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**Draft Comment Summary and Responses for Non-Regulatory
Amendments to the Water Quality Control Plan for the Sacramento
and San Joaquin River Basins**

No.	Commenter	Commenter Name
1.	City of Tracy	Melissa A. Thorne -- Downey Brand, LLP
2.	Central Valley Clean Water Association (CVCWA)	Debbie Webster

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No.	Author	Comment	Response
0.1)	Multiple	Some of the comments submitted in opposition to the State Board’s approval of this amendment were previously submitted to the Central Valley Water Board and submitted verbatim to the State Board, without further explanation.	<p>Many of the individual comments submitted to the State Water Resources Control Board on this matter are identical to a comment submitted to the Central Valley Regional Water Quality Control Board (Central Valley Water Board) at the time the draft version of this amendment was under consideration. As part of its consideration process, the Central Valley Water Board provided written responses to all of the significant comments it received. The Central Valley Water Board’s responses either indicated that changes would be made to the regulatory provisions or to the related documentation in response to the comment (in which case corresponding changes were made), or the Central Valley Water Board’s written responses indicated that that changes would not be made, and the response included the reason.</p> <p>Where a commenter merely repeats a comment that was originally tendered to the Central Valley Water Board on a prior version of an amendment, but fails to disclose what quarrel, if any, the commenter has with the response provided or the action taken by the Central Valley Water Board in response to the comment, the State Water Board is unable to address the comment. Specifically, in those cases where the Central Water Board made changes in response to a comment, the commenter has failed to explain how the changes were allegedly inadequate. Likewise, where the Central Valley Water Board did not make changes, the commenter has failed to explain how the response or explanation that the Central Valley Water Board provided was allegedly inadequate, or even whether the commenter believes that the response was inadequate.</p>

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1.1	City of Tracy	<p>“The Regional Water Quality Control Board for the Central Valley ("Regional Board") is attempting to add objectives and use designations that have not been in the Basin Plan ever, or for at least 20 years. These are, therefore, for all intents and purposes new water quality standards that must comply with the Clean Water Act, Porter Cologne Water Quality Control Act, including Water Code sections 13241 and 13242, and the functional equivalent process under the California Environmental Quality Act ("CEQA").</p> <p>A similar attempt to do this kind of "error-fixing" was not accepted by the State Water Board previously, and should be rejected now. In 2006, the San Diego Regional Water Quality Control Board attempted to reinsert prior Basin Plan language regarding "controllable water quality factors" as a "non-substantive change" to the Basin Plan in Resolution No. R9-2006-0029. At the State Board hearing, this part of the Basin Plan amendment was not approved due to the recognition by the State Board that many things had changed in the law and interpretations of the Basin Plan since the time that this language had previously existed in the plan. The State Board did not agree that this was a non-substantive change, and the language was not approved. See State Board Res. 2006-0090. This precedent should be considered and followed in this case.</p> <p>Where the Regional Board is attempting to impose beneficial use designations on Marsh Creek and Marsh Creek Reservoir, it must first ensure that these are past, present or probable future uses and ensure that the actual designations are accurate as the Regional Board was instructed by the State Board to do in 1990 in Res. 90-28. Further, "potential" uses, as proposed for REC-I or REC-2, are inconsistent with state law (Water Code §13241(a) and have been rejected in other cases. To avoid having to undertake a costly de-designation process, the Regional Board should be required to ensure that the uses being designated are accurate and based on evidence in the record. Justifying this designation on the grounds that this is merely "correcting an error" is</p>	<p>State Board Staff disagrees. The changes are non-regulatory because they impose no new regulations. The amendments correct editorial errors and include updated references for consistency and clarity.</p> <p>In the State Water Board's approval of the 1988 Basin Plan rewrite, the State Water Board disapproved the deletion of Marsh Creek and Marsh Creek Reservoir and their beneficial uses (State Board Res. 1990-0028). The State Water Board directed the Central Valley Water Board to add these water bodies and their beneficial uses to the Beneficial Uses Chapter of the Basin Plan (http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1990/rs1990_0028.pdf).</p> <p>Staff complied with the State Water Board's directives by adding a footnote to the Surface Water Beneficial Uses Table that stated, "Per State Board Resolution No. 90-28, Marsh Creek and Marsh Creek Reservoir in Contra Costa County are assigned the following beneficial uses: REC1 and REC2 (potential uses), WARM, WILD, and RARE. In 1994, this footnote describing the beneficial uses of Marsh Creek was inadvertently removed due to an editing error. Regardless of this accidental omission, all listed beneficial uses (and those that were deleted) were still being protected.</p> <p>There is only one permitted discharger in the Marsh Creek area designated by the deleted footnote, the City of Brentwood WWTP. The City of Brentwood's discharge permit adopted under Order No. R5-2008-0006 recognized that the Basin Plan description of the beneficial uses was not correct, because they had been deleted. The Basin Plan description was never used. Page 3 of Order No. R5-2008-0006 for the City of Brentwood Wastewater Treatment Plant (NPDES No. CA0082660) discharge to March Creek described the beneficial uses as such:</p> <p>"The Basin Plan does not directly specify beneficial uses for Marsh Creek. However, Footnote 9 to Table II-1 of the</p>
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		<p>inadequate without evidence that these are existing uses.</p>	<p>Basin Plan states: “<i>Per State Board Resolution No. 90-28, Marsh Creek and Marsh Creek Reservoir in Contra Costa County are assigned the following beneficial uses: REC-1 and REC-2</i>”. State Board Resolution 90-28, entitled, <i>Approval of Revision (Editing and Updating) of the Water Quality Control Plan for the Sacramento River Basin (Basin 5A), Sacramento-San Joaquin Delta Basin (Basin 5B), and San Joaquin River Basin (Basin 5C</i>”, approved a revised Basin Plan edition adopted by the Regional Water Board under Resolution No. 89-056, with several exceptions. State Water Board Resolution No. 90-28 states: “<i>That the State Board... disapproves the deletion of Marsh Creek and Marsh Reservoir and their beneficial uses. These water bodies and their beneficial uses are incorporated into Chapter II, Present and Potential Beneficial Uses.</i>” Prior to the edition of the Basin Plan updated by the Regional Water Board under Resolution No. 89-056, the beneficial uses identified for Marsh Creek included water contact recreation (REC-1); non-contact water recreation (REC-2); warm freshwater habitat (WARM); wildlife habitat (WILD); and rare, threatened, or endangered species (RARE). For surface waters, the Fourth Edition of the Basin Plan states on page II-2.00: “<i>In making any exemptions to the beneficial use designation of MUN, the Regional Board will apply the exceptions listed in Resolution 88-63.</i>” However, the exceptions in Resolution 88-63 only apply to waterbodies that are not specifically listed in the Basin Plan as having designated beneficial uses. The beneficial uses of Marsh Creek are as follows”:</p>
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Table 5. Basin Plan Beneficial Uses

Discharge Point	Receiving Water Name	Beneficial Use(s)
001	Marsh Creek	Existing: Contact water recreation (REC-1); non-contact water recreation (REC-2); warm freshwater habitat (WARM); wildlife habitat (WILD); preservation of rare, threatened or endangered species (RARE).

Please see Order No. R5-2008-0006 here:
http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/contra_costa/r5-2008-0006.pdf.

The previous permit cycle included the same reference: See page 5 of R5-2000-0171
http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/contra_costa/5-00-171-rev.pdf.

Even though the footnote was inadvertently deleted, the designated Beneficial Uses were protected during this time.

Regarding the comment about protecting "potential uses", the commenter has failed to provide how this is inconsistent within the requirements of Porter Cologne. Water Code §13241(a) states:

" ...Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

(a) Past, present and probable future beneficial uses of water.

Challenges to beneficial use designations are beyond the

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scope of this amendment. The Clean Water Act requires states to identify waters within its boundaries that do not meet applicable water quality standards. Water quality standards consist of the designated uses and the water quality criteria to protect the designated uses. (40 CFR § 131.3(i).) “Designated uses” are those specified in the Basin Plan, whether or not they are being attained. (40 CFR § 131.3(f).) USEPA encourages states to designate uses that can be attained. (USEPA, Water Quality Standards Handbook, Second Ed., § 2.4.) “Existing uses” include waters that have met standards since 1975, where the use has actually occurred, or where reasonable controls can result in attainment of the use. (Id., § 4.4.) In addition, uses are “attainable” and may be designated if they can be achieved by the imposition of effluent limitations on point-source discharges and reasonable non-point source controls. (40 CFR § 131.10(a), (d).)

The Central Valley Water Board has designated beneficial uses consistent with Federal and State Water Code.

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1.2		<p>Similarly, the Regional Board is proposing to include new boron objectives for several water bodies, and new radioactivity objectives without compliance with Water Code section 13241 (mandated factor analysis) and 13242 (implementation plan). The State Board should reject this proposal as a substantive change that is inconsistent with state law.</p>	<p>Please see comment 1.1 above.</p> <p>Regarding the boron objectives, these are not new objectives as the commenter states. The water quality objectives for boron were inadvertently removed in 1998 due to an editorial error. These amendments place the objectives back into the Basin Plan as originally intended.</p> <p>Waste discharge requirements for dischargers in the area have continued to implement the boron objectives. The correct Boron Objectives were upheld in Order No. R5-2001-0234 for the San Luis and Delta-Mendota Water Authority and U.S. Bureau of Reclamation Grassland Bypass Project identified water quality objectives for boron applicable to Mud Slough as 2.0 mg/L monthly mean from 15 March to 15 September and 5.8 mg/L as a maximum (See page 8, R5-2001-0234).</p> <p>http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/fresno/5-01-234.pdf.</p> <p>For the Radioactivity Objectives, the amendment updates the radioactivity reference (please see 1.4 below).</p>
1.3	City of Tracy	<p>Moreover, the Regional Board again proposes that the new radioactive objectives be <i>prospectively</i> incorporated by reference. Such prospective incorporation guarantees that no section 13241 analysis or section 13242 implementation plan will be done for any new objectives automatically incorporated in the future. In addition, this incorporation of drinking water standards adopted by another state agency that has no obligations or mandates under the Water Code represents an unlawful delegation of the Regional Board's powers to adopt water quality objectives. Water Code §13223(a).</p>	<p>This is an incorrect statement. In 1994, the MCLs for Radioactivity were found in the California Code of Regulations, Title 22, Section 64443, Table 4. On 11 June 2006, Section 64443 was repealed and replaced with a new Section 64442 and a revised Section 64443 which were incorporated by reference.</p> <p>This incorporation by reference is in the current basin plan and this amendment does not change that. The requested changes are outside the scope of the amendment.</p>
1.4	City of Tracy	<p>Second, the State Board should reject the Regional Board's proposed incorporation of the 1995 and 2006 amendments to the San Francisco Bay/Sacramento-San Joaquin Delta Plan</p>	<p>State Water Board Water Quality Control Plans supersede Regional Water Board Water Quality Control Plans for the same waters to the extent of any conflict (Section 13170 of</p>

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		<p>("Delta Plan") into the Basin Plan as these amendments have not yet been approved by the U.S. EPA.</p> <p>In September of 1991, the U.S. EPA again approved of the 1991 salinity objectives set to protect municipal, industrial, and agricultural beneficial uses as "water quality standards" (See PLAN AMENDMENT REPORT, APPENDIX 1 TO THE 2006 WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY/ SACRAMENTO-SAN JOAQUIN DELTA ESTUARY (December 13, 2006) at 10). Those 1991 standards were the ones incorporated into the Basin Plan and remain there today. These amendments propose to remove those standards and the accompanying tables and figures (e.g., Figure 111-2 and Table 111-5). (See R5-2009-0069 at 2.)</p> <p>It is important to note that EPA has not approved of the State Board's 1995 or 2006 Delta Plan changes. Therefore, the last "approved" version of the EC standards is the 1991 version, I and the 1995 and 2006 modifications are not approved "applicable water quality standards" required to be applied under federal law and regulations.</p>	<p>the California Water Code). Whether or not the Regional Board amends its Basin Plan, the current Bay-Delta Plan is in effect within the Regional Board's boundaries. Any changes to the Bay-Delta Plan will supersede the current Basin Plan without any Regional Board action. This amendment simply brings the Basin Plan into alignment with the latest iteration of the Bay-Delta Plan.</p> <p>In addition, USEPA's failure to approve portions of the Bay-Delta Plan does not affect the Plan's validity for purposes of state law.</p>
1.5	City of Tracy	<p>Moreover, the 2006 amendments to the Delta Plan, which included for the first time a statement that the Electrical Conductivity ("EC") objectives were to apply throughout the Delta and to all dischargers, including the City of Tracy, are currently being challenged by the City and the Central Valley Clean Water Association ("CVCWA"). The case has been completely briefed, except for supplemental responses due on December 3, 2010, and is awaiting a final judgment. In the interim, the State Board's remand order on the issue of EC for the Tracy Permit has been stayed. (See Exhibit A, Superior Court Order.) Given this legal uncertainty, the State Board should defer incorporating the 2006 Delta Plan amendments into the Basin Plan until a final judicial determination has been made on the validity of the EC provisions contained therein.</p> <p>This deferral would be consistent with the State Board's action on the 2010 303(d) list in which Mr. Howard's list</p>	Please see response to comment 1.4 above

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		<p>transmittal letter to EPA stated that the listing of Old River for EC is "currently being held in abeyance due to existing litigation." EPA, in its response letter to the State Board, stated that it "understands that the State is not listing the following water body pollutant combinations as requiring a TMDL as part of its 2008-2010 submittal:</p> <p>Old River (San Joaquin River to Delta Mendota Canal in Delta Waterways, southern portion) - Salinity."</p> <p>Alternatively, the State Board should order the Regional Board to conduct the 13241 analysis and adopt a 13242 implementation plan for any salinity objectives for the lower San Joaquin River and southern Delta incorporated into the Basin Plan. Such analysis has never before been done, and the City would like to point out that hundreds of millions of dollars will be needed around the Delta for many of the municipal dischargers to consistently meet an end-of-pipe effluent limits that equate to the water quality objectives in the Delta Plan.</p> <p>Similarly, if all agricultural discharges currently regulated under the waiver were required to meet these Delta Plan objectives, the costs to farmers will be huge. These costs must also be considered pursuant to Water Code §13141. For these reasons, the City requests that the State Board reject these modifications to the Basin Plan until the Regional Board carefully considers and balances each of the factors in Water Code section 13241 when incorporating the revised EC objectives from the 2006 Delta Plan amendments, and include a comprehensive implementation plan for those objectives as required by Water Code section 13242.4 Alternatively, the Regional Board should be required to wait to incorporate new salinity objectives until the State Board finalizes its review and modification of those objectives in the Delta Plan amendments that are currently underway.</p>	
1.6	City of Tracy	<p>Chapter IV: Implementation at IV-8.00</p> <p>The proposed modifications appear to be mere wording</p>	<p>State Board staff does not recommend this change at this time as it may cause more confusion.</p>

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		<p>changes, but the changes make the statements included inaccurate. It is not true that all State Board water quality policies and plans supersede Regional Water Board action. To correct this inaccuracy, the words ", as applicable" must be inserted at the end of this revised introductory paragraph to make it accurate.</p>	<p>The commenter refers to the language that introduces the State Water Board plans and policies that are applicable in the Central Valley. The recommendation to include "as applicable" is extraneous. The list of State Water Board plans and policies are only the ones that are applicable in the Central Valley. The Central Valley Regional Board doesn't include policies that are not applicable in the Basin Plan, such as the Ocean Plan.</p>
1.7	City of Tracy	<p>Chapter IV: Implementation at IV-10.00</p> <p>The proposed revisions to the third paragraph of Item 13 paint an incomplete picture of the history of the Delta Plan salinity objectives. This paragraph should be expanded to include the fact that these objectives have been deferred many times and are still not truly be applied to the state and federal water projects or agricultural discharges.</p>	<p>The commenter refers to an informational section that details the history of the adoption of the Bay-Delta Plan and information on the Nonpoint Source Plan and the Nonpoint Source Policy.</p> <p>With regards to the Bay-Delta Plan, the point of the information contained in this section is to refer the reader to the actual Bay-Delta Plan and not to include extraneous information. Discussing the enforcement of the water quality objectives from the Bay-Delta Plan has no relevance, since the intent of including a reference to the Bay-Delta Plan is to direct stakeholders to the correct policy to gain more insight.</p>
1.8	City of Tracy	<p>As for the changes to Item 14, it is unclear why the first two paragraphs regarding the Nonpoint Source Management Plan are being stricken when the title of the Section still includes the Plan. These two paragraphs should be maintained to explain the history, but the second paragraph should be amended as follows:</p> <p>"The <u>Plan's management</u> approaches <u>were</u> are listed in order of increasing stringency. In general <u>the Plan required that</u> the least stringent option that successfully protects or restores water quality should be employed, with more stringent measures considered if timely improvements in beneficial use protection are not achieved. The Regional Board will <u>was authorized to</u> determine which approach or combination of approaches is <u>was</u> most appropriate for any given nonpoint source problem.</p>	<p>State Board staff disagrees. The suggested language would not be consistent with the current State Board Plan and Policy.</p> <p>The Regional Board has included a reference to the 2004 policy that superseded the three tier approach that is no longer being used. The three tier approach was not consistent with Porter Cologne and was replaced.</p> <p>The language and history from the stricken paragraphs refers to the 1988 Nonpoint Source Management Plan which was superseded by the 1999 Nonpoint Source Program Plan. A sentence is contained in the new paragraphs that explain this history. Generally, description of the State Water Board's policies should be consistent in all Basin Plans. So, the proposed language comes from the State</p>

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			<p>Water Board’s own description of these plans and policies.</p> <p>The Nonpoint Source Management Plan’s approaches, otherwise known as the three tiers, was superseded by the Nonpoint Source Policy which explains that the administrative tools from the Porter Cologne Water Quality Control Act must be used to regulate nonpoint source discharges.</p>
1.9	City of Tracy	<p>Items 16-19, Control Action Considerations of the State Water Board at IV-10.01</p> <p>The proposed amendments include references to various State Board policies. However, it is not clear whether these policies are being included to supersede similar Basin Plan provisions and policies. For example, Item 19 is referencing the State Board's Compliance Schedule Policy, but does not explain how this policy coordinates with the Basin Plan's compliance schedule provisions.</p>	<p>State Board Staff agrees. As statewide policies are updated Basin Plans are constantly in flux, hence these non-regulatory changes.</p> <p>The amendments referencing State Water Board policies are meant to clarify that the State Water Board’s policies supersede Regional Water Board’s plans and policies to the extent of any conflict. The commenter notes that the Basin Plan was not appropriately revised to reflect the State Water Board’s Compliance Schedule Policy. The Regional Water Board will propose an amendment in the near future to update the remainder of the Basin Plan to be consistent with the State Water Board’s policies.</p> <p>State Board Staff agrees that Regional Board should address this in later non-regulatory updates. However, State Board Staff does not agree that this inconsistency requires a rejection of this amendment.</p>
1.10	City of Tracy	<p>Inadequate Justification for Remaining Modifications</p> <p>In the final pages, the Regional Board proposes language changes in addition to removal of Table IV-1 (listing a whole litany of Waste Discharge Requirement Waivers and Limitations), deleting introductory paragraph on Page IV-30.00, and deleting several sections on Page IV-37.00, and Appendices 31-32. Inadequate justification for these</p>	<p>The commenter is concerned over the removal of obsolete basin plan language. The Basin Plan contains the Central Valley Water Board’s regulations to implement the California Water Code and clearly cannot conflict with the Water Code. When the Legislature revised Section 13269 of the Water Code, all basin plan language on waivers became obsolete. Updating the Basin Plan language to include waivers is not necessary, and would cause unneeded confusion since</p>

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		<p>deletions has been provided. Instead of deletions, outdated information should be updated to be consistent with current programs and practices to aid the reader in understanding the history and the current processes set forth in the Basin Plan. Wholesale deletions of important information should be avoided without adequate explanation, or future amendments may be required to again reinsert information removed by error.</p>	<p>waivers must be reviewed and renewed every five years using a process that is different from basin planning.</p> <p>In order to include waivers in the basin plan, the basin plan would need to be amended after an action is taken on a waiver (adopt, renew or terminate). Basin plan amendments generally take two years to complete. During the majority of the time, the Basin Plan would include references to obsolete waivers which by the Water Code would not be in effect.</p> <p>The remainder of the stricken language refers to the 1994 triennial review. While triennial reviews are about the Basin Plan, they are not amendments to the Basin Plan. The language was informational only and had no regulatory effect. In addition, the language is clearly obsolete since it refers to actions being taken in FY93/94 through 95/96. The Central Valley Water Board now maintains more complete information on past and current triennial reviews on its website.</p>
2.1	CVCWA	<p>As an initial matter, we note that the proposed amendments are incorrectly denominated as “non-regulatory” in nature. To the contrary, as pointed out to the Regional Water Board during its consideration of the amendments, the proposed Basin plan provisions are substantive in nature. As such, the Water Boards are required to comply with Water Code sections 13241 and 13242 in developing and adopting the amendments.</p>	<p>State Board Staff disagrees. The changes are non-regulatory because they impose no new regulations. The amendments correct editorial errors and include updated references for consistency and clarity.</p> <p>Please see responses to comments 1.1 and 1.2 above.</p>
2.2	CVCWA	<p>CVCWA urges the State Water Board not to approve the amendments that would incorporate the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, as revised in 2006 (the 2006 Bay Delta Plan). The 2006 Bay Delta Plan, including water quality objectives, has yet to be approved by the United States Environmental Protection Agency (U.S. EPA), and therefore the objectives are not in force. (40 C.F.R. § 131.21.) Moreover, the State Water Board is in the process of reviewing and potentially revising the 2006 Bay Delta Plan, including a review of the water quality objectives and their implementation. It simply makes no sense to</p>	<p>The Central Valley Water Board has already addressed this comment in its response to CVCWA's July 2009 letter (See Response to comment #1) State Water Board staff reviewed the Central Valley Water Board's response to this comment and agrees with the response.</p> <p>Please see Response to Comment 0.1.</p> <p>In addition, please see Responses to Comments 1.4 and 1.5 above</p>

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	<p>incorporate those requirements into the Basin Plan during a time when it is undisputed that the objectives are in flux. Lastly, the 2006 Bay Delta Plan is currently the subject of legal challenges. (<i>City of Tracy v. State Water Resources Control Board</i>, Sacramento Superior Court Case No. 34-2009-80000392-CU-WM-GDS); <i>City of Stockton v. State Water Resources Control Board</i>, Sacramento County Superior Court No. 34-2010-80000488-CU-WM-GDS.) We are aware of no urgency that would warrant amending the Basin Plan to include these objectives, which may soon change due to action by U.S. EPA, the State Water Board or the courts.</p>	
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