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JOHN CRUDEN
Assistant Attorney general
MARTIN F. MCDERMOTT
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
601 D Street N.W., Suite 8000
Washington, D.C. 20004
Telephone: (202) 514-4122
martin.mcdermott@usdoj.gov

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, BAY.ORG d/b/a THE BAY INSTITUTE, and DEFENDERS OF WILDLIFE,

Plaintiffs,

v.

GINA McCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, and ALEXIS STRAUSS, in her official capacity as Acting Regional Administrator of the United States Environmental Protection Agency Region 9,

Defendants.

Case No. 4:16-CV-2184 JST

**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT, NOTICE OF MOTION, AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Judge: Hon. Jon S. Tigar
Date: Thursday, Sept. 15, 2016
Time: 2 p.m.
Crtrm: 9

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Defendants Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency ("EPA"), and Alexis Strauss,[1] in her official capacity as Acting Regional Administrator of EPA Region 9 (together, "EPA"), file this Memorandum of Law in support of this Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Notice is hereby given that this matter is currently calendared for hearing at 2 p.m. on September 15, 2016.

## INTRODUCTION

As is well known, the State of California has been (and continues to be) subjected to an extraordinary drought that has forced State regulators to make difficult water policy decisions. It is no secret that Plaintiffs take issue with many of those decisions. Compl. ¶ 17 (mentioning Plaintiffs' "protests and petitions for reconsideration" of State's actions during the drought).

The State of California has addressed the drought in various ways, one of which includes the issuance of temporary administrative orders in response to "temporary urgency change petitions" (or "TUCPs"). As the State Water Quality Control Board ("Water Board") explains:

> The State Water Board is committed to working cooperatively and diligently with water users throughout the state to find appropriate and timely solutions to their urgent, drought–related water needs. If you currently possess a water right and can demonstrate an urgent, drought-related need to modify the terms of your permit or license, you may formally request or "petition" the State Water Board for a conditional, temporary urgency change. Temporary urgency change orders issued by the State Water Board enable right holders to temporarily deviate from the terms of their existing water right in order to provide relief from drought conditions.

*www.waterboards.ca.gov/waterrights/water.../infosheets/infosheet_tucp.pdf*. A TUCP order is limited to no more than 180 days.

Most relevant here, the State has responded to the drought by issuing since January 2014 a number of TUCP Orders at the request of the U.S. Bureau of Reclamation ("Reclamation"), an

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[1] Pursuant to Fed. R. Civ. P. 25(d), Acting Regional Administrator Alexis Strauss is substituted for former EPA Region 9 Administrator Jared Blumenfeld.

agency within the U.S. Department of the Interior that operates the Central Valley Project in coordination with the California Department of Water Resources ("DWR"), the State agency in charge of operating the parallel State Water Project ("SWP").[2] Plaintiffs believe that the State's TUCP Orders (modifying Reclamation's and DWR's water rights permits) are ill-advised, and Plaintiffs have opposed the State's orders from the outset. Having failed to persuade the State to deny the relief sought in the urgency change petitions, Plaintiffs now bring this action against EPA. In essence, Plaintiffs demand that EPA "review" the State's 2014-2015 TUCP Orders as "revisions" to the State's water quality standards, and take "appropriate" action, presumably disapproval of such alleged revisions under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (the "CWA" or "Act"). Compl. ¶¶ 1, 9, 22, 53.

Plaintiffs, from the outset, have understood that: (1) the State did not (and still does not) deem its TUCP Orders as constituting new or revised water quality standards; (2) accordingly, the State did not submit any of its TUCP Orders to EPA for review under CWA section 303(c), 33 U.S.C. § 1313; and (3) EPA has not subjected any of those State Orders to EPA review as new or revised water quality standards.[3] Thus, the material facts of this matter are not disputed in this motion; it is the legal conclusion that follows from those facts that is at issue. If the TUCP Orders constitute revisions to the State's water quality standards, EPA has a statutory duty

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[2] Reclamation's and DWR's TUCP petitions (jointly-filed with the Water Board) sought temporary modifications to their water rights, allowing Reclamation and DWR to reduce instream flow requirements in the Bay Delta (as hereafter defined) in order to conserve water for future use.

[3] Indeed, for more than 30 years the Water Board has been issuing drought related orders approving temporary urgency petitions, without EPA review under the CWA. *See, for example,* WR Order 2004-005-DWR (February 24, 2004) (granting Reclamation's request for TUCP order temporarily relaxing San Joaquin River flow requirements designed to protect migratory fish), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0005.pdf. *See generally* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/droughtorders (discussing the long history of drought orders and TUCPs). Plaintiffs do not contend that they (or any other party) ever brought suit challenging EPA's failure to "review" any of those State orders as a breach of a nondiscretionary CWA duty.

to review and act on those State decisions. If the Orders do not constitute revisions to the standards, Plaintiffs' claim fails as a matter of law. As explained herein, the latter is true. Plaintiffs' legal theory amounts to a flawed attempt to manufacture and impose on EPA a non-discretionary duty that does not exist under the federal Clean Water Act. EPA has many mandatory duties under the Act, but not here. Also, Plaintiffs'' claim is moot, as the TUCP Orders they complain about have expired. The Complaint should be dismissed, with prejudice.

## I. CWA STATUTORY AND REGULATORY BACKGROUND

### A. Establishing Water Quality Standards

#### 1. Purpose and Content of Water Quality Standards

As the Supreme Court stated in *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), water quality standards are, "in general, promulgated by the States and establish the desired condition of a waterway. *See* [33 U.S.C.] § 1313." *See also* 40 C.F.R. § 131.2 ("A water quality standard defines the water quality goals of a water body.") Water quality standards have three elements: (1) "designated uses" of the water (e.g., recreation or protection of aquatic life); (2) criteria that specify the amounts of various pollutants (or "pollutant parameters") that may be present in the water without impairing the designated uses, expressed either in the form of numeric limits or in narrative form (*e.g.*, "no toxics in toxic amounts"); and (3) the antidegradation policy, requiring states to develop and adopt statewide policies to protect against the lowering of water quality. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 130.10(d)(4), 131.6, 131.10, 131.11, and 131.12.

The CWA does not require that states make their water quality standards directly enforceable but once the standards have been adopted by a state and approved by EPA, effluent limits contained in CWA "point source" discharge permits (*see* discussion on "Implementing Water Quality Standards," *infra* at Section I.(B)) must be established at levels that will attain and maintain water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. at 101.[4]

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[4] While the CWA refers to "water quality standards," the synonymous term in the State's Porter–Cologne Act is "water quality objectives." (Cal. Water Code § 13241.)

### 2. States' and EPA's Roles in the Development and Approval of Water Quality Standards

It is firmly established that "states have the primary role, under § 303 of the CWA (33 U.S.C. § 1313), in establishing water quality standards. EPA's sole function, in this respect, is to review those standards for approval." *NRDC v. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993) (internal citation omitted). The CWA thus affords EPA a limited role in the development and establishment of water quality standards. If and when a state "revises or adopts a new standard," the state must submit that revised or new standard to EPA for a decision whether it is consistent with the Act. Section 303(c)(2), 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.21(a). EPA must either approve the standard within 60 days or, if EPA determines that the standard is inconsistent with the CWA, disapprove it within 90 days and notify the state of changes necessary to gain EPA's approval. 33 U.S.C. § 1313(c)(3). If the state fails to make the changes, EPA must promulgate the standards for the state. *Id.* § 1313(c)(3)-(4)(A).

## B. Implementing Water Quality Standards Under The CWA

Water quality standards are established without consideration of any source of water quality impairment. In defining approaches to implementing programs to attain water quality improvements, Congress took significantly different approaches in the CWA depending upon whether or not an impairment is caused by a discharge of pollutants from a "point source." Congress defined "point source" to mean "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), and prohibited the discharge from a point source of any pollutant into the waters of the United States unless that discharge complies with the Act's requirements. *Id.* § 1311(a). Most point source dischargers achieve CWA compliance by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System ("NPDES") discharge permit issued pursuant to CWA section 402, 33 U.S.C. § 1342. *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). In California, pursuant to EPA authorization, NPDES permits are issued

by the State Water Resources Control Board ("SWRCB" or "Water Board") and the nine Regional Water Quality Control Boards, subject to EPA review. *See* 33 U.S.C. § 1342(a)-(d). NPDES permits contain (1) technology-based effluent limitations that reflect the pollution reduction achievable through particular equipment or process changes, without reference to the effect on the receiving water; and (2) where necessary, more stringent effluent limitations to ensure that the receiving waters achieve "water quality standards" adopted pursuant to CWA section 303, 33 U.S.C. § 1313. *See* section 301(b), 33 U.S.C. § 1311(b). To establish enforceable controls on a point source as necessary to achieve water quality standards, the permit-writer translates the relevant water quality standards into "effluent limitations," which are restrictions on the quantities, discharge rates, and concentrations of the pollutants discharged from the point source. 33 U.S.C. § 1362(11); 40 C.F.R. § 122.2.

Congress "drew a distinct line between point and nonpoint pollution sources." *Oregon Natural Res. Council ("ONRC") v. U. S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987). As the Ninth Circuit explained, "[n]onpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Id.* at 849 n.9 (citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)). Thus, CWA effluent limitations (including limitations to meet water quality standards) are not required for discharges of pollutants from nonpoint sources of pollution. 33 U.S.C. § 1362(11); 40 C.F.R. § 122.2. *See ONRC*, 834 F.2d at 849-50.[5] Further, the CWA does not give EPA the power to directly regulate nonpoint sources. *See, e.g.*, 33 U.S.C. §§ 1311, 1362(11), (12); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1197 (10th Cir. 2001).

California's regulatory implementation of water quality programs under State law in the nonpoint source context has two basic components. First, Regional Water Boards can issue "waste discharge requirements" for nonpoint source discharges affecting water quality. Second,

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[5] CWA section 502(19) defines "pollution" broadly as meaning "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

the State Water Board uses its authority to condition water rights permits to address any water quality impairments resulting from water diversions effected by water projects – the changes in salinity, temperature and flows created by the water diversion facilities found on almost all major river systems in the State. The underlying water rights permits spell out when, how much, and where water can be diverted and where and under what conditions it may be used for consumptive purposes. When California Water Code Section 13247 is operative, the Water Board is required by State law to comply with the water quality standards contained in the water quality control plans when the Board issues and revises water rights permits, and when it imposes operational constraints (diversion rates, reservoir release schedules, etc.) to address water quality impairments. Federal law (the Reclamation Act, 43 U.S.C. § 383) requires Reclamation "to follow state law as to the control, appropriation, use, or distribution of water used in irrigation and to obtain state-issued water rights permits for its projects." *San Luis & Delta-Mendota Water Auth. v. Jewell,* No. 1:13-CV-01232-LJO, 2013 WL 4402984, at *4 (E.D. Cal. Aug. 14, 2013) (citing 43 U.S.C. § 383; *California v. United States,* 438 U.S. 645 (1978)). "Under California law, any entity seeking to divert and use water must obtain a permit from the SWRCB. In turn, the SWRCB grants water rights permits and imposes conditions upon them." *San Luis & Delta-Mendota Wtr. Auth.,* 2013 WL 4402984, at *4 (citing Cal. Water Code §1350).

This litigation primarily concerns the Water Board's actions (taken while California Water Code Section 13247 is *not* operative) temporarily amending certain water rights permits as the State grapples with the drought. EPA has no authority under the CWA for objecting to modifications of State water rights permits or to State nonpoint source implementation measures on the basis that such permits or measures are insufficiently stringent to meet the State's water quality standards. In stark contrast to its direct authority over the State's issuance of point source discharge permits, EPA ultimately has only the "threat and promise of federal grants" to influence the State's control of nonpoint source pollution. *Pronsolino*, 291 F.3d at 1126-27.

**C. CWA Citizen Suits**

CWA section 505 provides that citizens may bring suit against the EPA Administrator for failing "to perform any act or duty" required by the Act. 33 U.S.C. § 1365(a)(2). *See Sierra*

*Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001) ("Congress has waived [sovereign] immunity in § 1365(a)(2) only for suits alleging a failure of the Administrator to perform a non-discretionary duty."). Thus, "[a] *clearly mandated*, nondiscretionary duty imposed on the Administrator is a prerequisite for federal jurisdiction under the Clean Water Act citizen suit provision." *Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997) (citations omitted) (emphasis added).

## II. FACTUAL BACKGROUND

### A. Federal and State Water Projects; The Bay-Delta Plan.

The Central Valley Project ("CVP") is "a system of dams, reservoirs, levees, canals, pumping stations, hydropower plants, and other infrastructure [that] distributes water throughout California's vast Central Valley." *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 801 (9th Cir. 2013) (internal citation and quotation omitted). As noted, the CVP is administered by Reclamation, which operates the CVP in coordination with the California DWR, the State agency in charge of operating the parallel SWP). *Pac. Coast Fed'n of Fishermen's Ass'ns ("PCFFA") v. Gutierrez*, 606 F. Supp. 2d 1122, 1133 (E.D. Cal. 2008).

The Sacramento-San Joaquin River Delta ("Delta") lies at the convergence of the Sacramento, San Joaquin, and other rivers. *See San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 682 (9th Cir. 2012). The Delta serves as a conduit for the transfer of water by the statewide water projects (the CVP and SWP), which divert water from the rivers that flow into the Delta and store that water in large reservoirs. Quantities of this stored water are periodically released into the Delta, and pumps at the Delta's southern edge also lift the water into canals for transport south to Central Valley farmers and Southern California municipalities. Water that is neither stored nor exported south passes through the Delta, where it is used by farmers, industries and municipalities, with any excess flowing into San Francisco Bay. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 97 (1986). *See also* Compl. ¶ 5 (Reclamation and DWR operate "the vast systems of dams, reservoirs, canals, and pumps in the CVP and SWP that control how water moves into, through and out of the Delta.").

In 1995, the SWRCB completed a major update of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan ("1995 Bay-Delta Plan"). Compl. ¶ 31. The 1995 Bay-Delta Plan identifies the beneficial uses to be served by the Delta's waters and identifies water quality objectives with respect to those uses, which "fall into three broad categories: municipal and industrial, agricultural, and fish and wildlife." *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 701 (2006):

> The [Water] Board established various salinity objectives "for the reasonable protection of [agriculture as a beneficial use] from the effects of salinity intrusion and agricultural drainage in the western, interior, and southern Delta." To protect fish and wildlife uses, the Board's Plan established objectives for six parameters: dissolved oxygen, salinity, amounts of Delta outflow, river flows, export limits, and Delta cross-channel gate operation. The plan also included a narrative objective for salmon protection.

*Id. See also* Compl. ¶ 33 (the Bay-Delta Plan states that the Water Board "implements" water quality objectives "for flows, export limits, salinity, dissolved oxygen, and DCC [Delta Cross-Channel] gate closures"). Pursuant to CWA section 303, EPA reviewed the revised or new water quality standards included in the 1995 Bay-Delta Plan and approved them in September 1995.

Pursuant to the water rights permits issued by the Water Board, Reclamation (along with DWR) "appropriates water from various [] sources, and delivers it for beneficial uses to central California areas." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002). The operation of the CVP and SWP facilities in the Delta is subject to various conditions, including the Water Board's "Water Rights Decision 1641" (or "D-1641"), adopted in 1999 following a public water rights proceeding. *See PCFFA*, 606 F. Supp. 2d at 1133.[6] D-1641 implements the Bay-Delta Plan through modifications to the CVP and SWP (and other) water rights permits by, among other things, regulating salinity levels in the Delta, setting minimum

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[6] The text of D-1641 is available at: http://www.swrcb.ca.gov/waterrights/water_issueas/programs/bay_delta/decision_1641/index.shtml (last visited July 18, 2016).

Delta outflow requirements, and regulating the export rates of the CVP and SWP.[7] Compl. ¶ 32 (asserting that "D-1641 contains terms and conditions for permits under which water rights holders operate to meet the flow- and operations-dependent objectives in the 1995 Bay-Delta Plan" and that Reclamation and DWR are the "largest and most significant water rights holders that control the reservoirs, dams, canals, pumps, and other infrastructure used to control and move water through the Delta"). According to the Complaint (¶ 33), the current (2006) Bay-Delta Plan did not substantively change the 1995 Plan, and the SWRCB continues to "use D-1641" to "implement" the water quality objectives in the Bay-Delta Plan.

**B. Drought Emergency Proclamation; Executive Orders; TUCP Orders.**

This case stems from actions taken by the State following Governor Edmond G. Brown, Jr.'s January 17, 2014, Proclamation of a "State of Emergency" throughout California due to severe drought conditions. In the Emergency Proclamation, issued pursuant to Section 8625 of the California Government Code, Governor Brown explained that the State's water supplies had dipped to "alarming levels," as indicated by vastly diminished snowpack in California's mountains (about 20 percent of normal average); low water levels in California's largest reservoirs; significantly reduced flows in the State's major river systems (including the Sacramento and San Joaquin river systems); and greatly diminished groundwater levels statewide. The Emergency Proclamation cited a host of urgent drought-related problems: at-risk drinking water supplies; threats to crops, and consequently to farmers' long-term investments and to low-income communities dependent on agricultural employment; threats to animals and plants (including species facing possible extinction); and greatly increased wildfire risk.

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[7] The Water Board is currently engaged in a multi-phase process of developing and implementing updates to the Bay-Delta Plan and flow objectives for priority tributaries to the Delta to protect beneficial uses in the Bay-Delta watershed. Phase 1 involves updating San Joaquin River flow and southern Delta water quality requirements included in the Bay-Delta Plan; Phase 2 involves changes to the Plan to protect beneficial uses not addressed in Phase 1 (Delta outflows, Sacramento River inflows, Suisun Marsh salinity, Delta Cross Channel Gate closure, export limits, reverse flows); Phase 3 involves changes to water rights and other measures to implement changes to the Plan from Phases 1 and 2; Phase 4 involves developing and implementing flow objectives for priority Delta tributaries outside of the Plan updates.

The Governor's Proclamation authorized the Water Board to consider making changes to water rights permits in order to conserve water for future use, stating, among other things:

> The Water Board will consider modifying requirements for reservoir releases or diversion limitations, where existing requirements were established to implement a water quality control plan. These changes would enable water to be conserved upstream later in the year to protect cold water pools for salmon and steelhead, maintain water supply, and improve water quality.

Office of Governor Edmund G. Brown, Jr., *Governor Brown Declares Drought State of Emergency*, Jan. 17, 2014, at ¶ 8, *available at* https://www.gov.ca.gov/news.php?id=18379 (last visited July 18, 2016). The Emergency Proclamation also suspended operation of California Water Code Section 13247 (which, if not suspended, would require State agencies to comply with water quality control plans approved by the Water Board).[8] On December 22, 2014, Governor Brown issued Executive Order B-28-14, which extended the suspension of Water Code Section 13247 and the California Environmental Quality Act ("CEQA) through May 31, 2016. Office of Governor Edmund G. Brown, Jr., Executive Order B-28-14, Dec. 22, 2014, *available at* https://www.gov.ca.gov/news. Ph?pid=18815 (last visited July 18, 2016).

As dry conditions persisted, on April 1, 2015, Governor Brown acknowledged the drought's continuing magnitude and issued Executive Order B-29-15, which required the orders and provisions of the prior proclamations and executive orders to remain in effect unless otherwise modified. On November 13, 2015, Governor Brown issued Executive Order B-36-15, which required the orders and provisions contained in the January 17, 2014 Proclamation, the April 25, 2014 Proclamation, and Executive Orders B-28-14 and B-29-15 to remain in effect.

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[8] Section 13247 provides:

> State offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute, in which case they shall indicate to the regional boards in writing their authority for not complying with such plans.

Consistent with the Governor's first Executive Order, in January 2014 Reclamation and DWR (as authorized under State law) petitioned the Water Board for changes to their water rights permits. Reclamation's and DWR's jointly-filed TUCP sought temporary modifications to their water rights permits to, among other things, authorize them to reduce instream flow requirements in the Delta in order to conserve water for future use. Reclamation's and DWR's stated purpose in requesting these changes was to allow them to "provide minimum human health and safety supplies and conserve water for later protections of instream uses and water quality."[9] The Water Board recognized that absent the suspension of Cal. Water Code Section 13247, it could not have approved such a petition to modify water right permits and licenses, even during a drought emergency, because it did not provide for full attainment of the water quality objectives specified in the Bay-Delta Plan.[10]

The Water Board responded with an order on January 31, 2014.[11] *See* Compl. ¶ 43. The Board acted after considering data, information and comments provided by a wide-range of interested parties, including the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the California Department of Fish and Wildlife (collectively, "fisheries agencies"), as well as these Plaintiffs and other interested parties. In granting (in substantial measure) the initial TUCP, the Water Board found that temporary adjustments to the Reclamation and DWR

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[9] Letter from M. Cowin (DWR) and D. Murillo (Reclamation) to T. Howard, State Water Board, submitting Temporary Urgency Change Petition Regarding Delta Water Quality (Jan. 29, 2014) *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.shtml.

[10] Order Approving a Temporary Urgency Change in License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (Jan. 31, 2014) ("1/31/2014 TUCP Order") at 13, *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/bd_change_order.pdf.

[11] Water Code section 1435 provides that a permittee or licensee who has an urgent need to change the point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for a conditional temporary change order. The Water Board's regulations set forth the filing and other procedural requirements applicable to such petitions. Cal. Code Regs. tit. 23, §§ 805, 806.

water rights permits were urgently needed to balance the protection of all beneficial uses of the water (including protecting the separate needs of fish and wildlife in the Delta and upstream areas). 1/31/2014 TUCP Order at 11. More broadly, the Water Board found that these temporary adjustments were in the public interest. *Id.* at 12. Due to changed circumstances and pursuant to subsequent requests from DWR and Reclamation, the State Water Board modified the TUCP Order on several occasions throughout 2014. *See* Compl. ¶ 6. The Complaint (*id.*) states, accurately, that the State did not submit any of its 2014 TUCP Orders to EPA for review, and that EPA did not require or request any such submission by the State. Nor did the State or EPA deem the Orders to constitute "new" or "revised" water quality standards.

On September 24, 2014, the Water Board adopted Order WR 2014-0029, addressing objections to its January 29, 2014 initial TUCP Order and subsequent modifications thereto. While Order WR 2014-0029 denied requests for reconsideration of the TUCP Order, the September 2014 Order did make some modifications to the prior TUCP Order in response to issues raised by various parties "in order to improve planning and coordination if dry conditions were to continue." For example, the September 2014 Order required preparation of a Water Year 2015 "Drought Contingency Plan" in the event of continued drought conditions that would identify "planned minimum monthly flow and storage conditions that consider Delta salinity control, fishery protection, and supplies for municipal water users related to projected flow and storage conditions."

In response to continuing drought conditions, in 2015 and 2016 DWR and Reclamation submitted additional TUCPs requesting temporary modification of specified D-1641 requirements to allow management of reservoir releases so as to conserve upstream storage for fish and wildlife protection and Delta salinity control later in the year while also providing for critical water supply needs.[12] The Water Board granted these petitions in substantial part. *See*

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[12] In addition, the Water Board required DWR and Reclamation to consult regularly with Board representatives and the fisheries agencies to coordinate real-time project operations based on current conditions and fisheries information to ensure that the temporary changes do not unreasonably affect fish, wildlife, and other instream water uses.

Compl. ¶¶ 7, 9. Consistent with their approach to the 2014 TUCPs, the State did not submit its 2015 or 2016 TUCP Orders to EPA for review, and EPA (again) did not require or request any such submission by the State. *See* Compl. ¶ 9. And, as the Complaint also reflects (¶ 10), neither the State nor EPA has deemed the Orders to constitute "new" or "revised" water quality standards requiring EPA review under CWA section 303(c). The TUCP Orders have all expired.

**C. Plaintiffs' Cause of Action.**

Plaintiffs, a coalition of three environmental organizations, filed this suit against EPA on April 22, 2016. Their Complaint focuses on certain actions taken by the State between January 2014 and mid-April 2016 to address California's drought conditions, and EPA's subsequent action (or, in Plaintiffs' view, inaction) in response. *See* Compl. ¶¶ 42-51. While the Complaint is lengthy and detailed, the relevant facts are undisputed for purposes of this motion.

Plaintiffs' legal theory is novel and articulated in several different ways. According to the Complaint (¶ 42), by "amending" D-1641 through several TUCP Orders, now expired, the Water Board should as a matter of law be deemed to have "made numerous revisions" to the water quality standards contained in the Bay-Delta and Central Valley Plans. *See* Complaint ¶ 6 ("Beginning on January 31, 2014, in response to requests from Reclamation and DWR, SWRCB revised the Bay-Delta water quality standards by amending D-1641."). These Water Board actions, the Complaint alleges (¶ 1), triggered a mandatory duty by EPA to "review and take appropriate" action with respect to these alleged revisions. According to Plaintiffs' legal theory, EPA repeatedly breached that alleged CWA duty because it "did not review, nor [sic] approve" any of these alleged "revisions" to the State's water quality standards contained in the Bay-Delta and Central Valley Plans. Compl. ¶ 52.

Near the end of the Complaint (¶ 67), however, Plaintiffs put the matter somewhat differently, acknowledging that the Water Board did not actually "amend the text of the Bay-Delta and Central Valley Plans themselves." Rather, according to Plaintiffs' theory, whenever the Water Board "decides not to implement" a water quality standard, the Board should be deemed to be "making a 'de facto amendment'" to water quality standards, even if the change is "temporary in duration." *Id.*

Paragraph 67 offers yet another characterization of events, alleging that the Board "worked a 'de facto amendment'" to the existing water quality standards, not by deciding *not to implement* a water quality standard but rather by "modifying the conditions of Reclamation's and DWR's licenses and permits under D-1641" such that those agencies could *operate* the CVP and SWP "in violation of the Bay-Delta and Central Valley Plans." *Id.* (Emphasis added).

Regardless of their precise characterization of events, according to Plaintiffs (Complaint ¶ 69) EPA "failed to carry out its mandatory federal oversight role" by "ignoring" the Board's alleged "ongoing and intermittent pattern of revising the Bay-Delta Plan and Central Valley Plan water quality standards." Plaintiffs allege that EPA "thus violated, and continues to violate, CWA section 303(c), 33 U.S.C. §1313(c)(2)(A), (c)(3)-(c)(4)" by "failing to review and take appropriate action in response to" the Water Board's actions. Compl. ¶ 69.

In their Prayer for Relief, Plaintiffs ask for various forms of declaratory and injunctive relief, including an order requiring EPA to (1) bypass review of the alleged "revisions" and "immediately notify" the Water Board that the Board's alleged "revisions" to State water quality standards "are in violation of" CWA section 303(c); and (2) immediately notify the Water Board that any "current or planned revision" by the State may not go into effect or be implemented until EPA reviews and approves such "revisions" (Prayer ¶ C). In addition, Plaintiffs ask the Court to require EPA to review and take "appropriate" action in response to any "future revision" that the Water Board might someday make to the water quality standards contained in the Bay-Delta and Central Valley Plans before such "revisions" "go into effect" (Prayer ¶ D).

## III. RULE 12 STANDARDS

EPA brings this motion under Rule 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, under Rule 12(b)(6) for failure to state a claim. In reviewing a Rule 12(b)(1) facial challenge to a court's subject matter jurisdiction, the court accepts all well-pleaded allegations in the complaint as true and views them in the light most favorable to the plaintiff.[13]

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[13] EPA requests that the Court take judicial notice of public documents referred to herein, in addition to those cited in the Complaint. "[A] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment, as long as

In such an attack, the challenger asserts that the complaint's allegations are insufficient on their face to invoke federal jurisdiction. Here, this Court should construe EPA's challenge as a facial one, as this matter presents solely a question of law: Does EPA have a nondiscretionary duty under the CWA to review the State's actions set forth in the Complaint? See, e.g., *McKibben v. McMahon*, No. EDCV1402171JGBSPX, 2015 WL 10382396, at *6 (C.D. Cal. Apr. 17, 2015) ("Whether an enactment is intended to impose a mandatory duty is a question of law."). Because EPA has no nondiscretionary duty under the CWA here, the Court lacks subject matter jurisdiction over Plaintiffs' claim. Further, given that the TUCP Orders that underlie Plaintiffs' claim have all expired, this matter is moot and the Court lacks subject matter jurisdiction on that basis, as well.

Alternatively, the Complaint should be dismissed under Rule 12(b)(6). To survive such a challenge, the Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that a defendant is liable for the misconduct alleged. However, while a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal,* 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.,* 83 F.3d 1136, 1140 (9th Cir. 1996). Dismissal is proper if there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). Plaintiffs' proffered legal conclusion – that the State's actions constitute "de facto" new or revised water quality standards – is fatally flawed and warrants dismissal of their case.

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the facts noticed are not subject to reasonable dispute." *Intri–Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (internal quotation marks and citation omitted).

## IV. ARGUMENT

### A. Because The TUCP Orders Have Expired, Plaintiffs' Claim Is Moot And Plaintiffs' Request For An Advisory Opinion Should Be Rejected.

The judicial power of the federal courts is limited to "cases" or "controversies." U.S. Const., Art. III, sec. 2. Because of this constitutional limitation, federal jurisdiction may not be invoked simply because two litigants have differing views of the law. The court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

Here, as stated in the Complaint (¶¶ 42-52), the SWRCB issued several TUCP Orders, beginning with the initial one in January 2014 and then on several occasions over the next two years. Each of these Orders, according to Plaintiffs, should be legally construed as a clear "revision" to water quality standards. However, these Orders forming the basis for Plaintiffs' claim have all expired, and there is no replacement TUCP order in effect. Nor do Plaintiffs even contend that Reclamation or DWR has a currently filed or pending petition for such an urgency order at this time (and EPA is aware of no such filed or pending petition). Thus, in its current posture, this case concerns a hypothetical, rather than an "actual," legal dispute concerning water quality standards "revisions" that could theoretically be effected through a TUCP order if one is eventually sought and if the Water Board decides to issue one at some unknown and incalculable future date. Given that no TUCP order is currently in effect (and that no proceeding has been initiated that might result in issuance of such an order), there is nothing for EPA to review and thus no live controversy before the Court. The question of whether a future action by the Water Board could possibly require EPA review hinges on contingencies that might not occur. Plaintiffs' claim is grounded on orders that have expired and is therefore moot. Further, given that context, their prayers for relief amount to impermissible requests for an advisory opinion from the Court.

**B. EPA Does Not Have A Nondiscretionary Duty Under The CWA To Review The State's TUCP Orders As Revisions To The State's Water Quality Standards.**

This Court has jurisdiction only if the Complaint alleges that EPA has failed to perform an act or duty that is nondiscretionary under the CWA. The Complaint alleges that such a duty exists because the State decided in its expired temporary TUCP Orders not to fully implement the State's water quality standards and then declined to submit such orders to EPA as "revisions" to the State standards. In such situations, Plaintiffs aver, EPA has nondiscretionary duty to review such actions, deem them illegal, and presumably disapprove them.

But the undisputed facts reveal that the Water Board has not adopted any "new" or "revised" water quality standards here. Indeed, Plaintiffs acknowledge that the water quality standards that EPA approved in 1995 for the waters at issue in this case are intact and remain as approved by EPA. *See* Compl. ¶ 67, stating that Water Board's TUCP Orders "did not amend the text of the Bay-Delta and Central Valley Plans themselves." Absent a bona fide State revision of its water quality standards, EPA has no statutory duty under CWA section 303(c) to review and approve or disapprove the State's actions. The Court therefore lacks subject matter over the Complaint, which for the same reason fails to state a valid legal claim against EPA. That should be the end of the matter, and the Court need not engage in the logical gymnastics embodied in the Complaint as Plaintiffs attempt to craft a legal theory that would impose an obligation on EPA where none exists under the Act.

In that vein, Plaintiffs appear to be of the opinion that if a matter is important enough, courts have broad authority under the CWA to impose on EPA mandatory duties that are not found in the statute itself. Such an approach would run afoul of the Ninth Circuit's "clear statement rule." *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). Under that rule, when a plaintiff sues EPA for failure to perform an act or duty that is not discretionary, "the nondiscretionary nature of the duty must be clear-cut – that is, readily ascertainable from the statute allegedly giving rise to the duty." (citations omitted). Further, the Court of Appeals made clear, the court "must be able to identify a 'specific, unequivocal

command' from the text of the statute at issue using traditional tools of statutory interpretation; it's not enough that such a command could be teased out" of various statutory provisions and other plaintiff submissions. *Id.* (citations omitted).

Plaintiffs' claim amounts to an assertion that whenever a state makes a decision or issues an order – even a temporary one – that is inconsistent with the state's water quality standards, the state may be deemed by a court to have implicitly or constructively (or, in Plaintiffs' phrasing, "de facto") "revised" the standards themselves. *See, e.g.*, Compl. ¶ 67 (alleging that when the State Water Board "decides not to implement a water quality objective, it is making a 'de facto amendment to a water quality objective in a water quality control plan,' even if it is temporary in duration."). But a court's task is not to broaden the statute's list of nondiscretionary duties, it is to mandate Agency compliance only when the nature of the duty is clear-cut. Plaintiffs' claim fails that test. EPA disagrees with Plaintiffs' interpretation of the CWA as giving rise to a nondiscretionary duty whenever the Water Board, in the context of drought, "modif[ies] the conditions" that attach to Reclamation's and DWR's water rights permits and thereby allows actions that conflict with water quality standards. *See* Compl. ¶ 67.

EPA's interpretation of the scope of its responsibilities under the statute is entitled to deference under well-established principles of statutory interpretation. In reviewing an agency's construction of a statute it administers, courts must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) ("*Chevron*"). If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Particular deference is due "where the Agency's decision on the meaning or reach of the Clean Water Act involves reconciling conflicting policies committed to the Agency's care and expertise under the Act." *Rybachek v. EPA*, 904 F.2d 1276, 1284 (9th Cir. 1990). In addition, a reviewing court must defer to EPA's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Kentuckians for the*

*Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted)). *See also United States v. Larionoff*, 431 U.S. 864, 872 (1977).

There is no indication in the CWA that Congress intended to address the manner in which EPA is to interpret the term "water quality standard," *see Pine Creek Valley Watershed Ass'n v. EPA*, 97 F. Supp. 3d 590, 598-99 (E.D. Pa. 2015), let alone that Congress dictated precisely how EPA should determine if and when a water quality standard has been constructively or implicitly "revised" by a state so as to trigger a clear nondiscretionary duty to review the state action. The Court should defer to EPA's reading of the Act as not imposing a nondiscretionary duty on EPA in this instance, particularly given that EPA has never subjected the State's TUCP orders to review under CWA section 303(c). Further, Plaintiffs' expansive interpretation of the CWA, which would impose on EPA a duty that is not unambiguously articulated in the statute, contravenes the principle that nondiscretionary duties must be narrowly construed.

The Court should reject Plaintiffs' novel interpretation of the statute for several additional reasons. First, Plaintiffs' reading of the Act would inappropriately expand the scope of the CWA's obligations on the Agency while simultaneously undermining the Act's assignment of the primary role under CWA section 303 to establish water quality standards to the states. *See Am. Wildlands*, 260 F.3d at 1194.

Second, in addition to not constituting revisions to water quality standards, the TUCP Orders do not fall within the purview of any other provision of the CWA that would require those orders to conform to water quality standards. The CWA requires permits under section 402 of the Act for discharges of pollutants from point sources into waters of the United States, and requires that such permits meet water quality standards. 33 U.S.C. § 1311. But the TUCP Orders were not issued pursuant to the State's permitting authority under CWA section 402, nor could they be, because that permitting requirement is "applicable only to point sources." *ONRC*, 834 F.2d at 850. The mere fact that these water rights permits may affect water quality conditions (rates of inflow and outflow from the Delta can influence salinity and water

temperatures) does not bring them within the scope of federal permitting because that requirement is "applicable only to point sources." *ONRC*, 834 F.2d at 850.

The TUCP Orders, in other words, are not of a type that EPA has authority to overturn under the CWA. EPA has never asserted authority to review and object to these TUCP Orders under the CWA on the theory that they are "de facto revisions" to state water quality standards, or on any other theory.[14] Construing any state decision that could have an effect on the attainment of water quality standards as itself being a "revision to water quality standards" would work a dramatic expansion of EPA's duties and authorities not contemplated by the statute. Congress' express grant of specific authority for EPA to review and overturn state changes to water quality standards would be transformed into an implicit imposition of general authority to review and overturn any state decision bearing on the attainment of water quality standards. The CWA simply does not impose on EPA a statutory requirement to review a state water rights permit implementation decision whenever such a decision can have an effect on the attainment of water quality standards.

As noted above, the Water Board premised its issuance of the TUCP Orders on its view that its obligation to fully implement state water quality standards in its issuance of water rights permits was suspended when the application of State Water Code Section 13247 was suspended. Fairly read, Plaintiffs' Complaint advocates for a contrary interpretation in which the State remains subject to a federal CWA duty to issue its orders consistent with a set of water quality standards. But no such duty exists. From this error, Plaintiffs take the view that the TUCP Orders must be now operating pursuant to some sort of "de facto" revised water quality standards established by the State and that EPA therefore has a mandatory duty to review the supposed revisions. But the actual circumstances are far simpler than Plaintiffs theorize. In the absence of state law to the contrary (i.e., State Water Code Section 13247), water rights permits affecting the Delta are not subject to any CWA requirement to achieve water quality standards.

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[14] Even if the TUCP orders were permits issued by the State under section 402 of the CWA, the only claim that Plaintiffs could assert was that specific orders must comply with the standards, not that the orders themselves "revised" water quality standards.

*See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006) ("It is clear that the Clean Water Act does not supersede, abrogate, or otherwise impair 'the authority of each state to allocate quantities of water within its jurisdiction.' 33 U.S.C. § 1251(g). States are responsible for enforcing water quality standards on intrastate waters. *See* 33 U.S.C. § 1319(a)").

Third, EPA did not review D-1641 (the State decision that implements the Bay-Delta Plan through modifications to the CVP and SWP water rights permits by, among other things, setting minimum Delta outflow requirements and regulating the export rates of the CVP and SWP) when it was originally issued by the Water Board. Nor did EPA incorporate D-1641 or any of the water permit conditions imposed by that decision into the Bay-Delta Plan's water quality standards that EPA approved in 1995. It would make little sense to deem temporary adjustments to the water rights conditions set forth in D-1641 to be "revisions" to the standards that require EPA review.

Fourth, any interpretation of the TUCP Orders as "de facto" amendments to the water quality standards in the Bay-Delta Plan would be inconsistent with California's intent when it adopted the Bay-Delta Plan in the first place. When California developed the Bay-Delta Plan, it made clear that it was not "establishing the responsibilities of water rights holders" or "the quantities of water that any particular water right holder or group of water right holders may be required to release or forego to meet objectives in this plan." Bay-Delta Plan at 3. The extent of any such responsibilities would be addressed by the Water Board in future water rights proceedings, with the Board retaining the discretion to decide whether to impose such conditions or the conditions to be imposed. Bay-Delta Plan (1995) at 4. The Board's actions here – temporarily adjusting water rights conditions to accommodate emergency conditions – simply do not equate to changing designated beneficial uses or water quality objectives. EPA's interpretation of the CWA (and of the State's action in question) is fully consistent with Congress's intent that states retain discretion in deciding how to manage nonpoint sources of pollution and how to allocate quantities of water within their jurisdictions under state law.

Contrary to Plaintiffs' position, the CWA imposes no obligation on states or EPA to ensure that state water rights permits ensure attainment of state water quality standards. The

CWA leaves it to the states to decide how and to what extent each will use water quality standards to guide its water rights permit decisions. This Court should decline Plaintiffs' invitation to contort the statute in order to reassign these decisions to EPA over its objection.

## CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed, with prejudice.

Respectfully submitted, this 18th day of July, 2016:

/s/ *Martin F. McDermott*
MARTIN F. MCDERMOTT
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
*Attorney for Defendants*

David Berol, attorney
U.S. EPA Office of General Counsel

Melanie Shepherdson, attorney
U.S. EPA Office of Regional Counsel, Region 9

## *CERTIFICATE OF SERVICE*

I certify that on July 18, 2016, a true and correct copy of the foregoing Memorandum was filed through the Court's ECF system, and thereby served on all counsel of record for Petitioners in the consolidated cases.

*/s/ Martin F. McDermott*
Martin F. McDermott
Attorney for Defendants