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- - - submitted via e-mail to owts_commentletters@waterboards.ca.gov - - -

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OWTS Policy
State Water Resources Control Board
P.O. Box 2231
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Sacramento, CA 95812

Comment Letter – Draft OWTS Policy Documents

On behalf of its 31 member counties, the Regional Council of Rural Counties (RCRC) appreciates this opportunity to provide you with written comments regarding the SWRCB's draft "Water Quality Control Policy for Siting, Design, Operation, and Maintenance of Onsite Wastewater Treatment Systems (OWTS)" and the associated "Preliminary Substitute Environmental Document (dated September 30, 2011).

RCRC's mission is to enhance and protect the quality of life in its member counties by fostering local control of its natural and manmade resources. Consistent with this mission, RCRC has been actively involved in the SWRCB's OWTS regulatory development process since the passage of AB 885 in 2000.

Recognizing that our member counties are disproportionately impacted by any new State mandates regarding OWTS regulation, RCRC was at the forefront of public opposition to the proposed regulations that the SWRCB issued in 2008. These proposed regulations were inflexible; they were unnecessarily intrusive; and, they were unreasonably costly with a projected 10-year price tag of over one billion dollars.

RCRC is pleased that the draft OWTS Policy, as currently proposed, no longer includes many of the more egregious regulatory provisions that were being considered previously.

At recent Workshops, we were also pleased to hear SWRCB staff say that the proposed new Policy is intended to accomplish various objectives that include:

- ▶ Continuing local control of county-specific OWTS regulatory policies
- ▶ Minimizing administrative costs to local government agencies
- ▶ Limiting new water quality monitoring costs by using available existing data
- ▶ Focusing regulatory efforts on known problem areas of the State
- ▶ Providing financial assistance to homeowners through local agencies

Unfortunately, these worthwhile objectives are not clearly spelled out in the Policy document and we are concerned that there is nothing in the proposed Policy itself to ensure that these objectives will, in fact, be met. We are further concerned that the Policy includes language that will make it difficult, if not impossible, to fully achieve these stated objectives.

The following is a summary of several suggested Policy changes that we feel must be made to address many of the outstanding issues of concern to rural counties:

1. Include a Clear Statement of Policy Objectives. In order to ensure that the stated objectives of the SWRCB will be met during Policy implementation, the Policy must include a clear and declarative statement of intent that, at a minimum, addresses the bulleted items listed above. As the proposed Policy is currently written, there is considerable uncertainty about exactly how the Policy will be interpreted and about how it will eventually be put into effect. Without an unambiguous statement of intent, it is quite possible that future outcomes could be a variance from the SWRCB's stated objectives and inconsistent with elements of the associated Substitute Environmental Document (SED).

2. Provide Assurances that Responsible Local Control Will Be Authorized. As the Policy is written, Regional Water Quality Control Boards (RWQCBs) will have the authority to determine whether or not counties will be able to continue their existing local on-site programs. Because of this, we believe that the final Policy must include additional mechanisms that will prevent RWQCBs from imposing arbitrary and excessively stringent across-the-board regulatory restrictions on county government as a condition of local control. The Policy must also provide RWQCBs with clear legal authority to approve local programs that reasonably protect water quality, but which may not strictly conform with existing strictures that were promulgated without due consideration of their applicability to OWTS. Since RWQCBs will have authority to determine the long-term effectiveness of the proposed Policy, RCRC believes that the SWRCB needs to do everything it can to be sure that future RWQCB actions are consistent with stated Policy

objectives. Along these same lines, the Policy should also identify the criteria that the SWRCB will use as the basis for adjudicating any disputes between local government and RWQCBs.

3. Clarify How “Basin Plan” Requirements Will Impact Policy Implementation. The Policy gives RWQCBs authority to override all Policy provisions by adopting Basin Plan amendments that conflict with Policy objectives. To address this, the Policy should require that all future Basin Plan amendments be consistent with stated Policy objectives (per Item 1, above). Also, the unnecessary reference in Section 3.1 to “Basin Plan compliance” should be deleted. Local agencies should simply be allowed to continue to implement their existing OWTS permitting programs without the implied imposition of new conditions. Existing “OWTS Guidelines” in the Central Valley “Basin Plan”, for example, are extremely outdated (over 35 years old). Their applicability to existing local programs is confusing and enforcement by the RWQCB has been inconsistent at best. It is inappropriate for the new Policy to explicitly mandate compliance with these “Guidelines”.

4. Restrict the Authority of SWRCB and RWQCBs to Arbitrarily Revoke Discharge Waivers for OWTS. Section 12.2 of the Policy says that a discharge waiver for any OWTS (or any category of OWTS) can be revoked at any time by either the SWRCB or any RWQCB. There are no requirements that OWTS owners be provided any advance notice that their waiver will be revoked and there are no provisions for any sort of due process providing homeowners with the right to appeal any such decisions. The Policy should require reasonable cause prior to any waiver revocation and homeowners must be provided a timeframe to contest the justification for any such action.

5. Eliminate Costly Unfunded Mandates that are Being Imposed on Local Government as a Condition of Local Control. The Policy includes an extensive list of requirements that counties must meet in order to be granted “local control”. RCRC believes that many of these requirements are excessive and unnecessary. Compliance with all of the proposed requirements will be costly to local governments and we simply do not have the resources to take on new unfunded mandates. Without any financial support from the State, many small counties with limited staff resources will be forced to curtail other important public health related activities in order to conform to Policy requirements. To avoid this, the Tier 2 submittal process for local program approval must be simplified and on-going reporting requirements to the RWQCBs must be reduced in both scope and content.

6. Eliminate Any Requirements for Costly New Water Quality Monitoring Programs. Despite the fact that SWRCB staff have consistently said that it is not their intent to require local governments to implement extensive new water quality monitoring programs, Section 9.3.8 of the Policy implies otherwise. This section requires that

county governments must—as a condition of local control—“establish” and maintain “regional and localized” water quality monitoring programs across its “entire jurisdictional area”. Instead of this potentially burdensome requirement, the final Policy should simply allow local governments to generally assess potential water quality impacts of OWTS based on existing and historic monitoring data from extensive water quality monitoring networks already in place. Counties should not be required to establish new data gathering programs. Without clarifying language to this effect, local governments could be forced by RWQCBs to implement costly and intrusive monitoring programs similar to those that were overwhelmingly rejected several years ago.

7. Recognize that Tier 2 Local Program Standards Will NOT Be “Equal” or “Comparable” to Highly Restrictive Tier 1 Prescriptive Requirements. It has been generally acknowledged that Tier 1 requirements are extremely conservative because the requirements for Tier 1 are based on the compounding of a multiplicity of “idealized” safety factors. Thus, Tier 1 standards provide for an unnecessarily high level of water quality protection that cannot be reasonably met in most areas of the State with less than ideal site conditions. Despite this, Section 9.6 of the Policy requires that Tier 2 local programs “achieve a comparable level of water quality protection” relative to Tier 1 standards. The word “comparable” is potentially confusing (and therefore limiting). We suggest that the word “comparable” be replaced with the word “acceptable”. Also, the Section 9.6 requirement that counties need to “detail with specific criteria the characteristics for which their Local Agency Management Program for OWTS deviates from those requirements in Tier 1” should be deleted (or, at least, substantially modified). A comprehensively integrated local program alternative designed to address complex siting criteria cannot be meaningfully compared to a laundry list of prescriptive Tier 1 standards on an item-by-item basis. Such a simplistic comparison fails to recognize how various design, siting, and permitting factors interrelate programmatically to provide for adequate water quality protection in consideration of county-specific limiting physical conditions.

8. Provide Clarifying Language to Ensure Continuation of Existing Local Programs Throughout the Tier 2 Review/Approval Process. Section 3.1 says that existing local programs are to remain in effect for up to 60 months while the Tier 2 review/approval process is ongoing. However, Section 4.2 requires RWQCBs to amend their Basin Plans within 12 months after the effective Policy date. Because existing local programs may not be fully consistent with the provisions of newly amended Basin Plans, the Policy needs to be clear that existing programs may remain in-place for up to 60 months regardless of any new Basin Plan amendments.

9. Provide Consistent Language to Ensure that Commercial Food Facilities Are Covered by the Policy’s Discharge Waiver. Section 6.1.2 of the Policy explicitly allows automatic waiver coverage for properly functioning OWTS serving food service facilities. However, this provision is not properly and consistently maintained throughout the Policy

document. For example, the section entitled “Purpose of the Policy” states that the “Policy only authorizes subsurface disposal of domestic wastewater”. Also, Section 2.4 restricts waiver coverage to OWTS that “accept and treat flows of domestic strength wastewater”. These, and other relevant sections of the Policy, need to be corrected to clearly indicate that all qualified food service facilities will be covered by the proposed discharge waiver.

10. Eliminate Inappropriate Tier 1 Land Use Restrictions for New Subdivisions. RCRC believes that the proposed Tier 1 density limit for new subdivisions (see Section 7.8) should be deleted. We believe that this restriction inappropriately infringes on local government’s exclusive land use authority and we believe that the required CEQA analysis for all new subdivisions will provide for adequate assessment and mitigation of any groundwater quality impacts that may result from OWTS-related project approvals.

11. Eliminate Inflexible Prescriptive Standards for Tier 2 Local Programs. The Policy includes restrictive and inflexible prescriptive standards that must be included in all Tier 2 local management programs—regardless of any mitigating factors that may be recommended to provide adequate water quality protection. These “one-size-fits-all” standards inappropriately limit the ability of local government to creatively and responsibly address challenging site conditions. The proposed Policy restrictions will be particularly problematic for replacement systems and for new systems on existing lots because it may be physically impossible for property owners to meet prescribed standards. RCRC recommends that prescriptive Tier 2 standards in Section 9.4 of the Policy only apply to new OWTS located on residential lots created after the effective date of the Policy. It is also recommended that the Policy clearly indicate that mound systems can be effectively used to achieve the specified two-foot separation from groundwater.

12. Eliminate Unnecessary and Inflexible Requirements for New Home Construction Adjacent to Impaired Water Bodies. It will be difficult—if not impossible—for many property owners to build homes on existing unimproved lots that are located adjacent to any one of the 700+ nitrogen- or pathogen-impaired water bodies in California. While we recognize the need to limit the discharge of additional pollutants into these impaired water bodies, RCRC believes that the proposed Policy requirements for new homes go far beyond those needed to protect against further impairment. For example, the Policy would require all new on-site systems within 600-feet of a pathogen-impaired water body to include advanced treatment technologies for pathogen removal. This will impose unnecessary costs on future homeowners (especially when one considers ongoing monitoring requirements) without any real benefit to water quality. Note that Tier 1 OWTS without advanced treatment for pathogen removal can be located within 100 feet of a drinking well. RCRC recommends that the Policy be changed to require advanced pathogen removal only in new systems that are located within 200 feet (not 600 feet) of a pathogen-impaired water body. The Tier 3 standards should also be clear

that the two-foot minimum separation to groundwater can be achieved with mound systems and engineered fills.

13. Eliminate Confusing and Overly Restrictive Standards for Repair and/or Replacement of Existing OWTS. As currently worded in the Policy, Tier 4 requirements for OWTS repair/replacement are too restrictive and could render many existing homes inhabitable because of existing site limitations that are inconsistent with the proposed standards. Section 11.1 of the Policy simply requires compliance with Tier 1, 2, or 3 standards. Unfortunately, there are no provisions to accommodate existing site limitations that preclude strict compliance with any one of these Tier-based standards. In order to avoid forcing people to abandon their homes (and to discourage illegal, unpermitted repair work), the Policy must provide flexibility within each Tier to make OWTS repairs (and to install replacements systems) that conform to recommended standards to the “greatest extent practicable” in consideration of existing soil conditions, lot size, and other relevant site restrictions. Virtually all OWTS will eventually require some level of system repair at some point. Recognizing this, it is important that the Policy clearly allow all homeowners to make necessary and reasonable repairs to their existing systems even if they are in Tier 3 and even they are located in a county that has not been approved for Tier 2 coverage. Related to this, the Policy definition of “Major Repair” needs to be amended so that minor issues (such as a broken baffle or a failing valve) do not automatically trigger all the bureaucratic bells and whistles associated with more significant Tier 4 “Corrective Actions”.

14. Clarify Responsibilities and Processes for Determining “System Failures”. Section 11.5 of the Policy states that an OWTS must be modified or upgraded if it “has affected or will affect” water quality so that the affected water is “unfit for drinking or other uses”. This Section is unacceptably vague. It is not clear who has the authority (or sufficient foresight for that matter) to determine whether an OWTS will someday make water unfit for some unspecified use. This Section similarly requires that an OWTS must be modified or upgraded if it is causing an undefined “public nuisance condition”. Again, the Policy does not indicate who is to make this determination and it is not clear whether or not homeowners have any rights to appeal or question the findings being made. This Section needs to be either deleted in its entirety or significantly re-worked to eliminate poorly defined terms and processes.

15. Require RWQCBs to Solicit Local Government and Homeowner Input on Future 303(d) Impaired Water Body Listings. Section 5.6 requires the SWRCB to evaluate whether or not OWTS are contributing to the impairment of a water body before adding new water bodies in future 303(d) listings. This determination is significant because it will determine whether or not existing homeowners will be subject to costly Tier 3 upgrade requirements. In order for this decision-making to be based on the best available information, the proposed evaluative process in Section 5.6 must be expanded

to include Policy mechanisms that will ensure participation by local government and by impacted homeowners. To accomplish this, RCRC believes that RWQCBs should be required to notify all impacted property owners (within 600 feet of the candidate water body) prior to recommending any new 303(d) listings to the SWRCB. At that time, RWQCBs should also be required to meaningfully engage local government so that the two parties can collaboratively assess the relative significance of all potential sources of nutrient and pathogen pollution into candidate 303(d) water bodies. Then, as part of the Section 5.6 evaluation process, the SWRCB should be required to consider all input provided by homeowners and local government. Additionally, the Policy should require that local government representatives and all potentially impacted homeowners be notified when relevant SWRCB hearings are scheduled and they should be allowed to comment directly to Board member

16. Provide a Mechanism that Will Allow Qualified Homeowners to Apply for Exemptions from Future Tier 3 Requirements. As new water bodies are added to the State's 303(d) listing of impaired water bodies, many existing homeowners could be required to add advanced treatment systems to their OWTS (for the removal of pathogens and/or nutrients). While this may be appropriate if the OWTS is contributing significantly to the cited impairment, RCRC believes that there should be a mechanism in the Policy that will allow homeowners to apply for an exemption from this requirement if they are able to demonstrate that their system is not contributing to the nearby impairment.

17. Consider Deletion of Woods Creek and Sullivans Creek from the Policy's Attachment 2 "Listing of Impaired Water Bodies Subject to Tier 3". Consistent with the request from Tuolumne County, RCRC supports the deletion of Woods Creek and Sullivans Creek from the referenced Attachment 2 listing because OWTS are not considered to be significant contributors to the pathogen impairment in either water body. Also, it is RCRC's understanding that Rattlesnake Creek (Amador County) will be similarly deleted from the Attachment 2 listing.

18. Establish a Financial Assistance Program for Impacted Homeowners and Allow for Regulatory Exemptions if Adequate Funding is Unavailable. AB 885 clearly states that it was the intent of the Legislature to provide financial assistance to qualified homeowners in order to help offset the costs of regulatory compliance. Yet, the proposed Policy fails to address this issue. RCRC believes that the Policy needs to establish an adequately funded program that will provide needed financial assistance to qualified homeowners. Also, we believe that the Policy must include provisions that will allow counties and RWQCBs to conditionally exempt homeowners from costly regulatory compliance if financial assistance from the State is not available and if such exemptions are considered to be in the best interest of the State. Without an allowance for exemptions,

it is likely that many residents throughout California could be forced to abandon their homes because of their inability to afford costly Tier 3 system upgrades.

RCRC believes that the Policy changes suggested above must be made prior to final Policy adoption to avoid costly over-regulation beyond that which is required to meet AB 885 statutory requirements. Without these suggested changes, many of our counties with increasingly limited resources will be subject to new financial burdens and a significant number of homeowners throughout the State will be subject to regulatory hurdles that provide minimal or no benefit to water quality.

RCRC is also concerned about apparent inadequacies of the Substitute Environmental Document (SED) that was prepared to evaluate the potential environmental effects of the proposed Policy. The following are examples of some major areas of concern:

- ▶ The SED cites Section 15251 of the Public Resources Code as the basis for not preparing and processing an EIR. However, the cited exemption seems to be limited to Basin Plans and “208 Planning Programs”. There is no specific EIR exemption for statewide “Water Quality Control Plans”.
- ▶ The SED fails to evaluate the costs or water quality benefits on a statewide basis. Instead, all areas of analysis seem to narrowly focus on individual systems, providing little or no information about cumulative impacts. Based on the SED, there is no way to know what the statewide costs of compliance will be and there is no way to assess the degree to which statewide water quality benefits will result from these costs.
- ▶ The SED fails to address the potential for dislocation of existing homeowners that may be unable to afford costly system upgrades. Similarly, the SED fails to consider lost property values for existing homes and unimproved lots that are located adjacent to 303(d)-listed impaired water bodies. It similarly fails to consider reduced property values for unimproved property that is adjacent to currently unlisted water bodies that may be subject to future 303(d) listing.
- ▶ The SED seems to inappropriately presume that all counties will implement a RWQCB-approved Tier 2 Program. Depending on RWQCB approval requirements, some counties may not be able to implement a Tier 2 Program. To address this very real possibility, the scope of the SED must be expanded to more fully address this situation. Without an approved Tier 2 Program, all new and replacement OWTS will need to comply with highly restrictive Tier 1 standards in order to qualify for a discharge waiver. The associated costs and other impacts on property owners could be quite significant. Along with these impacts, the expanded impact analysis should address the ability of RWQCB to adequately respond to emergency situations.

- ▶ The SED selects 15 different local agencies as a basis for evaluating statewide regulatory impacts. In Section 5.5, the SED says that these 15 agencies constitute a “representative sample” of local regulating agencies. This simply is not true and the selected agencies are not at all representative of all 31 RCRC member counties.
- ▶ Section 8.1.3 “Local Agency Requirements” grossly understates the level of effort that will be required of local governments to comply with the proposed Policy.

Prior to final Policy adoption, RCRC looks forward to the opportunity to meet with SWRCB staff to address outstanding concerns as summarized herein and as may be raised by our individual member counties. We would like to discuss Policy changes that we feel are needed in order to adequately protect water quality while avoiding costly over-regulation.

Thank you in advance for your willingness to consider the concerns of rural counties.



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