



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

AUG 13 2018



Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100, Sacramento, California 95812-2000

RE: Comment Letter — Salt and Nitrate Control Program Basin Plan Amendment

Dear Ms. Townsend,

Thank you for the opportunity to comment on the State Water Resources Control Board's ("State Board's") proposed approval of a salt and nitrate control plan for the Central Valley.<sup>1</sup> The U.S. Environmental Protection Agency ("EPA") recognizes the urgency of reducing salt and nitrate pollution in the Central Valley. We understand that the amendment was developed under the Central Valley Salinity Alternatives for Long-Term Sustainability initiative (CV-SALTS). The EPA has worked cooperatively with the Central Valley Regional Water Quality Control Board ("Regional Board") throughout 2018: attended the public workshop in January; submitted comments<sup>2</sup> and attended the hearing in May; held a conference call in March; met in-person with the Regional Board staff in April; and sought clarifications from the Regional Board staff in multiple emails and phone conversations through July and August. We appreciate the interchange with the Regional Board and would like to acknowledge the efforts of their staff working tirelessly on a complex and important amendment.

The EPA is offering three suggestions regarding the amendment, described below in greater detail: first, clarify the status of the 700/900 EC values; second, specify the process for "in lieu" compliance; and third, ensure that the multi-discharger variance is up to date. We look forward to working with the Regional Board and the State Board to get clarity on these, and any other, provisions:

**(1) Clarify the Status of the 700/900 EC Values**

The Phase I Conservative Salinity Permitting Approach establishes values for Agricultural Supply (AGR) use protection of 700  $\mu\text{S}/\text{cm}$  (as a monthly average) electrical conductivity (EC) and for

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<sup>1</sup> These comments address the State Board's proposed approval of 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 Plan. These comments are in reference to the final Basin Plan Amendments ("The Amendment") adopted by the Regional Board on May 31, 2018.

[https://www.waterboards.ca.gov/centralvalley/board\\_decisions/adopted\\_orders/resolutions/r5-2018-0034\\_res.pdf](https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2018-0034_res.pdf)

<sup>2</sup> The comments herein were timely raised in the response to comments and other written communications. Letter from Ms. Janet Hashimoto, United States Environmental Protection Agency to Glenn Meeks  
Central Valley Regional Water Quality Control Board on 4 May 2018.

[https://www.waterboards.ca.gov/centralvalley/water\\_issues/salinity/salt\\_nitrate\\_bpa/draftstaffrpt\\_comments/20180504\\_com\\_usepa.pdf](https://www.waterboards.ca.gov/centralvalley/water_issues/salinity/salt_nitrate_bpa/draftstaffrpt_comments/20180504_com_usepa.pdf)

Municipal and Domestic Supply (MUN) use protection of 900  $\mu\text{S}/\text{cm}$  EC (as an annual average). The Regional Board has stated that the 700/900 EC values, “shall not be considered a water quality objective” (Amendment Page 13). However, the amendment and supporting information have also made multiple statements that may not be entirely consistent with this stated intent and which may imply that the 700/900 EC values are to be used in the role of numeric objectives. Although the Regional Board describes the 700/900 EC values as an “interpretation of narrative water quality objectives,” a numeric translator<sup>3</sup> nonetheless may still express or establish the desired condition or instream level of protection for waters.<sup>4</sup> The Regional Board has described the 700/900 EC values as:

- **Used in the Role of Objectives:** The amendment states that the Regional Board will apply the associated narrative and “range in numeric objectives” (Amendment Page 12) implying that the values are potentially used in the role of objectives.
- **Protective of Uses:** The amendment states that 700/900 EC values will be protective of their respective uses.<sup>5</sup> If the Regional Board is to ensure use protection, then it appears that the referenced values express an instream level of protection, and therefore act like numeric objectives.
- **Basis of WQBELs:** In the National Pollutant Discharge Elimination System (NPDES) program, the desired level of instream water quality for salinity can be used to derive a water quality-based effluent limit (WQBEL). The Regional Board contends that the 700/900 EC values are not objectives, but still protective of instream uses and the basis of WQBELs. Alternatively, the Regional Board may have also described the 700/900 EC values as effluent limits,<sup>6</sup> but that description would not resolve the inconsistent statements regarding the feasibility of use protection.<sup>7</sup>
- **Eligible for WQS Variances:** The Regional Board’s water quality standards (WQS) salinity variance program authorizes variances from a WQS, relieving an NPDES discharger from an

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<sup>3</sup> 40 CFR § 131(b)(2) and EPA Water Quality Standards Handbook, Chapter 3.

<https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter3.pdf>

<sup>4</sup> What Is a New or Revised Water Quality Standard Under CWA 303(C)(3)? Frequently Asked Questions, October 2012. <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>. As the State Board knows, this issue of what constitutes a water quality standard requiring EPA review under Clean Water Act Section 303(c) is complex. As part of recent litigation in federal court about the status of the State Board’s “Temporary Urgency Change Petition Orders” (“TUCPs”), EPA issued a determination that included a substantial discussion of the interpretation of the October 2012 Frequently Asked Questions. See USEPA, Determination Regarding California Temporary Urgency Change Petition Orders (May 25, 2017).

<sup>5</sup> The amendment states that 700 EC, “...shall be considered to be a conservative value that is protective of the AGR beneficial use,” and correspondingly 900 EC, “...for protection of a MUN beneficial use.” The Regional Board response to comments says it, “will be protective of the designated uses.” A July 30, 2018 email from the Regional Board to the EPA says, “the numeric EC values (700/900  $\mu\text{S}/\text{cm}$ ) will be protective of all instream designated beneficial uses...” and will be used “...to establish water quality-based effluent limitations,” and “...could be used to establish limitations at the end-of-pipe or in the receiving water, depending on specific permit conditions.”

<sup>6</sup> Recognizing the Regional Board’s intent for the 700/900 EC values not to be objectives, the EPA has inquired whether the provision is instead establishing a salinity effluent limit (i.e. through NPDES rather than WQS authorities). The Regional Board’s response to comments does say, “...the Board proposes to establish a water quality based effluent limitation of 700  $\mu\text{S}/\text{cm}$  EC.” However, the response to the California Stormwater Quality Association, the Regional Board described the values differently, “The numeric salinity values identified (700/900  $\mu\text{S}/\text{cm}$  EC) are not numeric effluent limits. Instead, these values represent thresholds...”

<sup>7</sup> An effluent limit for salinity based on something other than water quality (e.g. technology or performance based effluent limits that are not directly calculated based on the receiving water’s assimilative capacity) would not support the Regional Board’s assertion that the values will be, “protective of all instream designated beneficial uses.”

obligation to comply with certain WQS.<sup>8</sup> The Regional Board has authorized varying salinity objectives, but also stated the 700/900 EC values are not objectives, which calls into question the need for a WQS variance.

Applying these 700/900 EC values in the role of objectives, despite statements that they are not, creates uncertainty for CWA WQS, permits and variances. It needs to be clarified whether the 700/900 EC values are being established as water quality objectives under WQS authority, effluent limitations under NPDES authority, or adopted pursuant to some other state authority. The characterization of whether these numbers are objectives (or not) is important for a few reasons:

- **CWA § 303(c) Review:** It is necessary to specify what values would be in effect for CWA purposes. Specifically, the EPA determines whether to review provisions under CWA § 303(c) by considering factors such as whether the provisions are new or revised, legally binding, address water quality criteria, and establish a desired condition. The Regional Board's statements have not consistently described the 700/900 EC values.
- **Applicability Across CWA Programs:** In response to email inquiries from the EPA asking what CWA programs the values are applicable to, the Regional Board stated that, "The Salt Control Program applies to any permittee who discharges salt in the Central Valley region, including those in the CWA 401 and 402 programs. However, these EC numeric values are not water quality objectives and will not change the way water bodies are assessed for the 303(d) process." It's unclear how the values could be differentially applied.
- **WQS Variances Eligibility:** Under CWA WQS authorities described at 40 CFR §131.3(o) and §131.14(c), the variance does not directly modify effluent limits, but rather the underlying use and associated criteria.<sup>9</sup> If the 700/900 EC values are not WQS, then a WQS variance is not the appropriate mechanism for altering them in NPDES permits.

## (2) Specify the Process for "In Lieu" Compliance

The EPA suggests clarifying language under the provision describing permit limits for participants in the Prioritization and Optimization (P&O) study (Amendment Page 17).<sup>10</sup> It states that, "Full participation in the P&O study as documented and confirmed by the lead entity overseeing the P&O Study shall be found by the Regional Board to provide for in lieu or alternative compliance to receiving water limits or effluent limits based on salinity." In response to the EPA's comments on this language, the Regional Board clarified that they, "...will include a provision to participate in the P&O Study in permits for dischargers that successfully apply for a water quality standards variance for salinity." We appreciate the clarification, but the Basin Plan language remains vague and does not establish whether effluent limits will be replaced with the P&O study requirements in the permit, or the permittee will need to apply for a

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<sup>8</sup> The Variance Program for Salinity Water Quality Standards makes references to a variance from a "WQBEL or proposed WQBEL based on a salinity water quality standard." Under Definitions and Terminology Specific to the Salt and Nitrate Control Program, the amendment defines a WQS variances as a, "...special authorization... that allows an NPDES-permitted discharge(s) to surface waters... without an obligation to comply with certain water quality standards that would normally apply to the given discharge(s) or waterbody."

<sup>9</sup> Per 40 CFR §131.3(o) a WQS variance, "...is a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance." Per 40 CFR §131.14(c) "A WQS variance serves as the applicable water quality standard for implementing NPDES permitting requirements... Any limitations and requirements necessary to implement the WQS variance shall be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance."

<sup>10</sup> The Phase I Alternative Salinity Permitting Approach for NPDES Surface Water Discharges Section 2: Requirements for Ensuring Reasonable Protection of Beneficial Uses.

multi-discharger WQS variance. The amendment should clarify what is meant by "...to provide for in lieu or alternative compliance."

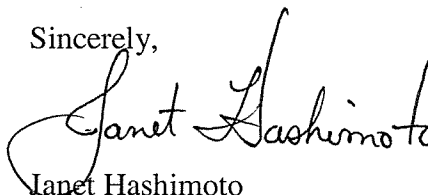
### **(3) Ensure that the Multi-Discharger Variance is Up to Date**

The EPA previously commented that the case studies underlying the multi-discharger variance should be analyzed and updated if necessary to ensure that the conclusions are still valid. The Regional Board responded that it will evaluate the necessary documentation (e.g. cost analyses) when submitted by dischargers applying for the variance.<sup>11</sup> This process is not consistent with the variance requirements of 40 CFR §131.14, specifically sections (b)(i) through (ii)(A), where documentation for a multi-discharger variance is provided to the EPA for review and approval or disapproval. Specifically, the justification for the variance still relies on case studies during a period in the past that may reflect different levels of social and economic impact than today. The Regional Board should make sure the case studies are still valid and provide updates with any new data if they have changed significantly.

### **Summary**

We would like to reiterate the urgency of reducing salt and nitrate pollution in the Central Valley, and affirm the EPA's commitment to supporting these efforts. We also recognize the efforts of CV-SALTS and numerous stakeholders to help develop this amendment. We appreciate the opportunity to provide input on the amendments as well as the productive discussions we have had with the Regional Board concerning this issue. If you have any questions, please contact me at (415) 972-3452 or [Hashimoto.Janet@epa.gov](mailto:Hashimoto.Janet@epa.gov) or Stephen Maurano of my staff at (415) 972-3477 or [Maurano.Stephen@epa.gov](mailto:Maurano.Stephen@epa.gov).

Sincerely,



Janet Hashimoto

Manager, Water Quality Assessment Section

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<sup>11</sup> The EPA commented that, "The current salinity multi-discharger variance relied on case studies in the 'Technical Evaluation of a Variance and Interim Salinity Program, Larry Walker Associates' (2012). If extension of this variance continues to rely on the same case studies the data should be analyzed and updated if necessary to ensure that the conclusions are still valid." The Regional Board responded that, "Dischargers choosing to apply for a variance must submit an application that includes, among other requirements, justification of the need for a variance and an assessment of implementation methods including an explanation of the basis for concluding that there are no readily available or cost-effective methodologies available to the discharger to consistently attain the water quality based effluent limitations for salinity. The Regional Board will evaluate the application to determine whether to adopt a variance and what conditions to include. This process assures that the data supporting the conclusions for the variance is the most up-to-date."