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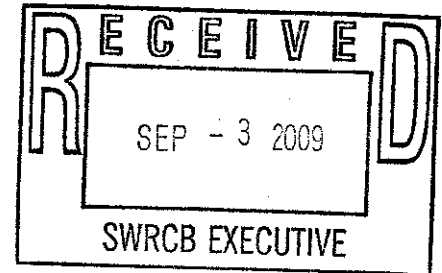
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September 3, 2009

VIA EMAIL - COMMENTLETTERS@WATERBOARDS.CA.GOV

Ms. Jeanine Townsend  
Clerk to the Board and  
Board Members of the  
State Water Resources Control Board  
1001 I Street, 24th Floor [95814]  
P.O. Box 100  
Sacramento, CA 95812-0100



Re: **Comments on A-1971, A-1971(a) and (b) - September 15, 2009 Board Workshop**  
Client-Matter No. 07547.00004

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

On behalf of the City of Tracy, we respectfully submit the following comments on the portions of the draft order related to the petitions of the City of Stockton, California Sportsfishing Protection Alliance, San Luis & Delta-Mendota Water Authority, and Westlands Water District ("Draft Order") related to electrical conductivity ("EC").

A. Electrical Conductivity

The Draft Order fails to recognize several key facts, the most important being that the citations to the Bay-Delta Plan do not specify exactly which Bay-Delta Plan is being cited. (See Draft Order at pg. 2 citing only to the "State Water Board's Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan)" without specifying a date.)

For example, in footnote 4 on page 5 of the Draft Order, there is a citation to language only found in the 2006 version of the Bay-Delta Plan that states: "The water quality objectives in this plan apply to waters of the San Francisco Bay system and the legal Sacramento-San Joaquin Delta, as specified in the objectives. Unless otherwise indicated, water quality objectives cited for a general area, such as for the southern Delta, are applicable for all locations in that general area and compliance locations will be used to determine compliance with the cited objectives."

What is also not acknowledged is that the 2006 version of the Bay-Delta Plan contains modifications, such as the sentences cited above, which have not yet been approved by the U.S.

Environmental Protection Agency, and therefore, cannot be utilized as "applicable water quality standards" under federal law for impairment determinations under Clean Water Act section 303(d) (33 U.S.C. §1313(d)), or for NPDES permitting decisions under Clean Water Act section 402 (33 U.S.C. §1342) and its implementing regulations, such as the City of Stockton's Permit and the proposed State Water Board Order. (See 40 C.F.R. §131.21(c)(2); *Alaska Clean Water Alliance v. Clark*, No. C96-1762R, 1997 W.L. 446499 at \*3 (W.D. Wash. 1997)(overturning a previous EPA regulation *presuming* approval of state water quality standards if not approved by EPA within statutory timeframe, and holding that "Congress did not intend new or revised state standards to be effective until after U.S. EPA had reviewed and approved them.")

Further, the State Board's Draft Order attempts to apply the initially adopted water quality objective for EC in the Bay-Delta Plan, because of these "non-substantive" modifications made in 2006, to all regions of the southern Delta (and beyond since Stockton is not located in the southern Delta<sup>1</sup>), rather than the previous four specified compliance points. In addition, the Draft Order imposes compliance with this objective on municipal dischargers, without ever having undertaken the mandatory analysis required by Water Code section 13241, or having adopted a comprehensive program for implementation required by Water Code section 13242 setting forth considerations for how municipalities like Stockton (and Tracy) would comply with the expanded applicability of the water quality objective for EC.<sup>2</sup> Application of the water quality objective for EC to the entire southern Delta, and to all discharges thereto including municipal discharges, without an appropriate implementation plan and with no analysis of the economic, environmental, and other impacts of such an action violated the mandatory statutory requirements contained in Water Code sections 13000, 13240, 13241, and 13242.

For these reasons, the EC requirements in the Stockton permit should be remanded to comply with the Bay-Delta Plan that existed *before* the 2006 modifications since those modifications were and are not legally valid under either federal or state law for the reasons stated above.

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<sup>1</sup> The Draft Order applies the southern Delta EC objectives to Stockton although acknowledging that Stockton's discharge "occurs between the compliance locations described as the interior Delta and southern Delta. See Draft Order at pg. 5. Other evidence demonstrates that Stockton is clearly outside the delineated southern Delta. See attached Exhibit 1 - map from presentation to SWRCB by Dr. Glenn J. Hoffman on Salt Tolerance of Crops in the Southern Sacramento-San Joaquin Delta (South Delta) (August 13, 2009).

<sup>2</sup> The first reference to applicability of the EC objectives to municipal discharges occurred in an amendment report that was merely *an appendix* to the Bay-Delta Plan adopted in 2006. See Plan Amendment Report, Appendix 1 to the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary November 29, 2006 at 28) In that report, the State Water Board purported to amend the implementation program to require "discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers." (*Id.* (emphasis added).) However, the State Water Board failed to comply with Water Code requirements before expanding the application of the implementation provisions. Prior to that, the implementation plan for the salinity water quality objective in the Bay-Delta Plan referenced only the "conditioning of water rights permits issued to the United States Bureau of Reclamation and the California Department of Water Resources for projects affecting the Delta." (State Water Board WR Decision 1379 at 2; see also *State Water Resources Control Board Cases*, 136 Cal. App. 4<sup>th</sup> 674, 687-712 (2006)(recitation of the history of the Bay-Delta water rights and water quality proceedings).)

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Respectfully submitted,

DOWNEY BRAND LLP



Melissa A. Thorne  
Special Counsel for the City of Tracy

cc: Steve Bayley, City of Tracy  
Tess Dunham, Somach Law

# South Delta

Page 2, Figure 1.1. Location map

