



VIA EMAIL

February 18, 2014

Daniel McClure
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670
T: (916)464-4751
E: dmcclure@waterboards.ca.gov

Comments to Proposed Amendments to Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos

Dear Mr. McClure:

These comments are submitted on behalf of the Pacific Coast Federation of Fishermen's Associations, Golden Gate Salmon Association, and Golden Gate Fishermen's Associations, and relate to the Central Valley Regional Water Quality Control Board's ("Central Valley Water Board" or "water board") proposed Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (the "Basin Plan") for the control of diazinon and chlorpyrifos.

These groups have a long-standing interest in restoring native salmon populations that depend on the health of the Sacramento River and San Joaquin River watershed. Pesticide use remains a major threat to the ecosystem, and we submit these comments to improve surface water protections needed to restore water quality and help return salmon runs to healthy levels.

As discussed in further detail below, the proposed amendments to the basin plan fail to comply with the water board's obligations to develop total maximum daily loads for chlorpyrifos and diazinon in waterways designated as "impaired" under the federal Clean Water Act. Furthermore, the water board has not adequately justified how its current proposal complies with its obligations under state and federal law.

1. Background Regarding Development of Proposed Basin Plan Amendments

In February 2013, the Central Valley Regional Water Control Board released a Proposed Basin Plan Amendment, which was intended to regulate discharges of two common agricultural

pesticides, chlorpyrifos and diazinon.¹ The proposed amendment included: new water quality objectives for the pesticides, TMDLs for the pesticides, revisions to existing TMDL and discharge control programs, and policies and monitoring programs aimed at addressing alternative pesticides. *Id.*

In May 2013, Earthjustice prepared comments critiquing the proposed basin plan amendment on behalf of the Pacific Coast Federation of Fishermen's Associations, Golden Gate Salmon Association, and Golden Gate Fishermen's Associations.² The comment letter critiqued the following aspects of the proposed basin plan amendment: (1) that the proposed basin plan amendment improperly assigned all agricultural sources nonpoint source load allocations for the purposes of calculating the TMDL; (2) that the proposed TMDL did not include a margin of safety; and (3) that the proposed basin plan amendment failed to provide reasonable assurances that the TMDL limits will be achieved.

On January 3, 2014, the water board released a revised basin plan amendment.³ The Draft Staff Report for the Revised Basin Plan Amendment noted that while there are a number of Central Valley water bodies on EPA's §303(d)(1) list of impaired water bodies, which would ordinarily require TMDLs, "if the Board can demonstrate that other pollution control requirements will successfully address an impairment, then a TMDL is not necessary." Draft Staff Report at 13. The water board noted that since the Irrigated Lands Regulatory Program ("ILRP") and other regulatory programs will effectively address chlorpyrifos and diazinon impairments, there would be no need to establish a TMDL: "[b]ecause diazinon and chlorpyrifos water quality impairments will be resolved by existing regulatory programs within a set compliance timeframe, this will obviate the need for the Board to establish TMDLs for these constituents. (40 C.F.R. §130.7(b)(1)(iii))." *Id.* at 17. Thus, instead of developing TMDL wasteload and load allocations, the Revised Basin Plan Amendments will focus on "establishment of water quality objectives, compliance time frames, and monitoring and implementation requirements." *Id.* at 16-17.

¹ Central Valley Regional Water Quality Control Board, Notice of Public Hearing and Notice of Filing of Draft Environmental Documents (February 25, 2013); *available at* http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/central_valley_pesticides/nph_cv_dc_bpa_2013feb25.pdf

² Letter from Earthjustice to Daniel McClure, Central Valley Regional Water Quality Control Board (May 20, 2013); *available at* http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/central_valley_pesticides/march2013_bpa_staffrpt_comments/earthjustice_2013may20_com.pdf

³ See Central Valley Regional Water Quality Control Board, Amendments to the Water Quality Control Plan for the Sacramento and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos Discharges, Public Review Draft Staff Report (January 2014) ("Draft Staff Report"); *available at*, http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/central_valley_pesticides/20140103_cv_dc_bpa_stfrpt.pdf.

2. The Water Board Is Required to Develop TMDLs for Impaired Waterways Listed Under the Clean Water Act

There are various waterways in the Central Valley polluted by chlorpyrifos and diazinon, and which have been listed on EPA's §303(d) list of "impaired" waterways.⁴ Consequently, under the federal and state statutes governing the maintenance of clean water, the Central Valley Regional Water Quality Control Board must set TMDLs to control chlorpyrifos and diazinon levels in these waterways.

The Clean Water Act ("CWA") was enacted in 1972, to promote the "[r]estoration and maintenance of chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). As part of their obligations under the CWA, state water quality control agencies must establish a "total maximum daily load" ("TMDL") for waterways that are impaired and fail to meet the water quality standards for particular pollutants. 33 U.S.C. §1313(d)(1)(C). 40 C.F.R. §130.7. If a waterway is on the CWA's list of "impaired" waterways (the "§303(d)(1) list"), a TMDL must be established for that waterway.⁵ 33 U.S.C. §1313(d)(1)(C); 40 C.F.R. §130.7(c)(1); *see also*, *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1343-44 (N.D. Cal. 2000)(TMDLs required for listed water bodies, even if those waters affected only by nonpoint source pollution), *aff'd*, *Pronsolino v. Nastri*, 291 F.3d 1123, 1127-28, 1132 (9th Cir. 2002); *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002)(state must develop TMDLs for listed waterways).

California's Porter-Cologne Water Quality Control Act implements provisions of the CWA, and its goal is to "attain the highest water quality which is reasonable, considering all demands being made and to be made on [the state's] waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Water Code §13000. Under the Porter-Cologne Act, the State and regional water boards are tasked with "coordination and control of water quality" in the state. Water Code §13001. To achieve the objectives of the CWA

⁴ *See*, US EPA Approved 2008-2010 303(d) List, *available at*, http://www.swrcb.ca.gov/rwqcb5/water_issues/tmdl/impaired_waters_list/2008_2010_usepa_303dlist/20082010_usepa_aprvd_303dlist.pdf; *see also*, Proposed 2006 CWA Section 303(d) List of Water Quality Limited Segments (Central Valley Regional Board), *available at*, http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/303dlists2006/swrcb/r5_final303dlist.pdf

⁵ The TMDL must "be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality"; and is the sum of: pollution from point sources (the "wasteload allocation" ("WLA")), pollution from non-point sources (the "load allocation" ("LA")), and a margin of safety. 33 U.S.C. §1313(d)(1)(c), 40 C.F.R. §130.2(i).

and Porter-Cologne Act, regional water boards will develop “basin plans” which address the beneficial water uses to be protected, the water quality objectives, and contain a program of implementation. Water Code §§13241, 13242; *see also*, *City of Arcadia v. State Water Resources Control Bd.*, 191 Cal. App. 4th 156, 164 (2010). In connection with this basin planning process, water boards must establish TMDLs for waterways on the §303(d)(1) list. *See* Resolution 2005-0050, *Water Quality Control Policy for Addressing Impaired Waters: Regulatory Structure and Options* (June 16, 2005)(“TMDL Policy”)⁶ at 4; *see also*, *Pronsolino*, 291 F.3d at 1127-28; *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.*, 183 Cal. App. 4th 1110, 1116, 1119 (Cal. Ct. App. 2010).

3. The Water Board Has Not Justified Its Failure to Develop TMDLs For Chlorpyrifos and Diazinon

The water board has failed to comply with its obligations to develop TMDLs for §303(d)(1) listed Central Valley waterways. The water board has acknowledged that there are a number of listed waterways, which currently do not have TMDLs in place. *See* Draft Staff Report at 42. The water board has also acknowledged that a number of these waterways have concentrations of diazinon and chlorpyrifos at levels of concern, and in excess of water quality standards. *Id.* at 52-53, 58-62, 65-68, 70-76.

In order to address these impairments, rather than adopting TMDLs, the water board has proposed to adopt numeric water quality objectives, based on the California Department of Fish and Game’s Aquatic Life Criteria. Draft Staff Report at 82. The water board contends that adoption of these objectives, and reliance on existing regulatory programs to enforce these objectives, will resolve impairments in listed waterways. *Id.* It also contends that this plan exempts it from the CWA’s requirement to adopt TMDLs for listed waterways, since these other regulatory programs constitute “other pollution control requirements...required by State authority,” within the meaning of 40 C.F.R. §130.7(b)(1)(iii). *Id.* at 153-54.

However, the water board’s actions do not satisfy its obligations under state or federal law. Pursuant to the CWA and the state’s Porter-Cologne Act, water boards are required to develop TMDLs for all §303(d)(1) listed waterways. *See* 33 U.S.C. §1313(d)(1)(C); 40 C.F.R. §130.7(c)(1); TMDL Policy at 4; *Pronsolino*, 291 F.3d at 1127-28.

The C.F.R. section cited by the water board in its Draft Staff Report does not provide an exemption to this requirement to develop TMDLs. Draft Staff Report at 153-54. Rather, 40 C.F.R. §130.7(b)(1)(iii) pertains to “Identification and priority setting for water quality-limited segments still requiring TMDLs,” and asks the states to identify waterways requiring TMDLs. It does provide an exception to the listing requirement if other regulatory programs will resolve

⁶ Available at http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/iw_policy.pdf

the impairment, and a waterway need only be listed where “[o]ther pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.” However, where waterways have already been listed as impaired, water boards must develop TMDLs for those waterways. By failing to develop TMDLs for already-listed waterways, the water board has failed to fulfill its obligations under state and federal law.

Additionally, the water board has failed to properly certify that other programs will correct the impairments. A water board need not develop a TMDL if it can formally certify that other regulatory programs will resolve the impairment. TMDL Policy at 6. However, if a water board chooses to follow this route, it must make various formal findings to issue the certification, including: that the other regulatory programs are consistent with the assumptions of the TMDL, that the program will address the impairment in a reasonable period of time, that effective enforcement mechanisms exist, that there is a monitoring program in place, and a date upon which the certification will expire if not reissued. *Id.* at 6-9. Here, the water board has not followed these requirements, and has not properly certified that other regulatory programs, like the ILRP, will resolve the impairments due to chlorpyrifos and diazinon. *See* Draft Staff Report at 154-55.

4. Conclusion

As set forth above, the Central Valley Regional Water Quality Control Board has failed to fulfill its obligations to develop TMDLs for chlorpyrifos and diazinon for listed waterways in the Central Valley, and has not adequately justified why it is exempt from these obligations.

Please consider these comments and revise the proposed basin plan amendments to address the omissions and inaccuracies identified above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Irene V. Gutierrez", with a long horizontal line extending to the right.

Irene V. Gutierrez
Greg C. Loarie
Counsel for the Pacific Coast Federation of
Fishermen’s Associations, *et al.*