STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

In the Matter of Wastewater Petition WW0055

City of Atwater Public Works Department

ORDER APPROVING CHANGE IN POINT OF DISCHARGE

SOURCE: Atwater Drain tributary to Peck Drain thence San Joaquin River

COUNTY: Merced

WHEREAS:

1. City of Atwater, Public Works Department (Atwater) filed Wastewater Change Petition WW0055 with the State Water Resources Control Board (State Water Board) on August 31, 2009, pursuant to section 1211 of the Water Code. Atwater proposes to relocate its existing Wastewater Treatment Plant (WWTP) and change the point of discharge of treated wastewater from the Atwater Drain to the Peck Drain.

   Pursuant to a contract with Atwater, Joseph Gallo Farms (Gallo) currently diverts the available treated wastewater from Peck Drain for irrigation purposes. Atwater has not proposed any changes in the point of diversion or place of use of treated wastewater associated with irrigation use by Gallo.

2. Public notice of the change was issued on November 19, 2009. No protests were filed.

3. The State Water Board has determined that the petition for change in the point of discharge will not cause injury to any other lawful user of water.

4. Under the California Environmental Quality Act (CEQA), Atwater is the lead agency for preparation of environmental documentation for the project. On December 27, 2007, Atwater issued a Draft Environmental Impact Report (DEIR) titled City of Atwater Wastewater Treatment Plant Improvement Project, SCH #2006101079. In August 2008, Atwater issued a Final Addendum to the DEIR. On September 22, 2008, Atwater issued a Notice of Determination (NOD) and Statement of Overriding Considerations. Atwater identified significant and unavoidable impacts related to: (a) the effect of project discharge on lead in the receiving waters, (b) impact on special-status plants and wildlife from increased summer flooding in the Arena Plains Unit of the Merced National Wildlife Refuge, (c) temporary, short-term construction-related emissions of criteria air pollutants and ozone precursors, and (d) exposure of sensitive receptors to odors. The EIR considered potential expansion of the WWTP from 6 million gallons per day (mgd) to 8 mgd. On September 22, 2008, the Atwater City Council determined that the WWTP would not be expanded.

   The State Water Board is a responsible agency for purposes of considering whether to approve the wastewater change petition that will allow Atwater to proceed with the proposed project. As a

responsible agency, the State Water Board must consider the environmental documentation prepared by the lead agency, and any other relevant evidence in the record, and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) The State Water Board has considered the EIR in deciding whether to approve the petition. Approval of the wastewater change petition with inclusion of the mitigation measures minimizes impacts to biological resources, to the extent feasible.

Atwater's environmental review was limited to impacts associated with the proposed wastewater project, i.e., the impacts associated with relocation of the WWTP and the change in the point of discharge. Consequently, the State Water Board's approval of the wastewater change petition must be similarly limited in scope.

In addition to any obligation the State Water Board may have under CEQA, the Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].)

Atwater is constructing the new WWTP in order to upgrade its level of treatment to meet Regional Water Quality Control Board standards. The existing WWTP is located near odor sensitive commercial and residential development. Therefore, Atwater determined that a new plant should be built, in lieu of modification of the existing treatment facility. The mitigation measures in the EIR minimize impacts to biological resources and no adverse impacts to public trust resources are expected, except for those elements of the project that are not fully mitigated in the EIR. The unmitigated effects of moving the treatment facility, such as temporary, short-term construction-related emissions of criteria air pollutants and ozone precursors and exposure of sensitive receptors to odors are outside the scope of the State Water Board's review of impacts to public trust resources.

The EIR states that the unmitigated effect of project discharge on lead in the receiving waters, with the proposed treatment improvements, is expected to maintain or reduce the concentration of lead in the effluent discharged to Peck Drain. The EIR also indicates that Atwater will implement additional treatment technologies to reduce lead levels in the effluent, as needed. Therefore, the Division finds that the impacts of lead on public trust resources has been addressed and the resources protected, to the extent feasible. The mitigation measures related to lead are incorporated in Atwater's National Pollution Discharge Elimination System (NPDES) permit issued by the Central Valley Regional Water Quality Control Board.

The remaining unmitigated impacts are associated with increased summer flooding of special-status plants and wildlife located in the Arena Plains Unit of the Merced National Wildlife Refuge. Due to the complexity of existing hydrological conditions in the Atwater Drain, Atwater was not able to determine the degree to which current or potential future flows from the wastewater treatment facility could contribute to flooding of seasonal wetlands and vernal pools. The EIR outlines measures to address this issue, including diversion of WWTP flows to storage ponds during critical periods, and assisting in implementation of a water management plan, on a fair share basis. The elements of the plan are listed below, in the Order section. The Division finds that any new summer flooding impacts to public trust resources have been addressed and the resources protected, to the extent feasible.

The State Water Board will issue a Statement of Overriding Considerations as part of its order. An NOD will be issued within five days of the date of this order.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

1. Atwater is authorized to change the point of discharge of treated wastewater effluent from the City of Atwater Wastewater Treatment Plant.

2. The State Water Board has determined that the wastewater discharge shall be amended to include the following specific changes:

   a. Remove existing point of discharge within California Coordinate system, NAD 83, Zone 3, North 1,946,489 feet and East 6,530,334 feet, being within SE¼ of NW¼ of Section 12, T7S, R12E, MDB&M.

   b. Add new point of discharge within California Coordinate system, NAD 83, Zone 3, North 1,924,637 feet and East 6,522,762 feet, being within NE¼ of SE¼ of Section 34, T7S, R12E, MDB&M.

3. Treated wastewater is currently diverted from Peck Drain for irrigation use by Joseph Gallo Farms. No change in point of diversion or place of use of treated wastewater was requested, or is approved, by this Order.

4. Atwater shall comply with the following conditions related to Federally and State-Protected waters:

   a. Before installing the effluent outfall to the Peck Drain or conducting any other project-related activity that could result in fill or degradation of jurisdictional wetlands or waters of the United States, Atwater shall obtain a verified wetland delineation from U.S. Army Corps of Engineers (USACE), identifying any jurisdictional wetlands that occur within project areas or within 25 feet of project boundaries.

   b. As part of the jurisdictional wetland delineation, Atwater shall identify any federally protected or state-protected waters that have the potential to support special-status plant and animal species.

   c. After the jurisdictional wetland delineation is completed, Atwater shall determine whether the construction corridor for the influent pipelines or any other construction activity is within 25 feet of any federally protected or state-protected waters, and furthermore, whether the construction will occur within 250 feet of protected vernal pools.

   d. If it is determined that fill or degradation of waters of the United States, including wetlands, can be avoided (including avoiding any disturbance within 25 feet of jurisdictional wetlands/waters and 250 feet of protected vernal pools), no further mitigation is necessary to reduce impacts on waters of the United States to a less-than-significant level.

   e. If impacts on waters of the United States, including wetlands, cannot be avoided, Atwater shall replace, enhance, or restore any jurisdictional wetlands or waters affected as a result of construction-related activities. The replacement, enhancement, or restoration shall occur on a "no net loss" basis, and shall be at a location and by methods in accordance with USACE and Central Valley Regional Water Quality Control Board (CVRWQCB) requirements. The City shall prepare and submit a habitat mitigation and monitoring plan to USACE, Department of Fish and Game (DFG), the Deputy Director of

the Division of Water Rights, and the CVRWQCB that includes creation of wetlands at a mitigation ratio no less than 1:1 for each acre of wetland filled. The plan shall be subject to review, modification and approval of USACE and the Deputy Director of the Division of Water Rights. The wetland creation section of the habitat mitigation and monitoring plan shall include the following:

(i) target areas for creation,

(ii) a complete biological assessment of the existing resources in the target areas,

(iii) specific creation and restoration plans for each target area,

(iv) performance standards for success that will illustrate that the compensation ratios are met, and

(v) a monitoring plan, including schedule and annual report format.

f. Atwater shall secure the following permits and regulatory approvals, as necessary, and comply with all permit conditions before implementation of the proposed project:

Authorization for the fill of jurisdictional waters of the United States shall be secured from USACE through the CWA Section 404 permitting process before any fill is placed in jurisdictional wetlands and before any construction occurs in the vicinity of jurisdictional wetlands. Timing for compliance with the specific conditions of the Section 404 permit shall be in accordance with conditions specified by USACE as part of permit issuance.

If a CWA Section 404 permit is required, before implementing the proposed project Atwater shall obtain water quality certification for the project pursuant to CWA Section 401. Any measures required, as part of the issuance of water quality certification shall be implemented.

Atwater shall obtain a streambed alteration agreement under Section 1600 et seq. of the California Fish and Game Code for impacts on waters of the state, as defined under Section 1602 of the California Fish and Game Code.

Atwater shall file a report of waste discharge with the CVRWQCB for activities affecting waters of the state and shall obtain a NPDES permit for the proposed WWTP discharge.

5. Atwater will implement the following measures to protect special-status plants and other sensitive biological resources in the Arena Plains Unit that could be affected by late-summer flooding originating from the Atwater Drain:

If late-summer flooding at the Arena Plains Unit of the Merced National Wildlife Refuge (NWR) occurs and Atwater is notified during the flooding event, Atwater will work with the Arena Plains Unit staff to ascertain the cause and impacts of the event. To the degree that the flow from the WWTP is involved, Atwater will work with Arena Plains Unit staff to develop a water management plan to prevent further flooding of vernal pools in the Arena Plains Unit of the Merced NWR. This plan could include identifying the source of the flooding and identifying methods, such as

reducing the peak of releases, constructing storage ponds, constructing additional drainage facilities (see below), or other such methods aimed at reducing the flooding potential.

Atwater will also assist the Arena Plains Unit with implementation of the water management plan. Assistance provided by the City may include identifying other parties that may be contributing flows to the drain and negotiating with them to reduce or eliminate excess flows during critical periods; diverting WWTP flows to storage ponds on farmland during critical periods, to the extent possible without violating permit conditions; and providing Atwater's fair share of in-kind services relative to its contribution to flooding of vernal pools to assist Arena Plains Unit staff with implementation of one or more of the actions identified below:

(i) removal of beaver dams or other potential drain obstructions that contribute to flooding during critical periods;

(ii) construction of flow diversion channels, with flow control structures that could be used to release excess flows from the Atwater Drain to Bear Creek during critical periods;

(iii) extension of the Atwater Drain through the Arena Plains Unit and connection to the East Side Canal; or

(iv) extension of the Atwater Drain through the Arena Plains Unit, with reconnection to the existing siphon passing under the East Side Canal. This latter option would permit excess flows in the Atwater Drain to continue through the Arena Plains Unit and the Snobird Unit of the Merced NWR to the drain's historical terminus, a set of flapgates that empty through a levee into Bear Creek. The latter option would have the added benefit of ensuring a high-quality water source for wetlands management, not only in the Arena Plains Unit but also in the Snobird Unit and on private land encumbered by a U.S. Fish and Wildlife Service (USFWS) conservation easement to the west of the refuge.

(v) Atwater's fair share will be based on channel capacity, flows in the area, and the degree to which they are caused by the WWTP.

6. In order to avoid or minimize impacts to Sanford's Arrowhead from decrease in water volume within the Atwater Drain along South Bert Crane Road and SR 140, Atwater shall:

Before the effluent outfall structure is installed at its new location on South Bert Crane Road, Atwater shall have a qualified biologist acceptable to the Deputy Director for Water Rights conduct a baseline survey, quantifying the size and distribution of the existing Sanford's arrowhead occurrence in the Atwater Drain.

Once the new effluent outfall becomes operational, Atwater shall monitor the size and distribution of the Sanford's arrowhead population for 2 years to determine whether the decrease in effluent in the drain results in a decrease in the occurrence of Sanford's arrowhead.

If the size and/or distribution of the Sanford's arrowhead occurrence are reduced by more than 50%, Atwater shall develop a habitat enhancement plan for Sanford's arrowhead that includes best maintenance practices to protect and enhance habitat for this species elsewhere in the Atwater Drain. The plan shall be approved by DFG and implemented by Atwater in coordination with Merced Irrigation District (MID) on portions of the drain under MID's jurisdiction.

7. Before construction of the influent pipelines, the decommissioning of the Atwater WWTP, the installation of the effluent pipeline and outfall, and the development of the new WWTP at the Bert Crane Road site, Atwater shall conduct the following avoidance and protection measures to prevent construction-related adverse effects on habitat that potentially supports special-status plant species:

   Atwater shall implement jurisdictional wetland delineation to identify any wetland habitats (including vernal pools) that could potentially support special-status species and to determine whether project-related construction could occur within 25 feet of wetlands or grassland habitat that could support special-status plants and/or within 250 feet of vernal pools.

   If it is determined that wetland and grassland habitat can be avoided (i.e., no soil disturbance within 25 feet of wetlands or grasslands and 250 feet of vernal pools), no further mitigation is necessary to reduce adverse impacts on special-status plants to a less-than-significant level.

   If it is determined that vernal pools are present within 250 feet of proposed project construction, pipeline construction, including trenching, staging and any other project-related activities, shall be limited to the west side of South Bert Crane Road (the opposite side of the road from the identified vernal pool habitat) along the length of the road where the vernal pool habitat occurs.

   If it is determined that vernal pools are not present, pipeline construction could occur within the paved portion or along the east side of South Bert Crane Road.

   In addition, the following further avoidance/protection measures shall be implemented:

   A minimum of a 25-foot buffer shall be maintained between the wetland/grassland habitat and project construction. The buffer shall be fencing made of solid material to prevent dirt or other construction-related materials from occurring in the vicinity of the sensitive habitat. Atwater shall be responsible for maintaining the fencing.

   Atwater shall obtain a biological monitor to inspect the fencing and train construction crews to recognize and avoid disturbance to sensitive habitats before initiation of any construction activity. The biological monitor shall also inspect the fencing and monitor construction activity periodically during construction (every other week or once a month, as deemed necessary by the biologist and Atwater during field visits). Should any disturbance to sensitive habitats occur, the biological monitor shall be given the authority to stop construction. No construction activity shall resume until Atwater has been notified and appropriate actions have been taken to ensure that the project is in compliance with all conditions of project approval and adopted mitigation measures and that the cause of disturbance has been remediated.

   In addition to the avoidance measures outlined above, Atwater shall implement any other avoidance or mitigation measures specified by U.S. Fish and Wildlife Service (USFWS).

8. Before construction, Atwater shall conduct the following avoidance and protection measures to address potential impacts on special-status wildlife associated with seasonal wetland/vernal pool habitat:

Atwater shall implement jurisdictional wetland delineation to determine whether seasonal wetland/vernal pool habitat is present along South Bert Crane Road within 250 feet of where project-related construction would occur.

If it is determined that seasonal wetland/vernal pool habitat is not present within 250 feet of project construction, no further action is necessary to reduce impacts on vernal pool special-status species to a less-than-significant level.

If it is determined that vernal pool habitat is present that could support vernal pool special-status species within 250 feet of the proposed project construction, all pipeline construction and any other project-related activities, such as staging, shall be limited to the west side of South Bert Crane Road.

a. Tricolored Blackbird:

A freshwater marsh is supported by emergency effluent diversion ponds located in the southwest corner of the existing WWTP. Before decommissioning of the WWTP commences, Atwater shall conduct the following avoidance and protection measures to determine presence and/or to avoid disturbance of tricolored blackbirds and to reduce impacts to a less-than-significant level:

If filling of the emergency effluent diversion ponds would occur during the tricolored blackbird nesting season (March 1–August 31), Atwater shall obtain a qualified biologist acceptable to the Deputy Director for Water Rights to conduct preconstruction surveys before this activity begins within 1,000 feet of potential nesting habitat, including freshwater marsh and areas of low shrubby riparian vegetation. The survey shall be conducted within 14 days before project activity begins. If no tricolored blackbird nesting is detected, no further mitigation shall be required and potential impacts on tricolored blackbirds would be reduced to a less-than-significant level.

If a colony is found, impacts shall be avoided by establishment of a 500-foot buffer. No project activity shall commence within the buffer area until a qualified biologist confirms that the colony is no longer active (i.e., no nesting tricolored blackbirds are present).

b. Raptors, Including Swainson's Hawk and White-Tailed Kite:

Large trees that could potentially support raptor nests are present along the Atwater Drain between the existing WWTP and Atwater Jordan Road, as well as along Atwater Jordan Road and Bert Crane Road. Atwater shall implement the following mitigation measures to reduce potential impacts on raptors from project-related construction (specifically the installation of the two influent pipelines) to a less-than-significant level:

If project activities occur during the raptor nesting season (March 1–September 15), a focused survey to identify active raptor nests on and in the vicinity of the project site shall be conducted by a qualified biologist acceptable to the Deputy Director for Water Rights before project activities begin. Surveys for Swainson's hawk and white-tailed kite nests shall include all areas of suitable nesting habitat within 0.25 mile of the project site. Surveys for other raptors shall include suitable nesting habitat within 500 feet of the areas where construction would occur. If no active nests are found, no further mitigation shall be required.

If active nests are found during the surveys, appropriate buffers shall be established to minimize impacts. No project activity shall commence within the buffer area until a qualified biologist confirms that the nest is no longer active. The size of the buffers may be adjusted, depending on the project activity and stage of the nest, if a qualified biologist determines that activity within a reduced buffer would not be likely to adversely affect the adults or their young.

c. Burrowing Owl:

Before any ground-disturbing activity at the existing Atwater WWTP and the Bert Crane Road site begins, the City shall implement the following mitigation measures to protect active burrowing owl burrows:

Preconstruction surveys for western burrowing owl shall be conducted in areas identified as suitable habitat that could be disturbed during construction at the existing Atwater WWTP and the Bert Crane Road site. The surveys shall be conducted by a qualified biologist acceptable to the Deputy Director for Water Rights in accordance with DFG-approved survey guidelines for burrowing owls. If no occupied burrows are found in the survey area, a report documenting survey methods and findings shall be submitted to DFG and the Division, and no further mitigation shall be necessary.

If occupied burrows are found in the survey area, impacts shall be avoided by establishing a buffer of 165 feet during the nonbreeding season (September 1–January 31) or 300 feet during the breeding season (February 1–August 31). The size of the buffer area may be adjusted if a qualified biologist and DFG determine that such an adjustment would not be likely to have adverse effects. No construction activity shall commence within the buffer area until a qualified biologist confirms that the burrow is no longer occupied. If the burrow is occupied by a nesting pair, a minimum of 6.5 acres of foraging habitat contiguous to the burrow shall be preserved until the breeding season is over.

If impacts on occupied burrows are unavoidable, on-site passive relocation techniques may be used if approved by DFG to encourage owls to move to alternative burrows outside of the impact area. However, no occupied burrows shall be disturbed during the nesting season unless a qualified biologist verifies through noninvasive methods that the burrow is no longer occupied. Foraging habitat for relocated pairs shall be provided in accordance with guidelines provided by DFG (1995). DFG guidelines recommend that a minimum of 6.5 acres of foraging habitat per pair or unpaired resident bird be acquired and permanently protected.

If relocation of the owls is approved for the site by DFG, Atwater shall hire a qualified biologist acceptable to the Deputy Director for Water Rights to prepare a plan for relocating the owls to a suitable site. The relocation plan must include all of the following:

(i) the location of the nest and owls proposed for relocation,

(ii) the location of the proposed relocation site,

(iii) the number of owls involved and the time of year when the relocation is proposed to take place,

(iv) the name and credentials of the biologist who will be retained to supervise the relocation,

(v) the proposed method of capture and transport for the owls to the new site,

(vi) a description of site preparation at the relocation site (e.g., enhancement of existing burrows, creation of artificial burrows, one-time or long-term vegetation control), and

(vii) a description of efforts and funding support proposed to monitor the relocation.

Relocation options may include passive relocation to another area of the site not subject to disturbance through one-way doors on burrow openings, or construction of artificial burrows in accordance with DFG guidelines.

If the above measure proves to be ineffective, then during the nonbreeding season (September 1–January 31), burrowing owls occupying the project site shall be removed by passive relocation as described in DFG's *Staff Report on Burrowing Owl Mitigation* (DFG 1995).

During the breeding season (February 1–August 31), occupied burrows shall not be disturbed, and shall be provided with a 250-foot (75-meter) protective buffer until a qualified biologist verifies through noninvasive means that either (1) the birds have not begun egg laying or (2) juveniles from the occupied burrows are foraging independently and are capable of independent survival. Once the fledglings are capable of independent survival, the burrows can be destroyed.

d. San Joaquin Kit Fox:

Preconstruction surveys and necessary follow-on actions shall be conducted to ensure that any impacts on San Joaquin kit fox are avoided. Surveys, den destructions, and monitoring shall be conducted by a qualified biologist according to USFWS's *Standardized Recommendation for Protection of the San Joaquin Kit Fox Prior to or During Ground Disturbance* (June 1999). The qualified biologist must have field experience in the identification and life history of the San Joaquin kit fox.

e. Substantial Adverse Effects on Sensitive Natural Communities Identified in Local and Regional Plans, Policies, or Regulations or by DFG or USFWS:

Atwater shall implement avoidance and protection measures to address the ecological goals and policies approved under the Merced County and City of Atwater general plans and any other regulations set forth by DFG or USFWS.

9. To ensure that required mitigation measures are implemented, the following condition applies:

   Atwater is not authorized to discharge water pursuant to this order until all construction related conditions are complied with. Atwater shall submit documentation within one year of issuance of this order and on a triennial basis thereafter, of compliance with order requirements. Said documentation shall include a description of the mitigation measures employed for each order condition and date of compliance with the mitigation measures. Atwater is not required to continue submitting construction compliance reports once full compliance with all construction related conditions is achieved.

   (0000063)

10. The State Water Board hereby adopts a Statement of Overriding Considerations finding that the unmitigated impacts of lead on public trust resources and the impacts associated with increased summer flooding of special-status plants and wildlife in the Area Plains Unit of the Merced National Wildlife Refuge have been mitigated to the extent feasible.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel
for *Victoria A. Whitney*
Deputy Director for Water Rights

Dated: JUL 2 2 2010