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December 17, 2015

VIA E-MAIL AND FEDERAL EXPRESS

Administrator Gina McCarthy
U.S. Environmental Protection Agency
Aerial Rios Building, Mail Code 1101 A
1200 Pennsylvania A venue, NW
Washington, D.C. 20460

Mr. Jared Blumenfeld
Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: October 29, 2015 Citizens' Suit Notice Letter Regarding California Water Quality Standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

Dear Administrator McCarthy and Regional Administrator Blumenfeld:

The San Luis & Delta Mendota Water Authority and Westlands Water District (collectively the "Water Agencies") are writing regarding the October 29, 2015 60-day notice of intent to file a citizens' suit ("Notice Letter") sent to U.S. EPA by the Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute ("Noticing Parties"). The Water Agencies are governmental agencies and key stakeholders that represent water users directly impacted by decisions regarding the San Francisco Bay/Sacramento-San Joaquin Delta ("Bay-Delta"). We are engaged every day in efforts to ensure reasonable protection of the quality of water for all beneficial uses. We appreciate the opportunity to share our perspective with EPA on the Notice Letter, and respectfully request the opportunity to discuss our views with EPA on the Notice Letter further to the extent EPA considers granting any relief or remedy as requested.

In the Notice Letter, the Noticing Parties demand that EPA review California State Water Resources Control Board ("State Water Board") orders issued in response to proclamations from the Governor of California and the unprecedented drought emergency facing this State. Specifically, the Letter challenges State Water Board orders temporarily modifying water rights issued by the Board to the United States Bureau of Reclamation ("Reclamation") and California's Department of Water Resources ("DWR) for the Central Valley Project ("CVP") and State Water Project ("SWP") in State Water Board Water Rights Decision 1641. *See* Revised Water Rights Decision 1641, *In the Matter of: Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (March 15, 2000) ("D-1641"); *see e.g.,* Order Approving in Part and Denying in Part a Petition For Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance With

Delta Water Quality Objectives in Response to Drought Conditions (Feb. 3, 2014).[1] According to the Noticing Parties, these emergency orders are revisions to California's approved "water quality standards" for the Bay-Delta found in the Water Quality Control Plan for the Bay-Delta 95-1 WR (May 22, 1995) ("Bay-Delta Plan") and thus must be reviewed by EPA under Section 303 of the Clean Water Act ("Act"), 33 U.S.C. § 1313.

We respectfully urge EPA to reject the Noticing Parties' demand. The State Water Board's orders simply do not revise the approved water quality standards as the Noticing Parties allege. Those standards remain unchanged. Instead, the Board has only temporarily modified terms and conditions imposed on state water right permits and licenses that the State Water Board imposed under state law through D-1641, as part of the State's program of implementation. The Bay-Delta Plan has always contemplated that California would develop its own water rights permitting program to implement elements of the plan. Indeed, just two days ago, the State Water Board considered and rejected these exact same arguments, finding it had not changed the approved standards, but "rather, it temporarily altered implementation requirements under state law." [2]

However, in the event EPA chooses to engage in a dialogue with the Noticing Parties, we respectfully request that the Water Agencies be allowed to participate in such discussions. For more than 20 years, we have been responsibly engaged in both water delivery[3] and water quality[4] issues in the Bay-Delta and would be keenly interested if EPA were to take up the issues presented by the Notice Letter. More than two dozen of the Water Authority's member agencies, including Westlands, are key and important stakeholders; the agencies have contracts with the United States for water through the CVP that have been impacted severely by the drought and are directly interested in the State Water Board's emergency orders. Indeed, millions of Californians rely on our member agencies to deliver vital fresh water from the Bay-Delta to support homes, businesses and farms across large parts of California.

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[1] D-1641 is *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf. The February 2014 State Water Board order is *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/tucp_order020315.pdf Subsequent State Water Board temporary orders are available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.shtml .

[2] *See* Draft Order Denying in Part and Granting in Part Petitions For Reconsideration and Addressing Objections at 43 (Draft, December 7, 2015) (excerpt attached). The final order is not yet available, but the State Water Board did not change this part of its draft decision at its December 15, 2015 hearing. The full draft order is available at http://www.waterboards.ca.gov/board_info/agendas/2015/dec/121515_7_with_coverltr.pdf

[3] The Water Agencies have submitted comments on both the Bay Delta Conservation Plan and on the California WaterFix. *See* Letter from D. Nelson (the Authority) and T. Birmingham (Westlands) to BDCP/ California WaterFix Comments (Oct. 30, 2015) and Letter from D. Nelson, T. Birmingham to R. Wulff, Comments of San Luis & Delta-Mendota Water Authority and Westlands Water District on the Draft EIR/S (July 29, 2014).

[4] E.g., Westlands Water District's Comments on EPA Advanced Notice of Proposed Rulemaking Regarding the Water Quality Challenges in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (April 25, 2011); Letter from D. Nelson (the Authority) and T. Erlewine (State Water Contractors) to USEPA (April 21, 2011) (comments on EPA's Advanced Notice of Proposed Rulemaking).

The Notice Letter is Without Merit.

At the outset, the arguments advanced in the Notice Letter are meritless for the reasons below, and EPA should not provide any recourse or remedy in response. To the extent EPA gives consideration to the Notice Letter or engages in discussions with the Noticing Parties, the Water Agencies respectfully request the opportunity to engage in discussions with EPA on their views summarized below.

A. The EPA-approved water quality standards for the Bay-Delta

Under the Clean Water Act, each state sets the "water quality standards" for waters within its boundaries. 33 U.S.C. § 1313(c). By regulation, a water quality standard "defines the water quality goals of a water body," 40 C.F.R. § 130.3, and consists of two components: (1) a designated use or uses for intrastate waters and (2) water quality criteria for such waters based on such uses. 40 C.F.R. § 131.3(i) (defining "water quality standards"); *see* 40 C.F.R. § 130.2(d) (same).[5] States submit water quality standards to EPA for federal review and approval. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.21(a). Once approved by EPA, the state standard becomes an applicable water quality standard under the Act, 33 U.S.C. § 1313(c)(3), and is used for specific purposes, including identifying impaired waters and calculating total maximum daily loads under section 303(d) of the Act, developing NPDES effluent limitations, and evaluating discharges of dredged or fill material. 40 C.F.R. § 131.21(d) (establishing "when … the applicable water quality standards" are used). Here, on May 22, 1995, the State Water Board adopted the Bay-Delta Plan.[6] As required by state law, the Bay-Delta Plan established the beneficial uses to be protected, water quality objectives,[7] and a program of implementation. In July 1995, the State submitted the beneficial uses and certain water quality objectives in the Bay-Delta Plan to EPA for approval as water quality standards,[8] and on September 26, 1995, EPA

[5] State water quality standards also must satisfy the statewide antidegradation policy. 40 C.F.R. § 131.12.

[6] *See* State Water Resources Control Board Resolution No. 95-24 Adoption of the Water Quality Control Plan For the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Bay-Delta Plan (May 22, 1995), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/1995wqcp/docs/1995wqcpb.pdf

[7] "Water quality objectives" are defined under state law as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." Cal. Wat. Code § 13050(h).

[8] The State submitted the Bay-Delta Plan to EPA, but reserved its view that not all state water quality objectives contained in the Bay-Delta Plan were subject to EPA approval as Clean Water Act water quality standards. *See* State Water Board Resolution No. 95-24 ("In the view of the SWRCB, the objectives for flow and operations are not subject to U.S. EPA approval, although the SWRCB recognizes that the U.S. EPA may disagree."); Bay-Delta Plan at 10 ("the objectives and beneficial uses in this plan that are water quality standards within the meaning of the Clean Water Act will be California's water quality standards for purposes of the Clean Water Act"); Bay-Delta Plan at 11, n.5. (State specifically reserving its view that the Clean Water Act did not authorize EPA to adopt water quality "standards for flow and operations, including standards for salinity intrusion.")

Region IX approved these standards as protective of designated beneficial uses in the Bay-Delta. 60 Fed. Reg. 65614 (December 20, 1995).[9]

B. In D-1641 and through conditions on water rights, California assigned responsibility for portions of the Bay-Delta Plan

Following EPA's approval of the standards in the Bay-Delta Plan, in a separate water rights proceeding, the State Water Board took a necessary step to implement the Bay-Delta Plan by adopting D-1641. In D-1641, the Board through conditions on water rights determined, in part, "interim and long term responsibilities of water rights holders." D-1641 at 6. D-1641 does not, however, establish the beneficial uses or the water quality objectives that make up the approved water quality standards.

D-1641 has remained in effect, subject to adjustments by the State Water Board, including the recent temporary adjustments to the water rights issued to Reclamation and DWR due to the unprecedented drought. In January 2014, the Governor of California first called upon the Board to consider modifying water rights requirements established to implement water quality control plans. The Governor renewed that request in 2015. Consistent with the Governor's call, Reclamation and DWR, as allowed under state law, first petitioned the State Water Board for changes to their water rights in 2014. The State Water Board responded through a January 29, 2014 order.[10] Reclamation and DWR requested the changes in order to allow them to "provide minimum human health and safety supplies and conserve water for later protections of instream uses and water quality."[11] The Board acted only after considering the available 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 the Noticing Parties. The State Water Board found temporary adjustments to the water rights were urgently needed to protect the Delta, would best preserve fish and wildlife, and were in the public interest.[12] As the drought has persisted, in response to further petitions, the Board

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[9] The State has since updated the Bay-Delta Plan in 2006. http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/2006wqcp/docs/2006_plan_final.pdf

[10] 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 State Water Board's regulations set forth the filing and other procedural requirements applicable to temporary urgency change petitions. Cal. Code Regs., tit. 23, §§ 805, 806.

[11] Letter from M. Corwin, DWR and D. Murillo, Reclamation to T. Howard, State Water Board, submitting Temporary Urgency Change Petition Regarding Delta Water Quality (Jan. 29, 21014) *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/bd_tucp.pdf

[12] *See* Order Approving in Part and Denying in Part a Petition For Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives in Response to Drought Conditions (Feb. 3, 2014) *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/tucp_order020315.pdf

extended or made additional adjustments after considering public input.[13] The orders required DWR and Reclamation to consult on a regular basis with State Water Board representatives and the fisheries agencies to coordinate real-time 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.

C. EPA has no duty to review the State Water Board's temporary orders as the orders do not revise the EPA-approved water quality standards

Contrary to the Noticing Parties contentions, EPA has no duty to review these prudent, temporary adjustments to these state-issued water rights ordered by the State Water Board, because the orders are simply not "revisions" to the approved water quality standards.

First, on their face, the State Water Board's orders do not revise the designated beneficial uses or water quality objectives that EPA approved as water quality standards. Those standards remain as they were approved by EPA. In response to the drought emergency, the orders only temporarily revise water rights conditions issued in accordance with D-1641. EPA never reviewed D-1641 when the Board adopted the decision. Nor did EPA incorporate D-1641 or any of the water rights conditions imposed by the decision into the water quality standards approved by EPA. It certainly would be unusual if temporary adjustments to a 15-year old water rights decision that EPA has not made part of its approved standards were now deemed revisions to those standards that mandate EPA approval.

Second, regardless, when it issued D-1641 the State Water Board confirmed that it was *not* revising the beneficial uses or water quality objectives in the Bay-Delta Plan. Rather, as the Board stated: "This decision is part of the [State Water Board]'s *implementation* of the 1995 Bay-Delta Plan." D-1641 at 5 (emphasis added). As the State Water Board made clear in the Bay-Delta Plan, "most of the water quality objectives would be implemented by assigning responsibilities to water rights holders because the factors to be controlled are primarily related to flows and diversions." Bay-Delta Plan at 4. This is because the Bay-Delta Plan, was not "establishing the responsibilities of water rights holders" or "the quantities of water that any particular water rights holder or group of water rights holders may be required to release or forego to meet objectives in this plan." *Id.* The extent of any such responsibilities would be addressed in "a future water rights proceeding or proceedings," with the State Water Board retaining the "discretion to decide whether to impose such conditions or the conditions to be imposed." *Id.* Temporarily adjusting water rights conditions that were imposed as part of the implementation plan does not equate to changing designated beneficial uses or water quality objectives themselves.

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[13] *E.g.,* Order Approving in Part and Denying in Part a Petition For Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives in Response to Drought Conditions (Feb. 3, 2015) *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/tucp_order020315.pdf

Third, under the Act, a water quality standard is plainly distinguishable from how a state implements the standard. Indeed, as the State Water Board has explained in rejecting the same contentions raised by the Noticing Parties, [14] sustaining this bright line distinction between the water quality standards and efforts to implement the standards is particularly appropriate when, as here, the critical implementation tools are water rights issued under state law, such as those of the CVP and SWP, and thus the associated operations of water diversions, dams, and reservoirs. *E.g., National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 166 and 176 (D.C. Cir. 1982) (Act does not provide direct authority for EPA to regulate nonpoint sources such as water diversions, dams and reservoirs). It has long been EPA's view that water management through water rights is the province of water resource management by state and local agencies. *See* U.S. Environmental Protection Agency, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (August 5, 2005) ("Based on the statute as a whole, we confirm the Agency's longstanding practice and conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities"). [15] Following that direction, the emergency procedures the State has adopted in adjusting D-1641 should not be subject to EPA review.

In their Letter, the Noticing Parties refer to EPA's Water Quality Standards Handbook, arguing the temporary measures adopted by the Board meet the definition of a revised standard under the part 1.5.1 of that guidance. Notice Letter at 9-11.[16] While the agency's guidance can be instructive, the starting point for agency review should be the regulations themselves. As D-1641 is not a "water quality standard" under the plain language of the EPA regulations, EPA need not look to its guidance in this instance.

Regardless, the Noticing Parties' reliance on the Handbook is misplaced. In particular, the Noticing Parties' claim that the State Water Board's orders have the "effect of changing an existing water quality standard" and so are not implementation decisions. Notice Letter at 11, citing Handbook 1.5.1. Yet, the Handbook also provides that "a provision that simply implements a WQS without revising it would not constitute a new or revised WQS." EPA Handbook 1.5.1. As the Bay-Delta Plan and D-1641 make absolutely clear, that is only what the water rights do; any orders temporarily adjusting water rights cannot be considered a revised standard. This does not mean the standards have been changed and that EPA must review them. Indeed, taken to its logical conclusion, under the Noticing Parties' theory, EPA would be

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[14] *See* Draft Order Denying in Part and Granting in Part Petitions For Reconsideration and Addressing Objections, *supra* at 43-45.

[15] *See ONRC Action v. Bureau of Reclamation,* No. 12-35831 (9th Cir. August 21, 2015) (finding waters transferred were not "meaningfully distinct" from the river itself and thus were not subject to permitting under the Clean Water Act); *see also* 43 U.S.C. § 383 (Section 8 of Reclamation Act provides that "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right thereunder…")..

[16] The Handbook is available at http://www.epa.gov/wqs-tech/water-quality-standards-handbook-chapters

required to review every change in any water right that affects whether the state may achieve an approved water quality standard. That surely is not what the Clean Water Act contemplates.[17]

Conclusion

The State Water Board has acted to revise water rights temporarily in order to respond to the urgent drought conditions and proclamations by California Governor. These temporary adjustments did not revise water quality standards under the Clean Water Act and thus do not require EPA review. However, should EPA choose to engage in discussions with the Noticing Parties, we respectfully request an opportunity to participate in discussions with EPA to discuss the issues addressed in the Notice Letter and this response. Please contact us if we can be of further assistance.

Sincerely,

Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Thomas Birmingham
General Manager
Westlands Water District

[17] *See Pine Creek Valley Watershed Assoc. v. EPA,* Civ. Act. No. 14-1478 (March 17, 2015) (rejecting claim that state law had the "effect" of revising standard because the Act only compels the EPA to review "revised or new water quality standard[s]"). The Notice Letter also claims the State Water Board has adjusted the dissolved oxygen standard under the "Basin Plan" issued by the Central Valley Regional Water Quality Control Board, Notice Letter at 8, referencing Fourth Edition of the Water Control Plan (Basin Plan) for the Sacramento River and San Joaquin River Basins (Sept. 15, 1998), and has failed to conclude Triennial Reviews of the Bay-Delta Plan. Notice Letter at 12. The Water Agencies reserve their rights to object to these claims, as well as any other contentions raised by the Notice Letter.

DECEMBER 7, 2015 DRAFT

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-

In the Matter of Specified License and Permits[1] of the Department of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project regarding the Executive Director's February 3, 2015 Order and Subsequent Modifications to That Order

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ORDER DENYING IN PART AND GRANTING IN PART PETITIONS FOR RECONSIDERATION AND ADDRESSING OBJECTIONS

BY THE BOARD:

1.0 INTRODUCTION

By this Order, the State Water Resources Control Board (State Water Board) denies in part and grants in part petitions for reconsideration of the Executive Director's February 3, 2015 Order Approving in Part and Denying in Part a Temporary Urgency Change Petition (TUCP Order) to change requirements of the State Water Project (SWP) and Central Valley Project (CVP) (collectively Projects) to meet water quality objectives in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta), and subsequent modifications thereto. In large part, this Order denies the petitions for reconsideration of the TUCP Order and modified orders and finds that the Executive Director's decisions were appropriate when those decisions were made based on the information available at the time. However, this order also grants some of the petitions for reconsideration of the TUCP Order and modifications to the extent that the petitions seek to improve future planning for drought conditions. Specifically, this Order extends the TUCP Order to address actions needed for next year, if conditions continue to be dry, to preserve the public interest, prevent catastrophic impacts to fish and wildlife, and ensure

[1] The petition was filed for Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation for the Central Valley Project.

actions on the transfers. As such, comments related to those transfers should be made in the separate transfer consideration processes.

Regarding opening the DCC Gates, the TUCP Order did find that impacts may occur to Sacramento River origin salmonids due to straying and entrainment. However, the Executive Director found that the proposed DCC gate operations would not be unreasonable because they were required to be operated consistent with the DCC Gate triggers matrix and in consultation with the fisheries agencies and State Water Board to avoid unreasonable impacts. While Petitioners argued that these real-time decision making measures are not adequate to protect against entrainment and other impacts, the fisheries agencies concurred that they would be. The State Water Board agrees that keeping the DCC gates closed would likely be more protective than opening of the DCC gates, but that difficult decisions were needed given the extreme drought conditions and limited water supplies. Accordingly, the Executive Director's decisions were reasonable and supported. However, going into next year, specific evaluation of the adequacy of the real-time measures will be required as part of the DCP.

4.5 Other Topics

4.5.1 Consistency of TUCP Orders with Water Quality Law

Several petitioners, including CSPA et al., RTD and the Exchange Contractor's et al., argued that the TUCP Order violated the federal Clean Water Act (33 U.S.C., § 1251 et seq.) by either failing to fully implement water quality objectives, or by impermissibly changing water quality objectives. They argued that the State Water Board lacks any authority to "suspend" or "relax" a water quality objective without conducting a rulemaking proceeding to change the Bay-Delta Plan. These arguments incorrectly conflate the State Water Board's planning authority under the Clean Water Act with its implementation authority under state law. The TUCP Order did not change water quality objectives; rather, it temporarily altered implementation requirements under state law.

A water quality objective is distinguishable from how an agency implements and enforces the objective, particularly when an agency implements an objective as applied to sources outside of the federal permitting authority of the U.S. Environmental Protected Agency (EPA). How an agency must implement a water quality objective depends on whether the activity being regulated is considered point source or nonpoint source pollution. (See *Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123; *City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal. App.

4th 1392, 1431 [Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution].) As discussed in detail below, nonpoint source pollution is a broad category of controllable water quality factors not subject to the permitting requirements for point source discharges of pollutants under the Clean Water Act, including water resource management activities such as the water supply project operations at issue here. The distinction between objectives and implementation is critical to understanding the statutory structure of the Clean Water Act that divides responsibility between the federal and state governments for controlling sources of water pollution. (See generally, U.S. Environmental Protection Agency, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (August 5, 2005) [Congress intended for water transfers to be subject to oversight by water resource management agencies and state nonpoint source pollution authorities].)

Under section 402 of the Clean Water Act, point source discharges of pollutants to waters of the United States are prohibited unless authorized under a National Pollutant Discharge Elimination System (NPDES) permit issued by EPA or state government if lawfully authorized to implement the Clean Water Act program. Nonpoint source pollution includes all other pollution exempted from the NPDES permitting program. This "category is defined by exclusion and includes all water quality problems not subject to [section] 402 [of the Clean Water Act]." (*National Wildlife Federation v. Gorsuch* (D.C. Cir. 1982) 693 F.2d 156, 166.) Water diversions, dams, and reservoirs fall in this category. The Clean Water Act does not provide direct authority for EPA to regulate nonpoint sources.[13] (See *id.* at p. 176 [describing separation of pollution sources amenable to NPDES technological controls as partly an "experiment" in the effectiveness of state regulation (citations omitted)].)

The Clean Water Act contains specific deadlines by which point source discharges must be in compliance with water quality standards. For nonpoint sources of pollution, by contrast, the Water Board generally has broad discretion in how it chooses to implement the objective in accordance with state law. (See, e.g., Wat. Code, § 13242 [program to achieve objectives shall include a description of the nature of the actions necessary to achieve objectives, including recommendations for appropriate action by any entity, public or private, a time schedule for actions to be taken, and monitoring to determine compliance].)

[13] The Clean Water Act establishes a variety of programs and initiatives related to nonpoint sources such as section 304(f) [EPA guidelines for evaluating the nature and extent of nonpoint sources including dams, levees, channels, causeways, or flow diversion facilities], 319 [grant program for specific nonpoint source implementation projects], 208 [area-wide management plans], and 303(d) [total maximum daily loads developed for impaired water bodies where traditional controls are not sufficient to maintain standards]. However, these programs all recognize that the States have primary responsibilities with respect to the development and use of land and water resources.

There are several reasons why dams are not appropriately regulated under NPDES point source control. First, water quality problems associated with dams involve effects attributable to the dam itself, not just effects resulting from the discharge. "[D]ams may not be amenable to the nationally uniform controls contemplated by [section] 402 because pollution problems are highly site-specific." (*National Wildlife Federation v. Gorsuch*, *supra*, 693 F.2d at p. 177, fn 61.) Also, Congress wanted to avoid interference with state management over water quantity and state allocation plans. Thus, dams were better left to regulation by the state, particularly by state agencies that have explicitly combined the two functions of regulating water quantity and quality. (*Id*. at p. 179.)

The fact that dams and reservoirs are exempted from NPDES requirements does not mean that these facilities are immune from Clean Water Act requirements. The Water Board can and does implement water quality objectives pursuant to its planning authorities and water right proceedings under state law. However, absent restraints imposed by the State Water Board itself (see Water Code section 13247, discussed below), the State Water Board has discretion to decide how to implement objectives in the context of statutory and common water rights law. This is consistent with the U.S. Supreme Court's interpretation of Clean Water Act section 101(g), which allows regulation of water users by a state to protect water quality while avoiding a fundamental interference with state water allocation authority. (*PUD No. 1 of Jefferson County v. Washington Dep't of Ecology* (1994) 511 U.S. 700, 720.) The TUCP Order temporarily changed some of the conditions of the water right permits and license for the Projects, which otherwise would have required DWR and Reclamation to fully meet water quality objectives in the Bay-Delta Plan. This was an implementation action under state law authority. The TUCP Order did not change the water quality objectives themselves in a manner inconsistent with the Clean Water Act.

The federally-promulgated water quality standards cited by CSPA et al. are not relevant to the discussion. As a component of a coordinated initiative of federal agencies, EPA promulgated criteria pursuant to Clean Water Act section 303(c)(3) and 303(c)(4) after it disapproved the State Water Board's 1991 Bay-Delta Plan. (60 Fed. Reg. 4668 (1995).) EPA subsequently approved the 1995 Bay-Delta Plan, and has committed to withdraw the standards articulated in Code of Federal Regulations, title 40, section 131.37. The Third District Appellate Court confirmed that once approved by EPA, the applicable water quality standards are those in the 1995 Bay-Delta Plan as a matter of law. (*State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at pp. 774-775 [citing 33 U.S.C. § 1313(c)(2)(A), (c)(3)].)

Water Code Section 13247

The petitioners continue to cite the Court of Appeal's opinion in the *State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th 674, to support their argument that the TUCP Order impermissibly altered Bay-Delta water quality objectives. In that case, the Court found that Water Code section 13247 "compelled" the Water Board to implement the a pulse flow objective on the San Joaquin River at Vernalis, rather than the alternate, experimental flow objective approved in Decision 1641. (*Id.* at p. 730.) This was because Water Code section 13247 requires state agencies to comply with water quality control plans, and the program of implementation contained in the 1995 Bay-Delta Plan provided only for the full implementation of the Vernalis pulse flow objective in a water right proceeding. (*Id.* at p. 728.) "The guiding principle is that the Board's power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing." (*Id.* at p. 729.)

The Water Board agrees that, absent the emergency proclamation, Water Code section 13247 requires state agencies, including the State Water Board, to comply with water quality control plans unless otherwise directed or authorized by statute. In addition, the Bay-Delta Plan, as currently drafted, does not provide sufficient flexibility in the program of implementation to adequately respond to the extended drought conditions facing California.

To address this problem, Governor Brown suspended Water Code section 13247 as applied to certain actions, including changes to Decision 1641 requirements that were approved by the TUCP Order pursuant to the California Emergency Services Act (Gov. Code, § 8550 et seq.). The Bay-Delta Plan implementation provisions are state law regulations and subject to modification by the Governor in response to emergencies. (Gov. Code, § 8567, subd. (a) [Governor may make, amend, and rescind orders and regulations that have the force and effect of law].) Accordingly, Water Code section 13247 does not apply to the TUCP Orders, and the holding in the *State Water Resources Control Board Cases* is inapplicable as a result.

RTD and CSPA et al.'s argument that the Governor lacks authority to "suspend a EPA-approved water quality objective on the grounds that he has declared an emergency water shortage" simply ignores the point discussed above, which is that the implementation of Clean Water Act objectives through the regulation of nonpoint sources (which includes water diversions) occurs

pursuant to state law. The Governor has authority to modify the application of state law under the emergency conditions that are present here.

Antidegradation Analysis

CSPA et al. also argued that the Water Board violated state and federal antidegradation requirements by lowering standards in a manner that did not protect the fisheries beneficial use. CSPA et al. complained that the TUCP Order did not contain any analysis of impacts to beneficial uses and the "trade-offs or costs" between water allocations and "benefits of weakening water quality standards." We disagree. The TUCP Order did not violate the antidegradation standard and an additional analysis was not required.

The federal antidegradation policy is designed to protect existing uses and the level of water quality necessary to protect existing uses, and provide protection for higher quality and outstanding national water resources. (40 C.F.R. 131.12). It establishes a three-part test for determining when increases in pollutant loadings or other adverse changes in surface water quality may be permitted:

> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.
>
> (3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.