



To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.

August 23, 2005

Kenneth Landau
Assistant Executive Officer
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Re: *Deltakeeper, et al. v. California Regional Water Quality Control Board, et al.*
Case No. 04CS00235
Proposed Resolution to Amend the Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands within the Central Valley Region

Dear Mr. Landau:

Northern California Water Association ("NCWA") submits the following comments on the above-referenced matter, which is scheduled for consideration by the Regional Water Quality Control Board ("Regional Board") on September 15 and 16, 2005.

1. Determination of Beneficial Uses

Page 3 of Draft Attachment A2 includes a list of five ways that beneficial uses can apply to waters of the state. Item number four on this list states:

Beneficial uses can be attributed by operation of law. (See, e.g. 33 U.S.C.A. § 1251(a)(2) (FWPCA § 101(a)(2)). The federal CWA requires that "waters of the United States" be protected for the beneficial uses of fishing and swimming.)

This statement requires clarification and appears to overstate the Clean Water Act ("CWA") requirements.

As an initial matter, it is unclear what "attributed" is intended to mean. There is no explanation of the difference between "designated" uses and "attributed" uses. NCWA has not before heard of the term "attributed" uses with respect to the CWA or Porter-Cologne

Water Quality Control Act (Wat. Code, § 13000, et seq.) (“Porter-Cologne”). NCWA requests clarification of the term “attributed.”

Second, the cited example implies that the CWA designates all waters of the United States for fishing and swimming uses. This is not the case. Rather, the CWA provides “it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved...” (33 U.S.C. § 1251(a)(2).) The CWA then delegates to States the role of designating beneficial uses and developing water quality criteria. (33 U.S.C. § 1313.) The CWA does not itself, by operation of law or otherwise, designate beneficial uses for any water bodies.

The federal regulations further clarify this point. The federal regulations provide that “[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.” (40 C.F.R. § 131.2.) The regulations go on to state that “States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). ‘Serve the purposes of the Act’ (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, and agricultural, industrial, and other purposes including navigation.” (*Id.*) In addition, section 131.10 of Title 40 of the Code of Federal Regulations specifically provides “Each State must specify appropriate water uses to be achieved and protected” taking into consideration numerous uses and values of water. (40 C.F.R. § 131.10.)

The regulations do not support the conclusion that fishing and swimming uses are designated for all waters of the United States via the CWA. In fact, the regulations make clear that this is not the case by providing that when the Environmental Protection Agency reviews a state’s proposed water quality standards, “[t]he review involves a determination of ... [w]hether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses...” (40 C.F.R. § 131.5(a)(4).) It is clear, therefore, that it is the State’s responsibility to determine whether fishing and swimming uses should be designated and, if not, to support that determination.

Based on the CWA and federal regulations, it is improper to conclude that the CWA designates all waters of the United States as having beneficial uses of fishing and swimming. NCWA is unaware of any examples of uses being “attributed” or designated by operation of law and, therefore, suggests that item number four be deleted. Alternatively, NCWA requests clarification of the term “attributed” and identification of all instances where the Regional Board believe that uses are “attributed by operation of law.”

