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State Water Resources Control Board

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December 17, 2002

To: Enclosed List of Parties To
Exchange Information

PETITION OF IMPERIAL IRRIGATION DISTRICT AND SAN DIEGO COUNTY WATER AUTHORITY FOR APPROVAL OF LONG-TERM TRANSFER OF CONSERVED WATER

The enclosed draft order taking action on petitions for reconsideration of Order WRO 2002-0013 regarding Imperial Irrigation District's (IID) and the San Diego County Water Authority's (SDCWA) amended joint petition for approval of a long-term transfer of conserved water from IID to SDCWA and to change point of diversion, place of use, and purpose of use under Permit No. 7643 is scheduled for consideration at the State Water Resources Control Board (SWRCB) meeting on December 20, 2002. The meeting will commence at 10:00 a.m. in the Sierra Hearing Room, Joe Serna Jr./Cal/EPA Building, 1001 I Street, Sacramento, California. A copy of the draft order is not being mailed to the full interested persons list, but is available upon request and can be found at: <http://www.waterrights.ca.gov>.

Parties and interested persons will have a brief opportunity to comment on the draft order at the December 20 SWRCB meeting. Oral comment will be limited to 15 minutes for parties and interested persons who filed petitions for reconsideration and 3 minutes for all other interested persons. Comments should be limited to the general acceptability of the draft order acting on petitions for reconsideration or possible technical corrections. Parties and interested persons may not introduce evidence at the SWRCB meeting. While written comments are encouraged, in view of the short review time involved, comments need not be submitted in advance of the December 20 meeting in order to be fully considered. Oral comments made at December 20 SWRCB meeting will be fully considered by the SWRCB before a decision is reached.

Any written comments should be sent to:

**Victoria Whitney, Program Manager
Hearings and Special Projects Section
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000**

California Environmental Protection Agency

Written comments may also be sent by electronic mail to IIDhearing@waterrights.swrcb.ca.gov, faxed to Ms. Whitney at (916) 341-5400, or delivered by hand to the following address:

**Division of Water Rights
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 14th Floor
Sacramento, CA 95814-2828**

If you have any questions regarding this letter, please contact Andy Fecko, Hearing Coordinator, at (916) 341-5393 or Dana Differding, Staff Counsel, at (916) 341-5188.

Sincerely,

/s/

Victoria Whitney, Program Manager
Hearing and Special Projects Section

Enclosures

cc: Victoria Whitney, Program Manager
Andy Fecko, Hearing Coordinator
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Interested Persons List (w/o enclosure)

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 -

In the Matter of

**IMPERIAL IRRIGATION DISTRICT'S (IID) AND
SAN DIEGO COUNTY WATER AUTHORITY'S (SDCWA)
AMENDED JOINT PETITION FOR
APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED WATER
FROM IID TO SDCWA
AND
TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, AND PURPOSE OF USE
UNDER**

PERMIT 7643 ISSUED ON
APPLICATION 7482 OF
IMPERIAL IRRIGATION DISTRICT

SOURCE: COLORADO RIVER

COUNTY: IMPERIAL

**ORDER DENYING RECONSIDERATION OF
AND MODIFYING ORDER WRO 2002-0013**

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (SWRCB) takes action on six petitions for reconsideration of Order WRO 2002-0013. Imperial County, the Imperial County Air Pollution Control District (ICAPCD), the South Coast Air Quality Management District (SCAQMD), the Salton Sea Authority, and Robert Trimm filed petitions for reconsideration. In addition, National Audubon Society, Inc., Defenders of Wildlife, Planning and Conservation League, Sierra Club, and the National Wildlife Federation (Audubon et al.) filed a joint petition for reconsideration.

In Order WRO 2002-0013, adopted on October 28, 2002, the SWRCB conditionally approved a joint petition filed by the Imperial Irrigation District (IID) and the San Diego County Water Authority (SDCWA) for approval of a long-term transfer of conserved water from IID to SDCWA pursuant to an agreement between IID and SDCWA, and conditionally approved a petition filed by IID to change the point of diversion, place of use, and purpose of use under Permit No. 7643 (Application No. 7482). Order WRO 2002-0013 authorizes the transfer of up to 200,000 acre-feet per annum (afa) of conserved water from IID to SDCWA and up to 100,000 afa of conserved water from IID to Coachella Valley Water District (CVWD) and Metropolitan Water District (MWD). The transfer is for a term of 45 years with an optional 30-year renewal period, for a total of 75 years.

Pursuant to Water Code section 1736, the SWRCB may approve a long-term transfer petition if the SWRCB finds that the transfer will not result in substantial injury to any legal user of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. In Order WRO 2002-0013, the SWRCB found that the transfer would not result in substantial injury to any legal user of water or unreasonably affect fish, wildlife, or other instream beneficial uses, provided that certain mitigation measures were implemented. The SWRCB conditioned its approval on implementation of those measures.

Order WRO 2002-0013 addressed the potential for the water conservation and transfer project to affect fish and wildlife that rely on the Salton Sea, an issue that has generated considerable concern. As summarized in the introduction to WRO 2002-0013, the Salton Sea is a terminal, saline lake that is almost entirely dependent on agricultural runoff, primarily from IID. The Salton Sea supports a productive fishery and numerous fish-eating birds, but the Salton Sea ecosystem is in jeopardy. Without a salinity control project, the Salton Sea will become too saline to support a viable fishery in the coming decades. The feasibility of restoring the Salton Sea is uncertain, and is the subject of an ongoing study by the Secretary of Interior and the Salton Sea Authority.

The implementation of water conservation measures within IID that reduce farm runoff or delivery system losses will reduce inflows to the Salton Sea, decreasing the time before the

Salton Sea becomes too saline to support the fishery. Conserving water by fallowing agricultural land will also reduce inflows, but to a lesser extent. Decreased inflows could also adversely affect the feasibility of long-term restoration of the Salton Sea.

In Order WRO 2002-0013, the SWRCB determined whether the impacts of the proposed conservation and transfer project to the Salton Sea would be unreasonable taking into account all relevant factors, including the nature and the extent of the impacts, the benefits of the transfer, and the cost of mitigation measures. The SWRCB took into account the fact that the transfer is a critical part of California's commitment to reduce its use of water from the Colorado River, and California's water supply could be severely impacted if the transfer is not implemented and the Secretary of Interior limits California's diversions from the Colorado River. The SWRCB also considered the fact that the only viable strategy for mitigating impacts to the Salton Sea was providing replacement water to the Sea to compensate for reduced inflows. This mitigation measure is likely to entail the fallowing of land within IID, which could have significant socio-economic impacts within Imperial County.

In view of the foregoing considerations, the SWRCB concluded that IID should be required to maintain salinity levels at the Salton Sea that would have existed in the absence of the transfer for a period of 15 years. The SWRCB reasoned that this requirement would mitigate project impacts long enough to allow the study of the feasibility of long-term restoration actions to be completed. At the same time, the requirement reflected the SWRCB's recognition that it would be unreasonable to have mitigation requirements remain in effect if ultimately a plan were developed to restore the Salton Sea without requiring continued mitigation by the parties to the transfer or if restoration were determined to be infeasible. The SWRCB reserved jurisdiction to modify the mitigation requirement in light of the results of the study on the feasibility of restoring the Salton Sea.

For the reasons discussed below, we conclude that Order WRO 2002-0013 was appropriate and proper, except that certain clarifying amendments should be made. Order WRO 2002-0013 should be amended to clarify that Order WRO 2002-0013 does not affect the independent authority of the ICAPCD and the SCAQMD to regulate air pollution. In addition, certain non-

substantive clarifications requested by Imperial County should be made. By this order, the SWRCB affirms Order WRO 2002-13 as modified and denies the petitions for reconsideration.

2.0 FACTUAL, PROCEDURAL AND LEGAL BACKGROUND

The factual, procedural, and legal background to the transfer are described in detail at pages 6-22 of Order WRO 2002-0013.

3.0 GROUNDS FOR RECONSIDERATION

The SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB upon petition by any interested person. (Wat. Code, § 1122.) A petition for reconsideration may be filed on any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(Cal. Code Regs, tit. 23, § 768.) A petition for reconsideration must be submitted in writing and contain the following:

- (1) Name and address of the petitioner.
- (2) The specific board action of which petitioner requests reconsideration.
- (3) The date on which the order or decision was made by the board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.
- (6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(*Id.*, § 769, subd. (a)(1-6).) In addition, a petition must be accompanied by a statement of points and authorities in support of legal issues raised in the petition. (*Id.*, subd. (c).)

In response to a petition for reconsideration, the SWRCB may refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration, deny the petition if the SWRCB finds that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, § 770.)

4.0 THE SWRCB'S FINDING THAT THE TRANSFER WILL NOT UNREASONABLY AFFECT FISH, WILDLIFE, AND OTHER INSTREAM BENEFICIAL USES IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Audubon et al. argue that the SWRCB's finding that the transfer as mitigated will not unreasonably affect, fish, wildlife, and other instream beneficial uses is not supported by substantial evidence. In support of this argument, Audubon et al. take issue with a number of other findings that the SWRCB made in connection with the SWRCB's finding concerning impacts to fish and wildlife.

First, Audubon et al. argue that the SWRCB's finding that Southern California's water supply could be severely impacted if the transfer is not implemented is not supported by substantial evidence. As explained in more detail in Order WRO 2002-0013, the transfer is an important part of California's Colorado River Water Use Plan, which provides a framework to reduce California's over-use of Colorado River. Approval of the transfer is also currently a condition of the draft Quantification Settlement Agreement (QSA), a draft agreement between IID, MWD and CVWD. The draft QSA would facilitate implementation of the Colorado River Water Use Plan by settling disputes among the parties regarding the priority, use and transfer of Colorado River water.

If a draft QSA is not executed by December 31, 2002, the Secretary of Interior has stated that the Interim Surplus Guidelines, adopted by the Secretary in January 2001 (66 Fed.Reg. 7772), will be suspended. (67 Fed.Reg. 41733, 41734.) The Interim Surplus Guidelines give California 15 years to reduce its use of Colorado River water from approximately 5,200,000 to 4,400,000 afa, California's apportionment during years when no surplus water is available. The Guidelines require California to reduce its water use to levels at or below specified benchmark water quantities every three years, starting with 2003. (*Id.*, § 5(C).) If the Guidelines are suspended,

Southern California will likely face an immediate short-fall of approximately 800,000 afa of water from the Colorado River. In the event that the Guidelines are suspended, they will remain suspended “until such time as California completes all required actions and complies with [the benchmark water] reductions” (*Id.*, § 5(B).)

Audubon et al. argue that execution of the draft QSA is not a “required action” within the meaning of the Guidelines, and the Guidelines will be reinstated even if the transfer is not implemented and the draft QSA is not executed, provided that California meets the benchmark water reductions. This is one plausible interpretation of the Guidelines, but it also can be argued, as SDCWA did in its closing brief, that a QSA must be executed in order for the Guidelines to be reinstated. Audubon et al. point to a letter from the Chief Executive Officer of MWD to the Director of the Department of Water Resources which suggests that execution of the QSA may not be necessary in order to satisfy the requirements of the Guidelines.

(Imperial 5.) Audubon et al. neglect to mention, however, that MWD sent a follow-up letter several days later which stated that “everything possible must be done to facilitate execution of the QSA by December 31, 2002 . . . and avoid a potential water crisis.” (SDCWA 61.) In short, the Guidelines are ambiguous. If they are suspended, the Secretary of Interior ultimately will be called upon to determine whether execution of a QSA is required in order for the Guidelines to be reinstated.

In addition, even if execution of the QSA were not essential, the record does not support the apparent assumption of Audubon et al. that the benchmark reductions in water use required by the Guidelines will be met without the transfer. As stated in Order WR 2002-0013, the self-described linchpin of the Colorado River Water Use Plan is the voluntary transfer of 400,000 to 500,000 afa of conserved water from agricultural to urban use, including the proposed transfer. (SDCWA 15, pp. 25, 32-37.) Without transfers from agricultural to urban use, it may not be possible to meet the benchmarks.

Moreover, an immediate reduction in Southern California’s Colorado River water supply would place increased pressure on the Bay-Delta. Increased diversions from the Bay-Delta could upset efforts to improve water management and restore the ecological health of the Bay-Delta through

the CALFED planning process. (SDCWA 5, pp. 2-3, 5-6.) In summary, substantial evidence supports the conclusion that the failure to implement the transfer and execute the QSA would pose a significant risk to California's water supply and environment.

Audubon et al. also take issue with the SWRCB's finding that IID might not be willing to implement the transfer on a voluntary basis if the cost of mitigating the environmental impacts of the transfer is too high. This finding was not mere speculation, but was based on the fact that the only way to mitigate impacts to the Salton Sea that had been identified on the record was conserving water by fallowing land, and IID had officially and unequivocally opposed fallowing because of the potential economic impacts. (IID 65, p. 2; IID Closing Brief, pp. 51-55.)

In addition to disputing the SWRCB's findings regarding the benefits of the transfer and the cost of mitigation, Audubon et al. argue that the SWRCB's findings concerning impacts to fish and wildlife that rely on the agricultural drains within IID's service area and shoreline habitat along the Salton Sea are not supported by substantial evidence. In Order WRO 2002-0013, the SWRCB required the replacement of drain and shoreline habitat that may be adversely affected by the transfer. These mitigation measures were developed as part of the Environmental Impact Report (EIR) and Habitat Conservation Plan prepared by IID in connection with the transfer project. Audubon et al. cite to Audubon's comments on the draft EIR, which raised questions concerning whether the creation of replacement habitat would fully mitigate the potential impacts to fish and wildlife that rely on the drain and shoreline habitat. The possibility that potential impacts may not be fully mitigated, however, does not defeat the SWRCB's determination, based on consideration of all relevant factors, that the potential impacts to fish and wildlife, as mitigated, will not be unreasonable.

Audubon et al. also assert that the SWRCB incorrectly concluded that the evidence concerning the impact of reduced inflows to the Salton Sea on long-term restoration efforts was inconclusive. In fact, the SWRCB acknowledged that reducing inflows could affect the feasibility of long-term restoration, but correctly concluded based on the evidence in the record that the feasibility of restoring the Salton Sea under any inflow scenario was uncertain. (Order WRO 2002-0013, pp. 42-43, 46.)

Finally, Audubon et al. contend that it was inappropriate for the SWRCB to rely on Senate Bill 482 (Stats. 2002, ch. 617) in support of the SWRCB's determination that impacts to the Salton Sea should be mitigated for 15 years. As explained in greater detail in Order WRO 2002-0013, SB 482 proscribes the conditions under which IID may obtain an incidental take permit authorizing the take of fully protected, threatened and endangered species in connection with the transfer under the California Endangered Species Act and fully protected species provisions of the Fish and Game Code. Among other things, SB 482 requires the Department of Fish and Game to find, in consultation with the Department of Water Resources, that the transfer will not result in a material increase in projected salinity levels at the Salton Sea for 15 years. (*Id.*, § 2.)

In considering the appropriate balance between the importance of mitigating project impacts to the Salton Sea long enough to study the feasibility of long-term restoration, the economic impacts of fallowing, and the importance of the transfer to California's water supply needs, the SWRCB took into consideration the balance struck by SB 482. Audubon et al. argue that relying on SB 482 was inappropriate because SB 482 only addresses fully protected species, not all of the fish and wildlife resources at the Salton Sea.

SB 482 prescribes the conditions for issuance of a permit for the incidental take of fully protected, threatened and endangered species. (Stats. 2002, ch. 617, § 2 [adding Fish & G. Code § 2081.7].) But the Legislature adopted SB 482 in consideration of a broader range of issues concerning the Salton Sea. (See *Id.* § 1 [making findings concerning impacts on the Salton Sea which are not limited to concerns about impacts on protected species].) Thus, while SB 482 does not address the precise legal issue decided in Order WRO 2002-0013, and does not bind the SWRCB on that issue, the bill addresses essentially the same considerations as were before the

SWRCB, and the SWRCB properly took into account the balance struck in SB 482.¹ Moreover, the requirement that IID mitigate for impacts to the water quality of the Salton Sea, and shoreline habitat around the Sea, incidentally protects all of the fish and wildlife resources that rely on the Sea, not just those species that are entitled to special protection under state law.

In summary, the SWRCB's finding that the transfer as mitigated will not unreasonably affect, fish, wildlife, and other instream beneficial uses is supported by substantial evidence.

5.0 ORDER WRO 2002-0013 IS CONSISTENT WITH CEQA

5.1 The Statement of Overriding Considerations Contained in Order WRO 2002-0013 Is Appropriate and Proper

The Salton Sea Authority, Audubon et al., Imperial County, and the SCAQMD contend that the statement of overriding considerations contained in Order WRO 2002-0013 is legally deficient due to uncertainties regarding the benefits of the transfer and the potential environmental impacts. In order to cure this alleged legal defect, petitioners assert that the SWRCB should require supplemental environmental review under the California Environmental Quality Act (CEQA) before approving the transfer of water after the initial 15-year period during which mitigation of potential impacts to the Salton Sea is required by the order. For the reasons set forth below, we disagree with petitioners and conclude that the statement of overriding considerations is appropriate and proper.

For purposes of considering whether to approve IID's and SDCWA's transfer petition, the SWRCB is a responsible agency under CEQA. IID is the lead agency under CEQA, and as lead agency IID prepared and certified a Final Environmental Impact Report (EIR) in connection with the transfer project. As a responsible agency, the SWRCB was required to consider the

¹ We recognize, however, that if the QSA, as defined in SB 482, is not executed by December 31, 2002, then the provision of SB 482 that authorizes the incidental take of fully protected, threatened, and endangered species will not be effective. (Stats. 2002, ch. 617, § 2.) If this provision of SB 482 is not effective, subsequent legislation authorizing the incidental take of fully protected species will be required for the transfer to proceed. Any subsequent legislation may impose different requirements than those imposed by SB 482. Accordingly, we will amend Order WRO 2002-0013 to reserve continuing authority to consider whether any changes to the order would be appropriate in light of any subsequent legislation that addresses the measures necessary to allow the incidental take of fully protected, threatened, or endangered species that rely on the Salton Sea.

environmental effects of the project as disclosed in the Final EIR in deciding whether and how to approve the project. (Cal. Code Regs, tit. 14, § 15096, subd. (f).) The SWRCB was required to balance the transfer's benefits against its potential environmental impacts and make a statement of overriding considerations if the SWRCB found that specific economic, legal, social, technological, or other benefits of the project outweighed the potential environmental impacts. (Cal. Code Regs., tit. 14, § 15093.)

The SWRCB made a statement of overriding considerations in connection with a number of significant environmental effects identified in the Final EIR. The SWRCB found that potential impacts to the Salton Sea after the initial 15-year period were overridden by competing considerations, including the uncertainty of restoring the Salton Sea and the environmental, economic, and social benefits of the transfer. (Order WRO 2002-0013, pp. 74-76.) The SWRCB also found that the benefits of the transfer overrode potential impacts to air quality due to shoreline exposure at the Salton Sea. Although Order WRO 2002-0013 required IID to implement a mitigation and monitoring plan designed to reduce air quality impacts to less than significant levels, the SWRCB made a statement of overriding considerations in light of the conclusion in the Final EIR that the transfer could have significant air quality impacts. The Final EIR explained that this conservative conclusion was appropriate in light of uncertainty regarding the feasibility of mitigating impacts to less than significant levels. (IID 93, pp. 3-52 – 3-53.)

The Salton Sea Authority argues that the SWRCB's statement of overriding considerations is not supported by substantial evidence because the magnitude of the transfer's potential impacts to the Salton Sea and to air quality after the initial 15-year period, and the feasibility of mitigating those impacts, are unknown. Similarly, the SCAQMD argues that the SWRCB could not properly balance competing considerations because the magnitude of potential air quality impacts is unknown. Imperial County and Audubon et al. make a similar argument. CEQA does not require, however, that the feasibility of a mitigation measure be certain, or that the precise magnitude of a potential, significant environmental impact be known with certainty. Rather, an EIR need only contain "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences." (Cal. Code, Regs, tit. 14, § 15151.) "The courts have looked not

for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” (*Ibid.*) If uncertainty exists regarding whether a potential impact can be mitigated, an approving agency must treat the potential impact as though it will be significant. (*Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-1029.)

Consistent with CEQA, the Final EIR concluded that impacts to air quality were potentially significant in light of the uncertainty regarding the feasibility of mitigating potential air quality impacts to less than significant levels. Similarly, the SWRCB assumed that impacts to the Salton Sea and to air quality could be significant in making its statement of overriding considerations. Moreover, the Final EIR contained sufficient information to allow the SWRCB to intelligently weigh the benefits of the transfer against the environmental risks.²

For the foregoing reasons, we conclude that the statement of overriding considerations was appropriate and proper, notwithstanding the uncertainty regarding the precise magnitude of the transfer’s potential impacts and the feasibility of mitigation measures.

5.2 The SWRCB Did Not Improperly Defer Mitigation

The SCAQMD makes the related argument that the SWRCB deferred the formulation of mitigation measures for air quality impacts until after project approval in violation of CEQA. The cases cited by the SCAQMD in support of this argument stand for the rule that an agency may not rely on unformulated mitigation measures in concluding that the impacts of a project will be reduced to less than significant levels. As discussed above, CEQA allows an agency to approve a project in the face of uncertainty regarding the feasibility of mitigation measures, provided that the agency treats the impacts as potentially significant.

² The SCAQMD argues that it was “legally impossible” for the SWRCB to adopt a statement of overriding considerations because of the uncertainty regarding the magnitude of the impacts to air quality. This amounts to an argument that the final EIR was inadequate to support approval of the project. As discussed in section 5.3, below, this is not a valid argument against the SWRCB in the exercise of its duty as a responsible agency under CEQA.

5.3 The SWRCB Did Not Violate CEQA by Relying on the EIR's Baseline

Audubon et al. contend that the SWRCB violated CEQA because the SWRCB relied on a legally defective EIR in approving the transfer project. Audubon et al. contend that the EIR is defective because it measures the potential impacts of the transfer on the Salton Sea against a baseline that takes into account a projected increase in salinity levels of the Salton Sea and a projected decrease in the Sea's elevation. Audubon et al. assert that the EIR should have used the existing conditions of the Salton Sea as a baseline.

The argument that the EIR is defective does not constitute a valid argument against the SWRCB in the exercise of its duties as a responsible agency under CEQA. The SWRCB was required only to consider the potential environmental impacts of the project as shown in the EIR in deciding whether and under what conditions to approve the transfer. (See Cal. Code Regs, tit. 14, § 15096, subs. (e) & (f).) The SWRCB is not responsible for the adequacy of the EIR. (*Id.*, subd. (i).) As lead agency, IID is responsible for the adequacy of the EIR (*id.*, § 15090, subd. (a)(1)), and any challenge to the adequacy of the Final EIR should be brought against IID.

In addition, the record supports the SWRCB's conclusion that the baseline described in the EIR is a reasonably accurate depiction of future conditions of the Salton Sea. (Order WRO 2002-0013, p. 40, fn. 10.)

6.0 MISCELLANEOUS AIR QUALITY ISSUES

6.1 Order WR 2002-0013 Does Not Affect the Independent Authority of the ICAPCD or the SCAQMD

The ICAPCD, the SCAQMD, Imperial County, and Audubon et al. request the SWRCB to clarify that Order WRO 2002-0013 does not affect the independent authority of the ICAPCD and the SCAQMD to regulate air pollution. Petitioners' concern stems from the requirement, discussed above, that IID implement a mitigation and monitoring plan designed to reduce potential air quality impacts attributable to exposed shoreline at the Salton Sea to less than significant levels. The order delegates to the Chief of the Division of Water Rights the authority to determine, in consultation with the California Air Resources Board, the ICAPCD, and the

SCAQMD, whether any mitigation measures identified as part of the plan are feasible. Petitioners are concerned that this requirement will be construed as a limitation on the ICAPCD's and the SCAQMD's independent authority to regulate any air quality impacts associated with the transfer.

The SCAQMD and the ICAPCD also assert that the requirement, contained in Order WRO 2002-0013, that IID comply with any relevant requirements of the State Implementation Plan (SIP) for PM10 prepared by the ICAPCD should be amended to require compliance with any applicable requirements of PM10 rules and SCAQMD's SIP. The SCAQMD asserts that compliance with its rules and SIP may be required because the SCAQMD has jurisdiction over the northern portion of the Salton Sea and the Coachella Valley, which could be affected by the transfer.

These clarifications are appropriate. Order WRO 2002-0013 required implementation of the mitigation and monitoring plan pursuant to the SWRCB's own authority. The requirement that the Chief of the Division of Water Rights consult with the California Air Resources Board, the ICAPCD, and the SCAQMD on the feasibility of mitigation measures simply recognizes the expertise of those agencies in the area of air resources, and does not supersede or subordinate their independent authority. Finally, IID may be subject to regulations imposed by the SCAQMD in addition to the ICAPCD because the northern portion of the Salton Sea geographic region is under the jurisdiction of the SCAQMD. (IID 93, p. 3-64; IID 55, pp. 3.7-8, 3.7-14.) By this order, we will amend Order WRO 2002-0013 to clarify that Order WRO 2002-0013 does not affect the independent authority of the ICAPCD or the SCAQMD and IID must comply with any applicable requirements of the air districts' PM10 rules or SIPs.

6.2 It Is Unnecessary to Amend Order WRO 2002-0013 To Define the Feasibility of Air Quality Mitigation Measures

The SCAQMD and Audubon et al. request that Order WRO 2002-0013 be amended to specify that, in determining the feasibility of air quality mitigation measures, the Division Chief must take into account financial resources other than IID's. Audubon also recommends that the order

specify that any best available control measures for dry lakebeds that may be added to the SIP are presumptively feasible.

It is unnecessary to amend the order to specify what factors might be relevant to a determination of feasibility, or to determine in advance that certain measures will be presumptively feasible. In determining the feasibility of a given air quality mitigation measure, the Division Chief will take into account all relevant factors, including the availability of funding from sources other than IID. In fact, as the SCAQMD notes, Order WRO 2002-0013 recognizes that the mitigation measures required by the order may be funded or implemented by a party other than IID. (Order WRO 2002-0013, pp. 26-27, fn. 8.)

6.3 IID Should Not Be Required To Provide Funding to the ICAPCD

The ICAPCD urges the SWRCB to require IID to provide the ICAPCD with sufficient funding to address the potential air quality impacts of the transfer. The requirement would not be warranted in this case. Contrary to the ICAPCD's suggestion, Order WRO 2002-0013 does not place a significant regulatory burden on the ICAPCD. The SWRCB's order requires IID, not the ICAPCD, to identify, analyze and mitigate for the potential air quality impacts of the transfer. The order provides only that the Chief of the Division of Water Rights will consult with the ICAPCD concerning the feasibility of any mitigation measure that IID determines is infeasible.

6.4 Order WRO 2002-0013 Should Not Be Amended To Address Unidentified Air Quality Impacts from Fallowing

The ICAPCD asserts that Order WRO 2002-0013 should make clear that IID must mitigate for all air quality impacts due to fallowing identified by the ICAPCD, not just those identified in the EIR. It is unclear what potential impacts the ICAPCD believes were not identified in the EIR. To the extent that the ICAPCD's position is that the EIR fails to disclose a potential impact to air quality, this is an issue that the ICAPCD should have pursued through the CEQA process and raised in comments on the draft EIR.

6.5 It Is Not Necessary To Amend the Air Quality Monitoring and Mitigation Plan

Audubon argues that the SWRCB should require that the methodology and conclusions of IID's air quality research and monitoring program be subject to peer review, and that the information that is developed be made available to the public and the local air districts. This amendment is unnecessary because the mitigation and monitoring plan itself requires coordination and communication between IID and air quality regulatory agencies during each phase of the plan. (IID 93, p. 3-52.) In addition, any public record prepared, owned, used or retained by IID is subject to disclosure under the California Public Records Act. (Gov. Code, § 62550 et seq.)

6.6 The Federal Attainment Status of Imperial County for PM10

Imperial County requests a change to Order WRO 2002-0013 to reflect Imperial County's position that, while the county may have been in federal moderate non-attainment for PM10 in 1993, the county's current status is in attainment, but for emissions from Mexico. We will amend Order WRO 2002-0013 to more accurately reflect the evidence in the administrative record concerning the attainment status of Imperial County.

7.0 REMAINING ISSUES RAISED BY IMPERIAL COUNTY'S PETITION**7.1 Order WRO 2002-0013 Should Not Be Amended To Implement Water Code Section 1810**

Imperial County argues that the SWRCB should find that Water Code section 1810 applies to the transfer. The county argues further that Order WRO 2002-0013 should be amended to implement section 1810, and that Water Code section 1013, subdivision (b), recently added by Senate Bill 482 (Stats. 2002, ch. 617, § 7), provides a mechanism for the SWRCB to do so.

Water Code section 1810 prohibits State, regional, and local public agencies from denying a transferor of water the use of unused capacity in a water conveyance facility, provided, among other things, that the use of the facility will not unreasonably affect the overall economy of the county from which the water is transferred. Imperial County asserts that this section applies in this case because the transfer involves the use of MWD's Colorado River Aqueduct.

Effective January 1, 2003, SB 482 will amend Water Code section 1013 to protect IID's water rights from forfeiture to the extent that IID implements water efficiency conservation measures or fallows land in order to carry out or mitigate for a transfer under the QSA. (Stats. 2002, ch. 617, § 7.) Before adopting a land fallowing conservation plan under this section, IID must consult with Imperial County and obtain the county's assessment whether the plan includes adequate measures to avoid unreasonable economic or environmental impacts in Imperial County. Imperial County argues that the SWRCB can fulfill its obligation to implement section 1810 by reserving jurisdiction to consider whether any changes to Order WRO 2002-0013 should be made to address the potential economic impacts of the transfer in light of the county's assessment made under Water Code section 1013.

We disagree that Order WRO 2002-0013 should be modified as suggested by the county. Order WRO 2002-0013 properly addressed the potential socio-economic impacts of the transfer pursuant to the SWRCB's authority to consider whether the transfer is in the public interest. (Order WRO 2002-0013, pp. 76-80.) When Water Code section 1810 applies, it is implemented by the agency that owns or operates a water conveyance facility with unused storage capacity that is needed to effectuate a transfer, not the SWRCB. (Wat. Code, §§ 1812, 1813.)

The SWRCB did not expressly reserve authority to consider Imperial County's assessment of economic impacts under section 1013. This was appropriate because section 1013 only applies to the extent that IID seeks protection from forfeiture under that section. If IID carries out the transfer, it is protected from forfeiture independent of the provisions of section 1013. (Wat. Code, § 1745.07.)

Moreover, the result that Imperial County seeks has already been achieved by Order WRO 2002-0013. In that order, the SWRCB reserved authority to consider whether to make changes to the order in light of a report to be prepared by the Resources Agency and the Technology, Trade and Commerce Agency pursuant to SB 482. The Resources Agency and the Technology, Trade and Commerce Agency must prepare their report in consultation with Imperial County. The county's assessment of potential economic impacts will be part of the

evaluation in the report and therefore may serve as the basis for the SWRCB's exercise of its reserved authority.

7.2 It Is Unnecessary To Amend Order WRO 2002-0013 To Specify that the Use of Water To Sustain the Salton Sea Would Be Reasonable and Beneficial

Imperial County asserts that Order WRO 2002-0013 should specify that IID's use of Colorado River water to sustain the Salton Sea would constitute a reasonable and beneficial use of water. Imperial County asserts that amending the order accordingly is necessary in order to protect IID's water rights and protect California against claims that Colorado River water is not being beneficially used as required by federal law.

Order WRO 2002-0013 addresses this issue adequately. In Order WRO 2002-0013, the SWRCB found that it did not anticipate the need, absent a change in circumstances, to reassess the reasonableness of IID's water use prior to the full ramp-up of the transfer in 2024, provided that IID implements the transfer in accordance with the QSA and flooding problems at the Salton Sea are resolved. (Order WRO 2002-0013, p. 83.) This finding encompasses all of IID's water use, including the use of conserved water to maintain baseline salinity levels at the Salton Sea to the extent necessary to mitigate the impacts of the transfer. In making this finding, the SWRCB was cognizant of the possibility that IID might use Colorado River water conserved by fallowing as a source of replacement water. (E.g., *id.*, pp. 50-52.) The SWRCB also recognized that IID's irrigation efficiency would not improve to the extent that IID chooses to fallow land in order to meet requirements to mitigate impacts to the Salton Sea. (*Id.*, p. 83, fn. 21.) The SWRCB concluded that IID could not be faulted for failure to improve irrigation efficiency to the extent that mitigation requirements precluded such an improvement. (*Ibid.*)

In addition, Order WRO 2002-0013 points out that the use of water for preservation and enhancement of fish and wildlife resources is a beneficial use under California law. (Order WRO 2002-0013, p. 51.) Finally, any potential argument that the use of Colorado River water to mitigate the impacts of the transfer on the Salton Sea is not a beneficial use as required by federal law is similar to the argument, addressed in section 5.2.8 of Order WRO 2002-0013, that Colorado River water cannot be used for fish and wildlife purposes under federal law. As we

stated previously, we question whether federal law can or should be interpreted to preclude the use of water to mitigate the impacts of conserving and transferring water for irrigation and domestic uses. But we need not resolve the issue here because the federal beneficial use requirement can not be interpreted to limit IID's ability to use Colorado River water to mitigate impacts to the Salton Sea where IID is using its present perfected rights in a manner consistent with state law. (*Bryant v. Yellen* (1980) 447 U.S. 352, 371-374 [100 S.Ct. 2232]; see Order WRO 2002-0013, pp. 50-52.) In summary, the provisions outlined above adequately address the issue whether IID's use of Colorado River water to sustain the Salton Sea would constitute a reasonable and beneficial use of water. The amendments advocated by the county therefore are unnecessary.

7.3 Some of the Clarifying Amendments Shown in Imperial County's Mark-Up of Order WRO 2002-0013 Should Be Made

Imperial County also submitted a mark-up with suggested amendments to Order WRO 2002-0013. Most of the suggested amendments are consistent with the county's arguments discussed above. Some of the amendments, however, are self-explanatory, clarifying amendments that should be made, and are included in the specific amendments to Order WRO 2002-0013 adopted in this order.

8.0 REMAINING ISSUES RAISED BY AUDUBON ET AL.

8.1 Audubon et al.'s Argument Regarding the SWRCB's Treatment of State and Federal Anti-degradation Policies Is Misplaced

Audubon et al. contend that the SWRCB's conclusion that the transfer will not violate federal and state anti-degradation policies is not supported by substantial evidence. Audubon et al. assert that the transfer will violate the anti-degradation policies because it will impair the instream beneficial uses of the agricultural drains within IID's service area and the New and Alamo Rivers by increasing selenium concentrations.

Audubon et al. misconstrue the SWRCB's conclusion concerning selenium concentrations in the drains. In Order WRO 2002-0013, the SWRCB acknowledged that, in reviewing the transfer, the SWRCB was required to consider the instream beneficial uses of the drains and the water

quality objectives necessary to protect those uses as set forth in the Water Quality Control Plan for the Colorado River Basin Region. (Order WRO 2002-0013, pp. 32, 34.) (In a footnote, the SWRCB explained that, with respect to the instream beneficial uses of the drains, by considering the beneficial use designations and water quality objectives in the basin plan the SWRCB took into consideration antidegradation requirements. (*Id.*, p. 32, fn. 9.)) The SWRCB also acknowledged that the transfer would increase selenium concentrations, which already exceed the water quality objective for selenium in the Alamo River and in the drains. (*Id.*, p. 29.)

Contrary to the assertion of Audubon et al., the SWRCB did not conclude that Order WRO 2002-0013 by itself would achieve compliance with water quality objectives. Rather, the SWRCB concluded that it may not be feasible to fully mitigate the water quality impacts of the transfer as part of its order. (Order WRO 2002-0013, p. 34.) The SWRCB explained that it is not required to fully implement water quality standards as part of each individual water right decision or order. (*Ibid.*) The SWRCB went on to discuss why the selenium problem should be addressed as part of a more global strategy to reduce selenium loading to the Salton Sea and its tributaries. To this end, the SWRCB required IID to participate in a comprehensive planning process to address selenium impacts.

8.2 The SWRCB Properly Concluded that It Did Not Need To Determine Whether the Public Trust Doctrine Applies to the Salton Sea

Audubon et al. argue that the SWRCB made an error of law by not reaching the issue of whether the public trust doctrine applies to the Salton Sea. In Order WRO 2002-0013, the SWRCB found that it did not need to reach the issue because Water Code section 1736 codifies the SWRCB's duty to consider public trust uses. Audubon et al. argue that section 1736 and the public trust doctrine are not coextensive because section 1736 required consideration of the fish, wildlife, and other instream beneficial uses of the Salton Sea, whereas the public trust doctrine required consideration of the Salton Sea as a place. Audubon et al. argue that the SWRCB could not determine the degree of significance to place on impacts to the Salton Sea because the SWRCB did not recognize that the Salton Sea is protected by the public trust doctrine.

Audubon et al.'s assumption that the SWRCB would have afforded the Salton Sea greater protection if the SWRCB had found that the public trust doctrine applies to the Salton Sea is unsupported. We interpret all of the public trust uses identified in the cases cited by Audubon et al. to be instream beneficial uses protected by Water Code section 1736, including fishing, recreation, and the preservation of habitat. Audubon et al. do not point to any public trust use that the SWRCB did not address pursuant section 1736. Moreover, by considering feasible measures to protect the instream beneficial uses of the Salton Sea, the SWRCB necessarily considered feasible measures to protect the water resources on which the instream beneficial uses rely.

8.3 The SWRCB Properly Addressed Potential Impacts to Fish and Wildlife in the San Diego Region

Audubon et al. claim that the SWRCB misinterpreted Water Code section 1736 to require consideration of impacts to fish and wildlife only within the watershed of origin. To the contrary, the SWRCB concluded that section 1736 was not so limited, and required consideration of potential impacts to fish, wildlife, and other instream beneficial uses in the proposed place of use. (Order WRO 2002-0013, p. 56, fn. 14.)

Audubon et al. also claim that the SWRCB's finding that the transfer probably would not have growth-inducing impacts in the San Diego region is not supported by substantial evidence. Although the SWRCB explained why the transfer was unlikely to induce growth, the SWRCB did not make a definitive finding on the issue whether the transfer would have growth-inducing impacts. (Order WRO 2002-0013, pp. 56-57.) Rather, the SWRCB found that to the extent that the transfer did induce growth, the resulting potential impacts to water quality and fish and wildlife were best addressed through regulatory programs implemented in the area where the growth occurs. (*Id.*, p. 58.)

9.0 REMAINING ISSUES RAISED BY THE SALTON SEA AUTHORITY

Most of the issues raised by the Salton Sea Authority have been addressed above. The Salton Sea Authority also argued that the SWRCB should require IID to replace reduced inflows to the Salton Sea on a one-to-one basis. Instead, Order WRO 2002-0013 requires

IID to implement the mitigation measure outlined in the EIR, which entails maintaining salinity levels at or below projected baseline levels. (Order WRO 2002-0013, pp. 43-45.) The approach required by Order WRO 2002-0013 is justifiable based on the administrative record. The SWRCB has reserved jurisdiction to consider appropriate modifications upon petition by IID if, for example, the Department of Fish and Game requires one-to-one replacement as a condition of the incidental take permit issued in connection with the project, and that approach is equally or more protective than the approach required by the SWRCB. (Order WRO 2002-0013, p. 92.)

10.0 PETITION OF ROBERT TRIMM

Robert Trimm's petition for reconsideration is in the form of a letter and raises two issues. First, Mr. Trimm asserts that land owners own the water rights in the Imperial Valley and any negotiations should proceed with them. Second, Mr. Trimm claims that negotiations with Assembly Speaker Emeritus Robert Hertzberg were unfair. Mr. Trimm's petition does not comply with most of the requirements for a petition for reconsideration. Among other things, the petition does not identify which specific SWRCB action the SWRCB should reconsider and why the action was inappropriate or improper. (Cal. Code Regs., tit. 23, § 769, subd. (a)(2), (4).) In addition, the petition was not accompanied by a statement of points and authorities in support of the legal issues raised by the petition. (*Id.*, § 769, subd. (c).) Accordingly, the petition should be denied.

11.0 CONCLUSION

For the reasons discussed above, the Order WRO 2002-0013 was appropriate and proper and the petitions for reconsideration should be denied. Any issues raised in the petitions that are not expressly addressed by this order are not substantial issues related to the causes for reconsideration and therefore reconsideration as to those issues is denied. Except for certain clarifying amendments, Order WRO 2002-0013 should be affirmed.

12.0 ORDER

IT IS HEREBY ORDERED:

1. Except as modified below, Order WRO 2002-0013 is affirmed and the petitions for reconsideration of Imperial County, the ICAPCD, the SCAQMD, the Salton Sea Authority, Robert Trimm, and Audubon et al. are denied.
2. The List of Acronyms on page iv is amended to include the South Coast Air Quality Management District.
3. The last sentence of the first full paragraph on page three is amended as follows:

In so doing, this order achieves a reasonable balance between the State's interest in protecting the fish and wildlife that depend on the Salton Sea, the State's interest in protecting the economy of Imperial County, and the State's interest in the implementation of this transfer to meet California's water supply needs.

4. The following sentence is added to the last paragraph on page 15:

The Court then quantified present perfected rights, including present perfected rights held by IID. (*Arizona v. California* (1979) 439 U.S. 419, 429 [99 S.Ct. 995, 1000].)

5. The second full paragraph on page 21 is amended as follows:

Effective January 1, 2003, Senate Bill 482 (Stats. 2002, ch. 617) will amend section 1013 to extend the protection against forfeiture to a reduction in water use attributable to temporary or long-term land fallowing, regardless of whether it occurs in the course of normal and customary agricultural production, if the fallowing is undertaken in order to carry out or mitigate for a transfer under the QSA and IID obtains ~~consults with~~ Imperial County's

assessment of the ~~concerning the potential~~ economic or environmental impacts of following. (*Id.*, § 7.)

6. A new footnote number 11 is added after the first sentence of the third paragraph on page 48 that reads as follows:

¹¹ We recognize that if the QSA, as defined in SB 482, is not executed by December 31, 2002, then subsequent legislation authorizing the incidental take of fully protected species will be required for the transfer to proceed. Any subsequent legislation may impose different requirements than those imposed by SB 482. Accordingly, we will reserve continuing authority to consider whether any changes to this order would be appropriate in light of any subsequent legislation that addresses the measures necessary to allow the incidental take of fully protected, threatened, or endangered species that rely on the Salton Sea.

The footnotes following new footnote number 11 are renumbered consecutively.

7. The second sentence of the second paragraph on page 51 is amended as follows:

We need not resolve the issue here, however, because the provisions of the Law of the River that SDCWA claims limit the purposes for which Colorado River water may be used plainly does not limit IID's ability to use Colorado River water for fish and wildlife purposes under~~exercise~~ its present perfected rights consistent with California law.

8. Footnote 18 on page 73 (to be renumbered footnote 19) is amended as follows:

Although the EIR states that the area is currently in federal moderate non-attainment (IID 93, p. 3-53; IID 55, p. 3.7-13), Imperial County's witness testified that USEPA currently ranks the area as is-in attainment, but for emissions from Mexico. (R.T. p. 2103.)

9. A new sentence is added after the fourth sentence of the second paragraph on page 74, the sentence following the new sentence is amended, and a new footnote number 20 is added, as follows:

The ICAPCD and the South Coast Air Quality Management District (SCAQMD) have jurisdiction over different parts of the Salton Sea geographical region. (IID 93, p. 3-64.) ~~In addition,~~ This order delegates to the Division Chief the authority to determine, in consultation with the ICAPCD, the ~~SCAQMD~~ South Coast Air Quality Management District, and the California Air Resources Board, whether any mitigation measures identified as part of the four-step plan is feasible.²⁰

²⁰ Nothing in this order, including this delegation, limits or supersedes the independent authority of the ICAPCD, the SCAQMD, or the California Air Resources Board. This order specifies that IID must comply with all applicable requirements of the ICAPCD's and the SCAQMD's SIPs and PM10 rules.

10. The first sentence of the first full paragraph on page 82 is amended as follows:

Imperial County argues that the SWRCB's order in this proceeding should not be designated as precedential as to jurisdiction, but precedential on the merits because of the significance of this proceeding and the potential for this transfer to serve as a model for future transfers.

11. The first sentence of footnote 20 on page 82 (to be renumbered footnote 22) is amended as follows:

The designation of this order as non-precedential will not affect the enforceability of this order as against the parties to this proceeding during the term of the transfer; only the SWRCB's authority to rely on the order in other~~future~~ proceedings will be affected.

12. The following sentence is added to the end of Condition 7 on page 90:

In the event that the incidental take authorization contained in section 2 of SB 482 is not effective, the SWRCB reserves continuing authority to consider whether it would be appropriate to add, delete or modify Conditions 5 and 6 in light of any subsequent legislation that addresses the measures necessary to allow the incidental take of fully protected, threatened, or endangered species that rely on the Salton Sea.

13. The last sentence of the second paragraph of Condition 8 on page 90 is amended as follows:

Permittee shall also comply with any relevant requirements of the State Implementation Plan for PM10 Emissions (SIP) or PM10 rules of, as amended by the Imperial County Air Pollution Control District (ICAPCD) or the South Coast Air Quality Management District (SCAQMD), as they may be amended.

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14. The last sentence of the fourth paragraph of Condition 8 on page 91 is amended as follows:

Notwithstanding such a determination by permittee, if the Chief of the Division of Water Rights determines, after consultation with the ICAPCD, the ~~SCAQMD-South Coast Air Quality Management District~~ and the California Air Resources Board, that the mitigation measure is feasible and necessary to mitigate the air quality impacts of the project, then permittee shall implement the mitigation measure.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a special meeting of the State Water Resources Control Board held on December 20, 2002.

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Clerk to the Board