



Submitted via electronic mail to ddwregunit@waterboards.ca.gov

July 14, 2017

Mr. Zachary Rounds
Regulatory Development Unit, Division of Drinking Water
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: 1,2,3-Trichloropropane Maximum Contaminant Level (SBDDW-17-001) – Response to Comments

Dear Mr. Rounds:

The Association of California Water Agencies (“ACWA”) and the California-Nevada Section of the American Water Works Association (“CA-NV AWWA”) are concerned with a number of the responses issued by the State Water Resources Control Board (“Water Board”) in the *DRAFT – Initial Response to Comments for Proposed 1,2,3-Trichloropropane (1,2,3-TCP) Maximum Contaminant Level (MCL) Regulations* (“Response to Comments”). As stated in our April 19, 2017 joint comment letter, ACWA and CA-NV AWWA, with our respective member agencies and utilities, support the adoption of the proposed MCL for 1,2,3-TCP without further delay. The MCL will set a clear target for water agencies and utilities that will allow them to take the necessary steps towards meeting the MCL and continuing to protect public health. However, our associations remain extremely concerned that the regulations fail to include a sufficient time period for public water systems to implement measures to comply with the new MCL without being deemed in violation.

ACWA and CA-NV AWWA are concerned that the Response to Comments fails to acknowledge the processes that water agencies and utilities must use to comply with the proposed MCL and the impacts that will occur as a result of non-compliance. These impacts include increased costs to ratepayers without any improvement to public health and therefore are not in the public interest. We would like to address the following assertions from the Response to Comments in order to clarify the impacts that can be avoided simply by including a reasonable compliance period in the proposed regulation.

- I. **The process that public agencies must use for installing new treatment devices is lengthy and expensive, even for known treatment technologies. Failing to include a compliance period will not speed up this process.**

The Response to Comments notes that “granular activated carbon is neither a new nor a novel technology requiring extensive preliminary planning and design to implement. A compliance period to provide Public Water Systems additional time to come into compliance with the MCL for 1,2,3-TCP is therefore not proposed as part of the regulations”.¹ This response fails to recognize the very real steps that public agencies and water utilities must use in order to develop and install a new treatment technology, regardless of whether the technology is novel or widely used. As outlined in our previous comments, these include possible land acquisitions, environmental impact assessments, public contracting and bidding requirements, and possible rate increases, all of which are explained in detail below.

- a. *Many wells are located in residential areas that do not have enough land around them to accommodate GAC.*

In this proposed rule, granular activated carbon (“GAC”) is identified as the Best Available Technology (“BAT”) for removing 1,2,3-TCP. GAC has a footprint that is much larger than many wellhead locations can accommodate. This means that in order to install the treatment technology, many water agencies and utilities will have to acquire land adjacent to well sites through costly land purchases or condemnations. If adjacent land is unavailable, water agencies and utilities may have to acquire other parcels of land to house the treatment structures and then connect the treatment devices to the wells via new piping. The amount of time that this may take is variable but cannot reasonably be accomplished in six months or less, which is the amount of time water agencies and utilities will have before the initial compliance period begins in January 2018.

- b. *All treatment technologies, including GAC, have environmental impacts that need to be evaluated and appropriately permitted.*

In order to develop and construct a sizable infrastructure project such as a GAC system, water agencies and utilities must complete environmental reviews to satisfy the California Environmental Quality Act. This is because these types of projects will likely result in construction impacts, possible increased traffic and visual impacts in the communities surrounding the systems, and impacts from discharge of treatment process waste products. In addition, water agencies must hold public hearings and receive public comments prior to proceeding with such projects. There are also a number of operational considerations such as backwash discharges and carbon change-outs that must be appropriately analyzed and permitted by the Regional Water Quality Control Board prior to initiating operations. In their

¹ At p. 15.

joint comments, the City of Chino, Chino Basin Desalter Authority and Monte Vista Water District estimate that the time to install GAC at all of their affected wells is at least two years.²

- c. *In order to finance infrastructure projects, water agencies and utilities may need to raise rates, which requires extensive public outreach and education in order to comply with Proposition 218.*

In their joint comments, the City of Chino, Chino Basin Desalter Authority and Monte Vista Water District estimate that the cost to install GAC at all of their affected wells will range between \$2.5 million and \$15 million per agency.³ Raising the capital for projects of this scale will most likely require these agencies to increase their rates. Public agencies can only raise their rates with voter approval through the Proposition 218 process. This is no trivial task as it requires extensive public education and engagement in order to foster acceptance and understanding of the need for the rate increase. The entire process must be completed well in advance of a water agency proceeding with a large capital investment project of this scale.

- d. *Public water systems must have regulatory certainty in order to justify spending public money on installing new treatment devices.*

The Response to Comments notes that “public water systems may choose to begin taking actions to remain in compliance with the proposed MCL in advance of the regulation effective date”.⁴ Public water agencies cannot responsibly begin spending significant public funds without knowing if a regulation will be finalized, when it will be effective, and what it will require. Water systems *are* able to begin monitoring and scoping the extent of treatment that may be necessary to meet a proposed MCL in advance of the regulation effective date. ACWA and CA-NV AWWA appreciate the grandfathering provision for existing monitoring data included in this regulation as it supports these early monitoring activities.

As noted in their joint comments, the City of Chino, Monte Vista Water District, and the Chino Basin Desalter Authority will be significantly impacted by the 1,2,3-TCP MCL. All three agencies have taken appropriate, proactive, and early actions to address the change in regulation prior to it going into effect, including: investigations into the extent to which water supplies are impacted by this chemical, changes to existing operational practices and shifting water supply sources to achieve early compliance with the MCL, assessments of the specific scope and treatment facilities that will be required to be constructed in order to achieve compliance under all supply conditions (e.g., loss of imported supply), and entering into contracts to provide interim and long-term treatment of impacted supplies. While the proposed MCL will result in significant financial and water supply reliability impacts for these agencies, they are already acting to address the issue.

² Joint comments, at p. 3.

³ *Ibid.*

⁴ At p. 14.

Even with such early action, it still normally takes water agencies and utilities at least two years to raise sufficient funds, complete environmental review, bid construction contracts, and complete installation of treatment systems, even when the treatment technology is a known technology such as GAC. Until the final MCL is adopted, it is not possible for water agencies and utilities to be certain how much treatment, if any, will be required to be in compliance. This makes it nearly impossible for water agencies and utilities to meet a compliance deadline that begins less than six months after the MCL is adopted, as this regulation proposes. The timeline outlined in this regulation is insufficient to accommodate these required processes and therefore will place public water agencies in compliance jeopardy without improving public health or speeding up the treatment installation process. Therefore, ACWA and CA-NV AWWA respectfully request that the regulation be amended to include an appropriate compliance period.

II. A reasonable compliance period is necessary to avoid water supply reliability impacts and unnecessary costs to ratepayers.

The Response to Comments notes that “although Public Water Systems may wish to avoid being declared noncompliant with the proposed MCL during the period between finding a source out of compliance and completing either installation of treatment or other activities which may bring the water system back into compliance, providing a compliance period is not necessary and not in the public interest”.⁵ ACWA and CA-NV AWWA completely disagree with this assertion. Once a water agency or utility is declared to be non-compliant, it will be subject to enforcement action that can include both compliance orders and fines, and is vulnerable to third party citizen lawsuits. The costs of legal fees and fines are passed directly onto the water system’s ratepayers and do nothing to speed up completion of treatment system construction or achievement of desired public health outcomes.

a. Non-compliance unnecessarily threatens the credibility of public water agencies and leads to increased costs to consumers in the long term.

If adopted on July 18, 2017, the draft regulation would require public water systems to begin monitoring for 1,2,3-TCP for purposes of determining compliance starting in January 2018, which is less than six months after the regulation would become effective. Although compliance based on a running annual average of monitoring results would give some affected water systems a few months before being deemed in violation of the adopted MCL, many other affected water systems would be deemed in violation of the new standard soon after monitoring begins. This will *not* speed up the process of bringing new treatment systems online. In fact, this may have the opposite effect of creating confusion and distrust among the public at the same time that the public water agency is attempting to educate the public in order to fund the necessary treatment.

⁵ At p. 15.

The Response to Comments indicates that the Water Board considers this an acceptable outcome, noting that “the public may lose confidence in their water supply or supplier but the public also has a right to know when their drinking water does not meet public health standards”.⁶ It is surprising and alarming that a state public health agency should suggest such an outcome as being acceptable. Water agencies and utilities are entrusted with providing a safe, reliable water supply to the public, and with educating the public about the content and quality of their water in their annual consumer confidence reports (“CCR”) and other notifications. Loss of confidence in a public water system undermines the validity of these reports and notifications as well as the extensive monitoring that water agencies perform. This loss of confidence can lead to significant additional costs to consumers and the environment, as customers may turn to purchasing bottled water to replace their public water supply.

b. Non-compliance makes water agencies vulnerable to lawsuits that further affect their credibility and drive up costs for ratepayers.

The Response to Comments asserts that “the concerns about the impacts of noncompliance may be less than expected. Although there have been several lawsuits against water systems due to the quality of the water supplied, staff are aware of only a relatively small number of such suits. Unlike the federal Safe Drinking Water Act, there is no citizen suit provision under the State Safe Drinking Water Act (SDWA), and civil penalties cannot be imposed under the federal SDWA citizen suit provisions”.⁷ While this is accurate, it does not prevent a party from filing a writ of mandamus to require a public water system to comply with the law and seek attorney’s fees under the state Code of Civil Procedure (“CCP”) private attorney general statute.⁸ Further, while the California Supreme Court⁹ and the California Court of Appeals¹⁰ have made it clear that following the law and applicable Safe Drinking Water regulations provides a safe harbor for water providers, not being in “compliance,” i.e. being told to limit the levels of a substance but not being able to do so because of the burden of dealing with the various components discussed herein to permit treatment, is an invitation for such suits. These toxic tort lawsuits are very costly whether they are for a single plaintiff or multiple plaintiffs and are not covered by insurance. The need to expend funds to defend such suits further increases costs to ratepayers while potentially delaying compliance with the new MCL as financial resources are drained and staff resources are diverted away from compliance activities to answering public records requests and assisting counsel in the defense of the litigation. These suits have occurred and continue to occur and while there may be “a few” in litigation now this does not in any way limit the exposure to such litigation when reasonable compliance time is not considered. Such suits have repeatedly occurred in this state over the last several decades and the lack of reasonable compliance schedules is an open invitation for further litigation.

⁶ At p. 15.

⁷ *Ibid.*

⁸ CCP §1021.5.

⁹ *Hartwell v. Superior Court* (2000) 27 Cal.4th 256

¹⁰ *In re Groundwater* (2007) 154 Cal. App. 4th 659

Lawsuits also leave the public with an unsavory opinion of their water suppliers who are compelled to appear defensive, secretive and therefore “guilty” due to the privileged and confidential attorney client provisions that are routinely invoked once a lawsuit is filed.

c. Non-compliance threatens water supply reliability.

The Response to Comments notes that “the most contaminated sources may be shut down and the vast majority of water systems will continue to serve drinking water despite an exceedence of the MCL...” Not all public water systems have a replacement supply that will compensate for the lost supply from shut wells. In particular, small disadvantaged communities may not have access to imported water, or it may be too expensive for them to utilize. Thus, the smallest water systems will be disproportionately affected by this regulation.

III. Compliance periods for new drinking water MCLs drive technology advancements that benefit communities and help avoid the installation of obsolete technologies.

The federal arsenic rule is a good example of the beneficial technology advancements that can occur when water systems have time to evaluate identified BAT and develop new treatment technologies. Few public water systems installed activated alumina treatment identified by USEPA as the BAT that would be widely used to meet the revised arsenic MCL. Within two years of adopting the MCL, research performed by water agencies and their consultants resulted in better, more cost effective technologies that had fewer impacts on communities and the environment. Without the compliance period provided in the arsenic rule, public water systems would have had to forego the research needed to evaluate technologies and hastily install one of the limited technologies identified when the rule was promulgated. Many more of the impacted public water systems would have ended up with treatment systems that were ineffective or too costly to operate because they were selected to satisfy a compliance order rather than being based on pilot tests and comprehensive technology evaluations that consider water quality conditions and waste management requirements.

The State’s MCL for hexavalent chromium is a more recent example that clearly demonstrates the problem with not providing a satisfactory compliance period. Following adoption of the hexavalent chromium MCL, public water systems were forced to make decisions based on limited treatment technology information while facing certain violation of the new MCL during the initial quarterly compliance monitoring period that began six months after the new MCL became effective. With the largest number of groundwater sources in the State impacted by the MCL, the Coachella Valley Water District (“CVWD”) spent millions of dollars to initiate design and environmental review work to install the State’s identified BAT and possibly limit the damages from violating the new MCL. The selected State BAT would have placed vessels over 20 feet tall on residential-sized lots within the views of hundreds of homes and would have included facilities that produced large amounts of mixed hazardous and radioactive waste. One community objected so strongly to the proposed facilities that CVWD had to certify the less intense alternative of the Environmental Impact Report (“EIR”) that eliminated facilities and provided no treatment solution to an entire community that housed thousands of residents. SB 385, signed by the Governor as an urgency measure, allowed CVWD

to maintain compliance with the MCL and focus limited resources on exploring alternative treatment technologies that would have fewer impacts on communities and the environment.

Following adoption of SB 385, CVWD evaluated numerous technologies with bench and pilot testing. A promising alternative technology identified by research performed by others was tested by CVWD and simplified during bench and pilot testing completed in May 2017. The technology produces no hazardous waste and uses an approved drinking water additive and low profile equipment that is simple to operate and fits on small well sites. One state small public water system in Santa Barbara County recently received approval to use this alternative technology and, on July 12, 2017, CVWD received written approval from the Water Board's Division of Drinking Water to perform a full-scale demonstration using the alternative technology. This project will reduce hexavalent chromium in the drinking water served from multiple groundwater wells to an entire community much more quickly than it would have taken to install any of the State-identified BATs. SB 385 provided CVWD the opportunity to find an alternative technology that is better for the environment, better for the community and will save its' rate payers hundreds of millions in capital and operating costs over the next 20 years. Without the time provided by SB 385 to evaluate alternative technologies, CVWD estimates it would have spent over \$100 million to date just to begin installing State identified BAT that will not be operational until late 2019 and will be considered obsolete by the end of this year when results of a successful demonstration of the alternative technology are available.

IV. A reasonable compliance period can be implemented in a manner that maintains water supplier transparency and accountability to the public, and is consistent with existing law.

a. Including an appropriate compliance period in the regulation does not preclude public notification regarding presence of contaminants.

The Response to Comments notes that “the public may lose confidence in their water supply or supplier but the public also has a right to know when their drinking water does not meet public health standards”.¹¹ Once the MCL for 1,2,3-TCP is adopted by the Water Board, state law requires that water agencies “shall initiate the quarterly monitoring for that chemical in January of the calendar year after the effective date of the MCL”.¹² If the Water Board were to establish a later compliance date, in the intermediate time between MCL adoption and the compliance date water agencies would still begin the required annual monitoring and the results would be reported in the agency's CCR.

The federal arsenic rule provides an excellent example of how this would work. Once the arsenic rule was adopted, public water agencies were required to comply with the monitoring requirements immediately upon the effective date of January 22, 2001. The regulation included specific public notification requirements that also took effect immediately

¹¹ At p.15.

¹² CCR § 64445(b).

and were included as amendments to the CCR.¹³ However, in recognition of the fact that public water systems needed time to install appropriate treatment to meet the new arsenic MCL, systems were not considered to be in violation until the compliance date of January 23, 2006. Thus, the public was informed of the presence of arsenic in their water and its potential health effects while the water agencies still had a reasonable period of time to develop and install the necessary treatment devices to meet the MCL prior to being deemed out of compliance.

ACWA and CA-NV AWWA recommend that the Water Board follow a similar process in developing the MCL for 1,2,3-TCP. This can be accomplished by amending the draft MCL as follows:

§64445 (b) For any organic chemical added to Table 64444-A, the water system shall initiate the quarterly monitoring for that chemical in January of the calendar year after the effective date of the MCL. The provisions for determining a violation per §64445.1(c)(5)(A), (B) and (C) shall take effect for the calendar year that begins 3 years following initiation of monitoring unless the Water Board determines that an earlier date is practicable, except the Water Board may allow up to 2 additional years to comply if the Water Board determines that additional time is necessary for capital improvements.

ACWA also recommends amending the Draft Resolution as follows:

WHEREAS:

7. Following the conclusion of the public comment period on April 21, 2017, State Water Board staff has compiled, review, and responded to every comment received during the comment period;
8. Based on public comment staff determined an appropriate compliance period for water systems would be warranted, in accordance with §1412(b)(10) of the Federal Safe Drinking Water Act;
89. Based on the staff evaluation, none of the public comments resulted in further modifications to the proposed regulations or the IS/MND, an no additional public comment period was required under the APA or CEQA;

b. Compliance periods are consistent with existing law.

ACWA and CA-NV AWWA consider the federal arsenic rule a good example of a regulatory process that the Water Board can follow as it proceeds with developing the 1,2,3-TCP MCL regulation. As highlighted in our previous comments, the federal Safe Drinking Water

¹³ 40 CFR §141 Subpart O, Appendix A.

Act (“SDWA”) provides for a phase-in period of up to five years to ensure that water systems have a reasonable amount of time to undertake the work that is necessary to comply with new drinking water standards.¹⁴ In addition, SB 385 signaled the intent of the State Legislature and Administration that a reasonable compliance period can be an appropriate practice if it is developed along with appropriate safeguards and public notification requirements. While our associations favor the approach outlined in the federal SDWA, the process outlined in SB 385, which allows agencies to submit compliance plans for Water Board approval, is allowing affected water systems to successfully achieve compliance with the MCL for hexavalent chromium and would work as an alternative.

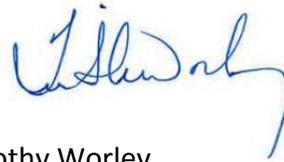
V. Conclusion

ACWA and CA-NV AWWA strongly urge the Water Board to further revise this regulation as suggested prior to adoption. The inclusion of an appropriate compliance period is critical for the reasons outlined in detail above. We are available to meet with you to discuss these comments and proposed changes in further detail. Please do not hesitate to contact Rebecca at rebeccaf@acwa.com or (916) 441-4545, or Tim at tworley@ca-nv-awwa.org or (909) 291-2102.

Sincerely,



Rebecca Franklin
Senior Regulatory Advocate
Association of California Water Agencies



Timothy Worley
Executive Director
California-Nevada Section, AWWA

cc: Honorable Chair and Board Members, State Water Resources Control Board
Mr. Darrin Polhemus, Deputy Director, Division of Drinking Water, State Water Resources Control Board

¹⁴ SDWA §1412(b)(10).