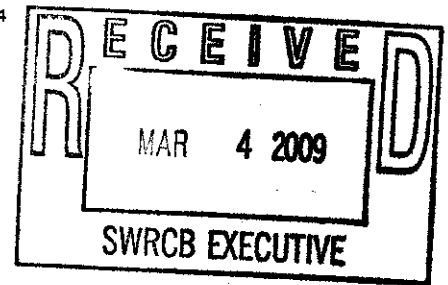




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March 4, 2009

Via Email commentletters@waterboards.ca.gov and Hand Delivery

Ms. Jeanine Townsend
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State Water Resources Control Board
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Subject: Comments to SWRCB/OCC File Nos. A-1846(a) and A-1846(b)
(City of Tracy) – March 17, 2009 Board Meeting

Dear Ms. Townsend:

The following comments are submitted on behalf of the City of Stockton (Stockton) regarding the State Water Resources Control Board's (State Water Board) proposed order (Draft Order) in the matter of Petition of Environmental Law Foundation and California Sportfishing Protection Alliance for Review of Waste Discharge Requirements Order No. R5-2007-0036 and Time Schedule Order No. R5-2007-0037 [NPDES No. CA0079154] for the City of Tracy Wastewater Treatment Plant, San Joaquin County (Tracy Permit). Stockton is particularly interested in this matter because the proposed findings with respect to final limitations for electrical conductivity (EC) may be relied upon with respect to EC limits contained in Stockton's Permit, which are currently pending review before the State Water Board. (See Waste Discharge Requirements for the City of Stockton Regional Wastewater Control Facility, Order No. R5-2008-0154 [NPDES No. CA0079138] (Stockton's Permit); see also Petitions A-1971, A-1971(a) and A-1971(b).) Overall, Stockton disagrees with the analysis and findings contained in the Draft Order with respect to final effluent limitations for EC. Comments on this issue are provided below. With respect to the other issues identified in the Draft Order, Stockton supports comments provided by Tracy and the Central Valley Clean Water Association.

I. The Draft Order Improperly Finds That The Permit Effluent Limitations Are Inconsistent With Federal Law

The Draft Order finds the effluent limitations for EC in Tracy's Permit to be inconsistent with federal law. This finding is incorrect because: (1) final water quality-based effluent limitations (WQBELs) for EC are not required because there is no evidence that

Ms. Jeanine Townsend

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Tracy's discharge has reasonable potential to cause or contribute to a violation of an applicable water quality objective; and, (2) irrespective of whether there is reasonable potential, the effluent limitations are consistent with federal regulatory requirements.

A. Tracy's Discharge Does Not Have Reasonable Potential To Cause Or Contribute To A Violation Of An Applicable Water Quality Standard

Federal regulations require the adoption of WQBELs when the discharge will cause, or have reasonable potential to cause or contribute to, an exceedance of any state water quality standard. (40 C.F.R. § 122.44(d)(1)(i).) The Central Valley Regional Water Quality Control Board (Regional Water Board) found reasonable potential simply by comparing the maximum effluent concentration to the lowest criterion, or in this case 700 $\mu\text{mhos/cm}$. (Tracy Permit at Table F-5, p. F-52.) While the Regional Water Board's approach for determining reasonable potential might be allowed if there were compliance with applicable law, it fails to properly consider if Tracy's discharge in fact causes or contributes to a violation of the applicable water quality objectives.

In this case, the applicable water quality objectives appear to be the seasonal objectives of 700 $\mu\text{mhos/cm}$ (April through August) and 1,000 $\mu\text{mhos/cm}$ (September through March) for which compliance is measured at Old River at Tracy Road Bridge. (Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Dec. 2006) (Bay-Delta Plan) at p. 13; see Tracy Permit at p. F-43.) To determine compliance with said objectives, the Bay-Delta Plan specifically states that the "compliance locations will be used to determine compliance with the cited objectives." (Bay-Delta Plan at p. 10.) Thus, the Regional Water Board must conduct its reasonable potential analysis to determine if Tracy's discharge will cause or contribute to a violation of the water quality objectives at the Old River/Tracy Road Bridge compliance location.

The record before the State Water Board does not support that Tracy's discharge will cause or contribute to a violation of the water quality objectives, as measured at the Old River/Tracy Road Bridge compliance location. For example, the Delta Simulation Model II modeling evaluation performed for Tracy and Mountain House Community Services District (MHCS) as part of the Regional Water Board's permitting process indicates that WQBELs set equal to the actual water quality objectives would not affect EC levels, or compliance with the water quality objectives, at the Old River/Tracy Road Bridge compliance location. (See Delta Simulation Model II, City of Tracy and MHCS (March 29, 2007) (DSM2 Modeling Evaluation) at pp. 15, 17.) Furthermore, the modeling indicates that even if Tracy did not discharge, it would not affect compliance with the objectives under the modeled worst-case conditions. (*Ibid.*) In other words, the objectives are met, or not met, regardless of Tracy's discharge. Thus, the Regional Water Board improperly found reasonable potential. The Regional Water Board itself questioned the necessity of including effluent limitations to protect the agricultural beneficial use. (See Response to Written Comments for City of Tracy

Wastewater Treatment Plant Tentative NPDES Permit and Tentative Waste Discharge Requirements (Board Meeting – 3/4 May 2007) (Response to Comments) at p. 28.) In light of the Regional Water Board's improper determination of reasonable potential, the State Water Board should revise the Draft Order to find that no final effluent limitation for EC is necessary, and remand the Tracy Permit to the Regional Water Board accordingly.

B. In The alternative, The EC Effluent Limitation Is Consistent With Federal Regulatory Requirements

Assuming *arguendo* that the Regional Water Board's finding of reasonable potential is correct and that said water quality objectives are applicable to Tracy's point of discharge, federal regulations require the permit to contain "effluent limitations for that pollutant." (40 C.F.R. § 122.44(d)(1)(iii).) The term effluent limitation is defined in the Clean Water Act (CWA) to mean "any restriction, ... including schedules of compliance." (33 U.S.C. § 1362(11).) Schedule of compliance is defined to include "remedial measures including an enforceable sequence of actions or operations" (33 U.S.C. § 1362(17).) Further, applicable federal regulations specifically allow for the use of best management practices when numeric effluent limitations are infeasible. (40 C.F.R. § 122.44(k)(3).) In other words, an effluent limitation is not necessarily numeric, and may include remedial measures, source control measures and best management practices. (See *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1105; see also *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society*, Order No. WQ 91-03 (May 16, 1991), at p. 48.)

The Draft Order recognizes that it is permissible to have effluent limitations that are not numeric. However, it contends that the limit in question is not appropriate because it is not enforceable or designed to implement the water quality objective. (Draft Order at p. 7.) For these reasons, the Draft Order finds that the EC effluent limitation is not consistent with applicable federal regulations. Stockton disagrees with these findings in the Draft Order because the final EC effluent limitation in Tracy's Permit is a WQBEL consistent with federal regulatory requirements.

1. The EC Final Effluent Limitation Is Enforceable And Is Designed To Achieve Water Quality Standards

The Draft Order argues that there is no final effluent limitation in Tracy's Permit because it is not "enforceable and designed to implement the water quality objective." (Draft Order at p. 7.) Stockton takes issue with this proposed finding for several reasons. First, the entire permit including the final effluent limitation for EC is enforceable. The final limit includes effluent limitations of 700 µmhos/cm (April 1 – August 31) and 1,000 µmhos/cm (September 1 – March 31) as monthly averages, a requirement to submit and implement a Salinity Plan, and a requirement to participate in the development of a Central Valley wide

Salinity Management Plan. If Tracy fails to submit a Salinity Plan, or if Tracy fails to implement the approved Salinity Plan, Tracy is in violation of the effluent limitation. In that case, the final numeric limitations of 700 $\mu\text{mhos/cm}$ and 1,000 $\mu\text{mhos/cm}$ become effective. More importantly, Tracy may be subject to enforcement action for failing to comply with the terms of its permit, including its failure to submit and implement the Salinity Plan.

Federal regulations require compliance with water quality standards. Water quality standards are both the beneficial uses of the water and the water quality objectives or criteria adopted to protect the beneficial uses. (40 C.F.R. §§ 131.2, 131.3(i).) As indicated above, the Regional Water Board correctly stated that it is unlikely effluent limitations for Tracy are necessary to protect the agricultural beneficial use, which is one part of the water quality standard. Furthermore, the effluent limitation includes final WQBELs set at 700 $\mu\text{mhos/cm}$ and 1,000 $\mu\text{mhos/cm}$ that become effective if Tracy fails to prepare and implement a Salinity Plan that is approved by the Regional Water Board. Thus, the final WQBEL is both enforceable and designed to achieve water quality standards.

2. The Salinity Plan Requirement Is A Proper Effluent Limitation

As described above, effluent limitations need not be numeric, and may be narrative in form and include remedial measures, source control efforts and/or best management practices. (See section I.B, *ante*.) The EC effluent limitation at issue here qualifies as a narrative limitation. For example, the Salinity Plan requirement is a remedial measure as well as a source control measure because it requires Tracy to: implement all reasonable steps to lower salinity in its water supply; identify and implement measures to reduce salinity in its discharge from various sources within its service area; implement measures to meet an interim salinity goal of 500 $\mu\text{mhos/cm}$ over water supply; and, participate in the development of a Salinity Management Plan for the whole Central Valley. (Tracy Permit at p. 9.) All of these requirements are designed to ensure compliance with water quality standards.

In its attempt to argue otherwise, the Draft Order mischaracterizes the effluent limitation, including the Salinity Plan requirement. The Draft Order states that “[t]he Permit simply requires, ..., the discharger to develop and comply with its own plan to reduce salinity in its discharge.” (Draft Order at p. 7.) This characterization is false. The Salinity Plan is not simply self-defined as suggested by the Draft Order. Once developed, the Salinity Plan must be submitted to the Regional Water Board for review and approval. (Tracy Permit at p. 9.) The Regional Water Board’s review process includes notice for public comment, and authorizes the Regional Water Board to revise the plan prior to its approval. (*Ibid.*) Thus, the Regional Water Board, members of the public, and the State Water Board will all have the opportunity to provide input into the Salinity Plan and its various elements prior to its approval and implementation.

Moreover, the Draft Order suggests that its findings are correct because they are consistent with U.S. EPA's statements in a letter with respect to denial of certain compliance schedule provisions contained in the State's *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (SIP). (See Draft Order at fn. 10, p. 8.) The Draft Order's comparison to statements made by U.S. EPA are misplaced. The U.S. EPA letter determined that the compliance schedule provisions were inappropriate because they could result in the deferral of developing WQBELs until such time that a total maximum daily load (TMDL) is developed. (Letter to Celeste Cantu from Alexis Strauss (Oct. 23, 2006) at p. 4.) In this case, there are WQBELs in the permit and the development of limitations is not being deferred until a later time.

3. The Effluent Limitation Is A Final WQBEL

Finally, the Draft Order points to selective statements in the Tracy Permit to argue that the Regional Water Board itself did not consider the effluent limitation in the permit to be a final WQBEL. (Draft Order at p. 8 ["[t]he Central Valley Water Board appears to acknowledge that the Permit provision does not constitute a final water quality-based effluent limitation."].) This statement in the Draft Order is incorrect. A complete reading of the fact sheet clearly indicates that the Regional Water Board did indeed consider the adopted effluent limitation to be a final WQBEL. For example, the Regional Water Board found that imposing salinity WQBELs that would require the construction and operation of reverse osmosis facilities prior to implementing other measures (i.e., a Salinity Plan) would not be a reasonable approach. (Tracy Permit at p. F-48.) The Regional Water Board did *not* find that the imposition of any final WQBEL was unreasonable. In fact, the opposite is true. The record clearly indicates that the Regional Water Board intended and considered the adopted effluent limitation to be a final WQBEL. (See Tracy Permit at pp. F-48 - F-49 ["[t]his Order also includes final WQBELs,"]; see also Staff Report City of Tracy Wastewater Treatment Plant Proposed NPDES Permit Renewal, Time Schedule Order, and Waste Discharge Requirements for Land Discharge San Joaquin County at pp. 5-6 ["The proposed Order also includes final water-quality based effluent limitations (WQBELs) stating"].) Thus, the Draft Order incorrectly characterizes the Regional Water Board's action, and the Regional Water Board's interpretation of its own action.

In sum, assuming *arguendo* that reasonable potential exists, the permit includes a proper final WQBEL and the State Water Board should reject the proposed findings in the Draft Order that suggest otherwise.

II. The Draft Order Improperly Finds That The State Water Board's Reasoning In The Manteca Order¹ Does Not Apply Here

In its proposed disapproval of the Tracy Permit limits as adopted by the Regional Water Board, the Draft Order argues that the Regional Water Board inappropriately relied on the State Water Board's conclusion in the Manteca Order. (Draft Order at p. 8.) More specifically, the Draft Order argues that the Manteca Order and its rationale do not apply because: its conclusions on this issue were non-precedential²; the Tracy Permit does not comply with requirements in the Manteca Order; and, the 2006 Bay-Delta Plan reaffirmed the south Delta water quality objectives and removed ambiguity with respect to application of the EC objectives. Stockton disagrees. The State Water Board's reasoning in the Manteca Order still applies because little has changed.

The State Water Board found it unreasonable to impose an effluent limit of 700 µmhos/cm on the City of Manteca because: requiring Manteca to comply with such an effluent limitation would not significantly change the EC of the water in the south Delta; the implementation program for meeting the objective is based on increased flows, the construction of salinity barriers and other actions unrelated to wastewater discharges; and, most importantly, the compliance with the effluent limitation could only be assured with the construction and operation of reverse osmosis facilities, which the State Water Board determined to not be a reasonable approach.³ (Manteca Order at pp. 13-14.) For the reasons specified below, all of these findings are applicable to Tracy and other similarly-situated dischargers.

A. Removal Of Tracy's Discharge Would Not Significantly Affect EC Levels In The South Delta

As discussed above, the DSM2 Modeling Evaluation performed by the Department of Water Resources (DWR) in consultation with Tracy, MHCSD, South Delta Water Agency, and the Petitioner California Sportfishing Protection Alliance (CSPA), shows that Tracy's

¹ *In the Matter of the Petition of City of Manteca for Review of Waste Discharge Requirements Order No. R5-2204-0028*, Order No. WQ 2005-0005 (March 15, 2005).

² Although the Manteca Order may not be precedential, it is not unreasonable or unlawful for the Regional Water Board to utilize that decision as guidance in addressing similar issues for similarly-situated dischargers.

³ In its Manteca Order, the State Water Board also took official notice of the fact that the operation of a large-scale reverse osmosis treatment plant would result in the production of highly saline brine for which an acceptable method of disposal would need to be developed. Due to this fact, the Manteca Order specifically advises that "any decision that would require use of reverse osmosis to treat the City's municipal wastewater effluent on a large scale should involve thorough consideration of the expected environmental effects." (Manteca Order at p. 12.)

discharge at its current level of quality, let alone set at a level equal to the water quality objectives, does not significantly affect the level of EC in the south Delta as measured at Old River/Tracy Road Bridge. (See DSM2 Modeling Evaluation at p. 15; see also Tracy Permit at p. F-47 ["[t]he reasonable worst-case Tracy impact is relatively small compared to other salinity sources in the area."].) Like Manteca, requiring Tracy to comply with an effluent limitation of 700 $\mu\text{mhos/cm}$ or 1,000 $\mu\text{mhos/cm}$ will not significantly affect Delta water quality. Furthermore, as the modeling shows, even if Tracy ceased its discharge to the Delta, water quality in the south Delta would not be affected. (See DSM2 Modeling Evaluation at p. 15.)

B. The Primary Methods For Implementing South Delta Objectives Are Unrelated To Wastewater Discharges

The State Water Board's conclusions in the Manteca Order are in large part supported by the history of the Bay-Delta Plan. More specifically, the Manteca Order found that related State Water Board decisions and water quality control plans did not treat effluent discharges as a source of salinity in the Delta. (Manteca Order at p. 10.) The Manteca Order also found that the primary responsibility for meeting the south Delta objectives is on the DWR and the Bureau of Reclamation to provide increased flows, and reductions in salinity as delivered to the Delta and its tributaries by irrigation return flows and groundwater. (*Id.* at pp. 10-11, 13.) Finally, the Manteca Order found that "the State Board intended for permit effluent limitations to play a limited role with respect to achieving compliance with the EC water quality objectives in the southern Delta." (*Id.* at p. 14.)

Since the State Water Board made these findings in the Manteca Order, nothing has changed appreciably. In fact, the Draft Order concedes that all of these factors apply to Tracy as well as Manteca. (Draft Order at fn. 12, p. 8.) At most, the Draft Order implies that the State Water Board's action on the 2006 Bay-Delta Plan somehow extinguished application of the reasoning in the Manteca Order to other similarly-situated dischargers. (*Ibid.*) As discussed further below, the State Water Board's action(s) with respect to the 2006 Bay-Delta Plan did nothing to change the State Water Board's reasons for concluding it improper to adopt an effluent limitation of 700 $\mu\text{mhos/cm}$, as expressed in the Manteca Order. (See section II.A, *ante.*) Until the State Water Board considers effluent discharges as a primary source of salinity, and properly evaluates limitations on effluent discharges from wastewater treatment plants as a means for implementing south Delta water quality objectives, the State Water Board is precluded from adopting limitations accordingly. (See *Cities of Arcadia, et al. v. State Water Resources Control Bd.* (Super. Ct. Orange County, 2008, No. 06CC02974), Preemptory Writ of Mandate [superior court found it necessary for water quality standards to be reviewed in light of the factors and requirements set forth under Water Code sections 13241 and 13000 where such standards had not previously been considered as applied to stormwater].)

C. Compliance With Effluent Limitations Set At 700 $\mu\text{mhos/cm}$ Could Only Be Assured Through The Construction And Use Of Reverse Osmosis Facilities

In its Manteca Order, the State Water Board found that compliance with the permit effluent limitation of 700 $\mu\text{mhos/cm}$ could not be assured without construction and use of reverse osmosis facilities; and, that this would *not* be a reasonable approach prior to implementing other measures to reduce salt loads in the south Delta. (Manteca Order at p. 14.) To distinguish Tracy from Manteca, the Draft Order argues that the Tracy Permit record fails to consider that there are other “feasible alternatives” for complying with such an effluent limitation. (Draft Order at p. 9.) The Draft Order then identifies various alternatives that the Regional Water Board should consider before concluding that reverse osmosis is required. (*Id.* at pp. 9-10.) Importantly, the Draft Order does *not* find or imply that requiring reverse osmosis is no longer unreasonable.

However, the Draft Order fails to account for uncertainty associated with the “feasible alternatives” identified, and fails to consider the limited time available for a compliance schedule. (See Draft Order at pp. 9-10.) The Draft Order mentions pre-treatment requirements for Leprino’s wastewater, a TMDL for Old River, site-specific water quality objectives, and other alternatives for meeting an effluent limitation of 700 $\mu\text{mhos/cm}$. In reality, there is a tremendous amount of uncertainty associated with any of these “alternatives.” Further, there is no evidence in the record to suggest that any of these alternatives are feasible.

More importantly, there is no evidence in the record to suggest that any of these alternatives are feasible in the amount of time that Tracy will likely be afforded to comply with a final effluent limitation of 700 $\mu\text{mhos/cm}$, if one is adopted by the Regional Water Board on remand. At most, Tracy expects that the level of EC in its effluent will decrease to approximately 956 $\mu\text{mhos/cm}$ as its discharge flow increases to 16 million gallons per day (mgd). (Tracy Permit Table F-4, at p. F-47.)

The length of the compliance schedule that Tracy may potentially receive for complying with final numeric effluent limits for EC will in large part depend on Regional Water Board and/or State Water Board interpretations of the state’s newly adopted *Policy for Compliance Schedules in National Pollutant Discharge Elimination System Permits*, State Water Board Resolution No. 2008-0025 (April 15, 2008) (Compliance Schedule Policy). Under the Compliance Schedule Policy, the Regional Water Board has the discretion to include a compliance schedule in a permit for up to ten years from the date of “adoption, revision, or new interpretation” of the applicable water quality objective. (Compliance Schedule Policy at p. 5.) The Compliance Schedule Policy defines “new, revised, or newly interpreted water quality objective” to mean,

[a] water quality objective or criterion in a water quality standard that is adopted, revised, or newly interpreted after the effective date of this Policy, except that the following dates shall apply instead of the effective date of this Policy in the Regions specified below:

... iv) Central Valley: September 25, 1995. (Compliance Schedule Policy at p. 3(d).)

The term "newly interpreted water quality objective" is further defined to mean a narrative water quality objective interpreted during permit development. (Compliance Schedule Policy at p. 3(e).) The Compliance Schedule Policy does not define "revised."

The Draft Order does not currently address the question if the water quality objectives in question would be considered "revised."

The south Delta water quality objectives in the Bay-Delta Plan were first adopted into the Bay-Delta Plan in 1978. (Water Quality Control Plan Sacramento-San Joaquin Delta and Suisun March (August 1978) at p. VI 29.) As part of the Bay-Delta Plan update in 2006, the State Water Board amended the Bay-Delta Plan to "clarify" that "[u]nless 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." (Bay-Delta Plan at p. 10.) For Tracy, the Regional Water Board used this language to find that the objectives for the south Delta are applicable to Tracy because Tracy's outfall is approximately four miles upstream of the Old River at Tracy Boulevard Bridge compliance location. (Tracy Permit at p. F-43.) It could potentially be argued that Tracy, and other similarly-situated dischargers, could not receive an in-permit compliance schedule to comply with the south Delta water quality objectives because they were adopted prior to September 1995. However, a more reasonable interpretation in light of the actual historical circumstances is that the 2006 Bay-Delta Plan revisions are a revision of the water quality objective, and therefore compliance schedules may be adopted in the permit in accordance with the requirements in the Compliance Schedule Policy. The Compliance Schedule Policy allows up to ten years from the date of adoption, revision, or new interpretation of the water quality objective. This would mean that dischargers could only receive compliance schedules in NPDES permits for a period of time that does not exceed ten years from the effective date of the "revised" Bay-Delta Plan, which would be approximately June 27, 2017.

If it was determined that the south Delta salinity objectives were not revised in 2006, then the Regional Water Board would be precluded from adopting an in-permit compliance schedule that allowed compliance sometime prior to June of 2017. In that case, Tracy could request the Regional Water Board adopt a time schedule order or a cease and desist order to provide additional time before compliance with the effluent limitation is essentially required. By law, an outside order (i.e., time schedule order or cease and desist order) may only protect

a discharger from the assessment of mandatory minimum penalties for a period of five years. (Wat. Code, § 13385(j)(3)(C).) Thus, at most, Tracy could receive protection from mandatory minimum penalties for a period of five years from adoption of a revised permit that includes numeric effluent limitations for EC based on the south Delta objectives. Furthermore, an outside order would provide no protection from third party litigants bringing an action against Tracy for violation of effluent limitations. (See *Citizens for a Better Environment v. Union Oil* (1996) 83 F.3d 1111 [unless an enforcement order includes an assessment of monetary penalties, the citizen suit is not barred by CWA § 309(g)(6) (33 U.S.C. § 1319(g)(6))].)

If the State Water Board remands the Tracy Permit to the Regional Water Board with direction to amend the Tracy Permit in the manner as proposed in the Draft Order, Tracy thus may likely need to comply with a final effluent limitation of 700 µmhos/cm within five years of the Regional Water Board's adoption of permit revisions. Five years is not enough time to implement other alternatives, and/or plan for, construct and begin operations of reverse osmosis facilities. Because of the uncertainty surrounding the other alternatives, the construction and operation of reverse osmosis facilities is the only method by which Tracy could be assured to meet an effluent limitation of 700 µmhos/cm within five years. It is, for that matter, questionable whether a compliance schedule until 2017 would be sufficient for a major capital project with likely significant environmental impacts such as reverse osmosis. (See Manteca Order at p. 12.) Tracy could not defer planning based on other speculative possibilities.

In light of the foregoing, the Draft Order erroneously finds that the State Water Board's reasoning and rationale as expressed in the Manteca Order are no longer applicable. In fact, there is very little that distinguishes the facts of Tracy's discharge from those of Manteca. Moreover, if adopted, the Draft Order will do precisely what the State Water Board intended to avoid by adopting the Manteca Order—require Tracy to construct and operate reverse osmosis facilities prior to implementing other measures. Irrespective of the “non-precedential” nature of the Manteca Order, the construction and operation of reverse osmosis facilities prior to implementing other measures is still an unreasonable approach, especially considering the insignificant impact of Tracy's discharge with respect to EC levels in the south Delta. Stockton recommends the Draft Order be revised accordingly.

III. The Draft Order Improperly Finds That The 2006 Amendments To The Bay-Delta Plan Resulted In Application Of Bay-Delta Objectives To POTWs

A. If The Draft Order Is Adopted, The State Water Board's 2006 Amendments And/Or The Water Quality Objectives Violate The Water Code

The Draft Order maintains that “in 2006, [the State Water Board] revisited the Bay Delta Plan, and readopted the salinity objectives without change.” (Draft Order at p. 8, fn. 12.) Despite this statement and the similar facts between the Manteca Order and this case, the Draft Order suggests that the 2006 re-adoption and clarification compel a different outcome for

Tracy as compared to Manteca. (See Draft Order at p. 10.) More specifically, the Draft Order appears to rely on the 2006 amendments to require stricter controls on EC for Tracy versus Manteca. To the extent the 2006 amendments trigger stricter controls, the 2006 amendments to the Bay Delta Plan must have expanded water quality objectives at issue and/or their implementation. Such an expansion violates Water Code sections 13241 and 13242.

Water Code section 13241 requires the State Water Board to adopt water quality objectives to "ensure the reasonable protection of beneficial uses and the prevention of nuisance." Water Code section 13241 "recognize[s] that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." The factors that the State Water Board must consider when it adopts water quality objectives include:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water. (Wat. Code, § 13241.)

The Water Code thus imposes a mandatory duty on the State Water Board to adopt water quality objectives that are reasonable. (See also Wat. Code, § 13000 and *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 121-122 ["The Board's paramount duty was to provide 'reasonable protection' to beneficial uses, considering all the demands made upon the water."].)⁴ "[E]conomic considerations are a necessary part of the determination of reasonableness." (Memorandum to Regional Water Boards from W. R. Attwater, Office of Chief Counsel, State Water Board (Jan. 4, 1994), at p. 3.) This requires an assessment of the costs of an objective's adoption or amendment based upon: (1) whether the objective is being attained; (2) what methods are available to achieve compliance with the objective if not it is not being attained; and (3) the costs of those methods.

⁴ Stockton hereby requests the State Water Board to take official notice of this Memorandum pursuant to California Code of Regulations, title 23, section 648.2.

(Memorandum to Regional Water Boards from W. R. Attwater, Office of Chief Counsel, State Water Board, *supra*, at p. 1.) The State Water Board must consider any information on economic impacts provided by the regulated community and other interested parties. (*Ibid.*) If the potential economic impacts are significant, the State Water Board must articulate why the objective is necessary to protect beneficial uses in a reasonable manner despite the adverse consequences. (*Ibid.*) Where an amended objective is at issue, the associated staff report or resolution may address the economic considerations. (*Id.* at pp. 1-2.) In 2006, the State Water Board did not conduct the type of analysis required by Water Code section 13241 with respect to the EC objective and potential adverse consequences for POTWs. (See Plan Amendment Report, Appendix 1 to the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, *supra*.)⁵ Nor was such an analysis conducted in connection with the south Delta water quality objectives when they were originally adopted.

In addition, when the State Water Board adopts new or modified water quality objectives, it must include a program of implementation to achieve the objectives. (Wat. Code, § 13242.) An implementation program describes the actions necessary to achieve the objectives, including recommendations for appropriate action by any public or private entity. (Wat. Code, § 13242(a).) The Bay-Delta Plan relies primarily upon flow requirements to implement the EC objectives in the southern Delta. For example, the State Water Board observed:

[A]lthough discharge of treated wastewater to the Delta or its tributaries under an NPDES permit can affect EC in the southern Delta, previous State Board decisions and water quality control plans do not discuss treated effluent discharges as a source of salinity in the southern Delta. Similarly, previously adopted implementation programs for complying with the EC objectives in the southern Delta have focused primarily on providing increased flows and reducing the quantity of salts delivered to the Delta and its tributaries by irrigation return flows and groundwater. The record also establishes that the implementation date for actions to implement the 0.7 $\mu\text{mhos/cm}$ EC objective for April through August has been repeatedly postponed and that the State Board recently adopted a report recommending review of southern Delta EC objectives. Revised Water Right Decision 1641 places primary responsibility for meeting the EC objectives on the Department of Water Resources and the Bureau of Reclamation ... (Manteca Order at pp. 10-11.)

⁵ Stockton hereby requests the State Water Board to take official notice of the administrative record for the Bay-Delta Plan beginning with the 1978 Bay-Delta Plan through and including the 2006 amendments to the Bay-Delta Plan. (Cal. Code Regs., tit. 23, § 648.2.) To the extent official notice is granted, Stockton hereby incorporates by reference the administrative record for the Bay-Delta Plan. (*Id.* at § 64.3.)

Thus, to the extent that the Bay Delta Plan requires stricter EC controls on POTWs (e.g., reverse osmosis), the Bay Delta Plan violates Water Code sections 13241 and 13242. In accordance with these sections, the State Water Board must consider cost and other factors associated with requiring POTWs to employ stricter controls to implement the objectives. (See also *Cities of Arcadia v. State Water Resources Control Bd.*, *supra.*) Based on the Manteca Order, and the record for the Bay Delta Plan, the State Water Board did not fulfill this duty.

B. The State Water Board's Re-Adoption Of The Bay-Delta Plan In 2006 Does Not Constitute A Re-Affirmation Of South Delta Water Quality Objectives

The Draft Order attempts to characterize the State Water Board's action with respect to the 2006 Bay-Delta Plan as re-affirmation of the appropriateness of the south Delta water quality objectives. However, the language in the 2006 Bay-Delta Plan and the State Water Board's continuing efforts to evaluate these same objectives suggest otherwise. As part of the amendments to the 2006 Bay-Delta Plan, the State Water Board identified four emerging issues because "circumstances and scientific knowledge are changing." (Bay-Delta Plan at p. 5.) Included are Delta and Central Valley salinity issues. (*Ibid.*) With respect to south Delta salinity, the Bay-Delta Plan specifically acknowledged that the State Water Board was evaluating the salinity requirements for the beneficial uses of water in the southern Delta (i.e., water quality objectives). (*Id.* at p. 6.)

Since taking action in 2006, the State Water Board continues to evaluate the appropriateness of the south Delta water quality objectives.⁶ In other words, the State Water Board is not convinced that the currently adopted south Delta water quality objectives are appropriate. Thus, the Draft Order mischaracterizes the State Water Board's action in 2006 as a "re-affirmation" of the south Delta objectives. At most, the State Water Board did not change the existing objectives while it continued its evaluation of the numeric objectives to determine if they are appropriate. In the meantime, the Draft Order, if adopted, would drive Tracy—and potentially other POTWs—to implement nonsensical and inappropriate treatment technologies.

⁶ Stockton hereby requests the State Water Board to take official notice of its ongoing efforts to evaluate the efficacy of the south Delta water quality objectives for protection of the agricultural beneficial use. (Cal. Code Regs., tit. 23, § 648.2.) To the extent official notice is granted, Stockton hereby incorporates by reference the State Water Board's notices at http://www.waterrights.ca.gov/baydelta/docs/wq_control_planning. (*Id.* at § 648.3.)

Ms. Jeanine Townsend

Re: Comments to SWRCB/OCC File Nos. A-1846(a) and A-1846(b) City of Tracy

March 4, 2009

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Based on the foregoing, the State Water Board should dismiss CSPA's claims with respect to the EC limitations in Tracy's Permit. Or, at the very least, revise the Draft Order in accordance with the comments provided above.

Sincerely,



Theresa A. Dunham

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