To: SWRCB BOARD

Re: "Comment Letter – General Order WDRs for Small Domestic Wastewater Systems and/or Negative Declaration and Initial Study."

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July 24, 2014

Ms. Felicia Marcus, Chairperson, California State Water Resources Control Board, and
Members, California State Water Resources Control Board
% Ms. Jeanine Townsend, Clerk of the State Water Resources Control Board
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Re: "Comment Letter – General Order WDRs for Small Domestic Wastewater Systems and/or Negative Declaration and Initial Study", proposed order labelled "State Water Resources Control Board Water Quality Order 2014-Xxxx-DWQ" Comment period from June 25, 2014 to July 25, 2014.

TO THE CHAIRPERSON FELICIA MARCUS AND TO BOARD MEMBERS OF THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD:

Dear Chairperson Marcus and Board Members:

I hereby respectfully submit my comments and objections to the California State Water Resources Control Board, to Chairman of the SWRCB Felicia Marcus, and to the SWRCB Board Members regarding the proposed **General Order WDRs for Small Domestic Wastewater Systems and/or Negative Declaration and Initial Study."** Comment period from June 25, 2014 to July 25, 2014.

I hereby oppose and object to the above referenced proposed general order, initial study and proposed negative declaration labelled **A Negative Declaration and A General Order For Small Domestic Wastewater Treatment Systems,** labelled "**State Water Resources Control Board Water Quality Order 2014-Xxxx-DWQ--General Waste Discharge Requirements For Discharges To Land By Small**

Domestic Systems". I recommend and urge that you vote AGAINST the adoption of this proposed general order, initial study and proposed negative declaration.

In summary, my comments, objections and positions are as follows:

1. I recommend you vote "NO" and AGAINST the adoption of the proposed order as a whole, and reject the initial study and proposed negative declaration, as not in compliance with APA rulemaking requirements under Govt. C. 11340, et seq., and as conflicting with Water Code, Sec. 13291, and the California Constitution, Art. 11, Sec. 7.
2. I object that the initial study and proposed negative declaration and proposed findings overall substantially lack any "substantial evidence" required to support a negative declaration under Public Resources Code, §§ 21080(e) and 21082.2(c), 14 CCR §§ 15064(f)(5) and 15384.
3. I object that this proposed general order is overbroad, too vague, duplicative, arbitrary, harsh and punitive, unenforceable and too costly.
4. I recommend the Board strike out and remove from the proposed general order the list of "prohibitions" on page 13 in section A, as overbroad, too vague, arbitrary, unreasonable, exceeding statutory and constitutional limits of Board's authority, and unenforceable, and interfering with and constituting regulatory revocation and "taking" of vested property rights involved with issued permits and licenses.
5. I object that the proposed general order lacks provisions for grandfathering in issued permits and licenses.
6. I object that the proposed general order lacks procedure for and granting exemptions, required by Water Code 13291 Subsec. (b)(6).
7. I object that the proposed general order fails to comply with federal Clean Water Act regulatory requirements for adequate written, mailed notice to interested parties under Title 40 CFR, Sec. 25.5, and Due Process of Law reasonable notice and reasonable opportunity to be heard requirements of the 5th and 14th Amendments, U.S Constitution.

1. I OBJECT THAT THIS PROCEEDING DOES NOT COMPLY WITH THE RULEMAKING REQUIREMENTS OF THE APPLICABLE APA PROVISIONS UNDER GOVERNMENT CODE, § 11353 AND § 11342.600. SWRCB v. OAL, 12 Cal.App.4th 697, 16 CR2d 25 (1993, 1st Dist.). ADOPTION OF A GENERAL ORDER BY THE SWRCB IS A FORM OF A RULEMAKING PROCEEDING.

I object that the State Water Resources Board lacks authority, that is, jurisdiction, to approve or adopt a "General Order" unless it complies with the California Administrative Code rulemaking provisions as applied to it through Government Code, Sec. 11353, because a "general order" is a "regulation". Government Code, Sec. 11342.600 defines a regulation as follows:

> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation,

order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. (Emphasis added.)

This proposed general order for a CEQA "negative declaration" does not comply in the least the rulemaking proceedings under the California Administrative Procedure Act (APA), Cal. Gov't Code, § 11340 et seq. If adopted by this SWRCB without it conducting those statutorily mandated rulemaking proceedings, it would be void. OAL v. SWRCB, 12 Cal.App.4th 697 (1993, 1st Dist.).

2. I OBJECT TO THE LACK OF CONSTITUTIONALLY AND STATUTORILY ADEQUATE NOTICES OF THESE PROCEEDINGS, THE PROPOSED GENERAL ORDER, THE INITIAL STUDY AND PROPOSED NEGATIVE DECLARATION: I cannot determine and establish that the pending proposed General Order and Negative Declaration above referenced have been served substantially or at all on other agencies in California that are affected by it, i.e., all of the 58 counties in California, all California municipalities, all governmental districts, all California residential property owners, users and occupants. Nor can I establish that constitutionally and statutorily adequate service of notice of proceedings and what is proposed have been effectuated, which comply with federal law under the U.S. Clean Water Act applicable regulations under 40 FCR, § 25.5, requiring that service by mail be accomplished on all of them. I therefore object to lack of constitutionally minimally adequate notice to all interested and affected parties as required by the Due Process Clauses, 5th and 14th Amendments, U.S. Constitution; Mullane v. Central Hanover Trust etc. Bank, 339 U.S. 306; 70 S. Ct. 652 (1950).

3. This proceeding and activity appears to be another, further, different administrative proceeding to adopt more regulations to implement, extend or re-write Water Code, Secs. 13240 through 13399.7, inclusive, and, in particular, Water Code, Sec. 13291, the codification for the legislation adopted under AB 885. However, this Board has already enacted its regulatory rulemaking and enactment of regulations of Water Code, Sec. 13291 in its 2012 OWTS Policy, SWRCB Resolution No. 2012-2032. This proposed order, as a series of proposed regulations, appears to be largely duplicative of the 2012 OWTS Policy, SWRCB Resolution No. 2012-0032, is therefore unnecessary, duplicative and creates potential and actual conflicts with this Board's 2012 OWTS Policy and the Water Code, Secs. 13240 through 13399.7, inclusive. It tends to conflict with the 2012 OWTS Policy and appears to have the effect of overriding, superseding and replacing it.

4. On page 13, in Section A of the proposed general order, a list of proposed regulatory prohibitions is set forth. I urge that it be deleted as overbroad, too vague to be enforceable, arbitrary, unreasonable, and exceeding this Board's statutorily granted authority and the constitutional limits of exercising this Board's and its Regional Boards' police powers. I object that all those listed prohibitions are overboard, vague, arbitrary, unduly harsh, and unnecessarily punitive, unnecessary, and unenforceable and exceed the statutory and constitutional limits of administrative agency rulemaking authority. Fundamental administrative law and constitutional

law place limits on the authority of an administrative agency, as well as the California State Legislature, county, municipal and other government rulemaking entities with (quasi)-legislative authority, by limiting the legislative enactments only to those assertions of legislative authority that are necessary. So where a governmental entity can curb or prevent an evil or activity by regulation, it exceeds its jurisdiction by entirely prohibiting it. San Diego TB Assn. v. East San Diego, 186 Cal. 252; 200 P. 393 (1921); Jones v. City of Los Angeles, 211 Cal. 304, 295 P.14 (1930); 13 Cal. Jur. 3d Constitutional Law § 141.

The California Water Code, Sections 13280 through 13285 provide the bases for evaluating whether complete prohibition of an activity should be ordered. These legislative provisions are self-executing and do not require further legislation or regulations to make same operative and effective. These provisions do not authorize the SWRCB or its Regional Boards to engage in across-the-board complete regulatory prohibitions. They require this agency and its regional boards to engage in case-by-case, permittee-by-permittee, discharger-by-discharger determinations.

In California Water Code, Section 13399.7 the State Legislature set forth the limitations on law enforcement for minor violations. The proposed General Order appears to conflict with and exceed the law enforcement authority of the SWRCB and its Regional Boards in Wat. C. 13399.7 by purporting to establish different and more punitive regulatory action and punishment, particularly by use of regulatory prohibitions which are likely to be confiscatory regulatory takings.

5. I object that the proposed "negative declaration" overall lacks "substantial evidence" to support any conclusions or findings of "no" or "less than" significant adverse effect in a negative declaration.

I object that the initial study is conclusionary and speculative so as not to provide this agency or a court with any evidentiary support whatsoever for a "negative declaration". It is rather pro forma. Facts are not disclosed as bases for the conclusions. It is missing expert opinions. It, therefore, lacks "substantial evidence"-- i.e., facts; reasonable assumptions predicated on facts (inferences); expert opinions supported by facts--that may be considered by the SWRCB or a court under Public Resources Code, §§ 21080(e) and 21082.2(c), 14 CCR §§ 15064(f)(5) and 15384. See CEB California Practice under the California Environmental Quality Act, Ch. 6, § 6.39.

An important purpose of the initial study generated by an agency to support its conclusion of a "negative declaration" is to provide documentation of the factual bases for the findings in a negative declaration that a project will not have a significant effect on the environment. Title 14 CCR § 15063, subd. (c)(5); Citizens, etc. v. Inyo Co., 172 Cal.App.3d 151, at 171.

Title 14 CCR 15384(a) provides the following definition of what "substantial evidence":

> "….enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might be reached."

The initial study fails to disclose the evidence on which that initial study has relied, and, therefore, it does not constitute "substantial evidence" or any evidence at all. Thus, the proposed negative declaration lacks the required evidentiary support for it. Sunstrom v. Mendocino Co., 202 Cal.App.3d 296 (1988); City of Livermore v. LAFCO, 184 Cal.App.3d 531 (1986); CEB California Practice Under CEQA, Ch. 6, § 6.41.

The initial study, at page 63, in section (b) and (c), improperly provides for negative findings and negative declarations which are impermissibly based on future studies and future investigations. In Sundstrom v. Mendocino Co., 202 Cal.App.3d 296, at 306-307 (1988, 1st Dist.), the Appellate Court there explained why future studies do not constitute evidentiary support for a negative declaration. The Appellate Court held:

> The requirement that an applicant adopt measures recommended in a future study is in direct conflict with the guidelines implementing CEQA. California Code of Regulations, title 14, section 15070, subdivision (b)(1) provides that if an applicant proposes measures that will mitigate environmental effects, the project plans must be revised to incorporate these mitigation measures "*before* the proposed negative declaration is released for public review . . . ." Here, the use permit contemplates that project plans may be revised to incorporate needed mitigation measures after the final adoption of the negative declaration. **This procedure, we repeat, is contrary to law.** (Sundstrom v. Mendocino Co., 202 Cal.App.3d 296, at 306). (Emphasis, in bold print, added.)
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> A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA. (Id. at p. 35; No Oil, Inc. v. City of Los Angeles, supra, 13 Cal.3d 68, 81; Environmental Defense Fund, Inc. v. Coastside County Water Dist. (1972) 27 Cal.App.3d 695, 706 [104 Cal.Rptr. 197].) (Sundstrom v. Mendocino Co., 202 Cal.App.3d 296, at 307).

See CEB California Practice Under the California Environmental Quality Act, Ch. 6.

6. IN PARTICULAR, WHAT ABOUT THE POTENTIALLY SIGNIFICANT ADVERSE IMPACTS ON HUMAN BEINGS? Other than a terse, much too conclusionary

statement about humans, the initial study fails to address the numerous staggeringly significant adverse environmental impact issues and facts regarding CEQA Guidelines, Appendix G Checklist, Section XVIII. MANDATORY FINDINGS OF SIGNIFICANCE, Subsection (c), impact issues covering significant adverse effects on human beings under the CEQA Guidelines Checklist. It is dismissive, perfunctory, and barely touches on considerable numbers and size, both qualitatively and quantitatively. Public Resources Code, Sec. 21083(b)(3); 14 CCR 15065(a)(4). CEQA Guidelines, Appendix G Checklist, Section XVIII. MANDATORY FINDINGS OF SIGNIFICANCE, Subsection (c).

It lacks any evidence addressing the growth-inducing potential from the likelihood of ejecting modest-means individuals from their rural residences who will likely migrate into cities and suburban areas, resulting from the significant adverse effect of shuttering rural and non-sewered outlying residential communities that lack the financial resources to install sewering or for which sewering is not otherwise feasible due to geography, geology, earthquake activity and seismic hazards.

It fails to address whether this general order will result, directly or indirectly, in shutting down entire residential communities that lack sewer systems and/or sewage/waste treatment plants and facilities so that residents lose their homes due to their becoming uninhabitable.

It fails to address the potential adverse significant impacts on local governments in urban and suburban areas from a substantial migration and influx of modest-means, indigent individuals and seniors into them, what impacts it will have in population receiving areas on their health care delivery systems, public and private, and their needs for senior and affordable housing and for senior assisted living.

It lacks evidence or discussion about the significant adverse financial impacts residents and residential property owners due to the need and legal requirements for housing relocation, particularly for those of modest means and who are seniors, and the significant adverse psychological and social impacts on humans, particularly the elderly, from forced relocation, as required by state and federal laws. See Title 42 U.S.C, Sec. 4600, et seq.

It lacks evidence about the likely significant adverse impacts on human beings due to the actual expected costs to rural, modest-means, affordable housing owners and residents involved in installing sewer systems and sewage disposal plants. The potential of $500 to $1000 a month assessments for 30 years are confiscatory costs. These assessments reach from $360,000, and up to $500,000 per residential parcel. Many rural and non-sewered parcels are not worth such sums and would be "under water" financially and worthless.

It lacks any evidence or discussion about the funding requirements and the rights of rural residents, affordable housing residents, senior citizens, mobile home parks and trailer parks, modest-means residents in outlying areas on septic to receive funding for upgrading of OWTS under Water C. 13291.5.

It lacks any evidence or discussion about the significant adverse impacts due the requirement that the State fund the state-mandated funding under the California Constitution, Article 13B, Section 6.

The proposed General Order, identified as statewide, would have extensive significant and significantly adverse impacts on the environment statewide on a cumulative basis, and particularly on human beings who are modest, low-income, elderly and seniors on fixed and limited incomes, and on agricultural areas where modest income workers live near rural agricultural operations. It is likely to cause a population shift from rural and suburban areas to cities and thus would be growth-inducing.

It may displace and thereby significantly adversely affect California organic agricultural businesses by making the costs prohibitive to operate certified organic farms so that they are put out of business are likely.

7. Cost shifts to small residential property owners, tenants, low-cost housing occupants and owners, rural, burdens, elderly, young families with low incomes are likely to occur. It allows cost shifting of costs of development that should be shouldered by developers and governmental entities to individual property owners and results in confiscatory regulatory takings without notice or any reasonable opportunity to be heard and displacement without residential housing assistance in violation of Title 42 USC Sec. 4600, et seq.

8. This proposed general prohibition order, and its proposed negative declaration and initial study, focus solely on domestic use, i.e., residential use and residential occupancy of properties. It has the impact of leveling accusations of fault and wrong-doing on residential occupants, users and owners on a disparate, discriminatory basis. Same violates the Due Process Clauses and Equal Protection Clauses of the Fifth and Fourteenth Amendment, U.S. Constitution, and Article I, Sections 1, 16 and 19, California Constitution. While issuing TMDL permitting maximum daily discharge allowances to commercial and governmental interests, residential or domestic "dischargers" are entirely prohibited from any equivalent discharging. This is disparate, invidiously discriminatory, and uneven-handed.

9. There is no indication that the SWRCB, as the lead agency, has made any effort to, or as substantially complied with the statutory requirement that it have consulted with all (or any) responsible and trustee agencies, required by Public Resources Code, Sec. 21080.3(a), 14 CC, Secs. 15063(g), 15073(c), CEB CEQA Sec. 6.43.

Given that this order is statewide, the statutorily required consultations would appear to include all other California State agencies, all 58 counties in California, all municipal governments and their agencies, all governmental districts within California such as water, utility, electricity (i.e., the City of Los Angeles Department of Water and Power, Los Angeles County Waterworks, the United States Environmental Protection Agency and various other affected U.S. Government agencies).

10. This general order would conflict with local ordinances, regulations, and laws which have been enacted to avoid adverse environmental hazards, harms and problems.

11. It lacks substantial or any evidence regarding the adverse effects of the potential failure(s) of sewer systems and sewage plants.

12. It lacks discussion about the State Constitution, Article 13B, Section 6, funding requirements provided by the State for its mandates, and requirements under Water C. 13291.5 for assistance in complying with these proposed regulatory mandates.

13. It conflicts and has the potential to conflict with already-enacted local land use and environmental laws implemented to protect the environment in violation of California Constitution, Art. 13B, Section 6, and Water Code, Secs. 13291 Subsec. (c), 13291.7.

14. I object to the scheduling and time of hearings, comment deadlines and proceedings during summer and holiday periods. This has the practical effort of deterring, discouraging, limiting and preventing public participation by scheduling so that this Board's activities and proceedings conflict with religious and vacation plans. Over-vacation periods and over-holiday period deadline and hearing scheduling sabotage public participation, and thus violate the requirement that this agency facilitate, encourage and promote public participation, as required by Title 40 CFR, Sec. 25.5.

15. Fails to provide for grandfathering in permitted or licensed activities on which permittees have relied to construct, use and operate. Fails to authorize and allow continued use under validly issued permits, licenses and other authorized activities.

16. Fails to provide a protocol for petitioning for an exemption, a compulsory requirement in developing regulations under Water Code, Sec. 13291 Subsec. (b) (6).

Consider, instead, a positive approach that will be supported by California's constituents, rather than this harsh, heavy-handed, cruel and over-controlling, exorbitantly costly, ultimately grossly unpopular and unenforceable tack.

Thank you for considering my legal analysis, whether or not you agree with me.

Respectfully submitted,

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