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VIA E-MAIL ONLY

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Chairman Longley and Members of the Board
Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Attn: Danny McClure

Re: Proposed Revisions to the 303(d) List of Impaired Water Bodies for the Central Valley Region

Dear Chairman Longley and Members of the Board:

These comments to the Proposed Revisions to the 303(d) List of Impaired Water Bodies for the Central Valley Region (Revised 303(d) List) are submitted on behalf of the Turlock Irrigation District (TID)¹ and supplement those submitted by TID under separate cover. While TID recognizes and appreciates the effort that the Regional Board staff has put into developing these proposed revisions to the 303(d) List, TID objects to those proposed for the Highline Canal and the Harding Drain.

In general, TID believes the assignment of Beneficial Uses to these waterways is improper and violates the Federal Clean Water Act (CWA) and/or the State's Porter-Cologne Water Quality Control Act (Porter-Cologne). TID believes that the Regional Board may not simply assign Beneficial Uses to previously undesignated water bodies without going through a proper Use Attainability Analysis. Similarly, the Board may not apply the Basin Plan's Water Quality Objectives to these particular waterways. Those Water Quality Objectives were adopted without either a proper analysis of the consequences of applying them to constructed agricultural canals and drains as required by Water Code section 13241. Moreover, they were adopted

¹ TID staff has reviewed this letter and affirms the factual statements made in it.

without a concurrent adoption of an Implementation Plan applicable to constructed agricultural canals and drains under Water Code section 13242.²

In particular, TID objects to those listings based on a supposed "Municipal and Domestic Supply" (MUN) Beneficial Use. Neither the Highline Canal nor the Harding Drain has ever been properly designated for such a Beneficial Use. These waterways are both constructed agricultural waterways owned and operated by TID. There is no such use of these two agricultural waterways currently, there are no plans to put them to such a use, nor is such a use probable or reasonably attainable in the foreseeable future. Therefore, and for the reasons set forth in greater detail below, TID urges the Board to decline to include any listings for Harding Drain and the Highline Canal in the revised 303(d) List based on a supposedly impaired MUN Beneficial Use.

In addition, the Basin Plan's "Chemical Constituents Objective, which prospectively incorporates by reference drinking-water Maximum Contaminant Levels (MCLs) developed by a different agency for an entirely different purpose, and the Basin Plan's "Pesticide Objective," which prospectively incorporates changing analytical standards approved by others, are unlawful Water Quality Objectives. It would be improper to rely on these unlawful Water Quality Objectives in finding "impairment" of these waterways.

Finally, TID objects to the application of Water Quality Objectives to either the Highline Canal or the Harding Drain based on either a REC-1 or WARM Beneficial Use until a proper analysis of the Water Quality Objectives has been performed as required by Water Code section 13241 and an Implementation Plan has been adopted as required by Water Code section 13242. These two waterways are not safe for swimming or other contact recreation, and they are both posted to this effect. Although TID recognizes that "fishable/swimmable" are the "default" *uses* under the Clean Water Act, the adoption of *Water Quality Objectives* to protect those uses is up to the individual states. Until Water Quality Objectives are properly adopted for constructed agricultural waterways, they cannot be applied to the Highline Canal or the Harding Drain and any 303(d) listing based on "impairment" of either a REC-1 or a WARM Beneficial Use is unsupported.

DISCUSSION

1. The Regional Board may not assign a MUN Beneficial Use without first conducting a full Use Attainability Analysis.

Federal law is clear: a state may not assign Beneficial Uses other than "fishable/swimmable" without first conducting a Use Attainability Analysis. There has been no Use

² TID requests the Board take Administrative Notice of its own historic Basin Plan administrative records, starting with the adoption of the 1975 Basin Plan and continuing through the present. The Board will see that the analyses required by section 13241 have never been performed as they relate to constructed agricultural canals and drains, nor are there any Implementation Plans adopted for constructed agricultural canals and drains.

Attainability Analysis for either the Harding Drain (a constructed agricultural drain) or for the Highline Canal (a constructed agricultural supply canal) for the purpose of establishing an MUN Beneficial Use for either of these waterways. The Board may not simply “designate” an MUN Beneficial Use for these water ways without first conducting a Use Attainability Analysis.

“A State *must* conduct a use attainability analysis as described in § 131.3(g) whenever: (1) The State designates or has designated uses that do not include the uses specified in Section 101(a)(2)³ of the Act, . . .” (40 C.F.R. § 131.10(j)) This requirement is mandatory. “A Use Attainability Analysis is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).” (40 C.F.R. § 131.3 (g)).

A review of the historic Basin Planning administrative records from 1975 to the present shows that there has never been a full Use Attainability Analysis for the purpose of establishing *any* Beneficial Uses for either the Highline Canal or the Harding Drain.⁴ It would be unlawful and an abuse of discretion to assign a MUN Beneficial Use to either of these two waterways without first performing a Use Attainability Analysis.

2. The Regional Board may not assign a MUN Beneficial Use to the Highline Canal or the Harding Drain without complying with Porter-Cologne sections 13241 and 13242.

Water Code section 13241 requires that Water Quality Objectives be the product of a reasoned balancing of a variety of factors to achieve the highest quality of water that is reasonable. Water Code section 13242 requires that Basin Plans contain a program of implementation to achieve Basin Plan Water Quality Objectives.

In full, Water Code section 13241 provides:

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the *reasonable protection* of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. 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:

³ Section 101(a)(2) of the Clean Water Act requires that waters be “fishable/swimmable” wherever attainable.

⁴ For example, flows in Harding Drain can, at times, consist solely of treated effluent and/or agricultural tailwater. These flow and water quality concerns would likely preclude direct MUN use. Without a full Use Attainability Analysis, it is unknown whether MUN is reasonably attainable for either the Harding Drain or the Highline Canal in the foreseeable future.

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water.

(Emphasis added.)

As the Chief Counsel of the State Board has explained, Porter-Cologne, including Water Code section 13241, imposes “an affirmative duty on the Boards to consider economics when adopting Water Quality Objectives.”⁵ (Exhibit A, at p. 1) The Chief Counsel cites legislative history reinforcing that “economic considerations are a necessary part of the determination of reasonableness” and Porter-Cologne requires the regional boards to “balance” economic and environmental factors.⁶

TID has requested the Board take Administrative Notice of its own historic basin planning records. Nowhere in any of those administrative records will the Board find any analysis of the consequences of applying MUN-based Water Quality Objectives to constructed agricultural canals or drains. Such an analysis is mandatory under Water Code section 13241. Similarly, no Basin Plan from 1975 to the present includes any Implementation Plan for applying MUN-based

⁵ As the Office of Chief Counsel advises, the requirement to consider economics is not satisfied by a perfunctory review:

the Boards should review any available information on receiving water and effluent quality to determine whether the proposed objective is currently being attained or can be attained. If the proposed objective is not currently attainable, the Boards should identify the methods which are presently available for complying with the objective. Finally, the Boards should consider any available information on the costs associated with the treatment technologies or other methods which they have identified for complying with a proposed objective.

(Exhibit A, art p. 4)

⁶ The Water Code does not further define “economic considerations.” Courts, however, have found that economic considerations at least include the “cost of compliance.” (*City of Arcadia, supra*, 135 Cal.App.4th at p. 1415; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625.) There has never been any analysis of the cost of meeting MUN-based Water Quality Objectives in constructed agricultural waterways.

Water Quality Objectives to constructed agricultural canals and drains. Without first complying with sections 13241 and 13242, it is unlawful and an abuse of discretion to apply MUN-based Water Quality Objectives to such waterways, including the Highline Canal and the Harding Drain.

3. The Basin Plan's incorporation of an unlawful regulation, State Board Resolution 88-63, is not a basis for designating a MUN Beneficial Use for the Highline Canal or the Harding Drain.

a. Resolution 88-63 was invalidated by the Office of Administrative Law and is not a lawful basis for designating MUN as a Beneficial Use

The Fact Sheets for the Revised 303(d) List do not identify the basis for assigning a MUN Beneficial Use to either the Highline Canal or the Harding Drain. This alone is sufficient to render any listing based on an MUN Beneficial Use unlawful. There is simply no evidence in the record to substantiate applying a MUN Beneficial Use to these two waterways.

TID can only assume that Regional Board staff is relying on the "incorporation" of State Board Resolution 88-63 into the Basin Plan to justify the first-time-ever application of a MUN Beneficial Use to these two constructed agricultural waterways for the purpose of a 303(d) List. Resolution 88-63, however, is an invalid regulation and may not be relied on by any agency for *any* purpose.

The Basin Plan states:

Water bodies within the basins that do not have beneficial uses designated in Table II-1 are assigned MUN designations in accordance with the provisions of State Water Board Resolution 88-63 which is, by reference, a part of this Basin Plan.

(Basin Plan at II-2.00)

State Board Resolution 88-63, entitled "Sources of Drinking Water," was adopted in May 1988 in response to the passage of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.⁷ Proposition 65 defines "source of drinking water" as "either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses." (Health & Saf. Code § 25249.11(d).) The State Board passed Resolution 88-63 in an effort to clarify Proposition 65's reference to "source of drinking water." (Exhibit B). Resolution 88-63

⁷ Under Proposition 65, "[n]o person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water . . ." (Health & Saf. Code, § 25249.5).

provides that “[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards with the exception of [certain specified waters].”

Resolution 88-63 immediately ran afoul of the California Administrative Procedure Act (APA). The APA establishes the process an agency must follow in adopting regulations. (Gov. Code, §§ 11346-11346.8.) Any regulation adopted by an agency must be submitted to the Office of Administrative Law (OAL). (*Id.* at § 11349.1(a).) The OAL reviews the regulation for clarity, consistency with other laws and regulations, necessity, and authority of the agency to adopt the regulation. (*Ibid.*) If the OAL disapproves the regulation, it is sent back to the adopting agency with a decision specifying why it was disapproved. (*Id.* at § 11349.3(b).) It is unlawful for an agency to even *attempt* to apply a regulation that has not been approved by the OAL:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. (*Id.*, § 11340.5(a).)⁸

In the 1989 OAL Determination No. 8⁹, the OAL held that Resolution 88-63 was a “regulation” subject to the APA, and that its adoption violated Government Code section 11347.5 (now section 11340.5) because the State Board failed to adopt this rule in compliance with the APA. (Exhibit C; *See also State Water Resources Control Bd. v. Office of Admin. Law*, 12 Cal.App.4th 697 (basin plan amendments are subject to the APA)). Although the APA allows an agency to challenge an OAL determination,¹⁰ the State Board never challenged Determination No. 8. Thus, Resolution 88-63 is invalid and may not be applied by any agency.

TID acknowledges that the State Board has asserted that OAL Determination No. 8 was advisory only. (*In the Matter of the Review on Own Motion of Waste Discharge Requirements*

⁸ Government Code section 11340.5(a) is the same as Government Code section 11347.5(a), which was in effect at the time Resolution 88-63 was adopted.

⁹ Regulatory Determination Decision of the California Office of Administrative Law (Docket No. 88-010) entitled: “In re: Request for Regulatory Declaration filed by Blackwell Land Company, Inc., concerning the State Water Resources Control Board’s Resolution No. 88-63, ‘Sources of Drinking Water,’ adopted May 19, 1988,” issued May 17, 1989, pursuant to Government Code section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2.

¹⁰ The APA allows an agency to: (1) redraft the regulation to comply with the OAL determination; (2) seek judicial review of the OAL determination (Gov. Code, §§ 11340.5(d), 11350); or (3) request a review of the determination by the Governor’s Office (Gov. Code, § 11349.5). The State Board did not pursue any of these options.

Order No. 5-01-044 For Vacaville's Easterly Wastewater Treatment Plant, State Board Order WQO 2002-0015). However, the State Board did not provide any legal authority to support its conclusion and this conclusion directly contradicts Government Code section 11340.5(a), quoted above, which expressly *prohibits* any agency from “issue[ing], utilize[ing], enforce[ing], or attempt[ing] to enforce” any regulation that has not been approved by the OAL. The State Board decision in the *Vacaville* matter never explains its anomalous conclusion, and it would be unlawful to attempt to apply the invalid Resolution 88-63 to designate Beneficial Uses in the Highline Canal and the Harding Drain as a basis for 303(d) listings for the first time now.

b. Resolution 88-63 was not “Grandfathered” Under the Subsequent APA Amendments

In other proceedings, the State Board has attempted to avoid the invalidation of Resolution 88-63 by claiming the Resolution was “grandfathered” by 1992 amendments to the APA. Those amendments provided that water quality control plans or amendments occurring after June 1, 1992 must comply with the APA, but that then-existing and uncontested plans were exempt from the APA. (See Gov. Code, § 11353; Order WQO 2002-0015). Of course, OAL Determination No. 8 was issued long *before* the 1992 APA amendments. By 1992, the OAL had already determined that Resolution 88-63 was invalid. Neither Resolution 88-63, nor any subsequent Basin Plan provision purporting to incorporate this invalid Resolution, is resurrected by the 1992 amendment to the APA.

c. Any blanket designation of MUN Use was unintended when the Basin Plan provision was adopted and reinterpretation now would be unlawful

At the time it purportedly incorporated Resolution 88-63 into the Basin Plan, the Regional Board did not intend to make a blanket designation of MUN Beneficial Uses throughout the Central Valley basin. If it had, it would have produced irrational results and would not have withstood judicial scrutiny. The Board cannot now simply reinterpret its own regulation to provide for something that was never intended.

In August of 2000, the Regional Board wrote that it did *not agree* with US EPA’s contention that the Sources of Drinking Water Policy (Resolution 88-63) designates Beneficial Uses as defined in the CWA. (Exhibit D, at p. 3 [“We do not agree that this policy *designates* beneficial uses as defined in the Clean Water Act.”], emphasis in the original.) The current, first-time-ever application of Resolution 88-63 to the Highline Canal and to the Harding Drain to justify inclusion on the 303(d) List represents a reinterpretation of the Basin Plan.

A reinterpretation of a regulation is itself a regulatory rulemaking that must comply with the Administrative Procedure Act. (See *Capen v. Shewry*, (DATE) 155 Cal.App.4th 378; *McGill v. Regents of University of California*, 44 Cal.App.4th 1776). There has never been a proper rulemaking for the purpose of reinterpreting the original incorporation of Resolution 88-63. Accordingly, it would be unlawful to apply a MUN Beneficial Use to these two constructed agricultural waterways based on the past incorporation of Resolution 88-63 into the Basin Plan.

d. **To the Extent the Basin Plan Contains Blanket Beneficial Use Designations, Such Designations are Unlawful**

Under Regional Board staff's current interpretation, application of Resolution 88-63 to establish a MUN use of all surface waters in the basin amounts to an automatic regulatory designation of Beneficial Uses. Any "blanket" designation of Beneficial Uses without a specific water-body by water-body consideration is, of necessity, arbitrary, capricious and entirely lacking in evidentiary support.

State and federal law are generally consistent as to when a Beneficial Use is to be designated. Uses should be designated for protection in channels where the use is existing or determined to be attainable (40 C.F.R. § 131.10) or where the use is a past, present or *probable* future use. (Wat. Code, § 13241.)

Blanket regulatory designations of Beneficial Uses, by definition, involve no consideration of whether a use is a past, present, or probable future Beneficial Use. As such, the short-cut form of regulation is arbitrary and capricious. The Regional Board itself has said as much: "There are *so many obvious examples* where tributaries *do not* have the same beneficial uses as the downstream named receiving waters ..." (Exhibit D, at p. 1, emphasis added.) The *Basin Plan itself* provides evidence that a blanket designation is arbitrary and capricious. For example, in Table II-1, where the Regional Board actually listed waters and identified their beneficial uses, not all channels have MUN use. Uses also vary between segments of an individually listed stream. (See Basin Plan Table II-1).

Any blanket regulatory designation would be, moreover, completely lacking in evidentiary support. In the entire record of the Basin Plan and Resolution 88-63, there is not one shred of evidence that MUN is a past, present, or probable future uses of either the Highline Canal or the Harding Drain. In the absence of such evidence, any regulatory designation must be set aside. (See *Idaho Mining, supra*, 90 F.Supp.2d at p. 1107 (Beneficial Use may not be designated where there is insufficient evidence to demonstrate the existence of the proposed use); Code Civ. Proc., § 1085.)¹¹

¹¹ Regional Board staff may also assert that a MUN blanket designation was also established by the Delta Plan. The Delta Plan is primarily a water rights document, proposing to attain the limited water quality standards contained therein through controls of water flows and diversions and agricultural drainage. (See Delta Plan at 3, www.waterrights.ca.gov/baydelta/2006controlplan.html, ("Most of the objectives in this plan are being implemented by assigning responsibilities to water right holders because the parameters to be controlled are primarily impacted by flows and diversions.")). The water quality objectives contained in the Delta Plan relate to specific constituents not at issue in this case (e.g., chloride, electrical conductivity, dissolved oxygen, and flow) and apply only at compliance locations not found within either the Highline Canal or the Harding Drain. (*Id.* at 10-17.) A review of the Delta Plan record, which TID also requests the Board take Administrative Notice, reveals it, too, never conducted a proper, waterway-by-waterway analysis of the existence of a MUN beneficial use or the consequences of applying MUN-based Water Quality Objectives to constructed agricultural waterways.

4. Water Quality Objectives based on standards incorporated by reference are invalid and do not support 303(d) listings

a. The Chemical Constituent Objective and the Pesticide Objective have never undergone a proper section 13241 analysis are therefore unlawful Water Quality Objectives

Several of the proposed listings for the Highline Canal and the Harding Drain¹² are improper because they are based on exceedances of Water Quality Objectives that were never properly adopted. Instead, the Basin Plan simply incorporates by reference present and future “standards” developed by other agencies for other purposes. These Objectives include the “Chemical Constituents Objective,” which incorporates by reference the Department of Public Health’s present and future Maximum Contaminant Levels (MCLs)¹³, and the “Pesticide Objective,” which incorporates by reference present and future “analytical methods approved by the Environmental Protection Agency or the Executive Officer.”¹⁴ Water quality objectives such as these are unlawful because they are based solely on standards set by other agencies that are then incorporated by reference without analysis of the factors mandated by Water Code section 13241¹⁵ and without the simultaneous adoption of the Implementation Plan required by section 13242.^{16,17}

¹² Constituent listings based in whole or in part on invalid Water Quality Standards include: .alpha.-BHC (Benzenehexachloride) -Harding Drain/MUN/Pesticide Objective; DDE - Harding Drain/WARM/Pesticide Objective; Lindane/gamma Hexachlorohexane (gamma-HCH) - Harding Drain/WARM/Pesticide Objective; and Simazine - Highline Canal/MUN/Chemical Constituent Objective.

¹³ “Waters shall not contain chemical constituents in concentrations that adversely affect beneficial uses At a minimum, water designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs) specified in the following provisions of Title 22 of the California Code of Regulations, which are incorporated by reference into this plan This incorporation-by-reference is prospective, including future changes to the incorporated provisions as the changes take effect.” (Basin Plan at III-3.00.)

¹⁴ “Total identifiable persistent chlorinated hydrocarbon pesticides shall not be present in the water column at concentrations detectable within the accuracy of analytical methods approved by the Environmental Protection Agency or the Executive Officer.” (Basin Plan at III-6.00).

¹⁵ Porter-Cologne contains a core requirement of reasonableness for all regulatory actions of the Regional Board. (Water Code, §§ 13000, 13001.) This general mandate is implemented by Water Code section 13241, which, again, provides:

While an agency may incorporate standards developed by other agencies, it may not do so without receiving the evidence supporting those standards and without performing its own independent analysis. (*California Assn. of Nursing Homes v. Williams, supra*, 4 Cal.App.3d at p. 815.) Incorporation of standards set by other agencies without independent analysis prevents meaningful public participation and informed legislative and judicial review. (*Id.* at 810-811.)

Incorporation of *future* standards simply magnifies these concerns:

Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or editions. This is not an inconsiderable loss. *It is equivalent to a declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents of each of those future amendments to or editions of the matter incorporated by reference, even though such changes will become effective law of the agency, and even if many of them turn out to be very controversial and of doubtful legality.* Furthermore, it should be obvious that no one

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. 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.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water.

¹⁶ Section 13242 provides:

The program of implementation for achieving water quality objectives shall include, but not be limited to:

- (a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.
- (b) A time schedule for the actions to be taken.
- (c) A description of surveillance to be undertaken to determine compliance with objectives.

¹⁷ Again, TID asks the Board to take Administrative Notice of its own historic Basin Planning administrative records and the lack of any 13241 analysis and a 13242 Implementation Plan for either the MCL-based or "undetectable pesticides" Objectives.

could effectively object to such later changes at the time the initial rule was adopted prospectively incorporating them by reference; at the time of the original rule-making proceeding in which the wholesale incorporation by reference of future changes was adopted, the specific content of those future changes would be unknown and unknowable.

(Exhibit E, at pp. 6-7, quoting Bonfield, *State Administrative Rule Making* (1986) pp. 325-326, emphasis added.)

With respect to the Chemical Constituents Objective, the 1975 Basin Plan simply incorporated drinking water MCLs and converted them to Water Quality Objectives without ever considering the section 13241 factors, nor has there been any consideration of those factors in any of the subsequent Basin Planning administrative records.¹⁸ The Department of Public Health (DPH; formerly the Department of Health Services) establishes MCLs for drinking water delivered to residences after filtering and treatment by drinking water suppliers.¹⁹ (Health & Saf. Code, § 116275(c); Cal. Code Regs., tit. 22, § 64431(a).) Admittedly, the State Board has concluded that “the public has an opportunity to participate in any future [DPH] rulemakings to change drinking water standards.” (Order WQO 2002-0015). However, the drinking water standards developed by DPH serve a different purpose than the Water Quality Objectives set by the Regional Board. MCLs are criteria that DPH determines must be met in tap water delivered to residences.²⁰ DPH is not subject to Porter-Cologne and properly does not concern itself with the cost of meeting drinking water standards in open surface water channels when it adopts MCLs for tap water. Water quality objectives are criteria reasonably necessary to protect Beneficial Uses in ambient surface waters, not kitchen sinks.

¹⁸ The 1975 Basin Plan’s incorporation of MCLs did not explicitly state that such incorporation was prospective. Nonetheless, from the context of the amendment, OAL review, and subsequent publication, it appears the Regional Board always interpreted the water quality objective to include prospective incorporation. An explicit “prospective” incorporation by reference did not actually appear in the Basin Plan, nor was it suggested as an amendment to the Basin Plan, until after the OAL issued its decision on the 1994 Basin Plan Amendments. OAL determined that “[a] prospective incorporation-by-reference (one that automatically incorporates future changes to an incorporated document) is of dubious validity.” Nonetheless, the Basin Plan was subsequently published including explicit incorporation-by-reference language. This occurred without any prior public notice or hearings in contravention of Water Code section 13244 and the APA.

¹⁹ The Legislature delegated to DPH the initial and primary authority, and corresponding responsibility, for establishing drinking water standards under the Safe Drinking Water Act (Health & Saf. Code, § 116270 et seq). (*Western States Petroleum Assn v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1008; Health & Saf. Code, §§ 116270(g), 116275(c), (d).) The act’s purpose is “to ensure that the water *delivered by public water systems of this state* shall at all times be pure, wholesome, and potable.” (Health & Saf. Code, § 116270(e), emphasis added.)

²⁰ The Legislature delegated to DPH the initial and primary authority, and corresponding responsibility, for establishing drinking water standards under the Safe Drinking Water Act (Health & Saf. Code, § 116270 et seq). (*Western States Petroleum Assn v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1008; Health & Saf. Code, §§ 116270(g), 116275(c), (d).) The act’s purpose is “to ensure that the water *delivered by public water systems of this state* shall at all times be pure, wholesome, and potable.” (Health & Saf. Code, § 116270(e), emphasis added.)

Similarly, there is no evidence in the historic Basin Planning administrative records showing the Regional Board has ever considered the cost of complying with the continually-lowering analytical detection limits for lab analyses.²¹ What might have been reasonable and necessary for the protection of Beneficial Uses in 1975 when pesticides were detectable in parts per million may be wholly unnecessary and unreasonable in 2009 when pesticides are detectable in parts per billion or even lower.

In short, there is no evidence in the historic administrative records of the adoption of the original Basin Plan, nor in those for any of the subsequent amendments of the Basin Plan, of compliance with Water Code section 13241. The Regional Board has never performed the mandatory balancing of economic and environmental factors implicated by applying a “post-treatment/from-the-tap” drinking water standard to a “raw/untreated” surface water channel. Similarly, there has never been a consideration of the section 13241 factors in relation to the cost and benefit of satisfying a Water Quality Objective based on continually-lowering analytical detection limits. These two Water Quality Objectives are unlawful and may not form the basis for a 303(d) listing.

b. The Water Quality Objectives Impermissibly Delegate the Regional Board’s Legislative Power

The Regional Board has the exclusive responsibility for adopting Water Quality Objectives. (Water Code, § 13241.) It may not delegate that authority even to its Executive Officer. (Water Code, § 13223(a).) As such, it is improper and unlawful for the Regional Board to, in essence, delegate that responsibility to DPH, the EPA, or its Executive Officer by incorporating present and future standards adopted by these individuals or agencies without the Board itself receiving and considering the evidence underlying those standards and performing its own independent analysis of the Water Code section 13241 factors.

In addition, by prospectively incorporating future changes to MCLs and analytical standards, the Regional Board also unlawfully delegated its power under the general delegation of powers doctrine. This doctrine prohibits a legislative body from delegating “unrestricted authority to make fundamental policy determinations.” (*Clean Air Constituency v. State Air Resources Bd.* (1974) 11 Cal.3d 801, 816; see *Bock v. City Council* (1980) 109 Cal.App.3d 52, 56.) To avoid unlawful delegation, the legislative body must provide an “adequate yardstick for the guidance of the administrative body empowered to execute the law.” (*Clean Air Constituency* at p. 817.) It must also provide “adequate safeguards” to ensure that the delegatee will not arbitrarily implement the law. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 381-382; *Bock* at p. 56.) By blindly incorporating all future changes to DPH’s MCLs and changes in laboratory analytical procedures, the Regional Board failed to provide any safeguards to assure such future changes go

²¹ It is common knowledge that detection limits for the analytical techniques used for chlorinated pesticides have been dramatically lowered since the “Pesticide Objective” was first adopted. TID asks the Regional Board to take administrative notice of this indisputable fact.

through a proper evaluation as they apply to surface water quality. The two Objectives' incorporation by reference of future standards is clearly an unlawful delegation of the Regional Board's exclusive authority.

- c. **The Regional Board failed to adopt an Implementation Plan when they adopted the Chemical Constituent and Pesticide Objective, rendering those Objectives invalid.**

Water Code section 13242 requires that Basin Plans contain a program of implementation to achieve Basin Plan Water Quality Objectives. The Basin Plan is devoid of any such program for the Water Quality Objectives based on incorporation by reference. (See Basin Plan at IV-1.00 to IV-38.00) Indeed, it would be impossible to adopt any such program because the Regional Board could not have known what values would later be incorporated. This, of course, underscores the basic impropriety of a regulatory approach using prospective incorporation by reference.

5. Application of Water Quality Objectives based on a REC-1 or WARM Beneficial Use to the Highline Canal or Harding Drain is unlawful because those Water Quality Objectives never underwent a section 13241 analysis that considered their application to agricultural canals and drains and has never adopted the Implementation Plan required by Section 13242.

Neither the Highline Canal nor the Harding Drain is safe for swimming or other contact recreation, and both are posted. REC-1 is clearly not an appropriate Beneficial Use for either of these waterways. Neither has either of these two constructed agricultural waterways ever been evaluated to determine whether a WARM Beneficial Use is appropriate.

Although TID recognizes that "fishable/swimmable" are generally considered "default" uses under the Clean Water Act, the adoption of Water Quality Objectives to protect those uses is, in the first instance, the responsibility of the individual states. (33 U.S.C.A. § 1251 ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . ."). In other words, when developing Water Quality Objectives are first and foremost a State function for which the States must follow their own laws.

As discussed earlier, in California, the development of Water Quality Objectives necessary to protect Beneficial Uses, and the steps necessary to implement those Water Quality Objectives, are governed by Porter-Cologne generally and specifically by section 13241 and 13242. Section 13241 requires the Regional Board to analyze a variety of factors to assure that the Water Quality Objectives comply with the overarching goal of Porter-Cologne that water quality protection be "reasonable" (Water Code § 13000.) Section 13242 requires the Regional Board to adopt an Implementation Plan outlining the steps that will be followed to implement the

Attn: Danny McClure
March 16, 2009
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Water Quality Objective. Clearly, these two sections are inextricably tied: one cannot, for example, determine the economic impact of establishing a particular Water Quality Objective if one does not know where and how one is going to implement it.

Historically, Beneficial Uses have not been applied to constructed agricultural canals and drains. The practice is of relatively recent origin and post-dates the decision in *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526. It was only after that case was decided that Regional Boards began to consider whether these constructed agricultural waterways might be "Waters of the United States" and subject to meeting Water Quality Objectives. Since the *Talent* decision, however, there has been no effort to revisit the Basin Plans' Water Quality Objectives to determine if they are, in fact, reasonable when applied to constructed agricultural waterways.

In short, there has never been a section 13241 analysis of any the Water Quality Objectives applicable to a REC-1 or the WARM Beneficial Use in the context of applying them to agricultural waterways, nor has there ever been a section 13242 Implementation Plan describing how these Water Quality Objectives are to be achieved and maintained in agricultural waterways. Until the Regional Board performs a proper section 13241 analysis and adopts a proper section 13242 Implementation Plan, it would be unlawful to apply Water Quality Objectives developed for REC-1 and WARM Beneficial Uses to constructed agricultural waterways such as the Highline Canal and the Harding Drain. Any 303(d) listings predicated of such Water Quality Objectives are unsupported.

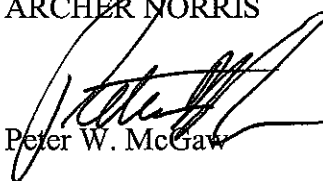
CONCLUSION

As detailed above, the proposed 303(d) listings for the Highline Canal and the Harding Drain suffer from numerous regulatory flaws. TID urges the Board to remove these proposed listings from the proposed Revised 303(d) List before it is finalized.

Pleased do not hesitate to call should you have any questions or wish to discuss any of the issues raised in these comments. TID appreciates your consideration of these issues.

Very truly yours,

ARCHER NORRIS



Peter W. McGaw

cc: Robert Nees, TID
Deborah Liebersbach, TID

EXHIBIT A

Memorandum

-7 9:57

: Regional Water Board
Executive Officers

Date: JAN -4 1994

Regional Water Board Attorneys



William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL

From : STATE WATER RESOURCES CONTROL BOARD
901 F Street, Sacramento, CA 95814
Mail Code: 6-8

Subject: GUIDANCE ON CONSIDERATION OF ECONOMICS IN THE ADOPTION OF WATER
QUALITY OBJECTIVES

ISSUE

What is required of a Regional Water Quality Control Board (Regional Water Board) in order to fulfill its statutory duty to consider economics when adopting water quality objectives in water quality control plans or in waste discharge requirements?

CONCLUSION

A Regional Water Board is under an affirmative duty to consider economics when adopting water quality objectives in water quality control plans or, in the absence of applicable objectives in a water quality control plan, when adopting objectives on a case-by-case basis in waste discharge requirements. To fulfill this duty, the Regional Water Board should assess the costs of the proposed adoption of a water quality objective. This assessment will generally require the Regional Water Board to review available information to determine the following: (1) whether the objective is currently being attained; (2) what methods are available to achieve compliance with the objective, if it is not currently being attained; and (3) the costs of those methods. The Regional Water Board should also consider any information on economic impacts provided by the regulated community and other interested parties.

If the potential economic impacts of the proposed adoption of a water quality objective appear to be significant, the Regional Water Board must articulate why adoption of the objective is necessary to assure the reasonable protection of beneficial uses of state waters, despite the potential adverse economic consequences. For water quality control plan amendments, this

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discussion could be included in the staff report or resolution for the proposed amendment. For waste discharge requirements, the rationale must be reflected in the findings.

DISCUSSION

A. Legal Analysis

1. Porter-Cologne Water Quality Control Act

Under the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq. (Porter-Cologne Act or Act), the State Water Resources Control Board (State Water Board) and the Regional Water Boards are the principal state agencies charged with responsibility for water quality protection. The State and Regional Water Boards (Boards) exercise this responsibility primarily through the adoption of water quality control plans and the regulation of waste discharges which could affect water quality. See Water Code Secs. 13170, 13170.2, 13240, 13263, 13377, 13391.

Water quality control plans contain water quality objectives, as well as beneficial uses for the waters designated for protection and a program of implementation to achieve the objectives. Id. Sec. 13050(j). In the absence of applicable water quality objectives in a water quality control plan, the Regional Water Board may also develop objectives on a case-by-case basis in waste discharge requirements. See id. Sec. 13263(a).¹

When adopting objectives either in a water quality control plan or in waste discharge requirements, the Boards are required to exercise their judgment to "ensure the reasonable protection of beneficial uses and the prevention of nuisance". Id. Secs. 13241, 13263; see id. Sec. 13170. The Porter-Cologne Act recognizes that water quality may change to some degree without

¹ The focus of this memorandum is limited to an analysis of the Boards' obligation to consider economics when adopting water quality objectives either in water quality control plans or, on a case-by-case basis, in waste discharge requirements. This memorandum does not discuss the extent to which the Boards' are required to consider the factors specified in Water Code Section 13241 in other situations. Specifically, this memorandum does not discuss the applicability of Section 13241 to the development of numeric effluent limitations, implementing narrative objectives contained in a water quality control plan. Further guidance on the latter topic will be developed at a later date.

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causing an unreasonable effect on beneficial uses. Id. The Act, therefore, identifies factors which the Boards must consider in determining what level of protection is reasonable. Id.² These factors include economic considerations. Id.³

The legislative history of the Porter-Cologne Act indicates that "[c]onservatism in the direction of high quality should guide the establishment of objectives both in water quality control plans and in waste discharge requirements". Recommended Changes in Water Quality Control, Final Report of the Study Panel to the [State Water Board], Study Project--Water Quality Control Program, p. 15 (1969) (Final Report). Objectives should "be tailored on the high quality side of needs of the present and future beneficial uses" Id. at 12. Nevertheless, objectives must be reasonable and economic considerations are a necessary part of the determination of reasonableness. "The regional boards must balance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality which is reasonable." Id. at 13.

2. Senate Bill 919

The Boards are under an additional mandate to consider economics when adopting objectives as a result of the recent enactment of Senate Bill 919. 1993 Cal. Stats., Chap. 1131, Sec. 8, to be codified at Pub. Res. Code, Div. 13, Ch. 4.5, Art. 4. The legislation, which is

2 Other factors which must be considered include:

- (a) Past, present, and probable future beneficial uses of water;
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto;
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area;
- (d) The need for developing housing within the region;
- (e) The need to develop and use recycled water.

³ See also Water Code Section 13000 which mandates that activities and factors which may affect water quality "shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (emphasis added).

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effective January 1, 1994, amended the California Environmental Quality Control Act, Public Resources Code Section 21000 et seq. (CEQA), to require that, whenever the Boards adopt rules requiring the installation of pollution control equipment or establishing a performance standard or treatment requirement, the Boards must conduct an environmental analysis of the reasonably foreseeable methods of compliance. This analysis must take into account a reasonable range of factors, including economics. For the reasons explained above, the latter requirement is duplicative of existing requirements under the Porter-Cologne Act regarding consideration of economics.

B. Recommendation

The meaning of the mandate to "consider economics" in the Porter-Cologne Act is not entirely clear. It is clear that the Porter-Cologne Act does not specify the weight which must be given to economic considerations. Consequently, the Boards may adopt water quality objectives even though adoption may result in significant economic consequences to the regulated community. The Porter-Cologne Act also does not require the Boards to do a formal cost-benefit analysis.

The Porter-Cologne Act does impose an affirmative duty on the Boards to consider economics when adopting water quality objectives. The Boards probably cannot fulfill this duty simply by responding to economic information supplied by the regulated community. Rather, the Boards should assess the costs of adoption of a proposed water quality objective. This assessment will normally entail three steps. First, the Boards should review any available information on receiving water and effluent quality to determine whether the proposed objective is currently being attained or can be attained. If the proposed objective is not currently attainable, the Boards should identify the methods which are presently available for complying with the objective. Finally, the Boards should consider any available information on the costs associated with the treatment technologies or other methods which they have identified for complying with a proposed objective.⁴

⁴ See, for example, Menssine Wastewater In Coastal Urban Areas, National Research Council (1993). This text provides data on ten technically feasible wastewater treatment technologies, which can be used to make comparative judgments about performance and to estimate the approximate costs of meeting various effluent discharge standards, including standards for toxic organics and metals.

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In making their assessment of the cost impacts of a proposed objective, the Boards are not required to engage in speculation. Rather, the Boards should review currently available information. In addition, the Boards should consider, and respond on the record, to any information provided by dischargers or other interested persons regarding the potential cost implications of adoption of a proposed objective.

If the economic consequences of adoption of a proposed water quality objective are potentially significant, the Boards must articulate why adoption of the objective is necessary to ensure reasonable protection of beneficial uses. If the objective is later subjected to a legal challenge, the courts will consider whether the Boards adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the Porter-Cologne Act. See California Hotel & Motel Assn. v. Industrial Welfare Com., 25 Cal.3d 200, 212, 157 Cal.Rptr. 840, 599 P.2d 31 (1979).

Reasons for adopting a water quality objective, despite adverse economic consequences, could include the sensitivity of the receiving waterbody and its beneficial uses, the toxicity of the regulated substance, the reliability of economic or attainability data provided by the regulated community, public health implications of adopting a less stringent objective, or other appropriate factors. These factors may also include the legislative directive that a "margin of safety [] be maintained to assure the protection of all beneficial uses." Final Report, p. 25 and App. A, p. 59.

If objectives are proposed for surface waters and adverse economic consequences stemming from adoption of the objectives could be avoided only if beneficial uses were downgraded, the Boards should address whether dedesignation would be feasible under the applicable requirements of the Clean Water Act and implementing regulations. See 40 C.F.R. Sec. 131.10. Dedesignation is feasible only for potential, rather than existing, uses. See *id.* Sec. 131.10(g). If dedesignation of potential beneficial uses is infeasible, the Boards should explain why, e.g., that there is a lack of data supporting dedesignation.⁵

⁵ It should also be noted that, even if dedesignation of potential beneficial uses is feasible, in the great majority of cases it will not have any significant effect on the selection of a proposed objective. This is so because the proposed objective will be necessary to protect existing beneficial uses, which cannot be dedesignated.

The State or Regional Water Board's rationale for determining that adoption of a proposed objective is necessary to protect water quality, despite adverse economic consequences, must be discernible from the record. This reasoning could be included in the staff report or in the resolution adopting a proposed water quality control plan amendment. When objectives are established on a case-by-case basis in waste discharge requirements, the rationale must be included in the findings.

EXHIBIT B