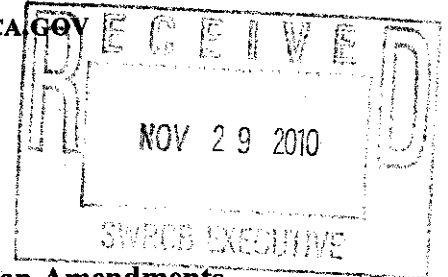


Public Comment
Reg. 5 Non-Reg Basin Plan
Deadline: 11/30/10 by 12 noon

November 29, 2010

VIA U.S. MAIL AND EMAIL - COMMENTLETTERS@WATERBOARDS.CA.GOV

Jeanine Townsend, Clerk to the Board and Board Members
State Water Resources Control Board
1001 I Street, P.O. Box 100
Sacramento, CA 95812-0100



Re: **Comment Letter – Region 5 “Non-Regulatory” Basin Plan Amendments**
Comments by City of Tracy
Client-Matter No. 07547.00004

Dear Ms. Townsend and Members of the State Water Resources Control Board:

On behalf of the City of Tracy (“City”), we would like to provide comments on the recently noticed “non-substantive” or “non-regulatory” changes to the Central Valley Water Quality Control Plan (“Basin Plan”). The City believes that many of these changes are in fact substantive, with regulatory consequences, and require further analysis under the mandates of the Water Code and the California Environmental Quality Act (“CEQA”). For these reasons, the City objects to the approval of many of these changes.

ADDITION OF BENEFICIAL USES AND OBJECTIVES

First, the Regional Water Quality Control Board for the Central Valley (“Regional Board”) is attempting to add objectives and use designations that have not been in the Basin Plan ever, or for at least 20 years. These are, therefore, for all intents and purposes new water quality standards that must comply with the Clean Water Act, Porter Cologne Water Quality Control Act, including Water Code sections 13241 and 13242, and the functional equivalent process under the California Environmental Quality Act (“CEQA”).

A similar attempt to do this kind of “error-fixing” was not accepted by the State Water Board previously, and should be rejected now. In 2006, the San Diego Regional Water Quality Control Board attempted to reinsert prior Basin Plan language regarding “controllable water quality factors” as a “non-substantive change” to the Basin Plan in Resolution No. R9-2006-0029. At the State Board hearing, this part of the Basin Plan amendment was not approved due to the recognition by the State Board that many things had changed in the law and interpretations of the Basin Plan since the time that this language had previously existed in the plan. The State Board did not agree that this was a non-substantive change, and the language was not approved. See State Board Res. 2006-0090. This precedent should be considered and followed in this case.

Where the Regional Board is attempting to impose beneficial use designations on Marsh Creek and Marsh Creek Reservoir, it must first ensure that these are past, present or probable future uses and ensure that the actual designations are accurate as the Regional Board was instructed by the State Board to do in 1990 in Res. 90-28. Further, "potential" uses, as proposed for REC-1 or REC-2, are inconsistent with state law (Water Code §13241(a)) and have been rejected in other cases. To avoid having to undertake a costly de-designation process, the Regional Board should be required to ensure that the uses being designated are accurate and based on evidence in the record. Justifying this designation on the grounds that this is merely "correcting an error" is inadequate without evidence that these are existing uses.

Similarly, the Regional Board is proposing to include new boron objectives for several water bodies, and new radioactivity objectives without compliance with Water Code section 13241 (mandated factor analysis) and 13242 (implementation plan). The State Board should reject this proposal as a substantive change that is inconsistent with state law.

Moreover, the Regional Board again proposes that the new radioactive objectives be *prospectively* incorporated by reference. Such prospective incorporation guarantees that no section 13241 analysis or section 13242 implementation plan will be done for any new objectives automatically incorporated in the future. In addition, this incorporation of drinking water standards adopted by another state agency that has no obligations or mandates under the Water Code represents an unlawful delegation of the Regional Board's powers to adopt water quality objectives. Water Code §13223(a).

For each of these reasons, the State Board should reject the proposed modifications to Footnote 9 of Table II-1, Table III-1, and the Radioactivity objective at page III-6.01 of the Basin Plan.

INCORPORATION OF THE 1995 AND 2006 DELTA PLAN OBJECTIVES

Second, the State Board should reject the Regional Board's proposed incorporation of the 1995 and 2006 amendments to the San Francisco Bay/Sacramento-San Joaquin Delta Plan ("Delta Plan") into the Basin Plan as these amendments have not yet been approved by the U.S. EPA.

In September of 1991, the U.S. EPA again approved of the 1991 salinity objectives set to protect municipal, industrial, and agricultural beneficial uses as "water quality standards" (*See PLAN AMENDMENT REPORT, APPENDIX 1 TO THE 2006 WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY/ SACRAMENTO-SAN JOAQUIN DELTA ESTUARY* (December 13, 2006) at 10). Those 1991 standards were the ones incorporated into the Basin Plan and remain there today. These amendments propose to remove those standards and the accompanying tables and figures (e.g., Figure III-2 and Table III-5). (*See R5-2009-0069* at 2.)

It is important to note that EPA has not approved of the State Board's 1995 or 2006 Delta Plan changes. Therefore, the last "approved" version of the EC standards is the 1991 version,¹ and the 1995 and 2006 modifications are not approved "applicable water quality standards" required to be applied under federal law and regulations.

Moreover, the 2006 amendments to the Delta Plan, which included for the first time a statement that the Electrical Conductivity ("EC") objectives were to apply throughout the Delta and to all dischargers, including the City of Tracy, are currently being challenged by the City and the Central Valley Clean Water Association ("CVCWA"). The case has been completely briefed, except for supplemental responses due on December 3, 2010, and is awaiting a final judgment. In the interim, the State Board's remand order on the issue of EC for the Tracy Permit has been stayed. (See **Exhibit A**, Superior Court Order.) Given this legal uncertainty, the State Board should defer incorporating the 2006 Delta Plan amendments into the Basin Plan until a final judicial determination has been made on the validity of the EC provisions contained therein.

This deferral would be consistent with the State Board's action on the 2010 303(d) list in which Mr. Howard's list transmittal letter to EPA stated that the listing of Old River for EC is "currently being held in abeyance due to existing litigation."² EPA, in its response letter to the State Board, stated that it "understands that the State is not listing the following water body pollutant combinations as requiring a TMDL as part of its 2008-2010 submittal:

Old River (San Joaquin River to Delta Mendota Canal in Delta Waterways, southern portion) – Salinity."³

Alternatively, the State Board should order the Regional Board to conduct the 13241 analysis and adopt a 13242 implementation plan for any salinity objectives for the lower San Joaquin River and southern Delta incorporated into the Basin Plan. Such analysis has never before been done, and the City would like to point out that hundreds of millions of dollars will be

¹ There is no evidence that any later version than the 1991 version of the Delta Plan was ever approved by EPA. Although the 1995 version was similar (see **Exhibit B** attached hereto, 1995 Delta Plan, at 14, Chapter III, Para. B. ("With the exception of the effective date of the salinity objectives for the southern Delta stations on Old River, these objectives are unchanged from the 1991 Bay-Delta Plan.")), the State Board expressly conditioned and narrowed the impact of EPA review of those objectives. *Id.* at 11 ("The USEPA's approval of this water quality control plan will not give the USEPA authority to enforce the plan's flow, operations, and salinity intrusion objectives.")

² See **Exhibit C** attached hereto, State Board October 11, 2010 Transmittal of the 2010 Integrated Report [Clean Water Act Section 303(d) and Section 305(b)].

³ See **Exhibit D** attached hereto, EPA Letter to Tom Howard, Executive Director, State Water Resources Control Board at pg. 7 of attachment, undated, but posted on EPA website at <http://www.epa.gov/region9/water/tmdl/california.html> (stating approved on November 12, 2010).

needed around the Delta for many of the municipal dischargers to consistently meet an end-of-pipe effluent limits that equate to the water quality objectives in the Delta Plan.

Similarly, if all agricultural discharges currently regulated under the waiver were required to meet these Delta Plan objectives, the costs to farmers will be huge. These costs must also be considered pursuant to Water Code §13141. For these reasons, the City requests that the State Board reject these modifications to the Basin Plan until the Regional Board carefully considers and balances each of the factors in Water Code section 13241 when incorporating the revised EC objectives from the 2006 Delta Plan amendments, and include a comprehensive implementation plan for those objectives as required by Water Code section 13242.⁴ Alternatively, the Regional Board should be required to wait to incorporate new salinity objectives until the State Board finalizes its review and modification of those objectives in the Delta Plan amendments that are currently underway.

NEW IMPLEMENTATION PROVISIONS

In addition to the modifications to the Basin Plan's water quality standards, the proposed changes also modify the Basin Plan's implementation provisions. The City has the following comments on the proposed revisions:

1. **Chapter IV: Implementation at IV-8.00**

The proposed modifications appear to be mere wording changes, but the changes make the statements included inaccurate. It is not true that all State Board water quality policies and plans supersede Regional Water Board action. To correct this inaccuracy, the words ", as applicable" must be inserted at the end of this revised introductory paragraph to make it accurate.

2. **Chapter IV: Implementation at IV-10.00**

The proposed revisions to the third paragraph of Item 13 paint an incomplete picture of the history of the Delta Plan salinity objectives. This paragraph should be expanded to include the fact that these objectives have been deferred many times and are still not truly be applied to the state and federal water projects or agricultural discharges.

As for the changes to Item 14, it is unclear why the first two paragraphs regarding the Nonpoint Source Management Plan are being stricken when the title of the Section still includes the Plan. These two paragraphs should be maintained to explain the history, but the second paragraph should be amended as follows:

"The Plan's management approaches ~~were~~ ~~are~~ listed in order of increasing stringency. In general the Plan required that the least stringent option that successfully protects or

⁴ This implementation plan should recognize, as the State Board recognized in 1995, that "[n]one of the flow, operations, and salinity intrusion objectives in this plan can be attained by regulating discharges from point sources." (See **Exhibit B** at 11.)

restores water quality should be employed, with more stringent measures considered if timely improvements in beneficial use protection are not achieved. The Regional Board will was authorized to determine which approach or combination of approaches is was most appropriate for any given nonpoint source problem.

3. Items 16-19, Control Action Considerations of the State Water Board at IV-10.01

The proposed amendments include references to various State Board policies. However, it is not clear whether these policies are being included to supersede similar Basin Plan provisions and policies. For example, Item 19 is referencing the State Board's Compliance Schedule Policy, but does not explain how this policy coordinates with the Basin Plan's compliance schedule provisions.

4. Inadequate Justification for Remaining Modifications

In the final pages, the Regional Board proposes language changes in addition to removal of Table IV-1 (listing a whole litany of Waste Discharge Requirement Waivers and Limitations), deleting introductory paragraph on Page IV-30.00, and deleting several sections on Page IV-37.00, and Appendices 31-32. Inadequate justification for these deletions has been provided. Instead of deletions, outdated information should be updated to be consistent with current programs and practices to aid the reader in understanding the history and the current processes set forth in the Basin Plan. Wholesale deletions of important information should be avoided without adequate explanation, or future amendments may be required to again reinsert information removed by error.

Thank you for allowing the City to submit comments on these Basin Plan amendments. We hope that the State Board will agree that the majority of these amendments are truly substantive and require additional analysis under the Water Code and CEQA. In addition, and most importantly, the State Board should delay action on these amendments until a court ruling on the legality of the 2006 Delta Plan amendments is resolved.

Respectfully submitted,

DOWNEY BRAND LLP



Melissa A. Thorme
Special Counsel for the City of Tracy

1122143.1

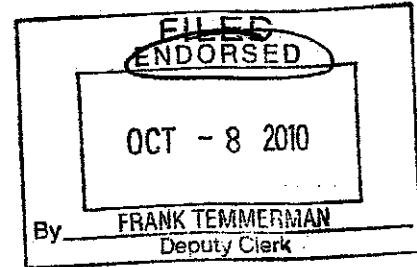
cc: Dan Sodergren, Tracy City Attorney
Steve Bayley, City of Tracy

EXHIBIT A

1 DOWNEY BRAND LLP
2 MELISSA A. THORME (Bar No. 151278)
3 LESLIE FREDRICKSON (Bar No. 265043)
4 621 Capitol Mall, Eighteenth Floor
5 Sacramento, CA 95814-4686
6 Telephone: (916) 444 -1000
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9 lfredrickson@downeybrand.com

10 Attorneys for Petitioner/Plaintiff
11 CITY OF TRACY

EXEMPT FROM FILING FEES
GOVERNMENT CODE § 6103



12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SACRAMENTO

14 CITY OF TRACY,
15 Petitioner/Plaintiff,
16 v.
17 CALIFORNIA STATE WATER
18 RESOURCES CONTROL BOARD,
19 Respondent/Defendant.

20 CENTRAL VALLEY CLEAN WATER
21 ASSOCIATION,
22 Intervenor/Plaintiff.

Case No. 34-2009-80000392-CU-WM-GDS

**[PROPOSED] ORDER GRANTING
PETITIONER CITY OF TRACY'S
REQUEST FOR TEMPORARY STAY**

DATE: October 1, 2010
TIME: 9:00 a.m. - 11:00 a.m.
DEPT.: 29
JUDGE: Honorable Timothy M. Frawley

23 The motion by the City of Tracy ("Tracy") for a limited, temporary stay of the State Water
24 Resources Control Board ("State Water Board") Order No. WQ 2009-03 (In the Matter of the
25 Petition of Environmental Law Foundation and California Sportfishing Protection Alliance for
26 Review of Waste Discharge Requirements Order No. R5-2007-0036 [NPDES Permit No.
27 CA0079154] and Time Schedule Order No. R5-2007-0037 for the City of Tracy Wastewater
28 Treatment Plant, San Joaquin County, issued by the RWQCB, Central Valley Region), came on
hearing at 9:00 a.m. on October 1, 2010, in the above-entitled Court, the Honorable Timothy M.

1 Frawley presiding. Appearances were noted on the record. Having considered the papers and
2 argument, and for good cause,

3 **IT IS HEREBY ORDERED AS FOLLOWS:**

4 In accordance with California Code of Civil Procedure section 1094.5(g) and in order to
5 maintain the status quo, the Court finds that a temporary stay is in the public interest and hereby
6 GRANTS Petitioner City of Tracy's request for temporary stay of certain limited provisions of
7 State Water Board Order No. WQ 2009-03, which remanded the Tracy NPDES Permit to the
8 Regional Water Quality Control Board for the Central Valley Region. The following provisions
9 of State Water Board Order No. WQ 2009-03 are HEREBY STAYED:

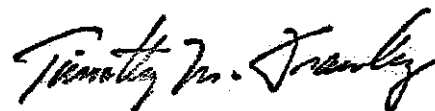
10 1. Pages 5-10, Section II.A regarding Electrical Conductivity (located in the
11 Administrative Record in this matter at CSPA000397-402); and

12 2. Page 19, Section III.1 regarding amending the Tracy Permit to include a final
13 effluent limitation for Electrical Conductivity in compliance with the salinity objectives in the
14 Bay-Delta Plan (located at CSPA000411).

15 This stay shall remain in place until a final judicial determination and judgment is made in
16 this matter.

17 **IT IS SO ORDERED.**

18 DATED: October 8, 2010



HONORABLE TIMOTHY M. FRAWLEY

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EXHIBIT B



WATER QUALITY CONTROL PLAN

**for the
San Francisco Bay/
Sacramento-San Joaquin
Delta Estuary**

**95-1WR
MAY 1995**

**STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY**



water quality regulatory framework. (Stats. 1969, Ch. 482) The Porter-Cologne Act also added new sections, and amendments to existing sections, which apply to water rights regulation. Water Code section 1258 was amended to its current form, which requires the SWRCB to consider terms and conditions implementing water quality control plans when it acts on water right applications. Water Code section 1257, as amended, requires the SWRCB, in considering water right applications, to consider the relative benefit to be derived from all beneficial uses of the water concerned, including any uses specified to be protected in any relevant water quality control plan. Water Code section 1242.5 was added, authorizing the SWRCB to approve appropriation by storage of water to be released for the purpose of protecting or enhancing the quality of other waters. Water Code section 1243.5 was added, requiring the SWRCB to take into account when it decides how much water is available for appropriation, if it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses. The section provides that beneficial uses include any uses specified to be protected in any relevant water quality control plan.

4. Program of Implementation. A program of implementation for achieving water quality objectives shall include, but not be limited to: (1) 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; (2) a time schedule for the actions to be taken; and (3) a description of surveillance to be undertaken to determine compliance with the objectives. (Wat. Code §13242)

5. USEPA Approval of This Plan. After adopting this water quality control plan, the SWRCB will submit this plan to the USEPA for approval under the federal Clean Water Act (33 U.S.C. section 1251 et seq.). To the extent that this plan addresses matters outside the scope of the Clean Water Act, this plan will be provided to the USEPA for its consideration as a matter of State/federal comity. When the USEPA approves this plan, the USEPA is expected to withdraw the standards it has adopted. When the USEPA withdraws its standards, the objectives and beneficial uses in this plan that are water quality standards within the meaning of the Clean Water Act will be California's water quality standards for purposes of the Clean Water Act.

In addition to Clean Water Act section 303(c), some of the matters in this plan are within the scope of Clean Water Act section 208 or 319. Some matters also are a part of the continuing planning process under section 303(e). Even though the SWRCB will submit this plan to the USEPA for approval, the SWRCB does not concede that it is required under the Clean Water Act to submit all parts of this plan to the USEPA. In the view of the SWRCB, the objectives for flow and operations are not subject to USEPA approval, but the USEPA may disagree. Assuming the USEPA has authority under the Clean Water Act to approve these objectives, the SWRCB believes that the USEPA could not adopt standards for these parameters under the

Clean Water Act⁵. If the USEPA attempted to adopt such standards, it could fundamentally interfere with the State's water allocation authority under section 101(g) of the Clean Water Act⁶.

Further, any concerns that the USEPA's approval of standards will enhance its regulatory authority are unfounded. The USEPA's approval of this water quality control plan will not give the USEPA authority to enforce the plan's flow, operations, and salinity intrusion objectives. The USEPA's authority directly to enforce water quality standards is limited to requiring permits for discharges from point sources to navigable waters; all other enforcement of standards is left to the states. (See 33 U.S.C. §1342) None of the flow, operations, and salinity intrusion objectives in this plan can be attained by regulating discharges from point sources.

This does not mean that the USEPA lacks other regulatory authority. The USEPA's regulatory authority to protect beneficial uses is independent of the existence of water quality standards. Under Clean Water Act section 404, the USEPA has authority to veto permits for the discharge of dredged or fill material into navigable waters. With this authority, the courts have allowed the USEPA to veto dredge and fill permits for projects that will result in adverse effects on beneficial uses, even when the construction itself will not directly cause the adverse effects. (See Riverside Irrigation District v. Andrews (1985) 758 F.2d 508; United States v. Akers (1986) 785 F.2d 814; James City County v. Environmental Protection Agency (1993) 12 F.3d 1330, cert. denied 115 S.Ct. 87 (1994)) Thus, even in the absence of federal standards for flow and operations, the USEPA could restrict the construction of new Delta facilities and their operations.

⁵ The SWRCB reserves its arguments regarding the USEPA's authority to adopt standards for flow and operations, including standards for salinity intrusion. The SWRCB's legal comments regarding the USEPA's authority are set forth in the SWRCB's comments on the USEPA's January 6, 1994 draft standards, which were provided to the USEPA on March 11, 1994.

⁶ The Supreme Court, in PUD No. 1 of Jefferson County v. Washington Dep't of Ecology (1994) 114 S.Ct. 1900, upheld a state's ability to impose an instream flow requirement under Clean Water Act section 401 to protect fish habitat which had been designated as a beneficial use in a water quality standard under Clean Water Act section 303. In reaching this result, the Supreme Court rejected arguments based on Clean Water Act section 101(g) that water quantities could not be regulated under the Clean Water Act. The Supreme Court pointed out that insufficient flows can cause water quality violations, and that reduced habitat caused by low flows may constitute pollution. The Court's narrow interpretation of section 101(g) allows regulation of water users by a state to prevent their having an adverse effect on water quality, but does not go so far as to allow a fundamental interference by the USEPA with a state's water allocation authority.

CHAPTER III. WATER QUALITY OBJECTIVES

This chapter establishes water quality objectives which, in conjunction with the water quality objectives for the Bay-Delta Estuary that are included in other SWRCB-adopted water quality control plans and in the water quality control plans for the Central Valley and San Francisco Bay basins, when implemented, will: (1) provide reasonable protection of municipal, industrial, and agricultural beneficial uses; (2) provide reasonable protection of fish and wildlife beneficial uses at a level which stabilizes or enhances the conditions of aquatic resources; and (3) prevent nuisance. These water quality objectives are established to attain the highest water quality which is reasonable, considering all demands being made on the waters of the Estuary.

The water quality objectives in this plan apply to the waters of the San Francisco Bay system and the legal Sacramento-San Joaquin Delta, as specified by the objectives. Tables 1, 2, and 3 contain the water quality objectives for the protection of municipal and industrial, agricultural, and fish and wildlife beneficial uses, respectively.

A. Water Quality Objectives for Municipal and Industrial Beneficial Uses

The water quality objectives in Table 1 are included for the reasonable protection of the beneficial uses, MUN, IND, and PROC, from the effects of salinity intrusion. These municipal and industrial objectives also provide protection for the beneficial uses of REC-1, REC-2, and GWR. These objectives are unchanged from the 1991 Bay-Delta Plan.

B. Water Quality Objectives for Agricultural Beneficial Uses

The water quality objectives in Table 2 are included for the reasonable protection of the beneficial use, AGR, from the effects of salinity intrusion and agricultural drainage in the western, interior, and southern Delta. With the exception of the effective date of the salinity objectives for the southern Delta stations on Old River, these objectives are unchanged from the 1991 Bay-Delta Plan.

C. Water Quality Objectives for Fish and Wildlife Beneficial Uses

The objectives for the protection of fish and wildlife beneficial uses are established for the following parameters: dissolved oxygen, salinity (expressed as electrical conductivity), Delta outflow, river flows, export limits, and Delta Cross Channel gate operation. Unlike water quality objectives for parameters such as dissolved oxygen, temperature, and toxic chemicals, which have threshold levels beyond which adverse impacts to the beneficial uses occur, there are no defined threshold conditions that can be used to set objectives for flows and project operations. Instead, the available information indicates that a continuum of protection exists. Higher flows and lower exports provide greater protection for the bulk of estuarine resources up to the limit of unimpaired conditions. Therefore, these objectives must be set based on a subjective determination of the reasonable needs of all of the consumptive and nonconsumptive

EXHIBIT C



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Executive Office

Charles R. Hoppin, Chairman
1001 I Street • Sacramento, California 95814 • (916) 341-5603
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100
Fax (916) 341-5621 • <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

OCT 11 2010

Ms. Alexis Strauss, Director (WTR-1)
Water Division
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Dear Ms. Strauss:

TRANSMITTAL OF THE 2010 INTEGRATED REPORT [CLEAN WATER ACT SECTION 303(d) AND SECTION 305(b)]

On August 4, 2010 under Resolution No. 2010-0040, the State Water Resources Control Board (State Water Board) approved the 2010 Clean Water Act section 303(d) list of water quality limited segments for California. Pursuant to Clean Water Act section 303(d)(2), the State Water Board is submitting to U.S. Environmental Protection Agency the 2010 Integrated Report and supporting documentation, as described below. The 2010 Integrated Report contains five categories (1 through 5). The California 303(d) list is comprised of categories 4a, 4b, and 5 of the Integrated Report.

Please note that the recommendations to retain on the list the following water body-pollutant combinations are currently being held in abeyance due to existing litigation: Old River - Electrical Conductivity, Lower San Joaquin River between Mendota Pool and Airport Way Bridge - Electrical Conductivity, and Delta Waterways Stockton Ship Channel - Organic Enrichment and Dissolved Oxygen.

The 2010 Integrated Report and supporting documentation listed below are being sent separately to Ms. Janet Hashimoto of your office. Changes that the State Water Board recommends are outlined in the State Water Board Resolution. The following information is enclosed in this submission:

- (1) Staff Report contains the listing methodology used; summaries of the proposed additions, deletions, and area changes; the 2006 California 303(d) list;
- (2) Category Reports
- (3) Fact sheets supporting recommendations for listing, delisting, and area changes,
- (4) Miscellaneous changes report
- (5) The State Water Board staff response to comments received between the periods of April 20, 2010 to May 28, 2010,

California Environmental Protection Agency

Ms. Alexis Strauss

- 2 -

OCT 11 2010

- (6) State Water Board Resolution
- (7) Proceedings of the Board Meeting recorded on digital disks (DVD)
- (8) Other 2010 Integrated Report supporting documentations

An updated version of the 2010 Integrated Report approved by the State Water Board and supporting documentation is available online at http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml

We look forward to receiving your approval of the list of water quality limited segments. If you have any questions on this subject, please contact me at (916) 641-5615 (thoward@waterboards.ca.gov). You may also contact Shakoora Azimi-Gaylon, Chief of Water Quality Assessment Unit, who is the lead staff person on this matter at (916) 341-5508 (sagaylon@waterboard.ca.gov).

Sincerely,



Thomas Howard
Executive Director

EXHIBIT D



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

**75 Hawthorne Street
San Francisco, CA 94105-3901**

Mr. Tom Howard
Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Mr. Howard:

Thank you for submitting California's 2010 Integrated Report and supporting documentation pursuant to Clean Water Act Sections 303(d) and 305(b). We received the submittal, including the State's list of water quality limited segments requiring Total Maximum Daily Loads (TMDLs), on October 15, 2010. I commend the State and Regional Board staff for their diligent efforts to improve the water body assessment process that supported the State's list. I am pleased that the State and EPA agreed on more than 99% of the State's assessment determinations identified in the Integrated Report. EPA is therefore acting today to approve the State's inclusion of all waters and pollutants that the State identified as requiring a TMDL and to disapprove the State's omission of several water bodies and associated pollutants that meet federal listing requirements.

We carefully reviewed the State's listing decisions, assessment methodology, and supporting data and information. Based on this review, we have determined that California's 2008-2010 list of water quality limited segments requiring TMDLs partially meets the requirements of Section 303(d) of the Clean Water and EPA's implementing regulations. We approve the inclusion of each of the water bodies and associated pollutants that California has identified as requiring a TMDL. Accordingly, pursuant to 40 CFR 130.7(d), EPA hereby approves each of the State's listings of water quality limited segments requiring a TMDL identified in the 2010 Integrated Report, Appendix A, Category 5 List, except for those listings that the State also describes as "being held in abeyance" in your letter dated October 11, 2010.

During our review, we also identified several water bodies and associated pollutants not included in the 2010 Integrated Report, Appendix A, Category 5 List that meet federal listing requirements. In addition, we conclude that several of the listings which the State determined to hold in abeyance meet federal listing requirements. The water bodies and associated pollutants that we are adding to the State's 2008-2010 list of water quality limited segments are identified in Table 3 in the enclosure. The statutory and regulatory requirements, a summary of our review of California's compliance with applicable requirements and our rationale for adding the water bodies and pollutants is described in the enclosure.


We appreciate your submittal of schedules for TMDL development. We understand these schedules serve the purpose of priority rankings required by federal regulations at 40 CFR 130.7(b). We are not taking action on these schedules as federal regulations do not require EPA to act upon TMDL schedules or priority rankings; however, we expect the schedules will guide the State's TMDL development efforts in the future.

The public participation process sponsored by the State Board included several public hearings and opportunities to submit written comments. The State prepared a responsiveness summary explaining how the State considered comments in the final listing decisions. The State's public participation activities were consistent with federal requirements.

We will now solicit public comments on the additions to the State's 303(d) list identified in Table 3 in the enclosure. We will provide a responsiveness summary for comments received on these additions and will advise if any revision to EPA's determination is found to be appropriate.

If you have questions concerning this decision, please call me at (415) 972-3572, Valentina Cabrera Stagno at (415) 972-3434 or Dave Guiliano at (415) 947-4133.

Sincerely yours,


Alexis Strauss
Director, Water Division

12 November 2010

Enclosure

cc: SWRCB members

Regional Board Executive Officers

Enclosure: Review of California's 2008-2010 Section 303(d) List

Review of California's 2008-2010 Section 303(d) List

*Enclosure to letter from Alexis Strauss, EPA Region IX to
Thomas Howard, State Water Resources Control Board*

Date of Transmittal Letter from State: October 11, 2010

Date of Receipt by EPA: October 15, 2010

Purpose

The purpose of this document is to describe the rationale for EPA's partial approval and partial disapproval of California's 2008-2010 list of water quality limited segments requiring a Total Maximum Daily Load (TMDL) under Clean Water Act, Section 303(d)¹. The following sections identify those key elements to be included in the list submittal based on the Clean Water Act and EPA regulations (*see* 40 CFR 130.7). EPA reviewed the methodology used by the State in developing its list and the description of the data and information it considered. EPA's review of California's list is based on EPA's analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed. This review describes the basis for EPA's decision to approve the State's listings of water quality limited segments requiring a TMDL identified in the State's 2010 Integrated Report, Appendix A, Category 5 List.

This document also describes the basis for EPA's decision to disapprove California's decision to not include certain waters and pollutants on its list of water quality limited segments requiring a TMDL. EPA's determination to add waters and/or pollutants is based on monitoring results and information in the State's administrative record, as well as additional material cited in the References section at the end of this document. We carefully reviewed the State's submittal including the listing decisions, assessment methodology, and supporting data and information and paid particular attention to the following portions of the State's submittal:

- i. Staff Report, State Water Resources Control Board, 2010 Integrated Report, Clean Water Act Sections 303(d) and 305(b), dated April 19, 2010 (including decision fact sheets and associated lines of evidence in Staff Report, Appendix G);
- ii. State Water Resources Control Board Resolution No. 2010-0040 (approving the Section 303(d) List portion of the State's Proposed 2010 Integrated Report, with five changes); and
- iii. The State's Staff Responses to Comments on the Proposed 2010 Integrated Report.

As discussed further below, EPA will open a public comment period on these additions to California's Section 303(d) List, and will, if appropriate, revise the list of added waters and pollutants following consideration of any comments received. The general basis for adding individual waters and pollutants are discussed here and case-specific water body information is provided in Table 3 at the end of this document.

¹ California's list of water quality limited segments requiring a TMDL was included as part of its 2010 Integrated Report submitted pursuant to Clean Water Act, section 303(d) and 305(b). Although the submittal refers to a 2010 list, California did not complete a 2008 list of water quality limited segments requiring a TMDL in 2008. EPA therefore considers that the list and supporting determinations included in the State's 2010 Integrated Report comprises the State's listing determinations for the 2008-2010 period.

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Statutory and Regulatory Background

Identification of Water Quality Limited Segments for Inclusion on a Section 303(d) List

Section 303(d)(1) of the Act directs States to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of Section 303(d).

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by federal, State or local authority, and (3) other pollution control requirements required by State, local, or federal authority. See 40 CFR 130.7(b)(1).

Consideration of Existing and Readily Available Water Quality-Related Data and Information

In developing its list of water quality limited segments requiring a TMDL, a State is required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. See 40 CFR 130.7(b)(5). In addition to these minimum categories, States are required to evaluate any other water quality-related data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available (see, EPA 1991, Appendix C). While States are required to evaluate all existing and readily available water quality-related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require States to include as part of their submittal to EPA documentation to support decisions to use or not use particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

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Priority Ranking

EPA regulations also address the requirement in Section 303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require States to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See Section 303(d)(1)(A). As long as these factors are taken into account, the Act provides that States establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), and EPA 1991.

Analysis of California's Submittal

Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information

EPA has reviewed the State's submittal, and has concluded that the State developed its list of water quality limited segments requiring a TMDL in partial compliance with Section 303(d) of the Act and 40 CFR 130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

California used its 2004-2006 Section 303(d) List as its starting point for its 2008-2010 list revision. The State based its 2008-2010 Section 303(d) submittal on its analysis of readily available data and information to determine whether additions to or deletions from the 2004-2006 list were necessary. See Staff Report, pp. 5-6. The State determined that waters listed in 2004-2006 should be retained on the Section 303(d) List unless: (1) new data and information supported a finding that listing requirements are no longer met or (2) errors in the analysis supporting the 2002 or earlier listing were identified. As a result, many waters were retained on the 2008-2010 Section 303(d) List without extensive analysis. EPA concludes that this incremental listing approach is consistent with federal requirements because the State is making the environmentally conservative assumption that previously listed waters are water quality limited segments (WQLSs) absent more recent data or information supporting a different finding. We note, however, that the State conducted assessments of a higher percentage of its waters than in prior listing decisions.

Assembly of Data and Information

The State devoted considerable effort to assemble new data and information for the 2008-2010 list (Staff Report, pp. 1-2). Regional Board staff compiled data and information from multiple sources, including each of the data and information categories identified at 40 CFR 130.7(b)(5). The State solicited data and information from the public on December 4,

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2006 and accepted data submittals until February 28, 2007. The solicitation was mailed to an extensive mailing list, and posted on State and Regional Board websites. The State also assessed several other sources of data including: the extensive monitoring data record compiled in the Surface Water Ambient Monitoring Program (SWAMP) data base for the period 2000-2007; Irrigated Lands Regulatory Program monitoring results; Municipal Separate Storm Sewer System monitoring report data; fish and shellfish advisories, beach advisories or other water quality based restrictions; reports of fish kills, cancers, lesions, or tumors; USEPA databases; Southern California Coastal Water Research Project Data and the San Francisco Estuary Institute's Regional Monitoring Program data; existing Water Board data and reports; existing and readily available water quality data and information reported by local, State and federal agencies, citizen groups, academic institutions and the public; and other sources of data and information that were readily available to Regional Water Board staff. The State considered data and information submitted during the nine Regional Board comment periods and the State Board comment period, the June 2010 workshop and the August 2010 hearing. Data and information sources assembled and considered by the State are specifically identified in the Staff Report and in more than 22,400 individual water body fact sheets included in the list submittal. EPA finds the State's approach assembling readily available information to be generally reasonable.

The State generally focused on data that became available after 2001. In some cases, the State considered older data as part of its 2008-2010 listing assessments, depending upon the pollutants at issue, the types of data (e.g., sediment vs. water column data), and the availability of more recent data and information. EPA finds it reasonable for the State to base its assessments on water quality data generally collected during the 2001-2006 timeframe because the more recent ambient water quality data are more likely to be representative and indicative of current water quality conditions. EPA also finds it is reasonable for the State to consider sediment and tissue data that are older than five years in age because these media usually are longer-term indicators of chemical contamination than ambient water column data, and provide reliable information for assessing water quality conditions for a longer period of time.

The State developed water body fact sheets to summarize listing assessments. The fact sheets include the following elements.

- water body identification information,
- applicable water quality standards/beneficial use information,
- monitoring results by matrix (e.g., water, sediment, tissue),
- data quality information,
- linkage between monitoring results and applicable standards or other guidelines,
- availability of data and information,
- considerations in analyzing data and information (e.g. sample size),
- temporal and spatial representation of available data,
- use of standard analytical methods for data analysis,
- pollutant source(s),
- listing recommendation

The State generated fact sheets for waters and pollutants to be added to the list, to be

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removed from the list, and in cases where new data and information were available but did not support a change in the listing decision. The fact sheets provide good summaries of the listing assessment decisions. The State also incorporated fact sheets previously generated during the 2004-2006 list development as part of the 2008-2010 decision record. EPA reviewed the fact sheets to ensure the basis for each water body assessment was sufficiently clear and consistent with federal listing requirements. We also reviewed the responses to public comments.

Listing Methodology

The list submittal summarizes the listing methodology used by California to develop the 2008-2010 list. In September 2004, the State adopted the *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) list* (the State Listing Policy) in accordance with California Water Code section 13191.3(a). The State Listing Policy contains a generally standardized approach for developing the State's Section 303(d) list. The State Listing Policy provides two assessment methodologies. First, the State Listing Policy specifies explicit factors for making listing and delisting decisions for different pollutant types based on different kinds of data. These quantitative assessment factors in the State Listing Policy specify statistical methods for evaluating potential standards exceedances, minimum data set requirements, and data quality requirements. These decision factors are applied to various types of data, including water chemistry, bacteria, health advisories, fish tissue, nutrients, nuisance factors, adverse biological response, water and sediment toxicity, and degradation of aquatic life populations and communities. The second assessment methodology describes a weight of evidence approach to be used when other listing factors do not result in the listing of a water body but information indicates non-attainment of standards.

California's 2010 Integrated Report includes a list of water segments where a water quality standard is not met or expected to be met, but an impairment is being addressed by a USEPA approved TMDL. See, 2010 Integrated Report, Appendix B, Category 4A List. The Integrated Report also includes a list of water segments where a standard is not met or expected to be met, but where the impairment is being addressed by actions other than TMDLs. See, 2010 Integrated Report, Appendix C, Category 4B List. EPA understands these lists to include water segments and pollutant pairs which the State has identified as impaired but not requiring a new or revised TMDL at this time.

The State used the assessment decision factors identified in the State Listing Policy as the basis for the majority of its 2008-2010 listing decisions and in some cases applied the weight-of-evidence assessment provisions to support decisions to list waters and pollutants. EPA reviewed the various assessments and concludes the State's assessments are consistent with federal listing requirements and applicable water quality standards in almost all cases. EPA, relying on federal listing regulations and guidance, has determined that some waters and/or pollutants that meet the Federal listing requirements under 40 CFR 130.7 were omitted from the State's list of water quality limited segments requiring a TMDL. The basis for EPA's decisions to add several waters/pollutants is discussed in greater detail in the following section.

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Clarifications to the State's Submittal

This section describes a couple of clarifications to the State's submittal.

A. Segment extent clarifications in the North Coast Region

By memorandum dated November 5, 2010, the State Board clarified the geographic extent of certain listings in the North Coast Region. EPA understands that several water body pollutant combinations were inadvertently included in the State's listings of water quality limited segments requiring a TMDL, Category 5 List for a broader extent than intended. Limitations on the areal extent of the listings for these water bodies are described in the fact sheets and supporting documentation in the State's Integrated Report however; those areal limitations were inadvertently left out of the Category 5 List submitted to EPA. EPA hereby clarifies that our approval action on California's 303(d) List includes the areal extents as identified in Table 1 below.

Table 1: Clarification of Areal Extent of Impairment for Specified Water Bodies

Water Body Name	Pollutant	Clarification to Areal Extent of Impairment
Eel River HU, Lower Eel River HA (includes the Eel River delta)	Aluminum	This listing applies to the mainstem Eel River in the Lower Eel River HA (includes the Eel River Delta).
Eel River HU, Middle Fork HA, Eden and Round Valley HSAs	Aluminum	This listing applies to the mainstem of the Middle Fork Eel River in the Middle Fork HA, Eden Valley and Round Valley HSAs.
Eel River HU, Middle Main HA	Aluminum	This listing applies to the mainstem of the Eel River in the Middle Main HA.
Eel River HU, South Fork HA	Aluminum	This listing applies to the mainstem South Fork Eel River in the South Fork Eel River HA. The listing does not include Elder Creek, or any other tributaries in the HA.
Mendocino Coast HU, Gualala River HA, Gualala River	Aluminum	This listing applies to the mainstem Gualala River in the Gualala River HA.
Klamath River HU, Middle HA and Lower HA, Scott River to Trinity River	Sediment	The weight of evidence indicates there is sufficient justification in favor of placing China Creek, Fort Goff Creek, Grider Creek, Portuguese Creek, Thompson Creek, and Walker Creek on the Section 303(d) List in the Water Quality Limited Segments category.
Klamath River HU, Middle HA, Iron Gate Dam to Scott River	Sediment	The weight of evidence indicates there is sufficient justification in favor of placing Beaver Creek, Cow Creek, Deer Creek, Hungry Creek, and West Fork Beaver Creek on the Section 303(d) List in the Water Quality Limited Segments category.

B. Water body pollutant combinations held in abeyance due to existing litigation

The transmittal letter from Thomas Howard to Alexis Strauss dated October 11, 2010 identifies the following water body pollutant combinations as being held in abeyance due to existing litigation:

Old River - Electrical Conductivity, Lower San Joaquin River between Mendota Pool and Airport Way Bridge - Electrical Conductivity, and Delta Waterways Stockton Ship

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Channel – Organic Enrichment and Dissolved Oxygen.

In light of the letter, EPA understands that the State is not listing the following water body pollutant combinations as requiring a TMDL as part of its 2008-2010 submittal:

Old River (San Joaquin River to Delta-Mendota Canal; in Delta Waterways, southern portion) – Salinity
San Joaquin River (Mendota Pool to Bear Creek) – Electrical Conductivity
San Joaquin River (Bear Creek to Mud Slough) – Electrical Conductivity
San Joaquin River (Mud Slough to Merced River) – Electrical Conductivity
San Joaquin River (Merced River to Tuolumne River) – Electrical Conductivity
San Joaquin River (Tuolumne River to Stanislaus River) – Electrical Conductivity
San Joaquin River (Stanislaus River to Delta Boundary) – Electrical Conductivity*
Delta Waterways (Stockton Ship Channel) – Organic Enrichment / Low Dissolved Oxygen*

The San Joaquin River Dissolved Oxygen TMDL approved by EPA on February 27, 2007 and the San Joaquin River Salt and Boron TMDL approved by EPA on February 8, 2007 address the two water body pollutant combinations marked with an asterisk (*) symbol above.

Basis for EPA Decisions to Add Waters To California's 303(d) List

This section describes the basis for EPA's decisions to (1) disapprove the State's decision to not list several water bodies and associated pollutants, and (2) add these water bodies and associated pollutants to the 2008-2010 Section 303(d) List. EPA analyzed the State's water body assessments and supporting rationales to determine whether the State's decisions not to list waters were consistent with federal listing requirements and the provisions of state water quality standards. The State is required to evaluate potential violations of both narrative and numeric water quality objectives 40 CFR 130.7(b)(3).

When determining whether to add waters to California's Section 303(d) List, EPA first considered provisions within State water quality standards and, if necessary, referred to listing criteria contained in EPA's water quality assessment guidance documents (EPA 2001, 2003b, 2005, 2006, 2009).

A. Electrical conductivity and total dissolved solids impairments of Old River and multiple segments of the San Joaquin River

EPA is adding the water body pollutant combinations identified in Table 2 below to the list of water quality limited segments requiring a TMDL. This is being done because they meet the federal listing requirements under 40 CFR 130.7. The water body pollutant combinations identified in Table 2 below as not having been listed in 2004-2006 are being added based on EPA's review of available data which indicates that at least one use is impaired. For the three segments that had been previously listed, no new data was included in the factsheets or supporting documentation to support removal of the impairments from the Section 303(d) List. EPA is adding these three water body

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pollutant combinations listed in 2004-2006 because upon request to the State for good cause for delisting EPA did not receive a water quality based reason for their delisting. Additionally, a preliminary review of data and information not assessed by the State shows continued impairment in the San Joaquin River by electrical conductivity.

Table 2: Water Bodies Held in Abeyance that EPA is Adding to the Section 303(d) List

Water Body Name	Pollutant	Included in 2004-2006 303(d) List
Old River (San Joaquin River to Delta-Mendota Canal; in Delta Waterways, southern portion)	Total Dissolved Solids, Electrical Conductivity	
San Joaquin River (Mendota Pool to Bear Creek)	Electrical Conductivity	Listed
San Joaquin River (Bear Creek to Mud Slough)	Electrical Conductivity	Listed
San Joaquin River (Mud Slough to Merced River)	Electrical Conductivity	Listed
San Joaquin River (Merced River to Tuolumne River)	Electrical Conductivity	
San Joaquin River (Tuolumne River to Stanislaus River)	Electrical Conductivity	

The water bodies identified in Table 2 are designated for Municipal and Domestic Water Supply (MUN) and Agricultural Supply (AGR) uses (RWQCB Central Valley Region, 2009, Table II-1, pp. II-7-8). Of the water bodies included in Table 2, a specific water quality objective for the AGR use applies to Old River only. The AGR use applies to all segments. This objective for electrical conductivity is expressed as follows in the Sacramento and San Joaquin River Basin Plan:

Maximum 30-day running average of mean daily, in mmhos
 Apr 1 – Aug 31 0.7, Sep 1 – Mar 31 1.0
 (RWQCB Central Valley Region, 2009, Table III-5)

The applicable standards for the MUN use for all of the water bodies included in Table 2 are included by reference into the Sacramento and San Joaquin River Basin Plan as chemical constituents that shall not exceed the secondary maximum contaminant levels (MCLs) specified in Title 22 of the California Code of Regulations (RWQCB Central Valley Region, 2009, pp. III-3). The secondary MCL's for electrical conductivity provide a range of values including a recommended level (900 uS/cm), upper level (1600 uS/cm) and a short-term level (2200 uS/cm). The State's Old River assessment for salinity includes an assessment of total dissolved solids (TDS) as well as electrical conductivity. For TDS the recommended level is 500 mg/L, upper level is 1,000 mg/L and the short term level is 1,500 mg/L. EPA assessed available data using the "Recommended" MCLs because they are protective of all drinking water uses and because using those MCLs is consistent with the decision recommendations and supporting factsheets the State approved at their August board hearing. A summary of the water body specific findings are included in Table 3 at the end of the document. Observed exceedances are greater than the 10% exceedance threshold for conventional and other pollutants as expressed in Table 3.2 of the State Listing Policy.

B. Temperature impairment of the San Joaquin River and tributaries

EPA has determined to add the following to the list of water quality limited segments for

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which a TMDL is required for temperature: San Joaquin River (Stanislaus River to Delta Boundary); San Joaquin River (Tuolumne River to Stanislaus River); San Joaquin River (Merced River to Tuolumne River); Merced River, Lower (McSwain Reservoir to San Joaquin River); Stanislaus River, Lower; and Tuolumne River, Lower (Don Pedro Reservoir to San Joaquin River). Applicable water quality standards for these water bodies are established in the Sacramento and San Joaquin River Basin Plan. All the aforementioned segments have the Migration of Aquatic Organisms (MIGR) designated use for Cold Freshwater Habitat (COLD) with a footnote indicating "salmon and steelhead" (See RWQCB Central Valley, 2009, Table II-1). The three tributary segments have the Spawning, Reproduction, and/or Early Development (SPWN) designated use for COLD with a footnote indicating "salmon and steelhead" (See RWQCB Central Valley, 2009, Table II-1, pp.II-8). Additionally, the Sacramento and San Joaquin River Basin Plan addresses temperature with the following narrative and numeric objectives:

"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. ...

In determining compliance with the water quality objectives for temperature, appropriate averaging periods may be applied provided that beneficial uses will be fully protected." (RWQCB Central Valley Region, 2009, pp. III-8)

Documentation of the natural receiving water temperature is not readily available so an assessment of whether the migration and spawning uses were being achieved was conducted by comparing the current temperatures to the temperature requirements of salmonid species identified in the EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards (2003a). EPA believes that the Region 10 guidance and its associated Technical Issue Papers provide the most comprehensive compilation of research related to salmonid temperature requirements available. The studies compiled in the guidance and associated papers address the full geographic extent of salmonid populations including California. The recommended numeric criteria to protect coldwater salmonids in this report were recommended for use by California's Department of Fish and Game in their temperature data submittal and subsequent comments. Additionally, the guidance's recommended numeric criteria have been used by the National Marine Fisheries Service as thresholds when considering the suitability of expected water temperatures for Central Valley steelhead in the Stanislaus River under the proposed actions in their Biological and Conference Opinion on the Long-term Operations of the Central Valley and State Water Project (2009). An enormous amount of temperature data has been collected for the subject segments of the San Joaquin River and its tributaries. After review of the data EPA finds that the subject segments are not attaining the relevant numeric temperature criteria for migration and spawning of coldwater salmonids. Observed exceedances are greater than the 10% exceedance threshold for conventional and other pollutants as expressed in Table 3.2 of the State Listing Policy. A summary of the water body specific findings are included in Table 3 at the end of this document.

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C. Bacterial indicator impairment of ten water Bodies in the Santa Ana Region

EPA has determined to add ten inland surface waters (identified in Table 3) in the Santa Ana Region to the list of water quality limited segments requiring a TMDL for indicator bacteria. These water bodies are designated as Water Contact Recreation (REC1) water bodies either explicitly or implicitly as tributaries to other designated segments (RWQCB Santa Ana Region, 2008, Table 3-1, pp.3-23 - 3-35). The Santa Ana Basin Plan has the following water quality objective for fecal coliform to protect REC1 uses:

Fecal coliform: log mean less than 200 organisms/100 mL based on five or more samples/30 day period, and not more than 10% of the samples exceed 400 organisms/100 mL for any 30-day period. (RWQCB Santa Ana Region, 2008, pp.4-9)

Recent monitoring data collected in these water bodies measures *Escherichia coli* indicator bacteria. *Escherichia coli* is one species within the broader category of fecal coliform bacteria and monitoring data for *E. coli* can be used to evaluate whether the fecal coliform objective is being met in the subject water bodies. In addition, EPA has recommended that California use EPA's Ambient Water Quality Criteria for Bacteria (1986) when there is no adopted *E. coli* standard. Specifically, EPA recommends that for REC1 uses the following criteria be used:

Steady state geometric mean indicator density - 126 indicator densities/100ml
Designated beach area (upper 75% confidence limit) - 235 indicator densities/100ml
(EPA, 1986, Table 4, pp.15)

EPA compared the *E. coli* data for subject water bodies to the Basin Plan's fecal coliform objective, as well as to EPA's recommended *E. coli* criteria. For eight of the ten water bodies sufficient exceedances of the fecal coliform objective and the EPA recommended criteria exist to merit listings per the 10% exceedance threshold for conventional pollutants expressed in Table 3.2 of the State Listing Policy. For Morning Canyon Creek and Temescal Creek Reach 6 only one of the sites sampled in each reach showed sufficient exceedances to merit listing under both methodologies. Since at least one site shows a significant impairment of the recreational use EPA concludes that these reaches are also impaired and is adding these entire reaches. If the State would like to re-segment these reaches to avoid listing the entire reach when the impaired segment is more localized, the State can do so in the next listing cycle. Alternately, the entire segment can remain listed as impaired and during TMDL development the TMDL can be aimed to address the appropriate portion of the segment. Two additional water bodies, San Diego Creek Reach I and Buck Gully Creek, show impairment by *E. coli* bacteria but are also identified as impaired by total and/or fecal coliform by the State. In these cases, EPA is not recommending listing for indicator bacteria for these reaches since they are already listed. The recent *E. coli* data for these two water bodies indicate that the previously identified total and/or fecal coliform impairments remain a concern. EPA recommends that the State adopt listings for the various forms of indicator bacteria under the heading "Indicator Bacteria" and include the specific analyses for each type of indicator as a line of evidence for that broader impairment. A summary of EPA's findings for the ten water bodies that EPA is adding indicator bacteria listings are included in Table 3 at the end of this document.

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D. Copper and lead impairments of three segments in the Santa Ana Region

EPA is adding listings for copper and/or lead for Cucamonga Creek Reach 1 and Santa Ana River Reaches 3 and 6. These segments all have at least one designated use that protects aquatic life such as: Warm Freshwater Habitat (WARM); Limited Warm Freshwater Habitat (LWRM); Cold Freshwater Habitat (COLD); Rare, Threatened or Endangered Species (RARE); and Spawning, Reproduction, and/or Early Development (SPWN) (RWQCB Santa Ana Region, 2008, Table 3-1, pp.3-25, 3-30). The metals criteria established in the California Toxics Rule (CTR) therefore apply to these segments. EPA evaluated data using the criteria and default conversion factors established in the CTR, and found impairment of three water bodies by copper and/or lead. Upon examination of the data the State had assessed for these waterbodies EPA finds that the detection limits of the data reported by San Bernardino County Stormwater Program pursuant to their NPDES permit was in most cases too low to assess compliance with the water quality standard. EPA strongly encourages the Regional Board to lower the monitoring detection limit required by the permit during the next permit renewal. A summary of the water body specific findings are included in Table 3 at the end of this document. Observed exceedances are greater than the 3% exceedance threshold for toxicants as expressed in Table 3.1 of the State Listing Policy.

E. Total dissolved solids impairments of two segments in the Lahontan Region

EPA is adding listings for Total Dissolved Solids (TDS) to Mammoth Creek (Headwaters to Twin Lakes) and East Fork of Carson River. Our review of readily available data against applicable water quality standards indicates these waters are impaired. These two segments have the following uses: Municipal and Domestic Supply (MUN); Agricultural Supply (AGR); Ground Water Recharge (GWR); Freshwater Replenishment (FRSH); Water Contact Recreation (REC1); Noncontact Water Recreation (REC2); Commercial and Sportfishing (COMM); Cold Freshwater Habitat (COLD); Wildlife Habitat (WILD); Rare, Threatened, or Endangered Species (RARE); Spawning, Reproduction, and Development (SPWN). Additionally, Mammoth Creek has Migration of Aquatic Organisms (MIGR) use and East Fork, Carson River has Navigation (NAV) use. The Lahontan Regional Basin Plan identifies specific water quality objectives for certain waterbodies and these waterbodies have the following applicable objectives for TDS:

East Fork, Carson River

Annual Average: 80 mg/L and 90th Percentile: 100 mg/L
(RWQCB Lahontan Region, 2005, Table 3-14, pp.3-39)

Mammoth Creek (Twin Lakes Bridge)

Annual Average: 60 mg/L and 90th Percentile: 90 mg/L
(RWQCB Lahontan Region, 2005, Table 3-17, pp.3-45)

EPA assessed data against the applicable standards for both the annual average and 90th percentile and determined that both aspects of the standard are not achieved. The Lahontan Regional Board and State Board stated that data was "not temporally representative." However, the data include many values above the water quality objectives throughout the year for both water bodies. Furthermore, not only do the

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annual averages consistently exceed the applicable water quality standards, data from multiple seasons indicate that the 90th percentile objective is also not achieved. A summary of the water body specific findings are included in Table 3 at the end of this document. Observed exceedances in both water bodies are greater than the 10% exceedance threshold for conventional and other pollutants as expressed in Table 3.2 of the State Listing Policy.

Good Cause for Delisting

California's Staff Report identified 131 water body-pollutant combinations that were not included on the Section 303(d) List because analysis of available monitoring data supported a conclusion that applicable standards were no longer exceeded (Staff Report Table 2, pp.iv). EPA reviewed California's rationale for its decision not to include on its 2008-2010 Section 303(d) List several waters that were included on its 2004-2006 Section 303(d) List. Except for the water body-pollutant combinations noted above, the State demonstrated to EPA's satisfaction good cause for not listing each of the waters. See, 40 CFR 130.7(b)(6)(iv).

California determined not to include Buckeye Creek, East Walker River (above Bridgeport Reservoir), Robinson Creek (Hwy 395 to Bridgeport Res), Robinson Creek (Twin Lakes to Hwy 395) and Swauger Creek on its list of water quality limited segments requiring a TMDL for pathogens based on its determination that this impairment would be addressed via other pollutant control requirements. EPA requested that the State provide a more detailed rationale to support its determination. The State provided information about its Grazing Waiver (RWQCB Lahontan Region, 2007) that identifies "an interim fecal coliform objective of 200 colonies per 100 ml" which is less stringent than their applicable water quality standard (RWQCB Lahontan Region, 2005, pp.3-4). Without a requirement in the Grazing Waiver to achieve the applicable standard, EPA is concerned that implementation of the Grazing Waiver will not achieve the water quality standard. However, since this is the first five year cycle of the Grazing Waiver an interim target is reasonable. Upon renewal of the Grazing Waiver, EPA expects the applicable water quality standard should be utilized as the water quality requirement if the Grazing Waiver is to be used as justification for not identifying these water body pollutant combinations as requiring a TMDL.

Public Comments

EPA carefully reviewed the State and Regional Board's detailed responses to several thousand comments received from the public during the list development process. EPA commends the State for its intensive effort to involve the public in Section 303(d) List decision-making. EPA found the State's responses to public comments reasonable and in accordance with federal listing requirements.

Priority Ranking /Scheduling

The State's submittal includes a schedule for TMDL completion for those waters requiring a TMDL, including waters scheduled for TMDL development over the next two

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years (Staff Report, pp. 6-7). We understand that these schedules serve as priority rankings for TMDL development as required by federal regulations at 40 CFR 130.7(b). The State Listing Policy provides ranking criteria for determining the schedule for TMDL development for each water body pollutant combination. TMDL development schedules were not set for waters and pollutants for which TMDLs have been completed or that are being addressed through other control actions. EPA concludes that the decision not to identify priority rankings or schedules for these waters and pollutants is appropriate. In future listing cycles, if it is determined the TMDLs or alternative control mechanisms do not result in attainment of applicable water quality standards, the waters should be included on the next Section 303(d) List and scheduled for TMDL development or revision. EPA is not taking action on these schedules as federal regulations do not require EPA approval of priority rankings or schedules.

Administrative Record Supporting This Action

In support of this decision to partially approve and partially disapprove California's listing decisions, EPA carefully reviewed the materials submitted by California with its listing decisions. The administrative record supporting EPA's decision to approve the State's inclusion of the waters and pollutants identified on the State's 2010 Integrated Report, Appendix A, Category 5 List (except for those listings held in abeyance) and to add certain waters and/or pollutants is comprised of the materials submitted by the State, copies of Section 303(d), associated federal regulations, EPA guidance concerning preparation of Section 303(d) lists, EPA's past comments on California's listing methodology and draft lists, EPA's decision letter and this enclosure. EPA determined that the materials provided by the State with its submittal generally provided sufficient documentation to support our analysis and findings that the State decisions to list waters meet the requirements of the Clean Water Act and associated federal regulations. We are aware that the State compiled and considered additional materials (e.g. raw data and water quality analysis reports) as part of its list development process that were not included in the materials submitted to EPA. EPA did not consider all of these additional materials as part of its review. It was unnecessary for EPA to consider all of the materials considered by the State in order to determine that, based on the materials submitted to EPA, the State complied with the applicable federal listing requirements. Moreover, federal regulations do not require the State to submit all data and information considered as part of the submittal. At EPA's request, the State did provide additional materials on case-specific basis for our review of the raw data and other relevant information. EPA's decisions to add certain waters and/or pollutants to the State's proposed final Section 303(d) List is supported by the monitoring data and information available within the State's administrative record and additional material cited in References.