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March 16, 2017

VIA EMAIL – [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Ms. Felicia Marcus, Chair, and  
Members of the State Water Resources Control Board  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

SUBJECT: City of Tracy's Comment Letter on the Proposed Phase I Bay-Delta Plan  
Amendment and Substitute Environmental Document

Dear Chair Marcus and Members of the Board:

The City of Tracy (Tracy) provides the following comments on the proposed Phase I revisions to the Bay-Delta Plan (Bay-Delta Plan Amendment) and Substitute Environmental Document (SED) released in 2016. In addition to being a water supplier to its residents and businesses, Tracy also has authority over local storm water and wastewater, and water recycling within its service area. Tracy has long taken issue with the attainability of current southern Delta water quality objectives for salinity and has been a vocal advocate for change, both to the objectives and to the program of implementation for these objectives as applied to municipalities. As such, Tracy is hopeful that the State Water Resources Control Board (State Water Board) and its staff will adopt more regulatory flexibility for application of the proposed salinity objective in the southern Delta while still reasonably protecting existing beneficial uses.

This letter supplements the presentation made by Tracy and by other members of the Central Valley Clean Water Association (CVCWA) to State Water Board members on December 16, 2016 in Stockton. This letter also provides additional comments on the adequacy of the SED under the California Environmental Quality Act (CEQA).

Tracy is concerned that the Southern Delta Water Quality (SDWQ) component of the Bay-Delta Plan Amendment, proposing an Electrical Conductivity (EC) objective of 1.0 deciSiemens per meter (dS/m)<sup>1</sup> as a rolling 30-day average, will impose an unnecessary burden on the Tracy wastewater treatment plant (WWTP) without creating any measurable improvement in salinity in the southern Delta.

<sup>1</sup> The proposed Bay-Delta Plan Amendments express EC units in either deciSiemens per meter (dS/m) or micromhos per centimeter (µmhos/cm), where 1.0 dS/m equates to 1,000 µmhos/cm. This letter uses dS/m throughout.



Tracy fears that the proposed SDWQ salinity objective will be interpreted as previous objectives were interpreted, as an end-of-pipe effluent limit equal to the objective, and applied as a monthly average. (See *accord* Appendix K, *Revised Water Quality Control Plan*, at pp. 45-46.) The SED also interprets application of this objective in this way as its impact analyses for publicly owned treatment works (POTWs) presumes permit limits of 1.0 dS/m. (See SED at pp. 13-70.) Given that Tracy's WWTP effluent, even with source control and a lower salinity source water supply, can still exceed 1.2 dS/m, imposing the salinity objective as an end-of-pipe effluent limit will impose an infeasible limit and an unnecessarily high cost burden on Tracy. To attempt to consistently meet a 1.0 dS/m effluent limitation, Tracy would have to desalinate its wastewater with its attendant high energy use and greenhouse gas impacts. Such extraordinary treatment is unnecessary since studies have shown that Tracy's wastewater discharges represent a *de minimis* source of salts, and removal of Tracy's discharge altogether would not substantially change the salinity in the Southern Delta.

Tracy, along with CVCWA and other Delta POTWs, proposes adoption of implementation provisions, as required under Water Code section 13242, where the determination of reasonable potential under National Pollutant Discharge Elimination System (NPDES) regulations (at 40 C.F.R. §122.44(d)(1)) and determination of compliance with the salinity objective are measured in-stream, rather than at end-of-pipe. This and other flexibility must be added to the implementation provisions for the adopted objective to ensure that POTWs can consistently and feasibly comply with the objective without bearing unnecessary costs. The only other way to ensure consistent compliance would be to adopt the 1.4 dS/m objective, which does not have the same substantial and unavoidable environmental impacts because that higher objective does not implicate the need for desalinization.

**1. NPDES Permitting flexibility is critical to avoid stringent permit limits on discharges that have a *de minimis* impact on salinity in the Delta.**

The Bay-Delta Plan Amendment concedes that "Overall, the WWTPs [wastewater treatment plants] have only a small effect on southern Delta salinity." (See SED, pp. 13-23.) The *de minimis* impact of the Tracy WWTP on salinity levels in the southern Delta is also acknowledged in the Bay-Delta Plan Amendment through its presentation of the conclusions drawn from a California Department of Water Resources (DWR) modeling study of NPDES discharges performed in 2007, which was performed to better understand the salinity impacts of new and expanded discharges from Tracy and Mountain House. That modeling study "concluded that the City of Tracy discharge under reasonable worst-case conditions has limited impacts on the salinity problem in the southern Delta as compared to other sources of salinity in the area defined as ambient salinity entering from the San Joaquin River, agricultural activities, and groundwater accretions." (See Appendix C, *Technical Report of the Scientific Basis for Alternative San Joaquin River Flow and Southern Delta Salinity Objectives*, pp. 4-10) Furthermore, a February 2012 mass balance analysis performed by the State Water Board, which compared the maximum permitted salinity loads from the point source discharges of Tracy, Mountain House, and Deuel Vocational Facility to the salinity loading entering the Head of Old River, determined "that the salt load from point sources in this part of the southern Delta is a small percentage of the salt load entering from upstream." (See Appendix C, *Technical Report of*

*the Scientific Basis for Alternative San Joaquin River Flow and Southern Delta Salinity Objectives*, pp. 4-11)

A similar analysis to the far-field water quality impact analyses was conducted for southern Delta POTWs in support of the Central Valley Water Board’s Staff Report for *Policies for Variances from Surface Water Quality Standards for Point Source Dischargers, Variance Program for Salinity, and Exception from Implementation of Water Quality Objectives for Salinity* (CVRWQCB, 2014). In that analysis, DWR’s Delta Simulation Model 2 (DSM2) results were used with EC effluent data for the Tracy WWTP to estimate water quality changes in downstream receiving water quality with and without the implementation of Reverse Osmosis (RO). (See DWR, *DSM2 Modeling Evaluation, City of Tracy and Mountain House CSD* (March 29, 2007).)

The incremental, far-field water quality data, presented in the following **Table 1**, showed a *de minimis* influence of Tracy’s POTW discharges on downstream ambient EC levels at the nearest modeling location (Old River at Tracy Road Bridge), and no change (0.00%) in ambient EC concentrations at the two modeling locations farther downstream (Middle River at Mowry Bridge and San Joaquin River at Brandt Bridge). In even the worst case scenario involving the Tracy discharge, which correlates to periods of low Delta exports, the highest estimated percent change in ambient EC was less than one percent (0.98%) at the Old River at Tracy Road Bridge modeling location. In contrast, the high Delta export scenario showed a difference just 0.04%.

**Table 1. DWR DSM2-Modeled Incremental Far-Field Water Quality Changes for October flows with Implementation of Partial Reverse Osmosis Treatment at the Tracy WWTP**

Location (moving downstream)	Low Delta Export			High Delta Export		
	Estimated Ambient EC		Est. % EC Change	Estimated Ambient EC		Est. % EC Change
	With RO	Without RO		With RO	Without RO	
Old River at Tracy Rd. Bridge	696.6	703.6	0.98	688.4	688.7	0.04
Middle River at Mowry Bridge	688.0	688.0	<b>0.00</b>	688.0	688.0	<b>0.00</b>
SJR at Brandt Bridge	688.0	688.0	<b>0.00</b>	688.0	688.0	<b>0.00</b>

DSM2 Model input:

Effluent permitted flow: 16 MGD

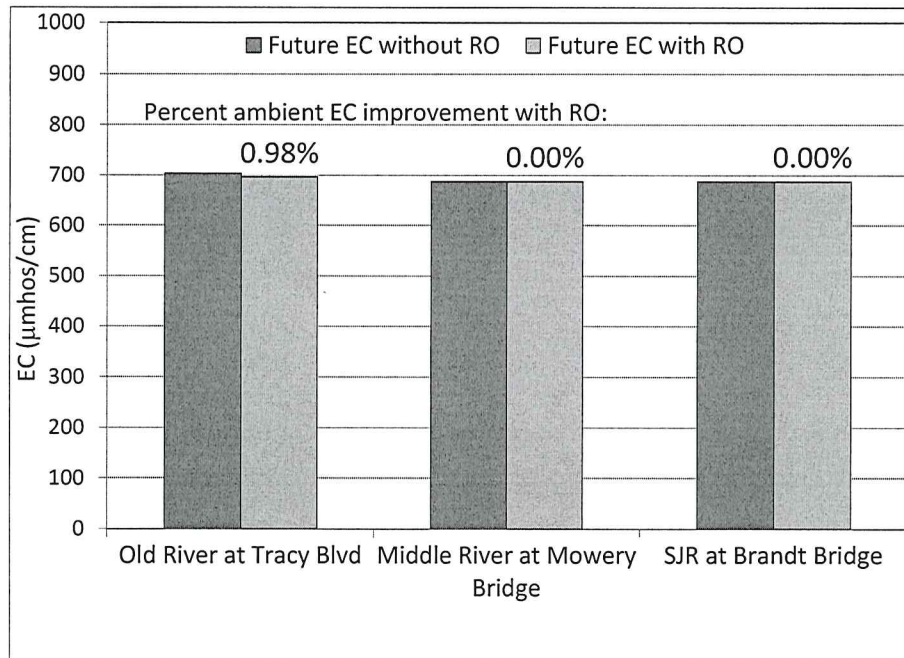
Current Tracy effluent EC level: 1250 µmhos/cm

Current Southern Delta ambient EC level: 688 µmhos/cm

River flows determined through DWR DSM2 modeling.

The estimated percent change in ambient EC levels downstream of the Tracy WWTP under a future scenario “with RO” (where the discharger implements RO to meet the proposed 1.0 dS/m EC objective) in comparison to ambient EC levels estimated to occur downstream of the

discharge “without RO” is shown graphically in **Figure 1**. This figure illustrates the very small, if any, difference in estimated ambient EC levels downstream of the Tracy WWTP for a discharge scenario that includes RO treatment. Further, given that Tracy’s salinity levels are now lower than those seen in 2006 and 2007 when the DWR study was performed (*see Figure 2*), the difference is probably even less now.



**Figure 1: City of Tracy WWTP Modeled Incremental Far-Field Water Quality Changes Associated with Implementation of RO under Low Delta Exports in October (based on DWR DSM2 Modeling).**

**2. The SED proposes compliance strategies with substantial and unavoidable impacts that will not significantly reduce salinity in the Delta.**

The SED suggests that the City should implement the following compliance options to meet a proposed southern Delta salinity water quality objective of 1.0 dS/m: (1) acquire new source water supplies, (2) implement salinity pretreatment programs, and (3) implement desalination.

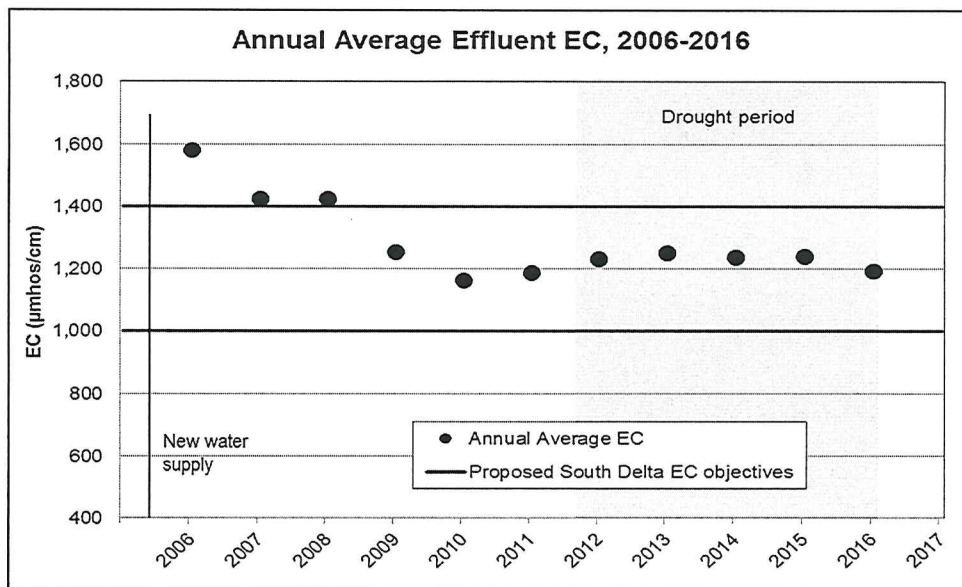
The SED ignores the fact that Tracy has already made a substantial investment in procuring and delivering significant new low salinity source water supplies from South San Joaquin Irrigation District (SSJID) at a cost of \$80 million.<sup>2</sup> Tracy has also been implementing salinity source

<sup>2</sup> The interconnection between flow and salinity is not explored adequately in the SED as the SED fails to analyze and disclose the impacts of the Lower San Joaquin River (LSJR) flow objectives on the ability of POTWs, such as Tracy, to comply with the SDWQ salinity objectives. Specifically, the SED suggests that municipalities and POTWs obtain more surface water supplies and reduce the amount of water supply sourced from groundwater, because groundwater tends to be higher in salinity than surface water. (*See SED at pp. 4-16.*) However, the SED fails to mention that the LSJR objectives may frustrate Tracy’s ability to maintain its current level of surface water supply, and may prevent the ability to obtain more surface water supply. These impacts are of particularly concern

control programs/pretreatment programs, under requirements in its existing NPDES permit, for many years. Although these actions resulted in improvements in Tracy’s EC effluent quality compared to that measured in the early 2000s, substantial further improvements are unlikely. In addition, these actions have not resulted in effluent quality that could consistently comply with a 1.0 dS/m EC end of pipe effluent limitation.

**Figure 2** shows times series plot of actual EC effluent data from the Tracy WWTP effluent and evidences decreasing EC levels over time, from the peak in 2006 when a new surface water supply was obtained from SSJID. However, the plot also shows EC levels increasing before and during the recent drought. Annual average EC levels were at or above 1.2 dS/m during the drought years of 2012-2016.

While an objective of 1.4 dS/m would be easily attainable,<sup>3</sup> the ability to continue to improve source water supplies to meet a 1.0 dS/m objective is limited. New surface water supplies are becoming less available, and are likely to become even more scarce and expensive as proposed flow restrictions also included as part of the Bay-Delta Plan Amendment will inevitably impact the availability of less saline water. As surface water volumes become less reliable, particularly during times of droughts, Tracy must pump local saltier groundwater to make up for losses in surface water supplies, which increases effluent EC.



**Figure 2: Tracy WWTP Annual Average Effluent EC: 2006 – 2016.**

to Tracy, which obtains its surface water supplies from the Stanislaus River via SSJID. Without available surface water flows, Tracy must rely more heavily on saltier groundwater.

<sup>3</sup> Even though the 1.4 dS/M objective does not raise the same substantial and unavoidable impacts, the SED somehow concludes that 1.0 dS/m is the environmentally superior alternative. (See SED at pp. 18-33.) It is unclear how the SED can make this conclusion when the 1.0 dS/m objective results in significant and unavoidable impacts on service providers and the environment (e.g., increased energy use, GHG impacts, brine disposal, etc.), while the 1.4 dS/M objective will not result in any significant and unavoidable impacts. (See SED at pp. 18-32).

The SED finds that the proposed preferred alternative, SDWQ 2 (30-day rolling average EC objective of 1.0 dS/m), presents significant and unavoidable impacts on service providers because the SED considers desalination, specifically RO, as the only way POTWs can reduce EC in their effluent to meet this objective.<sup>4</sup> (See SED at pp. 13-70.) The SED's recommendation for desalination of municipal wastewater has not been implemented by Central Valley POTWs, due to the increased energy consumption, increased greenhouse gas (GHG) emissions, increased costs to ratepayers, and potential challenges associated with brine disposal. Furthermore, as shown in **Figure 1**, the implementation of RO treatment for Tracy would impart no measurable water quality benefit in the receiving water. Planning level estimates of the capital and operations and maintenance (O&M) costs associated with implementation of RO treatment to meet a proposed 1.0 dS/m EC objective for Tracy are over **\$52 million** in capital (assuming treatment of 8.3 million gallons per day (mgd)), over **\$5 million** in annual O&M, and a total annual cost of nearly **\$9 million** (total annual cost = annualized capital cost + annual O&M cost). These new costs would be *in addition to* existing annual O&M costs for the Tracy WWTP and annual expenditures for the supply and treatment of less saline source water.

Although Tracy has been an innovation leader in piloting a new thermal desalination process, this process has never been tested at full scale for municipal wastewater treatment. Therefore, it is unclear whether or not Tracy could feasibly comply with a 1.0 dS/m objective end of pipe without traditional RO processes, with the attendant brine and energy costs and related potential environmental and greenhouse gas impacts. Given these substantial impacts and minimal benefit, RO should be considered infeasible at this time.

Instead of adopting a stringent water quality objective, presumed to apply end of pipe, Tracy urges the State Water Board to consider regulatory flexibility incorporated into the implementation plan for the adopted objective as required by Water Code section 13242. The following ideas should be considered for incorporation along with the suggestions of CVCWA and the other Delta POTWs.

### **3. Additional Alternatives for State Water Board's Consideration to Avoid Significant and Unavoidable Impacts**

Deliberations over the proposed Bay-Delta Plan Amendments should consider the following alternatives and provisions within a program of implementation related to the proposed southern Delta salinity water quality objective. One or more of these alternatives is necessary to avoid substantial impacts to Delta POTWs and the environment.

- Inserting dilution and *de minimis* impact considerations into the reasonable potential analysis (RPA) when determining whether effluent limitations for salinity are required under NPDES regulations. This can be accomplished by utilizing data from downstream locations for the RPA instead of end of pipe effluent values. This can also be accomplished by allowing modeling, such as the DMS2 model, to be used to demonstrate

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<sup>4</sup> In the State Water Board's Water Quality Order 2005-005 (for the City of Manteca), the State Water Board concluded that construction and operation of a large-scale reverse osmosis treatment plant to reduce the salt load in municipal wastewater discharges "would not be a reasonable approach."

that effluent limitations are not necessary.<sup>5</sup> This would also be consistent with USEPA's *Technical Support Document for Water Quality-based Toxics Control*, which allows for dilution credits to be considered when conducting a reasonable potential analysis.

- The implementation plan for the new objectives should instruct the Water Boards to conduct the RPA for Delta dischargers using ambient data at the historic compliance locations: San Joaquin River at Airport Way Bridge, Vernalis; San Joaquin River at Brandt Bridge; Old River near Middle River; and Old River at Tracy Road Bridge.
- Where limitations are necessary, insert flexibility into POTW effluent limit derivation by:
  - prescribing annual average limits and including express findings of impracticability for shorter term limits as required by 40 C.F.R. §122.45(d),
  - using mass-based effluent limits instead of concentration limits, which are based on calculated load allocations developed through a watershed loading analysis and facility-specific water quality modeling analysis similar to the waste load allocation (WLA) process used for a total maximum daily load (TMDL) under federal regulations and NPDES permit guidance,
  - providing dilution credits based on downstream water quality, and/or
  - authorizing narrative or Best Management Practice (BMP) based effluent limitations because the salinity objective is infeasible to comply with as a numeric end of pipe effluent limitation.<sup>6</sup>
- Maintain use of compliance locations where compliance with the new objectives will be determined for Tracy's discharge. (*See* Water Code § 13242, which requires "a description of surveillance to be undertaken to determine compliance with the objectives.") Compliance would be determined in-stream rather than at the end-of-pipe. At the downstream location, compliance should be able to be more easily demonstrated.<sup>7</sup>

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<sup>5</sup> The SED currently proposes that the Regional Board would establish effluent limits to ensure that POTWs comply with the 1.0 dS/m EC limit, stating that "[POTWs] with discharges that have a reasonable potential to cause or contribute to an excursion above the numeric objective would have effluent limitations in their NPDES permits to meet the revised objective." (SED, p. 16-215.) The program of implementation should contain a method of calculating reasonable potential that takes into account the limited POTW impact on salinity in the southern Delta. As the Court stated in the *City of Tracy v. SWRCB* case: "Measuring Tracy's 'reasonable potential' at its discharge pipe deprived Tracy of a potential "mixing zone" for its discharge" and "require[d] the Board to perform the reasonable potential analysis at the Old River/Tracy Road Bridge compliance location, as required by the 2006 Bay-Delta Plan." The program of implementation should continue to use compliance locations for this purpose.

<sup>6</sup> The *Tracy* decision held that "numeric effluent limitations are not necessary to meet the requirements of the federal Clean Water Act. (*Communities for a Better Environment, supra*, 109 Cal.App.4th at p. 1093.) Indeed, federal regulations expressly permit non-numeric effluent limitations ~ such as best management practices ~ when numeric effluent limitations are 'infeasible.' (40 C.F.R. §122.44(k)(3); see also State Board Order WQ 2006-0012, p. 16.) ... *Communities for a Better Environment* makes clear that one factor a board may consider in determining whether a numerical effluent limitation is 'feasible' is the 'ability of the discharger to comply.' (*See Communities for a Better Environment, supra*, 109 Cal.App.4th at pp 1100.) The court expressly approved the regional board's consideration of this factor in upholding the determination that numeric effluent limits were not 'appropriate' for the refinery at issue in that case. (*Id.* at p.1105 [approving determination that numeric WQBEL was not feasible 'for the reasons discussed above,' which included inability of discharger to comply.]")

<sup>7</sup> In the *City of Tracy v. SWRCB* case, the court held that the State Water Board "prejudicially abused its discretion in finding the 2006 Bay-Delta Plan authorizes the Board to perform the 'reasonable potential' analysis at the end of

- Adopt the objective as a range from 1.0 to 1.4 dS/m as is done with the incorporated Maximum Contaminant Levels (MCLs) for EC and TDS to protect municipal and domestic drinking water (MUN) uses. This would allow flexibility to use a higher number where needed for discharges such as Tracy’s, which can exceed 1.0 dS/m, but do not cause exceedances in the receiving water.
- Adopt a site specific objective (SSO) for the reach of the southern Delta where Tracy discharges of 1.25 dS/m to accommodate Tracy’s discharge without requiring RO treatment. This level would still provide reasonable protection of the AGR use<sup>8</sup> and, given modeling results, would be unlikely to change ambient water quality.
- Consider seasonal objectives that allow higher salinity in higher flow scenarios. The previous objectives for EC contained in the Delta Plan were seasonal with two different objectives (0.7 and 1.0 dS/m), depending on season.<sup>9</sup> Objectives of 1.0 and a higher objective (between 1.0 and 1.4) could be adopted to maintain seasonality and flexibility.
- Incorporate the flexibility being offered in the Central Valley through the CV-SALTs program and Basin Plan amendments, so that exceptions/variances, offsets, drought policies, and other long term salinity management strategies can be incorporated into NPDES permit provisions as needed.
- Incorporate drought provisions, allowing a higher EC objective (up to 1.4 dS/m) in drought and immediately after drought years.
- Incorporate the Clean Water Act analysis in 33 U.S.C. §1312(b)(2), which allows the issuance of an NPDES permit that modifies the effluent limitations that otherwise would be required under the Act “if the applicant demonstrates at [a] hearing that there is no reasonable relationship between the economic and social costs [of the effluent limitations] and the benefits to be obtained (including attainment of the objective of [the Act]) from achieving such limitation.” The Court in the *Tracy* decision opined that this would be allowed for salinity, since EC is not a priority toxic pollution.

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Tracy's discharge pipe, rather than at the Old River/Tracy Road Bridge compliance location.” By removing the references to compliance locations and making the objectives applicable to the whole reach, this analysis will be changed in a way that disadvantages Tracy and ensures a finding of reasonable potential, even when an effluent limitation may not be necessary.

<sup>8</sup> The *City of Tracy v. SWRCB* case stated: “A fundamental premise of Porter-Cologne is that water quality regulation must be ‘reasonable.’ The goal of Porter-Cologne is to attain the highest quality water which is reasonable, considering all demands being made and to be made on those waters and total value involved, beneficial and detrimental, economic and social, tangible and intangible. (Water Code §13000.) Consistent with this goal, Porter-Cologne requires water quality control plans to establish such water quality objectives as ‘will ensure the reasonable protection of beneficial uses’ and the prevention of nuisance. (Water Code §§13050(f), 13241.)” The SED concluded that 1.4 dS/m would not have a significant impact on agriculture in the southern Delta. (*See* SED at pp. 11-57.) Thus, 1.25 dS/m would not have significant adverse impacts on agriculture either.

<sup>9</sup> Per the 1978 Delta Plan, the State Board envisioned that these objectives would be achieved by controlling water quantity/flow through conditions on the water rights permits issued to USBR and DWR.



These considerations are required under the Water Code and under CEQA. “[I]n preparing an EIR [or equivalent such as an SED], the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect.” *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004). Here, the proposed 1.0 dS/m objective was determined to have substantial and unavoidable impacts. (See accord SED at pp. 13-70.) When a project will cause potentially significant impacts, the environmental document must propose and describe mitigation measures to minimize or avoid those effects. *East Sacramento Partnership for a Livable City v. City of Sacramento*, 5 Cal. App. 5th 281, 303 (2016), citing Pub. Res. Code §§ 21002.1(a), 21100(b)(3); State CEQA Guidelines, 14 C.C.R. § 15126.4(a)(1); *Gray v. County of Madera*, 167 Cal. App. 4th 1099, 1116 (2008) [project raised a “potentially significant problem,” requiring mitigation measures to “present a viable solution”].

CEQA requires the lead agency to adopt all feasible mitigation measures to avoid or reduce the project’s potential environmental impacts: “It is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental impacts of such projects. . . .” *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 565 (1990).

The State Water Board has not committed to any specific measures that would mitigate the project’s significant impacts, and thus has failed to meet its obligations under CEQA. *Cf. Gray v. County of Madera*, 167 Cal. App. 4th 1099, 1119 (2008). The above listed alternatives present feasible mitigation measures that would reduce or eliminate the “unavoidable” impacts of the 1.0 dS/m objective by avoiding the need to implement desalination technologies that were responsible for the main impacts noted.

Representatives for Tracy and other CVCWA members have met with State Water Board staff to propose specific language related to some of the above proposals that is acceptable to staff. We have also met with the Central Valley Regional Board’s permit writing staff to determine ways to ensure that POTWs are not held to more stringent standards than other dischargers in the southern Delta with regard to the salinity objective. Tracy requests that these proposals be given serious consideration and be incorporated into the final Bay-Delta Plan Amendment and SED. With the incorporation of some or all of the proposed alternatives into the program of implementation for the new objective, the SED should be able to refine its analysis of the impacts on service providers accordingly, since the program of implementation would modify the conclusion regarding significant and unavoidable impacts.

#### **4. Tracy’s Suggested Changes will assist the State Board in fulfilling its obligations under the *City of Tracy* decision.**

On June 25, 2009, Tracy filed a petition for a peremptory writ of mandate and complaint for declaratory relief in this action. Tracy, along with CVCWA, sought to invalidate the provisions of the Bay-Delta Plan relating to the southern Delta EC objectives, as well as the State Water

Board's Order WQ 2009-0003, applying the challenged provisions of the Bay-Delta Plan to Tracy's municipal WWTP.

On June 1, 2011, the Sacramento Superior Court entered a Judgment and issued a Peremptory Writ of Mandamus in the case of *City of Tracy v. SWRCB, et al*, Case Number: 34-2009-80000392, ordering the State Water Board to do the following:

Before applying the provisions of the Bay-Delta Water Quality Control Plan related to the Southern Delta Agricultural Water Quality Objectives for Electrical Conductivity (the "EC Objectives") to municipal dischargers such as Tracy, the State Water Board shall:

1. Conduct the analysis required by Water Code § 13241;
2. Reconsider and revise the provisions of the Bay-Delta Plan related to the EC Objectives in light of the §13241 factors;<sup>10</sup> and
3. Adopt a proper program of implementation under Water Code §13242 describing the nature of the actions necessary for municipal dischargers to achieve the EC Objectives, providing a reasonable time schedule for the actions to be taken, and describing the surveillance required to determine compliance.

The Judgment and Writ also enjoined the State Water Board from applying the existing EC objectives to Tracy and other municipal dischargers in the Delta pending satisfaction of the Writ. A final return on this writ is still pending, nearly 6 years later, awaiting the Bay-Delta Plan Amendment.

The decisions made in the *Tracy* case are binding on the State Water Board in these proceedings on the Bay-Delta Plan Amendment because this action is part of the remand from the Court and these decisions were not appealed. As such, the State Water Board must consider all of the 13241 factors, revise the provisions related to EC objectives in light of those considerations (including cost of compliance), and adopt a proper program of implementation specific to Delta municipalities. Tracy believes the suggested modifications will assist the State Water Board fulfill its obligations under the writ in the *City of Tracy* decision, and will result in less impacts at the same time as reasonably protecting the agricultural beneficial use in the southern Delta.

Tracy stands ready to assist as needed in creating language needed to meet these legal obligations, and encourages the State Water Board to also consider the comments and proposed

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<sup>10</sup> The court in the *City of Tracy* case determined that "When establishing water quality objectives, Porter-Cologne imposes an affirmative duty on the State to consider a number of factors, including economic considerations, environmental characteristics of the area, and whether the proposed objective is attainable. (Water Code § 13241; see also [ ] Atwater Memo.)" The Court further held that "The California Supreme Court has endorsed the view that section 13241 requires consideration of the 'cost of compliance' (See *City of Burbank*, [ ] 35 Cal 4th at p. 625 [finding the 'plain language' of section 13241 requires the board to consider the 'cost of compliance'])." Thus, the State Water Board must consider compliance costs when establishing water quality standards, and can adjust those standards to make compliance less costly so long as the beneficial uses are reasonably protected. (See *City of Burbank, supra*, 35 Cal.4th at p.623 [affirming conclusion of court of appeal that section 13241 requires a regional board to take economic considerations into account when it adopts water quality standards in a basin plan].)

modified language for incorporation into the Amendment provided separately by CVCWA and the other Delta POTWs prior to final adoption of the Bay-Delta Amendment.

Respectfully submitted,



Kuldeep Sharma  
Utilities Director  
City of Tracy

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