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From: Hagler, Tom
Sent: Thur 3/29/2018 6:40:15 PM
Subject: California 303(d) list - Discussions with Board staff/Options

ATTORNEY CLIENT COMMUNCATIONS/PREDECISIONAL/PRIVILEGED/DO NOT RELEASE

This email summarizes some discussions I have had with counsel to the State Board about our review of the 303(d) list and the potential addition of 9 stream segments in the San Joaquin Valley and Delta based on temperature impairments. Our addition would be based on temperature data from CDFA and CDWR that was not evaluated by the Regional or State Boards. We flagged that data in our submission to the Boards, although there is some question about whether we flagged it in a way that was consistent with the Boards' processes.

In our last briefing on this issue, we had proposed approving the existing list but augmenting that list by beginning the process of adding these 9 stream segments. That would begin with a solicitation of public comment.

Here are the highlights of the discussions with State Board counsel:

1. The Board would not be able to send us any communication that agrees with the additional listings. They would not have a record in front of them to enable them to make that conclusion one way or the other.

2. The Board will not commit, in the abstract, to looking at this "off cycle" (that is, in 2018-2019) as opposed to the next regular cycle review for RB5 (which would be roughly 6 years hence). They would have to look at the new data and decide whether it meets their programmatic goals and resources to enable it to be included in a quick "off cycle" review.

3. The Board is willing to send us a letter saying that the Board "would be willing to consider looking at the data off cycle." (That is not a quote, just a paraphrase.)

Given this, and based on my discussion with Janet, I think we have two options:

Option 1: Go ahead and move forward with "approval with additions". That letter is already drafted.

Option 2: Approve without additions, and explicitly defer to the Board, urging the Board to take the review "off cycle (soon), and then give the Board our summary of the data.

I have developed an "Option 2 Letter and Enclosures." The most relevant paragraphs are inserted below.

IMPORTANT NOTE: This is not a "legal" call. ORC will support either Option 1 or Option 2, because both fit within the regulatory scheme and are justified by the record.

Here is the most relevant part of my suggested Option 2 (no additional listings) letter:

"EPA has previously expressed concerns about the desirability of evaluating certain temperature data developed by the California Department of Fish and Wildlife (CDFW) and the California Department of Water Resources (CDWR). *See* Letter from Janet Hashimoto, EPA, to Joseph Simi, CVRWQCB, November 3, 2016. EPA recognizes that this listing cycle represents a significant shift in the State and Regional Boards' process for soliciting and reviewing relevant data. EPA further recognizes the complexities facing the State and Regional Boards and the interested public in working with the CEDEN system for data collection. At the same time, EPA also continues to be concerned about the need to develop a list that reflects the substantially impaired Fish Migration and related beneficial uses in the Central Valley and to include a consideration of the significant temperature data set from CDFW and CDWR.

EPA appreciates the constructive discussions we have had with Board staff on this issue. We understand, based on the State Board's Letter dated _____, that the State Board is willing to

consider reviewing this temperature data "off cycle" so that any possible additional listings could be included in the next review of water quality limited segments (presently scheduled for 2019). We believe that such a consideration is consistent with the Board's listing policy, which envisions "off cycle" evaluations in the event that there is "high priority data." *See* Staff Report, (02/03/15, Item 8, page 2). To assist the State Board in its consideration of this issue, EPA is enclosing as Enclosure 2 our recent synthesis of the CDFW and CDWR temperature data and our thoughts on how this data impacts protection of the salmonid beneficial uses."

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