



Indian Wells
(760) 568-2611

Irvine
(949) 263-2600

Los Angeles
(213) 617-8100

Ontario
(909) 989-8584

BEST BEST & KRIEGER
ATTORNEYS AT LAW

500 Capitol Mall, Suite 1700, Sacramento, CA 95814
Phone: (916) 325-4000 | Fax: (916) 325-4010 | www.bbklaw.com

Riverside
(951) 686-1450

San Diego
(619) 525-1300

Walnut Creek
(925) 977-3300

Washington, DC
(202) 785-0600

William J. Thomas
(916) 551-2858
william.thomas@bbklaw.com

July 29, 2016

Richard Meyerhoff
meyerhoffrd@cdmsmith.com

Daphne Orzalli
dorzalli@cvsalinity.org

Re: Comments on CV-SALTS Nitrate Policy

Dear Richard and Daphne:

I file these limited comments on behalf of the Southern San Joaquin Valley Water Quality Coalition. You will likely receive additional comments from the coalition members.

1. An initial observation is that having 19 regulatory pages to address how to reasonably address a single natural element, nitrogen, is both regulatory overkill and underscores that this will take considerable time for all interested parties to effectively review and coordinate with their constituents.

2. On Page 3, the policy makes reference to the Antidegradation Policy (ADP) in its present form, as one of the principal considerations for the State Board. The overarching question is, can the CV-SALTS Program devise implementation programs such that California's agriculture can continue to thrive, or must reasonable changes be made to the ADP policy itself so as to achieve a reasonable balance.

3. Section 1.3, page 3, states that when assigning assimilative capacity the Board shall "maintain an appropriate safety factor. This is not a direct requirement in the ADP therefore this is tantamount to lowering the standard, not by the policy itself, but by program implementation by staff.

4. Further, the State Board will have to make a finding that the discharger is implementing best practice treatment or control (pg. 4), and is consistent with the maximum benefit to the people of the State. In so doing, the Board must evaluate the dischargers' capacity to bear the cost of compliance to the surrounding community and analyze the associated environmental effects. These are not express elements in the ADP, nor have these interpretations and additional requirements been adequately discussed.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Richard Meyerhoff
Daphne Orzalli
July 29, 2016
Page 2

5. The Central Valley Regional Board must also evaluate if and how it will be able to process the possibly tens of thousands of such farmer applications, or even several hundred if it so happens that is how the dischargers will elect to apply. This has had no discussion.

6. The policy, on page 5, states:

“Notably, if the Central Valley Water Board concludes that, even after implementing BPTC, a discharge will unreasonably affect present or anticipated beneficial uses of water, or result in water quality less than that prescribed in the Basin Plan, or cause an unmitigated pollution or nuisance to occur, or is inconsistent with maximum benefit to the people of the state, then lower water quality cannot be authorized by allocating a portion of the available assimilative capacity.”

This seems to sum up the staff assessment as to how they would implement the ADP. This is troubling and, if that holds, it would compel the State Board to consider if the ADP needs reasonable reform to fit Nonpoint Source agricultural irrigation.

7. A. Section 1.5 on pages 6-7 states:

“...where groundwater quality already exceeds the primary MCL for nitrate and there is no reasonably feasible or practical means for assuring that nitrate concentrations from discharge will be less than 10 mg/L when the discharge reaches the groundwater, an alternative compliance option may be needed.”

This sets forth the real test for the CV-SALTS Program.

B. As Figure 1 sets forth, when discharge of nitrate exceeds the receiving water threshold and the receiving water exceeds 10 mg/L:

1) Requires functional-equivalent compliance using ACPs and incorporates ACP compliance into the WDR.

2) Authorize a variance/exception for discharges.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Richard Meyerhoff
Daphne Orzalli
July 29, 2016
Page 3

C. Category 5, page 9, also points out that the exceedances may also need an exception:

“Discharges that exceed the water quality objective for nitrate, and where First Encountered Groundwater has no available assimilative capacity, will be considered to be part of this category. Discharges in this category may need to seek an exception pursuant to the Exceptions Policy under the SNMP.”

8. An important provision is set forth in Section 5.1, pgs. 15-16:

“However, in some cases, there may be no reasonably feasible or practicable means for dischargers to comply with WDRs limiting the discharge of nitrate to groundwater to concentrations less than 10 mg/L, at least at the present time. In such circumstances, under the current regulatory framework, the Central Valley Water Board may have no legal option but to prohibit the discharge. This, in turn, may be tantamount to prohibiting any activity producing a discharge that is unable to comply with water quality objectives despite employing reasonable best efforts. Such an outcome is inconsistent with the State Water Board’s declaration that *“Resolution 68-16 is not a ‘zero-discharge’ standard but rather a policy statement that existing quality be maintained when it is reasonable to do so.”*

The italicized sentence needs to be recognized whenever considering the ADP.

9. The proposal sets forth requirements for early action plans (EAP), which includes addressing drinking water supply issues (Section 2.4.5, page 12; 3.3, page 13; pg. 16), and states on page 16:

“Thus, with this background in mind, the SNMP recommends that where existing groundwater quality already exceeds the MCL for nitrate (i.e., >10 mg/L), the Central Valley Water Board’s foremost goal should be to encourage rapid implementation of safe drinking water alternatives.”



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Richard Meyerhoff
Daphne Orzalli
July 29, 2016
Page 4

10. The drinking water issue is further addressed on page 17:

“Moreover, an ACP for nitrate will need to assure that groundwater users down-gradient of the discharge have drinking water that meets applicable state and federal standards. ACPs may include both interim actions (e.g., bottled water) in the short-term, permanent solutions (such as well-head treatment or alternative drinking water supplies) in the intermediate term, and efforts to re-attain the water quality objective (where feasible and practicable) over the long-term. In granting an exception, the central Valley Water Board must also consider the three management goals, as discussed previously in Section XXXX.”

This is further addressed in Section 5.26 on pg. 18:

“The ACP provides appropriate well-head treatment or an alternative drinking water supply to down-gradient groundwater users where nitrate levels exceed or threaten to exceed the MCL.”

The drinking water issue is important and must be solved; however, it is questionable that a Board regulation directed to only one class of discharge contributors will be adequately effective to universally address this important issue while we are regulatorily addressing the aquifer issues. Therefore, the nitrate proposal should add a provision clarifying that if the in-home drinking water issue is resolved via some other means, then these specific regulatory requirements should be set aside.

Sincerely,

William J. Thomas
for BEST BEST & KRIEGER LLP

WJT:lmg