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October 11, 2002

Arthur Baggett, Jr.
Chairman and Hearing Officer
State Water Resources Control Board
1001 T Street, 22nd Floor
Sacramento, CA 95814

Re: *National Audubon-CA, National Wildlife Federation, Defenders of Wildlife, and Planning and Conservation League Joint Comment Letter on Draft Order Regarding the Amended Joint Petition of the Imperial Irrigation District (IID) and San Diego County Water Authority (SDWA) for Approval of a Long-Term Transfer of Conserved Water Pursuant to an Agreement Between IID and SDCWA and Petition of the IID to Change the Purpose and Place of Use and the Point of Diversion Under Permit 7643.*

Dear Chairman Baggett:

On behalf of National Audubon Society – California, National Wildlife Federation, Defenders of Wildlife, and the Planning and Conservation League (“the organizations”), I am presenting the following comments on the September 26, 2002, Draft Order (Order WRO 2002-) referenced above.

The organizations regret the limited amount of time that was made available to review the proposed 95-page Draft Order. The result is a hurried attempt to highlight critical deficiencies in the Draft Order. With this letter the organizations also incorporate their April 25, 2002, joint comment letter on the IID Water Conservation and Transfer Project and Draft Habitat Conservation Plan DEIR/DEIS, which was made part of the record of proceedings here.

The length of the proposed order reflects the amount of time the State Water Board and its staff have devoted to this significant matter. Yet, the substance of the Draft Order inadequately resolves the concerns raised by the organizations throughout this proceeding. For the most part it appears the State Water Board is abdicating its responsibilities to the State Legislature, the lead agency (IID), and the proponents (IID and SDCWA) of the proposed water transfer project.

To anyone that has been remotely involved in this proceeding it is clear that the IID/SDCWA water transfer project has been made a piece of an overarching and looming issue -- the State of California's overuse of the Colorado River and the federal mandate to reduce this use. The emphasis placed on the looming issue of reducing California's use of Colorado River water has made the Board's order and its mandatory findings under the California Environmental Quality Act (CEQA) nothing more than a rationalization of a pre-determined outcome. The pervasive

influence of the Colorado River issue is evidenced by the way the Board justifies the extraordinary consequences of its decision on fish and wildlife resources, public health, air quality, growth, and the local economies. This is made explicitly clear in the Draft Order's rationalization for ignoring violations of the Basin Plan's water quality objective for selenium:

The impact of increasing selenium in the drains is of significant concern. In view of the important state interest in the proposed transfer, however, it would be unreasonable to deny approval of the transfer simply because it is not feasible, as part of this order, to prevent the proposed transfer from contributing to further violations of the water quality objective for selenium.¹

So, it is not surprising that the Draft Order finds that the substantial adverse impacts to fish and wildlife resources are not unreasonable. Nothing is unreasonable so long as the IID/SDCWA transfer project is viewed within the context of the overarching issue of reducing California's use of Colorado River water. In other words, because the Board believes that the IID/SDCWA water transfer project is inextricably linked to California's ability to meet the federally-mandated restrictions on Colorado River water use, anything justifies the end result. This perspective permeates this Draft Order, as the following excerpts show:

If the proposed transfer is not implemented because the cost of mitigation is too high, the consequences to the State's water supply and to the San Francisco Bay/Sacramento San Joaquin River Delta (Bay-Delta) could be severe.

. . . If the transfer stalls [and] if the Interim Surplus Guidelines are suspended and California is limited to its 4,400,00 afa apportionment, then under the terms of the Seven Party Agreement, Southern California as a whole would face an immediate short-fall of approximately 800,000 afa . . . this could have significant economic consequences in Southern California and lead to increased pressure on the limited amount of water available from the Bay-Delta . . . could upset ongoing efforts to improve water management and restore the ecological health of the Bay-Delta through the CALFED planning process.

Testimony from a number of witnesses showed that San Diego will seek out water from other sources if this transfer is not approved or implemented, chief among those sources is the Sacramento/San Joaquin Delta, an ecologically valuable and sensitive area.²

This "sky is falling," dire consequence perspective simply justifies a predetermined outcome. What is remarkable is that this entire Draft Order may be irrelevant if the IID Board, one of the lead agencies in this proceeding, decides not to proceed with this transfer project. As of this writing, the lead agency has only certified the EIR, it has not agreed to carry out the project.

The organizations have the following specific criticisms of the Draft Order:

¹ [CITE TO PAGE OF DRAFT ORDER]

² [CITE TO PAGE OF DRAFT ORDER]

I. THE WATER TRANSFER WILL HAVE UNREASONABLE IMPACTS ON FISH AND WILDLIFE

Water Code § 1736 states that the SWRCB may approve a long-term transfer petition if it finds that the transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses. As the Board states in its Draft Order at page 20, fn. 5, the determination of what constitutes an “unreasonable” effect codifies the duty to consider public trust uses per *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 418, 447, fn. 27. Under *National Audubon*, the Supreme Court held that the state has “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect the public trust whenever feasible.” *Id.* at 419. Thus, the reasonableness doctrine authorizes this Board to engage in a broad-ranging inquiry into the public costs and benefits of any given use or change in use of water, whether that change involves the purpose of use, method of use, method of diversion, or as is pertinent in this case, the method of conservation of water for transfer.³

Throughout the Draft Order, the Board finds that while there will likely be significant impacts on fish and wildlife [see *e.g.*, Draft Order at 33-34, 48, and 57], those impacts are outweighed by the public interest in ensuring that the water transfer agreement is signed by December 31, 2002. The Draft Order sets forth a rationale that any actions that could chill the signing of the Quantification Settlement Agreement would result immediately in a reduction of nearly 800,000 acre feet of water for coastal southern California. [Draft Order at 48.] Further, the Draft Order speculates that increased mitigation costs and costs to third parties from fallowing will likely cause the transfer to fall apart. [*Ibid.*]

The Draft Order’s conclusion that the significant impacts on fish and wildlife in the Salton Sea ecosystem are not “unreasonable” due to the substantial public interest in finalizing the water transfer is not supported by the evidence in the record. While there is substantial evidence demonstrating the serious impacts of the transfer on fish and wildlife in the Sea and its drains and tributaries, there is very little evidence, if any, that the failure to finalize the water transfer will indeed result in a substantial reduction in urban Southern California’s water supply.

II. THE DRAFT ORDER’S CONCLUSION THAT A FAILURE TO FINALIZE THE WATER TRANSFER WILL RESULT IN AN IMMEDIATE REDUCTION IN CALIFORNIA’S ALLOCATION OF COLORADO RIVER WATER IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

The Draft Order asserts that if the water transfer is not approved and the Quantification Settlement Agreement is not executed by December 31, 2002, Southern California would face an immediate shortfall of approximately 800,000 acre feet of water. [Draft Order at 48.] However, this assertion is nothing more than an opinion of one party of what the Interim Surplus Guidelines mean. Indeed, the Draft Order fails to even cite to the guidelines and the accompanying federal register notice interpreting these guidelines.

³ Footnote 5 at page 20 of the Draft Order simply dismisses the public trust issues Audubon raised in its closing argument. History appears to have a way of repeating itself it seems.

A plain reading of the guidelines demonstrates that the question of whether Southern California will immediately experience a shortfall in water is not a forgone conclusion. Section 5.B of the guidelines states that should the QSA and related documents not be executed by December 31, 2002, “the interim surplus determinations under Sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended . . . for either the remainder of the period identified in Section 4(a) or until such time as California completes all required actions and complies with reductions in water use reflected in Section 5(C) of these Guidelines, whichever occurs first.” Thus, in the event the QSA is not signed, the first consequence will be the suspension of the more liberal surplus declarations allowed under the ISG – the Full Domestic and Partial Domestic Surpluses.

Next, according to Section 5.B, the 70R strategy will govern surplus determinations until (1) through Dec. 31, 2015 or (2) California completes all required actions and complies with mandated reductions in water use.

Whatever the term “all required actions” refers to, there is no evidence to show that it includes execution of the QSA, and there is considerable evidence to the contrary. The Final EIS for the Interim Surplus Criteria (ISC) makes little mention of the need for a signed QSA, or even of the existence of a QSA,⁴ stressing instead in the Purpose and Need statement that the ISC were “intended to recognize California’s plan to reduce reliance on surplus deliveries, to assist California in moving toward its allocated share of Colorado River water, and to avoid hindering such efforts. Implementation of interim surplus criteria would take into account progress, or lack thereof, in California’s efforts to achieve these objectives.” [FEIS Colorado River Interim Surplus Criteria, at 1-4.] The bureau adheres to these goals when it assumes in subsequent compliance documents that reduction in agricultural use is the sole determinant in reinstating sections 2(B)(1) and 2(B)(2).⁵

In each of the environmental compliance documents associated with the QSA, the Bureau of Reclamation has consistently assumed that in their baseline analyses that the QSA would not be in effect, but the Interim Surplus Guidelines would be.

In the Interim Surplus guidelines Record of Decision (ISG ROD), benchmarks for reductions of agricultural use of Colorado River water in California were specified. Since these benchmarks are not met from QSA water transfers under the No Action scenario, it was assumed that the Metropolitan Water District (MWD) would reduce its use to meet the benchmarks and therefore, keep the ISG in effect.⁶

⁴ In fact, a draft QSA was not made public until after the FEIS was issued.

⁵ A look at the Purpose and Need statement (from the bureau) for the IID water conservation and transfer agreement mirrors the federal commitment to assist California in reducing its water use (rather than the commitment to a signed QSA, regardless of its import), particularly since one of the alternatives is the implementation of a water conservation and transfer agreement without implementation of the QSA. DEIS, at 1-5; 1-42 (timely implementation of the proposed project will assist in meeting the benchmark deadlines and satisfying the ISG)

⁶ DEIS IA, IOPP, and Related Federal Actions, App. G: Implementation Agreement Technical Memorandum No. 1, at 2-5. See also App. C-5, containing the MWD schedules with and without benchmark reductions.

No Action Alternative – this scenario assumes that the ISG described in Chapter 1 would be implemented and that water would not be transferred under the IA.⁷

The Interim Surplus Guidelines are presumed to be in effect for purposes of the assessment of the Proposed Project set forth in this Draft EIR/EIS. The Proposed Project will assist California in meeting the benchmarks for reduction of Colorado River water use included in the guidelines.⁸

Repeatedly, the Bureau of Reclamation has placed its emphasis on the reduction of California's water use. Furthermore, this emphasis has led to the bureau's consistent assumption that implementation of the ISG and its surplus determinations will continue if California meets the required reductions in use. Assistant Secretary of Water and Science Bennett Raley said it most succinctly last December when he told Colorado River water users, "The interim surplus guidelines depend on attaining benchmarks - *i.e.*, specific reductions in use - of Colorado River water use in California." (Written remarks of Bennett Raley, Colorado River Water Users Association, Las Vegas, NV (Dec. 13, 2001).) Therefore, the SWRCB's conclusion that the failure to implement the transfer will result in a loss of nearly 800,000 acre feet of water for Southern California is nothing more than speculation.

III. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE ASSERTION THAT ADDITIONAL COSTS ASSOCIATED WITH MITIGATION REQUIREMENTS OR THIRD PARTY IMPACTS FROM FALLOWING WILL KILL THE WATER TRANSFER.

The Draft Order also contains the conclusion that increased mitigation costs and increased costs associated with third-party impacts from land fallowing may result in IID refusing to agree to the water transfer. [Draft Order at 48.] This assertion is not even supported by a citation to the record. At this point, no one knows what the Imperial Irrigation District's bottom line may be. Thus, such an assertion by the Board is nothing more than pure speculation.

IV. THE SCALE AND SCOPE OF THE LOSS OF FISH AND BIRD LIFE IN AND AROUND THE SALTON SEA OUTWEIGHS ANY SPECULATIVE POSSIBILITY OF IMPACTS FROM FAILING TO IMPLEMENT THE WATER TRANSFER.

The Salton Sea is an environmental and recreational resource of the highest importance, one of the most productive areas for fish and wildlife in California. The Sea supports a diversity of invertebrate life, which in turn supports what may be one of the most productive fisheries in the world, sustaining up to 50 million fish. (Testimony of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1495, lines 4-11.) Several of these fish, including orangemouth corvina and tilapia, are important for recreational anglers; one of the fish species, the desert pupfish, is native to water bodies of the Salton Trough and is listed under the California and federal Endangered Species Acts. (IID Exh. 55, p. 3.2-61.)

⁷ DEIS IA, IOPP, and Related Federal Actions, at 3.0-3. See also *id.* at 3.1-20; 3.1-23; 3.1-26.

⁸ DEIS, *Id.*, at 1-32.

The Salton Sea and the surrounding area are of international importance to migratory birds. (Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1865, line 15.) Over 400 species have been counted in and around the Sea, two-thirds of all species in the United States. (PCL Exh. 1, p. 5.) On any given day there are hundreds of thousands of birds at the Sea; there are high day single counts of over 3 million. (Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1865, line 11.) The Salton Sea supports over 80 percent of American white pelicans, 90 percent of the North American population of eared grebes, 45 percent of the Yuma clapper rail, which is listed under both the federal and state Endangered Species Acts. (Testimony of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1496, lines 12-21.) It is the only inland nesting site for brown pelicans, also listed under both the state and federal acts. (*Ibid.*) Thirty to 50 percent of the *world's* population of mountain plovers, a species proposed for listing under the federal ESA, use adjacent agricultural areas. (*Id.* at lines 17-19.) Leg bands from birds banded at the Salton Sea have been recovered in Russia, Alaska, across Canada, up and down the Pacific Flyway, from as far away as Peru and Hawaii. (PCL Exh. 1, p. 2.) With over 90 percent of California's wetlands lost, the Salton Sea has become an irreplaceable link on the Pacific Flyway.

The loss of the Sea as habitat for any period of time is serious given the significance of the Sea as a resource to birds. See Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1868-1874. Even the Draft Order acknowledges serious impacts to fish and wildlife from the water transfer. See Draft Order at 33-34, 48, 57 and 81. In particular, the Draft Order acknowledges that the Sea will decline after year 15 of the transfer if there is no restoration plan in place. There is plenty of evidence that even if a restoration plan is not adopted, the Sea will continue to provide habitat for fish and birds for at least another 23 years and possibly more than 40 years. However, the Draft Order will cut short the Sea's usefulness as habitat by 8 to 25 years. This very real loss of such a critical resource will create a significant impact on fish and wildlife.

When this loss is weighed against speculative assumptions about the outcome of failing to complete the transfer, the conclusion should be that the transfer will result in an unreasonable impact on fish and wildlife resources.

V. THE DRAFT ORDER VIOLATES THE STATE AND FEDERAL ANTI-DEGRADATION POLICY AS IT IS APPLIED TO BOTH THE SEA AND THE TRIBUTARIES AND DRAINS AROUND THE SALTON SEA.

Water quality at the Salton Sea is subject to the federal antidegradation policy enacted pursuant to the federal Clean Water Act. (40 CFR § 131.12.) That policy requires that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained." (40 CFR § 131.12(a)(1).) SWRCB Resolution No. 68-16 establishes requirements similar to the federal antidegradation policy. In all cases where the federal antidegradation policy is applicable, SWRCB Resolution No. 68-16 requires that, at a minimum federal policy must be satisfied. (SWRCB Order No. WQ 86-17 at pp. 17-18.)

In the Mono Lake decision, this Board applied the requirements of the federal antidegradation policy enacted pursuant to the Clean Water Act and the requirements of SWRCB Resolution No.

68-16 to determine that the City of Los Angeles must reduce its diversions from streams feeding Mono Lake. The federal and state antidegradation policies apply at the Salton Sea and in Imperial Valley drains as well.

In this case, the Draft Order acknowledges that the water transfer will likely result in increased Selenium in both the drains/tributaries and the Sea. [See Draft Order at 33-34 and 51, fn 11.] In addition, testimony by the Regional Water Board showed that reduced inflows from on-farm conservation measures would exacerbate already existing problems with selenium in the drains and the New and Alamo rivers. The water quality objective for selenium, set as a federal standard and adopted by the Regional Board, is 5 parts per billion (ppb). (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1219, lines 1-8.) Currently, the concentration of selenium is approximately 1 ppb in the Salton Sea, approximately 4 ppb in the New River, and approximately 7 or 8 ppb in the Alamo River and Imperial Valley drains. (*Id.* at lines 16-22; see also Regional Water Quality Control Board Exh. 2, p. 3.) If the project is implemented as originally proposed, selenium could reach almost 10 ppb in the Alamo River and over 8 ppb in the New River. (Regional Water Quality Control Board Exh. 4, Tables 6 and 7.) Putting it differently, if inflows are reduced, New River water, which currently meets the selenium objective, could be in violation of that objective; and Alamo River and Imperial Valley drain water, which currently exceeds the selenium objective, could be even further out of compliance with the objective. (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1221, lines 2-7.) The result will be that the beneficial uses of the drains and tributaries, and possibly the Sea, will be impaired.

The Draft Order appears to attempt to mitigate for this impairment of beneficial uses by requiring the IID participate in a “study” to determine if anything can be done to deal with the increasing SE. Draft Order at 92-93. However, this “study” does not assure that there will be steps taken to reverse the effect of the transfer of the beneficial uses of the Sea and its tributaries. In addition, testimony by the Regional Board indicated that, at this time, there is a lack of technology that is hindering efforts to reduce Selenium. (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1224-25.

Based on the record, the Draft Order will result in an impairment of existing beneficial uses. Thus, the Draft Order violates the state and federal anti-degradation policies.

VI. THE DRAIN HABITAT CONSERVATION STRATEGY WILL HAVE AN UNREASONABLE IMPACT ON FISH AND WILDLIFE.

After 15 years, the water transfer will likely switch from a mix of on-farm conservation and fallowing to all on-farm conservation measures. Such a switch will have significant impacts in the drains and tributaries of the Sea as it will result in a decline in water flowing through the drains and rivers. This decline in water flow will have four impacts: (1) a loss of up to 652 acres wetland vegetation; (2) loss of water for fish and invertebrates; (3) loss of connectivity between habitats for desert pupfish; and (4) a decline in water quality. The Draft Order requires that these impacts are mitigated by the re-creation of up to 652 acres of wetland habitat, the participation of IID in a SE plan, and the implementation of the Desert Pupfish Conservation Strategy. Draft Order at 27-35. As concerns over the water quality mitigation plan have already been discussed

infra, this section will focus on the loss of wetland habitat and loss of water for fish and invertebrates.

First, there is evidence in the record that the “re-creation” of wetland habitat does not necessarily provide appropriate mitigation. There is no evidence that the wetland habitat that is re-created will be of similar habitat value for the species that use the drains and tributaries or that it would be created in a time frame that would be relevant to the affected species. (See Comments of the Cabazon Band of Mission Indians, *et al.*, on the Draft EIR/EIS, Audubon Exhibit 18, at 21-22.)

Second, the creation of 652 acres of wetland vegetation does not compensate for the loss of fish and invertebrates in the drains and tributaries due to a reduce water flow. Wetland vegetation serves the purpose of providing nesting, resting and foraging habitat, but it does not supply the same type of foraging habitat as the waters of the drains and tributaries. Indeed, there is no evidence in the record to support the assertion that the creation of up to 652 acres of wetlands vegetation will provide equivalent foraging habitat for the potential loss of hundreds of miles of drains and tributaries as foraging habitat for birds.

Therefore, based on the above concerns, there is insufficient evidence in the record to support the Board’s decision that the water transfer will not have an unreasonable impact on fish and wildlife.

VII. THE SALTON SEA HABITAT CONSERVATION STRATEGY WILL HAVE AN UNREASONABLE IMPACT ON FISH AND WILDLIFE.

The Draft Order concludes that IID will need to supply only 15 years of mitigation water to the Sea. Draft Order at 50. In addition, IID will need to provide shoreline habitat pursuant to the Salton Sea Habitat Conservation Strategy set forth in the draft Habitat Conservation Plan. (*Id* at 50.)

The SWRCB cites to SB 482 as evidence of the correct balancing of interests to support its decision to only protect the Sea from a reduction in inflows, and increase in salinity, for 15 years. It is important to point out that SB 482 was enacted to allow for the take of fully protected species only. It was not enacted to define the Board’s responsibility for protection of all fish and wildlife resources pursuant to Water Code § 1736. Thus, it is inappropriate for the Board to cite to SB 482 as justification for cutting mitigation water to the Sea after 15 years.

The decision to only supply mitigation water to the Sea for 15 years will result in making both restoration potentially infeasible and in unreasonable impacts to fish and wildlife.

VIII. IT IS UNREASONABLE FOR THE SWRCB TO CONCLUDE THAT THE EVIDENCE IN THE RECORD REGARDING THE FEASIBILITY OF RESTORATION WAS INCONCLUSIVE.

As part of its decision to only require that IID provide 15 years of mitigation water to the Sea, the Board concluded that there was inconclusive evidence in the record regarding the impact of a decline in flow to the Sea on restoration efforts. [Draft Order at 47.] Such a conclusion runs counter to record in which the Salton Sea Authority testified that a reduction in flow to the Sea

will result in making restoration infeasible. There was not testimony rebutting this statement by the Authority. [See Draft Order at 44.]

IX. EVEN IF A RESTORATION PLAN IS NOT IMPLEMENTED BY YEAR 15, THE TRANSFER WILL HAVE UNREASONABLE IMPACTS ON FISH AND WILDLIFE.

First, there is sufficient evidence in the record that fish will exist in the Sea well beyond 15 years. Indeed, it is likely that fish will persist in the Sea until 2030 or beyond. Thus, the termination of mitigation water to the Sea will deprive fish and wildlife of habitat much sooner than if the Sea were left at status quo. As discussed above, given the importance of the Salton Sea to bird species, it is unreasonable to deprive these species of 15 years or more of viable habitat.

Second, the Salton Sea Habitat Conservation Strategy fails to provide an assured replacement of inflow reduction. At first glance, the Salton Sea Habitat Conservation Strategy appears to fully mitigate for inflow reductions to the Sea caused by the project. (Final EIR, p. 3-37.) However, the devil is in the details, and those details reveal something less than a full commitment to provide one-to-one replacement for project-related inflow reductions. The formula for determining the amount of mitigation water provided is as follows:

The annual amount of mitigation water would be equal to the actual inflow reduction caused by the water conservation and transfer component of the Project plus or minus an amount of water necessary to maintain the target salinity trajectory. This trajectory would correspond to the salinity projection for the 95-percent confidence bound [reference omitted] until 2030. However, because of the continued threat of potential flooding of lands adjacent to the Salton Sea, IID would not be required to discharge mitigation water to the Sea if the discharge of that water would increase the surface elevation of the Salton Sea above the levels established by the projected elevation change associated with the Proposed Project [figure reference omitted]. That is, IID would not be required to discharge water to the Sea during years in which the elevation of the Sea was at or above the elevation projection for the Proposed Project . . . because of unforeseen increases in elevation (e.g., increased inflow from a major storm event). In addition, IID could discontinue to discharge water to the Salton Sea for mitigation prior to 2030 if a Salton Sea restoration project were implemented or if it could be demonstrated that tilapia were no longer successfully reproducing in the Sea.⁹

Several elements of the above formula cause concern. First, IID's obligation to provide mitigation water to the Sea does not actually correspond to the amount of project-related inflow reduction. The initial calculation appears to consist merely of inflow reduction caused by the water conservation and transfer portion of the project; any inflow reductions due to water conserved for the Interim Operations and Payback policy, an amount potentially up to 59,000 acre feet per year, appear to be left unmitigated.

⁹ Final EIR, pp. 3-37-3-38.

Second, the calculation does not stop at determining the inflow reduction caused by the water conservation and transfer component of the Project. Following that calculation, the amount is adjusted in order to maintain a salinity trajectory corresponding to the 95 percent confidence bound projected under the project baseline. If current inflows to the Sea are maintained, or if or if salinity otherwise increases at a rate slower than predicted under the baseline, for reasons that are not the result of IID's actions, IID will not be obligated to provide mitigation water in an amount equivalent to inflow reduction caused by the project. In addition, if the elevation of the Sea is at or above the elevation projected for the Proposed Project, IID will not be obligated to provide mitigation water, even if the higher elevation is the result of inaccuracies in the project baseline.

Thus, there is insufficient evidence in the record to support the Board's conclusion that the Salton Sea Habitat Conservation Strategy will provide sufficient mitigation water for the first 15 years of the transfer.

X. THE SALTON SEA HABITAT CONSERVATION STRATEGY'S REQUIREMENT FOR REPLACEMENT OF SHORELINE HABITAT DOES NOT PROVIDE SUFFICIENT MITIGATION FOR IMPACTS TO FISH AND WILDLIFE.

The Draft Order requires that IID replace shoreline habitat as it is lost after year 15 of the transfer. There is insufficient information in the record to support that this shoreline replacement strategy will provide adequate protections for impacts to birds. There is evidence in the record that states that benefits of shoreline replacement are speculative. (Audubon Exhibit 18 at 22-23.) In particular, the HCP fails to adequately assess the impact from the loss of slope of shoreline habitat and changes in the invertebrate community due to a shrinking Sea. These concerns have not been addressed. Thus, the transfer will likely have an unreasonable impact on fish and wildlife due to impacts from loss of shoreline habitat.

XI. THE LOWER COLORADO RIVER BIOLOGICAL OPINION DOES NOT ELIMINATE THE FACT THAT THE PROPOSED TRANSFER WILL HAVE AN UNREASONABLE IMPACT ON FISH AND WILDLIFE ON THE COLORADO RIVER.

The Draft Order concludes that the Lower Colorado River Biological Opinion effectively addresses impacts to species on the Colorado River. [Draft Order at 54-57.] However, the Draft Order fails to address the issue raised that the Biological Opinion failed to analyze for the aggregate impacts of the proposed project, QSA, Implementing Agreement, and Interim Surplus Guidelines. In particular, the Biological Opinion has not analyzed the impacts of the Interim Overrun Policy. Thus, there is insufficient evidence to support the conclusion that the Biological Opinion, if implemented, will provide mitigation adequate to ensure that the diversion of water on the river will not result in an unreasonable impact on fish and wildlife.

XII. THE BASELINE ADOPTED BY THE SWRCB IN THE DRAFT ORDER VIOLATES THE STANDARDS OF SB 482

Under SB 482 (Stats 2002, ch 617, §1.), the Department of Fish and Game is authorized to permit take of fully protected species for the purposes of implementation of the QSA if the following condition is met:

2081.7 (c) After consultation with the Department of Water Resources and an opportunity for public review and comment, the department determines, based on the best available science, that the implementation of the Quantification Settlement Agreement during the first 15 years that the agreement is in effect (1) will not result in a material increase in projected salinity levels at the Salton Sea, and (2) the agreement will not foreclose alternatives for reclamation of the Salton Sea as summarized in Section 101(b)(1)(A) of the Salton Sea Reclamation Act of 1998 (P.L. 105-372).

As the SWRCB notes in a footnote on page 45 of the Draft Order, the FEIR incorporates a sensitivity analysis that demonstrates that the baseline could be in error by as much as ten to fifteen percent in its projections of future inflows to the Salton Sea. Correctly projecting inflows is critical to accurately projecting salinity levels at the Salton Sea, and a ten to fifteen percent error in the baseline is almost certainly “material” under the standards of SB 482. Further, SB 482 requires the Department of Fish and Game to consult with the Department of Water Resources and provide an opportunity for public review and comment before determining whether the effect of the transfer on the Salton Sea is material. If some the challenged assumptions in the baseline to not hold up under increased scrutiny, the SB 482 standard may not be met. The SWRCB should provide flexibility for the Department of Fish and Game to adopt a different baseline rather than prejudging the process established in SB 482.

We further suggest that the SWRCB modify its order to allow for a “one for one” or “bucket for bucket” approach to ensuring that the standards of SB 482 are met. Under this approach, for every acre-foot of water lost to the Salton Sea because of the transfer, an additional acre-foot of water will be provided to the Sea to make up for the loss. While this method of accounting for water requires transparent and verifiable monitoring of the provision of make up water, it avoids disputes over the baseline and uncertainty over whether deviations from the salinity curve are caused by inadequate provision of make up water by IID or by external conditions for which IID is not responsible. The SWRCB should modify the Draft Order to allow for this simpler and less controversial approach to ensuring that the standards of SB 482 are met.

XIII. THE DRAFT ORDER’S FINDING THAT TESTIMONY ON THE POTENTIAL FOR WINDBLOWN DUST EMISSIONS FROM EXPOSED SEA BED AT THE SALTON SEA IS “INCONCLUSIVE” IS CLEARLY ERRONEOUS

The draft decision’s analysis of potential air quality impacts from exposed sediments at the Salton Sea is very disappointing, both for its length (barely two sentences) and its substance (a summary dismissal of days of testimony as “inconclusive”). Although no party provided incontrovertible proof that huge dust storms will result from lowering the elevation of the Salton

Sea, the California Air Resources Board (CARB) pointed out, “fugitive dust emissions may occur with the proposed lowering of the elevation of the Salton Sea.”¹⁰ Comparing the Salton Sea with Owens Lake and Mono Lake, CARB warned:

Not recognizing the potential for windblown fugitive emissions from increased surface exposure of a lowered Salton Sea elevation would ignore previous issues with dry lakebeds.”¹¹

The SWRCB should have required the petitioners to come forward with some well-founded and well-documented evidence, backed by research carried out at the Salton Sea, demonstrating that windblown fugitive emissions from the exposed sediments of the Salton Sea would not be a problem. CARB suggested as much in its January, 2000 comments, stating:

Because of the windblown dust problems exhibited at other exposed lakebeds in California, this area should be evaluated quantitatively and needs to be well-founded and documented. Information in the Owens Valley PM10 Planning Area Demonstration of Attainment State Implementation Plan Project Alternative Analysis, October 23, 1996, indicates that some of the salts at the Salton Sea are also present at Owens Lake, in some cases in comparable weight fractions. Wind tunnel studies should be conducted using soils from the Salton Sea to identify the potential magnitude of windblown dust from an exposed Salton Sea lakebed.¹²

Instead of the rigorous, quantitative analysis suggested by CARB, CH2MHILL, the consulting company that did the EIR/EIS, provided a two-page “qualitative analysis” that lists several supposed differences between the Salton Sea and Owens Lake and suggests rather hopefully that, because of these differences, the dust problem may not arise at the Salton Sea. Testimony from Mr. Ted Schade, Senior Project Manager at the Great Basin Air Pollution Control District, directly contradicts both the existence and significance of many of these claimed “differences” (RT 1724-1740). The EIR/EIS did not provide any quantitative analysis, wind tunnel analysis of Salton Sea sediments, peer review, or any other form of analysis derived from the scientific method (See IID 55).

When asked why the EIR/EIS does not even mention the possibility of air quality impacts from windblown dust in the Coachella Valley as the Sea recedes, a witness for CH2MH testified that this kind of analysis is “very difficult” or “perhaps impossible” (RT 818). Witnesses for CH2MHILL were also unable to answer basic questions about the environmental and human health effects of airborne distribution of toxic chemicals bound up in Salton Sea sediment (RT 818-820). However, it is not “impossible” to conduct a credible analysis of these issues. Detailed, quantitative analyses of the windblown dust problem at Owens Lake and Mono Lake have been developed and, in the Mono lake case, provided as evidence to the SWRCB (RT 1733, 1772-3).

¹⁰ California Air Resources Board Review Comments on the Salton Sea Restoration Draft EIS/EIR, January, 2000 (See attached).

¹¹ Id.

¹² Id.

Far from being “inconclusive”, the record contains overwhelming evidence of two points: (1) the inadequacy of the air quality analysis in the draft EIR/EIS, and (2) the high probability that emissions of windblown dust from exposed areas of the Salton Sea will occur to some degree. The issue that was not conclusively resolved, and will not be in the absence of a credible research and monitoring program at the Salton Sea, is how emissive the exposed areas of the Salton Sea will be. If the Salton Sea proves to be as emissive as Owens and Mono lake, this transfer will create an air quality, human health and economic calamity.

The evidence clearly shows that exposure of large areas of sea bed will have serious implications for human health and regulatory compliance in the Imperial Valley even if emissions from exposed Salton Sea sediments are just a fraction of what they are at Mono Lake or Owens Lake. (Testimony of Dr. Sharon Libicki, Hearing Transcript, May 16, 2002, p. 2106, lines 20-25.) If Salton Sea sediments were only 10 percent to 1 percent as emissive as Owens Lake, exposure of 50,000 acres of sea bed would still cause serious violations of PM 10 standards (RT 1740, lines 4-8.) Violations of air quality standards will lead to stricter control measures imposed on other dust emission source in Imperial County, from construction to agricultural activities. (Testimony of Dr. Sharon Libicki, Hearing Transcript, May 16, 2002, p. 2107, lines 4-8.) It would have similar results in the Coachella Valley, which was inexplicably left out of the air quality impacts analysis altogether.

XIV. THE AIR QUALITY PLAN IN THE FEIR IS CLEARLY INADEQUATE.

The FEIR does contain several improvements over the Draft EIR/EIS. For one thing, the FEIR acknowledges the possibility that toxic air contaminants could be a significant health issue (3-52). Perhaps more significantly, the FEIR outlines a four-part strategy for addressing potential dust emissions: 1) restricting access to exposed shoreline, 2) implementing a research and monitoring program as the Sea recedes, 3) developing a long-term program for creating or purchasing offsetting PM10 emission reduction credits, and 4) implementing measures to reduce emissions at the Sea directly. (FEIR, pp. 3-51 – 3-52.) Such measures include providing water to re-wet emissive areas “if feasible” and extending the Salton Sea Conservation Strategy beyond thirty years (3-52). Of course, under the Draft Order, the Salton Sea Conservation Strategy would end after fifteen years, accelerating the onset of air quality impacts.

There is little question that some of the approaches listed in the FEIR could effectively mitigate or avoid dust impacts if implemented. However, there is no evidence that this will actually occur. First, the FEIR provides no estimate of the potential cost of the four-part strategy, and no indication that any funds have been committed to implement the strategy. This is a significant problem in light of evidence in the record that the Owens Lake remediation effort could cost \$300 million, plus 50,000 acre-feet of water per year (valued at \$16.5 million annually), plus annual maintenance costs of \$5 to \$25 million per year (RT 1731-1732). Residents of regions that could be affected by windblown dust from the Salton Sea would do well to be concerned about the willingness and ability of the parties to this transfer agreement to pay mitigation costs of this magnitude.

Second, the FEIR still concludes that windblown dust from exposed shoreline caused by the proposed transfer “may result in potentially significant and unavoidable air quality impacts that could not be mitigated.” (FEIR, p. 3-52) The FEIR cites two reasons for this uncertainty:

- (1) uncertainty regarding the actual air quality impacts of Salton Sea shoreline exposure, because of the lack of sufficient records or research regarding emissive potential, and (2) and uncertainty regarding the availability or feasibility of mitigation measures.¹³

We agree wholeheartedly with both of these statements. As discussed above, basic research on the potential magnitude of the windborne dust problem has not been done. While the listed mitigation approaches all merit further investigation, none of them are sufficiently concrete to constitute an adequate mitigation plan.

Step (4) of the phased mitigation plan, implementation of direct emissions reductions at the Sea, is especially sketchy. Proposed emissions reductions methods outlined in the FEIR are:

- (a) Implementing feasible dust mitigation measures. This includes the potential implementation of new (and as yet unknown or unproven) dust control technologies that may be developed at any time during the term of the proposed project, and/or
- (b) If feasible, supplying water to the Sea to re-wet emissive areas exposed by the proposed project.¹⁴

We hope that the SWRCB does not put too much stock in hopes for new and unproven dust control technologies. Ted Schade testified specifically on this point, stating, “we aren’t going to invent a new way to keep dust down.” (RT 1738) Schade testified that the dust control mechanisms that have proven effective at Owens Lake mimic natural processes involving vegetation, gravel and water; processes that would take care of the dust problem all by themselves given hundreds or thousands of years. (RT 1738) Resolving the problem in a reasonable time frame, as required by law will require similar remediation strategies to those that are currently in use at Owens Lake. Any hope in the appearance of a magical, new dust abatement technology is likely to be misplaced.

XV. THE CONDITIONS IN THE DRAFT ORDER WILL NOT BE SUFFICIENT TO PROTECT AIR QUALITY.

The Draft Order does provide some protections for air quality. The SWRCB imposes the following conditions to address the issue of windblown dust from exposed sediments of the Salton Sea:

¹³ FEIR, p. 3-52.

¹⁴ FEIR, p. 3-52.

- Implementation of the monitoring and mitigation plan for air quality outlined in pages 3-50 through 3-52 of the Final Environmental Impact Report.
- Compliance with any relevant requirements of the State Implementation Plan for PM10 Emissions (SIP), as amended by the Imperial County Air Pollution Control District.
- Submittal of an annual report to the SWRCB on actions taken during each calendar year to comply with this condition.¹⁵

Finally, the SWRCB proposes to maintain jurisdiction to be able to adjust mitigation requirements as necessary.

Unfortunately, the air quality mitigation measures identified in the FEIR are too vague to give any meaning to the SWRCB's requirement that IID implement this plan. For example, IID could try and fail to predict whether dust emissions from the Salton Sea will occur, try and fail to create a program of PM10 emission reduction credits, try and fail to control dust emissions at the Salton Sea, submit a report every year, and thus comply with the SWRCB's order without reducing the air quality problem at all. What level of effort is required at each of these stages to comply with the SWRCB's requirements? What level of difficulty in securing funding or water for mitigation measures merits a finding that mitigation is not "feasible"?

The Draft Order states that the SWRCB believes that impacts to air quality due to exposed shoreline will be less than significant with implementation of the proposed monitoring and mitigation plan (Draft Order 75). Given that some of the approaches on the laundry list of mitigation measures in the FEIR, if implemented, would definitely accomplish this goal, we can agree that it is possible that the SWRCB is correct in this belief. However, the only way to ensure that air quality actually be protected is to require that the plan outlined in the FEIR be implemented in such a way that it in fact reduces air quality impacts to a less than significant level. However, the SWRCB does not do this. In fact, it does the exact opposite, finding that the importance of the transfer "overrides" impacts to air quality that are not "avoidable" or "mitigable." This assertion that providing water to some people "overrides" the importance of breathable air to others is astounding, and does not help ensure that air quality impacts will be mitigated.

The fundamental flaw that we see in the air quality section of the Draft Order is that the requirement that IID implement mitigation measures is meaningless without an enforceable, results-based standard. So long as the SWRCB receives annual reports reflecting some appearance of effort to implement some of the conceptual mitigation approaches in the FEIR, IID will have complied with the Draft Order. The obvious correction to make is to require, as a condition of the transfer, that IID mitigate air quality impacts to a less than significant level. The SWRCB apparently believes this standard will be met, and presumably wants air quality impacts to be mitigated. Finally, even if it turns out that air quality impacts really do become unavoidable and unmitigable sometime over the next seventy-five years, perhaps due to an

¹⁵ [CITE TO ORDER WHERE CONDITIONS ARE FOUND]

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unprecedented period of severe drought in the Colorado River basin, IID could always petition the SWRCB to re-open this issue.

By not requiring upfront that the dust control measures at the Sea actually work, the SWRCB has effectively stacked the deck against the people whose health and communities are most at risk. They would be reasonable to fear that the SWRCB will not intervene on their behalf unless prompted by an air quality disaster of such a magnitude that the damage – to lives, economies, and communities in an entire region of California – will already be done.

Finally, while we applaud the inclusion of a requirement that IID comply with applicable requirements of the State Implementation Plan for PM10 Emissions (SIP), we note that this condition is little more than a requirement that the project comply with federal law. We also note that, if there is a fugitive dust problem at the Salton Sea, implementation of the SIP will almost certainly require PM10 reduction offsets from other sources in affected areas. (RT 2107) This could have significant economic effects in both the Coachella and the Imperial Valleys.

It is less apparent whether the SIP contains or will ever contain mechanisms for requiring mitigation of dust emissions from the Salton Sea to a less than significant level. Ted Schade's description of the struggle that the Great Basin Air Pollution Control District went through to get Los Angeles to take responsibility for mitigating dust problems at Owens Lake is a particularly chilling example of the struggles that could ensue if this transfer harms air quality. (RT 1755 - 1759) The SIP may or may not ultimately have the necessary mechanisms to deal effectively with an air quality problem at the Salton Sea. Either way, the SWRCB should not ignore this issue, assuming without ensuring that some other process will take care of it.

The SWRCB cannot ignore the air quality implications of this transfer. Here, as in the case of Owens Lake and Mono Lake, the potential air quality problem is an indirect effect of the water transfer project. It is a foreseeable indirect result of the diversion of vast amounts of water to coastal, Southern California cities. In fact, prior diversions destroyed one of California's great inland lakes and seriously impaired another.

If the diversions from Owens Lake and Mono Lake had never occurred, and if the possibility of toxic dust storms and PM10 problems from dry lake beds were not well known, the SWRCB might be excused for refusing to use its authority to protect the air quality around the Salton Sea. However, we have no doubt that the SWRCB understands very well what happened at Owens Lake and Mono Lake. Comments from the CARB and others show that this indirect effect is foreseeable at the Salton Sea. Therefore, we respectfully request that the SWRCB revisit the air quality conditions in the Draft Order and adopt the changes recommended in these comments.

The SWRCB must require that the dust control measures at the Sea actually be effective. The SWRCB must also require that the air quality mitigation measures outlined at a conceptual level in the FEIR be further developed, and that they go through both public comment and scientific peer review before IID is allowed to stop implementing the Salton Sea Conservation Strategy. Without these basic safeguards as these, however, the SWRCB is gambling with the future of the Imperial and the Coachella Valleys.

We understand that the transfer will not lead to exposure of large amounts of sea bed for 15 years under the terms of the Draft Order.¹⁶ However, the mere fact of the delay of these impacts does not in any way lessen our concern about their potential severity.

XVI. THE SWRCB SHOULD REQUIRE MITIGATION OF AIR QUALITY IMPACTS FROM FALLOWING AND OTHER WATER CONSERVATION MEASURES TO A LESS THAN SIGNIFICANT LEVEL.

The requirement in the Draft Order that IID implement best management practices for conservation measures that could potentially generate PM10 is unclear. It is not clear whether “conservation measures that could potentially generate PM10” means fallowing or whether it also includes other conservation activities such as construction or installation of efficiency measures. Assuming the broader interpretation, we applaud this requirement. However, we request that the SWRCB require that mitigation be effective in reducing impacts to a less than significant level.

XVII. DRAFT ORDER FAILS TO TAKE INTO ACCOUNT SIGNIFICANT GROWTH INDUCING IMPACTS OF THE TRANSFER PROJECT.

The Draft Order dismisses comments and concerns raised about the growth inducing impacts of the proposed transfer by stating, “. . . growth is not fueled by the availability of excess water . . . growth spurs the search for additional water.” The Draft Order appears to suggest that growth drives the search for water. Certainly California has a history of bringing water from distant areas to satisfy urban and agricultural needs. But, despite the Draft Order’s attempt to rationalize away the transfer project’s impact on growth, the availability of water has an impact on growth.

With respect to the Draft Order’s dismissal of the project’s growth-inducing impacts (§ 5.4), we initially note that, at page 57, the Draft Order states that the allegations regarding growth inducement were based upon the fact that the water received by SDCWA under the transfer would be more reliable than current sources. This is true, but it ignores an additional reason the transfer will be growth inducing. Not only will the project ensure a more reliable supply of water, it also makes available to SDCWA an additional supply of water. The water rights ensured by the transfer are in addition to SDCWA’s current entitlements to MWD water, which remain unchanged by the IID transfer.

The Draft Order concludes at pages 57-58 that water availability does not affect growth. This conclusion, however, is not supported by any evidence or citation to the record. Denying the link between water and growth defies common sense. It also contradicts the evidence in the record. Even SDWCA admitted that reliable water supplies are necessary to serve the growth planned for the San Diego region. (E.g., R.T. pp. 421, 2629; NWF Exh. 7, p. 28.)

¹⁶ Although some sea bed will be exposed if the Salton Sea Conservation Strategy relies on the flawed baseline rather than ensuring replacement for project-related inflow reductions on a one-to-one basis. In this case, mitigation on exposed areas should begin before fifteen years have passed.

The Draft Order claims that SANDAG's growth predictions do not consider the availability of water. Actually, as the National Wildlife Federation pointed out, the DEIR/DEIS itself acknowledges,

All of the projections [for growth in the San Diego region] are based on the assumption that the necessary water supplies would continue to be available to the region in the future.

[DEIR/DEIS, § 5.2.2., p. 5-37] The Draft Order ignores the crucial fact, *indeed, the stated purpose for the transfer*, that the project provides a secure, reliable source of water to sustain San Diego County's projected growth. This reliable source of water does not currently exist. This is a substantial change in existing conditions. Therefore, the proposed water transfer will induce new urban growth in coastal San Diego because it will provide the San Diego County Water Authority a new and expanded water source independent of that provided by the Metropolitan Water District, and it will make available water more secure and reliable.

The argument in the Draft Order that SANDAG's growth forecasts do not include water availability as a factor is misleading. The record is clear that SANDAG explicitly assumes an adequate supply of water when forecasting growth. (IID Water Conservation & Transfer Project Draft EIR/EIS, p. 5-37.) Thus, far from showing that water supply is irrelevant to growth, SANDAG's standards confirm that water supply is a necessary element for growth. Indeed, SANDAG has stated that the assurance of a reliable source of water, and this project in particular, is necessary to support growth in San Diego. (NWF Exh. 6, pp. 55, 65.)

In determining whether a project may have a significant impact on the environment, the agency must consider reasonably foreseeable indirect impacts.¹⁷ If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. *For example, the construction of a new sewage treatment plant may facilitate population growth* in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution.¹⁸ This example applies to the importation of a new reliable source of water.¹⁹

SANDAG has recognized the linkage between the proposed SDCWA/IID transfer and the region's future growth in its 1998 entitled San Diego Regional Economic Prosperity Strategy.²⁰ The report recommended particular strategies for the San Diego region "to strengthen our existing industries, our emerging growth companies, and our universities and research and development institutions that create new enterprises."²¹ One of the crucial issues identified in the report was the availability of imported water, and SANDAG specified the IID transfer as a critical element, concluding that it could "substantially increase our supply of water."²² The report further noted that imported water was "an essential resource" to San Diego, and that "[i]t

¹⁷ CEQA Guidelines § 15064(d)(3).

¹⁸ CEQA Guidelines § 15064(d)(2) (emphasis added.)

¹⁹ See *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 194-199.

²⁰ San Diego Regional Economic Prosperity Strategy, Recommended Action 5, p. 65.

²¹ *Id.* at p. 4.

²² *Id.* at p. 55.

will continue to influence the long-term business expansion and location decisions of our existing and emerging growth industries.”²³ SANDAG further explained the importance of the agreement to such business decisions: “The ever-present perception of a looming water shortage in the region would quickly evaporate with the consummation of this agreement.”²⁴

While the Draft Order speculates about the dire consequences to the Bay-Delta, if this transfer project does not go forward, it fails to take into consideration the growth inducing impacts of the proposed project. The Draft Order also places many conditions on the area of origin regarding the conservation and use of water. Yet, the Draft Order ignores the conservation and use of water at the receiving end. The conservation of water by the SDCWA could reduce the demand for importing water out of the IID service area; thus, reducing the transfer project’s impacts on fish and wildlife resources.

Much of the Draft Order’s “analysis” of the growth inducement issue revolves around the unsupported conclusion that water quality and other environmental impacts of the project are too speculative. This analysis, however, is flawed. First, the project’s growth inducement and resulting impacts with respect to water quality and biological resources (among other impacts) are not speculative. The National Wildlife Federation produced detailed expert testimony that the project would result in such impacts within SDCWA’s service area.

Moreover, neither SWRCB, SDCWA, nor any other agency has even bothered to study the transfer’s growth-inducing impacts, nor the impacts the planned growth in San Diego will have on water quality issues. (*E.g.*, R.T. pp. 2651-2652.) The EIR prepared for the project, upon which the Board substantially relies for its analysis, is seriously deficient in this regard. It fails to acknowledge any growth-inducing impact and completely omits any discussion of environmental impacts in the SDCWA service area. Hence, it is fundamentally inappropriate for the Board to rely upon the EIR, and such reliance violates the Board’s obligations as a responsible agency under CEQA.

Along the same lines, the Draft Order improperly sets aside concerns about growth inducement and the resulting impacts to water quality and biological resources on the ground that they should be dealt with by other agencies and programs at the local level. The Board, however, has an obligation under the Water Code and CEQA to consider the environmental impacts of the water transfer. The Board cannot ignore these impacts by deferring to other agencies. Such neglect, for example, constitutes an abdication of the Board’s responsibilities as a responsible agency under CEQA.

XVIII. PROJECT DESCRIBED IN THE FEIR MAY NOT BE THE PROJECT APPROVED BY THE LEAD AGENCY.

The organizations continue to agree with Imperial County that the transfer project is only vaguely understood or described; and, certainly not “fixed.” The Draft Order’s response to Imperial County’s concern at page 63 is that IID may never provide a more accurate description

²³ *Id.* at p. 65.

²⁴ *Id.* at p. 55.

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of the project. This response begs the issue. If the project is not accurately described, then the entire environmental evaluation upon which the State Water Board must rely is tainted. (See *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-103.)

The Draft Order goes on to inaccurately state,

whether the project has been adequately defined for purposes of CEQA is distinct from the issue of whether the project has been adequately defined for purposes of making the findings required under the Water Code in order to approve the transfer. . . . it is IID's responsibility, as lead agency, to ensure that the FEIR complies with CEQA. It is the SWRCB's responsibility to make the findings required by the Water Code.²⁵

A responsible agency's duties are described in section 15096 of the CEQA Guidelines. A responsible agency can determine that the lead agency's EIR is not adequate and challenge the EIR within 30 days after the lead agency files an NOD. So the Water Board is not powerless. If the Water Board were to determine that the project approved by IID is not the same project that was evaluated by the Water Board may seek judicial relief. Especially, if IID's action were to jeopardize implementation of the Board's duties under the law.

In trying to address Imperial County's concerns about the sequencing of decisions, the Draft Order states that the order will not go into effect until after the QSA has been executed and IID has approved the transfer project and filed an NOD consistent with CEQA. Since the SWRCB's order will go into effect automatically upon the execution of the QSA and approval of the transfer project by the lead agency, the organizations' concerns about actual project that is before the Water Board remains.

XIX. CONCLUSION

In order to protect their rights under the law, the organizations object to the Water Boards adoption of the Draft Order for the reasons set forth in this letter, the April 25, 2002 joint organizations comment letter on the DEIR/DEIS, and within the record of proceedings.²⁶ In addition, the organizations request written notice of the filing of Notice of Determination regarding the adoption of this proposed order.²⁷ Notice to be served on the organizations at the addresses set forth within the service list that has been used throughout this proceeding.

Sincerely,

Bill Yeates

²⁵ Draft Order, p. 63.

²⁶ Pub. Resources Code, § 21177, subd. (b).

²⁷ Pub. Resources Code, §21092.2