



CVCWA

Central Valley Clean Water Association

Representing Over Fifty Wastewater Agencies

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December 28, 2015

Via Electronic Mail Only

Mr. James D. Marshall
Senior Water Resource Control Engineer
Regional Water Quality Control Board,
Central Valley Region
11020 Sun Center Drive, Suite 200
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jdmarshall@waterboards.ca.gov

RE: Comments on the Tentative Waste Discharge Requirements Order R5-2016-XXXX,
North Valley Regional Recycled Water Program

Dear Mr. Marshall:

The Central Valley Clean Water Association (CVCWA) appreciates the opportunity to comment on the tentative Waste Discharge Requirements for the North Valley Regional Recycled Water Program (Tentative Order). CVCWA is a non-profit association of public agencies located within the Central Valley region that provide wastewater collection, treatment, and water recycling services to millions of Central Valley residents and businesses. We approach these matters with the perspective of balancing environmental and economic interests consistent with state and federal law.

As a preliminary matter, CVCWA supports the North Valley Regional Recycled Water Program (NVRWP), and encourages the Central Valley Regional Water Quality Control Board's (Regional Board) to adopt this Tentative Order. Recycled water is a valuable resource and use of facilities such as the Delta Mendota Canal for conveyance is important for all of California, and the Central Valley in particular. CVCWA further encourages the Regional Board to continue to support unique and creative ways to use and convey recycled water through the Central Valley.

In this letter, we provide the following comment regarding the (Regional Board) approach to regulating nitrate plus nitrite, including the implementation of the narrative objectives in the reasonable potential analysis; and, a comment with respect to performance based salinity limits. CVCWA submits these comments to highlight important policy issues and areas of concern - not to delay the Regional Board's adoption of this very important permit for the conveyance of recycled water.

I. Reasonable Potential Analysis for Nitrate and Nitrite

The Tentative Order includes proposed average monthly water quality-based effluent limitations for nitrate plus nitrite (as N) of 10 micrograms per liter (mg/L). The Regional Board proposes the average monthly limits because "nitrate in the discharge has a reasonable potential to cause or contribute to an in-stream excursion above the" Primary Maximum Contaminant Level (MCL), which is used to implement the narrative chemical constituents objective, and because the discharge also "has reasonable potential to cause or contribute to an exceedance of the Basin Plan's narrative water quality objectives for biostimulatory substances and taste and odors." CVCWA has serious concerns regarding the implementation of these narrative objectives in the Tentative Order.

To interpret the chemical constituent objective for the protection of the municipal supply (MUN) beneficial use, the Tentative Order correctly refers to the primary MCL of 10 mg/L for nitrate plus nitrite. Based on the maximum effluent concentration observed during the prior permit term, the Tentative Order finds that nitrate in the discharge has reasonable potential to exceed the primary MCL. This analysis is consistent with federal regulations. Specifically, where the permitting agency finds there is reasonable potential to exceed a narrative objective, the permitting agency must establish effluent limits using a calculated and demonstrably protective water quality criterion; Clean Water Act section 304(a) recommended criteria; an indicator parameter; or a state policy interpreting a narrative water quality criterion supplemented with other information.¹ The *Water Quality Control Plan for the Sacramento and San Joaquin River Basins* (Basin Plan) contains such a policy: the *Policy for Application of Water Quality Objectives* (Policy). The Policy in general provides that where compliance with a narrative objective is required, the Regional Board will adopt numerical limitations, on a case-by-case basis, which will implement the narrative objective.²

¹ 40 C.F.R. § 122.44(d)(1)(vi); see also Tentative Order at p. F-13.

² Basin Plan at p. IV-17.00. The Basin Plan states in full: "To evaluate compliance with the narrative water quality objectives, the Regional Water Board considers, on a case-by-case basis, direct evidence of beneficial use impacts, all material and relevant information submitted by the discharger and other interested parties, and **relevant numerical criteria** and guidelines developed and/or published by other agencies and organizations . . . In considering such criteria, the Board evaluates whether the **specific numerical criteria**, which are available through these sources and

However, after correctly identifying a numeric criterion to interpret the chemical constituent objective for protection of MUN, i.e., the Primary MCL, the Tentative Order fails to identify any numeric criterion to implement the narrative biostimulatory substances objective and the narrative taste and odor objective. Rather, the Tentative Order includes generalized and unsubstantiated comments with regard to nutrients, and then adopts an effluent limit of 10 mg/L based on the technical capability of POTWs. This analysis conflates the numeric criterion and the narrative objectives that the Regional Board purports to be implementing. To interpret the narrative biostimulatory substances objective and the narrative taste and odor objective, the Regional Board must identify a relevant numeric criterion and other information. Further, this “other information” must be substantiated by evidence in the record.³ The Tentative Order does not include either part necessary for the interpretation of these two narrative objectives. Thus, this reasonable potential analysis and adoption of a water quality-based effluent limit for nitrate and nitrite, as it relates to the biostimulatory substances and taste and odor objectives, is inconsistent with the applicable law.

As described above, after finding reasonable potential to exceed a narrative objective, the Regional Board must establish a water quality-based effluent limitation consistent with federal regulations and the provisions of the Basin Plan. To establish such a limit, the Regional Board may use the following sources according to the federal regulation: a calculated numeric water quality criterion that has been demonstrated to be protective of the beneficial use; a state policy or regulation interpreting the narrative objective supplemented with other information, such as the United States Environmental Protection Agency’s (USEPA) Water Quality Standards Handbook, risk assessment or exposure data, information from the Food and Drug Administration, and current USEPA criteria documents; section 304(a) recommended criteria, supplemented where necessary by other relevant information; or an indicator parameter under certain conditions.⁴ Under the Policy in the Basin Plan, the Regional Board may consult: evidence of beneficial use impacts, relevant information submitted by the discharger, and relevant numeric criteria and guidelines published by various agencies.⁵ In this extensive list of available sources of information, nowhere is “technical capability” listed. A limit based on “technical

through other information supplied to the Board, are relevant and appropriate to the situation at hand and, therefore, should be used in determining compliance with the narrative objective. (*Ibid.*, emphasis added.)

³ See Code Civ. Proc., § 1094.5; *Asociacion de Gente Unide Por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1268.

⁴ 40 C.F.R. § 122.44(d)(1)(vi).

⁵ Basin Plan at p. IV-17.00.

capability” is not a water quality-based effluent limit derived in a manner consistent with applicable laws.⁶

Moreover, the Tentative Order offers generalized statements such as “increased nutrient loads can create excessive algal growth” and “increased nutrient loading contributes to the impairment of beneficial uses” to justify the effluent limitations. Based on principles of administrative law, however, these findings are clearly inadequate. The Regional Board’s order must be supported by the findings, and the finding must be supported by the evidence in the record.⁷ To be adequate, an agency’s findings must link the raw evidence with the ultimate decision.⁸ The Regional Board must discuss the evidence used to support a finding so that a court does not have to scour the administrative record to determine whether “some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency.”⁹

Accordingly, CVCWA respectfully requests that the Regional Board carefully consider its interpretation of narrative water quality objectives for establishing nitrate effluent limitations in all future permits. CVCWA understands that the Cities of Modesto and Turlock are not contesting these limitations, and thus CVCWA is not contesting them as applied in this permit as well. However, CVCWA remains concerned with the Regional Board’s approach and limited justification for providing nitrate effluent limitations as done so in this permit.

II. Performance Based Salinity Limitations

CVCWA also finds it necessary to express its concerns with the inclusion of performance-based effluent limitations of 1,250 umhos/cm for electrical conductivity that is applicable to both facilities. Specifically, CVCWA is concerned that the cities will not be able to meet the effluent limitations consistently, especially in drought years when the cities rely on groundwater almost exclusively for water supply. For example, the City of Modesto’s maximum observed annual average effluent for electrical conductivity was 1,152 umhos/cm. Use of groundwater for water supply purposes when surface water is limited and the act of recycling water, will undoubtedly raise the maximum observed annual average to above the performance-based limit. Thus, the City of Modesto is in serious jeopardy of violating a limitation that is supposed to be based on performance. Such jeopardy is not appropriate when establishing such a limit, and may further

⁶ A 10 mg/L limit for nitrate plus nitrite “based on technical capability” is not a technology-based effluent limit under federal law. (See 40 C.F.R. § 133.102.) Because this limit is neither technology-based nor water-quality based, it must be adopted consistent with Water Code section 13241.

⁷ Code Civ. Proc., § 1094.5(b).

⁸ *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

⁹ *Id.* at p. 516.

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discourage POTWs from recycling water for beneficial uses. To avoid this problem, CVCWA recommends that the Regional Board consider a drought exception with respect to the application of this performance-based limitation. A drought exception would recognize that the limit is not applicable when the cities have little surface water available for supply purposes, and when they are forced to rely almost exclusively on local groundwater supplies.

We appreciate your consideration of these comments. If you have any questions or if CVCWA can be of further assistance, please contact me at (530) 268-1338 or eofficer@cvcwa.org.

Sincerely,



Debbie Webster
Executive Officer

cc (*via email*): Pamela Creedon, Central Valley Regional Water Quality Control Board
(pamela.creedon@waterboards.ca.gov)