State Water Resources Control Board

TO: Tom Howard
Executive Director
EXECUTIVE OFFICE

FROM: Michael A.M. Lauffer
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: February 22, 2013

SUBJECT: *ASOCIACIÓN DE GENTE UNIDA POR EL AGUA V. CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD*: NEW CASE INTERPRETING STATE WATER RESOURCES CONTROL BOARD RESOLUTION 68-16

The Third District Court of Appeal recently issued a published decision interpreting State Water Resources Control Board (State Water Board) Resolution 68-16, which establishes California's antidegradation policy with respect to waters. The Court in *Asociación de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255 (*AGUA)* based its analysis on existing State Water Board guidance, so the case does not establish new rules or legal principles. *AGUA* is nevertheless significant because it gives precedential effect to some of this guidance. The decision also underscores the importance of documenting the steps to support an antidegradation analysis or to support a finding that an antidegradation analysis is unnecessary.

Background

AGUA involves a challenge to the Central Valley Regional Water Quality Control Board's (Central Valley Water Board) general waste discharge requirements order for existing milk cow dairies (Order). The Order regulates discharges from waste storage ponds, animal confinement areas, milk parlors, manure and feed storage areas, and land application areas (cropland) from about 1,600 dairies in the Central Valley. The Order prohibits existing ponds and other dairy discharges from degrading groundwater. The antidegradation analysis supporting the Order relies heavily on that prohibition.

Among other specific requirements, the Order includes liner design standards for all new or reconstructed storage ponds. The board found those standards to be best practicable treatment or control (BPTC) for new or reconstructed ponds. The Order does not require dischargers to line existing ponds to meet the design standards. Instead, dischargers must submit an engineering evaluation and implement approved remedial measures "when groundwater

monitoring demonstrates that [an] existing pond has adversely impacted groundwater quality." (Order, General Specification B.5.))

The Court of Appeal's Decision

Antidegradation Baseline

AGUA rejects parts of the Order's antidegradation analysis and remands the Order to the Central Valley Water Board to make additional findings. The Court first concluded that the antidegradation "baseline" is 1968[1] or the best water quality that has existed since 1968, unless subsequent lowering was due to regulatory action consistent with State and federal antidegradation policies. Since there was evidence that nitrate levels in many areas were below the maximum contaminant level (MCL) of 10 mg/L based on sampling from pre-1960 through 1995, at least some covered dairies discharge to existing high quality water. Thus, an antidegradation analysis was required if the Order authorized discharges that could cause degradation.

Prohibition of Degradation and Monitoring to Support the Prohibition

Next, the Court considered the Central Valley Water Board's argument that no antidegradation analysis was required because the Order prohibited, rather than authorized, degradation. The Court first noted that the Order authorized waste discharges to groundwater, and presumed that any discharge of waste to high quality groundwater would result in some degradation.[2] Even without applying that presumption, the Court concluded that the facts in this case showed that degradation would in fact occur.

First, the Order allowed dischargers to continue historic practices that had already caused groundwater degradation. Second, the Court concluded that the Order's degradation prohibition was illusory because the Order lacked an effective method to detect further degradation, much less to prevent it. All dairies enrolled in the Order were required to sample on-site supply wells and subsurface drainage systems, but there was uncontroverted evidence that supply well monitoring was inadequate to determine whether degradation is occurring. The Order expressed the board's intent that the Executive Officer would order 100-200 dairies per year to install groundwater monitoring wells, starting with dairies where nitrate-nitrogen was detected at or above the MCL in supply wells or tile drainage systems.[3] The Court essentially disregarded this language, because (1) the Order left the monitoring requirements to the discretion of the Executive Officer; (2) there were no mandatory standards governing the Executive Officer's

[1] Resolution 68-16 sets the baseline as "the quality established in policies as of the date on which such policies become effective …." The Court noted that the record did not indicate when applicable water quality objectives were established or whether the existing water quality was better than those standards. (*AGUA*, *supra*, 210 Cal.App.4th at p. 1270.) In some cases where water quality objectives were established after 1968 and no analogous standards were previously in place, the "existing quality" of the receiving water is determined as of the date the objectives take effect.

[2] *Id.* at p. 1272. In rare cases, effluent concentrations are lower than baseline receiving water concentrations. In those cases discharges can actually improve receiving water quality, at least for some constituents. Since the *AGUA* Court did not consider those facts, the case does not foreclose the argument that no antidegradation analysis is required in such cases. Even if an antidegradation analysis is required in such cases, a board may find that discharges that improve receiving water quality are to the maximum benefit of the people of the state, and that treatment that already achieves effluent quality better than baseline receiving water quality is presumptively BPTC.

[3] The board subsequently revised the Monitoring and Reporting Program to create a Representative Monitoring Program that allowed dischargers to participate in representative monitoring rather than conducting individual monitoring at their own sites. That Representative Monitoring Program was not before the Court.

discretion; and (3) to the extent that nitrate contamination in supply wells was a trigger for installing monitoring wells, the supply wells could not reliably detect the contamination in the first instance. With respect to using supply wells, the Court observed that requiring monitoring only after the beneficial use was already unreasonably affected does not adequately prevent degradation.

The Court agreed that it was reasonable to phase in the monitoring requirements based on threat to water quality, but only if the board set a clear timetable requiring all dairies to install monitoring wells. The Order's lack of a timetable made the monitoring program inadequate to detect or prevent degradation. Finally, the Court noted that the Order lacked an enforcement mechanism that would ensure that degradation would be stopped if it did occur.

Based on these factors, the Court concluded that historic degradation was almost certain to continue and the monitoring program was ineffective to stop the degradation in a timely fashion. This conclusion did not necessarily invalidate the Order, but it meant that an antidegradation analysis was required.

Findings with Respect to Antidegradation
The Court next turned to the question of whether the Order's findings satisfied Resolution 68-16, and found that they did not. Again relying on State Water Board guidance, the Court found that Resolution 68-16 requires a two-step analysis:

> The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans). The second step is that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.[4]

In step one, the Order relied on the degradation prohibition for the three required findings. The prohibition failed to establish compliance with the antidegradation policy in this context as well, because monitoring was inadequate either to detect degradation or to determine compliance with water quality objectives. The Court noted that the board must analyze sufficient evidence to support antidegradation findings, and explain how that evidence supports the board's conclusions. Findings need not be extensive or detailed, but they cannot simply assume the conclusion. The Court concluded,

> the crucial findings that would have allowed the Regional Board to authorize a discharge that would degrade the groundwater, i.e., that the discharge will be consistent with the maximum benefit to the people of the state, that it will not unreasonably affect beneficial uses, and that it will not violate water quality objectives, were all based upon the finding that the Order would not further degrade groundwater quality. That finding is not supported by the evidence in the

[4] *AGUA*, *supra*, 210 Cal.App.4th at p. 1278 (citing State Water Board Guidance Memorandum (Feb. 16, 1995) p. 2).

> record because the Order allows the continuation of some sources of groundwater degradation (i.e., existing retention ponds), but does not mandate the type of testing and monitoring program most likely to detect further groundwater degradation.[5]

Turning to step two, the Court again cited State Water Board guidance on how to determine BPTC:

> To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g., through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers.... Promulgated requirements such as federal best available technology economically achievable (BAT) or other promulgated technologies may be appropriate for ground water discharges and would apply to surface water discharges. In certain situations, BAT would be considered "best practicable treatment or control" under Resolution No. 68–16. The costs of the treatment or control should also be considered, and would be considered in determining the "maximum benefit to the people of the State."[6]

The Court found the Order's BPTC findings for land application (cropland) and new or expanded ponds were adequate, and that the Order was not required to include BPTC findings for off-site manure disposal that was outside the scope of the Order. However, the Court concluded the Order failed to consider BPTC for existing ponds.

The Court recognized that BPTC might be different for existing ponds as compared to new or expanded ponds. Nevertheless, even if retrofitting existing ponds would be so expensive that it would force many dairies out of business, the continued use of existing ponds must be supported by findings that such use is necessary to accommodate important economic or social development, will avoid a pollution or nuisance, and will attain the highest water quality consistent with the maximum benefit of the people of the state. Moreover, considering the costs to the discharger alone was improper. The Court cited State Water Board guidance and concluded that the board must also consider costs to the affected public.[7] The Order contained no such findings. Similarly, the Order included no findings that BPTC was required for corrals, milk parlors or the Order's closure requirements, despite evidence in the record that they pose a threat to groundwater.

Implications for Other Orders

The Court relied extensively on existing State Water Board guidance, including Administrative Procedures Update (APU) 90-004 and the 1995 Question and Answer document on Resolution 68-16.[8] While APU 90-004 technically only applies to NPDES permitting, the Court found it instructive in applying Resolution 68-16 in other contexts. Courts considering

---

[5] *AGUA*, *supra*, 210 Cal.App.4th at p. 1281.

[6] *Id.* at p. 1282 (citing State Water Board Guidance Memorandum (Feb. 16, 1995) pp. 5-6 (quotations omitted)).

[7] *Id.* at p. 1284 (citing State Water Board Guidance Memorandum (Feb. 16, 1995) p. 5).

[8] The APU is available at http://www.waterboards.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf. A copy of the 1995 question and answer guidance document is attached.

Resolution 68-16 in the wake of *AGUA* will likely continue to rely heavily on State Water Board guidance.

For the most part, the *AGUA* decision was very fact-specific and did not establish general rules, but several aspects of the case will have broad implications:

1. Consistent with the State Water Board and the Regional Water Quality Control Boards' (Water Boards') long-held interpretation, the Court recognized that the antidegradation "baseline" is 1968 (or a later date on which policies were established), adjusted by subsequent improvements in water quality or reductions in water quality that were authorized in compliance with the antidegradation policy. The Court did not address how a Water Board should determine the baseline in a general order. The petitioners argued that the first step in complying with Resolution 68-16 in a general order is to create an inventory identifying the location of all high quality water affected by the order, on a constituent-by-constituent basis. The Court implicitly rejected this argument because no inventory step was included in the court's two-step approach to antidegradation. The Court held only that the Order required an antidegradation analysis because at least some of the affected groundwater was high quality. The Court also did not address whether a Water Board must quantify the extent of authorized degradation, and if so, how to do that in the context of a general order.

2. The Court confirmed that time schedules or phased implementation of antidegradation requirements are appropriate. As with other requirements, time schedules must be justified by facts in the record and supported by findings.

3. The Court upheld the Central Valley Water Board's finding that the Order's liner standards constituted BPTC for new or expanded ponds, but did not require the same liners for existing ponds. The Court made clear that something short of retrofitting existing ponds might constitute BPTC, but only if the board finds that any lesser treatment or control requirements were necessary to accommodate important economic or social development in the area, would avoid pollution or nuisance (i.e., would not cause water quality objectives to be exceeded) and would maintain the highest water quality consistent with the maximum benefit to the people of the state. Thus, *AGUA* confirms that what constitutes BPTC can vary in different situations involving the same type of discharge.

4. "Maximum benefit" findings must consider the costs to the affected public, such as costs to treat water supplies affected by a discharge.[9] When cost savings to the discharger are part of the justification for allowing degradation, a Water Board must also demonstrate how the cost savings are necessary to accommodate important social and economic development.

5. Although monitoring figures prominently in the Court's analysis, the Court did not establish any general rule about whether, or how, regulated facilities must monitor groundwater quality as part of compliance with Resolution 68-16. The only issue

[9] Resolution 68-16 does not allow degradation that causes a pollution or nuisance, so discharges must not cause water quality objectives to be exceeded, including MCLs that are incorporated by reference as water quality objectives. As a result, the affected public should not generally have to incur costs to treat drinking water supplies.

before the Court was whether the Order could comply with the antidegradation policy by prohibiting degradation despite evidence that degradation would actually occur and that groundwater monitoring wells were the only effective way to detect or prevent degradation. The decision does not require regulated facilities in other programs to conduct groundwater quality monitoring in addition to or instead of other types of monitoring, such as visual observation, management practice tracking, photo-documentation, or tracking the quantities of chemicals or nutrients used. Similarly, the decision in no way undermines the propriety of watershed-based or representative monitoring programs; those issues were not before the Court.

Specific monitoring requirements must be based on the facts of each case. Nevertheless, courts applying *AGUA* are likely to conclude that orders authorizing discharges of waste must include *some* mechanism to confirm any assumptions that were used to support an antidegradation analysis and, if necessary, a mechanism to ensure that no degradation or pollution occurs. Orders authorizing discharges of waste should include findings demonstrating that the order as a whole provides adequate assurance that only the authorized amount of degradation, if any, will occur, and that monitoring and reporting requirements are adequate to detect degradation or to prevent any additional degradation if it were to occur.

6. BPTC determinations may consider relative benefits of proposed treatment or control methods to proven technologies; performance data; alternative methods of treatment or control; methods used by similarly situated dischargers; and/or promulgated BAT or other technology-based standards. Costs of treatment or control should also be considered.

Attachment: *Questions and Answers, State Water Resources Control Board Resolution No. 68-16* (Feb. 16, 1995)

cc: ***All via e-mail***
Jonathan Bishop, EXEC
Victoria Whitney, DWQ
Executive Officers
Assistant Executive Officers
OCC Attorneys