



February 22, 2016

**(4/19/16) Board Meeting  
General Order for Recycled Water Use  
Deadline: 2/22/16 by 12:00 noon**

Chair Felicia Marcus and Board Members  
c/o Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Sent via electronic mail to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



**RE: Comment Letter – General Order for Recycled Water Use**

Dear Chair Marcus and Board Members:

California Coastkeeper Alliance (CCKA) is a network of twelve Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems. We appreciate the opportunity to provide comments to the State Water Resources Control Board (State Water Board) on the Draft Water Reclamation Requirements for Recycled Water Use (Draft Order). CCKA supports the goal of expanding recycled water to offset other potable supplies in California. We were active members of the drafting group for the Recycled Water Policy, and have long advocated for responsible water recycling projects throughout California to allow water to remain in our waterways and improve ecosystem health.

The State Water Board’s efforts to advance responsible water recycling is laudable, but a General Order is the wrong approach to advance water recycling projects that are protective of human health, ecosystems and beneficial uses. Given the diverse array of climatic, geological and hydrological conditions found throughout California, water recycling regulations should be tailored to local conditions. California landscapes are not uniform; site specific conditions such as soils, slope, precipitation, and water table elevation all influence the volume of recycled water that should be applied. Regional variations of beneficial uses, local groundwater quality, and soil type demand regional conditions take precedent over statewide criteria.

The Russian River watershed illustrates our concerns regarding a statewide Water Recycling General Order. Over the past seven years, the Russian River Valley continues to see a large increase in proposals to transport recycled water to vineyards. This has led to increased concerns related to protecting endangered salmon and preserving high quality groundwater that provide well water to 25 percent of residents in the watershed. The soils in the major alluvial Valley—where most grapes are produced—are highly porous and lie over shallow groundwater tables that allow rapid movement of water both vertically and laterally. Any over-irrigation beyond plant requirements could discharge into streams and affect listed endangered Salmon and Steelhead; or could percolate downward to increase the concentration of pollutants in the groundwater table.

The Draft Order ignores these types of site specific concerns by taking a statewide approach to regulating recycled water and ignoring existing protections carefully developed in individual permits. As described below, we recommend the State Water Board make the following revisions to the Draft Order:

- Develop a methodology to assess how the Order fulfills the Human Right to Water;
- Require the Regional Water Board to conduct a reasonable use analysis for permittees applying for coverage under the Order;
- Include a public petition process to challenge the Executive Officer’s Notice of Intent (NOI) determination; and
- Perform a proper antidegradation analysis to ensure the Draft Order does not result in degradation.

**A. THE STATE WATER BOARD SHOULD ENSURE RECYCLED WATER IS PUT TO A REASONABLE USE.**

As recycled water projects become more prevalent, we urge the State Water Board to closely examine the uses of any new sources of recycled water. Requiring a reasonable use analysis before permittees are allowed to opt into the Draft Order will ensure new supplies fulfill the explicit goals of reducing imported supplies, increasing the state’s water resiliency, and furthering the Human Right to Water.

*1. Develop a methodology to evaluate how recycled water offsets potable demand.*

The State Water Board must comply with the Human Right to Water. The California Water Code declares that “the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”<sup>1</sup> The statute goes on to state that “[a]ll relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.”<sup>2</sup> Therefore, the State Water Board is required to consider the Human Right to Water when adopting the Draft Order.

The State Water Board claims to fulfill the Human Right to Water requirements “by reducing the amount of potable water used for non-potable uses where recycled water is available.”<sup>3</sup> The Draft Order, however, fails to provide any reasonable assurances that recycled water developed under the Draft Order will actually offset existing potable water use. Without a methodology to quantify how and where recycled water is offsetting potable water use, it is impossible to verify that the Draft Order is furthering the human right to water.

To ensure that the Draft Order is meeting the requirements of the California Water Code and the Human Right to Water, we request the State Water Board develop a methodology for evaluating how the consumption of recycled water offsets existing potable use.

*2. Require a reasonable use analysis for the consumption of new water generated by recycled water.*

The State Water Board is obligated to conduct a reasonable use analysis for new sources of water – including recycled water. By making water recycling available for consumption, the Draft Order provides a new source of water for California. California's Constitution, Article X, Section 2, requires that all uses of the state's water be both reasonable and beneficial. It places a significant limitation on water rights by prohibiting the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. Like all water in the state, recycled water is subject to the California Water Code, which states among other provisions, that “[a]ll water within the State is the property of the people of the State.”<sup>4</sup> The Water Boards have a non-discretionary affirmative duty and the legal authority to ensure the reasonable beneficial use of, and to prevent waste of, all of California’s water resources, and, when feasible, to protect in-stream flow dependent public trust resources. Recognizing that recycled water is subject to the same laws and provisions of any other type of water in the state, the Draft Order must require its reasonable use.

By not explicitly requiring a reasonable use of recycled water, the Draft Order fails to adhere to the California Water Code, as well as Article X, Section 2 of the California Constitution. Furthermore, as stated in the California Water Code “The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable

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<sup>1</sup> Cal. Water Code § 106.3(a).

<sup>2</sup> Cal. Water Code § 106.3(b).

<sup>3</sup> Draft Order, 6.

<sup>4</sup> Cal. Water Code § 102.

method of diversion of water in this state.”<sup>5</sup> The Draft Order fails to comply with these specific provisions by not Regional Water Boards to analyze or determine whether recycled water will be used reasonably.

In recognition that recycled water is beholden to the same laws and regulations similar to any other source of water in California, we urge the State Water Board to require Regional Water Boards to conduct a reasonable use analysis for any new permittees seeking coverage under the Draft General Order.

**B. THE STATE WATER BOARD SHOULD PROVIDE A PUBLIC OPPORTUNITY TO RAISE SITE-SPECIFIC CONCERNS REGARDING APPLICANTS SEEKING COVERAGE UNDER THE DRAFT ORDER.**

The Draft Order allows the Executive Officer – without public review and comment - to determine whether coverage under the Draft Order is appropriate. The Draft Order runs contrary to case law that finds eliminating meaningful agency review and public oversight violates fundamental provisions of the Clean Water Act, and has been expressly invalidated by the Ninth Circuit. In *Environmental Defense Center, Inc. v. U.S. E.P.A.*, the Court held:

Management programs that are designed by regulated parties must, *in every instance*, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.<sup>6</sup>

The Ninth Circuit further reasoned that “Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy.”<sup>7</sup> The public must be given the opportunity to participate in the permitting and compliance process.

The Draft Order circumvents the public review and comment requirements of the Clean Water Act by allowing a Regional Water Boards’ Executive Officer to independently determine whether special circumstances warrant denying an NOI. This authority violates the Clean Water Act and is contrary to the Ninth Circuit’s ruling in *Environmental Defense Center*.

We request the Draft Order require the Executive Officer to make NOIs available to the public, and provide a 30-day comment period to raise any possible concerns. If concerns are raised, and the Executive Officer is unable to resolve them, the NOI will go before the Regional Board for approval.

**C. THE STATE WATER BOARD SHOULD CONDUCT A PROPER ANTIDegradation ANALYSIS TO ENSURE THE DRAFT ORDER DOES NOT RESULT IN DEGRADATION OF HIGH QUALITY WATERS.**

*1. The State Water Board’s antidegradation analysis conflicts with the Recycled Water Policy.*

The Antidegradation Policy applies to the disposal of waste to high-quality surface water and groundwater. The Policy requires that the quality of existing high-quality water be maintained unless the state finds 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 policies as of the date on which such policies became effective. The Policy also requires best practicable treatment or control of discharges to high-quality waters to assure that pollution or nuisance will not occur, and that the highest water quality consistent with maximum benefit to the people of the state will be maintained.

The State Water Board’s Recycled Water Policy explains when the Antidegradation Policy will be applied in

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<sup>5</sup> Cal. Water Code § 275.

<sup>6</sup> 344 F.3d 832, 854-56 (9th Cir. 2003).

<sup>7</sup> *Id.*

instances where a streamlined irrigation with recycled water permit is being developed. First, if a project “meets the criteria for a streamlined irrigation permit and is within a basin where a salt/nutrient management plan satisfying the provisions of paragraph 6(b) is in place may be approved without further antidegradation analysis”.<sup>8</sup> Second, if a project is within a basin where a salt and nutrient management plan is being prepared for approval, then the project proponent must demonstrate “through a salt/nutrient mass balance or similar analysis that the project uses less than 10 percent of the available assimilative capacity as estimated by the project proponent in a basin/sub-basin (or multiple projects using less than 20 percent of the available assimilative capacity as estimated by the project proponent in a basin/sub-basin).”<sup>9</sup> And finally, if a project is not within a basin with a salt and nutrient management plan, then the State Water Board finds that “the use of water for irrigation may, regardless of its source, collectively affect groundwater quality over time.”<sup>10</sup> The Draft Order’s antidegradation analysis ignores the Antidegradation Policy and conflicts with the Recycled Water Policy.

To be consistent with the Recycled Water Policy’s antidegradation provisions, we suggest the following language from the Policy be included in the Order:

*In the event that a project is being proposed in a basin where a salt/nutrient management plan is being prepared, the administrator must show through a salt/nutrient mass balance or similar analysis that the project uses less than 10 percent of the available assimilative capacity as estimated by the project proponent in a basin/sub-basin (or multiple projects using less than 20 percent of the available assimilative capacity as estimated by the project proponent in a basin/sub-basin).*

2. *The State Water Board’s antidegradation analysis of whether recycled water will degrade high quality waters is insufficient and conflicts with recent case law.*

The Draft Order is inconsistent with California courts interpretation of the Antidegradation Policy. In a recent decision, *Association De Gente Unida Por El Agua v. Central Valley Regional Water Board (Agua)*<sup>11</sup>, the court held that Antidegradation Policy “applies whenever there is: (a) existing high quality water, and (b) an activity which produces or may produce waste or an increased volume or concentration of waste that will discharge into such high quality water.”<sup>12</sup>

Similar to the analysis the State Water Board performed here in the Draft Order, the court in *Agua* was not convinced by the Board’s contention that no analysis under Antidegradation Policy was necessary because the order prohibits further degradation of groundwater.<sup>13</sup> First, the court found that an actual showing of degradation is not required; instead the policy applies when there “is a determination that the receiving water is high quality water and that an activity will discharge waste into the receiving water.” The policy presumes from these two facts that the quality of the receiving water will be degraded by the discharge of waste.<sup>14</sup>

The court also found the monitoring system upon which the order relies to support its contention that no further degradation will occur was insufficient for the task.<sup>15</sup> Similar to the Draft Order, *Agua*’s monitoring program was determined by the court to be incapable of “alert[ing] the Regional Board if a dairy is degrading the groundwater.”<sup>16</sup> For instance, the monitoring program was limited to existing supply wells, which were not located in the proper areas to detect degradation and would not show pollution until several years after its

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<sup>8</sup> Recycled Water Policy, 14.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Asociacion De Gente Unida Por El Agua v Central Valley Regional Water Board* (2012) 210 Cal.App.4th 1255, 1258.

<sup>12</sup> *Id* at 1268.

<sup>13</sup> *Id* at 1280.

<sup>14</sup> *Id* at 1272.

<sup>15</sup> *Id* at 1273, 1274-1275, 1280.

<sup>16</sup> *Id* at 1274.

release.<sup>17</sup> The order also did not contain a timetable for monitor well installation, an enforcement mechanism for violations, nor did it test for all constituents of concern.<sup>18</sup>

Overall, “monitoring conducted from supply wells alone does not provide either an accurate or a timely indication of groundwater degradation.”<sup>19</sup> Therefore, the court found that the Antidegradation Policy applied to the Regional Board's Order because of evidence in the record that at least some of the groundwater affected is high quality groundwater and the Order allows the discharge of waste to groundwater.<sup>20</sup> Similarly, evidence in the record exists that groundwater will be affected by this Draft Order. Like *Agua*, there is no monitoring in place to accurately quantify the amount of groundwater degradation.

We suggest the Draft Order contain adequate monitoring to determine compliance with the Antidegradation Policy and water quality objectives.

3. *The State Water Board needs to provide a proper antidegradation analysis.*

The Order states that to “To the extent use of recycled water may result in a discharge to a groundwater basin that contains high quality water, this General Order authorizes limited degradation consistent with the Antidegradation Policy as described in the findings below.”<sup>21</sup> This type of circular statement is precisely what *Agua* determined to be not sufficient as a proper antidegradation analysis.

The State Water Board must adhere to the proper analysis to determine whether the antidegradation analysis within Resolution 68-16 applies to NOIs seeking coverage under the Draft Order. The analysis should be:

1. Establish the baseline water quality, which is the best level of water quality that has existed since 1968.
2. Compare the baseline water quality to the water quality objectives.
3. If the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved.
4. If the baseline water quality is better than the water quality objectives, the policy applies and the baseline water quality must be maintained.
5. Existing high quality waters are waters with existing background quality unaffected by the discharge of waste and of better quality than that necessary to protect beneficial use
6. Where the waters contain levels of water quality constituents or characteristics that are better than the established water quality objectives, such waters are considered high quality waters.

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Reuse of our limited water resources will be essential to replace existing potable supplies, so that water can remain instream to improve ecosystem health. As we have articulated, the goal of encouraging wastewater reuse and recycling can and should be pursued without diminishing the commitment to protect and enhance water quality fully in the process. We look forward to working with you to ensure clean, abundant water for California.

Sincerely,



Sean Bothwell  
Policy Director  
California Coastkeeper Alliance

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<sup>17</sup> *Id* at 1274-1275.

<sup>18</sup> *Id* at 1275.

<sup>19</sup> *Id* at 1275.

<sup>20</sup> *Id* at 1286.

<sup>21</sup> Draft Order, 8.