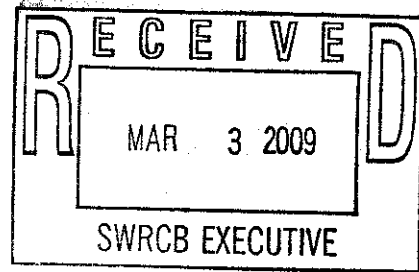



MOUNTAIN HOUSE[®]
COMMUNITY SERVICES DISTRICT
230 S. STERLING DRIVE, SUITE 100, MOUNTAIN HOUSE, CA 95391
(209) 831-2300 • (209) 831-5610 FAX
www.ci.mountainhouse.ca.us

Via Electronic and U.S. Mail

March 3, 2009

Tam Doduc, Chair, and Members
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
c/o Jeanine Townsend, Clerk to the Board
commentletters@waterboards.ca.gov



Re: Response of the Mountain House Community Services District to Proposed Order on Petition of WDRs for City of Tracy (SWRCB/OCC File A-1846(a) and A-1846(b))—March 17, 2009 Board Meeting

Dear Chair Doduc and Board Members:

The Mountain House Community Services District (MHCSD) appreciates the opportunity to provide comments on the Proposed Order regarding the waste discharge requirements issued to the City of Tracy. The MHCSD holds an NPDES permit for discharge to Old River, which was issued by the Central Valley Regional Water Quality Control Board (Regional Water Board) on the same date as the Tracy permit.

The MHCSD concurs with the comments submitted by the Central Valley Clean Water Association. We are writing separately to emphasize our significant concern regarding the implications of the approach to salinity required by the Proposed Order for publicly owned treatment works that discharge to waters that are within the coverage of the Bay-Delta Plan. As discussed below, we believe the Proposed Order is not legally required, is inconsistent with ongoing state and Regional Water Board efforts to address salinity comprehensively, and will present very real compliance costs for POTWs without a corresponding improvement in the health of the Bay-Delta. For these reasons, we respectfully request that the State Water Board reject the provisions of the Proposed Order relating to salinity.

The Bay-Delta Plan establishes water quality objectives for electrical conductivity (EC) to protect agricultural beneficial uses. The EC objectives at issue are for Old River in the Southern Delta and include 700 $\mu\text{mhos/cm}$ between April and August and 1,000 $\mu\text{mhos/cm}$ between September and March. (Bay-Delta Plan at p. 13.) To implement these objectives, the Permit requires that the Tracy discharge not exceed a monthly EC average equivalent to the objectives. (Permit at pp. 9, F-43.) These limits do not take immediate effect unless and until the City fails to submit and implement a Salinity Plan in accordance with the Permit. (*Id.* at p. 9.) The Permit also includes an interim mass limit for total dissolved solids (TDS) that requires the Tracy WTP's EC concentration to decrease as the discharge increases. (*Id.* at pp. 12, F-46.) The Proposed Order concludes that this approach to regulating Tracy's discharge was not lawful. The MHCSD respectfully disagrees.

As an initial matter, the MHCSD notes that Tracy's discharge does not have reasonable potential to cause or contribute to an exceedance of the water quality objective for salinity, and thus no water quality based effluent limitations (WQBELs) are required. Even under worst-case conditions, the Tracy discharge has little impact on salinity in Old River. (Permit at pp. F-46-F-47.) If the City of Tracy ceased to discharge altogether, the river's salinity problems would continue. (*Id.* at p. F-48.) The salinity problems result mainly from low flows and discharges of the saline drainage water. (*Id.* at p. F-44.) Indeed, Revised Water Rights Decision 1641 (D-1641) and the Bay-Delta Plan make the Department of Water Resources and United States Bureau of Reclamation responsible for meeting the salinity objectives.

Even if Tracy's discharge could be considered to cause or contribute to an in-stream excursion above the numeric EC objective for Old River, the Permit includes a permissible alternative to *numeric* final effluent limits. While the permit for a discharge that has reasonable potential "must contain effluent limits," they need not be numeric. (40 C.F.R. § 122.44(d)(1)(iii); *Communities for a Better Environment v. State Water Resources Control Board* (2003) (*Tesoro*) 109 Cal.App.4th 1089, 1091; see also *In the Matter of the Petition of Citizens for a Better Environment*, Order No. WQ 91-03 at p. 48.) In *Tesoro*, the Court was mindful of the challenges of addressing a pollutant as ubiquitous as dioxin through stringent regulation of *de minimis* point sources. The Court noted the "Regional and State Boards concluded the problem of dioxins had to be addressed comprehensively at a regional level, by the completion of a TMDL." (*Tesoro*, 109 Cal.App.4th at 1107.) In the interim discharge was only allowed at current levels, "which are not a significant source of the Suisun Bay dioxin problem." (*Ibid.*) In *Tesoro*, the petitioners had argued, similar to CSPA's contentions here, that the WQBELs were "contingent and precatory." The Court rejected that view, concluding that this argument "simply ignore[s] the reality of a carefully conceived, agency-approved, long-term pollution control procedure for a complex environmental setting." (*Id.* at 1108.)

Salinity in the Bay-Delta presents an equally compelling case for a flexible approach to regulating POTWs during the interim period before a comprehensive salinity

management strategy can be adopted. Complete removal of all of the POTW discharges from the Delta—including Tracy's and the MHCSD's—would not have any measurable effect on salinity levels. The State Water Board is in the process of reevaluating the appropriateness of the existing numeric standards, which were adopted without any consideration of the impacts of applying the strict numeric values to municipal wastewater agencies. The Central Valley Board is working with stakeholders on an ambitious and comprehensive process to develop a salinity and nitrate management plan that will, among other things, set beneficial uses and establish water quality objectives. This effort is known as "Central Valley Salinity Alternatives for Long Term Sustainability or "CV SALTS." Both the State Water Board planning effort and the CV SALTS initiative recognize that the salinity cannot be properly controlled and managed by focusing on point source discharges. While it is appropriate and fair to require all dischargers to take reasonable steps to reduce salinity during the development of these plans, there is no sound reason to force Tracy and other POTWs to undertake costly capital improvements in advance of developing an attainable standard protective of beneficial uses and an implementation plan for achieving the objectives.

At a minimum, even if the State Water Board finds the specific effluent limitation imposed on Tracy to be flawed in some way, the Board should revise the Proposed Order to make clear that an alternative narrative effluent limitation that meets the requirements of federal regulations is a permissible approach to regulating salinity in POTW discharges. Under the federal regulations, "effluent limitation" means "any restriction imposed by the Director on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of the 'contiguous zone,' or the ocean." (40 C.F.R. § 122.2.) Moreover, the Act allows WQBELs to include "alternative effluent control strategies" that may constitute narrative limits. (33 U.S.C. § 1312(a).)

The Proposed Order attempts to distinguish the Manteca Order on the grounds that Tracy's discharge does not meet the 1,000 µmhos/cm limit imposed in the Manteca Order. (Proposed Order at p. 9 n.13.) While we do not believe that this is a legitimate basis for rejecting the persuasive logic of the Manteca Order, we note that the MHCSD's discharge, like Manteca's, does consistently comply with 1,000 µmhos/cm, and yet the Proposed Order would seem to disallow the use of a similar approach in the MHCSD's case as well as Tracy's. While not precedential, the Manteca Order recognized that the Delta's salinity problems are complex:

[T]he salinity problems in the southern Delta are the result of many inter-related conditions, including water diversions upstream of the Delta, water diversions within the Delta for export and local use, high levels of salinity in irrigation return flows discharged to Delta waterways and tributaries, groundwater inflow, seasonal flow variations, and tidal conditions. (Manteca Order at p. 10.)

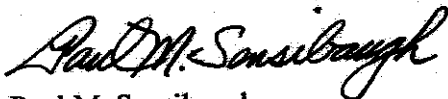
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This is equally true today. The Permit recognizes the complexity of the salinity issues involved and that the Bay-Delta Plan relies primarily upon flow requirements to implement the EC objectives. (Permit at p. F-44-F-48; see Bay-Delta Plan at pp. 3, 27; D-1641 at pp. 83, 88.) The Regional Water Board also found that because of Old River's high salinity and the amount of flow, reverse osmosis would have relatively little effect on EC in Old River. (Permit at pp. F-46-F-47.) In light of all of these factors, the Permit provisions related to salinity are appropriate, prudent and lawful.

As a final matter, the MHCSD is greatly concerned that the Proposed Order will place POTWs in noncompliance and expose these local public agencies to mandatory minimum penalties (MMPs). Under the State Water Board's compliance schedule policy, an in-permit compliance schedule would not be available for effluent limitations derived from the Bay-Delta objectives, which have been in effect unchanged for years. While MMP relief may be available outside the permit under an enforcement order such as a time schedule order, such relief is limited by statute to 5 years, which by any measure is insufficient time to develop and implement the technically complex salinity management plans. If the State Water Board intends to apply the numeric Bay-Delta Plan objectives to POTWs in the form of numeric effluent limitations, the amendments to the plan should include an authorizing compliance schedule provision to allow dischargers some reasonable time to come into compliance with the limitations.

For the reasons outlined above, the MHCSD requests that the State Water Board reject the provisions of the Proposed Order relating to salinity.

Sincerely,



Paul M. Sensibaugh
General Manager

c: Michael F. McGrew, District Counsel
Nader Shareghi, Public Works Director
Morgan Groover, Development Manager
Harpal Singh, Operations and Maintenance Director
John Miller, Southwest Water Company
Mike Buckley, Southwest Water Company
Michael Bryan, Robertson-Bryan, Inc.
Tess Dunham, Somach, Simmons & Dunn