



June 26, 2018

Sent Via Email [commentletters@waterboards.ca.gov]

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: **An Amendment to the Policy for Water Quality Control for Recycled Water**

Dear Ms. Townsend:

These organizations write regarding the proposed Amendment to the Recycled Water Policy (the "proposed Amendment").

We strongly support the goal of increasing the use of recycled water. However, the Recycled Water Policy must place the protection of water quality on equal footing with this worthy goal. Several revisions are required to ensure that water quality is protected and to require a fair process that includes disadvantaged communities, communities of color and low-income communities as stakeholders.

A. The Goals Stated In Section 3.1.

We support the revised goals stated in Section 3.1 of the Amendment. We are particularly in favor of increasing the use of recycled water to the extent it is feasible to do so while protecting groundwater quality. The numeric goals for increased use are ambitious and appear appropriate.

In addition to the two goals already stated in 3.1, we recommend adding a third:

3.1.3. To regulate the use of recycled water and other sources of salt and nutrients to achieve and ensure compliance with water quality objectives.

The Recycled Water Policy and proposed Amendment already contain provisions related to the protection of water quality and development of salt and nutrient management plans (SNMPs). This additional goal thus does not change the substance of the Recycled Water Policy. Instead, it elevates water quality to the same level of importance as encouragement for the production and use of recycled water.

B. The Amendments Must Expressly Include Environmental Justice Communities And Organizations As Stakeholders In Meaningful Public Process.

While we support the adoption of plans that allow for streamlined permitting of recycled water projects, the implementation of specific projects could have unintended consequences on local communities. Specifically, while a project may comply with the overall requirements of a regional salt and nutrient management plans, its implementation could have localized impacts that disproportionately impact local communities. We recommend that this policy include protections for local communities including: identification of local impacts on water quality or supply; mitigation of impacts; and public meeting requirements to inform community members of the project, and get feedback on community concerns and how and if those concerns can be addressed in project implementation.

C. SNMP Guidance.

We support the amendments to the extent that they provide additional guidance to the regional water boards and stakeholders regarding the process for proposing, accepting and evaluating implementation of an SNMP. We suggest some amendments to provide further clarification and a stronger review process:

- Section 6.2.2.3.: Further define the extent to which basin plan amendments should be “based on” the accepted SNMP. We ask that the provision be modified to clarify that the regional water board retains discretion to adopt basin plan amendments **“based on the accepted salt and nutrient management plan, comments on the salt and nutrient management plan, and other materials, as appropriate.”**
- Section 6.2.3.: This provision sets forth an alternate timeline for review of a proposed SNMP if “compliance with CEQA is required.” The provision should be revised to require that the regional water board inform the public within an appropriate amount of time of its determination regarding whether compliance with CEQA is required.
- Section 6.2.6.: A regional water board should not wait ten years before evaluating the data generated by and implementation of an SNMP. This section should be revised to state that ***all*** SNMPs, regardless of when they were adopted, must be evaluated every five years, despite any alternate timelines established in basin plan amendments.

Further, we appreciate that the proposed Amendment encourages coordination between Salt and Nutrient Management Plan stakeholders and SGMA groundwater sustainability agencies (GSAs). GSAs are already working to develop groundwater sustainability plans (GSPs) to address

undesirable results, including groundwater quality. Close coordination allows stakeholders to share expertise and resources while avoiding duplication of effort. We note, however, that in areas where salts and nutrients are an especially complicated and pervasive issues a separate SNMP focused on salt and nutrients is likely required, and a GSP is unlikely to serve as an adequate alternative on its own.

Critically, the language around the SNMPs does not emphasize the necessity of ensuring groundwater meets drinking water standards. While many basins within the state are not contaminated, there are many other communities reliant upon a contaminated source of water. This is especially true in agricultural regions where fertilizer and animal manure seep into the ground, contaminating drinking water supplies. There must be stronger requirements for basins which are not currently meeting drinking water standards to develop a plan with clear performance goals in order to meet drinking water standards as soon as possible. Otherwise restoration can turn into a drawn out process where dischargers and the regulatory agencies continue to delay at the expense of communities forced to either buy bottled water or pay high, and sometimes unaffordable, water rates to ensure their family's health and safety.

Monitoring is one tool that can help prevent drinking water standard exceedances and aid restoration projects. Section 6.2.4.1.1 states that monitoring "must focus on water supply wells and areas proximate to large water recycling projects..." While we agree with this, monitoring well locations must also be proximate to drinking water supply wells. An increase in nitrate in a drinking water supply can cause a significant public health risk immediately. Monitoring wells need to also be located near potential sources of salt and nutrient discharge such as farms, animal facilities, wastewater treatment plants, and food processing plants. Monitoring near these facilities will help catch where there are fluctuations in discharges that may endanger beneficial uses. We do support staff's encouragement of the use of existing groundwater monitoring wells utilized in other regulatory programs to prevent the duplication of similar efforts. We propose the following addition to the proposed Amendment:

6.2.4.1.4. The monitoring plan shall be designed to identify potential threats to drinking water sources.

Additionally, as mentioned in Section B, environmental justice communities and organizations must be included within the process to develop salt and nutrient management plans. Nitrate is an acute contaminant which can cause significant health problems very quickly, in particular for more vulnerable populations such as infants and pregnant women. Farmworker communities are especially impacted by nitrate contamination, and yet they are not invited to participate or contribute to the process which allegedly aims to address nitrate loading. Dischargers and state or local agencies may develop solutions which are not actually feasible or beneficial to communities. We propose the addition of the following language to the proposed Amendment:

6.2.1.6 The development, analysis, adoption and implementation of a salt and nutrient management plan shall include the identification of communities that could be negatively impacted by plan implementation, and shall incorporate the input and expertise of

potentially impacted and low-income communities in developing plans and mitigating potential impacts.

6.2.4.6. A plan for identifying, avoiding and mitigating potential or actual negative impacts of plan implementation on communities.

D. The Proposed Amendments Do Not Comply With The State Antidegradation Policy.

The State Antidegradation Policy is set forth in Resolution 68-16, which states in part that high quality waters shall “be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.” Resolution 68-16 further states that “[a]ny activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with the maximum benefit to the people of the State will be maintained.”

As set forth in SWRCB guidance and case law, the finding that a change in water quality will be “consistent with the maximum benefit to the people of the State” must be “affirmatively demonstrated” and made on a “case-by-case basis...based on considerations of reasonableness under the circumstances at the site.” (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1279; State Bd., Guidance Mem. (Feb. 16, 1995) p. 2.) In making this “case-by-case” finding, the Board must consider the following factors “(1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods.” (*Id.*)

Contrary to these requirements, the proposed Amendments do not require that all recycled water projects that degrade high quality waters be subject to a “case-by-case” analysis “based on considerations of reasonableness under the circumstances at the site.” Instead, the Amendments allow the proponent of a recycled water project to demonstrate compliance with Antidegradation by demonstrating consistency with an accepted SNMP and related basin plan amendments. (See Amendments §§ 7.3.2.2.5 [“Non-potable recycled water project proponents can satisfy the requirements of the Antidegradation Policy by submitting an analysis demonstrating that the project is consistent with the criteria specified in 7.3.2.1 to the regional water board with a report of waste discharge, which includes compliance with any applicable salt and nutrient management plan accepted by the regional water board pursuant to 6.2.3.2 or any applicable basin plan amendment adopted by the regional water board pursuant to 6.2.3.3.”], 8.2.2 [“For groundwater recharge projects within a basin for which the regional water board has adopted a basin plan amendment based on an accepted salt and nutrient management plan pursuant to 6.2.3.3,

compliance with the Antidegradation Policy may consist of conducting an analysis demonstrating that the project is consistent with the adopted basin plan amendment.”].)

As these provisions improperly substitute a program-level Antidegradation analysis for the required site-specific case-by-case analysis, the proposed Amendments do not comply with or implement the State Antidegradation Policy.

We understand the inclination to streamline permitting and review of recycled water projects, and agree that permitting may be streamlined. We also agree that an Antidegradation analysis for a recycled water project may be based, in part, on the technical findings of the accepted SNMP and related adopted and approved basin plan amendments. We do not, however, agree that consistency with an SNMP can stand in for a site-specific Antidegradation analysis; nor do we believe that proper application of Antidegradation requirements will unnecessarily impede recycled water projects.

Beyond our interest in avoiding precedent that erodes the requirements of the Antidegradation Policy, our objections here are practical and tangible. First, we note that an SNMP is only required to conduct an Antidegradation analysis of existing projects and “reasonably foreseeable future projects.” (Amendments § 6.2.4.5.) As such, if consistency with an SNMP is sufficient to demonstrate compliance with the Antidegradation Policy, projects that were not reasonably foreseeable at the time that the SNMP was proposed will not be subject to any Antidegradation analysis.

Second, an SNMP and related basin plan amendments may expressly defer project-specific Antidegradation analysis. For example, the Staff Report in support of the Amendments to the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and the Tulare Lake Basin to Incorporate a Central Valley-Wide Salt and Nitrate Control Program expressly defers any site-specific analysis:

“The antidegradation analysis is for the programmatic level commensurate with the development of the SED for the Preferred Alternative. There is no ability at the current time to evaluate any particular project that may occur as a result of implementing the elements of the proposed strategies, policies, and guidance. However, antidegradation analysis will be performed as specific projects and discharge conditions warrant.”

(Staff Report § 5.5, p. 343.) As such, a project’s consistency with the Central Valley SNMP cannot demonstrate compliance with the Antidegradation policy, given that the SNMP and related basin plan amendments did not conduct any project-level Antidegradation analysis.

Third, assuming for sake of argument that the Central Valley SNMP and basin plan amendments themselves comply with the Antidegradation Policy,¹ consistency with the SNMP may not in all cases demonstrate compliance with the Antidegradation Policy. The Central Valley basin plan

¹ These organizations contend that the Central Valley basin plan amendments do not comply with the Antidegradation Policy, and we will ask that the SWRCB decline to approve the amendments pursuant to Water Code § 13245 on that and other grounds.

amendments (which at the time of this letter have been adopted by the Regional Board but which have not been approved by the SWRCB) allow for the calculation of assimilative capacity of nitrate in groundwater to be horizontally averaged across large areas, up to and including a subbasin. As acknowledged by the basin plan amendments and related staff report, such averaging will cause exceedances of the nitrate MCL in localized areas. Thus, it is possible for a recycled water project to exacerbate or create exceedances in a localized area and comply with the SNMP. Depending on the location of the exceedance, and the proximity of public or private drinking water wells, such a project may be consistent with the SNMP but inconsistent with the Antidegradation Policy.

For these reasons, the Antidegradation provisions in the proposed Amendments to the Recycled Water Policy must be revised. Specifically, Section 7.3.2.2.5 should be revised to state:

Antidegradation analysis. ~~Non-potable recycled water project proponents can satisfy the requirements of the Antidegradation Policy by submitting an analysis demonstrating that the project is consistent with the criteria specified in 7.3.2.1 to the regional water board with a report of waste discharge, which includes compliance with any applicable salt and nutrient management plan accepted by the regional water board pursuant to 6.2.3.2 or any applicable basin plan amendment adopted by the regional water board pursuant to 6.2.3.3.~~ **For non-potable recycled water projects within a basin with (i) a salt and nutrient management plan accepted by the regional board pursuant to 6.2.3.2, or (ii) a basin plan amendment that has been adopted by the regional water board and approved by the state board which is based on an accepted salt and nutrient management plan pursuant to 6.2.3.3., the antidegradation analysis may be based, in part, on the technical findings of the salt and nutrient management plan or basin plan amendments, as applicable.**

Similarly, Section 8.2.2. should be revised to state:

For groundwater recharge projects within a basin for which the regional water board has adopted, **and the state water board has approved,** a basin plan amendment based on an accepted salt and nutrient management plan pursuant to 6.2.3.3, ~~compliance with the Antidegradation Policy may consist of conducting an analysis demonstrating that the project is consistent with the adopted basin plan amendment~~ **the antidegradation analysis may be based, in part, on the technical findings of the adopted and approved basin plan amendments and associated staff report.**

These amendments maintain the Antidegradation Policy as presently interpreted by the courts and SWRCB guidance. Further, by expressly authorizing insofar as appropriate the technical work completed by SNMP stakeholders and the regional water boards, proponents of recycled

water projects and the regional water boards will save time and resources completing the required site-specific analysis. We strongly believe that this strikes the proper balance between the desire to streamline and encourage the increased use of recycled water and the need to prevent degradation of high quality waters consistent with the maximum benefit to the people of the State.

E. All References To Adopted Basin Plan Amendments Must Be Revised To Refer To Adopted And Approved Basin Plan Amendments.

The proposed Amendment refers in several locations to basin plan amendments adopted by the regional water board. (See, e.g., Amendment § 8.2.2.) Such basin plan amendments “shall not become effective unless and until it is approved by the state board.” (Water Code § 13245.) As such, all references to basin plan amendments adopted by the regional water board must be revised to refer to basin plan amendments which are adopted by the regional water board **and** approved by the SWRCB.

F. Reporting Should Be Available To The Public.

We agree that the SWRCB should evaluate progress toward meeting the goals of the Recycled Water Policy, and appreciate the reporting requirements set forth in Section 3.2. However, these provisions should be revised to ensure transparency by requiring that reporting results are made available to the public in an online database.

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We appreciate the opportunity to comment on the proposed Amendments, and look forward to productive conversations with the Board and staff regarding these issues.

Sincerely,



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