Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Frank Temmerman, Clerk

Hearing Held: Friday, October 1, 2010, 9:00 a.m.

CITY OF TRACY **v.** **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD** **CENTRAL VALLEY CLEAN WATER ASSOCIATION**	**Case Number: 34-2009-80000392**

Proceedings: **Petition for Writ of Mandate and Complaint for Declaratory Relief**

Filed By: **Melissa Thorme and Leslie Fredrickson, Downey Brand LLP, Attorneys for Petitioner City of Tracy; Paul Simmons and Theresa Dunham, Somach Simmons & Dunn, Attorneys for Intervenor/Plaintiff Central Valley Clean Water Association**

On March 3, 2011, the Court issued its Tentative Statement of Decision (Tentative Decision) in this matter. On March 11 and 14, 2011, the parties timely filed objections to the Tentative Decision. On April 15, 2011, the Court held a hearing to discuss the objections.[1] The matter was argued and submitted Having taken the matter under submission, the Court hereby rules on the objections and issues its Final Statement of Decision.

FINAL STATEMENT OF DECISION

I.
Introduction

Petitioner City of Tracy has filed a petition for a peremptory writ of mandate and complaint for declaratory relief seeking to invalidate certain provisions of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta related to the regulation of salinity. Tracy also seeks a peremptory writ of

[1] The Court notes that most of the objections are to the conclusions reached, and are therefore technically improper All that is required is an explanation of the factual and legal basis for the Court's decision on the principal controverted issues at trial However, because the Court has not yet entered a final judgment in this proceeding, the Court retains inherent constitutional authority to reconsider, correct, or change its ruling, and the Court has exercised that authority where appropriate

mandamus to invalidate or modify certain provisions of a May 19, 2009, decision and order issued by the State Water Resources Control Board applying the challenged provisions of the 2006 Bay-Delta Plan to Tracy's municipal wastewater treatment plant discharges

Intervenor Central Valley Clean Water Association (Clean Water Association), a non-profit association representing more than 60 publicly-owned wastewater treatment facilities, joins Tracy in seeking to invalidate the contested provisions of the 2006 Bay-Delta Plan and the May 19, 2009, precedential decision applying those provisions to Tracy's municipal wastewater treatment plant.

The Court grants the petition in part, and denies the petition in part. The Court concludes that Respondent State Board failed to undertake the analysis required by Water Code section 13241 when the Board established the water quality objectives for electrical conductivity ("EC"). Accordingly, the Court concludes that a writ shall be granted directing the Board to conduct the required § 13241 analysis and reconsider the EC objectives after the § 13241 factors have been considered.

In addition, the Court concludes that the 2006 Bay-Delta Plan's program of implementation is inadequate in relation to municipal dischargers. Accordingly, the Court shall issue a writ compelling the Board to adopt an adequate program of implementation that describes the nature of the actions necessary for municipal dischargers to achieve the EC objectives (including recommendations for appropriate action by them), provides a reasonable time schedule for the actions to be taken, and includes a description of the surveillance required to determine their compliance.

Having concluded that the EC objectives were not validly adopted, and that the 2006 Bay-Delta Plan's program of implementation is inadequate for municipal discharges, the Court finds the Board prejudicially abused its discretion in applying the 2006 Bay-Delta Plan to Tracy's municipal wastewater treatment plant. In addition, the Board prejudicially abused its discretion in finding the 2006 Bay-Delta Plan authorizes the Board to perform the "reasonable potential" analysis at the end of Tracy's discharge pipe, rather than at the Old River/Tracy Road Bridge compliance location

Accordingly, the Court shall issue a peremptory writ of mandate compelling the Board to vacate the provisions of the May 19, 2009, Order relating to effluent limitations for electrical conductivity, and to reconsider and revise its Order in a manner consistent with this ruling.

In all other respects, the Court denies the challenges to the Board's Water Quality Control Plan and the Board's May 19, 2009 Order applying the Water Quality Control Plan to Tracy's municipal wastewater treatment plant.

The Court shall not require the Board to invalidate the existing EC objectives pending the Board's return to the writ, but shall enjoin the Board from applying the EC objectives to Tracy and other municipal dischargers pending reconsideration of

the EC objectives and adoption of an adequate program of implementation for municipal dischargers, in compliance with this Court's ruling.

The Court denies the request for declaratory relief, as unnecessary.

II.
Background Facts and Procedure

The quality of our nation's waters is governed by a complex statutory and regulatory scheme that implicates both federal and state responsibilities (*City of Burbank v State Water Resources Control Board* (2005) 35 Cal.4th 613, 619.)

The primary federal law governing water pollution in the United States is the Clean Water Act. The Clean Water Act is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (*Id.*) The Act's national goal was to eliminate by 1985 the discharge of pollutants into navigable waters of the United States (*Id.*, see also 33 U.S.C. § 1251(a)(1)) To accomplish this goal, the Act requires compliance with "effluent limitations," which are restrictions on the quantities, rates, or concentrations of chemical, physical, biological, and other constituents discharged from point sources into navigable waters (*City of Burbank*, *supra*, 35 Cal.4th at p.620; see also 33 U.S.C. §§ 1311, 1362(11).)

The Act provides for two sets of effluent limitations applicable to polluters. First, polluters must comply with technology-based effluent limitations, which are limitations based on the best available or practical technology for the reduction of water pollution. (*Communities for a Better Environment v State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1093.)

Second, the polluter must comply with more stringent water quality-based effluent limitations (or WQBELs), where applicable. (*Id.*) Congress supplemented the technology-based effluent limitations with water quality-based effluent limitations so that point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels. (*Id.*) Thus, WQBELs implement water quality standards. (*Id.* at p.1094.)

The Clean Water Act requires WQBELs whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the *reasonable potential* to cause, or contribute to, an excursion above any established water quality standard.[2] (*Id.*; see also 40 C F R. § 122 44(d)(1).)

Water quality standards establish the desired condition of a waterway (*Communities for a Better Environment, supra,* 109 Cal App.4th at p.1092.) Water quality standards define the water quality to be attained or maintained for a water body by determining the designated beneficial uses of the water body and setting

[2] This analysis is commonly referred to as the "reasonable potential" analysis

water quality criteria sufficient to protect those designated uses.[3] (*Id.*, see also 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i).)

Water quality standards are, in general, promulgated by the states. (*Id.* at p 1092.) However, the U.S. EPA provides states with guidance in the drafting of water quality standards and reviews and approves state water quality standards. (*City of Burbank, supra,* 35 Cal.4th at p.621; see also 33 U.S.C. § 1313(c)(2); Water Code § 13245.[4]) If the EPA recommends changes to state water quality standards and a state fails to comply with the recommendation, the Clean Water Act authorizes the EPA to promulgate water quality standards for the state (*City of Burbank, supra,* 35 Cal.4th at p 621; see also 33 U.S.C. § 1313(c)(2))

In California, the governing state law, the Porter-Cologne Water Quality Control Act (Porter-Cologne), assigns the task of establishing water quality standards to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards, which together comprise the principal state agencies with primary responsibility for the coordination and control of water quality. (Water Code § 13001.)

Porter-Cologne requires regional boards to establish water quality objectives through regional water quality control plans (or basin plans). However, the State Board, which is responsible for overseeing the activities of the various regional boards, also may formulate its own water quality control plans which supersede conflicting regional basin plans (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452; Water Code § 13170)

Water quality control plans must (1) identify the "beneficial" uses of the water to be protected, (2) establish "water quality objectives" to protect those uses, and (3) establish a "program of implementation" to achieve those objectives.[5] The program of implementation must include a description of the nature of the actions necessary to achieve the objectives, including recommendations for appropriate action by any entity, a time schedule for the actions to be taken; and a description of the surveillance to be undertaken to determine compliance with the objectives. (Water Code § 13242.)

A fundamental premise of Porter-Cologne is that water quality regulation must be "reasonable." The goal of Porter-Cologne is to attain the highest quality water which is reasonable, considering all demands being made and to be made on those waters and total value involved, beneficial and detrimental, economic and social, tangible and intangible. (Water Code § 13000.) Consistent with this goal, Porter-Cologne requires water quality control plans to establish such water quality objectives as "will

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[3] Water quality criteria can be expressed either as numeric quantitative limitations, pollutant concentrations or levels, or as narrative statements (40 C F R § 131 3(b))

[4] Citations are to California authority, unless otherwise indicated

[5] Beneficial uses may include, but are not limited to, domestic, municipal, agricultural, and industrial supply, power generation, recreation, aesthetic enjoyment, navigation, and preservation and enhancement of fish, wildlife and other aquatic resources or preserves (Water Code § 13050)

ensure the reasonable protection of beneficial uses" and the prevention of nuisance. (Water Code §§ 13050(f), 13241.)

When establishing water quality objectives, Porter-Cologne imposes an affirmative duty on the State to consider a number of factors, including economic considerations, environmental characteristics of the area, and whether the proposed objective is attainable. (Water Code § 13241; see also RB1545-1549 [Attwater Memo].)

State beneficial uses and water quality objectives are analogous to federal designated uses and water quality criteria. If they are approved by the U.S. EPA, state water quality objectives constitute the water quality standards for purposes of compliance with the Clean Water Act. Thus, in most instances, state water quality objectives, established through the adoption of water quality control plans, are the federal water quality standards.

Under both state and federal law, a permit is required to discharge pollutants from point sources to surface waters These permits are known under state law as Waste Discharge Requirements (WDRs) and under federal law as National Pollutant Discharge Elimination System (NPDES) permits. (33 U S C. § 1342, Water Code § 13374) WDRs established by the state are the equivalent of NPDES permits required by federal law. (Water Code § 13374.) Thus, WDRs issued by regional water boards ordinarily also serve as NPDES permits under federal law (*City of Burbank, supra,* 35 Cal 4th at p 631.) The regional boards issue discharge permits in orders adopted through quasi-adjudicatory proceedings.

Discharge permits are the primary means of enforcing the effluent limitations and water quality standards required by the Clean Water Act. (*City of Burbank, supra,* 35 Cal.4th at p.621.) NPDES permits must contain any (technology-based) effluent limitations set by the EPA or the state, as well as any more stringent (water quality-based) effluent limitations necessary to meet applicable water quality standards.

At issue in this case are the water quality criteria (or, to use the state term, objectives) for salinity in the southern portion of the Sacramento-San Joaquin Delta (the "southern Delta salinity objectives"[6]) and the State Board order applying those water quality objectives to the WDR/NPDES permit for the City of Tracy's municipal wastewater treatment plant. Based on the 2006 amendments to the Water Quality Control Plan for Salinity for San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the "2006 Bay-Delta Plan"), the State Board ordered the Central Valley Regional Board to amend Tracy's WDR/NPDES Permit to require final water quality-based effluent limitations to implement the southern Delta salinity objectives.

Petitioner Tracy and Intervenor Clean Water Association (collectively, "Petitioners") challenge whether the southern Delta salinity provisions can be applied to Tracy's wastewater treatment plant or other "publicly owned treatment works" (or "POTWs").

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[6] Because the salinity objectives are expressed as electrical conductivity (EC), the southern Delta salinity objectives are sometimes referred to as the southern Delta EC objectives or the EC objectives

Petitioners contend that the provisions of the Bay-Delta Plan related to the southern Delta salinity objectives were adopted and modified in a manner contrary to law and are, therefore, invalid. Moreover, even if the salinity provisions of the Bay-Delta Plan are valid, Petitioners contend that the State Board abused its discretion in applying them to Tracy's wastewater treatment plant.

A History of the efforts to control salinity in the southern Delta

The Sacramento-San Joaquin River Delta generally describes a large lowland estuary at the confluence of the Sacramento and San Joaquin Rivers The Delta acts as a funnel for the entire California Central Valley drainage basin, draining thousands of miles of waterways through the Delta, Suisun Bay, San Francisco Bay, to, ultimately, the Pacific Ocean. (*United States v. State Water Resources Control Board* (1986) 182 Cal App 3d 82, 107.)

The Delta serves as the heart of California's massive north-to-south water-delivery projects operated by the U S Bureau of Reclamation (USBR) and the California Department of Water Resources (DWR). (*Id.* at p.97.) In general, the purpose of the water projects is to divert and store water in the water-rich northern half of the state and transport it to water-poor areas in the south. Both the "Central Valley Project" and "State Water Project" (as the water projects are known) divert and store water from the rivers that flow into the Delta during periods of heavy flow. Quantities of this stored water are then periodically released back into the Delta. Pumps situated at the southern edge of the Delta eventually lift water released to the Delta into canals for transport to the San Francisco Bay Area, the San Joaquin Valley, and Southern California. (*Id.*) In normal water years, the water projects export about 30 percent of the water that reaches the Delta. Much of the water exported via the water projects is used for agricultural uses. The rest is used for municipal or industrial purposes, or is released into rivers or wetlands for environmental reasons.[7]

The Delta receives about 50 percent of California's total streamflow runoff. Water from the Delta is used to meet the needs of two-thirds of the population of California and to irrigate 4.5 million acres of farmland The Delta also provides crucial habitat for fish and wildlife and, because of its aesthetic appeal, is an attractive destination for boating, fishing, hunting, and other recreational activities.

For all of these reasons, improving and maintaining the quality of the water in the Delta is important. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 694.)

One of the most significant factors threatening the quality of water in the Delta is salinity (*United States v. State Water Resources Control Board, supra*, 182

[7] As of 1999, the Central Valley Project (or CVP) supplied water to approximately 19,000 farms covering three million acres The CVP also supplies water to many urban areas in Northern and Central California, including Redding, Sacramento, most of Santa Clara County, Stockton and Fresno State Water Project (or SWP) water is used for agricultural uses in the San Joaquin Valley and is transported to Southern California where it is used primarily for municipal and industrial uses

Cal.App.3d at p 107) Delta lands, situated at or below sea level, are constantly subject to ocean tidal action (*Id*) Salt water entering from San Francisco Bay extends well into the Delta, checked only by the natural barrier of fresh water flowing out from the Delta toward the Pacific Ocean. (*Id.*)

As fresh water increasingly has been diverted from the Delta for agricultural, industrial, and municipal development, saltwater intrusion has intensified, particularly during the dry summer months and in years of low precipitation and runoff. (*Id*) This has resulted in efforts to attempt to control the amount of salinity in the Delta.

1. Efforts to regulate salinity prior to the 1978 Delta Plan

Efforts to control salinity in the Delta date back to at least the 1960's. (*State Water Resources Control Board Cases, supra*, 136 Cal.App 4th at p.694.) At first, the State Water Rights Board (a predecessor to the current State Water Resources Control Board) merely recognized the problem of salinity incursion into the Delta, but did not attach any specific water quality standards to permits. However, the Water Rights Board reserved jurisdiction to revise or formulate additional terms and conditions regarding salinity control in the water rights permits issued to USBR and DWR when the impact of the diversions on the water quality in the Delta became better known. (*Id.* at p.695; see also DP37838, 38203-038204.)

In 1965, various interested parties, including USBR and DWR, reached agreement on water quality criteria for the Delta (the "1965 criteria"). The 1965 criteria did not govern electrical conductivity, but set applicable levels for chloride, one of several ions used to measure salinity. Two years later, in Decision 1275, the State Water Rights Board ordered the SWP's permits to be subject to the 1965 criteria insofar as the criteria do not conflict with the other terms and conditions of the permits. (DP37945)

Thereafter, the Federal Water Pollution Control Act required each state to establish water quality standards applicable to interstate waters by June 30, 1967. Consistent with the requirements of the legislation, on June 23, 1967, the State Water Quality Control Board submitted to the Secretary of the Interior a statement of policy for the control of water quality in California's interstate waters, including the Delta

In July of 1968, the federal government expressed concern that the State's water quality control policy for the Delta did not adequately protect beneficial uses and proposed some supplemental water quality objectives for chloride and total dissolved solids concentrations Following receipt of the federal government's comments, the State Water Resources Control Board (State Board) adopted a supplemental water quality control policy for the Delta through Resolution 68-17. (DP37360-37362, 37947.) The federal government approved the supplemental standards, but indicated its approval was given in reliance upon a commitment from the State Board to consider supplemental salinity standards

In accordance with the commitment made in Resolution 68-17, a hearing on supplemental salinity standards was initiated in 1969, which culminated with the Board's issuance of Decision 1379 in 1971. (DP37947.) Decision 1379 established

new water quality objectives for the Delta, applicable to both the CVP and SWP projects. However, as a result of litigation, Decision 1379 was stayed pending a final decision in *California v United States*, a case in which the principal issue was the jurisdiction of the State to condition water rights of federal projects. (DP37948.) Thus, the requirements of the earlier water rights decision, D-1275, remained in effect

Also in 1971, the regional water quality control board for the Central Valley Basin (Basin 5) adopted an interim water quality control plan.

Then, in 1973, the State Board held a hearing on proposed supplemental water quality objectives for the Delta and adopted a "Water Quality Control Plan Supplementing State Water Quality Control Policies for Sacramento-San Joaquin Delta." (DP37949 [by Resolution 73-16]) The plan set salinity standards based on chloride. (DP37904.)

Also in 1973, the State Board issued Decision 1422, granting USBR's application for permits to store water at New Melones Reservoir. Decision 1422 permitted USBR to appropriate water from the Stanislaus River for irrigation, municipal, and industrial uses, subject to various conditions and limitations, including the observation of water quality goals on the Stanislaus and lower San Joaquin rivers. Among other things, Decision 1422 required releases of stored water from New Melones Reservoir to maintain a mean monthly concentration of Total Dissolved Solids in the San Joaquin River at Vernalis of 500 parts per million or less (500 mg/l). (DP12004, 38437, 31241)

2. The 1978 Delta Plan and Water Rights Decision 1485

In 1978, the State Board adopted the 1978 Water Quality Control Plan for the Sacramento and San Joaquin Delta (the "1978 Delta Plan"). (DP37876 *et seq*) In the 1978 Delta Plan, the State Board concluded that salinity intrusion is the major water quality factor affecting beneficial uses of Delta water. Therefore the discussion on water quality conditions in the Delta was restricted to salinity intrusion. (DP37901)

According to the Board, the extent of salinity intrusion into the Delta is determined by the relative magnitude of the opposing forces of tidal action and Delta outflows. (See DP 37901; see also DP37951 [beneficial uses of the Delta water are dependent upon adequate outflow of freshwater to repel seawater intrusion and provide suitable habitat for fish and wildlife]) The Board determined the major factors affecting Delta outflows were natural runoff, the regulatory effects of upstream developments, and the SWP and CVP water projects. Thus, the Board found that salinity in the Delta is directly influenced by the operations of the CVP and SWP water projects. (DP37901)

In the 1978 Delta Plan, the Board set new salinity objectives, expressed as electrical conductivity (or "EC"), to protect agricultural uses in the southern Delta (See DP37961, 37990.) The southern Delta EC objectives were based on the calculated

maximum salinity of applied water that would sustain 100% yields of two salt-sensitive crops grown in the southern Delta (beans and alfalfa). (DP37987-37990.)

The 1978 Delta Plan set the following EC objectives for the southern Delta an EC objective of 700 micromhos per centimeter (700 µmhos/cm or 0 7mmhos/cm) from April 1 through August 31, to protect beans during the summer irrigation season, and an EC objective of 1000 micromhos per centimeter (µmhos/cm) from September 1 through March 31, to protect alfalfa during the winter irrigation season (DP16907.) The State Board envisioned that these objectives would be achieved by controlling water quantity/flow through conditions on the water rights permits issued to USBR and DWR. (DP37363.)

Although the 1978 Delta Plan adopted new EC objectives for locations in the southern Delta, the State Board delayed implementation of the objectives pending negotiations concerning the construction of permanent barriers or other physical devices to meet the established water quality objectives in the southern Delta. The Board noted that if the physical facilities are constructed, the flows needed to prevent salinity intrusion may be only a moderate increase above those committed from New Melones Reservoir. (DP37993.) Accordingly, while the Board may have set EC objectives for locations in the southern Delta, it expressly stated that such objectives were "to become effective only upon the completion of suitable circulation and water supply facilities." (DP38000.) In the meantime, the Board concluded that the "Vernalis objective" contained in the Sacramento-San Joaquin Delta Basin (Basin 5B) Plan should be used as the interim water quality standard for the southern Delta (DP37994; see also DP37961.)

In conjunction with the 1978 Delta Plan, the State Board also exercised its earlier reservation of jurisdiction over the USBR and DWR water right permits for the CVP and SWP by adopting Water Rights Decision 1485. In Decision 1485, the State Board amended the water rights permits held by the USBR and DWR for the CVP and SWP projects, exercising the Board's reserved jurisdiction to establish or revise the terms and conditions of those permits for salinity control. Decision 1485 amended the permits to include, as terms and conditions of the CVP and SWP permits, the same water quality objectives adopted in the 1978 Delta Plan to protect beneficial uses of the Delta (except for the southern Delta). (*State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at p 698)

Consistent with the 1978 Delta Plan, Decision 1485 did not incorporate the southern Delta EC objectives into the terms or conditions of the CVP or SWP permits (DP37840-37841; see also DP37837.) Indeed, the Board concluded that there was no evidence that the CVP and SWP facilities were having any direct impact on water quality conditions in the southern Delta (DP37840.) Thus, the Board did not incorporate into its decision any specific provisions for protection of agriculture in the southern Delta. (*State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at p.698.)

As in the 1978 Delta Plan, the Board noted that negotiations were then ongoing between the operators of the water projects and the South Delta Water Agency concerning the construction of physical facilities to meet the established water

quality objectives in the southern Delta. The Board concluded that if the negotiations did not result in an agreement, or if the water projects are otherwise determined to have an effect on water quality in the southern Delta, the Board would use its reserved jurisdiction to amend the terms and conditions of the CVP and SWP permits as appropriate. (DP37842.)

A number of parties filed mandamus petitions challenging the 1978 Delta Plan and Decision 1485. The trial court found the Board's water quality objectives inadequate and issued a writ of mandate commanding the Board to reconsider the Plan (*State Water Resources Control Board Cases, supra*, 136 Cal.App.4th at p.699.)

On appeal, the appellate court concluded that modification of the water projects' permits to implement the water quality objectives was a proper exercise of the Board's water rights authority. However, in establishing objectives that protect only Delta water users, the court concluded that the Board had too narrowly defined the scope of its duty and power to provide water quality protection Nevertheless, because the Board already had announced its intention to establish new and revised water quality objectives, the appellate court determined that remand to the Board would serve no useful purpose and, as a result, Decision 1485 remained in effect. (*Id.*)

In short, the principal focus of both the 1978 Delta Plan and Decision 1485 was on the effects of the state and federal water projects on the Delta. (DP38205)

3. The 1991 Bay-Delta Plan

In 1987, the State Board began proceedings to review and revise (if necessary) the applicable water quality objectives for the Delta, including the standards for salinity (DP11945, 38206.) The State Board subsequently adopted in 1991 its "Water Quality Control Plan for Salinity for San Francisco Bay/Sacramento-San Joaquin Delta Estuary" (the "1991 Bay-Delta Plan").

The 1991 Bay-Delta Plan included water quality objectives for EC to be implemented over time in the southern Delta at Vernalis and three other specified locations. (DP11967) The Plan included EC levels of 0.7 mmhos/cm EC during the summer irrigation season and 1.0 mmhos/cm EC during the winter irrigation season.

Because negotiations regarding the construction of permanent barriers never were completed, as contemplated in the 1978 Delta Plan, the 1991 Bay-Delta Plan provided for a staged implementation of EC objectives in the southern Delta. Initially, the Plan only imposed a 500mg/l mean monthly Total Dissolved Solids (all year) standard, measured at Vernalis. However, the Plan specified that EC objectives of 0.7 mmhos/cm during the summer irrigation season, and 1.0 mmhos/cm EC during the winter irrigation season, were to be implemented no later than 1996.[8]

[8] According to the State Board's Resolution 2006-0098, the 1991 Bay-Delta Plan required implementation of the EC objectives at Vernalis and Brandt Bridge by 1994, and required implementation of the EC objectives at Old River (near Middle River and at Tracy Road Bridge)

4. The 1995 Bay-Delta Plan and Water Rights Decision 1641

In 1994, the State Board commenced a series of public workshops to review and revise the 1991 Bay-Delta Plan. The workshops culminated in the State Board's adoption, in 1995, of an amended "Water Quality Control Plan for Salinity for San Francisco Bay/Sacramento-San Joaquin Delta Estuary" (the "1995 Bay-Delta Plan") (DP38396-38399, 38400 et seq.)

The 1995 Bay-Delta Plan indicates that the water quality objectives for salinity are unchanged from the 1991 Bay-Delta Plan, except that the 1995 Plan further delayed, until December 31, 1997, the effective date of the EC objectives for the southern Delta compliance stations on Old River.[9] (DP38397, 38422, 38425; see also DP38416-38417.)

The 1995 Bay-Delta Plan provides that most of the water quality objectives in the Plan will be implemented by assigning responsibilities to water rights holders because the factors to be controlled were primarily related to flows and diversions. (DP38412.) The Plan specifically provides that implementation of the southern Delta EC objectives will be accomplished through the release of adequate flows to the San Joaquin River and control of saline agricultural drainage to the San Joaquin River and its tributaries. (DP38437) The State Board indicated that it would consider, in a future water rights proceeding, the nature and extent of water rights holders' responsibilities to meet the objectives in the Plan (DP38412.)

In 1997, the Board issued a notice of public hearing for the water rights proceeding in which the Board would allocate responsibility for implementing the objectives in the 1995 Bay-Delta Plan. (DP31165; see also *State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at pp.705-706.) Ultimately, in 1999, the Board adopted Water Rights Decision 1641 In 2000, following consideration of various petitions for reconsideration, on March 15, 2000, the Board issued Revised Decision 1641 pursuant to Order WR 2000-02 (DP81, 31165)

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by 1996, unless a three-party agreement was reached among DWR, USBR, and South Delta Water Agency (DP135) However, the language of the 1991 Bay-Delta Plan is not entirely consistent with this interpretation (See DP11967, 11971, 12007, 12062, 12105, 12109, 12124) For example, one section of the Plan required the EC objectives to be implemented no later than 1994, with six identified compliance monitoring stations (namely, the San Joaquin River at Vernalis, Brandt Bridge, and Mossdale, Old River near Middle River and at Tracy Road Bridge, and Middle River at Howard Road Bridge) While the Mossdale and Middle River monitoring locations are mentioned in footnotes to the table of water quality objectives, and in the implementation plan, they are not mentioned in the text of the discussion of the water quality objectives (See DP11967, 11971, 12007, 12105, 12109, 12124) Further, although the Plan speaks of three distinct stages, there does not appear to be any meaningful difference between stage 2 and stage 3

[9] This language supports the State Board's view that the 1991 Bay-Delta Plan required implementation of the EC objectives at Vernalis and Brandt Bridge by 1994, and implementation of the EC objectives at Old River by 1996, but, as discussed above, this is not clear from the language of the 1991 Bay-Delta Plan itself.

Revised Decision 1641 was an effort by the State Board to allocate responsibility for meeting the southern Delta salinity objective set forth in the 1995 Bay-Delta Plan. (DP31241.) The 1995 Bay-Delta Plan included salinity objectives for the San Joaquin River (at Vernalis and Brandt Bridge) and Old River (near Middle River and at Tracy Road Bridge). As of 2000, USBR was required (at least temporarily) to meet the Vernalis salinity objective in the 1995 Bay-Delta Plan pursuant to Order WR 98-09 (DP31241.) However, no regulatory requirement was in place to assign responsibility for meeting the objectives at the other three locations. (*Id.*)

In Revised Decision 1641, the State Board concluded that the salinity problem at Vernalis is the result of saline discharges to the San Joaquin River, principally from irrigated agriculture, combined with low flows in the river due to activities associated with operating the CVP in the San Joaquin River basin. The State Board concluded that, by reducing the assimilative capacity of the river, the CVP is the "principal cause" of concentrations exceeding the salinity objectives at Vernalis. (DP31242, 31245) Therefore, Revised Decision 1641 amended the CVP permits to require USBR to meet the 1995 Bay-Delta Plan's salinity objectives at Vernalis.[10] (DP31248-31249, 31344.)

The State Board concluded that water quality in the southern Delta downstream of Vernalis is influenced by San Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity. (*Id.*) The State Board concluded that DWR and USBR are partially responsible for salinity problems in the southern Delta because of hydrologic changes caused by export pumping Therefore, Revised Decision 1641 amended the export permits of DWR and USBR to require the projects to take actions to achieve construction of permanent barriers (e.g., gates, weirs or wingdams) to enhance water levels and circulation in the southern Delta, by April 1, 2005

Until April 1, 2005, Revised Decision 1641 required DWR and USBR to meet an EC objective of 1.0 mmhos/cm. (DP31249.) After April 1, 2005, DWR and USBR would be required to meet all the southern Delta EC objectives, including the 0 7 mmhos/cm objective, except that if permanent barriers are constructed and an acceptable operations plan is prepared, the 0 7 EC objective would be replaced by the 1.0 EC objective. (DP31344; see also DP31321-31325) Thus, under Revised Decision 1641, the full 1995 Bay-Delta Plan EC objectives were not applicable to DWR and USBR until (at the earliest) April 1, 2005.

By 2005, the USBR and DWR had not constructed the permanent barriers contemplated by Revised Decision 1641. Thus, as of April 1, 2005, USBR and DWR were required to meet the southern Delta salinity objectives of 0 7 mmhos/cm EC during the summer irrigation season and 1 0 mmhos/cm EC during the winter irrigation season.[11]

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[10] It appears that, until April 1, 2005, USBR only was required to meet an EC salinity requirement of 1 0 mmhos/cm (See DP31344)

[11] The State Board has taken the position that Revised Decision 1641 did not require SWP to meet the salinity objectives at Vernalis

5. The 2006 Bay-Delta Plan

In December of 2006, the State Board adopted an amended "Water Quality Control Plan for Salinity for San Francisco Bay/Sacramento-San Joaquin Delta Estuary" (the "2006 Bay-Delta Plan"), amending the Water Quality Control Plan originally adopted in 1978 and subsequently amended in 1991 and 1995.

Although the 2006 Bay-Delta Plan amended the program of implementation to achieve the salinity objectives, in the view of the State Board, the 2006 amendments did not make any substantive changes to the objectives themselves. According to the State Board, the 2006 Bay-Delta Plan did not change the agricultural beneficial uses, or the salinity objectives to protect such uses. (DP2, 24, 85.)

During the Plan review, the State Board received comments regarding whether it should modify the southern Delta EC objectives for the protection of agricultural beneficial uses. (DP134.) The State Board concluded, however, that it did not have adequate evidence to support changes in the EC objectives as part of the 2006 Bay-Delta Plan amendments. (DP142.) The State Board indicated that it would receive additional information on the objectives and their program of implementation beginning in 2007. (DP 45, 142 [12])

The State Board did make what it characterized as "minor" changes to the table of the EC objectives for agricultural beneficial uses in the southern Delta [Table 2]. Specifically, Footnote 5 of Table 2 in the 1995 Bay-Delta Plan stated that the 0 7 mmhos/cm EC objective would be implemented at the two Old River sites by December 31, 1997. Because USBR and DWR were required by virtue of Revised Decision 1641 to meet both the 0.7 mmhos/cm and 1.0 mmhos/cm EC objectives at these sites as of April 1, 2005, the State Board deleted Footnote 5 from the Bay-Delta Plan as obsolete. (DP142.) The State Board also deleted a statement in Table 2 of the 1995 Bay-Delta Plan regarding the possible implementation of a three party contract among DWR, USBR, and SDWA. (*Id.*)

Prior to 2006, the programs of implementation for the Bay-Delta Plan focused on the federal and state agencies that oversee the CVP and SWP, but the State Board noted that it would use its Clean Water Act section 401 water quality certification authority in "appropriate cases." (See DP 38435.) In regard to the southern Delta agricultural salinity objectives, the 1995 Bay-Delta Plan indicated that implementation of the objectives would be accomplished primarily through the release of flows to the San Joaquin River at Vernalis and by control of saline agricultural drainage to the San Joaquin River and its tributaries

Although the 1995 Bay-Delta Plan indicated that other source control and drainage management measures were expected to contribute to achieving the salinity objectives, municipal discharges were not discussed as a substantial source of

[12] The Plan states that there is a need for an updated independent scientific investigation to address whether the agricultural beneficial uses in the southern Delta reasonably would be protected at higher salinity levels (DP45)

salinity, and the Plan did not discuss municipal discharge controls as a means to achieve the agricultural salinity objectives.

In the 2006 Bay-Delta Plan, the State Board stated that elevated salinity in the southern Delta is caused by a "multitude of factors," including low flows, irrigation return flows, subsurface accretions of groundwater, tidal actions, diversions of water by the SWP, CVP, and local water users, channel capacity, local discharges of land-derived salts, and municipal discharges. (DP134.) Therefore, the State Board stated that implementation of the southern Delta salinity objectives will require a mix of water right actions and water quality control measures, including dilution flows, regulation of water diversions, pollutant discharge controls, improvements in water circulation, and long-term implementation of best management practices to control saline discharges. (DP40-41.)

The Plan notes that the State Board already has conditioned the water rights of the USBR upon implementation of the salinity objectives on the San Joaquin River at Vernalis, and the water rights of the DWR and USBR upon implementation of the salinity objectives at three other (interior) compliance stations (the San Joaquin River at Brandt Bridge, Old River at Middle River, and Old River at Tracy Road Bridge) The Plan further notes that salinity objectives also are being implemented through various non-water right actions, including the San Joaquin Salinity Control Program and the Central Valley Regional Board's Basin Plan Amendment for salt and boron discharges in the San Joaquin River. (DP41.)

The Plan provides that to achieve the southern Delta salinity objectives, the State Board also could require dilution flow releases from non-SWP/CVP reservoirs or use measures that affect circulation of water in the southern Delta (such as permanent operational gates). In addition, to reduce salinity in the southern Delta, the Plan provides that the Central Valley Regional Board shall implement Total Maximum Daily Load (TMDL) and shall impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers. (DP41)

For the first time, the State Board's program of implementation for the southern Delta salinity objectives specifically required pollutant discharge controls on in-Delta discharges of salts by municipal dischargers. Prior to 2006, the Bay-Delta Plan indicated that implementation of the objectives would be accomplished primarily through the release of flows by water right holders and, to a lesser extent, by control of agricultural discharges. Municipal discharges, however, were not discussed

In addition, the State Board amended the Bay-Delta Plan to "clarify" that the water quality objectives for a general area (such as the southern Delta) apply to all locations within the general area, and not just at specific monitoring locations used to determine compliance with the objectives (Vernalis, Brand Bridge, and Old River at Middle River and at Tracy Road Bridge). (DP 23, 85, 87.)

Thus, as a result of the 2006 amendments, the Bay-Delta Plan stated, for the first time, that the southern Delta salinity objectives apply to all locations within that general area and that municipal dischargers would be regulated to implement those objectives using pollutant discharge controls.

The 2006 modifications to the Bay-Delta Plan were approved by California's Office of Administrative Law in June of 2007

6. The 2006 Cease and Desist Order

On February 15, 2006, the State Board issued a Cease and Desist Order (CDO) (Order WR 2006-0006) against DWR and USBR for a threatened violation of the requirement to meet the 0.7 mmhos/cm interior southern Delta salinity objective. (See State Board Order WR 2010-0002, Ex. A to the Declaration of Melissa Thorme, supporting Tracy's Request for Judicial Notice, at p 4) The State Board ordered USBR and DWR to implement measures to obviate the threat of violation by July 1, 2009, either by constructing permanent barriers in the Delta or implementing equivalent salinity control measures (*Id.*) The State Board required DWR and USBR to submit a compliance plan for approval by the Board's Executive Director. (*Id.*) The Board also imposed several reporting requirements. (*Id.*)

As required by the 2006 CDO, DWR and USBR submitted a proposed compliance plan. The compliance plan proposed to obviate the threatened violation, in part, by constructing permanent, operable gates as part of the South Delta Improvements Program (the Improvements Program). Construction of the gates was a central component of the plan to achieve compliance with the interior southern Delta salinity objectives (See State Board Order WR 2010-0002, Ex. A to Thorme Declaration, at pp.1-7.)

In order to implement the Improvements Program and proceed with construction of the permanent gates, DWR and USBR needed to comply with numerous regulatory requirements, including the state and federal Endangered Species Act, sections 401 and 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act, and sections 1600 through 1616 of the Fish and Game Code. In addition, USBR and DWR needed to comply with the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) (*Id*) In 2006, USBR initiated formal consultation with the NOAA Fisheries (NOAA) and the U.S. Fish and Wildlife Service (USFWS).

In 2009, NOAA released a biological opinion concluding that the permanent gates would degrade critical habitat for the Central Valley steelhead and (potentially) salmon, and directed DWR not to implement the Improvement Program.[13] (*Id*)

In May of 2009, DWR and USBR applied for a modification to the 2006 CDO. In 2010, the State Board determined that the deadline for compliance with the interior southern Delta salinity objectives should be extended in recognition of the fact that NOAA prohibited DWR from constructing the permanent gates as part of the Improvement Program The State Board extended the compliance deadline until after it completes its review of the 2006 Bay-Delta Plan and any subsequent water rights proceeding. (*Id.*)

[13] USFWS issued a biological opinion allowing operation of the permanent gates, subject to USFWS approval to protect Delta smelt

In the interim, the State Board required DWR to continue to implement a temporary barriers program to improve salinity in the southern Delta, and required DWR and USBR to study the feasibility of alternative salinity control measures. (*Id.*)

B. History of Tracy's Discharge Permit

Tracy owns and operates the Tracy Wastewater Treatment Plant.

The Tracy plant is composed of a main treatment facility and an industrial pretreatment facility. (SB39.) Most of the waste treated by the plant is domestic wastewater from the City's wastewater collection (sewer) system. The plant also accepts industrial wastewater, much of which is food-processing wastewater from a local cheese manufacturer called Leprino Food Company. Leprino's permit allows for a discharge of up to 850,000 gallons per day of industrial food-processing wastewater into Tracy's plant.

The Tracy Plant discharges to Old River, which is part of the southern Sacramento-San Joaquin River Delta. Treated effluent is discharged at Old River approximately 3.5 miles north of the plant near the junction of Paradise Cut, Tom Paine Slough, Salmon Slough, and Sugar Cut Slough. The nearest water quality monitoring station is Old River at Tracy Road Bridge, approximately 4 miles west (downstream) of the discharge point.

Relative to other municipal wastewater discharges, Tracy's effluent discharge is high in salt. The high salinity is partly due to its municipal water supply source, but also due to Leprino's high salt loading. Wastewater from Leprino has an average EC of 3,113 µmhos/cm (3.113 mmhos/cm). Leprino treats its wastewater to reduce the organic loading typical of food processing waste, but provides no specific treatment to reduce salt. (SB148.) Also, before being processed at the main treatment facility, Leprino's industrial wastewater is discharged (along with other high salinity water) into unlined industrial oxidation ponds. While in the ponds, salts are concentrated through evaporation of the wastewater. The high salinity industrial wastewater is then commingled and discharged to the main treatment facility. This results in a significant salt load to the main treatment facility and, ultimately, Old River. (SB149.)

A review of Tracy's monitoring reports from July 1998 through December 2004 shows an average effluent EC of 1753 µmhos/cm, with a range of from 1008 µmhos/cm to 2410 µmhos/cm. These levels exceed the southern Delta EC objectives of 700 µmhos/cm (during the summer irrigation season) and 1000 µmhos/cm (during the winter irrigation season) (SB147.)

Old River, in the vicinity of the Tracy plant's discharge, is tidally influenced. River flow moves upstream during the incoming (or flood) tide and downstream during the outgoing (or ebb) tide In addition to tidal influences, the amount of flow in Old River is affected by San Joaquin River releases, the South Delta Temporary Barriers Program, and SWP and CVP pumping at Clifton Court Forebay. (SB107)

In the Permit, the Regional Board stated that the background EC for the receiving water in the vicinity of Tracy's plant averaged 640 µmhos/cm, indicating that the receiving water frequently has no assimilative capacity for EC (SB 147.) According to monitoring reports, the EC of the plant's water supply averaged 739 µmhos/cm, with a maximum of 821 µmhos/cm. (SB175.) This shows that part of Tracy's salinity problem is the high salt load of its municipal water supply (Even if Tracy did nothing more than discharge its municipal water supply into Old River, its discharge would exceed the southern Delta EC objectives during the summer irrigation season. For its discharge to comply with the EC objectives, Tracy would have to "clean" (remove salt from) the municipal water supply)

The discharge from Tracy's Wastewater Treatment Plant previously was regulated by Order No 96-104 and National Pollutant Discharge Elimination System (NPDES) Permit No. CA0079154.

On November 1, 2000, Tracy filed a report of waste discharge and submitted an application for renewal of its Waste Discharge Requirements (WDRs) and NPDES permit. Subsequently, on February 3, 2003, Tracy submitted a revised report of waste discharge, which included a request to expand the capacity of its plant from 9.0 million gallons per day to 16 million gallons per day (SB37, 105-106, 350)

On May 4, 2007, the Central Valley Regional Board adopted a Permit and Time Schedule Order for Tracy in Orders No. R5-2007-0036 and R5-2007-0037 (collectively, the "Regional Board Permit").

Based on the monitoring reports, the Regional Board acknowledged that discharges from the Tracy plant may cause or contribute to exceedances of the water quality objectives for salinity. Nevertheless, upon the recommendation of the Regional Board's staff, the Regional Board did not impose final numeric water quality based effluent limitations (WQBELs) for salinity in Tracy's Permit.

The Regional Board noted that the Tracy discharge has limited impacts on the salinity problems in the southern Delta. (SB150.) Even under reasonable worst-case conditions, the impact of the Tracy discharge is "relatively small" compared to the other salinity sources in the area. (SB151) If the Tracy discharge were entirely removed, it still would not solve the salinity problems in the area. (SB152.)

Because the receiving water frequently has little or no assimilative capacity for EC, the Regional Board found that imposing final numeric WQBELs for salinity would require Tracy to construct and operate a reverse osmosis treatment plant to reduce its salt loading into the Delta. (SB149, 152.) The Regional Board noted that in Water Quality Order 2005-005 (for the City of Manteca), the State Board concluded that construction and operation of a large-scale reverse osmosis treatment plant to reduce the salt load in municipal wastewater discharges "would not be a reasonable approach." (SB149)

Further, because the Regional and State Boards were in the process of developing a new salinity policy for the Central Valley, and because Tracy could not reasonably be expected to achieve compliance with final numeric WQBELs for salinity within the

life of the Permit, the Regional Board concluded that imposing final numeric WQBELs for salinity was not a "reasonable" approach. (SB149-150, 152.)

Instead, the Permit imposed an interim performance-based effluent limitation for Total Dissolved Solids, intended to limit the annual mass loading of salinity to then-current levels. (SB150-152.) The Permit also established a monthly average effluent salinity goal of 1350 µmhos/cm (water supply plus 500 µmhos/cm) EC to be achieved during the Permit term, and required Tracy to take steps to reduce the salinity in its discharge. (SB62, 150-152, 174.)

The Permit required Tracy to submit a Salinity Plan to reduce its salinity impacts to the southern Delta. Under the Salinity Plan, Tracy must (1) implement all reasonable steps to obtain alternative, lower salinity, water supply sources for the plant; (2) develop and implement a salinity source control program in an effort to meet the interim salinity goal of a maximum increase of 500 µmhos/cm EC over the plant's water supply; and (3) participate financially in the development of a Central Valley Salinity Management Plan. (SB47.) To ensure compliance with the Salinity Plan requirements, the Permit includes final numeric effluent limitations (WQBELs) for EC, to become effective if Tracy fails to submit and implement an acceptable Salinity Plan.[14] (SB47, 153)

The Permit also required Tracy to implement best practicable treatment or control (BPTC) of its discharge (i.e, tertiary treatment or its equivalent), required the development and implementation of a pollution prevention plan for salinity in accordance with § 13263 3 of the California Water Code; and required Tracy to submit annual reports demonstrating its efforts to reduce salinity. (SB60-61, 110, 112, 150) The Permit included a requirement to study the effects of Tracy's discharge in the south Delta and a reopener provision to allow modification of the Permit requirements, if necessary. (SB150.) The Permit requires that it be reopened to include an effluent limitation for salinity prior to the increase in Tracy's discharge to 16 million gallons per day. (SB112)

Altogether, the Regional Board characterized these measures as "reasonable salinity controls" that put Tracy on the path to reducing its salt loading to the Delta. (SB152, see also SB175)

The City's Regional Board Permit was appealed to the State Board by the California Sportfishing Protection Alliance (CalSPA) and by Tracy. (Tracy's petition was held in abeyance while the CalSPA petition was resolved.) CalSPA argued that the Permit failed to establish an effluent limitation for EC that is protective of applicable water quality objectives. (CSPA397.) The State Board found in Order WQ 2009-0003 that CalSPA's petition has merit. The State Board found that the approach taken by the Regional Board was inconsistent with federal requirements to establish a final effluent limitation in an NPDES permit when a pollutant (in this case, salinity) will be discharged at a level that will cause or contribute to an excursion above a water quality standard. (*Id.*) Thus, the State Board concluded, Tracy's Permit must be

[14] The WQBELs state that the EC in Tracy's discharge shall not exceed 700 µmhos/cm during the summer irrigation season and 1000 µmhos/cm during the winter irrigation season (SB153)

remanded to the Regional Board for inclusion of the final effluent limitations for EC consistent with the water quality objectives applicable to Old River. (*Id.*)

After the State Board issued its Order on the CalSPA petition, Tracy removed its own petition for review from abeyance and asked the State Board to rule on that petition. Tracy's petition was reactivated and the Regional Board filed a response to the issues raised. The State Board dismissed Tracy's petition without review.

C. Tracy's Petition for Writ of Mandate

On June 25, 2009, Tracy filed its petition for a peremptory writ of mandate and complaint for declaratory relief in this action. Tracy seeks to have this Court invalidate the provisions of the Bay-Delta Plan relating to the southern Delta EC objectives, as well as the State Board's Order WQ 2009-0003 applying the challenged provisions of the Bay-Delta Plan to Tracy's municipal wastewater treatment plant.

III.
Standard of Review

The actions of the State Board challenged in this proceeding involve both quasi-legislative and quasi-adjudicative functions, invoking different standards for review.

In establishing water quality objectives in a water quality control plan, the Board acts in a legislative capacity. The water quality control plan is thus a quasi-legislative decision.

When reviewing quasi-legislative decisions, the scope of review is narrowly limited. A reviewing court will ask three questions: first, did the agency act within the scope of its delegated authority; second, did the agency employ fair procedures; and third, was the agency action reasonable. (*United States v. State Water Resources Control Board*, *supra*, 182 Cal.App.3d at pp.112-113.) Under the third inquiry, the reviewing court does not inquire whether, if it had power to act in the first instance, it would have taken the action taken by the administrative agency. Rather, the authority of the court is limited to determining whether the decision of the agency was arbitrary, capricious, or entirely lacking in evidentiary support. (*Id.*)

In contrast, in applying the challenged provisions of the Delta Plan to Tracy's municipal wastewater treatment plant, the State Board performs an adjudicatory function. Thus, Order WQ 2009-0003 is a quasi-judicial decision.

Quasi-judicial decisions are judged under Code of Civil Procedure section 1094.5. The inquiry in a case under Civil Procedure Code section 1094.5 shall extend to questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (Civ. Proc. Code § 1094.5(b).)

In cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines the findings are not supported by substantial evidence in the light of the whole record (Civ. Proc. Code § 1094.5(c).)

In this case, California Water Code section 13330(d) specifies that this Court must exercise its independent judgment on the evidence to determine if the State Board abused its discretion under C.C.P. § 1094.5(c). (See Cal. Water Code § 13330(d).) Thus, abuse of discretion is established if the Court determines the findings of the State Board are not supported by the weight of the evidence

When reviewing an agency's interpretation of a statute or regulation, courts must independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning. (*Yamaha Corp of America v State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) It is the duty of the courts to state the true meaning of the law finally and conclusively, even if this requires the courts to overturn an erroneous administrative construction. (*Id* at p 7.)

The agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, or convincing. Other times, it may be of little worth. (*Id.* at pp.7-8) To quote the statement of the Law Revision Commission, the standard of review of an agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency *appropriate to the circumstances* of the agency action (*Id.* at p 8 [emphasis added].)

In determining how much weight to give an agency interpretation, courts must analyze two broad categories of factors· those indicating that the agency has a comparative interpretive advantage over the courts, and those indicating that the interpretation in question is probably correct. (*Id* at p 12.) In the first category are factors indicating the agency has special expertise or technical knowledge, especially where the legal text to be interpreted is technical, complex, or entwined with issues of fact, policy, and discretion (*Id.* at p.12.) In the second category are factors suggesting that the agency gave careful consideration to its interpretation (such as adoption of a formal interpretive rule under the APA), factors indicating that the agency's interpretation was adopted contemporaneous with the legislative enactment being interpreted, and factors showing that the agency has consistently maintained the interpretation over time. (*Id.* at pp 12-13)

Where the agency has special expertise or technical knowledge, and the record shows agency officials have reached an interpretation after careful and studied review, the agency's interpretation is entitled to great weight unless unauthorized or clearly erroneous. (*North Gualala Water Co v State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1607; *Communities for a Better Environment v State Water Resources Control Bd* (2005) 132 Cal.App.4th 1313, 1334.)

IV.
Requests for Judicial Notice

The several requests for judicial notice filed by Tracy and Clean Water Association, which are unopposed, are granted, for background information purposes.

V.
Discussion

A. Tracy's challenge to the EC objectives and the Bay-Delta Plan

1. Were the water quality objectives adopted in a manner contrary to law?

Petitioners Tracy and Clean Water Association contend that the provisions of the Bay-Delta Plan related to the southern Delta EC objectives should be invalidated because they were adopted in a manner contrary to law.

Petitioners contend that the State Board failed to undertake the analysis required by Water Code section 13241 when the State Board initially adopted the EC objectives in 1978 and again when the State Board (purportedly) amended the objectives in 2006. In addition, Petitioners contend the State Board failed to adopt a comprehensive program for implementation of the EC objectives as required by Water Code section 13242. Further, Petitioners allege that the State Board failed to comply with a statutory mandate to periodically review and revise the EC objectives. Therefore, Petitioners seek a declaratory judgment that the contested provisions of the Bay-Delta Plan were adopted and modified in a manner contrary to law, and a peremptory writ of mandate commanding the State Board to set aside those provisions.

Respondent State Board contends that it adequately complied with section 13241 when it adopted the EC objectives in 1978, and that it was not required to conduct the analysis again in 2006 because the objectives did not change (See Opposition, p.9 [citing DP37625-37684])

Further, the State Board argues that even if it failed to conduct the analysis required by section 13241, that failure would at most only be grounds to compel the Board to conduct the required analysis, and would not be grounds to invalidate the EC objectives. The State Board contends that regardless of the outcome of any analysis under section 13241, the State Board is required to maintain the EC objectives to comply with the requirements of the federal Clean Water Act, which does not allow economic considerations to be used as a factor in setting federal water quality standards The State Board argues that failure to comply with state law in the adoption of water quality objectives is of no consequence where, as here, the water quality objectives are approved water quality criteria under the federal Clean Water Act.

The State Board contends that its program of implementation for the EC objectives complies with the requirements of Water Code section 13242. The State Board

argues that a program of implementation does not need to specifically describe how municipal dischargers like Tracy will comply with the applicable water quality objectives Neither, according to the State Board, is a Water Code section 13241 analysis required when establishing a program of implementation in a water quality control plan.

Finally, the State Board contends that it complied with the requirements of Water Code sections 13143 and 13240 to periodically review the Bay-Delta Plan, even if the EC objectives did not change. The State Board argues that while the Water Code requires water quality control plans to be periodically reviewed, it does not require that they be periodically revised. Thus, the State Board did not violate the Water Code by retaining the water quality objectives for EC when the Bay-Delta Plan was reviewed.

a. When were the EC objectives "established?"

When establishing water quality objectives, Water Code section 13241 imposes an affirmative duty on the State to consider a number of factors, including economic considerations. (Water Code § 13241.) Petitioners contend that the State Board failed to undertake the analysis required by Water Code section 13241 when the State Board established the EC objectives

As an initial matter, the Court notes there is some confusion as to when the southern Delta EC objectives were "established." There is good reason for this confusion.

The 1978 Delta Plan, in which the EC objectives were first adopted, provided that the southern Delta salinity objectives would "become effective" only upon the completion of suitable barriers proposed to enhance water levels and circulation Because the barriers never were completed, the EC objectives were not implemented as part of the 1978 Delta Plan.

The EC objectives also were not implemented – at least not fully – under the 1991 Bay-Delta Plan or the 1995 Bay-Delta Plan Indeed, the EC objectives were not implemented at all four compliance locations until, at the earliest, April 1, 2005, and even then the objectives were made applicable only to USBR and DWR.[15] It was not until 2006 that the Bay-Delta Plan was amended to make the objectives fully effective at all four compliance locations

As a result, there is some uncertainty as to when the EC objectives were "established." Were the objectives established in 1978 when the 700/1000 µmhos/cm numeric objectives were selected; in 1991, when the Bay-Delta Plan allegedly required the objectives to be implemented; in 2005, when the full objectives were for the first time made applicable to the DWR and USBR water rights permits;

[15] It is undisputed that USBR and DWR still are not in compliance with the interior southern Delta EC objectives As recently as 2010, the State Board extended the deadline for their compliance with the interior southern Delta salinity objectives until after the State Board completes its review of the 2006 Bay-Delta Plan and any subsequent water right proceedings

in 2006, when the Bay-Delta Plan was amended to fully implement the objectives; or all of the above?

The Board asserts that water quality objectives do not have to be "implemented" to be "established " The Court agrees. The dictionary definition of "establish" includes (1) to institute (as a law) permanently by enactment; (2) to make firm or stable, or (3) to bring about or bring into existence. (See Merriam-Webster's Online Dictionary, at http://www.merriam-webster.com/dictionary/establish [as of April 29, 2011]) In contrast, the verb "implement" means to "carry out," "accomplish" or "give practical effect to." (*Id.* at http://www.merriam-webster.com/dictionary/implement [as of April 29, 2011].) Thus, these definitions support the Board's argument that water quality objectives do not have to be implemented to be established, but they do have to be established (in existence) to be implemented (carried out).

Accordingly, the EC objectives were "established" when they were adopted in 1978, even if the objectives were not fully implemented until many years later.

Petitioners contend that the Board effectively established new objectives when the Board amended its Bay-Delta Plan in 2006 to apply the objectives to "all locations" within the southern Delta.

The Board denies it changed the objectives when it amended its Bay-Delta Plan in 2006. The Board contends that the EC objectives always have applied at all locations throughout the southern Delta. The Board contends its 2006 amendments merely clarified existing law

Where an agency has special expertise or technical knowledge, and the record shows the agency has reached an interpretation after careful and studied review, the agency's interpretation is entitled to great weight and a court will not depart from the interpretation unless it is unauthorized or clearly erroneous (*North Gualala Water Co. v State Water Resources Control Bd* (2006) 139 Cal App 4th 1577, 1607; *Communities for a Better Environment v State Water Resources Control Bd.* (2005) 132 Cal App 4th 1313, 1334.) Those factors are present here Thus, the State Board's interpretation is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized

With respect to the area covered by the EC objectives, the Board's interpretation is not clearly erroneous or unauthorized.[16] Therefore, the Court concludes that while the 2006 Bay-Delta Plan amended the program of implementation to carry out the objectives, it did not make any substantive changes to the area covered by the objectives.

[16] However, the Court acknowledges some evidence suggesting the EC objectives were intended to be location-specific prior to 2006 (See DP38000, DP11956, DP12049, DP38422, DP38425, DP38428 [footnotes 7 and 8], DP5728, DP5731 [footnotes 7 and 8], DP5742, DP5744, see also SB 147, DP38455, RB1921, RB14740)

Petitioners contend that even if the 2006 amendments did not change the location of the EC objectives, the 2006 amendments effectively established new objectives by applying the objectives, for the first time, to municipal discharges

Petitioners argue that when the EC objectives were initially adopted in 1978, the focus was on the effects of the state and federal water projects on the Delta The Board envisioned the objectives would be achieved by controlling water quantity (flow/diversions) through conditions placed on the water rights of USBR and DWR. Because only DWR and USBR would be responsible for meeting the objectives, the Board did not consider, and had no reason to consider, the effect that the EC objectives would have on agricultural, domestic, and municipal dischargers

Unfortunately, the Board proved unable or unwilling to enforce the objectives against DWR and USBR through water rights actions Thus, nearly twenty years after the objectives were initially adopted in 1978, the Board amended the 1995 Bay-Delta Plan to include, for the first time, controls on in-Delta discharges of salts

At first, the pollutant discharge controls applied only to agricultural dischargers Municipal dischargers were not discussed as a substantial source of salinity and the Board's Bay-Delta Plan did not discuss municipal discharge controls as a means to achieve the EC objectives. This did not change until 2006 when, nearly thirty years after the EC objectives were initially adopted, the Board amended its program of implementation to include municipal dischargers In so doing, Petitioners argue, the Board effectively established new EC objectives.

This raises an interesting question as to when, if ever, Water Code section 13241 applies to a program of implementation for achieving water quality objectives. There is limited case authority on this issue.

On one hand, the concurring opinion of Justice Brown in *City of Burbank v State Water Resources Control Board*, suggests that section 13241 analysis is required whenever the Board adopts a basin or water quality plan. (*City of Burbank, supra,* 35 Cal.4th at p.632; see also *id* at p 625 [noting Court of Appeal held the board must consider section 13241 when it adopts a water quality plan, but not when it issues a wastewater discharge permit].)

In contrast, in *City of Arcadia v State Water Resources Control Board ("City of Arcadia II")* (2010) 191 Cal.App 4th 156, the Fourth Appellate District Court of Appeal recently concluded that section 13241 applies only when the Board adopts water quality objectives, and not when it adopts or revises a program of implementation needed for achieving such objectives.[17] (*City of Arcadia v. State*

[17] The opinion in *City of Arcadia II* was certified for publication on December 22, 2010 The Board advised this Court of the opinion the following day However, the decision did not become final as to the Court of Appeal until January 22, 2011, and did not become final for all purposes until the California Supreme Court denied the petition for review on March 16, 2011 – thirteen days after this Court issued its Tentative Decision on March 3, 2011 However, because the Court has not yet entered a final judgment in this proceeding, the Court retains inherent authority to reconsider, correct, or change its ruling

Water Resources Control Board (2010) 191 Cal.App.4th 156, 177-178; see also *San Joaquin River Exchange Contractors Water Authority v State Water Resources Control Board* (2010) 183 Cal.App.4th 1110, 1119-1120 [stating that 13241 does not apply to a program of implementation for achieving already established objectives]; *City of Arcadia v State Water Resources Control Board ("City of Arcadia I")* (2006) 135 Cal.App 4th 1392, 1415-1416 [declining to decide whether Trash TMDL effectively established new water quality objectives because the basin plan did not contemplate a Trash TMDL and therefore economic considerations of a TMDL were not considered].)

In general, the Court agrees with the language in *City of Arcadia II* and *San Joaquin River Exchange* that 13241 does not apply to a program of implementation.

However, in this Court's view, section 13241 can apply to a program of implementation where the program of implementation is so fundamentally different that it constitutes a de facto revision (or material reinterpretation) of the objective itself In such a scenario, the changes may effectively "establish" – that is, bring about – a new and different water quality objective

Consider, for example, what happened in this case. The Board adopted water quality objectives for salinity in 1978 with the understanding that the objectives would be met by regulating the flow of water through the Delta. As a result, the Board did not consider, and had no reason to consider, the cost of compliance of pollutant discharge controls [18] Tracy could not have objected to the objectives when they were established in 1978 because municipal dischargers were not required to comply with the objectives. Then, thirty years later, the Board required Tracy and other municipal dischargers to comply immediately with the objectives, even though discharge controls for EC and the economic consequences of such controls never have been considered by the Board This seems unreasonable and contrary to the purposes of section 13241, which requires the Board to consider the economic consequences of its water quality control requirements.[19]

Nevertheless, the Court is bound to consider the holding of *City of Arcadia II. (Auto Equity Sales, Inc. v Superior Court* (1962) 57 Cal.2d 450, 455 [decisions of every division of the Courts of Appeal are binding upon all superior courts of this state]) The Court in *City of Arcadia II* found that revising a basin plan to include storm water and urban runoff from municipal storm drains discharging into water bodies already covered by that plan did not trigger the need to comply with section 13241. (*City of Arcadia II, supra*, 191 Cal.App.4th 156, 178.) The holding in *City of Arcadia II*

[18] The California Supreme Court has endorsed the view that section 13241 requires consideration of the "cost of compliance " (See *City of Burbank, supra,* 35 Cal 4th at p 625 [finding the "plain language" of section 13241 requires the board to consider the "cost of compliance"])

[19] Alternatively, the Court would have to conclude that the Board was required to consider all possible costs of compliance at the time water quality objectives were first adopted, which would have required the Board to engage in rank speculation about how the objectives would be applied years into the future This is an equally untenable interpretation

suggests that revisions to a program of implementation generally will not trigger the need to comply with section 13241.[20]

The holding in *City of Arcadia II* is further supported by the decision in *San Joaquin River Exchange*, which concluded that the section 13241 factors need not be considered for a basin plan amendment that is merely a program of implementation for achieving an already-established water quality objective. (*San Joaquin River Exchange, supra*, 183 Cal.App.4th at pp.1119-1120.)

Comparing the facts of those cases to the facts of this case, the Court is unable to conclude that those cases are not controlling or, at least, highly persuasive. In *San Joaquin River Exchange*, for example, the Court concluded that section 13241 did not apply even though the Board applied a water quality objective "established" for the southern Delta to discharges upstream of the southern Delta If those amendments did not establish a new water quality objective, it is difficult to see how the instant amendments do

Accordingly, the Court is compelled to reject the argument that the Board "established" new EC objectives when it amended its program of implementation in 2006. It follows that a Water Code section 13241 analysis was not required when the Bay-Delta Plan was amended in 2006.

b. Did the State Board comply with Water Code section 13241 when it established the EC objectives in 1978?

As described above, Petitioners contend that the State Board failed to undertake the analysis required by Water Code section 13241 when the State Board established the EC objectives.

Having concluded that the Board established the EC objectives in 1978, the Court now proceeds to consider whether the State Board adequately complied with Water Code section 13241 when it established the objectives [21]

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[20] *City of Arcadia II* arguably is distinguishable on the grounds the Court did not decide whether the revised basin plan "effectively established" new water quality objectives In that case, the Court noted that the parties conceded extending the revised plan to cover storm water and urban runoff was not sufficient to "change" the water quality objectives (*City of Arcadia II, supra*, 191 Cal App 4th 156, 177) Moreover, the Court found, as a factual matter, that the revised basin plan at issue in that case had referred to section 13241 and discussed the potential economic impacts of the changes made in the plan (*Id* at p 178) However, even if it is distinguishable, the holding strongly suggests that section 13241 will not apply to most basin plan amendments On the other hand, if *City of Arcadia II* is construed to stand for the general proposition that amendments to a program of implementation cannot trigger the need to comply with section 13241 under any circumstances, it this Court's opinion that the case is wrongly decided and should not be followed by other courts of superior jurisdiction

[21] One could argue that even if the Board failed to comply with section 13241 when it established the EC objectives in 1978, Petitioners' challenge is too late However, it should be noted that the EC objectives were not applied to municipal dischargers like Tracy until 2006 Tracy likely would not have had standing to challenge the objectives prior to 2006 Moreover, Respondent Board has waived any defense based on the timing of the petition Accordingly, the Court proceeds to hear and decide this issue on the merits

As described above, Water Code section 13241 imposes an affirmative obligation on the State, when establishing water quality objectives, to take into account various factors, including the economic costs of adopting the proposed objective. (Water Code § 13241; RB1545-1549 [Attwater Memorandum].)

In this case, the State Board contends that it adequately complied with section 13241 when it adopted the EC objectives in 1978 because it considered "socioeconomic factors" in the EIR for the 1978 Delta Plan. The Court does not agree.

First, while the EIR for the 1978 Delta Plan purportedly considered socioeconomic effects, the discussion appears to be limited to the economic *benefits* to municipal, agricultural, and industrial water *users* of establishing water quality *requirements* There was no meaningful discussion of the economic costs of adopting the objectives, and certainly no discussion of the costs associated with the methods identified to meet the objectives.[22] Nor was there any consideration of economic factors related to wastewater discharges.

Second, to the extent the EIR included socioeconomic information, it did so only for the purpose of determining whether the project would have significant *environmental* effects under CEQA. (See, e.g., 14 C.C.R. §§ 15064, 15131.) Because there was no consideration of economic factors except in relation to their expected environmental effects, the EIR's analysis was inadequate to meet the requirements of Water Code section 13241

Third, the State Board conceded at oral argument in *United States v State Water Resources Control Board* that it did not comply with the requirements of Water Code section 13241 when it set the southern Delta EC objectives as part of the 1978 Delta Plan. (*United States v State Water Resources Control Board (the "Racanelli Decision")* (1986) 182 Cal.App.3d 82, 122 fn.15.) Based in part on this failure, the First District Court of Appeal concluded in the *Racanelli Decision* that the southern Delta EC objectives were "not established in the manner required by law "[23] (*Id.* at p.123.) The Board is estopped from now contending otherwise.

The record and the history of the Bay-Delta Plan show that the State Board did not comply with section 13241 when it adopted the southern Delta EC objectives in 1978

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[22] As noted above, section 13241 requires consideration of the "cost of compliance " (See *City of Burbank, supra,* 35 Cal 4th at p 625 [finding the "plain language" of section 13241 requires the board to consider the "cost of compliance"]) Even if the Court's conclusion technically constitutes dicta, it is persuasive and should not be rejected without a compelling reason, which is not present here (*Howard Jarvis Taxpayers Assn v City of Fresno* (2005) 127 Cal App 4th 914, 925)

[23] Because of the Board's stated intention to reconsider the standards for the southern Delta at an upcoming hearing, the Court declined to remand for further proceedings consistent with its opinion (*United States, supra,* 182 Cal App 3d at p 123) Ultimately, however, the Board did not change the numerical objectives Thus, Petitioners contend, the Board never complied with the requirements of section 13241

Further, the Court finds no merit in the State Board's argument that because Water Code section 13263 requires a regional water board to consider the provisions of section 13241 before issuing waste discharge requirements, a section 13241 analysis should not also be required prior to establishing water quality objectives.

The Board's argument is inconsistent with the language of section 13241, which plainly requires a section 13241 analysis whenever water quality objectives are "established." (Water Code § 13241.)

In addition, the Board's argument is inconsistent with what the State Board itself has argued in defending waste discharge requirements: namely, that because section 13241 factors are considered in connection with the adoption of water quality objectives, the factors do not also have to be considered when issuing waste discharge requirements to implement those objectives. (See *City of Burbank, supra,* 35 Cal.4th at pp.626-627 [federal law forbids regional board from using cost or other section 13241 factors to justify wastewater discharge restrictions that do not comply with federal standards].)

For these reasons, the Court ruled in its Tentative Decision that the Board did not properly consider the Water Code section 13241 factors when it initially established the southern Delta salinity objectives (the "EC objectives") in 1978. Respondent Board subsequently objected to the Court's Tentative Decision on the grounds the Court failed to consider or discuss the Board's efforts to comply with Water Code section 13241 after the *Racanelli Decision*, culminating in its 1991 Bay-Delta Water Quality Control Plan for Salinity (the "1991 Bay-Delta Plan").

Respondent Board is partially correct. The Court did not consider or discuss the Board's efforts to comply with section 13241 between 1978 and 2006. However, the Court had a good reason for not doing so, as it was not a principal controverted issue at trial. (The Court uses the term trial to refer to the hearing on the merits)

The issues at trial are determined by the pleadings. The issues presented by the pleadings in this case were (1) did the Board comply with section 13241 when it adopted the EC objectives in 1978, and (2) did the Board comply with section 13241 when it (purportedly) amended the objectives in 2006.

The Board argues that Petitioners did not challenge the Board's efforts to comply with section 13241 between 1978 and 2006. However, Petitioners alleged that the Board *never* performed the analysis required by Water Code section 13241 for the EC objectives. (See Tracy's Petition, at ¶¶ 41-42.) Petitioners alleged that the Board failed to undertake the analysis required by Water Code section 13241, not only when the Board "initially adopted" the EC objectives, but also "each time" the water quality objectives in the Bay-Delta Plan were reviewed and modified, including in 2006. (*Ibid.*) Petitioners also advanced this argument in their opening briefs. (See, e.g , Tracy's Opening Brief, at p.27.) Thus, Petitioners raised the issue, at least in a general sense, whether the Board ever performed a Water Code section 13241 analysis for the EC objectives.

In response to Petitioners' allegations, the Board argued that it complied with section 13241 when it adopted the EC objectives in 1978. The Board also argued that because the EC objectives have "remained unchanged since 1978," no further analysis under section 13241 was required, in 2006 or at any other time. (See Opposition Brief, at pp. 4, 9, 13, 18.)

The Board did *not* argue that even if it failed to undertake the analysis required by section 13241 in 1978, it performed the required analysis as part of its 1991 Bay-Delta Plan update. The Board raised this argument *for the first time* in its objections to the Court's Tentative Decision.

It should be no surprise, therefore, that the Court did not consider or discuss the Board's efforts to comply with section 13241 as part of its 1991 Bay-Delta Plan update. This was not at issue at trial. Instead, the issue was whether the Board completed the section 13241 analysis prior to the adoption of the EC objectives in 1978 For the reasons described above, the Court concluded it did not.

The question presented here is whether the Board, having lost on this issue at trial, now should be permitted a "second bite at the apple" to show it fulfilled its obligations under section 13241 The Court is persuaded that it should not.

While the Court is loath to invalidate or enjoin the EC objectives based on a failure to undertake a section 13241 analysis if the Board did, in fact, perform one, the Court likewise cannot countenance the Board raising wholly new arguments at this late date. (See *Ralphs Grocery Co v Workers' Comp Appeals Bd* (1997) 58 Cal.App 4th 647, 651 fn.2 [lack of opposition is deemed a concession of the merits].)

Further, if the Court were to consider the Board's belated argument, the Court would reject it. Although the full administrative record for the 1991 Bay-Delta Plan may not be before the Court, the administrative record in this case includes the 1991 Bay-Delta Plan itself as well as the Board resolution adopting that Plan. These documents by themselves are sufficient to show that the analysis done in 1991 did not satisfy the requirements of Water Code section 13241 *for the EC objectives.*

As a general matter, the documents show that the Board acknowledged Water Code section 13241 and the requirement to consider (among other things) the "economic considerations" of its water quality control plan. (DP8520-8521; see also DP8584, 8558.) The Plan states that the only direct evidence of economic consequences related to the costs of changing leaching practices for Delta agriculture. (DP8521) As a result, "all other economic effects were analyzed using water availability as an indicator of economic cost." (*Ibid.*, see also DP8538-8539.)

Water availability studies were run for the various water quality objective alternatives, based on the effects the alternatives would have on the combined CVP-SWP system. Thus, the combined CVP-SWP system was used as a surrogate (or proxy) to reflect the water supply consequences of the alternatives on users in the watershed. (DP8521)

Putting aside the issue of whether a study of CVP-SWP system water availability is a legitimate means to analyze the economic effects of water quality objectives – particularly for dischargers – there is a fundamental problem with the 1991 study it excluded the interior stations for the south Delta from its analysis. (*Ibid.* ["Currently the operations study is not designed to analyze the water needed to meet water quality objectives for the interior stations of the south Delta . . . ."]; see also DP8533 ["Without considering the potential impact of meeting the interior objectives of the south Delta . . . ."])

In addition, the study assumed that the objectives would be met through the release of flows by the CVP-SWP water right holders. (See DP8539, 8838) The study did not consider the economic consequences of the objectives on dischargers because dischargers were not (at that time) required to meet the objectives There is no evidence in the record that the Board has ever considered the costs of compliance with the southern Delta EC objectives, to municipal, agricultural, other domestic dischargers, or anyone else.

The Court flatly rejects the argument that it is a matter entirely within the Board's discretion to determine what it means to take "economic considerations" into account While it is true that section 13241 does not specify precisely how the Board must go about considering the factors in section 13241, this does not mean courts should abdicate their constitutional role to independently construe the meaning of the statute. (See, e g., *California Hospital Association v Maxwell-Jolly* (2010) 188 Cal App.4th 559, 570-571, 573-577 [department abused discretion by failing to adequately consider the impact of a contemplated Medicaid rate change on the statutory factors of efficiency, economy, quality, and access to care]) The Board's interpretation is one among several tools available to the court in judging the interpretation of the text of the statute, but the Board's interpretation is not binding. In this case, the Court finds the Board's interpretation that a "socioeconomic" analysis of a project's environmental impacts is sufficient to be clearly erroneous.

The Board may disagree that section 13241 requires consideration of the "cost of compliance," but the California Supreme Court has endorsed the view that it does (See *City of Burbank, supra*, 35 Cal.4th at p.625 [finding the "plain language" of section 13241 requires the board to consider the "cost of compliance"].)

Further, in analogous circumstances, the Supreme Court has acknowledged that "sound policy requires that the economic consequences of pollution control regulations must be taken into account." (See *Western Oil and Gas Association v. Air Resources Board* (1984) 37 Cal 3d 502, 517-518.) In *Western Oil and Gas*, the Court concluded, based on the language of the Mulford-Carrell Air Resources Act, that the Legislature intended local and regional authorities, rather than the State Air Resources Board, to consider the economic consequences of compliance with air quality standards. (*Id.* at pp 517-521.)

Here, the statutory language at issue squarely puts this responsibility on the Board. (Water Code § 13241 [requiring Board to consider, in establishing water quality objectives for the "reasonable" protection of beneficial uses, such things as economics, the water quality conditions that could "reasonably" be achieved, and the

need for housing within the region].) That the Board is required to consider factors like the "need for housing" and the water quality conditions that can "reasonably" be achieved, shows the Legislature intended the Board to consider not just the economic benefits of controlling water pollution, but the economic costs of compliance with the water pollution controls.

Accordingly, the Court stands by its conclusion that the Board has failed to consider the factors set forth in Water Code section 13241 for the EC objectives. The Court now proceeds to consider what this means for the validity of the EC objectives

c Is the State Board's failure to comply with Water Code section 13241 a basis to invalidate the EC objectives?

The State Board contends that even if it failed to conduct the analysis required by section 13241, this is, at most, a basis for issuing a writ of mandate requiring the Board to conduct the required analysis The Board argues, however, that it is not a basis to invalidate the EC objectives. According to the Board, the State cannot adopt water quality standards that are less stringent than those approved by the federal government. Because the 700/1000 µmhos/cm EC objectives were adopted as federal water quality standards, the Board asserts that it cannot, based on economic (or other § 13241) factors, adopt state water quality objectives that are any less protective than those standards.

Petitioners respond that EPA approval does not excuse a failure to comply with state law in the adoption of state water quality standards. The Court agrees with Petitioners.

The Court's analysis necessarily begins with the supremacy clause of the United States Constitution. The supremacy clause provides that federal constitutional and statutory law is binding on state governments as the supreme law of the land (U S. Const., art VI, § 2.) Thus, when Congress passes legislation, state legislation regulating the same subject may be preempted

Preemption may be express or implied. Preemption is express when Congress has expressly stated in a statute the areas of state law that are preempted. Absent express preemption, there are three bases for finding implied preemption (1) where it is clear Congress intended to occupy an entire regulatory field, (2) where compliance with both state law and federal law is impossible; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See Matthew Bender & Company, Inc., Constitutional Law, 126A California Forms of Pleading and Practice -- Annotated § 126A.23)

The question presented here is whether the Clean Water Act preempts Water Code section 13241's requirement that the State consider economic factors before establishing water quality objectives.

Relying on *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 612, 626-627, the State Board contends that the supremacy clause prohibits

using economic considerations to justify water quality standards that are less stringent than required by federal law.

At issue in *City of Burbank* was Water Code section 13263, which requires regional boards to take various factors, including economic considerations, into account when issuing wastewater discharge permits. To meet a general narrative water quality criteria that waters be maintained "free of toxic substances in concentrations that are [toxic or detrimental to] human, plant, animal or aquatic life," the Los Angeles Regional Board adopted specific numeric requirements setting daily maximum limitations for more than 30 toxic pollutants present in the treated wastewater of the City of Los Angeles. (*Id.* at p 622) The cities of Los Angeles and Burbank filed appeals with the State Board, contending that the board violated section 13263 because it did not consider the economic burden on the cities in meeting the pollutant restrictions. (*Ibid.*)

In affirming the judgment of the Court of Appeal, the California Supreme Court held that because the supremacy clause of the federal Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not rely on state law to justify pollutant restrictions less stringent than those required by federal law.[24] (*Id.* at p.618.) In other words, state water quality laws cannot be used to impose pollutant restrictions less stringent than required by federal law. As Justice Brown's concurrence aptly points out, that "seems a pretty self-evident proposition " (*City of Burbank, supra*, 35 Cal 4th at p.629.)

However, the issue in this case is different The issue here is not whether the State can use compliance costs to relax pollutant restrictions necessary to meet water quality standards, but whether the State can consider compliance costs when establishing water quality standards. Contrary to what the State Board argues, the holding in *Burbank* supports the view that it can

As the Court noted in Burbank, the Clean Water Act does not preempt state water quality laws To the contrary, the Clean Water Act is an example of "cooperative federalism," anticipating a "partnership between the States and the Federal Government" to achieve a shared objective (*Burbank, supra*, 35 Cal.4th at p 620; see also *id.* at p.629.)

Toward this end, the Clean Water Act reserves to the states significant aspects of water quality policy and, in many instances, incorporates state water policy into federal law. (*Id* at p 627) While (technology-based) effluent limitations are promulgated by the federal government, states have the leading role in establishing water quality standards. (*Id.* at p.620; see also 33 U.S C. § 1251(b).)

States must adopt water quality standards and submit them to the EPA, which reviews them for compliance with the Clean Water Act (*Natural Resources Defense Council v. United States EPA* (E.D. Va. 1992) 806 F.Supp. 1263, 1268.) The EPA

[24] Only when a regional board is considering whether to adopt permit restrictions more stringent than federal law requires may the board take economic factors into account

may approve the standards or notify the state of specific changes required to meet Clean Water Act requirements. (*Ibid.*)

Federal law does not preempt state procedures for adopting water quality standards To the contrary, federal law requires water quality standards to be adopted in compliance with state laws. (40 C.F.R. §§ 131.3(b), 131.5, 131.6; 33 U S.C § 1313(c)(2).) EPA review includes whether the state has followed its legal procedures for adopting the standards. (*Natural Resources Defense Council, supra,* 806 F.Supp. at p.1269.) Thus, a failure to comply with state legal procedures is a failure to comply with federal procedural requirements.

The Supreme Court acknowledged as much in *Burbank* by affirming the determination of the lower courts that section 13241 requires the State to consider costs of compliance when it adopts water quality standards in a basin or water quality plan. (See *City of Burbank, supra,* 35 Cal.4th at p.623 [affirming conclusion of court of appeal that section 13241 requires a regional board to take economic considerations into account when it adopts water quality standards in a basin plan]) The clear implication of *Burbank* is that the State is free – required even – to consider compliance costs when establishing water quality standards, but cannot relax established requirements merely because an NPDES permit holder alleges compliance will be too costly (*Id* at p 627)

This conclusion also is supported by other language of the federal Clean Water Act, which provides that water quality standards should, *wherever attainable*, provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water, and take into consideration the *use and value* of the water for public water supplies, propagation of fish, shellfish, wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation [25] (40 C.F R. §§ 130.3, 131.2, see also 33 U.S.C § 1313(c)(2) [emphasis added] [26])

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[25] The Act does not define how the "use and value" of the water should be taken into consideration in establishing water quality standards The only case to have considered this issue concluded that states should take the "use and value" of the water into consideration only when designating the uses for a particular water body, but not when setting the criteria to protect those uses (See *Mississippi Commission on Natural Resources v Costle* (5th Cir 1980) 625 F 2d 1269, 1277) However, the decision in *Costle* is not binding and this Court does not find it persuasive The court in *Costle* selectively takes language out of context and ignores the plain directive that "water quality standards" shall be based on the "use and value" of the waters involved It makes no sense to read the language to mean that the "use" of water shall be based on the "use and value" of the water Further, if Congress had intended value to be considered only in relation to use, it could have said so It did not It is noteworthy that the EPA in *Costle* had examined the economic impact of its criteria, severely undermining EPA's argument that it was under no obligation to do so In any event, the case at hand involves California, not Mississippi, water quality standards California law requires the State to consider economic considerations when establishing water quality objectives, and this law predates the 1972 enactment of the federal Clean Water Act When Congress adopted the Clean Water Act, it expressly required water quality standards to be adopted in compliance with state laws, including, in the case of California, Water Code section 13241 The Court presumes Congress knew what it was doing

[26] In *City of Burbank*, the Supreme Court rejected an argument that consideration of economics was "consistent with federal law" under the Clean Water Act The Court found "nothing" in the

In sum, the State has it exactly backwards. It argues that federal law prohibits application of state laws when establishing federal water quality standards The text of the Clean Water Act and the Supreme Court's decision in *Burbank* show that the opposite is true: federal law requires water quality standards to be adopted in compliance with state laws.

In trying to avoid this problem, the State Board argues that because the 700/1000 µmhos/cm EC objectives were approved by the EPA, the EC objectives are "the federal water quality standards," and the supremacy clause prohibits the State from adopting less stringent standards

This is flawed reasoning. It would mean that water quality standards approved by the EPA never could be lowered – which the State Board conceded at the hearing is not correct.

There are no federally-promulgated water quality criteria for the protection of agriculture in the southern Delta Federal law does not necessarily require the 700/1000 µmhos/cm numeric objectives Merely because the 700/1000 µmhos/cm objectives were approved by the EPA does not mean that the State cannot adopt less stringent objectives in the future.

In giving its approval, the EPA merely determined that the 700/1000 µmhos/cm objectives (criteria) were sufficient to protect the designated water uses. The EPA did not determine that only those criteria would be sufficient to protect the designated uses. The EPA's approval does not foreclose the possibility that other criteria also might be sufficient to protect the designated uses

In establishing the EC objectives, the State Board was required by Water Code section 13241 to consider the factors set forth in that statute It did not do so. Accordingly, the Court concludes that a writ must be granted directing the Board to

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Clean Water Act to suggest that states may weaken federal clean water requirements when a permit holder alleges that compliance will be too costly (*Id* at p 627) However, that is not the issue here Also, the Supreme Court's holding is limited by its facts to requirements of waste discharge permits involving "toxic" pollutants (See 40 C F R § 131 3 [defining toxic pollutants as those pollutants listed by the Administrator under section 307(a) of the Act]) Presumably because the case involved toxic pollutants, the Court did not consider the provisions in 33 U S C section 1312(b)(2) Section 1312(b)(2) allows the Administrator (here, the State) to issue a permit which modifies the effluent limitations that otherwise would be required under the Act "if the applicant demonstrates at [a] hearing that there is no reasonable relationship between the economic and social costs [of the effluent limitations] and the benefits to be obtained (including attainment of the objective of [the Act]) from achieving such limitation " (33 U S C § 1312(b)(2)) By its terms, section 1312(b)(2) of the Clean Water Act does not apply to "toxic pollutants " But for pollutants other than "toxic pollutants," this section expressly allows consideration of economic costs to relax or modify water quality-based effluent limitations in a wastewater discharge permit Cases are not authority for propositions not considered Because the issue here involves establishing water quality standards, rather than issuing permits to meet standards, and because the Court in *City of Burbank* did not consider the provisions in section 1312(b)(2), the Court finds that the *City of Burbank* opinion is not contrary to the Court's interpretation here

conduct the required § 13241 analysis and reconsider the EC objectives after the § 13241 factors have been considered.

However, in recognition of the environmental harm that could occur if the water quality criteria were to be invalidated immediately, the Court's writ shall not require the Board to invalidate the existing objectives pending reconsideration by the Board (*Morning Star Co. v State Bd of Equalization* (2006) 38 Cal 4th 324, 341) The Court shall instead enjoin any action to enforce the existing EC objectives against Tracy and other municipal dischargers pending reconsideration by the Board [27]

2. Was the program of implementation adopted in a manner contrary to law?

Petitioners also contend the State Board failed to adopt a comprehensive program for implementation of the EC objectives as required by Water Code section 13242.

Water Code section 13050, subdivision (j) provides that a water quality control plan shall include a program of implementation needed for achieving water quality objectives. (Water Code § 13050(j).) Under Water Code section 13242, the program of implementation shall include (i) a description of the nature of actions necessary to achieve the objectives, including recommendations for appropriate action by public or private entities; (ii) a time schedule for the actions to be taken; and (iii) a description of surveillance to be undertaken to determine compliance with the objectives. (Water Code § 13242.)

Petitioners allege that, while the Bay-Delta Plan includes a program of implementation, the State Board failed to consider how municipal dischargers like Tracy would comply with the EC objectives, failed to include a time schedule for actions to be taken, and failed to describe surveillance to be used to determine compliance. Therefore, Petitioners argue, the State Board's program of implementation is insufficient to meet the requirements of Water Code section 13242.

In its Tentative Decision, the Court found that, on balance, the 2006 Bay-Delta Plan's program of implementation is adequate. The Court specifically referred to the following provisions of the implementation program.

In regard to the southern Delta salinity objectives, the Plan describes a number of measures that can be used to control salinity in the southern Delta, including "state regulatory actions, state funding of projects and studies, regulation of water diversions, pollutant discharge controls, improvements in water circulation, and long-term implementation of best management practices to control saline discharges " (DP41.) Specifically, the Plan refers to the Grasslands Bypass Project, West Side Regional Drainage Plan, San Luis Unit Feature Reevaluation Project, Central Valley Project Improvement Act Land Retirement Program, San Joaquin River Real-time

[27] Intervenor Clean Water Association objected to the Tentative Decision because it only enjoined application of the existing EC objectives as to Tracy Intervenor's objection is well taken and the Court has modified the scope of its injunction

Water Quality Management Program, South Delta Improvements Program, and the Delta-Mendota Recirculation program (DP41-45.) The Plan indicates that the State Board has conditioned the water rights of the USBR and DWR, and indicates that the Board also could require releases or other measures be taken by other non-SWP/CVP reservoirs. (*Id.*) The Plan further provides that the Regional Board shall implement a Total Maximum Daily Load (TMDL) for the San Joaquin River at Vernalis, and "shall impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers." (DP41.)

The Court further noted that the Plan includes some time schedules and surveillance programs to achieve the objectives. (See DP42-45.) For example, the Plan states that the State Board will conduct a workshop in January 2007 to discuss the need for an updated scientific investigation regarding the southern Delta salinity objectives, the causes of salinity in the southern Delta, and measures to implement the salinity objectives for southern Delta agriculture. (DP42, 45)

While the Court concluded that a more detailed description would be preferable, the Court was not persuaded that the implementation plan was materially deficient

Tracy objected to the Court's Tentative Decision on this issue, arguing that the program of implementation is not adequate in regard to municipal discharges.

Having reconsidered its Tentative Decision, the Court agrees with Tracy.
As a general matter, the Court agrees that a program of implementation is not required to describe in detail how particular dischargers (or other parties) will comply with the objectives. However, when a program of implementation changes who is responsible for meeting previously-established water quality objectives, more specificity is required. When a program of implementation is revised to make previously-established water quality objectives applicable to new entities, the program of implementation must specifically address the change. It must describe the nature of the actions necessary for such entities to achieve the objectives, provide a reasonable time schedule for the actions to be taken, and include a description of the (new) surveillance required to determine their compliance with the objectives.

The facts of this case show why such a requirement is necessary.

Here, when the Board initially established the EC objectives in 1978, the Delta Plan envisioned that the objectives would be implemented by managing the flows of the CVP-SWP water right holders. Then, many years later, the Board having failed to implement the objectives against water right holders, the Board decided that the objectives should be achieved through a mix of water right actions and water quality control measures, and, for the first time, made the objectives applicable to municipal (and agricultural) dischargers.

Despite this radical change in how the EC objectives will be achieved, the Board's program of implementation includes virtually no discussion of how municipal dischargers may comply with the objectives, no time schedule for them to achieve the objectives, and no description of how the Board will determine their compliance.

The implementation program's discussion of municipal dischargers consists of a single sentence: "The Central Valley Regional Water Board shall impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers." (DP41.) This is not adequate.

While the Court does not deny the Board's authority to revise its program of implementation as necessary for achieving water quality objectives, the Board must do so in a way that conforms to the policies set forth in the Water Code. (Wat Code §§ 13240, 13000.) The Court is persuaded that the Board has not done so here. Accordingly, the Court shall issue a writ compelling the Board to adopt an adequate program of implementation that describes the nature of the actions necessary for municipal dischargers to achieve the EC objectives (including recommendations for appropriate action by them), provides a reasonable time schedule for the actions to be taken, and includes a description of the surveillance required to determine their compliance. Further, the Court shall enjoin any action to enforce the provisions of the 2006 Bay-Delta Plan relating to the EC objectives against Tracy and other municipal dischargers pending an adequate program of implementation that meets the requirements of Water Code § 13242.

3. Did the State Board comply with its mandate to periodically review and revise the EC objectives?

Petitioners contend that the State Board failed to comply with its statutory mandate to periodically review and revise the EC objectives as required by Water Code sections 13143 and 13240 and 33 U S.C § 1313(c)(1). This claim lacks merit.

The Water Code and the federal Clean Water Act require that water quality standards be periodically reviewed, but they do not necessarily require that water quality standards be revised. (See Water Code § 13143 [state water quality control policy "shall be periodically reviewed and may be revised"]; Water Code § 13240 [water quality control plans "shall be periodically reviewed and may be revised"]; 33 U.S.C. § 1313(c)(1) [state water pollution control agency shall from time to time hold hearings for the purpose of reviewing applicable water quality standards "and, as appropriate, modifying and adopting standards"], see also *National Wildlife Fed'n v. Browner* (D.C. Cir. 1997) 127 F.3d 1126, 1129.)

The Bay-Delta Plan has been periodically reviewed. The Board was under no legal obligation to revise the southern Delta EC objectives.

B. Tracy's challenge to Order WQ 2009-0003· Were the southern Delta EC objectives properly applied to Tracy's discharge and permit?

Petitioners contend that because the Bay-Delta Plan salinity provisions were improperly adopted and/or modified, the State Board abused its discretion in applying those provisions to Tracy's discharge and Permit [28]

[28] As discussed above, Respondent State Board denies that the 2006 Bay-Delta Plan and its EC objectives were improperly promulgated But even if the Court finds the 2006 Bay-Delta Plan is

Tracy further contends that even if the Bay-Delta Plan was legally promulgated, the State Board abused its discretion by (1) finding that the water quality objectives for EC are required to be imposed upon Tracy at the end of its discharge pipe; (2) finding that Tracy's Permit fails to include final water quality-based effluent limits for EC; and (3) finding that the EC effluent limitations to be imposed on Tracy must be numeric. Tracy seeks a peremptory writ of mandate directing the State Board to vacate the contested provisions of its Order WQ 2009-0003 [29]

The State Board asserts that federal regulations require water quality based effluent limitations (WQBELs) when a discharge has the reasonable potential to cause or contribute to an excursion above an applicable water quality standard. The State Board argues that because Tracy's discharge consistently exceeds the applicable standard for EC at its point of discharge, and the receiving water frequently has no assimilative capacity for EC, Tracy's discharge has the reasonable potential to cause or contribute to an excursion above the applicable standard Therefore, according to the State Board, Tracy's NPDES permit is required to include water quality based effluent limitations to achieve the water quality standard

The State Board asserts that it properly ordered the Regional Board to include numeric effluent limits for EC in Tracy's Permit because numeric effluent limits are necessary to assure achievement of the numeric water quality objectives (criteria) for EC.

The State Board rejects the claim that the cost of compliance with numeric effluent limits would be unreasonably high when considered in light of the relatively small potential benefit to water quality. Moreover, the State Board argues that economic considerations are irrelevant when establishing effluent limitations in a permit to meet applicable water quality standards Because numeric effluent limitations are necessary to comply with the federally-approved numeric water quality objectives, the State Board maintains that Tracy must comply with the numeric effluent limitations, regardless of cost.

Having concluded that the EC objectives were improperly adopted, the Court finds the Board should be enjoined from applying the EC objectives to Tracy's discharge and Permit pending reconsideration of the objectives in compliance with this Court's

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deficient, the State Board contends that the EC objectives are still properly applied to Tracy's discharge

[29] In addition, Tracy seeks a judicial declaration that the challenged 2006 Bay-Delta Plan provisions were not properly applied to Tracy because the 2006 Bay-Delta Plan had not yet been approved by the State's Office of Administrative Law or the U S EPA at the time Tracy's application was considered However, insofar as Tracy seeks to challenge the application of the Bay-Delta Plan to its discharge, Tracy is essentially seeking review of the validity of the State Board's quasi-adjudicatory decision Because an action for declaratory relief is not appropriate to review an agency's quasi-adjudicatory decisions, Tracy's request for declaratory relief regarding application of the 2006 Bay-Delta Plan is denied Such review is properly brought under the provisions of C C P § 1094 5 (See *County of Los Angeles v State Water Resources Control Bd* (2006) 143 Cal App 4th 985, 1002, *State of California v Superior Court (Veta Company)* (1974) 12 Cal 3d 237, 251)

ruling. Nevertheless, for purposes of providing future guidance, the Court proceeds to consider Tracy's specific challenges to the State Board's Order WQ 2009-0003.

1. Did the State Board prejudicially abuse its discretion by finding that the water quality objectives for EC are required to be imposed upon Tracy at the end of its discharge pipe?

Tracy alleges that even if the 2006 Bay-Delta Plan and EC objectives were legally promulgated, the State Board erred by finding that the Plan requires compliance with the EC objectives to be measured at the end of Tracy's discharge pipe. The Court agrees.

While the Bay-Delta Plan was amended in 2006 to state that water quality objectives cited for a general area shall be "applicable for all locations in that general area," the amendment did not change the requirement that the "compliance locations indicated in the tables will be used to determine compliance with the objectives." (DP87; see also DP23 ["compliance locations will be used to determine compliance with the cited objectives"]) Thus, even if the Board intended the objectives to be applicable at the end of Tracy's discharge pipe, as a practical matter, the language of the Plan made them applicable only at the specified compliance locations.

Since the Board was required to comply with the requirements of its Plan, (Water Code §§ 13247, 13263), the Board was required to conduct its "reasonable potential" analysis at the Old River/Tracy Road Bridge compliance location, instead of at the end of Tracy's discharge pipe

Tracy's discharge pipe is approximately 4 miles upstream of the compliance location Measuring Tracy's "reasonable potential" at its discharge pipe deprived Tracy of a potential "mixing zone" for its discharge

As an aside, the Court gives no credence to the Board's arguments regarding the purported effect of discharges from Tracy's Plant on DWR's and USBR's obligation to release fresh water to the southern Delta. The salt in Tracy's discharge may make compliance for DWR/USBR more difficult, but that does not necessarily mean Tracy is attempting to shirk its responsibility for the salinity problem in the southern Delta. After all, one could argue that the reason there is no assimilative capacity in the Delta is because DWR/USBR have shirked their responsibility to release sufficient fresh water from New Melones Reservoir. If DWR/USBR simply released more fresh water, there would be assimilative capacity, and Tracy's discharge would not have the "reasonable potential" to cause or contribute to an excursion above the applicable water quality objectives.

It is worth noting that, historically, the programs of implementation for the EC objectives focused primarily (or, in some instances, exclusively) on the release of flows by DWR/USBR Indeed, the Board previously determined that the CVP is the "principal" cause of the salinity problem at Vernalis. Nevertheless, the Board has delayed enforcement of the objectives against DWR/USBR for many years. Viewed from this perspective, Tracy might argue that it is the victim here – because it is

being requested to reduce its salt loading so that DWR/USBR may export more water by means of the SWP/CVP.

In essence, Tracy's discharge and the SWP/CVP water projects are two sides of the same coin: the more water released by DWR/USBR, the less Tracy will be required to reduce its salt load; and the more Tracy reduces its salt load, the less water DWR/USBR will be required to release to meet the salinity objectives (and the more water available for export).

This Court is in no position to determine each party's "fair share" of the salinity problem in the southern Delta. Thus, it makes no value judgments about who is (and who is not) attempting to shirk their "responsibilities" for solving the salinity problem.

In its Tentative Decision, the Court ruled that the Board's error appeared to be harmless since the receiving water frequently has no assimilative capacity for EC and Tracy's discharge exceeds the applicable standard for EC at the point of discharge.[30] Tracy objected to the Court's Tentative Decision, disputing that the receiving water does not have any assimilative capacity, and arguing that an analysis of assimilative capacity cannot substitute for a proper reasonable potential analysis. Tracy contends the Court should simply order the Board to perform a reasonable potential analysis at the Old River/Tracy Road Bridge compliance location, rather than speculate what the results of such an analysis would show.

Tracy's objection is well taken. The Court has modified its Decision to require the Board to perform the reasonable potential analysis at the Old River/Tracy Road Bridge compliance location, as required by the 2006 Bay-Delta Plan.

2. Did the State Board abuse its discretion by finding that Tracy's Permit fails to include final water quality-based effluent limits for EC?

Tracy further alleges that the State Board abused its discretion by finding that Tracy's Permit does not include final water quality-based effluent limits (WQBELs) designed to implement the objectives for EC. The Court does not agree.

The Clean Water Act generally requires a permit to contain WQBELs whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to, an in-stream excursion above the allowable concentration of a numeric criterion within a state water quality standard (40 C F R § 122.44(d)(1).)

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[30] The Board argued that the receiving water frequently has no assimilative capacity for EC, so essentially any increase in the concentration of salinity would have the reasonable potential to cause or contribute to an excursion above the EC objectives. According to the Board, the assimilative capacity of the receiving water is so low that even removing Tracy's discharge entirely would not solve the salinity problem. For Tracy's discharge to meet the "reasonable potential" test, its discharge would have to improve (or at least not worsen) the salinity conditions in the southern Delta.

As described above, the Court has concluded that the Board failed to conduct its "reasonable potential" analysis at the Old River/Tracy Road Bridge compliance location, as required by the 2006 Bay-Delta Plan. In the absence of a proper reasonable potential analysis, it is premature to determine whether Tracy's Permit is required to include final WQBELs for EC.

Nevertheless, for purposes of providing as much guidance as possible, the Court proceeds to determine whether the Board also abused its discretion by finding that Tracy's Permit does not include final water quality-based effluent limits (WQBELs) designed to implement the objectives for EC

The Board determined that Tracy's Permit is insufficient to meet the requirements of the Clean Water Act. Although Tracy's Permit includes final numeric WQBELs designed to achieve the EC objectives, the limitations are "conditional" and do not apply unless Tracy fails to comply with its own salt reduction plan. The State Board determined that because the final numeric WQBELs are "conditional," they are not protective of the numeric water quality objectives for EC

The Court agrees with the State Board that, where a permit makes final WQBELs contingent on compliance with certain conditions, the permit must stand or fall based upon whether the conditions themselves meet the requirements of the Clean Water Act

In this case, the Tracy Permit's numeric WQBELs were made contingent on the development and implementation of an approved Salinity Plan and various other salinity control requirements in the Permit. Thus, the relevant inquiry is whether the Salinity Plan and other salinity control requirements in the Permit are sufficient to meet the requirements of the Clean Water Act.

The State Board contends that the Salinity Plan is not sufficient because it does not constitute an "effluent limitation" and is not designed to achieve the applicable water quality objectives The Court disagrees that the Salinity Plan is not an "effluent limitation," but agrees that the Plan is not a final WQBEL designed to implement the southern Delta EC objectives

As an initial matter, the Court rejects any suggestion that effluent limitations are required to be numeric. The definition of "effluent limitation" in the Clean Water Act refers to "any restriction," and may include a "schedule of compliance " (33 U.S.C. § 1362(11); 40 C F.R. § 122.2.) The term "schedule of compliance" means a "schedule of remedial measures," including an enforceable sequence of interim requirements leading to compliance with an effluent limitation or standard (33 U.S.C. § 1362(17); 40 C.F.R § 122.2.)

In *Communities for a Better Environment*, the First Appellate District Court of Appeal specifically rejected the argument that the federal regulations mandate numeric WQBELs in all circumstances. Rather, the Court found, Congress intended a "flexible approach" including alternative effluent control strategies. (*Communities for a Better Environment v State Water Resources Control Bd* (2003) 109 Cal.App 4th 1089, 1105, *Communities for a Better Environment v State Water Resources*

Control Bd. (2005) 132 Cal.App 4th 1313, 1318; see also *Divers' Environmental Conservation Organization v State Water Resources Control Bd* (2006) 145 Cal.App.4th 246, 262 [following *Communities for a Better Environment*].) Thus, numeric effluent limitations are not necessary to meet the requirements of the federal Clean Water Act. (*Communities for a Better Environment, supra,* 109 Cal.App.4th at p.1093.) Indeed, federal regulations expressly permit non-numeric effluent limitations -- such as best management practices -- when numeric effluent limitations are "infeasible." (40 C.F.R. § 122 44(k)(3); see also State Board Order WQ 2006-0012, p.16.)

The State Board construes "infeasibility" to refer to "the ability or propriety of establishing" numeric limits. (See State Board Order WQ 2009-0015, p.7; State Board Order WQ 2006-0012, pp.14-16.) Thus, according to the State Board, feasibility turns on the ability and propriety of establishing numeric effluent limitations, rather than the ability of a discharger to comply.

However, this argument is unfounded and is not supported by case law or by the Board's own Water Quality Orders It will nearly always be *possible* to establish numeric effluent limitations, but there will be many instances in which it will not be feasible for dischargers to comply with such limitations. In those instances, states have the authority to adopt non-numeric effluent limitations.

Communities for a Better Environment makes clear that one factor a board may consider in determining whether a numerical effluent limitation is "feasible" is the "ability of the discharger to comply." (See *Communities for a Better Environment, supra*, 109 Cal.App 4th at pp 1100.) The court expressly approved the regional board's consideration of this factor in upholding the determination that numeric effluent limits were not "appropriate" for the refinery at issue in that case. (*Id.* at p.1105 [approving determination that numeric WQBEL was not feasible "for the reasons discussed above," which included inability of discharger to comply.)

Likewise, in Water Quality Order 2003-0012, the State Board declined to impose numeric effluent limitations in a waste discharge permit because of a concern that numeric limitations would not be appropriate [31] (State Board Order WQ 2003-0012.)

The Board's Order in this proceeding cited to WQO 2003-0012 with approval, noting that "it is possible to have effluent limitations other than numeric effluent limitations [provided] the effluent limitation is . enforceable and designed to implement the water quality objective." (CSPA000398.) The Board remanded the matter to the

[31] The Board's Water Quality Orders indicate a "preference" for determining the "ability and propriety" of establishing numeric effluent limitations in a regulatory setting, e g as part of a basin plan amendment, rather than as part of a permit petition process (See State Board Order WQ 2003-0012, pp 8-9, State Board Order WQ 2009-0015, p 7 fn 28) Thus, the Board contends, while the Board may consider dischargers' ability to comply when deciding whether numeric effluent limitations are "appropriate," in general, a discharger's ability to comply should not be considered when setting specific numeric effluent limitations in a permit (*See ibid*) However, Water Quality Order 2003-0012 shows that the Board has considered the "ability and propriety" of numeric effluent limitations as part of the permit petition process, at least to give the Board time to address the issue in a regulatory setting (See State Board Order WQ 2003-0012, p 9)

Regional Board to further consider whether there are feasible alternatives or methods, other than reverse osmosis, that the City could use to achieve the numeric limits. (CSPA000401.)

Accordingly, the Court rejects the argument that in determining the "propriety" of numeric effluent limitations, the Board may not consider the ability (or inability) of the discharger to comply with such limitations. The ability to comply is a critical factor in determining the "propriety" of numerical limitations.

On the other hand, the Court accepts the Board's assertion that "feasibility" does not depend on the economic costs to comply with numeric effluent limitations. (State Board Order WQ 2003-0012, p.9 fn. 26.) The relevant consideration is whether the discharger can comply, not whether it is cost-effective to do so.

This conclusion is supported by the California Supreme Court's holding in *City of Burbank v State Water Resources Control Board* (*City of Burbank v State Water Resources Control Board* (2005) 35 Cal 4th 613.) That case involved application of Water Code section 13263, which requires regional boards to take economic considerations into account when issuing wastewater discharge permits The cities of Los Angeles and Burbank filed appeals contending that the board violated section 13263 because it did not consider the economic burden on the cities in meeting the pollutant restrictions in their permits. The Court held that when considering effluent limitations in a waste discharge permit, federal law does not allow a regional board to use economic considerations to impose limitations less stringent than necessary to meet applicable federal standards (*Id* at p.618) Important to the Court's holding in *City of Burbank* was its finding that federal law requires dischargers to achieve federal water quality standards "regardless of cost." (*Id.* at p.626)

Here, the State Board found that the Regional Board failed to adequately consider the "feasibility" of numeric effluent limitations. Petitioners dispute this finding

The Court finds this is a close question. The evidence in the record could be read either way. On one hand, the evidence shows the Regional Board considered numerous factors before determining that Tracy could not reasonably be expected to achieve compliance with final WQBELs within the five year life of the Order, including that: Old River frequently has no assimilative capacity; Tracy's discharge is one of many contributors (including DWR and USBR) responsible for the salinity problems in the southern Delta; Tracy's impact on salinity is relatively small compared to other salinity sources in the area, that even if Tracy's discharge were entirely removed, it would not solve the salinity problem in the southern Delta; that part of Tracy's salinity problem is the high salt load of its municipal water supply, imposing final numeric WQBELs may and likely would require the construction and operation of reverse osmosis facilities; reverse osmosis facilities are very costly and energy intensive and produce highly-saline brine waste with limited and costly disposal options; and the State is engaged in ongoing efforts to review and revise the salinity control policies for the Delta (including total maximum daily loads for salinity) which might render reverse-osmosis treatment unnecessary

On the other hand, the State Board is correct that the Regional Board did not show that reverse osmosis is the only treatment methodology available and failed to adequately consider whether there are other alternatives/methods available that could be used to meet the EC objectives.

Even where the independent judgment test applies, the findings of the agency come before the court with a strong presumption as to their correctness, and the burden falls on the petitioner to convince the court that the agency's findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal 4th 805, 811-12, 817.)

On balance, Petitioners have failed to persuade the Court that the State Board's finding is contrary to the weight of the evidence. Accordingly, the Court upholds the State Board's determination that the Regional Board failed to adequately consider the feasibility of numeric effluent limitations

The Court also upholds the State Board's alternative finding that the Tracy Permit's provisions are not adequately protective of the applicable water quality objectives for EC

The State Board contends that, even if numeric effluent limitations are infeasible, the Tracy Permit does not include water quality-based effluent limitations (WQBELs) designed to achieve the applicable water quality criteria (See 33 U.S.C § 1312; 40 C F.R § 122 44.)

Tracy argues that its Permit included appropriate (non-numeric) effluent limitations by virtue of the required Salinity Plan and the various other salinity control requirements in the Permit (such as the requirements for best practicable treatment or control, a pollution prevention plan, a monthly average effluent salinity goal, and an interim performance-based effluent limitations for Total Dissolved Solids).[32]

On this issue, the Court agrees with the Board. To the extent the Tracy Permit includes effluent limitations, the effluent limitations are interim, performance-based limitations (such as for TDS) intended to reduce the salinity of Tracy's discharge, not water quality-based effluent limitations (WQBELs) designed to implement the applicable water quality objectives.

While the Permit includes final numeric WQBELs for EC, they are conditional and apply only if Tracy fails to design and implement a Salinity Plan. The Permit allowed -- but did not require -- that final numeric WQBELs be established in the future, as

[32] Tracy argues that the Regional Board properly approved these non-numeric effluent limitations because the Regional Board concluded that numeric WQBELs would be infeasible, in that they likely would require the construction and operation of extremely costly reverse-osmosis facilities and would not significantly reduce EC levels in the south Delta As described above, the Court has concluded that the weight of the evidence supports the State Board's finding that the Regional Board did not adequately consider the feasibility of numeric WQBELs and upholds the Board's remand on this basis

part of a TMDL for example [33] Nor did it require that the Salinity Plan itself be designed to implement the applicable water quality objectives.

As a result, the adequacy of the Permit turns on the provisions pertaining to best practicable treatment or control (BPTC).

In general, there is nothing preventing states from establishing WQBELs based upon best management practices (BMP) or best practicable treatment or control (BPTC). However, the BMP or BPTC must be enforceable and designed to implement the applicable water quality objectives. There must be an "enforceable sequence of actions or operations" leading to compliance with the applicable water quality objectives. Studies and commitments to studies that do not actually implement the water quality standards do not satisfy federal requirements.

Tracy's Permit falls short of this standard. The Permit contains nothing more than a vague requirement that Tracy prepare a "work plan" and "technical report" to determine the BPTC of its discharge, provide recommendations for necessary modifications to achieve BPTC, and identify sources of funding and a proposed schedule for such modifications. The Permit does not discuss any particular BPTC, and imposes no specific time limitations for the BPTC plan and report. Further, the Permit contains no discussion of *how* BPTC will result in compliance with applicable water quality objectives for EC In essence, the Permit defers to some uncertain date in the future the determination not only of what BPTC may be required, but also how BPTC will be achieved (if it all).

There is, therefore, no enforceable sequence of actions or operations leading to compliance with applicable water quality standards.

As a result, this case must be distinguished from the situation in *Communities for a Better Environment*, in which the court found that an enforceable "schedule of compliance" leading to the adoption of final effluent limitations designed to achieve water quality standards (at the completion of a TMDL) constituted an acceptable WQBEL for purposes of the Clean Water Act. (*Communities for a Better Environment, supra*, 109 Cal.App.4th at pp.1106-1107.)

The State Board did not abuse its discretion in determining that such provisions do not meet the requirements of the federal Clean Water Act. The weight of the evidence supports finding that the Permit fails to establish WQBELs for EC that are designed to implement the applicable water quality objectives

Therefore, assuming arguendo that Tracy's discharge has the reasonable potential to cause or contribute to an in-stream excursion, the State Board did not abuse its discretion in remanding the Permit to the Regional Board for reconsideration of the feasibility of numeric WQBELs and inclusion of final (numeric or non-numeric)

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[33] A TMDL assesses responsibilities, identifies specific actions to be taken by identified parties, and results in an allocation of the total allowable pollutant burden This approach seems well suited for the salinity problem in the southern Delta and is, in any event, required by federal law because the southern Delta is listed as impaired for salinity

WQBELs designed to implement the numeric water quality objectives contained in the Bay-Delta Plan.

3. Did the State Board abuse its discretion by finding that the EC effluent limitations to be imposed on Tracy must be numeric?

Finally, Tracy alleges that the State Board abused its discretion by finding that the EC effluent limitations to be imposed on Tracy must be numeric.

In its Opposition, the State Board contends that it properly ordered the Regional Board to include numeric effluent limits in Tracy's permit because numeric effluent limitations always are required to achieve the numeric water quality standards. As described above, this is not correct. Narrative effluent limitations can in some circumstances be adequate.

Nevertheless, the Court rejects Tracy's challenge because the Court is not convinced that the State Board ordered the Regional Board to include numeric effluent limits. It merely ordered the Regional Board to reconsider its determination that numeric effluent limitations are not feasible.

C Conclusion

The Court concludes that Respondent State Board failed to undertake the analysis required by Water Code section 13241 when the Board established the water quality objectives for EC in 1978. Accordingly, a writ shall be granted directing the Board to conduct the required § 13241 analysis and reconsider the EC objectives after the § 13241 factors have been considered.

In addition, the Court concludes that the 2006 Bay-Delta Plan's program of implementation is inadequate in relation to municipal dischargers. Accordingly, the Court shall issue a writ compelling the Board to adopt an adequate program of implementation that describes the nature of the actions necessary for municipal dischargers to achieve the EC objectives (including recommendations for appropriate action by them), provides a reasonable time schedule for the actions to be taken, and includes a description of the surveillance required to determine their compliance.

The Court denies the other challenges to the State Board's Water Quality Control Plan.

In light of the Court's conclusions that the EC objectives were not validly adopted, and that the 2006 Bay-Delta Plan's program of implementation is inadequate for municipal discharges, the Court concludes that the Board prejudicially abused its discretion in applying the 2006 Bay-Delta Plan to Tracy's municipal wastewater treatment plant. In addition, the Board prejudicially abused its discretion in finding the 2006 Bay-Delta Plan authorizes the Board to perform the "reasonable potential" analysis at the end of Tracy's discharge pipe, rather than at the Old River/Tracy Road Bridge compliance location. Accordingly, the Court shall issue a peremptory writ of mandate compelling the Board to vacate the provisions of the May 19, 2009,

Order relating to effluent limitations for electrical conductivity, and to reconsider and revise its Order in a manner consistent with this ruling.

In recognition of the environmental harm that could occur if the water quality objectives for electrical conductivity were to be invalidated immediately, the Court shall not require the Board to invalidate the existing EC objectives pending the Board's return to the writ. However, the Court shall enjoin the Board from applying the EC objectives to Tracy and other municipal dischargers pending reconsideration of the EC objectives and adoption of an adequate program of implementation for municipal dischargers, in compliance with this Court's ruling.

The Court denies the request for declaratory relief, as unnecessary.

Counsel for Tracy is directed to prepare a formal judgment and writ consistent with this ruling; submit them to counsel for the State Board and Clean Water Association for approval as to form; and thereafter submit them to the Court for signature and entry of judgment

Petitioners Tracy and Clean Water Association shall be entitled to recover their costs of suit upon appropriate application.

Dated. May 10, 2011 Signed. _____

Honorable Timothy M. Frawley
Superior Court Judge
County of Sacramento

Case Number: 34-2009-80000392 Department 29
Case Title: City of Tracy v. California State Water Resources Control Board, et al

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing RULING by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed to

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: May 10, 2011

Superior Court of California, County of Sacramento

By: F. Temmerman,
Deputy Clerk