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May 4, 2018

Central Valley Regional Water Quality Control Board

Attn: Glenn Meeks

Submitted electronically – glenn.meeks@waterboards.ca.gov

Subject: ECM Services Comments Letter – Amendments to the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and the Tulare Lake Basin (Basin Plans) to Incorporate a Central Valley-wide Salt and Nitrate Control Program

Dear Mr. Meeks:

We are writing to comment on the proposed amendments to the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and the Tulare Lake Basin (Basin Plans) to incorporate a Central Valley-wide Salt and Nitrate Control Program (Proposed Amendment). It is our understanding that the intent of the Proposed Amendment is to create a framework for the Central Valley Regional Water Quality Control Board (Regional Board) to regulate the discharge of salts and nitrates to groundwater, for the Regional Board's entire jurisdictional area, under a new regulatory program, the *Salt and Nitrate Management Plan* (SNMP).

At issue is that the Regional Board's adoption of the proposed SNMP, as an amendment to the Basin Plans, is in violation of both CEQA and the Administrative Procedures Act (APA). California's APA establishes rulemaking procedures and standards for state agencies to follow, including the Regional Board, to ensure that the public is provided '*a meaningful opportunity to participate in the adoption of state regulations, and to ensure that regulations are clear, necessary and legally valid*'.

Article 2 of Title 2 of the Government Code defines the proposed SNMP as a new regulatory program, requiring compliance with the APA's public review process¹. Title 23 CCR Sections 649 (a) and 649.1, concerning rulemaking proceedings by the State and Regional Boards, specifically require "regulations" to be adopted pursuant to the APA.

Government Code section 11347.5 provides in part: *(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] ... standard of general application ... which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] ... standard of general application ... has been adopted as a regulation and filed with the Secretary of State pursuant to the APA*². The 1989 OAL D-4 affirmed that a proposed new regulation cannot be adopted as an amendment to a Water Quality Control Plan without first being adopted as a regulation in accordance with the APA rule making process.

¹ §11342.600: "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure

² 1989 OAL Determination No.4, Docket No. 88-006, March 29, 1989 (1989 OAL D-4)

The proposed SNMP is, by the plan's own narrative, a new regulatory program. The Proposed Amendment's Executive Summary states that the SNMP proposes "...new policies, new regulatory tools (or strategies), and recommended clarification to existing policies to facilitate the Regional Water Board's efforts to achieve the salt and nitrate management goals".

While amendments to Basin Plans are exempt from a full CEQA review, adoption of new regulations are not³. The Proposed Amendment is a new regulatory program as defined by APA, as well as the plan's own admission. Consequently, in accordance with 14 CCR 15187 the Proposed Amendment is subject to a full CEQA review, including compliance with an adequate and complete 'No Project' Alternatives Analysis in accordance with 14 CCR 15126.6.

The only CEQA document developed for the SNMP appears to be limited to the *Central Valley Salt and Nitrate Management Plan Substitute Environmental Documentation*, incorporated into the proposed Basin Plan Amendment as Attachment C: *Environmental Review and Economic Analysis Supporting Documentation*. A review of the Regional Board's publicly available program documents does not identify any other CEQA documents for this proposed new regulatory program.

It is our concern and belief that unless the Regional Board can document a fully compliant APA process for the new regulatory program being proposed, adoption of this proposed Basin Plan amendment will result in the creation of underground regulation, in strict violation of the APA. Moreover, failure to complete a fully compliant CEQA review for the proposed new regulatory program denies the regulated community, and the general public, the opportunity to adequately vet the justification for such an 'overreaching' new regulatory program in light of the extensive and commanding permitting authority already vested to the Regional Board to regulate the discharge of pollutants to Waters of the State.

Thank you for your consideration of our concerns and we look forward to the Regional Board's substantive response to our comments. If you have any questions, please contact Maureen Daggett at 916-919-4768.

Sincerely,



Maureen Daggett, TOR-QISP, QSD/P, CPESC, CPSWQ
Regulatory Specialist/Sr. Scientist

³ 14 CCR 15251: List of Certified Programs