



## REQUESTED CHANGES TO THE WINERY GENERAL ORDER

California Coastkeeper Alliance (CCKA) is supportive of the State Water Board’s efforts to establish California’s first statewide General Waste Discharge Requirements (WDR) for Winery Wastewater (General Order). We understand the challenging balance that must be struck in developing this General Order to promote statewide consistency, yet allow enough flexibility for region- and site-specific conditions. We submitted comments in August 2020 on the draft General Order, and are concerned with a number of changes made since that time given:

- (1) Proposed pond and groundwater monitoring requirements are not consistent with the overarching requirements of the General Order, which include, but are not limited to, ensuring permittees comply with applicable Basin Plan requirements, associated prohibitions, protection of beneficial uses, and ensuring waste does not cause or contribute to a water quality objective exceedance.
- (2) WDRs do not expire or reopen, and are instead only reviewed “periodically”<sup>1</sup> based on the discharger’s threat to water quality, often leaving requirements that fail to protect water quality unchanged for decades at a time.
- (3) The administrative burden placed on the public to watchdog each individual Notice of Applicability issued to General Order enrollees, given the broad discretion granted to the Regional Water Boards regarding the requirements for Tier 1-3 facilities.

### **I. Groundwater monitoring requirements must be consistently required to ensure there are adequate feedback mechanisms to confirm the protection of groundwater quality.**

The Porter-Cologne Water Quality Act requires any “person discharging waste, or proposing to discharge waste, within any region that *could affect* the waters of the state ... to file with the appropriate regional board a report of the discharge.”<sup>2</sup> The Draft Order must then contain specific, enforceable standards to measure the effectiveness of management practices to comply with Basin Plan requirements and relevant water quality objectives.

California courts have found minimal monitoring programs – that only require some individual monitoring – as inefficient to determine compliance with water quality standards. Specifically, in *Monterey Coastkeeper*,<sup>3</sup> the court held that “monitoring must be sufficient to verify the effectiveness of the management practices that are implemented.” Further in *Agua*,<sup>4</sup> the Central Valley Regional Water Board had required monitoring for supply wells a significant distance from the source of pollution – manure ponds – and was ultimately found to be “ineffective to accomplish the timely detection of a change in [water] quality.”

The State Water Board must avoid this same detrimental flaw, and require adequate monitoring and reporting of groundwater conditions from any waste discharged to a pond or land application area that could affect the quality of waters of the state. Water Code section 13263 and the Draft Order require facilities not impair beneficial uses by adhering to specific loading limits and general prohibitions. However, like the Regional Water Board in *Agua*, the State Water Board cannot ensure that this Draft Order will result in the timely detection of groundwater contamination and prevent beneficial use impairment.

Currently, the Draft Order **only requires a one-time finding** that a pond – whether lined or unlined – meets pond performance requirements for Tier 1 and 2 facilities, and only requires that a “periodic” leak test be done for a Tier 3 facility 5 years after NOA issuance, pond liner installation, previous performance test, or

<sup>1</sup> Water Code section 13263, subd. (e).

<sup>2</sup> Cal. Wat. Code, sec. 13260, subd. (a)(1).

<sup>3</sup> *Monterey Coastkeeper et al. v. State Water Resources Control Bd.* (Super Ct. Sacramento County, 2015, No. 34-2012-80001324).

<sup>4</sup> *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal. App. 4th 1255.

decommissioning of a groundwater monitoring well network. No such leak test is required for Tier 1 or 2 facilities. Further, **only Tier 4 facilities** – those required to have lined ponds – **are required to conduct groundwater monitoring, and may even be subject to a groundwater monitoring exemption.** Without groundwater monitoring data, we simply do not – and cannot – know if and to what extent Tier 1-3 discharges affect groundwater quality. Further, absence of data is *not* evidence of no impact.

Without requiring monitoring of *any* frequency for Tiers 1-3, the Draft Order fails to require adequate monitoring and reporting to ensure the protection of groundwater beneficial uses.<sup>5</sup> Given that this General Order will require the Regional Water Boards to follow and implement, we urge the State Water Board revise the Draft Order to avoid the illegal – and unprotective – pitfalls outlined in *Coastkeeper I* and *Agua*.

**Requested Action:**

- Tier 3 groundwater monitoring requirements be reinstated.
- At a minimum leak testing be performed for lined ponds operated by all Tiers at least once every 5 years.
- Groundwater monitoring be required for all unlined ponds (if existing unlined ponds are allowed by the Regional Water Board).
- Groundwater monitoring be required for all land application areas and subsurface disposal sites unless otherwise certified by an appropriately qualified professional in accordance with the California Business and Professions Code (BPC) (BPC, sections 6735, 7835, and 7835.1) that there are site-specific conditions that do not pose a threat to water quality and that all other requirements of the General Order are met.

Further, while no groundwater monitoring exemption should be granted, the conditions that give rise to a groundwater monitoring exemption must be verified by a qualified professional in accordance to Business and Professions Code sections 6735, 7835, and 7835.1.

**Requested Language *\*If the exemption is not otherwise struck (new language indicated in red):***

**D. Discharge Specifications (Tiers 2, 3, and 4)**

2) Pond Specifications

f. Pond Groundwater Monitoring

a) Facilities may qualify for a groundwater monitoring exemption provided all of the following criteria are met:

(1) The facility pond system total volume is less than 1 million gallons. The pond system total volume is the sum of the design capacities of all onsite process water ponds.

(2) The ponds are well managed and operate within the available pond capacities without process water spills (e.g., overtopping the pond, berm failures, flood inundation) and all other requirements of this General Order are met, **as certified by an appropriately qualified professional in accordance with the California Business and Professions Code (BPC) (BPC, sections 6735, 7835, and 7835.1).**

**II. Liner and capacity requirements must be upheld to protect water quality.**

The discharge of winery wastewater – regardless of the size of a discharge – has the potential to degrade surface or groundwater quality. Winery wastewater is characterized by elevated biochemical oxygen demand (BOD), total dissolved solids (TDS), nutrients, and a wide range of pH, among other constituents of concern, that can severely degrade our surface and groundwater resources. The discharge of raw winery wastewater to land further introduces an organic loading significantly higher than domestic wastewater, which generally receives at least a secondary treatment prior to discharge.

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<sup>5</sup> *Agua* was explicit that general warnings that Coalition members not discharge pollutants at levels that exceed applicable water quality objectives do not cure the absence of meaningful monitoring to ensure that dischargers are actually complying with water quality standards. *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal. App. 4th 1255, 1280 (“The Order protects the beneficial uses of groundwater by declaring that degrading groundwater is prohibited. However, as previously shown, the mechanism for ensuring the groundwater will not be degraded, the monitoring program, is insufficient for the task”).

While winery wastewater may not be loaded with human pathogens, its discharge to land has a high potential to degrade groundwater quality, and therefore the proper management of wastewater ponds is essential to meet the requirements of the General Order – this includes requiring a liner for *all* new or expanded ponds, and ensuring the performance of all existing ponds (regardless of Tier size).

Waste discharge requirements are further intended to prevent potential water pollution and unreasonable degradation, and are *not* intended to respond to the discharge of waste constituents after the fact.<sup>6</sup> Therefore, it is unacceptable that any Tier be allowed to install and operate a **new** unlined pond, or operate an existing unlined pond without certification that the existing pond operates without affecting underlying groundwater or otherwise cause or threaten to cause exceedances of groundwater limitations. Additionally, given increasing changes and patterns in precipitation – including the increase of atmospheric rain events in many parts of the state, we urge that the 100-year, 24-hour peak storm design standard be maintained as the criteria governing required pond size, unless otherwise certified that the pond will not overtop and threaten either groundwater or surface water quality based on site-specific conditions.

**Requested Language** (*new language indicated in red*):

**C. Discharge Specifications (Tier 1)**

2) Pond Specifications

b. Pond capacity and hydraulic conductivity

i. New or expanding ponds – ~~The Discharger may construct an unlined pond or a pond that is smaller than the peak storm design standard provided all other requirements of this General Order are met.~~ At least **120 days** prior to the start of pond construction, the Discharger shall submit relevant information to the regional water board describing the capacity, ~~lined or unlined status, and, if applicable, or existing~~ liner characteristics (e.g., material, thickness) of the new or expanding pond.

ii. Existing ponds – The Discharger may continue to operate an existing pond at its ~~present size and~~ present lined or unlined state (on or before this General Order adoption date) provided all other requirements of this General Order are met. Details of the existing pond capacity, liner status, and liner characteristics (e.g., pond dimensions and age; liner material, thickness, age, and condition), ~~and if the existing pond is unlined, a certification by an appropriately qualified professional in accordance with the California Business and Professions Code (BPC) (BPC, sections 6735, 7835, and 7835.1) that the existing pond operates without affecting underlying groundwater or otherwise cause or threaten to cause exceedances of groundwater limitations,~~ shall be provided in the NOI and/or technical report with all other relevant information.

(1) ~~If it is determined that a Tier 1 facility with an unlined pond poses a threat to water quality, the regional water board may require the Discharger to comply with the pond liner requirements in this section within 5 years of regional water board notification.~~

**III. Setbacks must be reinstated for ponds, land application areas, and subsurface disposal systems.**

Despite the broad discretion granted to Regional Water Boards under this General Order, the Order will compel, or at least influence, Regional Water Boards to adopt many of the discharge requirements of this Order in individual WDRs. It is therefore critical that this Order impose pond and groundwater monitoring requirements that are protective of surface and groundwater quality. The Draft Order specifically provides broad discretion for the Regional Water Boards impose site-specific setbacks, rather than imposing minimum setback requirements. Given that Regional Water Boards may approve alternate setbacks (both smaller or larger) based on site-specific conditions, the State Water Board should reinstate its proposed setbacks to ensure protective setbacks are considered by the Regional Water Board.

<sup>6</sup> See Cal. Wat. Code section 13263, subd. (e). (applies to “any person discharging waste, or proposing to discharge waste, within any region that *could affect* the waters of the state.”) (emphasis added).

The July 2020 and December 2020 General Order Draft each establish setbacks (minimum horizontal distances) to water supply wells, surface waters or surface water drainage courses, and property lines. Such setbacks are best practicable control measures that create discharge-free buffer zones to mitigate the discharge's impact on supply wells and reduce the risk of spills to surface waters or to adjoining properties. Both Drafts provide broad discretion for the Regional Water Boards to conditionally impose shorter site-specific setbacks. The latest December 2020 Draft reduces the setbacks proposed in the July draft by half, and establishes a five-foot setback to property lines for land application areas "provided the irrigation system is managed to prevent discharges offsite." The fifty percent setback reductions appear to be an arbitrary change made solely in response to discharger objections and not a change based on a comprehensive risk assessment. In the absence of a finding justifying the fifty-percent setback reductions, the State Water Board should reinstate the July 2020 Draft's setbacks.

Additionally, the five-foot setback imposed by the December 2020 Draft to property lines for land application areas only attempts to mitigate the risk of offsite discharges. Winery wastewater is highly putrescible and its discharge to land can create objectionable conditions (e.g., odors and flies). The five-foot setback is inadequate to ensure that objectionable conditions do not unreasonably interfere or disturb the rights of adjoining landholders or create a private nuisance. Given that the Regional Water Boards may approve alternative setbacks based on site-specific conditions, the State Water Board should reinstate the setbacks proposed in the July 2020 draft.

**Requested Action** (*new language indicated in red*):

**D. Discharge Specifications (Tiers 2, 3, and 4)**

1) General Specifications

- j. The Discharger shall adhere to the following setbacks (minimum horizontal distances) unless a different setback is approved by the regional water board based on site-specific conditions or except as otherwise required (e.g., California Plumbing Code, county or local agency requirements, California Well Standards, part II, section 8). **This section does not preclude the regional water board from imposing greater setback requirements based on slope and other site-specific conditions to prevent spill or discharge into a groundwater aquifer, surface waters, surface water drainage courses, or adjacent properties.**
- i. Waste shall not be discharged within ~~50~~ 100 feet of any water supply well.
- ii. Waste shall not be discharged within ~~50~~ 100 feet of surface waters or surface water drainage courses.
- iii. Waste shall not be discharged within ~~25~~ 50 feet of the property line, **unless certified by an appropriately qualified professional in accordance with the California Business and Professions Code (BPC) (BPC, sections 6735, 7835, and 7835.1) that land application areas are managed to prevent discharges. ~~except for land application areas where a 5 foot setback from the property line shall apply, provided the irrigation system is managed to prevent discharges.~~**

**IV. Increased tier requirements should be imposed based on cumulative impacts of facilities within close geographic proximity for all tiers.**

The cumulative impacts of 'exempt' facilities must be considered when determining whether a facility poses a threat to water quality that is then subject to the requirements of this General Order. As currently drafted, the Draft Order properly authorizes a large geographic concentration of Tier 1 wineries be required to apply for Tier 2 coverage. The Draft Order, however, does not explicitly extend this requirement to 'exempt' facilities or Tier 2 or Tier 3 facilities. Given there is no fact sheet stating the State Water Board's intention that a large concentration of 'exempt' facilities may qualify as a threat to water quality that may result in coverage as a Tier 1 facility, or concentration of Tier 2 or Tier 3 facilities that may give rise to higher tier requirements, we urge this language be explicit in the final Order to ensure this intent is clear and that Regional Water Boards are granted discretion to impose higher tier requirements.

**Requested Language** (*new language indicated in red*):

**Findings**

13. ... A large concentration of exempt facilities in an area, however, may pose a threat to water quality and result in groundwater degradation. Therefore, such high-density exempt facilities may each be required to apply for General Order coverage as a Tier 1 facility if directed to do so by the State Water Board or regional water board. A facility's exempt status does not diminish the State Water Board or regional water board permitting or enforcement authority related to waste discharge.

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15. (new) A large concentration of Tier 2 and 3 facilities in an area, however, may pose a threat to water quality and result in groundwater degradation. Therefore, such high-density facilities may each be required to apply for General Order coverage as a Tier 3 or 4 facility if directed to do so by the State Water Board or regional water board.