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11 And on behalf of:
12 DEFENDERS OF WILDLIFE, PLANNING
13 AND CONSERVATION LEAGUE, SIERRA
14 CLUB and NATIONAL WILDLIFE FEDERATION.

15 **STATE OF CALIFORNIA**

16 **STATE WATER RESOURCES CONTROL BOARD**

17 In the Matter of IMPERIAL IRRIGATION) PETITION FOR RECONSIDERATION OF
18 DISTRICT’S (IID) AND SAN DIEGO) ORDER WRO 2002-0013 ON BEHALF OF
19 COUNTY WATER AUTHORITY’S) NATIONAL AUDUBON SOCIETY, INC.;
20 (SDCWA) AMENDED JOINT PETITION) DEFENDERS OF WILDLIFE; PLANNING
21 FOR APPROVAL OF A LONG-TERM) AND CONSERVATION LEAGUE; SIERRA
22 TRANSFER OF CONSERVED WATER) CLUB; AND NATIONAL WILDLIFE
23 FROM IID TO SDCWA AND TO CHANGE) FEDERATION (Cal. Code Regs., tit. 23, §
24 THE POINT OF DIVERSION, PLACE OF) 768.)
25 USE, AND PURPOSE OF USE UNDER)
26 PERMIT 7643 ISSUED ON APPLICATION)
27 7482 OF IMPERIAL IRRIGATION)
28 DISTRICT)

1 **PETITION FOR RECONSIDERATION**

2 National Audubon Society, Inc, Defenders of Wildlife, Planning and Conservation
3 League, Sierra Club, and National Wildlife Federation (“Environmental Organizations”), hereby
4 petition the State Water Resources Control Board (“SWRCB” or “Board”) to reconsider SWRCB
5 Order WRO 2002-13 (Oct. 28, 2002). The Environmental Organizations’ mailing addresses are
6 as follows:

7 National Audubon Society, Inc. c/o
8 Law Office of J. William Yeates
9 8002 California Ave.
Fair Oaks, CA 95628
Attn: Bill Yeates

Defenders of Wildlife
926 J Street, Suite 522
Sacramento, CA 95816
Attn: Kim Delfino

10 Planning and Conservation League
11 926 J Street, Suite 612
12 Sacramento, CA 95814
13 Attn: Karen Douglas

Sierra Club California
1414 K Street, Suite 500
Sacramento, CA 95814
Attn: Bill Allayaud

12 National Wildlife Federation
13 3500 5th Avenue, Suite 101
14 San Diego, CA 92103
Attn: David Younkman

15 The Board’s action was inappropriate or improper because:

- 16 1) Order WRO 2002-13 is not supported by substantial evidence; and,
17 2) The Board made errors in law in adopting Order WRO 2002-13.

18 The specific action that the Environmental Organizations seek is for the Board to rescind
19 Order WRO 2002-013 in its entirety, and to instead deny the IID/SDCWA Joint Petition. In the
20 alternative, the Environmental Organizations request that the Order be modified to expressly
21 limit the term of the Order to the 15-year period that the Permittee is required to implement all
22 provisions of the Salton Sea Habitat Conservation Strategy outlined in the Final Environmental
23 Impact Report and Habitat Conservation Strategy (SCH # 1999091142), as defined in Senate Bill
24 482 (Stats. 2002, ch. 617, § 1), with an express requirement that any extension of the 15 year
25 term will require further action of the Board following supplemental environmental review under
26 of CEQA Guidelines section 15167, subdivision (b).

27 This Petition for Reconsideration is filed pursuant to California Code of Regulations, title
28 23, sections 768, subdivisions (b) and (d), and 769, and is based on this Petition; the

1 accompanying Points and Authorities; all documents and arguments submitted by the
2 Environmental Organizations in this proceeding; all documents and arguments presented by any
3 other persons in this proceeding to the extent that such documents and arguments are not
4 inconsistent with the legal theories, policy positions and evidence submitted by the
5 Environmental Organizations; and on any other documents or arguments that may be submitted,
6 considered or otherwise relied upon by the Board in rendering its decision on this and any other
7 Petition for Reconsideration to the extent that such documents and arguments are not inconsistent
8 with the legal theories, policy positions and evidence submitted by the Environmental
9 Organizations regarding the proposed transfer.

10 Copies of this Petition and accompanying materials have been sent to all interested
11 parties.

12 DATE: _____ LAW OFFICE OF J. WILLIAM YEATES
13 [original signed]

14 _____
15 Keith G. Wagner, on behalf of Audubon,
16 Defenders, PCL, Sierra Club and NWF
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11 and on behalf of:
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13 CONSERVATION LEAGUE, SIERRA CLUB, and
14 NATIONAL WILDLIFE FEDERATION

15 **STATE OF CALIFORNIA**

16 **STATE WATER RESOURCES CONTROL BOARD**

17 In the Matter of IMPERIAL IRRIGATION) MEMORANDUM OF POINTS AND
18 DISTRICT’S (IID) AND SAN DIEGO) AUTHORITIES IN SUPPORT OF
19 COUNTY WATER AUTHORITY’S) PETITION FOR RECONSIDERATION OF
20 (SDCWA) AMENDED JOINT PETITION) ORDER WRO 2002-0013 ON BEHALF OF
21 FOR APPROVAL OF A LONG-TERM) NATIONAL AUDUBON SOCIETY, INC.;
22 TRANSFER OF CONSERVED WATER) DEFENDERS OF WILDLIFE; PLANNING
23 FROM IID TO SDCWA AND TO CHANGE) AND CONSERVATION LEAGUE; SIERRA
24 THE POINT OF DIVERSION, PLACE OF) CLUB; AND NATIONAL WILDLIFE
25 USE, AND PURPOSE OF USE UNDER) FEDERATION (Cal. Code Regs., tit. 23, §
26 PERMIT 7643 ISSUED ON APPLICATION) 768.)
27 7482 OF IMPERIAL IRRIGATION)
28 DISTRICT)

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I. INTRODUCTION

On October 28, 2002, the State Water Resources Control Board (SWRCB, or “Board”) adopted Order WRO 2002-0013 (“Final Order”), conditionally approving a proposed, long-term transfer of Colorado River water from of Imperial Irrigation District (IID) and San Diego County Water Authority (SDCWA), and changing the point of diversion, place of use, and purpose of use specified for that water under IID’s existing permit (“IID/SDCWA Petition”).¹ National Audubon Society, Inc., Defenders of Wildlife, Planning and Conservation League, Sierra Club and National Wildlife Federation (collectively “Environmental Organizations”) hereby request that the Board reconsider its conditional approval of the IID/SDCWA Petition.

The Environmental Organizations request reconsideration on the grounds that the Board’s determination that the proposed water transfer will not have unreasonable impacts to fish, wildlife and other beneficial instream uses 1) is not supported by substantial evidence, and 2) is based on errors of law. For these reasons, the Environmental Organizations request that the Final Order be rescinded, and that the Board deny the IID/SDCWA Petition due to a lack of credible evidence upon which the Board can make a reasoned determination that the proposed transfer will not have unreasonable impacts on fish, wildlife and other beneficial instream uses. If the Board declines to set aside the Final Order, the Environmental Organizations request that the term of the permit be expressly limited to fifteen (15) years, with the mandatory requirements that any extension of the fifteen-year term will require 1) further public hearings before the Board to ensure that environmental impacts are not unreasonable, after 2) conducting supplemental environmental review pursuant to CEQA’s provisions for staged EIRs.²

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¹ State of California, State Water Resources Control Board, Order WRO 2002-13 In the Matter of Imperial Irrigation District (IID) and San Diego County Water Authority (SDCWA) Amended Joint Petition for Approval of a Long-Term Transfer of Conserved Water From IID to SDCWA and to Change the Point of Diversion, Place of Use, and Purpose of Use Under Permit 7643 Issued on Application 7482 of Imperial Irrigation District (Oct. 28, 2002) (hereinafter “Final Order”).

² Cal. Code Regs., tit. 14, § 15167.

1 **II. STATEMENT OF FACTS**

2 The relevant procedural facts of the Board’s consideration and approval of the
3 IID/SDCWA Petition are generally set forth at Part 2.0 of the Final Order.³ The facts of the
4 historic existence of the Salton Sea and its acknowledged importance to fish, wildlife and other
5 public trust uses are generally as set forth in the Final Order, and in the evidence and documents
6 submitted by the Environmental Organizations and others throughout this proceeding.

7 **III. STATEMENT OF LAW**

8 SWRCB’s regulations state that any person interested or affected by any order of the
9 Board may petition the Board for reconsideration of the matter within 30-days after the adoption
10 of the order.⁴ Allowable grounds for such petition include 1) that the decision is not supported
11 by substantial evidence, and 2) that an error of law has been made.⁵

12 **IV. DISCUSSION**

13 **A. THE FINAL ORDER IS BASED ON AN INVALID ENVIRONMENTAL “BASELINE”**

14 **1. The Water Transfer EIR/EIS Unlawfully Uses Projections of Future
15 Conditions at the “Baseline” for Environmental Analysis**

16 The Final Order is in error of law because the Board relied on a legally defective EIR in
17 rendering approving the proposed IID/SDCWA water transfer. The California Environmental
18 Quality Act (“CEQA”) requires the *existing* environmental baseline conditions of a proposed
19 Project, not a *future prediction* of environmental conditions, be used as the basis for
20 environmental review.⁶ The Final Order relies on the Salton Sea Accounting Model’s 75-year
21 predictive “baseline” for determining the proposed Project’s environmental impacts on the Salton
22 Sea. This model, and the sensitivity analysis that the lead agency used in the FEIR for the first
23 time (without benefit of public review and comment) justifying the baseline environmental
24 conditions, violates CEQA’s environmental review requirements and has tainted several key

25 ³ Final Order, at pp 9-14.

26 ⁴ Cal. Code Regs., tit. 23, § 768.

27 ⁵ Cal. Code Regs., tit. 23, § 768, subds. (b) and (d).

28 ⁶ Pub. Resources Code, § 21060.5; Cal. Code Regs., tit. 14, § 15125, subd. (a).

1 aspects of the Order’s analysis and findings.⁷ CEQA requires environmental evaluation of any
2 significant physical change in the existing environment, not “a reasonably accurate depiction of
3 the future conditions of the Salton Sea.”⁸

4 In calculating present inflow information from the Imperial Irrigation District (IID) and
5 Coachella Valley Water District (CVWD), the Model takes into account “a pre-existing
6 conservation program between IID and the Metropolitan Water District of Southern California
7 (MWD), effects of priority 3 entitlement enforcement of Colorado River water, the need for
8 increased leaching within IID due to forecasted increases in salinity at Imperial Dam, changes in
9 water use patterns in CVWD, and changes in Coachella Aquifer interactions with the Salton
10 Sea.”⁹ In calculating the present level inflows from other “unmeasured” sources, however, the
11 Model uses an average of historic flows for the past ten years, plus 3% to account for increased
12 salinity of the Colorado River.¹⁰

13 Predicted baseline flows for water and salts into the Sea for the next seventy-five (75)
14 years are generated by the Model from this set of assumptions and presented in table format.¹¹ In
15 examining the Model’s predictive tables for water and salt inflows, the following features stand
16 out:¹²

- 17 • The annual baseline water and salt inflows from Mexico and
18 “unmeasured” sources are calculated averages from the past ten years plus
19 3% “for increased salinity in [the] Colorado River.”
- 20 • IID’s Baseline annual water and salt discharge to the Sea fluctuates from
21 year to year, but does not seem to show any progression increase or
22 decrease over the 75 year modeling period.

22 ⁷ Footnote 10 of the Final Order states, “[b]ased on the results of the sensitivity analysis, the
23 SWRCB finds that the baseline relied upon in the Final EIR/EIS is a reasonably accurate
24 depiction of the future conditions of the Salton Sea.”

24 ⁸ *Ibid.*, see Pub. Resources Code, §§ 21002.1, 21060.5, 21061, 21068.

25 ⁹ Water Transfer DEIR/DEIS (IID Exhibit 55) at Appendix F, § 4.0, p. 12.

26 ¹⁰ Water Transfer DEIR/DEIS (IID Exhibit 55) at Appendix F, § 4.1, p. 13.

27 ¹¹ See Water Transfer DEIR/DEIS (IID Exhibit 55) at Appendix F, Table 4.1, pp. 14-15.

28 ¹² See Water Transfer DEIR/DEIS (IID Exhibit 55) at Appendix F, Tables 4.1 and 4.2, pp. 14-18.

- 1 • The CVWD baseline for surface water flow to the Sea show a steep
2 downward trend over the 75 year modeling period from 77 KAFY in 2000
3 down to 48.3 KAFY in 2074.
- 4 • Over the same time period, annual salinity loading from the CVWD flows
5 progressively decreases from an annual addition of 94.4K tons of salt to an
6 annual *subtraction* of 216.6K tons of salt. The model explains this shift
7 from positive to negative salt inputs from CVWD occurs because the Sea
8 will increasingly recharge the Coachella Aquifer as the aquifer level drops
9 over time.¹³
- 10 • A constant 56.9 KAFY is subtracted from the Baseline inflow to reflect a
11 “reduction due to entitlement enforcement.” Corresponding to this
12 constant subtraction of annual water inflow, a constant 71K tons of salt are
13 correspondingly subtracted from the annual salt budget.

14 Rather than evaluate the collective contribution of all these projects and programs on the
15 Salton Sea the EIR/EIS places all of the impacts associated with these projects and programs into
16 the projected “baseline.”¹⁴ This impermissibly skews baseline and the evaluation of transferring
17 an *additional* 130 KAFY to 300 KAFY out-of-basin and from the Salton Sea.

18 An EIR must include, among other things, a detailed statement setting forth “[a]ll
19 significant effects on the environment of the proposed project.”¹⁵ CEQA statutorily defines the
20 “environment” to be “the *physical conditions which exist* within the area which will be affected
21 by a proposed project including land, air, water, minerals, flora, fauna, noise, [and] objects of
22 historic or aesthetic significance.”¹⁶

23 In elucidating and implementing these statutory mandates, the CEQA Guidelines require
24 that an EIR include “a description of the physical environmental conditions in the vicinity of the
25 project, as they exist at the time the notice of preparation is published.”¹⁷ “This environmental
26 setting will normally constitute the baseline physical conditions by which a lead agency
27

28 _____
¹³ See Water Transfer DEIR/DEIS (IID Exhibit 55) at Appendix F, § 4.2, p. 13.

¹⁴ See discussion at note 9, *supra*.

¹⁵ Pub. Resources Code, § 21100, subd. (b)(1).

¹⁶ Pub. Resources Code, § 21060.5 (emphasis added).

¹⁷ Cal. Code Regs., tit. 14, § 15125, subd. (a).

1 determines whether an impact is significant.”¹⁸ In other words, CEQA statutorily requires that
2 the “baseline” for environmental analysis of a proposed Project consist of a snapshot of the
3 physical environment, frozen at that moment in time where contemplation begins of the proposed
4 Project’s potentially significant environmental effects. California’s courts have consistently
5 rejected arguments that lead agencies have license to disguise and minimize the appearance of a
6 proposed project’s potentially significant environmental impacts by 1) predicting numerous
7 future impacts from other projects and activities, 2) cumulating those predictions into a bleak,
8 “future” baseline, and then 3) declaring that the proposed project will have less than significant
9 environmental impacts, because the resource is otherwise doomed to the predicted, degraded
10 state. As one court concluded:

11 The better approach . . . [is] to follow the general rule expressed in the Guidelines
12 and cases that baseline conditions are normally to be determined as of the time
13 environmental review is begun. This most closely describes the environment ‘as
14 it exists before the commencement of the project.’¹⁹

15 As stated by Audubon in its legal brief,

16 [T]he “evidence” in the record regarding the project’s environmental impacts is
17 wishful speculation wrapped in the shroud of a computer model to give the
18 appearance of scientific validity. IID’s fatalistic predictions that may never come
19 to be are not a reasonable (or lawful) basis for the Water Transfer EIR/EIS’
20 repeated declarations that the proposed transfer will have less than significant
21 impacts on the *existing* Hydrology and Water Quality or on the Biological
22 Resources of the Salton Sea. In turn, it would likewise be arbitrary for the Water
23 Board to rely on such “evidence” in making any determination about whether the
24 water transfer would unreasonably impact fish, wildlife and other beneficial
25 instream uses at the Salton Sea.²⁰

26 Just one example of how the Board has misapplied the Salton Sea Accounting Model and
27 the Water Transfer EIR’s baseline information to trivialize the transfer project’s unreasonable
28 adverse impacts of fish and wildlife resources can be found at page 49 of the Order, where the
29 Board states: “The island rookeries will become connected to the mainland in the year 2011

30 ¹⁸ *Ibid.*

31 ¹⁹ *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87
32 Cal.App.4th 99, 126; see *County of Amador v. El Dorado County Water Agency* (1999) 76
33 Cal.App.4th 931, 955 (“[a]n EIR must focus on impacts to the existing environment, not
34 hypothetical situations”).

35 ²⁰ National Audubon Society, Closing Argument / Legal Brief, at p. 30.

1 under baseline conditions. The 15-year mitigation period protects these nesting sites beyond their
2 forecasted useful life and no additional mitigation is warranted.”

3 This baseline assumes a loss of water flowing into the Sea that the Salton Sea Authority
4 disputes. While salinity in the Sea will increase over time, because the Sea is terminal, there is
5 no credible evidence in the record that supports the claim that there will be an accelerated change
6 in the Sea’s elevation without the proposed transfer project. It is the loss of water that will
7 unreasonable expose these nesting sites. This loss of elevation due to reduced inflow is directly
8 caused by the proposed transfer project in combination with other water depleting activities.
9 However, rather than formulation mitigation measures for the project’s direct impacts, and then
10 proposing additional mitigation to offset cumulative effects, the cumulative effects of other
11 projects are “buried” in the baseline for environmental analysis, painting an unduly grim (and
12 inaccurate) picture of a Salton Sea that is already dead.

13 The Environmental Organizations hereby formally incorporate by reference all of the
14 evidence and argument presented by them throughout this proceeding, and, in particular the
15 National Audubon Closing Argument and Legal Brief, demonstrating that the Water Transfer
16 EIR’s use of a 75-year projection – and the EIR’s resulting failure to analyze meaningful
17 mitigation measures or alternatives as a result of pronouncing the Sea “dead-on-arrival” before
18 the analysis is ever begun – is in error of law.²¹

19 **2. The Order’s Mean Salinity Curve is Built Upon Invalid Baseline.**

20 The Final Order relies upon a mean salinity curve that is built by the Salton Sea
21 Accounting Model.²² According to the mean salinity curve the salinity of the Sea will reach 60
22 Ppt by the year 2023, which is the predicted threshold where fish will cease to reproduce.²³ The
23 Order’s salinity curve is built upon a faulty baseline that prejudicially distorts the Salton Sea’s
24

25 ²¹ National Audubon Society, Closing Argument / Legal Brief, at pp 28-51.

26 ²² Final Order, at p. 44 (“The mean salinity curve . . . is a modeled estimate of what the Sea will
27 experience in coming years under the no-project, baseline conditions).

28 ²³ *Ibid.*

1 likely future condition. Thus, the Board’s Order is not supported by substantial evidence, where
2 the Board relied on this curve in establishing a 15-year term for maintaining inflows to the Sea.

3 Implementation of the Salton Sea Habitat Conservation Strategy (SSHCS), which
4 requires replacement water to the Sea to mitigate the project’s impacts, is based on the mean
5 salinity curve. Although the SSHCS proposes to maintain the salinity levels at or below the 95
6 percent confidence bound line until 2030, the allowable, incremental annual increase in salinity
7 is based on the Salton Sea Accounting Model’s faulty prediction – not on any actual
8 determination of the mean without this project’s and without *other* project’s effects.²⁴ In short,
9 implementation of the SSHCS with its skewed salinity projections, will *accelerate* the Sea’s
10 increases in salinity, because the mitigation measure buries all cumulative impacts of other
11 projects in the curve’s “baseline,” giving the impression that less should be done to mitigate for
12 the IID/SDCWA water transfer project. In other words, the Order’s mitigation measures simply
13 accommodate rather than reduce or avoids the project’s significant impacts.

14 The Final Order exacerbates the Salton Sea Accounting Model and SSHCS’ modeling
15 errors, by only requiring the Permittee to implement all provisions of the SSHCS for 15 years
16 from the date of the execution of the Quantification Settlement Agreement (QSA). Also, rather
17 than maintain the salinity levels at or below the 95 percent confidence bound line (as stated in the
18 SSHCS), the Permittee need only meet mean modeled future baseline salinity trajectory. The
19 Final Order not only accelerates the incremental annual increase in salinity each year for 15
20 years, after 15 years its abandons any attempt to protect the Salton Sea in perpetuity.

21 Despite the Order’s claim that the Permittee is mitigating the environmental
22 consequences of the proposed water transfer, for 15 years the salinity of the Sea will increase
23 more rapidly than it would without the project, because the measure of “mitigation” is based
24 upon a baseline model that *incorporated all the of effects of other projects* that increase the
25 salinity of the Salton Sea. Rather than reduce the significant environmental effects of the project
26 on the existing environment, as it exists at the time of the filing of the Notice of Preparation of

27 _____
28 ²⁴ *Ibid.*

1 the EIR, the Order simply authorizes the Permittee to follow a mistaken set of inaccurate
2 assumptions (*i.e.*, the mean salinity curve) to destruction. This is the antithesis of CEQA’s
3 purpose.

4 **B. THE FINAL ORDER FAILS TO ADEQUATELY ASSESS THE PUBLIC TRUST DOCTRINE**
5 **STATUS OF THE SALTON SEA**

6 Footnote 5 at page 20 of the Order states that “section 1736 effectively codifies the
7 SWRCB’s duty to consider public trust uses Accordingly, we need not reach the argument
8 advanced by some parties to this proceeding that the public trust doctrine applies to the Salton
9 Sea.” The Board’s conclusion that section 1736 is coextensive with the Public Trust Doctrine is
10 in error of law.

11 Water Code section 1736 provides that water transfers shall only be approved where the
12 Board determines, based on substantial evidence, that the proposed transfer will not have an
13 unreasonable impact on fish, wildlife and other beneficial, instream uses. In other words, section
14 1736 concentrates on *things* and *activities* that are in the public domain. The Public Trust
15 Doctrine, however, transcends the mere protection of “fish,” “wildlife,” or “instream uses.” The
16 Public Trust Doctrine goes to the State’s duty of trust to protect *places* to ensure that they will
17 continue to support their public trust functions.²⁵

18 In 1983 the California Supreme Court decided *National Audubon Society v. Superior*
19 *Court of Alpine County*, and confirmed the well-established rule that, under California’s Public
20 Trust Doctrine, the state “owns all of its navigable waterways and the lands lying beneath them
21 as trustee of a public trust for the benefit of the people.”²⁶ “It is . . . well settled in the United
22 States generally and in California that the public trust is not limited by the reach of the tides, but
23

24 ²⁵ See, e.g., *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419.

25 ²⁶ *National Audubon, supra*, 33 Cal.3d at p. 434 (citations and internal quotations omitted). In
26 this petition, the term Public Trust Doctrine is used in the capitalized form to distinguish the
27 ancient common law doctrine – which protects in place navigable waterways and the lands
28 beneath them – from traditional concepts of public trust resources typically created or
acknowledged through constitutional or statutory provisions, such as public rights regarding
water, air, and wildlife.

1 encompasses all navigable lakes and streams.”²⁷ Traditional uses protected by the Public Trust
2 Doctrine include navigation, commerce, fishing, hunting, swimming, wading, standing, bathing
3 and general recreation purposes.²⁸ California has expanded these traditional uses to include “the
4 preservation of those lands in their natural state, so that they may serve as ecological units for
5 scientific study, as open space, and as environments which provide food and habitat for birds and
6 marine life, and which favorably affect the scenery and climate of the area.”²⁹

7 The Environmental Organization have presented conclusive evidence demonstrating that
8 the Salton Sea is a naturally recurring part of the Colorado River’s hydrology, that navigable
9 waters existed in the Salton Basin before, during, and after California’s statehood, and that it is
10 *only* human interference since California’s statehood that presently prevents the Colorado River
11 from periodically replenishing the Sea of its own accord.³⁰ Thus, as in *National Audubon*
12 *Society*, the Public Trust Doctrine attaches not only to the fish, or the wildlife of the “beneficial
13 instream uses” of the Sea – the public trust is an inherent attribute *of the Sea itself*.

14 As stated in Audubon’s closing brief:

15 The Salton Sea is a navigable waterway that is, and always has been, a natural
16 sink for the Colorado River’s outflows and is a part of the Colorado River’s
17 natural bed. The Sea is therefore protected by the Public Trust Doctrine. The
18 California Supreme Court’s 1983 *National Audubon* decision might allow IID to
19 transfer some portion of its allocation of Colorado River water out-of-basin for
20 SDCWA’s use, but any such transfer must protect the Sea’s Public Trust Doctrine
21 uses. At this time, however, the Board and project proponents have consistently
22 denied that the Salton Sea is protected by the Public Trust Doctrine, and therefore
23 have not adequately considered the proposed transfer’s impacts on the Sea’s
24 Public Trust Doctrine uses. The Board cannot approve the transfer at least until it
25 acknowledges that the Sea is, as a matter of law, protected by the Public Trust
26 Doctrine, and performs the balancing of considerations mandated by the *National*
27 *Audubon* decision.³¹

28 _____
29 ²⁷ *National Audubon, supra*, 33 Cal.3d at p. 435 (citations omitted).

30 ²⁸ *National Audubon, supra*, 33 Cal.3d at p. 434 citing *Marks v. Whitney* (1971) 6 Cal.3d 251,
31 259.

32 ²⁹ *Marks v. Whitney, supra*, 6 Cal.3d at p. 259-260, cited in *National Audubon, supra*, 33 Cal.3d
33 at p. 434-435.

34 ³⁰ See, e.g., National Audubon Society, Closing Argument / Legal Brief, at pp 1-13.

35 ³¹ National Audubon Society, Closing Argument / Legal Brief, at p 16.

1 And, as the Environmental Organizations explained during this proceeding, the Board's
2 authority to approve IID's sale of senior water rights for use outside of the Imperial Valley are
3 tempered by the Board's duty to ensure that IID's rights are exercised in a manner that is
4 consistent with the Sea's Public Trust Doctrine status:

5 There is no question that the Water Board has plenary authority to review and
6 make adjustments to IID's appropriation of Colorado River water – that is the
7 fundamental nature of this very proceeding. Now, in weighing IID's current water
8 rights and deciding whether and how much of IID's appropriative right may be
9 transferred to San Diego for the next seventy-five years, the Water Board is bound
10 by its Public Trust Doctrine duties, as expressed in the *National Audubon* case, to
11 ensure that the transfer is consistent with the Salton Sea's current needs. So long
12 as IID continues to appropriate the Salton Sea's source waters under the State's
13 authority, that appropriation is fully subject to the Water Board's paramount duty
14 to ensure that the State's Public Trust Doctrine resources, in the form of the
15 Salton Sea, are adequately protected.³²

16 The Environmental Organizations hereby formally incorporate by reference all of the
17 evidence and argument they have presented throughout this proceeding, and, in particular, the
18 National Audubon Closing Argument and Legal Brief, demonstrating that the Salton Sea is
19 protected by the Public Trust Doctrine.³³ The Final Order is in error of law, because the Board
20 must at least make a legal determination (which it has entirely avoided in the Final Order) as to
21 whether the place that is known as the "Salton Sea" is protected by the Public Trust Doctrine,
22 before it can reasonably make any factual determination as to the *degree of significance* that
23 should be attached to abandoning the Sea and its public trust resources and uses.

24 **C. THE FINAL ORDER'S CONCLUSION THAT IMPACTS TO FISH AND WILDLIFE WILL NOT
25 BE UNREASONABLE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

26 As previously mentioned, the Water Code states that the SWRCB may approve a long-
27 term transfer petition if it finds that the transfer would not unreasonably affect fish, wildlife, or
28 other instream beneficial uses.³⁴ Throughout the Final Order, the Board finds that while there
will likely be significant impacts on fish and wildlife, those impacts are outweighed by the public

32 National Audubon Society, Closing Argument / Legal Brief, at p 27.

33 National Audubon Society, Closing Argument / Legal Brief, at pp 1-27.

34 Water Code, § 1736.

1 interest in ensuring that the water transfer agreement is signed by December 31, 2002.³⁵ The
2 Final Order sets forth a rationale that any actions that could chill the signing of the Quantification
3 Settlement Agreement would result immediately in a reduction of nearly 800,000 acre feet of
4 water for coastal southern California.³⁶ Further, the Final Order speculates that increased
5 mitigation costs and costs to third parties from fallowing will likely cause the parties not to come
6 to agreement on the Quantification Settlement Agreement.³⁷

7 The Final Order's conclusion that the significant impacts on fish and wildlife in the
8 Salton Sea ecosystem are not "unreasonable" due to the substantial public interest in finalizing
9 the water transfer is not supported by substantial evidence in the record. While there is
10 substantial evidence demonstrating the serious impacts of the transfer on fish and wildlife in the
11 Sea and its drains and tributaries, there is very little evidence, if any, that requiring mitigation
12 water to be delivered to the Sea beyond 15 years will result in the collapse of the IID water
13 transfer or that the failure to finalize the water transfer will indeed result in a substantial
14 reduction in urban Southern California's water supply.

15 Therefore, without substantial evidence to support the SWRCB's assertion that impacts to
16 fish and wildlife are less than impacts to the public interest from failure to sign the Quantification
17 Settlement Agreement, the Board's balancing of interests pursuant to Water Code section 1736 is
18 fatally flawed. Instead, the Board should have concluded that the significant impacts to fish and
19 wildlife, without more mitigation than what is currently in the Board's order, outweigh any
20 speculative impact from not approving the water transfer.

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26 ³⁵ See, e.g., Final Order, at pp. 33-35, 40-43, 49, 67, 70, 71-72 and 74-76.

27 ³⁶ Final Order, at p. 47.

28 ³⁷ *Id.*

1 **1. The Final Order’s conclusion that a failure to finalize the water transfer will**
2 **result in an immediate reduction in California’s allocation of Colorado River**
3 **water is not supported by substantial evidence.**

4 The Final Order asserts that if the water transfer is not approved and the Quantification
5 Settlement Agreement is not executed by December 31, 2002, Southern California would face an
6 immediate shortfall of approximately 800,000 acre feet of water.³⁸ However, this assertion is
7 nothing more than the Board’s incorrect interpretation of the testimony of an official with
8 Metropolitan Water District of what the Interim Surplus Guidelines mean. Counterbalancing that
9 “opinion” is substantial evidence that such a “sky is falling” viewpoint is nothing more than
10 hyperbole aimed at scaring officials into believing that they do not have a choice in whether or
11 not they should approve the water transfer.

12 First, a plain reading of the Interim Surplus Guidelines demonstrates that the question of
13 whether Southern California will immediately experience a shortfall in water is hardly a forgone
14 conclusion. Section 5.B of the Interim Surplus Guidelines states that should the QSA and related
15 documents not be executed by Dec. 31, 2002, “the interim surplus determinations under Sections
16 2(B)(1) and 2(B)(2) of these Guidelines will be suspended . . . for either the remainder of the
17 period identified in Section 4(a) or until such time as California completes *all required actions*
18 and complies with reductions in water use reflected in Section 5(C) of these Guidelines,
19 whichever occurs first.”³⁹ Thus, in the event the QSA is not signed, the first consequence will be
20 the suspension of the more liberal surplus declarations allowed under the Guidelines – the Full
21 Domestic and Partial Domestic Surpluses. According to section 5.B, the 70R strategy will
22 govern surplus determinations 1) through Dec. 31, 2015, or 2) until California completes all
23 required actions and complies with mandated reductions in water use.⁴⁰

24 Whatever the term “all required actions” refers to, there is no evidence to show that it
25 includes execution of the QSA, and there is considerable evidence to the contrary. The Final EIS

26 ³⁸ Final Order, at p. 47.

27 ³⁹ 66 Federal Register 7772 (Jan. 25, 2001) (Imperial County Exhibit 5) (emphasis added).

28 ⁴⁰ An official with MWD testified that California will meet the first water reduction benchmark
in 2003. Testimony of Dennis Underwood, Hearing Transcript, Apr. 23 2002, p. 160.

1 for the Interim Surplus Criteria (ISC) makes little mention of the need for a signed QSA, or even
2 of the existence of a QSA, stressing instead in the Purpose and Need statement that the ISC were
3 “intended to recognize California’s plan to reduce reliance on surplus deliveries, to assist
4 California in moving toward its allocated share of Colorado River water, and to avoid hindering
5 such efforts. Implementation of interim surplus criteria would take into account progress, or lack
6 thereof, in California’s efforts to achieve *these objectives*.”⁴¹ The bureau adheres to these goals
7 when it assumes in subsequent compliance documents that reduction in agricultural use is the
8 sole determinant in reinstating sections 2(B)(1) and 2(B)(2).⁴²

9 In each of the environmental compliance documents associated with the QSA, the Bureau
10 of Reclamation has consistently assumed that in their baseline analyses that the QSA would not
11 be in effect, but the Interim Surplus Guidelines would be.

12 In the Interim Surplus Guidelines Record of Decision (ISG ROD), benchmarks for
13 reductions of agricultural use of Colorado River water in California were
14 specified. Since these benchmarks are not met from QSA water transfers under
15 the No Action scenario, it was assumed that the Metropolitan Water District
16 (MWD) would reduce its use to meet the benchmarks and therefore, keep the ISG
17 in effect.⁴³

18 No Action Alternative – this scenario assumes that the ISG described in Chapter 1
19 would be implemented and that water would not be transferred under the IA.⁴⁴

20 The Interim Surplus Guidelines are presumed to be in effect for purposes of the
21 assessment of the Proposed Project set forth in this Draft EIR/EIS. The Proposed

22 ⁴¹ FEIS Colorado River Interim Surplus Criteria, at 1-4 (IID Exhibit 57). In fact, a *draft* QSA
23 was not made public until after the FEIS was issued.

24 ⁴² A look at the Purpose and Need statement (from the Bureau) for the IID water conservation
25 and transfer agreement mirrors the federal commitment to assist California in reducing its water
26 use (rather than the commitment to a signed QSA, regardless of its import), particularly since one
27 of the alternatives is the implementation of a water conservation and transfer agreement without
28 implementation of the QSA. DEIS, at 1-5; 1-42 (timely implementation of the proposed project
will assist in meeting the benchmark deadlines and satisfying the ISG) (IID Exhibit 55).

⁴³ DEIS IA, IOPP, and Related Federal Actions, App. G: Implementation Agreement Technical
Memorandum No. 1, at 2-5 (IID Exhibit 53). See also App. C-5, containing the MWD schedules
with and without benchmark reductions.

⁴⁴ DEIS IA, IOPP, and Related Federal Actions, at 3.0-3 (IID Exhibit 53). See also *id.* at 3.1-20;
3.1-23; 3.1-26.

1 Project will assist California in meeting the benchmarks for reduction of Colorado
2 River water use included in the guidelines.⁴⁵

3 Repeatedly, the Bureau of Reclamation has placed its emphasis on the reduction of
4 California's water use. Furthermore, this emphasis has led to the Bureau's consistent assumption
5 that implementation of the ISG and its surplus determinations will continue if California meets
6 the required reductions in use. Assistant Secretary of Water and Science Bennett Raley said it
7 most succinctly last December when he told Colorado River water users, "The interim surplus
8 guidelines depend on attaining benchmarks - *i.e.*, specific reductions in use - of Colorado River
9 water use in California."⁴⁶

10 Second, while the SWRCB relies upon the "opinion" of an official of MWD for its
11 assertion that failure to approve the IID water transfer will result in an immediate reduction in
12 water to southern California, the board fails to consider evidence *from MWD* that conflicts with
13 this "opinion."⁴⁷ Indeed, MWD Chief Executive Officer Ron Gastelum sent a letter to the
14 California Department of Water Resources clearly stating that failing to sign the QSA by
15 December 31, 2002, would not automatically mean a cut off of water for Southern California.⁴⁸

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18 ⁴⁵ DEIS, *Id*, at 1-32 (IID Exhibit 53).

19 ⁴⁶ Written remarks of Bennett Raley, Colorado River Water Users Association, Las Vegas, NV
20 (Dec. 13, 2001) (IID Exhibit 42).

21 ⁴⁷ A reading of the transcript reveals that the MWD official actually qualified his statement that
22 an immediate cut back in water to Southern California may occur if the QSA is not signed when
23 he stated that the cut back may happen "assuming no other actions occur." Testimony of
24 Dennis Underwood, Hearing Transcript, April 23, 2002, p. 149. In addition, a witness from the
25 California Department of Water Resources testified that, based on his reading of the Interim
26 Surplus Guidelines, he does not know whether or not California will experience an immediate
27 reduction in Colorado River water. Testimony of Steve Macaulay, Hearing Transcript, April 23,
28 2002, p. 147-148.

⁴⁸ Letter from Metropolitan Water District to Thomas Hannigan, Director, California Department
of Water Resources (Aug. 27, 2001) (Imperial County Exhibit 5) at p. 2 ("We are all working
diligently and in good faith to accomplish timely execution of the QSA, but that goal could be
frustrated That is why the Secretary prudently and properly retained discretion to evaluate
our overall performance in achieving the only real goal of reducing Colorado River water use . .
..")

1 Therefore, based on a plain reading of the Interim Surplus Guidelines, comments by
2 federal and state officials and comments by water transfer parties, the SWRCB's conclusion that
3 the failure to implement the transfer will result in a loss of nearly 800,000 acre feet of water for
4 California is nothing more than speculation and hardly supported by substantial evidence.

5 **2. There is insufficient evidence in the record to support the assertion that costs**
6 **associated with additional mitigation requirements from fallowing will kill**
7 **the water transfer.**

8 The Final Order also contains the conclusion that increased mitigation costs and increased
9 costs associated with third-party impacts from land fallowing may result in IID refusing to agree
10 to the water transfer.⁴⁹ The Final Order cites to its later section on Socio-Economic Impacts to
11 support this conclusion.⁵⁰ However, the referenced section of the Final Order contains a detailed
12 discussion by the Board about why the economic impacts asserted by IID may not be as
13 significant as IID estimates.⁵¹ Indeed, the record before the Board fails to contain any substantial
14 evidence as to how much mitigation is "too much" mitigation for IID to agree to the water
15 transfer. At this point, no one knows what IID's bottom line may be. Thus, such a conclusion by
16 the Board is purely speculative and not supported by substantial evidence.

17 **3. The scale and scope of the loss of fish and bird life in and around the Sea**
18 **outweighs any speculative possibility of impacts from failing to implement**
19 **the water transfer.**

20 The Salton Sea is an environmental and recreational resource of the highest importance,
21 and one of the most productive areas for fish and wildlife in California. The Sea supports a
22 diversity of invertebrate life, which in turn supports what may be one of the most productive
23 fisheries in the world, sustaining up to 50 million fish.⁵² Several of these fish, including orange
24 mouth corvina and tilapia, are important for recreational anglers; one of the fish species, the

25 ⁴⁹ Final Order, at p. 47.

26 ⁵⁰ *Id.*

27 ⁵¹ Final Order, at p. 78-79.

28 ⁵² Testimony of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1495, lines 4-11.

1 desert pupfish, is native to water bodies of the Salton Trough and is listed under the California
2 and federal Endangered Species Acts.⁵³

3 The Salton Sea and the surrounding area are of international importance to migratory
4 birds.⁵⁴ Over 400 species have been counted in and around the Sea, two-thirds of all species in
5 the United States.⁵⁵ On any given day there are hundreds of thousands of birds at the Sea; there
6 are high-day, single counts of over 3 million.⁵⁶ The Salton Sea supports over 80 percent of
7 American white pelicans, 90 percent of the North American population of eared grebes, 45
8 percent of the Yuma clapper rail, which is listed under both the federal and state Endangered
9 Species Acts.⁵⁷ It is the only inland nesting site for brown pelicans, also listed under both the
10 state and federal acts.⁵⁸ Thirty to 50 percent of the *world's* population of mountain plovers, a
11 species proposed for listing under the federal ESA, use adjacent agricultural areas.⁵⁹ Leg bands
12 from birds banded at the Salton Sea have been recovered in Russia, Alaska, across Canada, up
13 and down the Pacific Flyway, from as far away as Peru and Hawaii.⁶⁰ With over 90 percent of
14 California's wetlands lost, the Salton Sea has become an irreplaceable link on the Pacific Flyway.

15 The loss of the Sea as habitat for any period of time is serious given the significance of
16 the Sea as a resource to birds.⁶¹ Even the Final Order acknowledges serious impacts to fish and
17 wildlife from the water transfer.⁶² The Final Order claims that the Sea will decline after year 15

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19 ⁵³ Water Transfer DEIR/DEIS (IID Exhibit 55), p. 3.2-61.

20 ⁵⁴ Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1865, line 15.

21 ⁵⁵ PCL Exhibit 1, p. 5.

22 ⁵⁶ Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1865, line 11.

23 ⁵⁷ Testimony of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1496, lines 12-21.

24 ⁵⁸ *Ibid.*

25 ⁵⁹ *Id.* at lines 17-19.

26 ⁶⁰ PCL Exhibit 1, p. 2.

27 ⁶¹ See Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, pp. 1868-1874.

28 ⁶² See, *e.g.*, Final Order, at pp. 33-35, 40-43, 49, 67, 70, 71-72 and 74-76.

1 of the transfer if there is no restoration plan in place. However, there is plenty of evidence in the
2 record before the Board that even if a restoration plan is not adopted, the Sea will continue to
3 provide habitat for fish and birds until 2023 and possibly until 2040. Indeed, the Final IID
4 Transfer EIR/EIS requires no impact to the Sea and its drains and tributaries until 2030.
5 However, the Final Order will end the Sea’s usefulness as habitat for fish and wildlife after 15
6 years. This very real loss of such a critical resource will create a significant impact on fish and
7 wildlife and on the recreation industry at the Sea.

8 **i. There is no substantial evidence to support the conclusion that the**
9 **Drain Habitat Conservation Strategy will have not have an**
10 **unreasonable impact on fish and wildlife in the drains.**

11 After 15 years, the water transfer will likely switch from a mix of on-farm conservation
12 and fallowing to all on-farm conservation measures. Such a switch will have significant impacts
13 in the drains and tributaries of the Sea as it will result in a decline in water flowing through the
14 drains and rivers. This decline in water flow will have four impacts: (1) a loss of up to 652 acres
15 wetland vegetation, which provides nesting and roosting sites for birds; (2) loss of water for fish
16 and invertebrates, which will also reduce the availability of foraging habitat for wildlife; (3) loss
17 of connectivity between habitats for desert pupfish; and (4) a decline in water quality, particularly
18 relating to an increase in selenium pollution. The Final Order requires that these impacts be
19 mitigated by the re-creation of up to 652 acres of wetland habitat, the participation of IID in a
20 selenium reduction study, and the implementation of the Desert Pupfish Conservation Strategy.⁶³
21 As further explained below, the Board lacks substantial evidence in the record to support the
22 Final Order’s conclusion that the creation of 652 acres of replacement habitat for the loss of
23 wetland habitat and loss of water for fish and invertebrates will adequately mitigate for the
24 substantial impacts to fish and wildlife.

25 The Final Order concludes that while the 1400 miles of drains will be significantly
26 impacted from the water transfer, there is no substantial evidence in the record that the “re-
27 creation” of wetland habitat provides appropriate mitigation because wildlife will simply move to

28 ⁶³ Final Order, at p. 27-35.

1 the “cleaner/newer” habitat and will balance out any negative impacts to the reproduction
2 capability and nesting and foraging needs of species that utilize the drains.

3 According to the Water Transfer DEIR/DEIS, numerous wildlife species utilize the
4 drains, including yuma clapper rail, herons, great egret, red-winged blackbird, common
5 yellowthroat, black phoebe, mourning dove, and American coots.⁶⁴ As part of comment
6 submitted to IID on the DEIR/DEIS, Dr. Nils Warnock stated that there is no evidence that the
7 wetland habitat that is re-created will be of similar habitat value for the *all* of species that use the
8 drains and tributaries or that it would be created in a time frame that would be relevant to the
9 affected species.⁶⁵ In addition, Dr. Warnock cites to serious concerns there is also no evidence to
10 support the assertion that enough wildlife will utilize the replacement habitat to counterbalance
11 the inevitable impacts to wildlife that continue to utilize the polluted drains. Indeed, the Final
12 EIR/EIS for the transfer fails to respond to these criticisms except to state that individuals “could
13 move” to the new habitat, without citing to any studies other than those conducted for Yuma
14 clapper rail.⁶⁶

15 Therefore, based on the above concerns, there is insufficient evidence in the record to
16 support the Board’s decision that the water transfer will not have an unreasonable impact on fish
17 and wildlife in the drains.

18 **ii. There is no substantial evidence to support the conclusion that the**
19 **Salton Sea Habitat Conservation Strategy will have not have an**
20 **unreasonable impact on fish and wildlife at the Sea.**

21 The Final Order concludes that IID will need to supply only 15 years of mitigation water
22 to the Sea.⁶⁷ In addition, IID will need to provide shoreline habitat pursuant to the Salton Sea
23

24 ⁶⁴ Water Transfer DEIR/DEIS (IID Exhibit 55), at 3.2-4.2.

25 ⁶⁵ Comments of the Cabazon Band of Mission Indians, et al. on the Draft EIR/EIS, Audubon
26 Exhibit 18, at 21-22.

27 ⁶⁶ Final EIR/EIS, at p. 10-626.

28 ⁶⁷ Final Order, at p. 49.

1 Habitat Conservation Strategy set forth in the draft Habitat Conservation Plan.⁶⁸ According to
2 the SWRCB, this mitigation should be enough to balance out any unreasonable impacts on fish
3 and wildlife at the Sea.

4 The SWRCB cites SB 482 to support its decision to only protect the Sea from a reduction
5 in inflows, and increase in salinity, for 15 years.⁶⁹ It is inappropriate for the Board to use SB 482
6 as justification for its decision regarding its determination of impacts to *all* fish and wildlife
7 resources at the Sea. SB 482 was enacted only to allow for the take of species that have been
8 formally designated as “fully protected” by the Legislature. SB 482 does not generally limit the
9 Board’s duty to protect all fish and wildlife resources pursuant to Water Code section 1736.

10 As discussed below, the evidence in the record does not reasonably support the Board’s
11 conclusion that supplying mitigation water to the Sea for only 15 years will not make future
12 restoration efforts infeasible. Therefore, the Board cannot make the requisite finding, under
13 section 1736, that the transfer will not have unreasonable impacts to fish and wildlife after the
14 15-year term has run.

15 (a) **There is no substantial evidence in the record supporting the**
16 **conclusion that the feasibility of restoration was inconclusive.**

17 As part of its decision to only require that IID provide 15 years of mitigation water to the
18 Sea, the Board concluded that there was inconclusive evidence in the record regarding the impact
19 of a decline in flow to the Sea on restoration efforts.⁷⁰ Such a conclusion runs counter to the
20 evidence before the Board, including, but not limited to, the Salton Sea Authority’s testimony
21 that a reduction in flow to the Sea will make restoration infeasible.⁷¹ Further, it runs counter to
22 evidence cited by the Board itself in its Final Order.⁷² On the other hand, there was no testimony
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24 ⁶⁸ *Id.*

25 ⁶⁹ Final Order, at p. 47-49.

26 ⁷⁰ Final Order, at p. 46.

27 ⁷¹ See, *e.g.*, Salton Sea Authority Exhibits 1, 3, 6, and 19.

28 ⁷² Final Order, at p. 43.

1 rebutting this statement by the Authority. Thus, there is not substantial evidence to support the
2 Board’s conclusion that a reduction in inflow to the Sea from on-farm conservation will not
3 result in making restoration of the Sea (specifically the use of in-Sea salt ponds) infeasible.

4 **(b) There is substantial evidence in the record that the water**
5 **transfer will significant impacts on fish and wildlife.**

6 There is sufficient evidence in the record that fish will exist in the Sea well beyond 15
7 years. Indeed, it is likely that fish will persist in the Sea until 2030 or beyond.⁷³ The termination
8 of mitigation water to the Sea will deprive fish and wildlife of habitat much sooner than if the
9 Sea were left at status quo – by at least 15 years. Given the importance of the Salton Sea to bird
10 species and to its fishery, it is unreasonable to deprive these species of 15 years or more of viable
11 habitat.

12 The SWRCB acknowledges that after year 15, the Sea will be significantly impacted.⁷⁴
13 While the Board essentially writes off the Sea’s fishery and its importance to bird species, it does
14 require that IID replace shoreline habitat as it is lost after year 15 of the transfer.⁷⁵
15 Unfortunately, there is insufficient information in the record to support that this shoreline
16 replacement strategy will provide adequate protections for impacts to birds. There is evidence in
17 the record that states that benefits of shoreline replacement are speculative.⁷⁶ In particular, the
18 HCP fails to adequately assess the impact from the loss of slope of shoreline habitat and changes
19 in the invertebrate community due to a shrinking Sea. These concerns have not been addressed.
20 Thus, the Board lacks the necessary evidence to make a finding under section 1736 that the
21 transfer will not have unreasonable impacts on fish and wildlife due to loss of shoreline habitat.

22 /////

23 _____
24 ⁷³ See, e.g., discussion at Part IV.A, *supra*, explaining that the Water Transfer EIR/EIS’ “worst
25 case” prediction for the Sea fails to take into account efforts by the Salton Sea Authority and
26 other public and private actors to preserve and enhance the Sea’s environment.

27 ⁷⁴ Final Order, at p. 75.

28 ⁷⁵ Final Order, at p. 49.

⁷⁶ Audubon Exhibit 18, at pp. 22-23.

1 **D. THE FINAL ORDER'S CONCLUSION THAT THE WATER TRANSFER DOES NOT VIOLATE**
2 **THE STATE AND FEDERAL ANTI-DEGRADATION POLICY IS NOT SUPPORTED BY**
3 **SUBSTANTIAL EVIDENCE**

4 Water quality at the Salton Sea is subject to the federal antidegradation policy enacted
5 pursuant to the federal Clean Water Act.⁷⁷ That policy requires that "existing instream water
6 uses and the level of water quality necessary to protect the existing uses *shall* be maintained."⁷⁸
7 SWRCB Resolution No. 68-16 establishes requirements similar to the federal antidegradation
8 policy. In all cases where the federal antidegradation policy is applicable, SWRCB Resolution
9 No. 68-16 requires that, at a minimum federal policy must be satisfied.⁷⁹

10 In the Mono Lake decision, this Board applied the requirements of the federal
11 antidegradation policy enacted pursuant to the Clean Water Act and the requirements of SWRCB
12 Resolution No. 68-16 to determine that the City of Los Angeles must reduce its diversions from
13 streams feeding Mono Lake.

14 According to guidance from the SWRCB interpreting the federal antidegradation policy,
15 the requirement regarding instream water uses is an "absolute requirement that uses attained must
16 be maintained."⁸⁰ Thus, the "State must assure full protection of existing instream beneficial
17 uses, including the health and diversity of aquatic life. Reductions in water quality should not be
18 permitted if the change in water quality would seriously harm any species found in the water."⁸¹

19 In this case, the Final Order acknowledges that the water transfer will likely result in
20 increased selenium in both the drains/tributaries and the Sea.⁸² In addition, testimony by the
21 Regional Water Board showed that reduced inflows from on-farm conservation measures would
22 exacerbate already existing problems with selenium in the drains and the New and Alamo rivers.

23 ⁷⁷ 40 C.F.R. § 131.12.

24 ⁷⁸ 40 C.F.R. § 131.12 (a)(1) (emphasis added).

25 ⁷⁹ SWRCB Order No. WQ 86-17, at pp. 17-18.

26 ⁸⁰ Memorandum to Regional Board Executives from William R. Attwater, Chief Counsel,
27 SWRCB (Oct. 7, 1987) at 11.

28 ⁸¹ *Id.*

⁸² Final Order, at pp. 33-34 and 51, fn 11.

1 The water quality objective for selenium, set as a federal standard and adopted by the Regional
2 Board, is 5 parts per billion (ppb).⁸³

3 Currently, the concentration of selenium is approximately 1 ppb in the Salton Sea,
4 approximately 4 ppb in the New River, and approximately 7 or 8 ppb in the Alamo River and
5 Imperial Valley drains.⁸⁴ If the project is implemented as originally proposed, selenium could
6 reach almost 10 ppb in the Alamo River and over 8 ppb. In the New River.⁸⁵ Putting it
7 differently, if inflows are reduced, New River water, which currently meets the selenium
8 objective, could be in violation of that objective; and Alamo River and Imperial Valley drain
9 water, which currently exceeds the selenium objective, could be even further out of compliance
10 with the objective.⁸⁶ The result will be that the beneficial uses of the drains and tributaries, and
11 possibly the Sea, will be impaired.

12 The Final Order appears to attempt to mitigate for this impairment of beneficial uses by
13 requiring the IID participate in a “study” to determine if anything can be done to deal with the
14 increasing selenium.⁸⁷ However, this “study” does not assure that there will be steps taken to
15 reverse the effect of the transfer of the beneficial uses of the Sea and its tributaries. In addition,
16 testimony by the Regional Board indicated that, at this time, there is a lack of technology that is
17 hindering efforts to reduce selenium.⁸⁸ In addition, the Final EIR/EIS for the water transfer goes
18 into great detail about the infeasibility of any methods to reduce selenium outside of fallowing.⁸⁹

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22 ⁸³ Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1219, lines 1-8.

23 ⁸⁴ *Id.* at lines 16-22; *see also* Regional Water Quality Control Board Exhibit 2, p. 3.

24 ⁸⁵ Regional Water Quality Control Board Exhibit 4, Tables 6 and 7.

25 ⁸⁶ Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1221, lines 2-7.

26 ⁸⁷ Final Order at 92-93.

27 ⁸⁸ Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1224-25.

28 ⁸⁹ Water Transfer FEIR/FEIS, at pp. 3-2 through 3-12.

1 Indeed, based on the record, it appears that currently, fallowing of land is the only feasible
2 method for ensuring that selenium does not increase.⁹⁰

3 Thus, there is no substantial evidence to support the Board's conclusion that the Final
4 Order will not violate the state and federal anti-degradation policies.

5 **E. THE FINAL ORDER'S CONCLUSIONS REGARDING AIR QUALITY IMPACTS ARE NOT**
6 **SUPPORTED BY SUBSTANTIAL EVIDENCE**

7 The Environmental Groups recognize the importance of this water transfer in the context
8 of weaning California from its significant, annual overdraft of Colorado River water. However,
9 these organizations also firmly believe that the transfer should not go forward until the Board can
10 establish mitigation measures that provide concrete assurances that the health and economic
11 viability of the residents and communities of the Imperial and Coachella Valleys will be
12 absolutely protected, and not simply sacrificed in a lopsided balancing against Southern
13 California coastal cities' cries for expanded and new water supplies. While the Final Order
14 contains some of these needed protections, there are critical points at which it still falls short.

15 **1. The condition that "Permittee shall also comply with any relevant**
16 **requirements of the State Implementation Plan for PM10 Emissions (SIP), as**
17 **amended by the Imperial County Air Pollution Control District (ICAPCD)."**

18 First, the Environmental Organizations understand that the South Coast Air Quality
19 Management District (SCAQMD) has jurisdiction over part of the Salton Sea, as well as over PM
20 10 compliance in the Coachella Valley. Therefore, the Environmental Organizations respectfully
21 suggest that the Final Order be amended to include the SIP as it may be amended by the
22 SCAQMD.

23 Second, the range of requirements that fall under the term "*any relevant requirements of*
24 *the State Implementation Plan for PM10 Emissions*" is ambiguous. If the SWRCB intends to
25 condition this Order on implementation of Best Available Control Measures for dry lakebeds, if
26 and when such measures are included in the SIP by ICAPCD or SCAQMD, this condition would
27 clearly be protective of air quality. However, if "*relevant requirements*" is read narrowly, it

28 ⁹⁰ Final Order, at p. 30.

1 could even be limited to those measures explicitly required in air quality permits for this project.
2 Because there is no requirement that Permittee obtain an air quality permit for this project, there
3 may be no specific SIP requirements with which IID must comply. This interpretation would
4 render this condition meaningless. Finally, the Board should require compliance with state as
5 well as federal air quality laws. We suggest the following clarifying language to this condition of
6 the Final Order:

7 Permittee shall also comply with *state air quality laws and any relevant*
8 *requirements of the State Implementation Plan for PM10 Emissions (SIP), as*
9 *amended by the Imperial County Air Pollution Control District and the South*
10 *Coast Air Quality Management District. If state law or the SIP is amended to*
11 *include Best Available Control Measures for dry lakebeds, Permittee shall*
12 *implement such measures to mitigate project-related air quality impacts.*

13 **2. The requirement that IID implement a research and monitoring program at**
14 **the on dust emissions from exposed Salton Sea sediments within six months**
15 **of the effective date of SWRCB approval.**

16 As discussed in prior comments, this requirement is a step in the right direction.
17 However, it is seriously diminished by the fact that the SWRCB will have already approved the
18 transfer project and adopted statements of overriding considerations for air quality impacts that
19 may occur after fifteen years. By approving the transfer with statements of overriding
20 considerations for air quality impacts, the SWRCB will turn the research and monitoring regime
21 at the Salton Sea into a procedural exercise rather than a serious, substantive evaluation of this
22 very real public health risk.

23 Given the paucity of concrete information about air quality impacts in the record, it is
24 clear that the Board's decision to approve the transfer at this point is not based on a meaningful
25 understanding of the project's likely environmental impacts in light of serious analysis and
26 concrete mitigation proposals. To make a finding of overriding considerations without knowing
27 the extent of harm to the environment is a clear error of law, both with respect to CEQA
28 requirements and the responsibility of the Board to determine the reasonableness of the
environmental impacts of the transfer.

CEQA requires an investigation of potentially significant environmental impacts and the
feasibility of proposed mitigation measures to address those impacts *before* project approval, not

1 after.⁹¹ This legal deficiency could be corrected if the Board orders a supplemental CEQA
2 analysis before allowing the transfer to cause any reductions in the level of the Salton Sea and
3 explicitly reserves the authority to find based on new information that the benefits of future
4 transfers do not outweigh adverse environmental impacts.⁹² The public has not yet had the
5 benefit of seeing and commenting on any substantive analysis of possible dust emissions from
6 exposed sea bed at the Salton Sea. The Environmental Organizations have examined and
7 commented on the limitations of the EIR/EIS' air quality analysis in previous comments and
8 hereby incorporate all evidence and argument that they have presented on these issues. Because
9 of the EIR/EIS' informational and analytical weaknesses in the area of air quality impacts, the
10 Board has no reliable evidence upon which to base its decisions regarding the project's impacts
11 to air quality, or whether feasible mitigation measures or alternatives exist to ameliorate those
12 impacts. Supplemental CEQA review is necessary to meet the public review requirements of
13 California law, and to provide the Board with a reliable, factual basis upon which to make its
14 decisions regarding the water transfer's potentially devastating consequences to air quality.

15 The Environmental Organizations also request that the SWRCB require that the
16 methodology and conclusions of IID's air quality research and monitoring program be subject to
17 peer review, and that the information developed be made available to the public and to air
18 pollution control districts with jurisdiction over the Salton Sea and surrounding areas.

19 **3. The requirement that mitigation continue so long as project-related air**
20 **quality impacts occur**

21 The Environmental Organizations fully support this requirement. The water transfer
22 could cause lasting environmental impacts that require mitigation measures to be implemented
23 beyond the term of the transfer itself. By requiring that mitigation continue so long as project-
24 related air quality impacts occur, the SWRCB has taken an important step toward protecting air
25 quality.

26 ⁹¹ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359; *Sundstrom v. County of Mendocino*
27 (1988) 202 Cal.App.3d 296.

28 ⁹² See discussion at Part IV.G, *infra*.

1 On the other hand, however, it is far from certain that this requirement of “perpetual
2 mitigation” will be met in practice. It would be preferable (both from an informational
3 standpoint, and in order to satisfy CEQA’s procedural requirements) to develop a legally and
4 scientifically defensible study regarding the project’s potential air quality impacts and mitigation
5 measures and to include that information in the project EIR before the transfer is approved. Once
6 the impacts are incurred, it is hardly certain that the specified mitigation measures will – in fact –
7 reduce these impacts to insignificance, or even keep them under control at all.

8 **4. The requirement that IID implement of mitigation measures for windblown**
9 **dust from exposed sea bed if the Chief of the Division of Water Rights to**
10 **determines that such measures are “feasible and necessary” to mitigate air**
11 **quality impacts of the project to less than significant levels.**

12 The Environmental Organizations appreciate the SWRCB’s willingness to use its
13 authority to protect air quality. If the SWRCB keeps the feasibility analysis rather than requiring
14 mitigation of air quality impacts to less than significant levels, as we have advocated, we request
15 that the Board clarify that such determinations are made under its authority alone and do not
16 affect the independent regulatory authority of any other regulatory agency such as the ICAPCD
17 and the SCAQMD, except to the extent that SWRCB’s determinations would be more protective
18 of public health than of any requirement imposed by the regional air quality boards.

19 It is still unclear what standard the SWRCB would use in rendering such a feasibility
20 determinations. This makes it very difficult to know how protective of air quality the SWRCB
21 will be. To reduce this uncertainty, the Environmental Groups recommend that the SWRCB
22 clarify the Final Order as follows:

23 In each report, if the air quality impacts of the project are not being mitigated to
24 less than significant levels, permittee shall identify any air quality mitigation
25 measure that it determined was infeasible. Notwithstanding such a determination
26 by permittee, if the Chief of the Division of Water Rights determines, after
27 consultation with the ICAPCD, the South Coast Air Quality Management District
28 and the California Air Resources Board, that the mitigation measure is feasible
and necessary to mitigate the air quality impacts of the project, then permittee
shall implement the mitigation measure. *If the SIP is amended to include Best
Available Control Measures for dry lakebeds, such measures are presumptively
feasible.*

This presumption avoids delegating the Board’s authority to outside agencies while giving
confidence to local communities and our organizations that the standard for feasibility

1 determinations will be sufficiently protective of air quality. The Final Order should specify that
2 additional actions such as research to improve best available control measures may be required
3 by the SWRCB if they are found to be “feasible and necessary” to reduce air quality impacts to
4 less than significant levels. In addition, we request that the Order specify that feasibility
5 determinations will take into account resources available to pay for mitigation measures from all
6 transfer parties, not just IID.

7 While the structure established in the Final Order could be effective if modified as
8 outlined above, the Environmental Organizations stress their objection to the Board’s hindsight
9 approach to project mitigation (i.e., approve the project now, decide which mitigation measures
10 are “feasible and necessary” later). This approach is in violation of CEQA, and demonstrates
11 that the Board lacks the necessary, substantial evidence upon which to make a determination of
12 the reasonableness of the transfer’s impacts.

13 The Environmental Organizations request that the SWRCB withdraw its Final Order, and
14 that the Board condition any reconsideration of the project on a requirement that the EIR provide
15 full analysis, disclosure and mitigation of air quality impacts rather than depend on a post-
16 approval feasibility analysis of mitigation measures. The risk of infeasibility of dust control
17 measures should be borne by the transfer, not the people who live near the Salton Sea.

18 Alternatively, the Environmental Organizations request that the Board require supplemental
19 CEQA review before allowing any transfer-related decline in the level of the Salton Sea.

20 **F. THE FINAL ORDER’S CONCLUSIONS ARE IN ERROR REGARDING OUT-OF-BASIN AND**
21 **GROWTH INDUCING IMPACTS**

22 The Final Order acknowledges that Water Code section 1736 generally prohibits the
23 approval of any water transfer that will have unreasonable impacts on fish, wildlife and other
24 beneficial instream uses.⁹³ However, the Order then goes on to limit section 1736’s application
25 to only the watershed of origin, stating the Board’s opinion that section 1736 does not require
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28 ⁹³ Final Order, at p. 56, fn. 14.

1 any consideration of impacts to fish, wildlife or beneficial instream uses at the proposed place of
2 use for the transferred water.⁹⁴

3 The Board’s interpretation of section 1736 is in error of law because it is not supported by
4 the statute’s plain language. By its own terms, section 1736 requires the Board to find that
5 impacts of a transfer will not unreasonably affect fish, wildlife or other beneficial instream uses,
6 *without regard to location*. Because of this error of law, the Board has not given the proper (i.e.,
7 *any*) weight to potentially significant impacts to fish, wildlife and instream uses of water that will
8 accrue as expanding sprawl – induced by new access to senior Colorado River water rights –
9 destroys existing streams and associated habitats throughout the SDCWA service area.

10 Beyond this error of law, the Final Order’s conclusions regarding growth inducing
11 impacts in the SDCWA service area are not based on substantial evidence. In the Final Order the
12 Board’s declares that the IID/SDCWA transfer is “probably” not growth inducing.⁹⁵ However,
13 the Board’s finding is in direct conflict with SDCWA’s avowed and acknowledged purpose for
14 seeking this transfer: “[SDCWA] needs [an] independent, reliable, long-term [water] supply for
15 drought protection *and to accommodate anticipated growth* in domestic, municipal and
16 agricultural uses in San Diego.”⁹⁶ “SDCWA seeks to acquire an independent, reliable, alternate
17 long-term water supply . . . *to accommodate . . . projected demand* for municipal, domestic, and
18 agricultural water uses.”⁹⁷

19 The Board’s determinations regarding out-of-basin and growth-inducing impacts are in
20 error, both as a matter of law, and as a matter of fact. The Environmental Organizations hereby
21 formally incorporate by reference all of the evidence and argument presented by them throughout
22 this proceeding, and, in particular the National Audubon Closing Argument and Legal Brief,
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24 ⁹⁴ Final Order, at p. 56, fn. 14.

25 ⁹⁵ Final Order, at p. 56, fn. 14.

26 ⁹⁶ Second Amendment to the Joint Petition of IID and SDCWA (SWRCB Exhibit 1d);
27 Testimony of Maureen Stapleton, Hearing Transcript, Apr. 24, 2002, p. 420, lines 11-14
(emphasis added).

28 ⁹⁷ 64 Fed. Reg. 52103 (Sept. 27, 1999) (emphasis added).

1 demonstrating that the express purpose of this proposed water transfer is, in fact, to
2 accommodate projected demand for growth in the SDCWA service area, which – logically – will
3 have concomitant impacts on fish, wildlife and other beneficial instream uses as streams and
4 riparian areas in the SDCWA service area are increasingly converted to municipal, domestic and
5 agricultural uses.⁹⁸

6 **G. THE BOARD SHOULD RESCIND ITS FINAL ORDER, OR, AT THE LEAST, LIMIT THE**
7 **ORDER TO AN EXPRESS, 15-YEAR TERM**

8 For all of the foregoing reasons, the Board should rescind the Final Order until such time
9 as the factual and legal errors identified above have been resolved. However, in the event that
10 the Board declines to rescind the Order, the Environmental Organizations hereby request that the
11 Board limit the term of the Final Order to the 15-year period during which the SSHCS is to be
12 implemented, with a requirement for a supplemental EIR to be prepared and further action by the
13 Board for any extension beyond this term.

14 CEQA contemplates a process known as “staging” for the environmental review of large
15 capital projects requiring a number of discretionary approvals.⁹⁹ Under such circumstances, a
16 staged EIR can be prepared that “shall evaluate the proposal in light of current and contemplated
17 plans and produce an informed estimate of the environmental consequences of the entire
18 project.”¹⁰⁰ Indeed, despite the Water Transfer EIR/EIS’ substantial deficiencies, this is largely
19 what the EIR/EIS attempts to do: to “estimate” the environmental consequences of the project in
20 the absence of any reliable quantification on what would otherwise happen to the Sea in the next
21 seventy-five years.

22 However, where CEQA’s staged EIR process and the Board’s present Order part ways is
23 in requiring following up to determine whether the present EIR/EIS’ “best estimate” of future
24 conditions and impacts was correct. Under the Final Order, the Board has decided that

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26 ⁹⁸ National Audubon Society, Closing Argument / Legal Brief, at pp 35-38.

27 ⁹⁹ Cal. Code Regs., tit. 14, § 15167.

28 ¹⁰⁰ Cal. Code Regs., tit. 14, § 15167, subd. (a).

1 replacement water should be supplied to the Salton Sea for only 15 years, and that at the end of
2 that time period, no further mitigation will be necessary (practically guaranteeing the loss of the
3 Sea and its public trust resources and uses). CEQA’s staged EIR process, on the other hand,
4 would require that “a supplement to the EIR shall be prepared when a later approval is required
5 for the project, and the information available at the time of the later approval would permit
6 consideration of additional environmental impacts, mitigation measures, or reasonable
7 alternatives to the project.”¹⁰¹

8 In the instant case, there is no question that the long-term status of the Sea – with or
9 without the proposed transfer – is highly speculative. Selectively viewed, portions of the
10 available evidence appear to point to a Sea in terminal decline – as demonstrated by the EIR/EIS’
11 inappropriate 75-year “baseline” projection. However, the evidence throughout this proceeding
12 has demonstrated that the Sea – as the one remaining, great stopover on the Pacific flyway – has
13 been, and continues to be, a place of inestimable ecological value.¹⁰² Congress has recognized
14 the Sea’s importance to the nation, and has even gone so far as to commission reports and studies
15 to determine feasible methods for protecting the Salton Sea in perpetuity. In fact, the Salton Sea
16 Authority was formed for the very purpose of protecting the ongoing viability of the Sea and to
17 find ways to stabilize environmental conditions at the Sea.

18 In light of these uncertainties, the Environmental Organizations request that if the Board
19 declines to rescind the Final Order, then the Board should, at the most, treat the Water Transfer
20 EIR/EIS as a first-stage EIR, issue the requested water transfer permit for an express term of 15-
21 years, and require that IID and SDCWA return to the Board with supplemental environmental
22 analysis for any extension of the 15-year period. Under such circumstances, the Board could
23 then at least reserve decisions about which mitigation measure should be terminated until a point
24 in time when the consequences of that determination (and available alternatives) can be more
25 reasonably assessed in light of the actual conditions at the Sea fifteen years from now. It would

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27 ¹⁰¹ Cal. Code Regs., tit. 14, § 15167, subd. (b).

28 ¹⁰² See discussion at notes 52-60, *supra*.

1 be extremely unfortunate for the Water Board to take final action on a granting a 75-year water
2 transfer right to SDCWA, while only requiring mitigation at the Salton Sea for 15 years – a mere
3 one-fifth of the permit’s duration. In that same 15-year time frame, efforts by the Salton Sea
4 Authority and other interested persons and organizations may well develop alternatives that
5 would allow for the transfer (or some portion of it) to continue while maintaining or even
6 improving environmental conditions at the Sea.

7 **V. CONCLUSION**

8 For the foregoing reasons, National Audubon Society, Inc., Defenders of Wildlife,
9 Planning and Conservation League, Sierra Club and National Wildlife Federation respectfully
10 request that the Board reconsider its issuance of the Final Order.

11
12
13 DATE: November 27, 2002

LAW OFFICE OF J. WILLIAM YEATES

14 [original signed]

15 _____
16 J. William Yeates,
17 Keith G. Wagner,
18 attorneys for National Audubon Society, Inc.,
19 and on behalf of Defenders, PCL, Sierra Club
20 and NWF
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