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February 13, 2007

Ms. Gita Kapahi, Chief  
Bay Delta/Special Projects Unit  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000

Re: *Consideration of the Southern Delta Water Quality Objectives for Salinity in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*

Dear Ms. Kapahi:

Contra Costa Water District (CCWD) appreciates the opportunity to provide this supplementary letter following up on the comments presented orally on January 19, 2007, the second day of the Workshop on the above subject.

As previously noted, CCWD does not support the relaxation of the southern Delta agricultural objectives. CCWD believes, first and foremost, that any additional studies that are to be undertaken concerning the southern Delta agricultural objectives should be coordinated with other studies currently on-going in the Delta and must evaluate the water quality impacts elsewhere in the Delta that would result from each proposed alternative to the water quality objective or implementation measures.

Second, CCWD observes that federal and state anti-degradation policies seriously constrain, if not outright prohibit, the relaxation of the southern Delta water quality objectives.

Third, CCWD cautions the Board not to accept the arguments presented by Kern County Water Agency that suggest that a philosophical construct such as "naturally occurring water quality" or "natural flow" as a limitation on water quality objectives or that the project's obligations are solely to mitigate adverse water quality impacts proximately caused by the projects.

1. **Although the scope of the Workshop is relatively narrow, the Board should coordinate its consideration of the Southern Delta Water Quality Objectives with other ongoing studies, and evaluate whether revisions in the Southern Delta Water Quality Objectives impact water quality elsewhere in the estuary.**

The current Workshop was noticed as a proceeding to "develop and manage a thorough study of studies of salinity issues in the southern Delta." CCWD agrees with Board staff that the evidence presented during periodic review – primarily during Issue 10 – did not provide a sufficient scientific or technical basis to relax these objectives and agrees with stakeholders who suggested that what is needed is "an independent scientific investigation (similar to the investigation on which the objectives are based) ... to review the issues raised." (Appendix 1 to the Revised Draft Water Quality Control Plan dated November 29, 2006 approved by SWRCB Resolution No. 2006-98 last month, p. 71.)

If new studies are chartered, they should

- recognize that recirculation of salts occurs on the San Joaquin River, particularly under low river flow conditions, and suitably address the further concentration of salts that will occur if water higher in salinity is exported and subsequently returned

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to the Delta via the San Joaquin River after consumptive use, with even higher salt loading;

- consider Best Management Practices such as reducing loading by reducing return flow quantities, by reducing salt concentrations in return flows, or both;
- evaluate relocation of agricultural drains in key areas of the southern Delta, particularly in channels with stagnant or near stagnant conditions, where significant water quality improvements may be achieved without simply re-directing impacts.<sup>1</sup>

Such studies should also be closely coordinated with existing regional efforts, not only those of the Central Valley and Delta Salinity Management Plan, the San Joaquin River Water Quality Management Group, and other similar efforts, to achieve a robust and comprehensive salinity management strategy, that considers multiple methods of implementation. CCWD supports those efforts as an effective way to improve water quality in the southern Delta. In this regard, CCWD recommends funding for the Westside Regional Drainage Plan.

Such studies should also be coordinated with the Pelagic Organism Decline studies – for, as set forth in the second attachment to CCWD’s January 5, 2007 letter – there are indications that increased salinity may play a significant role in the declining fisheries.

Such studies must be coordinated with the information developed through the CALFED Water Quality Program and the Central Valley Drinking Water Policy. It is not hard to imagine that a relaxation of the southern Delta agricultural objectives would work at cross purposes with contemplated new water quality objectives for bromides, total organic carbon and other precursors of disinfection by products.

Furthermore, any studies conducted in connection with the possible degradation of the of the southern Delta agricultural objectives must, as a matter of both federal and state law, examine the impacts on other beneficial uses throughout the Delta.

The federal antidegradation policy – discussed at greater length under the next heading – specifically requires the Board to “assure water quality adequate to protect existing uses fully” “[i]n allowing ... degradation or lower water quality.” (40 CFR § 131.12, subd. (a)(2).)

As the Supreme Court noted in a different context:<sup>2</sup>

In setting standards, the State must comply with the following broad requirements: [¶] “Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established *taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]*” *Ibid.* [¶] See also § 1251(a)(2).

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<sup>1</sup> In cooperation with dischargers, CCWD has successfully re-located an agricultural drain from Rock Slough and a municipal discharge near Old River, both of which resulted in immediate improvements in water quality at CCWD intakes.

<sup>2</sup> In a case involving a water quality certification (required by section 401 of the Clean Water Act for the approval of a hydropower project), the United States Supreme Court explained that “§ 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. .... The limitations included in the certification become a condition on any federal license.” (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 707.)

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*(PUD No. 1 of Jefferson County v. Washington Dept. of Ecology (1994) 511 U.S. 700, 704-705 (emphasis added).)*

Similarly, under state law, the state antidegradation policy currently embodied in SWRCB Resolution No. 68-16 – discussed in greater length under the next heading – provides for the maintenance of “existing high quality water ... until it has been demonstrated to the State that any change ... will not unreasonably affect present and anticipated beneficial use of such water...” The plain effect of this language is to require an examination of the effects on other beneficial uses within the Delta.

CCWD further asserts that, in order to provide the “hard look” at possible environmental effects that CEQA requires, even in the certified regulatory program context, such studies must review the impacts of relaxed objectives on salinity elsewhere in the Delta. As noted on pages 3 and 4 of its January 5, 2007 letter, CCWD believes certain modeling activities are necessary to properly review these impacts, and that the results of these modeling runs should include water quality impacts at the location of municipal intakes and other key long-term monitoring stations within the Delta, with discussion of the maximum and minimum daily values.

**2. Federal and state anti-degradation policies seriously constrain, if not outright prohibit the relaxation of the Southern Delta Water Quality Objectives**

As a matter of federal law, the State antidegradation policy must be interpreted – and implemented – in a manner consistent with the federal antidegradation policy, which prohibits degradation of water quality in “Outstanding National Resource Waters”(Tier III waters), or where water quality is “just adequate” (Tier I waters); the federal antidegradation policy only allows degradation of Tier II waters, waters “in which water quality exceeds that necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water.” Assuming that it can reasonably be concluded that Delta water quality “exceeds that necessary to support propagation of fish” – notwithstanding the growing body of evidence that higher fall salinities are closely associated with the rapid decline of the pelagic fishery in the Delta – the deferral antidegradation policy requires existing water quality to “be maintained and protected unless the State finds... that allowing lower water quality is necessary to accommodate important economic or social development *in the area in which the waters are located.*” (Emphasis added.) Although the “*area in which the waters are located*” in this particular proceeding could be construed to be the southern portion of the statutory Delta, the requirement that impacts on other beneficial uses be evaluated effectively mandates that the entire Delta (and areas immediately adjacent thereto) be deemed to be the “*area in which the waters are located.*” Finally, the analysis of water quality impacts must look not only at the incremental effect of the relaxation of the objectives at issue but must also examine the cumulative impacts of other water-degrading activities.

**a. Antidegradation policies were required before the NPDES system was adopted and were never intended to apply only to waste discharges.**

It has long been a substantive requirement of federal law that the water quality standards of each state contain antidegradation provisions. In fact, these antidegradation provisions preceded the Clean Water Act, which first introduced the concept of permitting pollution through the National Pollution Discharge Elimination System upon its enactment in 1972:

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When the Clean Water Act was enacted in 1972, the water quality standards of all 50 States had antidegradation provisions. These provisions were required by federal law. See U.S. Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1-2 (Aug. 1968); see also Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 IOWA L.REV. 643, 658-660 (1977). By providing in 1972 that existing state water quality standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See 33 U.S.C. § 1313(a). EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly recognized the existence of an “antidegradation policy established under [§ 303].” § 1313(d)(4)(B).

(*PUD No. 1 of Jefferson County, supra*, 511 U.S. at 718.)

The California antidegradation provisions were adopted as SWRCB Resolution 68-16 on October 28, 1968, entitled “Statement of Policy with Respect to Maintaining High Quality of Waters in California.”<sup>3</sup> The resolution begins by declaring that “it is the policy of the State that ... the waters of the State shall be so regulated as to achieve [the] *highest water quality consistent with maximum benefit* to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State.”<sup>4</sup> (State Board Resolution 68-16 (emphasis added).)

In this context, the State Board resolved that “[w]henver the existing quality of water is better than the quality established in policies [now objectives]..., such existing high quality *will be maintained* until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.” (SWRCB Res. 68-16, first resolved clause, item 1 (emphasis added).) Similarly, numbered item 2 – which, unlike item 1, is principally concerned with discharges – concludes by stating “the highest water quality consistent with maximum benefit to the people of the State will be maintained.”

The following year, the Legislature enacted the Porter-Cologne Act, and therein provided the following further direction to the State Board: “the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation...” In Water Code section 13241, the Legislature reiterated that the “water quality objectives” established under the Porter-Cologne Act must “ensure the reasonable protection of beneficial uses,” but “recognized that it *may* be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses.” (Emphasis added.)

In 1972, there were two significant developments in the law applicable to water quality. First, in April the Supreme Court ruled in *Illinois v. City of Milwaukee* (1972) 406 U.S. 91, 102 that “it is federal, not state, law that in the end controls the pollution of . . . navigable waters.”

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<sup>3</sup> The title of Resolution 68-16 is the antithesis of the sort of degradation under consideration.

<sup>4</sup> The resolution attributes this policy to the Legislature, which the year before enacted Water Code section 174 stating its intention “to provide for consideration of water pollution and water quality, and availability of unappropriated water whenever ... water quality objectives are established.”

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Second, in October, Congress enacted the Federal Water Pollution Control Amendments of 1972,<sup>5</sup> which upon enactment of the 1977 amendments, became the Clean Water Act. Nine years later, the United States Supreme Court confirmed that the Clean Water Act supplanted the federal common law of nuisance. (*Middlesex County Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 21-22.)

In 1983, the federal antidegradation policy was promulgated by the EPA as section 131.12 of title 40 of the Code of Federal Regulations. The federal antidegradation policy directs states to “develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy ... consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected....<sup>6</sup>

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.”

In 1987, Region 9 of the EPA issued a document entitled *Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12* to “provide[] ... guidance for the States of Region 9 on the development of procedures for implementing State anti degradation policies.” (*Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12* (1987) p. 1)<sup>7</sup> Section 303(c) of the Clean Water Act (33 U.S.C. §1313) confirms that the EPA has the power to veto any relaxation of water quality standards in violation of the federal policy discussed in the text.

The *Region 9 Guidance* document identifies three types of water, each corresponding to the first three subdivisions of the federal antidegradation policy quoted above:

Tier III waters, which have been designated as Outstanding National Resource Waters (40 CFR 131.12(a) (3)),

Tier I waters, where the water quality is “just adequate to support the propagation of fish, shell fish and wildlife in and on the water,”

Tier II waters, waters “in which water quality exceeds that necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water.”

(*Region 9 Guidance, supra*, p. 2.) The *Region 9 Guidance* document goes on to unequivocally state that “actions which would lower water quality in [either Tier I or Tier III] waters are prohibited.” (*Region 9 Guidance, supra*, p. 4.)

It seems highly doubtful that it could reasonably be concluded in light of the difficulties

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<sup>5</sup> As explained by the United States Supreme Court, the original Federal Water Pollution Control Act, which relied primarily upon state enforcement of water quality standards, “proved ineffective.” (*Middlesex County Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 11.)

<sup>6</sup> As discussed below, there is a provision for allowing degradation of so-called “Tier 2” waters in limited circumstances.

<sup>7</sup> This document will be cited as “*Region 9 Guidance*.”

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encountered by Delta fisheries in the past few years that the waters of the Delta are Tier II waters “in which water quality exceeds that necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water.”

**b. The Board is required to apply federal and state antidegradation policies in considering the Southern Delta Water Quality Objectives.**

The Clean Water Act plainly requires the Board to apply the federal and state antidegradation policies when evaluating whether to replace a more stringent objective (the term “standard” is used in the Clean Water Act) with a less stringent one.<sup>8</sup> As the Supreme Court noted in the context of a water quality certification<sup>9</sup> required for the approval of a hydropower project:

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an “antidegradation policy” – that is, a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality standards “only if such revision is subject to and consistent with the antidegradation policy established under this section.” § 1313(d)(4)(B). Accordingly, EPA’s regulations implementing the Act require that state water quality standards include “a statewide antidegradation policy” to ensure that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 CFR § 131.12 (1993). At a minimum, state water quality standards must satisfy these conditions.

(*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 705.) That case also makes clear that states must implement their antidegradation policies:

EPA has promulgated regulations implementing § 303’s antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to “develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy.” 40 CFR § 131.12 (1993). These “implementation methods shall, at a minimum, be consistent with the ... [e]xisting instream water

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<sup>8</sup> There has been discussion about the propriety of an agricultural objective that varies by water year type, perhaps being more lenient in drier years and more stringent in wetter years. CCWD’s position is that the propriety of such an objective would depend upon the anticipated flows, pumping rates, the degree and timing of the changes, and how that all of these factors balance out. However, the Board needs to keep in mind that averaging water quality may not adequately protect the beneficial use. Averaging water quality does not work for drinking water quality or for the protection of fish and wildlife. Where people and fish are concerned, it is the months of poor quality water that is the problem. People drink water every day, dry year or wet year, and fish must live in the water. Studies suggest that it is the dry period, high salinity that is the problem for the pelagic fisheries that are now crashing.

<sup>9</sup> As explained by the United States Supreme Court, “§ 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. .... The limitations included in the certification become a condition on any federal license.” (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 707.)

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uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” *Ibid.* EPA has explained that under its antidegradation regulation, “no activity is allowable ... which could partially or completely eliminate any existing use.” EPA, Questions and Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner “consistent” with existing uses of the stream. .... The Solicitor General, representing EPA, asserts, Brief for United States as Amicus Curiae 18-21, and we agree, that the State’s minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an “existing instream water us[e]” will be “maintained and protected.” 40 CFR § 131.12(a)(1) (1993).

(*PUD No. 1 of Jefferson County, supra*, 511 U.S. at 718-719.)

The *Region 9 Guidance* document explains the first step of any analysis of whether to relax water quality objectives as follows: “If the action could or will lower water quality, and the affected water is not a Tier I or Tier III water, then the steps to be followed to determine whether or not 40 CFR 131.12 is satisfied are described in the following sections of this guidance.” (*Region 9 Guidance, supra*, p. 4.)<sup>10</sup>

The federal antidegradation policy is very specific about what the Board may lawfully consider in determining whether to allow the possible degradation of Tier II waters: “that quality [i.e., quality in excess of that “necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water “] shall be maintained and protected *unless the State finds ... that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.*” (40 CFR § 131.12, subd. (a)(2) (emphasis added).)<sup>11</sup>

In the current context, “the area in which the waters are located” must, at a minimum, comprise the southern Delta area protected by the objectives at issue. Conversely, the phrase “the area in which the waters are located” does *not* encompass any of the areas to which water is exported.<sup>12</sup> Of course, as noted above the further condition upon the relaxation of objectives in

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<sup>10</sup> The “sections” referenced in the quotation in the text describe 4 tasks in deciding whether to allow degradation of Tier II waters: “Task A – Identify Actions that Require Detailed Water Quality and Economic Impact Analyses; Task B – Determine that Lower Water Quality will Fully Protect Designated Uses; Task C – Determine That Lower Water Quality is Necessary to Accommodate Important Economic or Social Development in the Area in which the Waters are Located; and Task D – Complete Intergovernmental Coordination and Public Participation.” (*Region 9 Guidance, supra*, pp. 5-12.)

<sup>11</sup> The omitted phrase requires the Board to “full[y] satisf[y] the intergovernmental coordination and public participation provisions of the State’s continuing planning process.”

<sup>12</sup> Of course, by law “the area in which the waters are located” includes the “area immediately adjacent [to the Delta] which can conveniently be supplied with water therefrom,” which area is protected by the Watershed of Origin statutes and the Delta Protection Act. See e.g., Water Code §§ 11460 (projects are not allowed to deprive locals of the “prior right to ... the water reasonably required to adequately supply the beneficial needs of the ... area”), 12201 (“the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area ... is necessary to the peace, health, safety and welfare”), 12931 (“the Sacramento-San Joaquin Delta [vis-à-vis the State Water Project] shall be deemed to be within the watershed of the Sacramento River”); 12220 (defining the statutory Delta.)

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Tier II waters – that “[i]n allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.” – effectively requires that the Board evaluate the water quality impacts of relaxation throughout the Delta. This means that – assuming that it properly concludes that the waters of the southern Delta are Tier II waters – that the Board must maintain the existing objectives “unless the State finds ... that allowing lower water quality is necessary to accommodate important economic or social development” in (and immediately adjacent to) the Delta.

Finally, as noted above, the antidegradation policy is not merely a federal regulation; it has been incorporated as a substantive requirement of the Clean Water Act. (*PUD No. 1 of Jefferson County*, supra, 511 U.S. at 705; *Region 9 Guidance*, supra, p. 1 (“Section 303(a) (4) of the Clean Water Act explicitly refers to satisfaction of the antidegradation requirements of 40 CFR 131.12 prior to taking various actions which would lower water quality.”).)

**c. The Board has previously recognized that the regional boards are required to apply federal and state antidegradation policies in considering relaxation of the Southern Delta Water Quality Objectives.**

In Water Quality Order 86-17<sup>13</sup> the Board described the process of applying the antidegradation policies as follows:

The State Water Resources Control Board and the Environmental Protection Agency have adopted similar policies intended to protect the high quality of state and federal waters. The State Board has adopted Resolution No. 68-16, the “Statement of Policy with Respect to Maintaining High Quality of Waters in California,” as part of state policy for water quality control. See Cal. Water Code §13140 et seq. Resolution No. 68-16 has also been adopted, as a general water quality objective, in all sixteen regional water quality control plans. The Environmental Protection Agency has adopted a federal anti degradation policy as part of the agency’s water quality standards regulations. 40 C.F.R. §131.12. Before approving any reduction in water quality, or any activity that would result in a reduction in water quality, the Regional Board must first determine that the change in water quality would not be in violation of State Board Resolution No. 68-16 or the federal anti degradation policy. Because the Regional Board did not make the required determination, as part of waste discharge requirements permitting a significant increase in receiving water pollutant levels, the Regional Board’s action was improper.

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<sup>13</sup> SWRCB Order WQ 86-17 was cited in Order WRO 2004-0043-EXEC (addressing potential water quality degradation resulting from Joint Point of Diversion) for the following proposition: “The requirement in SWRCB Resolution No. 68-16 to maintain the existing high quality of water unless a change (1) is consistent with maximum benefit to the people of the state, (2) will not unreasonably affect the beneficial use of the water, and (3) will meet the water quality objectives is itself a water quality objective.” (SWRCB Order WRO 2004-0043-EXEC, p. 7, fn. 6.)



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State Board Resolution No. 68-16 requires that:

“ ... the existing quality of water ... will be maintained until it is demonstrated to the State that any change will be consistent with the maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of water and will not result in water quality less than that prescribed [by other applicable water quality objectives] .. “

In determining whether changes in water quality will be consistent with “the maximum benefit to the people of the State,” the State and Regional Boards are guided by the policies of the Porter-Cologne Act. The Porter-Cologne Act evinces a policy of ensuring consistency with federal Clean Water Act requirements. To take maximum advantage of federal programs, and to avoid direct regulation by the Environmental Protection Agency of activities already subject to regulation by the State and Regional Boards, the state’s standard setting and waste discharge control programs must ensure that, at a minimum, all applicable Clean Water Act requirements are satisfied. See Cal. Water Code §§ 13160, 13170, 13370; recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project: Water Quality Control Program 31 (1969).

Clearly, it is in the maximum benefit of the people of the State that the State and Regional Boards ensure that the State’s water quality programs are consistent with the federal antidegradation policy. The State and Regional Boards have routinely followed the federal antidegradation policy. See, e.g., State Water Resources Control Board, Lake Tahoe Basin Water Quality Plan 37 (1980).

[¶¶]

Where this test is applicable under federal law, State Board Resolution No. 68-16 incorporates this test in determining whether changes in water quality are consistent with the maximum benefit to the people of the State. [¶].... State Board Resolution No. 68-16 incorporates the test set forth in the federal antidegradation policy ... where the federal anti degradation policy is applicable. .... [¶] On its face, the federal anti degradation policy is applicable. It is clearly intended to apply to ... changes in water quality control plan objectives. See 40 C.F.R. §131.12; Environmental Protection Agency, Questions and Answers on: Antidegradation 2, 6. ....

(SWRCB Order WQ 86-17, 16-19.)

In 2004, the Board reiterated that the antidegradation policy is itself a water quality objective. (See Order 04-43, fn. 6 (“The requirement in SWRCB Resolution No. 68-16 to maintain the existing high quality of water ... is itself a water quality objective. (See SWRCB Order WQ 86-17 at 17 [‘Resolution 68-16 has been adopted, as a general water quality objective, in all ... regional water quality control plans.’].)”

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- d. **In examining the water quality impacts of the relaxation of the Southern Delta Water Quality Objectives, the federal antidegradation policy requires an examination of the cumulative impacts of other water-degrading activities.**

The *Region 9 Guidance* document describes the necessary analysis as follows:

Repeated or multiple small changes in water quality (such as those resulting from actions which do not require detailed analyses) can result in significant water quality degradation. To prevent such cumulative adverse impacts, a baseline of water quality must be established for each potentially affected water body, prior to allowing any action which would lower the quality of that water. This baseline should remain fixed unless some action improves water quality. At such time, the baseline should be adjusted accordingly.

Proposed actions to lower water quality should then be evaluated with respect to the baseline and the resultant water quality change should be determined. This determination should include the cumulative impacts of all previous and proposed actions and reasonably foreseeable actions which would lower water quality below the established baseline.

(*Region 9 Guidance* document, *supra*, p. 6.)

3. **The opinions in the *State Water Resources Control Board* cases and in the *El Dorado Irrigation District* case do not limit the Board's discretion to either set water quality objectives that may exceed the quality naturally available or to impose on the projects salinity control in excess of what might be required to mitigate the project's adverse impacts.**

Kern County Water Agency would have this Board – in conducting an analysis of “the highest water quality which is reasonable” (Water Code § 13000) – instead set less stringent objectives because they are “capable ... of being fully met by imposing terms and conditions on water rights permits.” This proposition is evidently based on a misreading of the lengthy opinion penned by Justice Robie in *State Water Resources Control Board cases* (2006) 136 Cal.App. 4<sup>th</sup> 674.<sup>14</sup>

Contrary to Kern County's apparent misreading, the opinion in *State Water Resources*

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<sup>14</sup> In the *State Water Resources Control Board cases*, the State Water Contractors argued that the trial court's decision wrongly “rest[ed] on ‘the assumption that water right decisions adopted by the Board must provide for full and immediate implementation of the water quality objectives set forth in any applicable water quality control plan.’” (*State Water Resources Control Board cases*, 136 Cal.App. 4th, at 729.) The appellate opinion expressly rejected the argument, concluding instead that “[t]he guiding principle is that the Board's power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing.” (*Ibid.*) The opinion noted in footnote 21 that “we see no reason the Board could not have commenced a regulatory proceeding to amend the 1995 Bay-Delta Plan to modify the flow objectives in the plan for the purpose of authorizing the San Joaquin River Agreement and the Vernalis Adaptive Management Plan” (*ibid.*), and went on to conclude that “the Board cannot – as it attempted to do here – make a de facto amendment to a water quality objective in a water quality control plan by simply refusing to take the action that it has identified as necessary to achieve that objective” (*id.*, at 732).

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*Control Board cases* confirmed the prior holding in *United States v. State Water Resources Control Bd.* (“*Racanelli*”) (1986) 182 Cal.App.3d 82, which explained that in the proceedings leading up to D-1485, “the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights.” ( *Id.* [*Racanelli*,] at p. 120....)” (*State Water Resources Control Board cases, supra*, at 699.) That is precisely what Kern County Water Agency is arguing here: that the Board should set objectives based on what can be enforced against the projects’ water rights. As *Racanelli* definitively put it, “nothing in the federal act or California’s Porter-Cologne Act allows the Board to limit the scope of its basin-planning function to such water quality standards as are enforceable under the Board’s water rights authority.” (*Racanelli, supra*, 182 Cal.App.3d, at 120.)<sup>15</sup>

Kern County Water Agency’s further argument that conditions on water rights cannot exceed the obligations of the water right holder to mitigate is likewise flatly contradicted by *Racanelli*. As *Racanelli* stated on pages 141 to 142:

Under its reserved jurisdiction to modify the permits (§ 1394), the Board was authorized to impose upon the projects water quality standards at whatever level of protection the Board found reasonable (§ 13241), whether “without project” or greater. [footnote omitted] By the very nature of the reserved jurisdiction, the Board was empowered to impose such terms and conditions upon the project permits as would in its judgment best serve “the public interest.” (§§ 1253, 1257, 1258; *Johnson Rancho County Water Dist. v. State Water Rights Board, supra*, 235 Cal.App.2d 863, 45 Cal. Rptr. 589; *Bank of America v. State Water Resources Control Bd., supra*, 42 Cal.App.3d 198, 212, 116 Cal.Rptr. 770.) ... Nothing in the statutory scheme limits the Board’s supervisory authority over appropriation permits to provide a level of water quality protection which exceeds the quality afforded by water rights.”

(*Racanelli, supra*, 182 Cal.App.3d, at 141-142.) As was noted in *State Water Resources Control Board cases* (quoting from *Racanelli*):

“But as fresh water was increasingly diverted from the Delta for agricultural, industrial and municipal development, salinity intrusion intensified, particularly during the dry summer months and in years of low precipitation and runoff into the river systems. One of the major purposes of the projects was containment of maximum salinity intrusion into the Delta. By storing waters during periods of heavy flow and releasing water during times of low flow, the freshwater barrier could be maintained at a constant level.” ( *United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 107, 227 Cal.Rptr. 161.)

(*State Water Resources Control Board cases, supra*, 136 Cal.App. 4<sup>th</sup> at 694.)

The reliance on the recent opinions in *El Dorado Irrigation District v. SWRCB* (2006) 142 Cal.App. 4<sup>th</sup> 937 and the *State Water Resources Control Board cases, supra*, for the proposition that “Delta water users ... do not have the right to demand that the [projects] provide water quality enhancements through stored water releases” is misplaced where the water is released to meet water quality objective, not for the purpose of direct diversion.

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<sup>15</sup> In a subsequent portion of the opinion, the court stated, “at the risk of tedious repetition, we reiterate that the Board’s obligation, when setting water quality standards, is not to protect water rights but to provide “reasonable protection of beneficial uses.” (§ 13241.)” (*Racanelli, supra*, 182 Cal.App.3d, at 144.)

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In *El Dorado Irrigation District*, the primary issue was whether Term 91 – requiring the El Dorado Irrigation District (“El Dorado”) to bypass water when water was being released from storage by the projects to meet Delta water quality objectives – could lawfully be applied to El Dorado when it was not applied against users junior to its rights with a 1927 priority date. (*El Dorado Irrigation District, supra*, at 942-943.) The appellate court “agree[d] with the trial court that the Board abused its discretion when it included term No. 91 in El Dorado’s permit without including that term in the licenses and permits of junior appropriators, because the imposition of term No. 91 in these circumstances subverted the rule of priority without adequate justification.” (*El Dorado Irrigation District, supra*, at 972.)

The portion of the *El Dorado Irrigation District* opinion quoted in Kern County Water Agency’s statement was in response to the trial court’s additional ruling that “the preference in Water Code sections 11460 and 11128 for El Dorado’s use of water within the watershed of origin to meet El Dorado’s increasing development needs was intended to trump the Projects’ use of that water-including previously stored water-for project operations outside the watershed.” The appellate decision rejected that argument, ruling that “although El Dorado may be entitled to assert a priority under section 11460 over the Bureau and the Department to the diversion of water originating in the watershed of the South Fork American River, that priority does not extend to water the projects have properly diverted to storage at an earlier date. If El Dorado wants water properly stored by the projects, it must pay for it.” (*Id* at 976.) This language makes clear that what was at issue was the direct diversion by El Dorado of the very water released from storage by the projects.

Similarly, the selective quotation from the opinion in the *State Water Resources Control Board* cases proves little. Immediately following the second sentence quoted by Kern County Water Agency, the court draws a distinction between water released for diversion by Delta users and water released for water quality purposes:

Nothing in the Delta Protection Act purports to grant any kind of water right to any particular party. The Delta Protection Act does preclude the diversion of water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta; however, it is for the Board to decide, in the exercise of its judgment, what level of salinity control should be provided and what is an adequate supply of water for users in the Delta.

(*Id.*, at 771-772.) Plainly, neither opinion is authority for the existence of an obligation of Delta users to pay for stored water release to meet water quality objectives, a proposition not considered in either case. (See *State Water Resources Control Board cases*, 136 Cal.App.4<sup>th</sup> at 758.)

As noted above, one of the key criticisms of the Board actions in adopted D-1485 as set forth in the *Racanelli* decision was that the Board confused its water quality and water right responsibilities. (*E.g.*, *Racanelli, supra*, 182 Cal.App.3d, at 116 (basing objectives on “water flows necessary to protect the existing water rights in the Delta against impairment by the projects ... is fundamentally defective”); at 117-118 (“the Board’s ... approach to that task [taking action necessary to protect the consumptive uses (agricultural, industrial and municipal) in the Delta] was seriously flawed by equating its water quality planning function with protection of existing water rights”); at 118 “Board erroneously based its water quality objectives upon the unjustified premise that upstream users retained unlimited access to upstream waters, while the projects and Delta parties were entitled only to share the remaining water flows”); 119-120 (“combining the water quality and water rights functions in a single proceeding ... was unwise”

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and “compromised [the Board’s] important water quality role”).)

Unlike the opinions in the *State Resources Control Board* cases and *El Dorado Irrigation District*, the *Racanelli* opinion squarely faced the question of whether compensation was required for water released to meet a water quality objective:

The U.S. Bureau, together with the state and federal contractors, argued below that the Board had no authority to compel the projects to provide extra water in order to protect the quality of canal waters because the District has no vested water rights. Any additional water, it is argued, must be purchased by the District.

The trial court agreed and held the drinking water standards for the Contra Costa Canal invalid. The court reasoned that since the District had neither riparian, appropriative nor perfected watershed rights, the District was limited to its contractual rights, and it had “bargained away” its right to water of a specified quality.

The question thus presented is troublesome. Yet, a careful analysis impels the conclusion that the court’s basic premise – that water quality protection hinges on ownership of water rights – is faulty.

As discussed earlier, in performing its planning function, the Board is authorized to establish water quality objectives which in its judgment will ensure “the reasonable protection of beneficial uses ...” (§ 13241, emphasis added), a concept embracing a wide spectrum of consumptive and nonconsumptive, instream uses. (§ 13050, subd. (f).) Thus, the Board’s authority in setting water quality standards is not limited to the protection of water rights but extends to the protection of all beneficial uses from degradation of water quality, even if the resulting level of water quality exceeds that provided by water rights. Accordingly, we conclude that the Board acted within its broad water quality planning authority to set standards to protect municipal or domestic supplies.

Enforcement of the standards, however, presents an entirely different issue. Succinctly stated, the question is whether the Board has authority to compel the projects to comply with such water quality standards. *The purpose of the trial court’s ruling, it seems apparent, was not to invalidate the standards themselves but rather to deny the Board’s attempt to compel compliance by the projects to supply salinity control water free of charge. We think the court’s ruling was incorrect.*

Under its reserved jurisdiction to modify the permits (§ 1394), the Board was authorized to impose upon the projects water quality standards *at whatever level of protection the Board found reasonable* (§ 13241), *whether “without project” or greater.* [footnote omitted.] By the very nature of the reserved jurisdiction, the Board was empowered to impose such terms and conditions upon the project permits as would in its judgment best serve “the public interest.” (§§ 1253, 1257, 1258; *Johnson Rancho County Water Dist. v. State Water Rights Board*, *supra*, 235 Cal.App.2d 863, 45 Cal.Rptr. 589; *Bank of America v. State Water Resources Control Bd.*, *supra*, 42 Cal.App.3d 198, 212, 116 Cal.Rptr. 770.) While the scope of that duty requires consideration of the public benefits derived from the projects (§ 1256), it also requires that water quality needs be taken into account. (§§

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1243.5, 1257, 1258, 13000.) *Nothing in the statutory scheme limits the Board's supervisory authority over appropriation permits to provide a level of water quality protection which exceeds the quality afforded by water rights.*

(*Racanelli, supra*, 186 Cal.App.3d, at 140-142 (emphasis added).)

Finally, the time has long past for reliance on the case of *Town of Antioch v. Williams Irrigation District* (1922) 188 Cal. 451 for the proposition that a Delta user is bound to accept whatever level of salinity intrusion that may result from upstream diversions is wholly misplaced. Since 1922, the State adopted a constitutional prohibition on unreasonable use, which arguably is triggered now if not enough water flows down through the Delta into the Bay, the two massive water projects were constructed, each with a primary purpose of controlling the very same salinity intrusion of which the Town of Antioch spoke, the Clean Water Act was adopted to protect and enhance water quality as a national objective, Porter Cologne was enacted to protect and enhance water quality as a state objective, and the state and federal Endangered Species Acts were adopted, which have radically affected how the projects and other diverters operate.<sup>16</sup>

In conclusion, no longer is a reasonable argument available that water quality protection is constrained by water rights. Moreover, the fact that it is now beyond doubt that “[o]ne of the major purposes of the projects was containment of maximum salinity intrusion into the Delta ... [b]y storing waters during periods of heavy flow and releasing water during times of low flow,” (*Racanelli, supra*, 182 Cal.App.3d, at 107),<sup>17</sup> necessarily means that water quality objectives are not limited to the quality that would be available from “natural flows.” The fact that the projects store and release water to meet water quality objectives does not “trigger” an obligation for someone directly or indirectly benefited thereby to compensate the projects.

For the reasons set forth above, CCWD respectfully asserts, first, that additional studies concerning the southern Delta agricultural objectives, if any are undertaken, should be closely coordinated with other on-going studies and should analyze and present the water quality impacts elsewhere in the Delta that would result from each proposed alternative. Second, as explained in detail above, federal and state anti-degradation policies seriously constrain, if not outright prohibit, the relaxation of the southern Delta water quality objectives. Third, the Board should reject the arguments presented by Kern County Water Agency that “naturally occurring water quality” or “natural flow” limit permissible water quality objectives and that each project’s obligations cannot exceed “mitigating their impacts”; as was explained above, existing caselaw precludes each of these arguments.

Yours Very Truly,



Carl P. A. Nelson

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<sup>16</sup> See e.g., *Racanelli supra*, 182 Cal.App.3d, at 117 (notwithstanding the *Antioch* case, “existing constitutional and legislative authorities encompass the Board’s obligation to protect the quality of the Delta waters from saltwater intrusion”).

<sup>17</sup> See also *Racanelli, supra*, 182 Cal.App.3d, at 135-136 (rejecting the United States’ argument that salinity control was merely “incidental” and concluding instead that that “salinity control was an integral part of the announced congressional purposes possessing a priority at least equal to that of transport to water-deficient areas”).