BEFORE THE
STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 - 0013

In the Matter of

IMPERIAL IRRIGATION DISTRICT'S (IID) AND SAN DIEGO COUNTY WATER AUTHORITY'S (SDCWA) AMENDED JOINT PETITION FOR APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED WATER FROM IID TO SDCWA AND TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, AND PURPOSE USE UNDER

PERMIT 7643 ISSUED ON
APPLICATION 7482 OF
IMPERIAL IRRIGATION DISTRICT

SOURCE: COLORADO RIVER

COUNTY: IMPERIAL

PETITION OF SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT FOR RECONSIDERATION OF FINAL ORDER

Hearing Date: December 30, 2002
Time: 9:00 a.m.

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I. THE COACHELLA VALLEY PM_{10} DUST PROBLEM AND SCAQMD'S ROLE IN COMBATTING AIR POLLUTION.

The South Coast Air Quality Management District (SCAQMD) is the regional air pollution control agency responsible for attaining state and federal air quality standards within its jurisdiction. (Heath & Safety Code §40462.) The SCAQMD includes all or major portions of Los Angeles, Orange, Riverside, and San Bernardino Counties. The Coachella Valley and the northern portion of the Salton Sea, which is significantly affected by the water transfer involved in this case, are within the SCAQMD's jurisdiction and area of responsibility. The SCAQMD has filed previous comments on the transfer and is very appreciative of the fact that the State Water Resources Control Board ("Board") has listened to its comments and made modifications to the Order to address SCAQMD's concerns.

As noted in our earlier comments, the Coachella Valley is classified as a "serious" nonattainment area under the federal Clean Air Act for particulate matter less than 10 microns in diameter (known as PM_{10}). Because the Coachella Valley failed to attain the national ambient air quality standards for PM_{10} by the statutory deadline of 2001, the SCAQMD has submitted to EPA a State Implementation Plan amendment which is required to impose "most stringent measures"[1] for control of PM_{10}. If approved by EPA, this plan will allow the Coachella Valley until 2006 to attain the standards. Even after attainment, the SCAQMD will need to submit a maintenance plan to demonstrate how it will maintain air quality within the health-based federal standards. (Clean Air Act, §110 (a), 42 U.S.C. §7410 (a).)

In the Coachella Valley, the primary contributor to PM_{10} emissions is windblown dust. The PM_{10} attainment plan does not include any significant margin of error for attaining the standard. Any additional windblown dust emissions will make it more difficult to maintain the standards even after attainment. The SCAQMD is very concerned about potential impacts on public health from PM_{10} emissions resulting from fallowing agricultural land and especially from exposure of the

[1] This means the Coachella Valley must implement the most stringent measures that are included in any area's SIP or achieved in practice. (Clean Air Act § 188 (e), 42 U.S.C. § 7513 (e).)

shoreline of the Salton Sea as the water transfer results in less runoff to replenish the sea. As stated in the EIR, there may be 16,000 acres of lakebed eventually exposed. (Master Response to Comments, §3.9.6.)

The air agencies in this state have substantial and sad experience with very significant PM_{10} problems caused by exposed lakebed resulting from water transfers, notably at Owens Lake. While the EIR notes potential differences between the Owens Lake and Salton Sea areas, the EIR's ultimate conclusion was that it is impossible to predict the magnitude of PM_{10} impacts. (Master Response to Comments, §3.9.4.) Therefore, impacts similar to Owens Lake cannot be ruled out.

In the scientific community, PM_{10} is considered a serious health threat because particles this small are easily breathed deep into the lungs. PM is associated with a number of significant respiratory and cardiovascular diseases. It has been linked to increased hospitalization, increased emergency room visits, increased respiratory symptoms, and increased disease — especially among children and individuals with lung disease, such as asthma. It also decreases lung function and can cause premature death. See 64 Fed. Reg. 1,770, 1,773 (1999).

In addition, the record in this case indicates that the lakebed may contain toxic contaminants that may become airborne in the event of shoreline exposure. (Master Response to Comments, §3.13.3.) Scientific study of the effects of PM_{10} continues to demonstrate serious health effects. (California Air Resources Board and Office of Environmental Health Hazard Assessment Staff Report for Public Hearing to Consider Amendments to the Ambient Air Quality Standards for Particulate Matter and Sulfates, located at ftp://ftp.arb.ca.gov/carbis/regact/aaqspm/isor.pdf.)

The SCAQMD respectfully requests this Board to reconsider its Order and make specific clarifications and modifications. These clarifications will assure that the duty of affected parties to comply with SCAQMD PM_{10} rules, as well as those of the Imperial County Air Pollution Control District (ICAPCD), is clearly understood. In addition, this Board should ensure that in determining the feasibility of air quality mitigation measures, all available resources are considered, not just

those of the Imperial Irrigation District (IID), and particularly including the agencies that will benefit from the water transfer being approved in this project.

Finally, the SCAQMD has two CEQA concerns. First, the Order improperly defers the formulation of mitigation measures until after project approval. Second, the Board could not properly carry out its duty under the California Environmental Quality Act (CEQA) to balance the benefits of the project against the unavoidable adverse impacts, because the magnitude of the adverse PM_{10} health impacts is unknown and the design and feasibility of mitigation measure is unknown. These CEQA concerns can be addressed only by ordering a further CEQA analysis at the time the PM_{10} impacts can be fully analyzed, and by the Board reserving authority to limit further water transfers, if after such CEQA analysis the Board finds there are significant air quality impacts that cannot feasibly be mitigated and the Board cannot find that the benefits of future water transfers continue to outweigh such adverse impacts.

II. CLARIFICATIONS REQUESTED IN THE ORDER.

A. The Board Should Clarify that Permittee Shall Comply with PM_{10} Requirements of SCAQMD as well as ICAPCD.

The South Coast Air Quality Management District is extremely grateful that the Board has listened to its concerns and added language on p.74 of the order (§6.3.8.) specifying that the Division Chief shall consult with the SCAQMD as well as ICAPCD in determining whether PM_{10} mitigation measures are feasible. Similarly, on p.91 (condition 8 of the order, §10.0), the SCAQMD has been added as a consulting agency for determining whether mitigation is feasible. The SCAQMD believes that the Board intends to fully recognize the SCAQMD's role and jurisdiction in this matter. However, to make the order complete and accurate, it is necessary to add the SCAQMD to condition 8, p. 90 of the Order, so that the language will read as follows**:**

"Permittee shall also comply with any relevant requirements of the State Implementation Plan for PM_{10} Emissions (SIP), <u>or PM_{10} rules</u>, as amended by the Imperial County Air

Pollution Control District (ICAPCD) or the South Coast Air Quality Management District (SCAQMD)." (The addition of the reference to PM_{10} rules is discussed immediately below.)

Since the SCAQMD has jurisdiction over areas affected by the water transfer, the permittee should be required to comply with SCAQMD rules and SIP provisions as well as those of ICAPCD. It would be an error of law within the meaning of Title 23, §768 (d) regarding reconsideration of Board orders, for the Order not to properly reflect SCAQMD's jurisdiction.

B. The Board Should Clarify That Permittee Shall Comply with Applicable PM_{10} Rules as well as SIP Requirements.

The SCAQMD respectfully requests this Board to add the words "or PM_{10} rules" to Condition No. 8, p.90 of the Order so that the language reads **"Permittee shall also comply with any relevant requirement of the State Implementation Plan for PM_{10} Emissions (SIP) or PM_{10} rules, as amended by the Imperial County Air Pollution Control District (ICAPCD) or the South Coast Air Quality Management District (SCAQMD)."** (The addition of a reference to SCAQMD is discussed immediately above.)

SCAQMD requests the addition of the words "or PM_{10} rules" to Condition 8 for two reasons. The first reason is a simple matter of timing. Air districts may adopt PM_{10} rules before they are actually approved by EPA into the SIP. These rules are fully enforceable as a matter of state law even before they are approved by EPA. Under the Clean Air Act, EPA has 18 months to approve a rule into the SIP, so there is likely to be delay before the rule is approved. (Clean Air Act §110 (k), 42 U.S.C. §7410(k).) Moreover, EPA frequently does not act on rules within the time required by the Clean Air Act. Several years ago, in fact, SCAQMD had to file suit to compel EPA to act on 51 rules that were long overdue for approval into the SIP. Therefore, permittee should be required to comply with all SCAQMD & ICAPCD PM_{10} rules even if they are not in the SIP.

Secondly, under state law (Health & Safety Code §39606) the California Air Resources Board is required to adopt state ambient air quality standards that may be more stringent than the

federal standards, and has done so for PM_{10}. The SCAQMD is required to adopt a plan, and rules to implement that plan, to achieve the state ambient air quality standards by the earliest practicable date. (Health & Safety Code §40462, 40440 (a).) Therefore, permittee should be required to comply with rules adopted to achieve the state ambient air quality standards for PM_{10} even if they are not in the SIP. It would be an error of law for the Board to fail to recognize the independent state law requirements to control PM_{10} as well as the duty to comply with rules to attain federal ambient air quality standards before they are included in the SIP.

C. The Board Should Clarify that Nothing in the Order Affects Any Person's Duty to Comply with Air Quality Rules of SCAQMD and ICAPCD.

Condition No. 8, p.91, of the Order specifies that IID must report any air quality mitigation measure that it determines to be infeasible. Thereafter, if the Chief of the Division of Water Rights determines, after consultation with the air districts, that the measure is in fact feasible and necessary, permittee IID shall implement the measure.

At the Board hearing on October 28, 2002, the Board's staff counsel, Dana Differding, explained that nothing in the order "in any way is intended to or can impair the independent authority of the air district to regulate air pollution." The SCAQMD appreciates this clarification, which in our view demonstrates the proper legal relationship among the agencies. Permittee has independent duty to comply with air district regulations regardless of whether they are identified as mitigation measures. By the same token, permittee must implement feasible mitigation measures as determined by the Chief of the Division of Water Rights, regardless of whether the air districts have adopted them as rules.

We believe it is important that this legal clarification be included in the order itself. Because of the significance of this Board's decision, the parties will look to this order as governing law for many years to come. The SCAQMD is concerned that the parties may assume that the mitigation requirements of this order embody all of their duties with respect to air pollution, when in fact they have an independent duty to comply with air district rules. Therefore, the SCAQMD

respectfully requests that a sentence be added to Condition 8 to read as follows: **"Nothing in this order is intended to or can affect the independent authority of the air districts to regulate air pollution."** It would be an error of law not to recognize these principles.

III. IN DETERMINING FEASIBILITY OF PM_{10} MITIGATION MEASURES, THE BOARD SHOULD CONSIDER THE RESOURCES OF AGENCIES THAT ARE BENEFICIARIES OF THE TRANSFER, NOT JUST IID.

Pursuant to state law, economic factors are to be considered in determining whether a mitigation measure is feasible. (Pub. Res. Code §21061.1.) SCAQMD is very concerned that years from now, as the shoreline of the Salton Sea becomes exposed, IID may claim it does not have adequate resources to carry out needed mitigation measures. The SCAQMD believes it is appropriate for those who benefit from the water transfer to bear an equitable share of the responsibility for mitigating the adverse effects on public health due to air pollution resulting from the transfer.

This Board has already recognized that principle. As explained in footnote 8, p. 26, of the decision, mitigation measures must be implemented regardless of who pays for them, and it need not be IID that pays for them and implements them. This principle should be explicitly included in the order so that, in determining feasibility of air quality mitigation measures, all appropriate resources are considered, not just IID's. In particular, resources of the agencies that are the beneficiaries of the transfer should be considered.

Therefore, SCAQMD respectfully requests that a sentence be added to Condition No. 8, p. 91, to read as follows: **"In determining feasibility of air quality mitigation measures, the Division Chief shall consider all available resources, including those of beneficiary agencies to the water transfer."** SCAQMD believes this Board has the power and duty to so condition the Order and that it would be an error in law to fail to do so. Indeed, this Board should condition the Order to assure that adequate funding is made available by the beneficiary agencies, so that the commitment to mitigation measures is truly meaningful.

IV. THE BOARD SHOULD REQUIRE FUTURE CEQA ANALYSIS OF THE PM_{10} IMPACTS OF SHORELINE EXPOSURE, AND RESERVE AUTHORITY TO LIMIT ONGOING TRANSFERS IF THE BOARD FINDS SIGNIFICANT ADVERSE IMPACTS THAT CANNOT FEASIBLY BE MITIGATED AND THE BOARD CANNOT MAKE FINDINGS OF OVERRIDING CONSIDERATIONS

A. The Order Improperly Defers Formulation of Mitigation Measures to the Future without Assuring That Physical Changes to the Environment Will Not Occur Unless Adverse Effects Are Mitigated

The SCAQMD recognizes that this Board has been placed in a difficult position because the EIR has concluded that it is not possible to determine the magnitude of potential adverse air quality effects of the transfer. Therefore, the EIR properly concludes that, at least as to shoreline exposure, the effects are likely to be significant.[2] As a result, it cannot be determined exactly what measures will be needed to mitigate these impacts or whether such measures are feasible. Under these circumstances, the Board should not irrevocably bind future generations to breathing poor air. Instead, the Board should reserve the authority to make the decision regarding mitigation measures at a later point when the adverse impacts are fully understood.

It is well settled under CEQA that an agency may not defer the formulation of mitigation measures until after project approval. (*Sundstrom v. County of Mendocino*, (202 Cal. App. 3d 296 (1988); *Oro Fino Gold Mining Corp. v. County of El Dorado*, (225 Cal. App. 3d 872 (1990)). An exception exists where it is impractical to devise mitigation measures at an early stage in the process, as long as "future action to carry a project forward is contingent on devising" appropriate mitigation. *Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011, 1028. In this case, however, the Board has not made future action contingent on further analysis and development of appropriate mitigation measures. As a result, the Order improperly defers

[2] SCAQMD believes that the same conclusion should apply to impacts from fallowing land. If impacts are uncertain but may be significant, the conclusion should be "significant." SCAQMD's significance threshold for PM_{10}, which should be applied here, is 150 lbs./day.

formulation of mitigation measures until after project approval. It would be an error of law not to correct this problem. The Board should modify the Order to ensure that any action which will result in significant PM_{10} impacts from shore exposure will not occur unless sufficient mitigation is implemented.

B. The Board Has Failed to Follow CEQA Because the Board Cannot Carry Out its Duty to Balance Project Benefits Against Environmental Harms Without an Estimate of the Magnitude of Environmental Harms.

CEQA Guidelines §15093 requires the decision-making agency to balance the benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project. The agency shall state in writing the specific reasons to support its action, and the "statement of overriding considerations shall be supported by substantial evidence in the record." (CEQA Guidelines §15093 (b)). The project may be approved if "specific economic legal, social, technological or other benefits of the proposed project outweigh the unavoidable adverse environmental effects." (CEQA Guidelines §15093 (a)).

In the present case, the EIR states that "several factors prevent any reasonable quantitative estimate of emissions and associated impacts from the exposed shoreline." (Master Responses to Comments, §3.9.2.) No estimate of the magnitude of emissions – or potential health impacts – can be given. The EIR further concludes that

> "without information on the nature and extent of the potential problem to be mitigated, it is unwise and impractical to propose or commit prematurely to costly dust control mitigation measures. Further, the dust control mitigation measures studied and under implementation at other lakebeds, such as Mono and Owens, may not be feasible or practical at the Salton Sea, given limitations on financial resources and the constraints on water availability for mitigation in the desert area. Nor would it be prudent to propose use of ratepayers' money to

fund dust control measures for a problem that does not currently exist and may never materialize."[3]

Finally, the EIR concludes: "Under shoreline exposure scenarios, it is currently impossible to predict the extent and intensity of potential increases in dust emissions or the associated increases in ambient concentrations of the pollutant PM10 in excess of standards." (Master Response §3.9.4.) As a result, this Board is forced to make its decision in a vacuum.

SCAQMD respectfully contends that it is legally impossible for this Board to "balance" the benefits and harms of the project, or to determine that the benefits "outweigh" the adverse impacts (CEQA Guidelines §15093) without some idea of the magnitude of those adverse impacts. The agency does not know whether the harmful side of the balance weighs a feather or many tons. Therefore, the statement of overriding considerations (§6.3.9) is not supported by substantial evidence. Under CEQA and this Board's rules, lack of substantial evidence justifies reconsideration of the Order.

In particular, there is no evidence, let alone substantial evidence, to support the conclusion that "We expect that these [air quality] impacts will be mitigated to less than significant levels by IID." (p. 75 of §6.3.9). Since there is no evidence of the magnitude of impacts, and no identification of what mitigation measures are feasible, there is no evidence to support any conclusion that adverse PM10 health effects will be mitigated below significance. This sentence should therefore be stricken.[4]

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[3] SCAQMD finds the lead agency's attitude toward mitigation measures extremely disappointing. The lead agency appears to believe it should not mitigate adverse impacts as has been required in Owens Valley, without explaining why the health of residents in Imperial County and Coachella Valley is less important than the health of residents near Owens Lake. Moreover, the lead agency's repeated reference to cost as a reason to avoid mitigation substantially fuels SCAQMD's concern that IID will plead poverty when it comes time to mitigate, thus prompting the contention that feasibility determinations must consider all available resources. Moreover, IID's claim that lack of water is a reason not to mitigate adverse effects of transferring water out of the area is certainly ironic. Master Response to Comments, §3.9.4.

[4] To allow this conclusion to remain is to lull the public into believing there is no risk from air pollution impacts of this decision when in fact the results may be huge.

However, merely striking this sentence does not cure the legal defects in the statement of overriding considerations. To "balance" or "weigh" one factor against another requires knowing the weight of the factors balanced. In the absence of information provided by the lead agency, it is legally impossible for the Board to carry out its duty to balance the adverse effects of this project, particularly from shoreline exposure. Nor can there be "substantial evidence" to support a decision that benefits outweigh harms when the extent of harm is not known. As discussed below, these issues can be corrected by modifying the Board's order.

C. CEQA Issues May Be Resolved By Requiring Further CEQA Analysis when the Extent of Air Quality Impacts Can Be Determined and Reserving Authority to Limit Further Water Transfers After Shoreline Exposure Occurs if Impacts Cannot Feasibly be Mitigated and the Board Cannot Find that Project Benefits Continue to Outweigh Adverse Impacts

As is clear from the above discussion, significant CEQA issues are presented by the current status of this Board's Order. However, these issues can clearly be remedied by requiring further CEQA analysis and a new balancing of harms against benefits at a time when the extent of harms can be known.

Ordinarily, a project may not be approved until its impacts are fully analyzed, where the failure to analyze precludes informed decision-making and informed public participation. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3rd 692, 712.)

However, it is possible to approve a project for which analysis and findings are complete as long as the decision does not irrevocably commit to further projects which cannot be analyzed, and CEQA will again be required before future plans are approved. (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal. App. 4th 351, 371-2.) The objective is to assure that environmental consequences are understood by government officials before a project reaches the "ecological point of no return." (*Rio Vista Farm Bureau Center, supra,* 368.)

Therefore, this Board may correct CEQA problems by approving only phases of the project for which it can comply with CEQA as long as it does not irrevocably commit to phases for which it cannot currently comply with CEQA.

This Board's Order has already established the precedent of reserving authority to impose requirements at later stages in the project. For example, in Conditions 7 and 8 the Board reserves continuing authority to require additional mitigation measures if later determined to be necessary and feasible. Moreover, the Board in Condition 12 has specified that certain standards must occur before implementation of specified portions of the project.

Therefore, the SCAQMD respectfully requests that a sentence be added to Condition No. 8, p. 91, to read as follows: **"This Board hereby orders IID to prepare a further CEQA analysis when PM_{10} impacts of shoreline exposure can be determined, and expressly reserves the authority to limit or reduce further water transfers if the Board finds after such analysis that the air quality impact cannot be mitigated to insignificance and the Board cannot determine that the benefits of the project continue to outweigh the adverse effects."** SCAQMD believes this provision will remedy air quality related CEQA issues with the present orders.

As noted above, it is impossible to properly balance the benefit and harms of later phases of the project when the harms of the project cannot be known. Moreover, the benefits of future phases of the project may change when compared to later available alternatives. For example, this Board has already noted that although desalinization may not be a viable alternative at the present time for Southern California's water supply, it may well be so in the future. (Decision, p. 58.) Therefore, SCAQMD submits that in order to allow an accurate balancing of harms against benefits, this Board should reserve authority to halt or reduce further water transfers after shoreline exposure begins (estimated in the EIR to be not before 2035) if the balance at that time does not justify a finding of overriding considerations that the benefits of future water transfer continue to outweigh the adverse air quality efforts.

V. CONCLUSION

For the reasons stated above, SCAQMD respectfully requests that this Board reconsider its Order and make the revisions that we have suggested.

Dated: November 27, 2002

Respectfully submitted,

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Barbara Baird, District Counsel
South Coast Air Quality Management District

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, certify and declare that I am over the age of 18 years, employed at 21865 E. Copley Drive in the City of Diamond Bar, County of Los Angeles, State of California, and not a party to the above-entitled case. On November 27, 2002, I caused the following document to be served: **PETITION OF SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT FOR RECONSIDERATION OF FINAL ORDER** by depositing said document in the United States Mail at Diamond Bar, California in a sealed envelope with the postage thereon fully prepaid addressed to the following:

See attached service list

I caused such envelope to be deposited in the mail at Diamond Bar, California, as indicated, the envelope mailed with postage thereon fully prepaid. I am readily familiar with the District's practice of collection and processing correspondence for mailing. The mail is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on a motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 27, 2002, at Diamond Bar, California.

_____
Vanessa M. Rodriguez

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