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TONY LOPRESTI
FELLOW

October 29, 2015

***Via Certified Mail, Return Receipt Requested***

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

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

Re: Sixty-day notice of intent to sue for failure to carry out non-discretionary federal review of California water quality standards in violation of Clean Water Act section 303(c)

Dear Administrator McCarthy and Regional Administrator Blumenfeld,

I write on behalf of Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute ("Noticing Parties") to provide you with notice of their intent to bring suit against you in your official capacities as Administrator and Regional Administrator of the United States Environmental Protection Agency ("EPA"). This suit will redress continuous and intermittent violations of the Clean Water Act ("CWA") for: (1) failing to carry out a non-discretionary duty under 33 U.S.C. §1313(c)(2) – (4) to review and take appropriate action regarding revisions to the water quality standards in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan ("Bay-Delta Plan") and Water Quality Control Plan for the Central Valley Region, Sacramento River Basin and San Joaquin River Basin ("Central Valley Plan");

and (2) for failing to carry out a non-discretionary duty under 33 U.S.C. §1313(c)(1) to review and take appropriate action regarding the existing standards in the Bay-Delta Plan at least every three years.

Pursuant to 33 U.S.C. §1365(b)(2) and 40 C.F.R. §135.2(c), the Noticing Parties will file suit if these violations are not cured within sixty days of the postmark date of this letter. As required by 40 C.F.R. §135.2(b), a copy of this notice is being sent to the Attorney General of the United States. A copy is also being provided to California's State Water Resources Control Board.

## I. STATUTORY FRAMEWORK

The CWA aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain, *inter alia*, "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. §1251(a), (a)(2). Under the CWA, federal and state governments share the responsibility of monitoring and regulating water pollution. *Florida Pub. Interest Research Grp. Citizen Lobby, Inc. v. U.S. Envtl. Prot. Agency*, 386 F.3d 1070, 1080 (11th Cir. 2004) ("*FPIRG*"). The EPA has principal responsibility for regulating point source pollution—pollution which comes from any "discernible, confined and discrete conveyance"—by issuing National Pollutant Discharge Elimination System ("NPDES") permits that mandate technological controls to reduce pollution into the nation's waters. *Am. Wildlands v. Browner*, 260 F.3d 1192, 1193 (10th Cir. 2001). States, on the other hand, have primary responsibility for regulating non-point source pollution by establishing and enforcing water quality standards. *FPIRG*, 386 F.3d at 1073.

There are three basic components to water quality standards: first, states must establish the designated uses of their waterbodies, *see* 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. §131.6(a); second, states must establish water quality criteria sufficient to protect the designated uses, *see* 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. §131.6(c); and, third, states must adopt an anti-degradation review policy enabling states to assess whether the water quality of a particular water body has been diminished, *see* 40 C.F.R. §131.6(d); 40 C.F.R. §131.12(a).

Although the CWA allows states to promulgate water quality standards, Congress established a system of mandatory federal oversight to ensure that states maintain adequate water quality standards. The CWA provides that "[w]henever the State revises or adopts a new [water quality] standard, such revised or new standard shall be submitted to the Administrator" of the EPA. 33 U.S.C. §1313(c)(2)(A). Although the states are required to submit any new or revised standard for review, the EPA has an affirmative duty to review any new or revised standard regardless of whether the state makes a submission. *FPIRG*, 386 F.3d at 1073 ("While states are primarily responsible for establishing these water quality standards, the EPA, in turn, is required to undertake a review of any new or revised water quality standards adopted by the states."); *Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 375 (D. Me. 2012) ("The EPA is

under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review."); *see also* EPA Frequently Asked Questions 2 (EPA-820-F-12-017, Oct. 2012) ("EPA has a mandatory duty to approve or disapprove a new or revised WQS even if the state did not submit such new or revised WQS to EPA for review.").

The EPA must review a new or revised water quality standard to determine whether it complies with multiple requirements, including, *inter alia*: (1) the water quality criteria in the new or revised standard "are consistent with the requirements of the [CWA]"; (2) the water quality criteria "protect the designated water uses"; (3) in adopting or revising the standard, the state followed its own "legal procedures for revising or adopting standards"; (4) that "standards which do not include [fish and wildlife protection or recreational uses] are based upon appropriate technical and scientific data and analyses"; and (5) that the new or revised standard "meets the requirements included in [40 C.F.R.] § 131.6."[1] 40 C.F.R. §131.5. If the standards submitted to the EPA meet each of these criteria, the EPA must approve the standard. *Id.* §131.5(b). Otherwise, the EPA must disapprove the standard and, unless the state submits an acceptable revised standard within ninety days, promulgate a federal water regulation that meets the strictures of the CWA. *Id.*; 33 U.S.C. §1313(c)(4). An existing water quality standard "remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard." 40 C.F.R. §131.21(e); *FPIRG*, 386 F.3d at 1070.

The CWA also requires states to conduct triennial public reviews of water quality standards. 33 U.S.C. §1313(c)(1). Specifically, the CWA provides that states "shall from time to time (but at least once every three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." *Id.*; 40 C.F.R. §131.20. After each triennial review, the state must submit the results of the review to EPA regardless of whether there has been any revision to the standards. 40 C.F.R. §131.20. The state's submission to the EPA must include "the results of the review, any supporting analysis for the use attainability analysis, the

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[1] The "minimum requirements for water quality standards submission[s]" in 40 C.F.R §131.6 include: "(a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act; (b) Methods used and analyses conducted to support water quality standards revisions; (c) Water quality criteria sufficient to protect the designated uses; (d) An antidegradation policy consistent with § 131.12; (e) Certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law; and (f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation."

methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards." *Id.* As with new or revised water quality standards, the EPA is under an affirmative duty to complete review of a state's existing water quality standards at least every three years, regardless of whether the state submits the results of a triennial review to the EPA.

## II. FACTUAL BACKGROUND

### A. The Bay-Delta Plan

In 1995, California's State Water Resources Control Board ("SWRCB" or "Board") approved the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("1995 Bay-Delta Plan"). SWRCB, WR 95-1 (May 1995). The 1995 Bay-Delta Plan, which established water quality standards for the Bay-Delta region, adopted the beneficial uses to be protected from an earlier Bay-Delta plan, including fish and wildlife and agriculture. The 1995 Bay-Delta Plan's objectives included criteria for salinity, flows, exports, and dissolved oxygen. Many of these objectives vary by location, time of year, and the type of water year. The plan also included an objective for how often the Delta Cross Channel ("DCC") gates could be opened during different times of the year.

The 1995 Bay-Delta Plan stated that "most of the objectives in th[e] plan will be implemented by assigning responsibilities to water rights holders because the factors to be controlled are primarily related to flows and diversions." *Id.* at 4. Specifically, the program of implementation for the 1995 Bay-Delta Plan explained that,

> The SWRCB will initiate a water rights proceeding following adoption of this water quality control plan. The water rights proceeding will address the water supply-related objectives in this plan through the amendment of water rights under the authority of the SWRCB. The water supply-related objectives include those for Delta outflow, river flows, export limits, the Delta Cross Channel gates, and salinity control for the protection of municipal and industrial supply, agricultural supply (excluding salinity objectives for protection of southern Delta agriculture, which are discussed in section B.4 of this chapter), and fish and wildlife.

*Id.* at 27. Accordingly, in 1999, the SWRCB adopted Water Rights Decision 1641 ("D-1641"), which the Board later revised in 2000. SWRCB, WR-2000-02. D-1641 contains terms and conditions for permits under which water rights holders operate to meet the objectives in the 1995 Bay-Delta Plan. *Id.* at 12.

In 2006, the SWRCB approved the current water quality control plan for the Bay-Delta. Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 4 (Dec. 13, 2006). D-1641 remains the operative SWRCB order regarding water quality standards in the Bay-Delta. As such, for all relevant purposes, the water quality criteria in the Bay-Delta

Plan are the same as the water quality criteria in D-1641. The Board has not conducted timely triennial reviews of the Bay-Delta Plan.

### B. Governor Brown's Drought Proclamations And The SWRCB's Orders Approving Petitions To Modify Water Quality Standards

Pursuant to California Water Code §13247, "state offices, departments, and boards" are required to "comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute." On January 17, 2014, California Governor Jerry Brown issued a Drought Emergency Proclamation suspending section 13247 on the basis that it would "prevent, hinder, or delay the mitigation of the effects of the [drought] emergency."[2] Brown directed the SWRCB to "consider modifying requirements for reservoir releases or diversion limitations, where existing requirements were established to implement a water quality control plan." On April 25, 2014, Brown extended his drought proclamation and the suspension of section 13247,[3] and on December 22, 2014, Brown issued Executive Order B-28-14 extending the suspension of section 13247 through May 31, 2016.[4]

Following the Governor's Drought Proclamations and Executive Order, water users have filed successive petitions requesting changes to the water quality standards in the Bay-Delta Plan, as implemented by D-1641. The California Water Code provides that a permittee may petition the Board for an order changing the terms of its permit or license. Cal. Water Code §1435(a). Upon making specified findings, the Board may issue a change order approving the petition. *Id.* §1435(b). Unless an earlier date is specified, the order automatically expires 180 days from its issuance. *Id.* §1440. The Board may, however, renew the order for successive 180-day periods. *Id.* §1441.

On January 31, 2014, the SWRCB issued an order approving a petition jointly filed by the U.S. Bureau of Reclamation ("Reclamation") and the California Department of Water Resources ("DWR"). The Board's order approved Reclamation and DWR's requests to amend the delta outflow objectives, export requirements, and DCC gate closure requirements in D-1641, thus allowing the agencies to operate the federally owned Central Valley Project ("CVP") and state-owned State Water Project ("SWP") in a manner different from that required by the water quality standards in the Bay-Delta Plan. The Board's order explained that:

> Absent suspension of section 13247, the State Water Board could not approve a petition to modify water right permits and licenses in a way that does not provide

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[2] The text of Governor Brown's January 17, 2014 Drought Proclamation is available at: http://gov.ca.gov/news.php?id=18368.
[3] The text of Governor Brown's April 25, 2014 Drought Proclamation is available at: http://gov.ca.gov/news.php?id=18496.
[4] The text of Executive Order B-28-14 is available at: http://gov.ca.gov/news.php?id=18815.

> for full attainment of the water quality objectives as specified in the Bay-Delta Plan, even during a drought emergency.

SWRCB Order Approving Temporary Urgency Change 7 (Jan. 31, 2014). The Board did not address compliance with federal law or the Clean Water Act.

The Board issued subsequent orders on February 28, March 18, April 9, 11, and 18, May 2, and October 7, 2014, modifying and/or extending changes to delta outflow and other flow requirements (including San Joaquin River flow requirements), export requirements, and DCC gate closure requirements, all of which are set forth in the Bay-Delta Plan and D-1641.[5] Additionally, the Board's May 2 order moved the salinity compliance location in Table 2 of the Bay-Delta Plan and D-1641 (establishing water quality objectives for agricultural beneficial uses) from Emmaton to Threemile Slough on the Sacramento River, a change that allowed Reclamation and DWR to operate at salinity levels that exceeded the water quality objectives in the Bay-Delta Plan. The EPA did not review nor approve any of the Board's 2014 orders modifying D-1641 to allow water users to operate in violation of the approved Bay-Delta Plan water quality standards.

In 2015, the SWRCB has issued several orders approving modifications to the water quality objectives in D-1641 and the Bay-Delta Plan.[6] On February 3, 2015, the Board approved changes to minimum delta outflow requirements, minimum San Joaquin River flows, DCC Gate closure requirements, and export limits established in the Bay-Delta Plan and D-1641, as follows:

- The Bay-Delta Plan and D-1641 establish a minimum Net Delta Outflow Index ("NDOI") of 7,100 cfs in February and March, calculated as a 3-day running average, or alternate compliance with salinity standards. The NDOI objective is intended to protect estuarine habitat for anadromous fish and other estuarine fish, many of which are listed as endangered or threatened species. The February 3 order changed the minimum NDOI to allow flows of "no less than 4,000 cubic-feet per second (cfs) on a monthly average," and a 7-day running average "not less than 1,000 cfs below the monthly average."

- The Bay-Delta Plan and D-1641 establish minimum flow rates for the San Joaquin River at Airport Way Bridge, Vernalis. This objective is designed to insure that there is adequate downstream freshwater flow to protect fish and wildlife. The objective calls for flows between February 1 and April 14 of 710 or 1,140 cfs in critically dry years,[7] depending on the location of the 2 parts per thousand isohaline. The February 3 order

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[5] Most of the SWRCB's 2014 orders are available on the SWRCB website at: <http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.shtml>.
[6] The SWRCB's 2015 orders approving modifications to the water quality objectives in the Bay-Delta Plan, as implemented by D-1641, are available on the SWRCB website at: <http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.shtml>.
[7] 2015 is classified as a critically dry year.

changed the minimum flow rate during the months of February and March to "no less than 500 cfs on a monthly average."

- The Bay-Delta Plan and D-1641 establish requirements for the closure of the DCC Gates. This objective is designed, in part, to protect fish and wildlife, particularly endangered and threatened salmonid species. The Bay-Delta Plan and D-1641 call for the gates to be closed from February 1 through May 20 each year. The February 3 order modified this objective to allow the gates to be open in February and March "as necessary to preserve limited storage in upstream reservoirs and reduce infiltration of high salinity water into the Delta while reducing impacts to migrating Chinook salmon."

- The Bay-Delta Plan and D-1641 establish limits on the quantity of water flowing into the Delta that can be diverted from the South Delta by the SWP and CVP pumping facilities. The objective is designed to protect the habitat of estuarine and anadromous fish species. Generally, the Bay-Delta Plan and D-1641 call for exports to be limited to 35% of delta inflow between February and June. However, when the best available estimate of the Eight River Index for January is less than or equal to 1.0 million acre-feet, as was the case in February 2015, the export limit for February is 45%. The February 3 order set forth a complex modification of the export limits set forth in the Bay-Delta Plan and D-1641 that allowed varying export levels to occur depending on hydrologic circumstances.

On March 5, 2015, the SWRCB revised its February 3 order to allow additional exports from the Delta during the month of March when certain hydrologic conditions are met. On April 6, 2015, the SWRCB extended the changes to delta outflow requirements and export requirements, as set forth in its February 3 and March 5 orders, through the end of June 2015, and extended the changes to the DCC gate closure requirements through May 20, 2015. The SWRCB's April 6 order made the following additional changes to the water quality standards in the Bay-Delta Plan, as implemented by D-1641:

- The Bay-Delta Plan and D-1641 require a pulse flow volume of 3,110 cfs or 3,540 cfs at Vernalis during critically dry years. The April 6 order reduced the required volume to 710 cfs at Vernalis.

- As mentioned above, the Bay-Delta Plan and D-1641 establish minimum flow requirements in the San Joaquin River at Airport Way in Vernalis at 710 cfs or 1,140 cfs, depending on hydrology. The April 6 order reduced the flow requirement following the pulse flow period to 300 cfs until May 31, and to 200 cfs during June 2015.

- As explained above, the Bay-Delta Plan and D-1641 establish a compliance point for the Western Delta agricultural salinity requirement at Emmaton on the Sacramento River. As the Board did in 2014, the April 6 order moved this compliance point to Three-Mile Slough for the period of April-June 2015. Without this change, the water quality objective for salinity compliance at Emmaton (a 14-day running average of under 2.78 mmhos/cm between April 1 – August 15 in critical dry years) would have been violated

as of May 1, 2015, when the 14-day running average reached 2.81 mmhos/cm, and thereafter.

On July 3, 2015, the SWRCB extended the change in the salinity compliance point for the Western Delta agricultural salinity requirement until August 15, and made additional changes to the water quality standards in the Bay-Delta Plan and D-1641, including, among other changes:

- The Bay-Delta Plan and D-1641 establish a minimum NDOI in July of 4,000 cfs in critically dry years. The July 3 order reduced the minimum NDOI to 3,000 cfs on a monthly average during the month of July 2015.

- The Bay-Delta Plan and D-1641 establish minimum flows in the Sacramento River at Rio Vista in critically dry years of 3,000 cfs in September and October, and 3,500 cfs in November, based on a monthly average. The Bay-Delta Plan and D-1641 further state that the 7-day running average cannot be more than 1,000 cfs below the monthly average. The July 3 order reduces the minimum flow to 2,500 cfs for the period of September – November 2015, with a 7-day running average of no less than 2,000 cfs.

- The Bay-Delta Plan and D-1641 limit exports from the Delta to 65% of inflow between July and January. The July 3 order replaces the 65% inflow objective with contingency-based export limits Specifically, through November 30, 2015, when water quality objectives designed to protect agricultural and fish and wildlife beneficial uses (Tables 2 and 3 of D-1641) are not being met, the combined maximum exports at the SWP Banks Pumping Plant and the CVP Jones Pumping Plan shall be no greater than 1,500 cfs. Through December 30, 2015, the order requires compliance with D-1641 if the criteria in Table 2 and 3 are being met, but limits SWP and CVP exports above 1,500 cfs to natural or abandoned flow.

Further, on August 4, 2015, the SWRCB approved changes to the dissolved oxygen objective for the Stanislaus River below Goodwin Dam.[8] The Central Valley Plan establishes that,

> For surface water bodies outside the legal boundaries of the Delta . . . [t]he dissolved oxygen concentrations shall not be reduced below the following minimum levels at any time: Waters designated [for warm habitat beneficial uses] 5.0 mg/l; Waters designated [for cold habitat beneficial uses] 7.0 mg/l; Waters designated [for spawning] 7.0 mg/l.

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[8] The SWRCB's August 4, 2015 order is available at: <http://www.waterboards.ca.gov/waterrights/water_issues/programs/compliance_monitoring/stanislaus_river/>.

Fourth Edition of the Water Quality Control Plan (Basin Plan) for the Sacramento River and San Joaquin River Basins III-5.00 (Sept. 15, 1998).

Because the Stanislaus River from Goodwin Dam to the San Joaquin River has warm, cold, and spawning freshwater habitat beneficial uses, the more protective minimum 7.0 mg/l objective is the operative objective for DO in the Stanislaus River from Goodwin Dam to the San Joaquin River. D-1641 and Water Rights Decision 1422 ("D-1422") implement the relevant dissolved oxygen objective in the Central Valley Plan. The SWRCB's August 4 order amended D-1641 and D-1422 to allow Reclamation to operate the Central Valley Project to meet a minimum DO level in the Stanislaus River below Goodwin Dam of 5.0 mg/l, instead of the 7.0 mg/l level provided for in the Central Valley Plan. The order is effective through November 30, 2015.

To date, the EPA has not reviewed nor approved any of the Board's 2015 orders modifying water quality standards in the Bay-Delta and Central Valley Plans, as implemented by D-1641 and D-1422.

## III. FAILURE TO CARRY OUT NON-DISCRETIONARY DUTIES UNDER THE CLEAN WATER ACT

### A. Violation of CWA Section 303(c)(2) – (4) For Failure To Review And Take Appropriate Action Regarding SWRCB's Revisions To Water Quality Standards In The Bay-Delta And Central Valley Plans

The CWA's citizen suit provision authorizes suit against "the Administrator where there is alleged a failure of the Administrator to perform such act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. §1365(a)(2). Under the CWA, all new or revised water quality standards "shall be submitted to the Administrator" for review. 33 U.S.C. §1313(c)(2)(A) (emphasis added). Applying EPA's own definition of "new or revised standards," the EPA violated the CWA when it failed to review the SWRCB's repeated and ongoing modifications to the water quality standards in the Bay-Delta and Central Valley Plans as required by 33 U.S.C. §1313(c)(2) – (4).

The EPA has interpreted the CWA and its implementing regulations in its Water Quality Standards Handbook ("EPA Handbook"). Chapter 1.5.1, entitled "What Provisions Constitute New or Revised Water Quality Standards Under Clean Water Act Section 303(c)" sets forth a four-part definition for "new or revised water quality standards." If the responses to the following four questions are affirmative, EPA has a non-discretionary duty to review the relevant provision and take appropriate action under CWA section 303(c)(2) – (4):

> (1) Is it a legally binding provision adopted or established pursuant to state or tribal law?; (2) Does the provision address designated uses, water quality criteria to protect designated uses, and/or antidegradation requirements for waters of the United States?; (3) Does the provision express or establish the desired condition (e.g. designated uses, criteria) or instream level of protection (e.g., anti-

> degradation requirements) for waters of the United States immediately or mandate it will be expressed or established for such waters in the future?; (4) Does the provision establish a new WQS or revise an existing WQS? . . . A provision that establishes a new WQS or has the effect of changing an existing WQS would meet this consideration. In contrast, a provision that simply implements a WQS without revising it would not constitute a new or revised WQS."

EPA Handbook 1.5.1. The SWRCB's orders modifying the water quality standards in the Bay-Delta and Central Valley Plans, as implemented by D-1641 and D-1422, satisfy each of these elements.

First, the Board's orders modifying Reclamation's and DWR's permits and licenses such that they do not have to comply with the water quality objectives in the Bay-Delta Plan were issued pursuant to state law and have legally binding effect. The SWRCB utilized its authority to issue a final administrative order approving modifications that effectively changed the water quality standards in the Bay-Delta and Central Valley Plans.

Although the Board's orders did not amend the text of the Bay-Delta and Central Valley Plans themselves, the orders modified the requirements in D-1641 and D-1422 to meet water quality objectives in the Bay-Delta and Central Valley Plans. When the 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. *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 732 (2006). The Board worked a "de facto amendment" to the Bay-Delta and Central Valley water quality standards by modifying the conditions of Reclamation's and DWR's licenses and permits under D-1641 and D-1422 such that they could operate the CVP and SWP in violation of the Bay-Delta and Central Valley Plans.

With respect to the second element of the definition of "new or revised water quality standards," the SWRCB's 2014 and 2015 orders approving modification of Reclamation's and DWR's licenses and permits clearly "address" the water quality criteria in the Bay-Delta and Central Valley Plans, which were promulgated for the purpose of protecting fish and wildlife and other designated uses. The 2014 and 2015 orders allow Reclamation and DWR to operate the CVP and SWP based on water quality criteria other than those in D-1641, D-1422, and the Bay-Delta and Central Valley Plans.

Third, the SWRCB's 2014 and 2015 orders "express and establish a desired condition" both "immediately" and "in the future." The modifications are expressed as changes to the "desired condition" because they change the water quality criteria set forth in D-1641 and D-1422, and by extension, the Bay-Delta and Central Valley Plans. In its Water Quality Handbook, EPA clarifies that a change in water quality criteria establishes and expresses a new "desired condition." EPA Handbook 1.5.1. Additionally, the SWRCB's orders express and establish new water quality criteria "immediately" and "in the future." For instance, the SWRCB's July 3,

2015 order reduced the minimum NDOI for the month of July 2015 to 3,000 cfs, and the Rio Vista flow to 2,500 cfs for the September – November 2015 period.

Finally, the Board's orders have "the effect of changing an existing water quality standard" and are not mere implementation decisions. Several federal courts have applied the "effects test" reflected in EPA's Water Quality Handbook definition to determine whether a state law or regulation is subject to section 303 review. *See, e.g.*, *FPIRG*, 386 F.3d at 1080; *Nw. Envtl. Advocates v. Envtl. Prot. Agency*, 855 F. Supp. 2d 1199, 1209 (D. Or. 2012). Because the modifications to D-1641 allowed Reclamation and DWR to operate the CVP and SWP in a manner that violated the water quality criteria in the Bay-Delta and Central Valley Plans, they had the effect of modifying the Plans' water quality standards. The mandate of section 303 cannot be avoided by amending D-1641 or D-1422 instead of the water quality control plans themselves, particularly where those plans include standards for critically dry years. The allocation of responsibilities in D-1641 and D-1422 is intrinsically intertwined with the water quality standards in the Bay-Delta and Central Valley Plans. By modifying the water users' obligations to implement the water quality criteria, even temporarily, the SWRCB has supplanted or at very least delayed the attainment of these water quality standards.

Nor are the SWRCB's orders mere implementation decisions within the meaning of EPA regulations. Under 40 C.F.R. §131.13, "states may, at their discretion, include *in their State standards*, policies generally affecting their application and implementation, such as mixing zones, low flows and variances." (Emphasis added). Here, the Bay-Delta and Central Valley Plans do not include provisions providing for the modifications in the SWRCB's orders. Nor has the SWRCB defined or described its orders as "variances," or any other type of implementation decision within the meaning of 40 C.F.R. §131.13.

In sum, the SWRCB's 2014 and 2015 orders meet the four elements of EPA's definition for a new or revised water quality standard triggering the CWA's section 303(c)(2) – (4) review requirements. The SWRCB's orders were: (1) made pursuant to state law and have legally binding effect; (2) address water quality criteria; (3) express and establish a desired condition for the Bay Delta; (4) and have the effect of changing existing water quality standards. EPA was, and is, under an affirmative obligation to review the SWRCB's revisions regardless of whether the SWRCB submitted them to the EPA for review. *FPIRG*, 386 F.3d at 1073; *Friends of Merrymeeting Bay*, 839 F. Supp. 2d at 375. The EPA has failed to carry out its mandatory federal oversight role by ignoring SWRCB's ongoing pattern of approving changes to Reclamation and DWR's permits that do not meet the water quality standards in those plans and in D-1641 and D-1422. The EPA thus violated, and continues to violate, CWA section 303(c)(2) – (4) by failing to review the SWRCB's modifications to the Bay-Delta and Central Valley Plans.

After 60 days, the Noticing Parties intend to bring suit for a continuous and intermittent failure to carry out a non-discretionary duty to review and take appropriate action regarding the

currently effective revisions to the Bay-Delta and Central Valley Plans discussed in the previous section, and any other revisions in effect after the date of this notice. The Noticing Parties will seek, *inter alia*, injunctive relief requiring that you comply with CWA section 303(c)(2) – (4) by reviewing and taking appropriate action regarding modifications to the Bay-Delta and Central Valley water quality standards, and declaratory relief requiring CWA-compliant review of future modifications to the Bay-Delta or Central Valley Plans.

### B. Violation Of CWA Section 303(c)(1) For Failure To Review The Bay-Delta Water Quality Standards At Least Every Three Years

The Bay-Delta Plan was last updated in 2006. Therefore, triennial review of the Bay-Delta water quality standards was required, at minimum, in 2009, 2012, and 2015. The Board has not conducted timely reviews of the Bay-Delta Plan, as required by CWA section 303(c)(1).

The plain text of the CWA and its implementing regulations is mandatory, not permissive: triennial review of water quality standards "shall" occur "at least every three years." 33 U.S.C. §1313(c)(1); 40 C.F.R. §131.20(a). Just as courts and the EPA itself have recognized that the agency has a non-discretionary duty to review new and revised standards under section 303(c)(2) regardless of whether states submit them to the EPA, the EPA has a similar affirmative review obligation under CWA section 303(c)(1). The EPA's failure to take action in the face of California's prolonged inaction is thus a violation of a mandatory duty. *See, e.g.*, *Scott v. City of Hammond,* 741 F.2d 992, 998 (7th Cir. 1984); *Alaska Ctr. for the Envtl. v. Reilly*, 762 F. Supp. 1422, 1424 (W.D. Wash. 1991).

After 60 days, the Noticing Parties intend to bring suit for a continuous failure to carry out a non-discretionary duty to ensure the review of the water quality standards in the Bay-Delta Plan at least every three years. The Noticing Parties will seek, *inter alia*, injunctive relief requiring review of the water quality standards in the Bay-Delta Plan and declaratory relief requiring that such review take place at least every three years.

## IV. IDENTIFICATION OF PERSONS GIVING NOTICE AND LEGAL COUNSEL

**The persons giving this notice are:**

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## V. CONCLUSION

For the foregoing reasons, after 60 days from the postmark date of this notice, the Noticing Parties will bring suit if these continuous and intermittent violations of CWA section 303(c) are not cured.

Sincerely,

Barbara J. Chisholm
*Attorney for Natural Resources Defense Council*

**Copies Sent Via Certified Mail To:**

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