O'Laughlin & Paris LLP Attorneys at Law

VIA US MAIL AND ELECTRONIC MAIL (byee@waterboards.ca.gov)

July 22, 2009

Betty Yee
Regional Water Quality Control Board,
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670.

Re: Solicitation of information for the 2009 Triennial Review of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins

Dear Ms. Yee:

In response to the Central Valley Regional Water Quality Control Board ("CVRWQCB") solicitation for information regarding the 2009 Triennial Review of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins ("Basin Plan"), the San Joaquin River Group Authority ("SJRGA") offers the following comments.

1. Beneficial Use Designations and Effluent and Agriculture Dominated Water Bodies

The first three issues summarized in Attachment 1, beneficial use designations, effluent dominated water bodies, and agriculture dominated water bodies, are by far the most important. All three issues tie into beneficial use designations, the starting point for basin planning and regulatory action.

Current beneficial use designations derive from the 1971 Interim Basin Plan, which was simply intended "as a guide for water quality management and for waste treatment plant construction in the next two years, until completion of comprehensive basin and regional plans which are now under preparation." (1971 Basin Plan, forward.) It was not intended to be used as the basis for beneficial use designations. Rather, it was the initial step toward a more comprehensive "Fully Developed Water Quality Control Plan." (Id.) During the interim period, "intensive study" would be made to better catalog all present uses of the water in both basins. (1971 Basin Plan, p. 30.) At that time a more detailed list of beneficial uses would be developed and locations of specifics uses would become a part of a fully developed plan the CVRWQCB was required to submit to the USEPA by July 1, 1973. (Id.)

Post Office Box 9259
Chico, California 95927-9259
www.olaughlinandparis.com

530.899.9755 tel
530.899.1367 fax

By the 1975 triennial review, which resulted in adoption of the 1975 Basin Plan, the CVRWQCB only had designated uses for less than 100 water bodies out of an estimated 10,000. Instead, the 1975 Basin Plan adopted the now infamous "tributary rule," which applied the beneficial uses of the listed streams, lakes, and reservoirs to all tributary streams that were not listed. The Regional Board envisioned that, in the ensuing years, there would be a continuing planning process in which tributaries of the major water bodies would be investigated in some priority fashion, and the beneficial uses of these tributaries would be identified and designated in periodic amendments to the Basin Plan." In other words, the tributary footnote was intended to act as a stop gap measure until more factual information was available. The language was revised in 1995 and currently reads:

> The beneficial uses of any specifically identified water body generally apply to its tributary streams… In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board's judgment will be applied. It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis.

(Basin Plan, p. II-2.00.)

As a result of the revised Tributary Rule language, downstream beneficial uses apply to an upstream tributary that is not listed in the Basin Plan unless the beneficial use is de-designated in a Basin Plan amendment. (SWRCB Water Quality Order No. 2002-0015, *In the Matter of the Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 For Vacaville's Easterly Wastewater Treatment Plant Issued by the California Regional Water Quality Control Board, Central Valley Region* ("SWRCB WQO 2002-0015") (Oct. 3. 2002), p. 10-14.)

While basin plan provisions assigning downstream beneficial uses to upstream tributaries are valid as a general rule, its application in particular cases can lead to unreasonable results. (SWRCB WQO 2002-0015, p. 15.) In general, if the CVRWQCB has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use. (Id.) It is also unreasonable in the interim until the CVRWQCB either successfully amends the Basin Plan to de-designate the use or determines that the use cannot be legally de-designated. (Id.) In the interim, the CVRWQCB needlessly expends resources protecting a designated use that does not exist and likely cannot be feasibly attained and the regulated community needlessly expends resources complying. The current situation has been described as a "bureaucratic bait and switch," wherein the CVRWQCB precludes addressing issues of beneficial use designations during §303(d), TMDL, and permitting processes, tells the public to raise issues of beneficial use designations in the Triennial Review, but then never addresses issues of beneficial use designations. (City of Burbank v. St. Water Resources Control Bd. (2005) 35 Cal.4th 613, 633 (Brown, J., conc.).)

At a minimum, if the CVRWQCB has evidence that a use neither exists nor likely can be feasibly attained, it must expeditiously initiate appropriate Basin Plan amendments to consider de-designating the use. (SWRCB WQO 2002-0015, p. 15.) Thus far, such a process has occurred for one stream, Old Alamo Creek, but for the CVRWQCB to address similarly situated streams and permits issued under similar conditions, a more efficient process is required. The CVRWQCB should not wait for an order from the SWRCB to "expeditiously" initiate an appropriate Basin Plan amendment and neither should it indefinitely defer such review to a triennial review.[1]

In addressing beneficial use designations for agriculture and/or effluent dominated water bodies and for other water bodies subject to regulatory standards for beneficial uses that do not exist, the CVRWQCB can take reactive and proactive approaches. As with Old Alamo Creek, if evidence collected during a permitting process shows a beneficial use does not exist and is inappropriate for a water body it can issue a permit with a time schedule allowing sufficient time for data collection and a Basin Plan amendment and then expeditiously amend the Basin Plan. However, the CVRWQCB should couple such an aspect of its permitting process with a proactive ongoing process addressing site-specific beneficial use designations for agriculture dominated water bodies, effluent dominated water bodies, and other water bodies. At the least, the CVRWQCB could solicit information to compile a list of water bodies falling under exceptions 2a and 2b in the *Sources of Drinking Water Policy*.[2] (SWRCB Resolution 88-63 (May 19, 1988).)

2. Discharge Controls on in-Delta Discharges of Salts by Agricultural, Domestic, and Municipal Dischargers

The 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Plan") includes salinity objectives for three locations in the Southern Delta referred to as the "Interior South Delta."[3] (2006 Bay-Delta Plan, p. 13.) Among other implementation actions, the 2006 Bay-Delta Plan stated that the

---

[1] In WQO 2002-0015, the SWRCB concluded that, although the CVRWQCB was correct in finding that certain beneficial uses applied to Old Alamo Creek. However, since there was evidence that the beneficial uses at issue were not existing uses, it ordered the CVRWQCB, repeatedly, to "expeditiously" amend the Basin Plan to de-designate certain beneficial uses.

[2] Under the *Sources of Drinking Water Policy*, all 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… Surface and ground waters where:

a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or

b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards.

[3] The three locations are the San Joaquin River at Brandt Bridge, Old River near Middle River, and Old River at Tracy Road Bridge.

CVRWQCB "shall impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers." (Id. at 28.) Despite the 2006 Bay-Delta Plan's mandatory directive, the SJRGA is unaware of any of any effort initiated by the CVRWQCB to address such in-Delta discharges. However, since Water Code §§13146 and 13247 generally require that the CVRWQCB comply with all applicable water quality control plans approved or adopted by the SWRCB, the CVRWQCB must impose discharge controls on in-Delta discharges of salts.

The most practical long-term implementation action for the Interior South Delta Salinity Objectives has long been the construction of construction of physical facilities to provide adequate circulation and substitute supplies. (1978 Bay-Delta Plan, p. VI-23; *see also* U.S. v. St. Water Resources Control Bd. (1987) 182 Cal.App.3d 82, 122 fn12.) However, the recent National Marine Fisheries Service Biological Opinion for the Central Valley Project and State Water Project prohibits construction and operation of permanent operable gates as currently designed and contemplated. As a result, the permanent operable gates may no longer be a realistically feasible long-term solution. Even if permanent operable gates remained realistically feasible and were constructed, the Department of Water Resources and U.S. Bureau of Reclamation still expect exceedances to occur. The only implementation action remaining in the Bay-Delta Plan for which no effort has been made is discharge control on in-Delta discharges of salts. Now that permanent operable gates are no longer realistic nor feasible, controlling in-Delta discharges of salts is needed more than ever.

3. Maximum Contaminant Levels

The Chemical Constituents objective contained in the Basin Plan currently incorporates primary and secondary maximum contaminant levels ("MCLs") contained in §64449 Table 64449-B in the California Code of Regulations by reference for application to MUN-designated surface waters. (Basin Plan, p. III-3.00.) Secondary MCLs apply to water provided to the public by community water systems. (Cal. Code Regs., tit. 22, §64449(a).) A "community water system" is defined as a public water system serving at least 15 service connections or regularly serving an average of at least 25 individuals daily at least 60 days out of the year. (Cal. Code Regs., tit. 22, §64410.10.) Since Secondary MCLs apply to water "supplied to the public," they apply at the tap, not the source.[4] (Cal. Code Regs., tit. 22, §64449(a).) The result is that although the Basin Plan applies Secondary MCLs to surface water, the regulatory language for the Secondary MCLs themselves only applies Secondary MCLs to tap water provided by community water systems; not to surface waters or to tap water not provided by community water systems. Secondary MCLs could consequently become applicable to water bodies where MUN is not an existing use, where there are no community or private water systems, and where there is no realistic possibility that the water body will supply a community or

[4] This is consistent with the federal definition, pursuant to which an MCL is the maximum permissible level of a contaminant in water which is delivered to the free flowing outlet of the ultimate user of public water system. (22 C.F.R. §143.2(f); *see also* 44 Fed. Reg. 42197 (Jul. 19, 1979).)

public water system any time in the foreseeable future. The result is the same as the Tributary Rule and may lead to similarly unreasonable results.

Additionally, the incorporation by reference is prospective and includes future changes, including future changes to the incorporated provisions as the changes take effect. (Basin Plan, p. III-3.00.) However, by automatically incorporating revised MCLs, the Basin Plan effectively amends applicable water quality objectives without the CVRWQCB considering the required factors set forth in Water Code §13241. In order for the CVRWQCB to comply with its duties to consider the Water Code §13241 factors whenever it adopts new or revised water quality objectives, the CVRWQCB may consider amending the Basin Plan language to incorporate only MCLs adopted as of a date specified and then update the language in future Basin Plan amendments.

4. Non-Substantive Recommended Amendments

a. Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

In general, the Basin Plan has always referenced a particular edition of the Bay-Delta Plan, such as the 1978 Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh or the 1991 Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("1991 Salinity Plan"). The current recommended non-substantive regulatory revisions continue this practice, referencing the 1995 Bay-Delta Plan and 2006 Bay-Delta Plan. However, amendments to Bay-Delta Plan have occurred faster than the CVRWQCB updates the references in the Basin Plan. As a result, the current Basin Plan language still references the long-outdate 1991 Salinity Plan, parts of which were never even approved by the USEPA. A better approach may be to simply reference the "current" water quality control plan for the Bay-Delta.

b. "Potential" Beneficial Uses

The Basin Plan designates water bodies with "potential" beneficial uses. The USEPA regulations define "existing" use, but nowhere do the regulations, the Basin Plan, or any state plan or policy define "potential" use except to say that a potential use in not an existing use. In the triennial review, the CVRWQCB should consider, as clarification, defining what a "potential beneficial use" is, rather than simply defining what a potential beneficial use is not.

c. Temperature

Under the Basin Plan:

> The natural receiving water temperature of intrastate waters shall not be altered unless it can be demonstrated to the satisfaction of

> the Regional Water Board that such alteration in temperature does not adversely affect beneficial uses… At no time or place shall the temperature of COLD or WARM intrastate waters be increased more than 5°F above natural receiving water temperature.

(Basin Plan, p. III-8.00.)

As written, the Temperature Objective for intrastate waters depends on natural receiving water temperature as its baseline. However, natural receiving water temperature is defined only in the *Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays of California* ("Thermal Plan"). The Thermal Plan defines natural receiving water temperature as "[t]he temperature of the receiving water at locations, depths, and times which represent conditions unaffected by any elevated temperature waste discharge or irrigation return waters." (Thermal Plan, p1.) "Elevated temperature waste" is "[1]iquid, solid, or gaseous material including thermal waste discharged at a temperature higher than the natural temperature of receiving water." (Id.) "Thermal waste" is "cooling water and industrial process water used for the purpose of transporting waste heat." (Id.)

Although the Thermal Plan applies to coastal and interstate waters and to enclosed bays and estuaries, the SWRCB has nonetheless used adopted the definition of natural receiving water temperature contained therein as the definition for natural receiving water temperature applicable for intrastate waters.[5] (SWRCB Water Quality Order No. 2002-0015, *In the Matter of Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 for Vacaville's Easterly Wastewater Treatment Plant Issued by the California Regional Water Quality Control Board, Central Valley Region*, p. 49 (Oct. 3, 2002).) When and agency uses an identical term that has a specific definition in similar regulations, the use of the term is presumed to have the same meaning. (Boise Cascade Corp. v. USEPA, 942 F.2d 1427, 1432 (9th Cir. 1991); Urban Renewal Agency v. Calif. Coastal Zone Conservation Co. (1975) 15 Cal.3d 577, 584-585.) Consequently, the definition of natural receiving water temperature for the Temperature Objective for intrastate waters is the same as that in Thermal Plan. For clarification, the CVRWQCB should therefore either include the definitions of natural receiving water temperature, elevated temperature waste, and thermal waste in the Basin Plan or adopt the definitions by referencing the Thermal Plan.

[5] The legislative history also suggests that the Basin Plan intended to use the definition of natural receiving water temperature broadly and apply it to intrastate waters. The term first appeared in the Thermal Plan, adopted in 1972 and revised in 1975. It subsequently appeared in the next edition of the Basin Plan, which was also adopted in 1975.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By: 

KENNETH PETRUZZELLI