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October 27, 2008

Via: E-mail: klandau@waterboards.ca.gov
And U.S. Mail

Ms. Pamela C. Creedon, Executive Officer
Mr. Kenneth D. Landau, Assistant Executive Officer
Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Dr., Suite #200
Rancho Cordova, CA 95670

Re: ***Renewal of Waste Discharge Requirements (NPDES N0. CA0078590) for Town of Discovery Bay Discovery Bay Wastewater Treatment Facility, Contra Costa County***

Dear Ms. Creedon and Mr. Landau:

Through this letter, the San Luis & Delta-Mendota Water Authority ("Authority"), on behalf of its member agencies, and Westlands Water District ("Westlands") provide written comments on the tentative waste discharge requirements (National Pollutant Discharge Elimination System ("NPDES") permit No. CA0078590) applicable to the Town of Discovery Bay's ("Town") Wastewater Treatment Facility ("Town's Wastewater Facility") ("Tentative Discharge Requirements"), and request designated party status in the proceeding to consider those Tentative Discharge Requirements scheduled for December 4 and 5, 2008.

The Authority, formed in 1992 as a joint powers authority, consists of 31 public agencies, each of which contracts with the United States Department of the Interior, Bureau of Reclamation ("Reclamation"), for water from the Central Valley Project ("CVP"). The Authority's members hold contracts with Reclamation for the delivery of approximately 3.3 million acre-feet of CVP water annually. Reclamation conveys CVP water delivered to the Authority's members through the Sacramento-San Joaquin River Delta ("Delta"). Of the amount of water under contract, the Authority's members put to beneficial use, on average, approximately 2 million acre-feet of water on about 1.2 million acres of agricultural lands within the western San Joaquin Valley and parts of

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San Benito and Santa Clara Counties, California; 200,000 acre-feet for municipal and industrial uses, including those within the Silicon Valley; and approximately 300,000 acre-feet for environmental purposes, including for waterfowl and wildlife habitat management in the San Joaquin Valley, California.

Westlands, a member of the Authority, is a California water district formed in 1952. Westlands uses CVP water for irrigation of approximately 500,000 acres on the west side of the San Joaquin Valley in Fresno and Kings Counties, as well as for municipal and industrial purposes within those Counties. Westlands' farmers produce more than 60 high quality commercial food and fiber crops sold for the fresh, dry, canned, and frozen food markets, both domestic and export. More than 50,000 people live and work in the communities that are dependent on Westlands' agricultural economy.

The Authority and Westlands appreciate the challenge the California Central Valley Regional Water Quality Control Board ("Regional Board") faces in balancing the competing interests potentially affected by renewal of the Town's NPDES permit. In an effort to help the Regional Board make a properly balanced and reasoned decision in that regard, the Authority and Westlands submit the following comments.

Interest In Tentative Discharge Requirements

The Town "owns a wastewater collection, treatment, and disposal system, and provides sewerage service to the community of Discovery Bay." (Central Valley Regional Water Quality Control Board, Order No. R5-2003-0067, NPDES No. CA0078590, at ¶ 2.) The system serves a population of approximately 16,000 people. (Tentative Discharge Requirements, Sec. II.B.) Wastewater is processed at the Town's Wastewater Facility and treated wastewater is discharged into the Old River, a part of the Delta and "a water of the United States." (Tentative Discharge Requirements, Sec. II.B. The discharge occurs near facilities used to deliver water to the Authority's member agencies, including Westlands.

The Authority and Westlands have an acute interest in discharges to the Delta because of the impact they can have on the water supply of the Authority's member agencies, including Westlands. Three examples highlight this point. Initially, the Town's point of discharge is located north of the facilities used to pump water to the Authority's member agencies, including Westlands. Because of hydrodynamics within

the southern Delta, the effluent from the Town moves from the point of discharge to the in-Delta facilities. The Town's effluent thus directly affects the quality of water available to the Authority's member agencies.

In addition, the State Water Resources Control Board ("SWRCB") assigned to Reclamation significant responsibility for water quality objectives established in the Water Quality Control Plan for the San Francisco/Sacramento-San Joaquin Delta Estuary ("Bay Delta Plan"), a copy of which is attached hereto as Exhibit A. As a result, discharges into the Delta that fail to adequately protect beneficial uses of Delta water could require Reclamation to increase releases from CVP reservoirs and/or reduce pumping at in-Delta facilities, to avoid a claim that Reclamation is not meeting its responsibilities. Either of those actions would likely reduce the amount of water available to the Authority's member agencies.

Finally, it is likely pollutants discharged from wastewater treatment facilities, including the Town's Wastewater Facility, adversely affect fish species dependant upon the Delta. Such effects may increase the level of regulatory constraints imposed under the federal Endangered Species Act on Reclamation's CVP operations. The added regulatory constraints on the CVP also could limit the amount of water made available to the Authority's member agencies.

In the notice of the proceeding to consider the Tentative Discharge Requirements scheduled for December 4 and 5, 2008, the Regional Board offered interested persons or entities the opportunity to request designated party status. For the reasons stated above, the Authority and Westlands have much more than a casual interest in the Delta, and in-Delta discharges like those by the Town. Accordingly, the Authority and Westlands require designated party status to ensure that the permitted discharge by the Town does not jeopardize the Authority's and Westlands' interests. Therefore, the Authority and Westlands respectfully request designated party status regarding the Town's NPDES permit renewal and all rights attendant thereto.

Background Of Law Applicable To The NPDES Permit For The Town's Wastewater Facility

The federal Water Pollution Control Act of 1972 (the "Clean Water Act") is designed to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251.) The Clean Water Act makes it unlawful to

discharge pollutants from a point source into the waters of the United States. (33 U.S.C. § 1311(a).) Section 402 of the Clean Water Act, however, establishes the NPDES under which the United States Environmental Protection Agency or an authorized state may issue permits that grant a permittee the right to discharge. (33 U.S.C. § 1342.)

In California, the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") is designed to protect the "quality of all the waters of the state . . . for use and enjoyment by the people of the state." (Cal. Water Code § 13000.) To that end, the Porter-Cologne Act requires the regulation of all "activities and factors which may affect the quality of the waters of the state . . . to attain the highest water quality which is reasonable." (*Ibid.*)

Furthermore, California is a state authorized to administer NPDES permits and does so through the SWRCB and the Regional Boards. (Cal. Water Code §§ 13370; 13377.) Because the Regional Boards are responsible for monitoring and enforcing the State and federal plans, policies, and regulations that help protect and restore the water quality in California, a NPDES permit issued by a Regional Board must therefore advance the requirements and regulations promulgated under the Clean Water Act <u>and</u> Porter-Cologne Act.

General Comment Regarding The Renewal Of The Town's NPDES Permit

Conditions in the Delta are believed to have declined considerably since the Town's prior permit was issued in 2003. As explained by the CALFED Bay Delta Program:

> In the last few years [approximately 2002-2004], the abundance indices calculated by the Interagency Ecological Program (IEP) Fall Midwater Trawl survey (FMWT) and Summer Townet Survey (TNS) show marked declines in numerous pelagic fishes in the upper San Francisco Estuary (the Delta and Suisun Bay) (IEP 2005). The abundance indices for 2002-2004 include record lows for delta smelt and age-0 striped bass and near-record lows for longfin smelt and threadfin shad.

(http://www.science.calwater.ca.gov/pod/pod_index.html.)

Former Director of the California Department of Fish and Game, Ryan Broddrick, conveyed a similar point. He expressed to the U.S. House of Representatives, Committee on Natural Resources, Subcommittee on Water and Power:

> Of particular concern to [the Department of Fish and Game] is the recent serious and unexpected decline (approximately 90%) in young Delta smelt produced this season. As alarming as the reduced numbers are, this decline is part of a more generally observed decline in other important fish and aquatic resources in the estuary. Anadromous fish (steelhead and salmon), sport fish (striped bass), other native fishes, and some important fish food organisms (invertebrates) of the Delta are in serious trouble.

(Statement Presented by Ryan Broddrick Director, California Department of Fish and Game To U.S. House of Representatives, Committee on Natural Resources Subcommittee on Water and Power Oversight Hearing on "Extinction is not a Sustainable Water Policy: The Bay Delta Crisis and the Implications for California Water Management", July 2, 2007, Vallejo City Council Chambers, Vallejo, California, a copy of which is attached hereto as Exhibit B.) This characterization caused Director Broddrick to conclude that the Delta is "broken." (*Id.*)

During the time of the perceived changes in the "health" of the Delta, and as noted above, the Town held a NPDES permit for the Town's Wastewater Facility, which the Regional Board issued in 2003. The changed circumstances in the Delta and the emergence of new studies and information on the effects of contaminants discharged in wastewater warrant immediate action by the Regional Board. In particular, the Regional Board must consider whether past permitting strategies and decisions are protective of beneficial uses of the Delta waters going forward.

The Tentative Discharge Requirements Are Unlawful

The Tentative Discharge Requirements are contrary to law, as they are inconsistent with the Bay Delta Plan and the Water Quality Control Plan, Fourth Edition, for the Sacramento and San Joaquin River Basins ("Basin Plan"). Most obvious, the Tentative Discharge Requirements impose an electrical conductivity (EC) limitation of 2,700 µmhos/cm (annual average), (Tentative Discharge Requirements, IV.A.1.g), while the Bay Delta Plan and the Basin Plan impose much more stringent requirements. In

the general area of the Town's discharge, the Bay Delta Plan and the Basin Plan establish 30-day running average salinity objectives of 1,000 µmhos/cm during the September through March period and 700 µmhos/cm during the April though August period. Thus, the Town's proposed EC limitations exceed the salinity objectives by approximately 170 to 400 percent.

To support EC limitations that are contrary to the Bay Delta Plan and the Basin Plan, the Tentative Discharge Requirements cite to Water Quality Order 2005-005. The Tentative Discharge Requirements suggest that, in Water Quality Order 2005-005, the SWRCB intended for "permit limitations to play a limited role with respect to achieving compliance with the EC water quality objectives." (Tentative Discharge Requirements, Attachment F, IV.C.3.p.iv.) The Tentative Discharge Requirements also suggest that EC limitations consistent with the salinity objectives in the Bay Delta Plan and Basin Plans are infeasible. (*Id.*) The rationales fail for at least two reasons.

An interpretation that effluent limitations have a circumscribed role in achieving salinity water quality objectives is belied by the Bay Delta Plan. In the Bay Delta Plan, which the SWRCB adopted after it issued Water Quality Order 2005-005, the SWRCB made clear that the Regional Board maintains an important role in implementing salinity objectives. The most explicit example is the SWRCB order to the Regional Board, that requires it to "impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers", as a means of implementing salinity objectives in the San Joaquin River at Brandt Bridge, in Old River near Middle River, and in Old River at Tracy Road Bridge. (Bay Delta Plan at Ch. IV, B.1.) Contrary to that order, but as conceded in the Tentative Discharge Requirements, the proposed EC limitations "may cause or contribute to an exceedance of a water quality objective for salinity." (Tentative Discharge Requirements, Attachment F, IV.C.3.p.iv.)[1]

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[1] That the Regional Board is expected to implement water quality objectives through the discharge permits it administers has also been conceded by the Central Valley Clean Water Association ("CVCWA"), a prominent advocacy group whose mission is to "effectively represent the interests of wastewater agencies in the Central Valley in regulatory matters." (Central Valley Clean Water Association Strategic Plan, June 19, 2008, available at http://www.cvcwa.org/bp.htm, as of October 27, 2008.) In a September 30, 2008, letter to the SWRCB, the CVCWA made the following comment:

> "In 2006, the State Water Board amended the Bay-Delta Plan . . . implementation program to require the Central Valley Regional Water Board to 'impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers.' (2006 Bay-Delta Plan at pp. 10, 28.)" (See Exhibit C, September 30, 2008, letter by CVCWA.)

Furthermore, an argument that it is infeasible for the Town to implement measure that will allow it to comply with the existing objectives established in the Bay Delta Plan and Basin Plan is not well taken. Those objectives are not new. They date back to at least 1995, when the SWRCB issued is 1995 Water Quality Control Plan for the San Francisco/Sacramento-San Joaquin Delta Estuary. Ample time has passed for dischargers like the Town to develop means of complying with the salinity objective set forth in the Bay Delta Plan and Basin Plan.

The Tentative Discharge Requirements do include a circumstance when the Town must comply with the salinity objectives established in the Bay Delta Plan and the Basin Plan. However, the circumstance occurs only when the Town fails to comply with a salinity reduction plan mandated in the Tentative Discharge Requirements. In other words, the Tentative Discharge Requirements impose on the Town obligations that are consistent with the Bay Delta Plan and Basin Plan only as a penalty that may not ever be imposed. While the development and implementation of a plan may be appropriate in certain circumstances, this does not appear to be one of those circumstances. As discussed immediately above, the Town has or should have been aware of the water quality objectives established for salinity for 13 or more years (the Bay Delta Plan superseded a prior plan adopted by the SWRCB in 1995, which included the same objectives for salinity), and the Town has reasonable means to ensure its dischargers meet the objectives established in the Bay Delta Plan and Basin Plan.

The Permit Terms Should Be Based On The Best Available Scientific Data

Given the perceived decline in the Delta, the Regional Board should ensure that the Tentative Discharge Requirements are reflective of the best available and emerging scientific data. The Tentative Discharge Requirements, however, appear not to rely upon such new information.

For example, the effluent limitation for ammonia is based upon United States' Environmental Protection Agencies' "Ambient Water Quality Criteria for the Protection of Freshwater Aquatic Life." (Tentative Discharge Requirements, Attachment F, IV.C.3.f.) However, the SWRCB and the Regional Board have identified the emergence of potentially important, new science related to contaminants, including ammonia, in the

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Thus, the advocacy group: 1) recognized permits like the one at issue here must be consistent with water quality objectives stated in the Bay Delta Plan and Basin Plan, and 2) acknowledged the Regional Board is expected to "impose discharge controls" – e.g., through NPDES permits – that advance those objectives.

Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay Delta Strategic Workplan"), a copy of which is attached hereto as Exhibit D. For example, in that Workplan, the SWRCB and the Regional Board wrote:

> Studies suggest that delta smelt may be particularly sensitive to ammonia and that ammonia may limit primary productivity in the Delta. Definitive, controlled laboratory experiments must be conducted to determine the importance of these potential impacts.

(*Id.* at 53.) Also, the Regional Board's concern with ammonia in the Delta has been the subject of two recent, summary papers, copies of which are attached hereto as Exhibit E.[2]

The Authority and Westlands appreciate that the newness of emerging scientific information may make it appear uncertain. But newness does not necessarily render such information unreliable. If adopted, the Tentative Discharge Requirements will be in existence for five years, a considerable length of time. Therefore, even if the Regional Board is apprehensive of emerging scientific information, it should not summarily discount its value.

Need For More Rigorous Monitoring

If newly emerging science is deemed insufficient at this time to make regulatory decisions, it should at least be used to support a more rigorous and comprehensive monitoring program. The SWRCB and the Regional Board recognized in the Bay Delta Strategic Workplan the importance of increased monitoring for contaminants. The Bay Delta Strategic Workplan provides:

> The pelagic organism decline in the Delta and subsequent increased focus on contaminants as a potential cause highlight the need for regularly compiling, assessing, and reporting data that is currently being collected and the need to better coordinate monitoring efforts.

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[2] The two papers were found on the Central Valley Regional Board's website at: waterboards.ca.gov/centralvalley/water_issues/delta_water_quality/ammonia_issues/ammonia_issues_11jun08.pdf, and waterboards.ca.gov/centralvalley/water_issues/delta_water_quality/ammonia_issues/delta_smelt_update_30jul08.pdf

(Bay Delta Strategic Workplan, p. 59.) The renewal of the Town's NPDES permit provides an opportunity to effectuate better monitoring of contaminants.

Specifically, the SWRCB and the Regional Board have recognized that there "are a suite of contaminants and source categories that pose a concern for some Delta beneficial uses and there is also concern for an emerging list of new contaminant categories (pharmaceuticals and endocrine disrupters)." (Bay Delta Strategic Workplan, p. 25.) Recent investigations claim to have discovered detectable levels of pharmaceuticals in drinking water supplies across the country. ("Prescription Drugs Found in Drinking Water Across U.S." Associated Press, March 10, 2008; "AP Enterprise: Drugs Affect More Drinking Water," Associated Press, September 11, 2008; "AP Enterprise: Report Prompts More Testing," Associated Press, September 11, 2008.) The investigations assert medication not absorbed by its taker "passes through the [body] and is flushed down the toilet," and that even though the wastewater is treated "most treatments do not remove all drug residue." Thus, according to the investigations, prescription drugs can enter water supplies through municipal wastewater discharges. Therefore, even if the Regional Board believes it is presently unclear whether NPDES permits, like the one the Town seeks, should include discharge requirements that specifically address pharmaceuticals, emerging science supports a rigorous and comprehensive monitoring plan that requires the Town to conduct comprehensive testing for a broad range of contaminants in its waste discharges, including pharmaceuticals.

Separate and apart from additional monitoring and reporting compelled by emerging science, the Town should be obligated to notify downstream water authorities if untreated (or partially treated) wastewater is released from the Town's wastewater system. The Authority and Westlands are among the parties that might come into contact with such releases and should be made aware of them if they occur.

Finally, a great majority of the effluent and receiving water monitoring required under the Tentative Discharge Requirements calls for monitoring on a weekly or monthly basis. (Tentative Discharge Requirements, Attachment E, Tables E-3 and E-5.) The monitoring schedule is too infrequent in light of the requirements in the Bay Delta Plan and Basin Plan and in light of a declining Delta. The Town should be required to monitor its discharges and the receiving waters, at a minimum, consistent with the manner in which water quality objectives are measured. Moreover, to facilitate

access to this important information, the Town should also be required to post, at least weekly, the results of its monitoring on a publicly available Internet web site.

Conclusion

For the reasons set forth above, the Authority and Westlands respectively request that the Regional Board decline to adopt the Tentative Discharge Requirements as drafted. The Authority and Westlands remain concerned that the Tentative Discharge Requirements are not protective of beneficial uses. They do not appear consistent with the Bay Delta Plan and the Basin Plan, and they do not appear to reflect important, emerging science and information on the effects of contaminants in wastewater. Furthermore, the NPDES permit ultimately issued by the Regional Board must include increased monitoring by the Town.

Thank you very much for your consideration of these comments.

Very truly yours,

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Attorneys for San Luis & Delta-Mendota Water Authority and Westlands Water District

cc: Daniel Nelson, San Luis & Delta-Mendota Water Authority
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