g., page 46, section C.(5)) should be limited to addressing the constituent(s) for which the variance or exemption is granted.

16. The definition of "person" in footnote 5 on page 50 seems focused on local, state, and federal entities and should be expanded to include the definition in 40 C.F.R. §122.2, which defines "person" as "an individual, association, partnership, corporation, municipality, state or federal agency, or an agent or employee thereof."

17. No explanation is provided for the prohibition on new or renewed salinity exceptions after June 30, 2019. There may be new issues in the future that are currently unanticipated that could benefit from the continued use of this policy. Other state policies have been in existence and are still utilized decades later (Res. No. 68-16). Thus, this sunset provision should be removed.

18. The Tulare Lake Basin plan excerpts on pages 54-56 contain numeric discharge limitations for EC, chloride and boron that may not have current applicability and are one of the reasons that the variance/exception policy is needed. Presumably these will be the subject of review and possible modification through the CV-SALTS process. The Regional Board should also look to remove language, such as "whichever is more stringent" since that type of language removes flexibility and the ability to regulate on a site-specific basis.

19. Concerns exist that these variances/exceptions will not be granted even though incorporated into the Basin Plan and needed by dischargers. As seen on pages 55 and 56, there are already exceptions for industrial sources, food processing industries, and oil field wastewater in the Basin Plan, but there have not been many (if any) exceptions granted previously under this language. In fact, Valley Water asked for a public hearing under the oil field wastewater exception in 1996 and has never been granted a hearing to make the requisite demonstration. There needs to be a commitment by the Regional Board to actually grant these variances/exemptions and perhaps the approval could become a ministerial decision (like the issuance of a

building permit) if certain criteria are met. This would help with issues related to CEQA as well if this were not a discretionary determination.

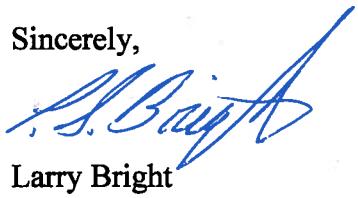
20. The current language on page 60 draws too much between differences before and after a variance/exemption. In most cases, a variance/exemption is needed because the effluent limitations are unattainable. Therefore, the language of the third full paragraph should be changed as follows: "There ~~is~~ may be a difference in water quality between allowing a variance and not allowing a variance. The difference ~~is~~ would be the incremental improvement in ambient water quality if there were no variance and the discharger was required to and could feasibly meet water quality based effluent limitations…."

21. The language at the end of the page on page 63 seems to indicate that "reverse osmosis is the most appropriate end-of-pipe treatment for POTWs," yet this should contain a caveat that this technology may be infeasible due to cost, brine production, and greenhouse gas and energy concerns. The current wording might be misunderstood to support the implementation of reverse osmosis as the "most appropriate" option.

22. Instead of requiring a salinity reduction plan or pollution prevention plan for discharges where the ability to reduce salinity is limited, the discharger should be given the option to instead participate in the creation and implementation of a local salt management plan that would address the constituent of concern, but may not reduce or prevent salt disposal so long as the current activities are demonstrated to be protective of actual local uses or not utilizing all local assimilative capacity.

In closing, Valley Water hopes the requested changes can be made to the policy prior to adoption so that the policy can be workable for all dischargers that need to utilize variances and/or exceptions from currently applicable water quality objectives or beneficial uses that may be modified as a result of the CV-SALTS and further Basin Planning processes.

Sincerely,



Larry Bright

Valley Water Management Company

cc: Chris Burger, General Counsel
Gary Carlton, Kennedy/Jenks
Melissa Thorme, Downey Brand LLP