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VIA E-MAIL

February 17, 2017

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Fl.  
Sacramento, CA 95814  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Public Comment  
Beneficial Uses and Mercury Objectives  
Deadline: 2/17/17 12 noon



Re: Comments of the Merced Irrigation District to the Proposed Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California – Tribal and Subsistence Beneficial Uses and Mercury Provisions

Dear Ms. Townsend:

The Merced Irrigation District (“MID”) appreciates the opportunity to provide you with comments to the Proposed Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California – Tribal and Subsistence Beneficial Uses and Mercury Provisions (“Provisions”).<sup>1</sup> MID is a California irrigation district and the owner and operator of the Merced River Hydroelectric Project licensed by the Federal Energy Regulatory Commission. MID diverts water from the Merced River primarily for irrigation use. Lake McClure is MID’s principal water storage reservoir. Accordingly, MID has a direct interest in the proposed Provisions, which because they have Statewide application, may apply to segments of the Merced River including reservoirs such as Lake McClure.

MID has participated previously in outreach meetings regarding the proposed beneficial use categories pertaining to tribal traditional and cultural uses, tribal subsistence fishing and subsistence fishing by other cultures and individuals, and hereby incorporates its previous comments submitted on June 29, 2016, a copy of which is attached here as Exhibit A.

<sup>1</sup> According to the Draft Staff Report, a Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries (“ISWEBE Plan”) is not yet adopted. (Draft Staff Report, p. 1 n. 2.)

According to the issued Draft Staff Report, including Substitute Environmental Documentation (SED) (collectively “Draft Staff Report”), the Provisions would establish the following: (1) three new beneficial uses pertaining to tribal traditional and cultural use, tribal subsistence fishing use and subsistence fishing use by other cultures or individuals (2) one narrative and four numeric mercury water quality objectives to protect numerous beneficial uses involving human health and aquatic dependent wildlife; and (3) a program of implementation to control mercury discharges. This program of implementation to control mercury discharges is separate and distinct from the ongoing project referred to as the statewide mercury control program for reservoirs (hereinafter “reservoir program”), which is intended to establish “a program to implement the Provisions’ water quality objectives for Commercial Sport Fishing (COMM), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE) in all California reservoirs impaired by mercury for those uses.” (Draft Staff Report, p. 4.) However, if the reservoir program is not adopted by the State Water Resources Control Board (“Board” or “Water Board”), the Draft Staff Report states that these Provisions will be implemented on a case-by-case basis for discharges to reservoir, as described in Section 6.13.3 of the Draft Staff Report.

## **General Comments**

### **1. Public Outreach**

As noted above, MID participated in the public outreach meetings for the proposed tribal and subsistence beneficial uses that took place in 2016 as described in section 2.6.5 of the Draft Staff Report. That process had specially designated meetings for input from water agencies and agricultural representatives. (See Draft Staff Report, Table 2-2.) In contrast, the focus group meetings on the Provisions’ key elements, including on the reservoir program, in 2014, did not include a focus group meeting to gain public input specifically from water agencies, reservoir operators or, more broadly, agricultural interests. (See Draft Staff Report, Table 2-1.) Because the Provisions at issue do or could implicate mercury levels in rivers and reservoirs, specific focus group meetings to obtain the input of water agencies should have been conducted.

### **2. Improper Segmentation Under CEQA**

There currently is no statewide Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries. (Draft Staff Report, p. 1 n. 2.) Instead of preparing, reviewing and adopting the intended ISWEBE Plan in one proceeding, the Plan is being prepared in individual parts or chapters over many years with no disclosed overarching framework or environmental review of the plan as a cohesive whole. The Provisions represent Part 2 of the ISWEBE Plan yet to be adopted by the Water Board with Appendix A to the Draft Staff Report containing the proposed text to be added to Chapter II of the future ISWEBE Plan. In addition to addressing only one part or aspect of the proposed ISWEBE Plan, the Provisions further segment or separate consideration and analysis of the impacts of setting water quality criteria for mercury for particular beneficial uses (e.g., COMM or WILD) by addressing non-reservoir water bodies

separately from the establishment of mercury water quality criteria for the same beneficial uses in California reservoirs.<sup>2</sup> (Draft Staff Report, p. 4.)

Though the environmental review for the Provisions is done through Substitute Environmental Documentation, the State Water Board must still comply with CEQA's substantive goals and policies, including the policy of avoiding significant adverse effects on the environment where feasible. (Draft Staff Report, p. 15 citing 14 Cal. Code Regs. § 15251(g); see also *City of Arcadia v. State Water Resources Control Board*, 135 Cal.App.4th 1392, 1422 [when conducting its review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA].) Key to CEQA's goal of avoiding significant adverse effects on the environment is a complete project description. A complete project description is necessary to ensure that all of the project's environmental impacts are considered. (*City of Santee v. City of San Diego*, 214 Cal.App.3d 1438, 1452.) CEQA mandates that environmental considerations not become submerged by chopping a large project into many little ones, but that the project as a whole be subject to environmental review. (*Id.* citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.)

Here, the Project, the Provisions, is not the ISWEBE Plan but rather solely Part 2 of the ISWEBE. While the cumulative impacts analysis includes the adopted Part 1 Trash Provisions to the ISWEBE Plan and mentions other planned future components of the ISWEBE Plan (e.g., Bacteria Amendments), these other future components of the Plan are currently not yet fully developed. Moreover, it is unknown what the final ISWEBE Plan will include. By segmenting the analysis and approval of individual Parts of the statewide ISWEBE Plan, a full analysis of the impacts of the Plan as a whole is precluded, particularly since the development of the plan is occurring over such an extended time frame.

Even if the environmental review of individual components of the Plan were proper, the Provisions further segment the review of establishing of water quality criteria for mercury for California waters by separately conducting the reservoir program. Because the reservoir program is not yet developed and its potential reservoir management actions for compliance have not yet been validated, the Staff Report concludes that a full cumulative impact analysis is speculative at this time. By separating the Provisions and the reservoir program into two distinct projects, one of which is developed and the other in the early stages of development, a complete environmental analysis of the potential cumulative impacts from the establishment of water quality criteria for waters eventually intended to be covered by the ISWEBE plan is also precluded.

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<sup>2</sup> Originally, it appears that the Water Board contemplated a comprehensive statewide statement mercury amendment program with 3 elements: (1) establishing all mercury water quality objectives, (2) an implementation program for all waters except reservoirs and upstream watersheds, and (3) a mercury control program for reservoirs and upstream sources. (See Water Board handout for Focus Group Meetings – Spring/Summer 2014 for the Proposed Statewide Mercury Amendment dated June 2, 2014 available at [http://www.waterboards.ca.gov/water\\_issues/programs/mercury/docs/focusgroups.pdf](http://www.waterboards.ca.gov/water_issues/programs/mercury/docs/focusgroups.pdf))

## **Comments Regarding the Proposed Adoption of New Beneficial Uses**

### **3. Statewide Adoption of Proposed Beneficial Uses**

No information put forward in the Staff Report demonstrates that statewide establishment of these proposed beneficial uses is necessary or preferable. Instead, where appropriate, such beneficial uses should be defined by the Regional Water Quality Control Boards if needed in their respective region. This apparently is already the case in Region 1 where the applicable water quality control plan includes a Native American culture beneficial use and a subsistence fishing beneficial use.

The benefits of allowing regional designation of tribal traditional and cultural use, tribal subsistence fishing use and other subsistence fishing use is that it allows the water quality criteria to protect such beneficial uses to be tailored to the use in that region. In the case of the subsistence fishing uses, tribal or otherwise, the water quality criteria can be tailored to the level of consumption, species consumed and other environmental conditions of the water body at issue instead of assuming a one-size-fits-all criteria for the state. As the Draft Staff Report acknowledges, the data on subsistence fishing indicates that the use is variable across the state and also that the use of local data is preferred by the U.S. EPA. (Draft Staff Report, p. 118 [justifying a narrative water quality standard for mercury for the subsistence fishing use].)

The ability to regionally define and designate beneficial uses is particularly relevant for the proposed Tribal Tradition and Cultural Use (“CUL”), which, as defined, covers a broad and largely unspecified range of activities. (Draft Staff Report, pp. 77-78.) The Draft Staff Report acknowledges the lack of clarity on the multitude of activities covered by this beneficial use, admitting that the proposed language covers an unknown number of tribal traditional and cultural uses among the more than 100 tribes recognized by the State of California. (Id.) The Draft Staff Report goes on to note that such tribal traditions and “lifeways” are closely linked to the natural resources available in the tribal areas. (Id.) The lack of clarity on the activities covered by the CUL beneficial use and the variability between regions of the state argues against a statewide beneficial use designation with corresponding state-wide water quality criteria and in support of regional definition of tribal traditional and cultural beneficial uses. In particular, the use of statewide numeric water quality criteria, as with the two proposed tribal beneficial uses, can lead to under or overprotective water quality criteria, the environmental and economic impacts of which are impossible to assess based on the information in the Draft Staff Report, since it is unknown which waters of the state will receive these additional designations, or in the case of the CUL beneficial use, which activities are covered.

### **4. Tribal Tradition and Cultural Use**

As noted above, the proposed Tribal Tradition and Cultural Use is ambiguous and open-ended in what practices constitute traditional and cultural uses to be protected, raising the potential for inconsistent interpretations and application. In particular, the undefined and unfamiliar term “lifeways” is incomprehensible. Because the proposed language is open-ended and largely undefined, it is impossible to assess the potential application of this proposed beneficial use to a particular water body, to determine any overlap with existing, beneficial uses or to determine the potential impacts to water users or the environment from corresponding water

quality criteria. Any beneficial use for Tribal Tradition and Cultural Use should be more precisely worded so as to clearly define the practices protected, and, where needed, terms should be defined.

Particularly problematic is the inclusion of traditional and cultural uses of water for navigation. The types of navigation covered by this beneficial use and the distinction from the current Navigation beneficial use is entirely unclear. More worrisome, the Draft Staff Report mentions that flow objectives could be set for the reasonable and beneficial protection of this and other traditional and cultural uses, including through 401 water quality certifications. Without an understanding of the types of activities that traditional or cultural navigation is intended to encompass, there is no way to determine the potential impacts to water quantity from the setting of such flow objectives to protect a tribal traditional or cultural use of water for navigation.

Under the current proposed wording, it is conceivable that existing beneficial uses adequately protect all of the traditional and cultural uses of water sought to be protected. The Draft Staff Report does not provide sufficient evidence demonstrating that existing beneficial uses will not be sufficiently protective of these activities, merely suppositions. (See Draft Staff Report, pp. 104-111.) For example, the Draft Staff Report's conclusion that tribal consumption of fish or shellfish is not already sufficiently protected by the Commercial and Sportfishing beneficial use, or, in the case of more regular consumption, the proposed Tribal Subsistence Fishing use is largely unsupported by evidence.

On page 6, the Draft Staff Report states that the function of the Tribal Subsistence Fishing and Subsistence Fishing beneficial uses is not to protect or enhance fish populations or aquatic habitats, which are protected and enhanced by other existing beneficial uses, but rather relate to the risks to human health from the consumption of noncommercial fish or shellfish. The Water Board needs to make clear that the same interpretation applies to the consumption of fish or shellfish as a beneficial use of water under the proposed Tribal Tradition and Cultural beneficial use.

Finally, it is unclear how such an open-ended Tribal Tradition and Cultural beneficial use will be applied (designated) by the Regional Boards. The Draft Staff Report provides no information regarding the degree of evidence required to establish a tribal traditional and cultural use, aside from tribal confirmation and unspecified evidence from tribal communities regarding locations and timing of ceremonial and cultural activities. (See Draft Staff Report, p. 8.) Other questions that remain include, but are not limited to, how longstanding, established or frequent would the use have to be, how many members of the tribe would need to be engaging in the use, and would the use have to originate from a treaty right.

## **5. Tribal Subsistence Fishing**

For the Tribal Subsistence beneficial use, the amount of evidence that would be required to achieve this designation in addition to tribal confirmation is unclear. The Draft Staff Report suggests that evidence could include, but is not required to include, an angler or community consumption study demonstrating that a population or group is consuming fish at a higher rate than the average consumer. (Draft Staff Report, p. 108.) As with the Tribal Tradition and Cultural beneficial use, a large amount of uncertainty remains regarding how longstanding,

established or frequent would the subsistence fishing use have to be, how many members of the tribe would need to be engaging in subsistence fishing, and would the use have to originate from a treaty right.

## **6. Subsistence Fishing**

Similarly, the proposed beneficial use for Subsistence Fishing is worded so broadly that it is uncertain what level of subsistence fishing in a water body, for cultural or economic reasons, is intended to trigger the designation of this beneficial use. As noted on page 108, evidence supporting designation of this beneficial use could include an angler or community consumption study but such a study is not necessarily required. The Draft Staff Report also provides little information concerning how broadly “cultural traditions” is intended to be defined or what level of economic resources constitutes a “lack of personal economic resources.” Considering these ambiguities, the impacts to water supplies and operations statewide could potentially be immense. The proposed wording should be revised to make clear what constitutes a “cultural use” or “lack of personal economic resources” and what level of subsistence fishing warrants protection as a subsistence fishery.

### **Comments regarding Water Quality Objectives and Program of Implementation to Control Mercury Discharges**

## **7. Mercury Objection for the Tribal Tradition and Cultural Use**

The Tribal Tradition and Cultural use encompasses a broad and bewildering array of activities, as noted above. One of these potential activities is consumption of fish. However, a water body could be designated as having a Tribal Tradition and Cultural use unrelated to consumption of fish yet an unnecessary water quality objective to protect consumption of fish would be applied. For this reason, the assignment of appropriate mercury water quality objectives should be left to the Regional Water Boards given the site-specific level of fish consumption, if any, thus ensuring appropriately protective objectives on a case-by-case basis.

## **8. Water Quality Objective for Statewide Wildlife Protection**

The Provisions recommend a water quality objective for mercury for the protection of piscivorous wildlife separate and distinct from the Sport Fish objective that will result in greater mercury monitoring efforts and costs. The Provision’s recommendation seems to be based more on an uncertainty or lack of data and calculated estimated values (Appendix K) instead of actual field data showing that the proposed Sport Fish objective, measured in trophic level 4 or 3 fish, would not be protective of wildlife in most water bodies with the exception of the California Least Tern or a small number of additional species. The Draft Staff Report states that it is not clear whether a 0.2 mg/kg Sport Fish objective would be protective of wildlife that eats lower trophic level fish. (Draft Staff Report, pp. 125-127.) Expressly acknowledging the uncertainty, the Draft Staff Report states that data is limited. (Id.) It rationalizes that the relationship between mercury concentrations in sport fish and mercury concentration in prey fish is water body specific but does not provide a citation to or explanation of a study supporting this conclusion. (Id.) Section 4.5.4 of the Staff Report provides very limited information regarding existing conditions in the State and does not show specific studies of water bodies where

concentrations of mercury in prey fish have resulted in adverse effects on wildlife. Due to the lack of data supporting the establishment of a separate water quality objective for prey fish, in addition to the Sport Fish Objective and the California Least Tern Objective, the water quality objective for Sport Fish should be chosen to protect wildlife (Option 1) with site-specific water quality objective set for protection of wildlife in water bodies in which it can be demonstrated that the 0.2 mg/kg water quality objective is not sufficiently protective of a particular species.

## **9. Legacy/Historic Mining Activities**

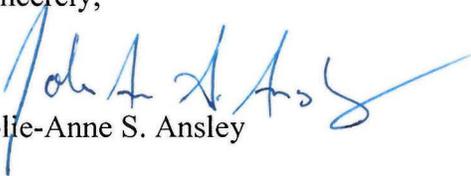
Among other sources such as atmospheric deposition, historic gold and mercury mining in California remains a source of mercury to the environment. While active mines and some abandoned mines continue to have responsible parties/mine owners that can be held responsible for the contamination, in other instances historic mining has already widely contaminated the landscape beyond the vicinity of the mine and no originating responsible party can be identified. The costs of dealing with the repercussions of such landscape level mercury contamination from historic gold and mercury mining in California, which cannot be attributed to parties responsible for the mining activities or mine owners, should be borne equally by the citizens of California and not allocated to downstream users of water.

## **10. Program Implementation Excludes Reservoirs and Reservoir Management Actions**

The Provisions contain a program of implementation to control mercury inputs to water bodies through NPDES permits issued pursuant to Section 402 of the Clean Water Act, water quality certifications pursuant to section 401 of the Clean Water Act, and waivers of waste discharge requirement, where any of the five mercury water quality objectives apply. The focus of the Provisions is on dischargers of mercury into water bodies, including potentially discharges *into* reservoirs (section 6.13.3). Such “dischargers” discussed and analyzed in the Draft Staff Report and SED include mines, dredging activities, wetlands, municipal and industrial stormwater, wastewater treatment plants and non-point sources. (See Draft Staff Report Section 7.2.) While discharges from the establishment or restoration of wetlands, and associated water management activities, appear to fall within the Provisions’ program of implementation (See Draft Staff Report, Section 7.2.4.), the Provisions expressly do not establish a program of implementation of water quality objectives for beneficial uses (COMM, WILD, RARE) designated for California reservoirs. It is our understanding that this is the purview of the separate and distinct statewide mercury control program for reservoirs, which will contain its own environmental review process. (See Draft Staff Report, Section 1.6.) As such, the SED for the Provisions does not analyze or support the implementation of water quality objectives in California reservoirs through any of the legal mechanisms listed above, including Section 401 certifications. (See Draft Staff Report, Section 1.6.)

MID appreciates the opportunity to provide comments to the Provisions and intends to continue participating in this ongoing proceeding as well as the ongoing statewide mercury control program for reservoirs.

Sincerely,



Jolie-Anne S. Ansley

cc: Phil McMurray ([PMcMurray@mercedid.org](mailto:PMcMurray@mercedid.org))  
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# **EXHIBIT A**

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June 29, 2016

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Re: Comments of the Merced Irrigation District to Proposed Beneficial Use  
Categories Pertaining to Tribal Traditional and Cultural Practices, Tribal  
Subsistence Fishing and Subsistence Fishing by Other Cultures and Individuals

Dear Ms. Tracy:

The Merced Irrigation District (“MID”) appreciates the opportunity to provide you with our initial comments to the proposed beneficial use categories pertaining to tribal traditional and cultural uses, tribal subsistence fishing and subsistence fishing by other cultures and individuals currently in development by State Water Board staff. MID participated in the stakeholder meeting on June 15, 2016 for ACWA and Water Agencies. At this meeting, participants were provided with draft language for the three new proposed beneficial uses.

## General Comments

The stated purpose of the stakeholder meetings is to receive input on the development of the proposed new beneficial uses prior to reporting to the Water Board in September 2016. Until June 15, 2016, however, the process of developing the proposed beneficial uses has been undertaken by Water Board staff, certain Native American Tribes and non-governmental organizations. According to the draft Stakeholder Outreach Document dated June 2016 and other documents, this process has been ongoing since 2013. The adoption of new beneficial uses has the potential to impact water supplies and operations on which millions of Californians rely, for example through the 401 water quality certification process. Water agencies/water users should have been provided an opportunity earlier to participate in the development process to

investigate and address the need for these additional beneficial use categories and the potential impacts on water supplies and operations.

Going forward, impacts to water users from the three proposed beneficial uses should be studied and understood prior to the release of a draft amendment for public comment, currently scheduled for Fall 2016. This process could involve a series of workshops to allow for further discussions with all stakeholders to determine whether these additional beneficial uses are needed, the intended interpretation and application of the beneficial uses proposed by the State Water Board staff, and the potential impacts on water users.

However, no information put forward by the Water Board staff to date demonstrates that statewide establishment of these proposed beneficial uses is even necessary. Instead, where appropriate, such beneficial uses can be defined by the Regional Water Quality Control Boards if needed in their respective region. This apparently already is the case in Region 1 where the applicable water quality control plan includes a Native American Culture beneficial use and a Subsistence Fishing beneficial use.

During the stakeholder meeting on June 15, 2016 and in associated circulated documents, Water Board staff emphasized that none of the three proposed beneficial uses were intended to protect beneficial uses currently protected by other uses, such as cold freshwater habitat. Instead, according to Water Board staff, the proposed Tribal Subsistence Fishing and Subsistence Fishing beneficial uses are intended to apply solely to safe levels of consumption. For example, a beneficial use for Tribal Subsistence Fishing would not be intended to protect the presence or abundance of fish species. It was less clear, in discussions with Water Board staff, how to distinguish the intended protections of the proposed Tribal Traditional & Cultural Use beneficial use from existing beneficial uses. If the process moves forward, all three proposed beneficial uses should include language that makes clear their intended scope of protection as distinguished from the protections of current beneficial uses.

### **Additional Specific Comments**

#### Tribal Traditional & Cultural Use

The current proposed language for Tribal Traditional & Cultural Use is ambiguous and open-ended in what practices constitute traditional and cultural uses to be protected by the proposed beneficial use, raising the potential for inconsistent interpretations and application. In particular the undefined and unfamiliar term “lifeways” is incomprehensible. Because the proposed language is open-ended and largely undefined, it is impossible to assess in advance the potential application of this proposed beneficial use to a particular water body, to determine any overlap with existing, beneficial uses or to determine the potential impacts to water users. Under the current proposed wording, it is conceivable that existing beneficial uses adequately protect all of the traditional and cultural uses sought to be protected. Any beneficial use for Tribal Traditional & Cultural Use should be more precisely worded so as to clearly define the practices protected, and, where needed, terms should be defined.

Further, it is unclear how such an open-ended Tribal Traditional & Cultural beneficial use will be applied (designated) by the Regional Boards. The Water Board staff provided little

information on the type of evidence it envisions would be required to establish a tribal traditional and cultural use, aside from saying that it would apply only to federal and state-recognized tribes and evidence would be required. Other questions that remain include, but are not limited to, how longstanding, established or frequent would the use have to be, how many members of the tribe would need to be engaging in the use, and would the use have to originate from a treaty right.

### Tribal Subsistence Fishing

As noted above, the proposed beneficial use for Tribal Subsistence Fishing fails to make clear that the intended “protection” is geared towards consumption levels and not abundance of aquatic species or habitat, which are protected by currently existing beneficial uses. The proposed wording should be revised to make clear that this proposed beneficial use is intended narrowly to protect human health related to consumption levels. Other issues of concern include the evidence required to establish a “tribal subsistence fishing” use.

### Subsistence Fishing

At the June 15, 2016 meeting, Water Board staff provided no substantive information regarding levels of subsistence fishing (as distinct from Native American tribal subsistence fishing) in California water bodies. There is no indication that such a beneficial use is needed, in particular to be defined on a statewide basis as opposed to a regional basis.

Further, the proposed beneficial use for Subsistence Fishing is worded so broadly that it is unclear whether one individual subsistence fishing in a water body, for cultural or economic reasons, is intended to trigger the designation of this beneficial use. It is also unclear from the wording how broadly “cultural traditions” is intended to be defined or what level of economic resources constitutes a “lack of personal economic resources.” Considering these ambiguities, the impacts to water supplies and operations state-wide could potentially be immense. The proposed wording should be revised to make clear what constitutes a “cultural use” or “lack of personal economic resources” and what level of subsistence fishing warrants protection as a subsistence fishery? As noted above, the wording should also be revised to make clear that this proposed beneficial use is intended narrowly to protect human health related to consumption levels.

MID appreciates the opportunity to provide these comments and intends to continue participating as a stakeholder in the development process.

Sincerely,

/s/ Jolie-Anne S. Ansley

cc: Zane Poulson ([Zane.Poulson@waterboards.ca.gov](mailto:Zane.Poulson@waterboards.ca.gov))  
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