

February 16, 2007

**VIA HAND DELIVERY**

James D. Marshall  
Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive #200  
Rancho Cordova, CA 95670-6114

Re: Additional Legal Comments on Tentative Waste Discharge Requirements for  
Sacramento Municipal Utility District NPDES Permit No. CA0004758 (Rancho Seco)  
(Client-Matter No. 00780.00135)

Dear Mr. Marshall:

This letter is being submitted as part of the comments of Sacramento Municipal Utility District (the District) on the Tentative Waste Discharge Requirements issued for comment on January 12, 2007, for Sacramento Municipal Utility District's Rancho Seco Facility's NPDES Permit No. CA0004758 ("Tentative Order"). The Tentative Order contains inappropriate effluent limitations for copper, aluminum, and electrical conductivity for such pass-through constituents. These effluent limitations should be removed from the order, to avoid costly and unnecessary treatment of diverted river water at facilities that are nearing decommissioning or water merely passed through Rancho Seco Lake. In this letter we address why the NPDES permit for these facilities should not include these effluent limitations or otherwise restrict constituents from river water that passes through the facilities from Folsom South Canal.

As explained below, constituents that are merely conveyed within the waters of the United States by passing through the District's facilities should not be regulated as additions of pollutants subject to NPDES permit effluent limitations. Rather, reasonable potential should be analyzed so as to eliminate copper, aluminum, and electrical conductivity from the analysis to the extent it is derived from the diverted Folsom South Canal water. The evidence indicates that would result in elimination of the effluent limitations in question.

We do not repeat here all the other reasons in the District's comments why the electrical conductivity limitation should be eliminated. Electrical conductivity in the facility's discharge is many times lower than water quality standards, as recognized by the Tentative Order. The Tentative Order's limitation was inappropriately set as a technology-based limit at an extremely low level based, without margin for variability, and without supportive findings or justification. The Tentative Order justifies this limit as addressing "regional efforts" to reduce salt loading in

the Delta; however, in this instance such an approach is not factually logical or warranted under NPDES regulations. Aluminum also is addressed in other District comments, which note that the Maximum Effluent Concentration on which reasonable potential was based has been corrected by Sierra Foothills Lab. For that additional reason, effluent limits for aluminum are not required.

### **BACKGROUND FACTS**

The District's Rancho Seco facilities are covered by a single NPDES permit and are comprised of a nuclear facility nearing completion of decommissioning and Rancho Seco Park. The surface water discharge addressed in the NPDES permit is dominated by water taken from Folsom South Canal, which carries water from the American River. The canal currently ends at the location of the Rancho Seco facility. Neither the American River at the point it enters Folsom South Canal, nor Folsom South Canal, have been identified as impaired for copper, aluminum, or electrical conductivity. To the contrary, it is well known that the American River is considered to carry water of high quality.

Water diverted from Folsom South Canal serves as source water for Rancho Seco Lake, a recreational lake and source of back-up dilution water for the Rancho Seco nuclear facility. The facility also diverts Folsom South Canal water directly to use as dilution water pursuant to Nuclear Regulatory Commission-mandated treatment processes for the liquid radio active waste treatment system. This dilution water is added to the facility's highly treated liquid radioactive wastewater, which is produced in ever decreasing amounts as the facility nears completion of decommissioning activities.

The combined effluent discharge regulated under the NPDES permit is largely comprised of this passed through dilution water, together with water from the spillway at Rancho Seco Lake (also dominated by Folsom South Canal water), modest amounts of fire protection water (from Folsom South Canal), irrigation water, and infrequent and declining discharges from a small domestic wastewater treatment system. As noted in paragraph II.A.2 of the Tentative Order Fact Sheet, the sewage treatment plant continues to operate in a manner that usually produces no discernible discharge during the warmer months, and the District plans to decrease this effluent volume as the decommissioning process continues.

As shown in Attachment 2 to the District's comment letter and as explained above, the discharge is heavily dominated by large volumes of Folsom South Canal water, i.e. American River water, passed through the facilities. As also explained in the District's comment letter, there is no reason to believe that activities at the facilities add copper, aluminum, or any significant electrical conductivity to the discharge.

## LEGAL ANALYSIS

### The Facilities' Activities and Processes Do Not Add Pollutants to the "waters of the United States."

The Clean Water Act (the Act) only requires the District to obtain an NPDES permit when its activities add a pollutant to navigable waters from a point source. It does *not* require an NPDES permit for the mere connection of two navigable waters. Nor does it require a permit simply because a point source is the last element in a chain of events that moves water from one part of the "waters of the United States" to another.

The Act's NPDES permitting requirements apply only to the "discharge of any pollutant." 33 U.S.C. § 1342(a). The Act further defines "discharge of a pollutant" as "the addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The reach of the Act may be broad, but it does not cover the conveyance of water from one part of the "waters of the United States" to another. Section 1362(12) does not say an addition to *any* navigable water, but rather to "navigable waters," defined elsewhere as "waters of the United States." Moving water from one part of the "waters of the United States" to another part of the "waters of the United States" does not *add* anything to navigable waters. At worst, it redistributes pollutants from one place to another *within* navigable waters. Thus, unless a conveyance system introduces pollutants into navigable waters from the "outside world," there is no need for an NPDES permit.

The statutory text strongly suggests that the NPDES program is aimed at the introduction of a pollutant into the nation's water system, rather than the movement of pollutants within that system. The definition of "discharge of a pollutant" reads "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12). Congress' use of the term "any" three times in this definition highlights its understanding that all additions of all pollutants from all sources are regulated by the Act. In contrast, the absence of the modifier "any" before "navigable waters" was obviously deliberate, signifying that Congress understood that "the waters of the United States" should be viewed as a whole for purposes of the NPDES program.

If Congress intended to cover water conveyances from one part of the waters of the United States to another part of the United States, it would have been much easier to say "any addition of any pollutant to any navigable waters from any point source." But the missing "any" before navigable waters strongly suggests that it was intentional. Congress meant to regulate introductions of pollutants *into* the U.S. water system, not transfers of waters and the collateral transfers of pollutants *within* the system.

This position has substantial support in the federal Courts of Appeals and other high-level sources. Both the Sixth Circuit and D.C. Circuit have held that no NPDES permit is required unless someone "physically introduces a pollutant into water *from the outside world.*" National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988); *see also* National Wildlife Federation v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982). Indeed, Gorsuch involved a

conveyance system that caused physical, chemical, and biological changes to the water. The water held behind the dam reported low dissolved oxygen, dissolved minerals and nutrients, temperature changes, and supersaturation because of the dam. See id. at 161-64. But the D.C. Circuit affirmed the EPA's view that no NPDES permit was required because the dam operator did not add anything to the "waters of the United States" as a whole. The Sixth Circuit was even clearer in Consumers Power Co., holding that a "facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States." Consumers Power Co., 862 F.2d 580. Other Circuits have also agreed. See Missouri ex rel. Ashcroft v. Dep't of the Army, 672 F.2d 1297, 1303-04 (8th Cir. 1982). The United States made this precise argument in its brief in South Florida Water Management District v. Miccosukee Tribe, but the Court refused to address the argument because it had not been raised below. 541 U.S. 95, 109 (2004) ("neither the District nor the Government raised the unitary waters approach before the Court of Appeals or in their briefs respecting the petition for certiorari").

River water from Folsom South Canal exits the District's facility in the same condition it enters the plant with respect to copper, aluminum, and salinity. There is no debate that either the Folsom South Canal or the American River is a "water of the United States," or that the copper, aluminum, and salinity in the water the facilities discharges into the Clay Creek come from the American River and the Canal. The facilities thus have not *added* any copper, aluminum, or salinity pollutants to the waters of the United States. Therefore, it is inappropriate for the agency to regulate those pollutants within the context of Rancho Seco's NPDES permit.

Subjecting these pass-through constituents to NPDES requirements would also lead to absurd results. First, the District would be forced to make the water it withdraws from the American River and the Canal *cleaner* than it is when it flows down the American River or the Canal. This would turn the Clean Water Act on its head. Instead of regulating the *addition* of pollutants to "waters of the United States," it would now regulate the failure to *remove* pollutants from waters of the United States, which is antithetical to the Act's regulatory system. Without causation, there is no legal responsibility for removing pollutants from the water. See Appalachian Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976); see also Gorsuch, 693 F.2d at 174 n. 57.

#### Constituents Derived from River Water in the Folsom South Canal are not Pollutants

The Ninth Circuit has recently held that the definition of "pollutant" under the Clean Water Act only appears limited to materials that are "waste material of a human or industrial process." Ass'n to Protect Hammersly, Eld & Totten Inlets v. Taylor Resources, 299 F.3d 1007, 1016 (9th Cir. 2002) ("Taylor Resources"). If "Congress did not intend that living shellfish and the natural chemicals and particulate biological matter emitted from them, or the occasional shells that separate from them, be considered pollutants" under the Clean Water Act, it is unlikely that Congress considered pre-existing copper, aluminum, or salinity in water to be pollutants. Id. Under Taylor Resources, naturally occurring materials are not considered "pollutants" unless they are either the byproduct of a human or industrial process or are altered by a human or industrial process. See id. at 117.

Here, the facilities do nothing to significantly add to copper, aluminum, or salinity existing in the Folsom South Canal; the effluent closely tracks the intake water. The water that Rancho Seco intakes and discharges is not “transformed by human activity,” *id.*, nor is it “man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” *Id.* (quoting) 33 U.S.C. § 1362(19). Neither is the water a byproduct of Rancho Seco’s processes. And while Northern Plains Resource Council v. Fidelity Exploration, 325 F.3d 1155 (9th Cir. 2003), imposed liability for extracting and discharging unaltered groundwater, that groundwater was considered a “pollutant” because it would not have reached surface waters but for Fidelity’s coal bed methane mining.

Here, the source water is already a part of the waters of the United States in that it is flowing in the American River and Folsom South Canal. The constituents in question are also not identified as pollutants impairing those waters, and are present in river and canal water. The constituents are not pollutants added by the District to waters of the United States.

Further, when Congress requires the removal of pollutants by a person who has not introduced them, it has done so in an explicit fashion, and *only* when that person introduces pollutants into the navigable waters system. *See, e.g.*, 33 U.S.C. § 1311(b)(1)(B) (publicly owned treatment works). The District’s operations do not add copper, aluminum, or significant salinity to the water. If the District and the Bureau of Reclamation let the water pass by in the Canal, it would end up in the Delta -- the same place it ends up under Rancho Seco’s current operations -- with only a minor detour through the Clay Creek and (during some periods) the Cosumnes River. The District should not be saddled with treating water for pre-existing constituents in the American River or the Folsom South Canal merely because it moves some water from the Canal to Clay Creek.

Finally, applying the statute in this manner does not mean that the State cannot regulate Rancho Seco’s operations, but merely that it may not regulate the pass-through of these constituents via the NPDES program. Congress went out of its way to stress that States have primary authority for water allocations and water quality. *See, e.g.*, 33 U.S.C. § 1251(b)(g). Despite the Clean Water Act, there has been a “consistent thread of purposeful and continued deference to state water law by Congress.” California v. United States, 438 U.S. 645, 653 (1978). Indeed, applying the NPDES program to pollutants carried along by the mere movement of water *inhibits* the State’s ability to address water supply as well as water quality problems by imposing unnecessary layers of bureaucracy and regulation. The District’s operations do not add these elements into the “waters of the United States” or into the Delta system. The District merely connect two navigable waters at a point slightly upstream. Thus, there is thus no basis for the agency to regulate copper, aluminum, and salinity in the facilities’ NPDES permit.

Even if the NPDES Scheme Applies, There Is No Basis For Regulating the Facilities' Operations Based on Impacts to the Delta Because the Facilities Are Not Adding Any Pollutants to the Delta System

Even assuming that it is appropriate to regulate constituents in an NPDES permit based on a transfer from one part of the “waters of the United States” to another part, there is no basis for regulating constituents based on a concern that they may impact the Delta in this permit. The facilities withdraw water from the Folsom South Canal off of the American River—water that would otherwise run down the American River and into the Delta—and then runs that water through a system that does not add copper, aluminum, or salinity to the water. As described in the District's comment letter, discharge appears not to reach the Consumes River and the Delta for much of the year. To the extent it reaches the Delta, it is not adding these constituents to the Delta because the American River itself is an upstream component of the Delta watershed. It is inappropriate to regulate the facilities based on the impacts of those constituents to the Delta when they end up in the Delta either way.

Further, there has been no suggestion that the facilities' operations add these pollutants, retard their degradation, or that the “alternate path” to the Delta results in the introduction of more pollutants being introduced into the Delta system. In Gorsuch, for example, the D.C. Circuit rejected an NPDES permit requirement for waters held behind a dam and later released. Despite the fact that the dam induced changes in water conditions, the Gorsuch court rejected the view that an NPDES permit was required. 693 F.3d at 171. There was no “addition” of pollution merely when the water changed character because it was held in one place instead of another, even for changes the dam caused to downstream waters *after* the release. See id. at 175. Other federal courts are in accord.<sup>1</sup> For the agency to justify regulating constituents based on an impact to the Delta, it must show an actual impact on the Delta.

Had Congress wanted to use the NPDES program to regulate all sources of pollution regardless of source of impact, “it would easily have chosen suitable language, e.g., all pollution released through a point source.” Gorsuch, 693 F.2d at 176. Instead, Congress chose the word “addition,” to limit the NPDES system “to addition[s] of pollutant from a point source.” Id. If the conveyance system “itself added pollutants to the water, rather than merely transmitting the water coming into it, in whatever altered form, then it would be subject to the NPDES permit system.” Consumers Power Co., 862 F.2d at 586. As it was in Consumer Powers — where “the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added” — so it is with Rancho Seco. The copper, aluminum, and salinity are always headed to the Delta. As the facilities are not the cause of the pollutants reaching the Delta, it is

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<sup>1</sup> See, e.g., Missouri ex rel. Ashcroft v. Department of the Army, 672 F.2d 1297, 1304 (8th Cir.1982) (“[T]he discharge of a pollutant requires an ‘addition’ of a pollutant from a ‘point source’ and neither term applie[s] to soil erosion or the oxygen content of the water.”); see also National Wildlife Federation v. Consumers Power Co. 862 F.2d 580, 585 (6th Cir. 1988) (Changing “the form of the pollutant from live fish to a mixture of live and dead fish in the process of generating electricity” was not an “addition” requiring an NPDES permit).

inappropriate to regulate the pollutants discharged into Clay Creek based on potential impacts to the Delta.

The Tentative Order's approach is inconsistent with the Clean Water Act's specific scheme for evaluating and regulating loading of impairing pollutants to waters of the United States. The Regional Board fails to apply the Total Maximum Daily Load (TMDL) scheme and does not refer to any TMDLs for any segment of the receiving waters (Clay Creek and the Cosumnes River). Nor does the Tentative Order identify Rancho Seco's discharge as a source of significant loading, which would require regulation under an appropriate waste load allocation.

Without evidence that the facilities' operations would impact the Delta in a different way than if the water proceeded down the American River, there is no justification for regulating Rancho Seco's operations based on the impact to the Delta. Any such regulation would be arbitrary and capricious, an abuse of discretion, and unwarranted by the facts. 5 U.S.C. § 706(2).

Under relevant law the Regional Board may not make a decision that is arbitrary and capricious, an abuse of discretion, or unwarranted by the facts. A decision is "arbitrary and capricious" if there is no rational connection between the facts found and the choice made. NRDC v. United States, 966 F.2d 1292, 1297 (9th Cir. 1992) See 5 U.S.C. § 706(2). . It is not rational to require the District to solve a problem which is not of its creation, and would exist regardless of whether the District took the water from the Folsom South Canal and American River.

Orders not supported by the findings, or findings not supported by the evidence, constitute an abuse of discretion. Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 515; California Edison v. SWRCB, 116 Cal. App.3d 751, 761 (4th Dt. 1981); *see also* In the Matter of the Petition of City and County of San Francisco, et al., State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995). In this case, the requirements contained in the Tentative Order respecting regulation to address impacts on the Delta, are not supported by findings, or findings made are not supported by evidence. The same is true for requirements seeking to otherwise restrict constituents simply passed through from the Folsom South Canal including copper, aluminum and electrical conductivity.

Finally, in adopting the Permit, the Regional Water Board also failed to abide by the Porter-Cologne's directive to be reasonable and the Basin Plan's mandate to focus regulation on controllable water factors. Water Code section 13000 specifies that activities "which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." The Basin Plan provides that its application be focused on controllable water quality factors, which would not include unreasonably restricting the pass through of constituents contained in river water diverted through the District's facilities.

Therefore, and for the additional reasons contained in the District's comment letter, we respectfully request that the Regional Board revise the Tentative Order to remove the proposed effluent limitations for copper, aluminum, and electrical conductivity.

Very truly yours,

DOWNEY BRAND LLP



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