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April 15, 2013

Via Electronic Mail

North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403
Attn: Lauren Clyde
lauren.clyde@waterboards.ca.gov

**Re: Comments on Proposed Amendment to the Water Quality Control Plan
for the North Coast Region to Update Water Quality Objectives**

Dear Ms. Clyde:

The California Association of Sanitation Agencies (CASA) and Tri-TAC appreciate the opportunity to provide comments on the Proposed Amendments to the Water Quality Control Plan for the North Coast Region (Proposed Amendments). CASA is a statewide association of municipalities, special districts, and joint powers agencies that provide wastewater collection, treatment, and water recycling services to millions of Californians. Tri-TAC is sponsored jointly by CASA, the California Water Environment Association, and the League of California Cities. Our associations do not routinely comment on matters within individual regions, except in circumstances such as this, where the proposed regional action could have significant statewide implications. To the extent that the North Coast Regional Water Quality Control Board (Regional Board) actions in this regard could affect how other regions approach amendments to their basin plans in the future, all of CASA's members statewide have a significant interest the development and implementation of the Proposed Amendments.

CASA and Tri-TAC submitted comments on the previous iteration of the proposed amendments in March of 2012. To the extent that the substance of the concerns raised therein still have some application to the proposed amendments, we would like to reiterate those concerns as part of these comments. However, the Regional Board has since made significant changes to the content and approach of these amendments, necessitating a completely new set of comments on issues that are markedly different from those addressed in the first letter. A more detailed list of concerns is attached heretoe. In brief, however, CASA and Tri-TAC are very concerned with the following issues:

- The Regional Board has failed to analyze the impacts of the proposed new chemical constituents water quality objective in accordance with Water Code section 13241.
- The Regional Board has failed to adequately disclose the environmental impacts of the proposed objective as required by the California Environmental Quality Act (CEQA).

- The proposed Narrative Water Quality Objective Translator/Policy for the Application of Narrative Water Quality Objectives (“Policy”) is inappropriate for several reasons:
 1. The Policy improperly uses the translator mechanism as part of the implementation measures instead of as part of the water quality standard itself;
 2. The Regional Board has failed to consider the nature of the actions needed to achieve the translated narrative objectives, the feasibility or ability to take those actions, the economic impacts of those actions, a time schedule for when these actions could be undertaken, or how compliance will be determined;
 3. The Policy will leave dischargers with no input into the regulatory process and unclear on how their discharges will be regulated under the narrative criteria;
 4. The Policy fails to provide permit writers with sufficient guidance for establishing appropriate and reasonable numeric criteria; and
 5. The proposed translation mechanism could allow any guidance documents or other water quality goals to be used as “de facto” water quality objectives, with no consideration of site specific factors, ambient water conditions, or effects on beneficial uses.

Additionally, one of CASA’s members, the City of Santa Rosa, has submitted detailed comments similar to those provided here by CASA and Tri-TAC, which we support and incorporate by reference.

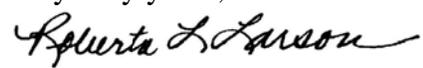
More generally, the proposed amendments are purportedly being pursued on the basis of ensuring regulatory transparency, and Regional Board staff has repeatedly indicated that these amendments are reflective of existing and long-standing processes. However, the proposed modifications will actually obfuscate regulatory requirements and eliminate certainty in the regulatory process, essentially sanctioning an entirely case-by-case approach to water quality regulation, and placing the regulated community in the position of having to continually speculate as to the requirements they must attain and maintain. This sort of uncertainty is unreasonable, particularly for public agencies currently facing economic strain and attempting to undertake long-term planning efforts to efficiently and effectively manage their infrastructure and operations.

Given the importance of these issues to the clean water community, CASA and Tri-TAC strongly urge the Regional Board to reconsider the proposed approach taken in these Proposed Amendments and consider the detailed comments that follow when deciding whether to proceed with the updates. CASA and Tri-TAC anticipate meeting with Regional Board counsel soon after the comment deadline to discuss legal issues raised by the proposed amendments, and would appreciate the opportunity to revise and/or supplement these comments with any insight and issues that come from that meeting.

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Thank you very much for the opportunity to provide our comments.

Very truly yours,

A handwritten signature in black ink that reads "Roberta L. Larson". The signature is written in a cursive style with a prominent initial 'R'.

Roberta L. Larson
Executive Director

A handwritten signature in blue ink that reads "Terrie Mitchell". The signature is written in a cursive style with a prominent initial 'T'.

Terrie Mitchell
Tri-TAC Chair

Detailed Comments on Proposed Amendment to the Water Quality Control Plan for the North Coast Region to Update Water Quality Objectives

The Proposed Action is Inconsistent with Other Terms of the Basin Plan

The following language appears in Chapter 1 of the existing Basin Plan (“Current BP”):
“Article 3 of Chapter 4 of Porter-Cologne directs regional water boards to adopt, review, and revise basin plans, and provides specific guidance on factors which must be considered in adoption of water quality objectives and implementation measures. The format for basin plans as described in Sections 13241-13247 of Porter-Cologne follows a logical progression towards water quality protection by:

- 1) describing the resources and beneficial uses to be protected;
- 2) stating water quality objectives for the protection of those uses;
- 3) providing implementation plans (which include specific prohibitions, action plans and policies) to achieve the water quality objectives;
- 4) describing the statewide plans and policies which apply to the waters of the region; and
- 5) describing the region's surveillance and monitoring activities.” (Current BP at 1-3.00.)

The proposed amendments do not meet the requirements set forth in Chapter 1 with respect to, among other actions, revision of the chemical constituents narrative water quality objective and the adoption of the narrative water quality objective for toxicity in groundwater, and no implementation plan is provided that meets the specified criteria. The existing Basin Plan provision favors a more prescriptive, region-wide approach to regulation that ensures both clarity and consistency. Further, the current Basin Plan already requires that “[w]ater quality objectives are established (see Chapter 3) to be sufficiently stringent to protect the most sensitive use.” (Current BP at 2-13.00.) If the Regional Water Board believes that additional water quality objectives are needed to protect specific sensitive beneficial uses, and the proposed amendment to narrative water quality objectives is meant to accomplish this on a permit-by-permit (or other regulatory action) basis, there is no reason why the same values that would be derived on a case-by-case basis cannot currently be specifically evaluated for compliant adoption under the routine water quality objective (or standard) adoption process. The same is true if Regional Water Board staff believe the currently incorporated by reference numeric Maximum Contaminant Levels (“MCLs”) from Title 22 set forth in the chemical constituents narrative water quality objective are stale or outdated.

The Proposed Action is Inconsistent with the Administrative Procedures Act

Although Basin Plan amendments are not subject to all of the provisions and requirements of the California Administrative Procedures Act (“APA”), the proposed amendments are subject to the standards of necessity, authority, clarity, consistency, reference and non-duplication set forth in the APA. (*See* Gov’t Code, §§11353(b)(4).) For the reasons set forth herein, the proposed Basin Plan amendments fail to comply with the standards of authority and consistency, by failing to comply with requirements of federal and state law. (*See* Gov’t Code, §§11353(b)(4) (incorporating, *inter alia*, the standards of authority and consistency from section 11349.1(a)(2) and (4).])

The proposed amendment purports to expand the applicability of the chemical constituents narrative water quality objective to the protection of *all* beneficial uses. (*See* Final Supplemental Environmental Document (“SED”) at p. 1-1.) However, the Regional Water Board has failed to demonstrate the necessity of applying the new or revised objectives to *all* beneficial uses given that other water quality objectives already fully protect non-MUN uses from toxicity and other potential detrimental impacts of discharges, and the Basin Plan already mandates protection of the most sensitive designated use. (*See* Current BP at 2-13.00 (“[w]ater quality objectives are established (see Chapter 3) to be sufficiently stringent to protect the most sensitive use.”).) Failure to identify the necessity of the proposed amendment violates state law. (*See* Gov’t Code, §§11353(b)(2)(C) and (b)(4) (incorporating, *inter alia*, the standard of necessity from section 11349.1(a)(1).); Water Code, §13241.)

The proposed amendment purports to increase “transparency” when, in fact, the proposed procedures render it impossible to determine the applicable regulatory requirements. (SED at pp. 2-6, 3-5, 4-4.) Thus, the Regional Water Board has failed to meet the mandatory standard of clarity for regulations. This failure violates state law. (*See* Gov’t Code §§11353(b)(4) (incorporating, *inter alia*, the standard of clarity from section 11349.1(a)(4).))

The Proposed Amendment Fails to Amend the Bacteria Objectives

The proposed amendment does not propose modifying the current water quality objectives for bacteria. (SED at pp. 3-4) This ignores the fact that U.S. EPA recently modified the national water quality criteria guidance for bacterial indicators to protect recreational uses. (*See* <http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/index.cfm>.) Since the Regional Water Board is concerned with having water quality standards based on the most recent and applicable science, the Regional Water Board should consider modifying and updating the bacteria water quality objectives.

The Term “Adversely Affect” Should be Removed from Water Quality Objectives

Many of the water quality objectives set forth in the proposed amendment, as well as existing water quality objectives set forth in the Basin Plan, state that waters should not contain substances that “cause nuisance or adversely affect beneficial uses.” (*See* Current BP at 3-3.00 to 3-5.00). The term “adversely affect” is not defined in the Basin Plan and is inconsistent with state law, which requires “reasonable protection” of beneficial uses, and requires that uses are not “unreasonably” affected. (Cal. Wat. Code, §13241 (emphasis added).) Thus, the term

“adversely affect” should be changed to “unreasonably affect” throughout Chapter 3 in order to achieve consistency with the Water Code.

The Proposed Amendments Are Not Reasonable as Required

The California Legislature has found and declared that activities affecting water quality “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.” *See* Water Code §13000 (emphasis added). This section sets state policy and imposes an overriding requirement on all Regional Boards that regulation be reasonable. For the reasons set forth herein, the proposed amendments are not reasonable and should be substantially revised.

The Proposed Amendment to the Water Quality Objective for Toxicity Is Not Supported

The proposed amendment to the water quality objective for toxicity has not been adequately explained or justified. For example, the changes to the last sentence entirely change the meaning and the requirements of that sentence. The current Basin Plan contains the following final sentence:

“Where appropriate, additional numerical receiving water objectives for specific toxicants will be established as sufficient data become available, and source control of toxic substances will be encouraged.” (*See* Current BP at 3-4.00)

This sentence has two parts: 1) that “where appropriate, additional numerical receiving water objectives for specific toxicants will be established as sufficient data become available”; and 2) that “source control of toxic substances will be encouraged.”

The newly proposed language changes the need for sufficient data before establishing receiving water objectives by stating “where appropriate, additional numeric receiving water objectives for specific toxicants will be established.” The language also changes the second part to require, instead of encourage, source control of toxics “as sufficient data become available.” No analysis of the impacts of this new source control requirement have been analyzed pursuant to Water Code section 13241 and no implementation plan prescribed as required by Water Code section 13242. More analysis and explanation of the need for these changes is required.

The Newly Proposed Water Quality Objective for Toxicity in Groundwater is Unnecessary and Incomplete

A new water quality objective for toxicity in groundwater is being proposed based, in part, to protect aquatic life. (SED at pgs. 3-17 to 3-19, and A-12.) Aquatic life are not present in groundwater, and any aquatic life that may be impacted in surface waters from groundwater are protected by the surface water quality objective for toxicity. This justification for the groundwater toxicity objective should be removed. Further, given the stated breadth of the proposed narrative water quality objective for chemical constituents (groundwater and surface waters), it is even more unclear why this proposed objective is needed.

The Regional Water Board justifies the proposed groundwater toxicity objective by referencing that the Central Valley Regional Water Board has a similar objective. This is an inadequate justification, and ignores the fact that the Central Valley Regional Water Board also has explicit

language conditioning the applicability “as the objectives are relevant to the protection of designated beneficial uses” and clarifying that “[t]hese objectives do not require improvement over naturally occurring background concentrations.” (*See* Central Valley Regional Water Board Basin Plan for Sacramento/San Joaquin at III-9.00.) If this Regional Water Board proceeds with adopting the proposed narrative toxicity objective for groundwater, similar conditional language regarding the application and background levels should be included. Section 3.7 should also explicitly state that “The ground water objectives contained in this plan are not required by the federal Clean Water Act” consistent with the Central Valley Regional Water Board’s Basin Plan. (*Id.*)

Finally, no analysis of the impacts of this new water quality objective have been analyzed pursuant to Water Code section 13241 and no implementation plan prescribed as required by Water Code section 13242. The Regional Water Board cannot escape the required performance of this analysis because as a new water quality objective, the Regional Water Board cannot rely on faulty justifications, as they have for proposed amendments modifying existing objectives, that the adoption will have no cost or impact because the action is consistent with how Regional Water Board staff have already been allegedly interpreting and applying an objective. Thus, the adoption of this water quality objective as presently proposed violates the Water Code. (*See City of Tracy v. SWRCB*, Sacramento Sup. Ct. Case No. 34-2009-80000392, Final Statement of Decision (May 10, 2011).)

The Proposed Amendment to the Narrative Objective for Chemical Constituents Violates State and Federal Law

The Regional Water Board is proposing to amend the water quality objective for chemical constituents in several crucial ways, by (1) broadening the scope of its applicability from waters designated with an MUN or AGR use to *all* beneficial uses; (2) removing reference to specific numeric criteria (Title 22 MCLs) in favor of a generic statement; and (3) incorporating a policy by which the generic statement will be “translated” into discharge or cleanup requirement, which itself, provides a broad range of sources by which those discharge requirements may be derived with no certainty as to how a particular source will be selected or interpreted. This approach is problematic for a variety of reasons set forth below.

Clean Water Act section 303(c)(2)(B) requires numeric criteria for toxic pollutants where section 304(a) guidance criteria exist. (33 U.S.C. §1313(c)(2)(B).) Thus, where 304(a) criteria exist, numeric water quality objectives are required to be adopted in accordance with state law, through a public process, taking into account site-specific factors and Water Code section 13241 factors. (*Id.*; 40 C.F.R. §131.5(a)(3) and §131.6(e).) Thus, if numeric objectives are not being adopted as required by federal law, then the narrative water quality objective should exclude its use of for any toxic chemical constituents that have 304(a) criteria.

The justification for removal of Table 3-2 is not adequate. If the MCL values are out of date, they can be updated or modified as needed to protect the designated MUN or AGR uses by directly importing the values into the Basin Plan, or incorporating them by specific reference. Further, the fact that this objective does not protect other uses is of no accord as that is not its

intended purpose. Other objectives not proposed to be changed only protect a single use. For example, the temperature objectives are for the WARM and COLD uses (Current BP at 3-4.00), different bacteria objectives protect the REC-1 and SHELL uses (*id.*), and the dissolved oxygen and pH objectives are to protect aquatic life uses (*id.*). This is consistent with the requirements of federal law that mandates that water quality standards include enumerated designated use(s) and a water quality criteria to protect that use (33 U.S.C. §1313(c)(2)(A))¹ and of the Water Code that water quality control plans contain beneficial uses and water quality objectives set to reasonably protect those uses (Cal. Wat. Code, §13050(j); §13241.) Decoupling the objective from any particular beneficial use violates the water quality standard concept underlying both the federal Clean Water Act and the state Porter-Cologne Water Quality Control Act.

Further, by removing reference to the MUN and/or AGR beneficial uses, the narrative objectives in the Basin Plan become unnecessarily duplicative and confusing to the regulated community. If adopted, the proposed amendments would blur the line between the purpose of the narrative water quality objective for toxicity (meant to address toxicity in the waters for the protection of aquatic life) and the purpose of the narrative chemical constituents objective (meant to address protection of human health and other uses).

Finally, the proposed amendment to this objective cannot be validly adopted as the Regional Water Board has completely failed to substantively consider the factors set forth in Water Code section 13241, and has not set forth an implementation plan as required by Water Code section 13242. Regional Water Board staff attempt to justify this omission by inaccurately stating that the baseline for purposes of considering the Water Code section 13241 factors is the current practice of imposing requirements not supported by existing Basin Plan provisions, rather than the duly adopted provision in the existing Basin Plan. Until this analysis is properly performed, and implementation actions by the regulated community evaluated and prescribed, the proposed amendment fail to comply with law.

The Proposed Narrative Water Quality Objective Translator/Policy Does Not Comply with Federal and State Law

Notwithstanding the language of the Clean Water Act at section 303(c)(2)(B), U.S. EPA regulations permit States to adopt narrative, rather than numeric, criteria to protect designated uses so long as the State provides “information identifying the method by which the State intends to regulate point source discharges of toxic pollutants ... based on such narrative criteria.” (40 C.F.R. § 131.11(a)(2).) This “narrative translator” procedure is intended to

1 “The federal Clean Water Act (Section 303, 33 U.S.C. § 1313) requires states to adopt water quality standards (water quality objectives and beneficial uses) for navigable waters of the United States and to review and update those standards on a triennial basis.” (*See* Current BP at 1-3.00.)

ensure “acceptable scientific quality and full involvement of the public and EPA.” (57 Fed. Reg. 60853 (1992).)

The Regional Water Board is attempting to adopt the translator mechanism as part of the *implementation* measures when it is actually supposed to be part of the water quality standard itself. (See 57 Fed. Reg. 60853, 60873 (Dec. 22, 1992) (“EPA believes the combination of a narrative standard along with a translator mechanism as a part of a State’s water quality standards can satisfy the substantive requirements of the Clean Water Act...If established and correctly applied, EPA has indicated that it could meet the requirements of section 303(c)(2)(B).”). Implementation measures are still needed, consistent with Water Code section 13242 to include:

- (a) A description of the nature of actions which are necessary to achieve the [translated narrative] objectives, including recommendations for appropriate action by any entity, public or private.
- (b) A time schedule for the actions to be taken [to achieve the translated narrative objective].
- (c) A description of surveillance to be undertaken to determine compliance with [translated narrative] objectives.

The Regional Water Board has wholly failed to consider the nature of the actions needed to achieve the translated narrative objectives, the feasibility or ability to do so, or the economic impacts of those actions, a time schedule for when these actions could be undertaken, or how compliance will be determined. This failure violates Water Code section 13242 and must be remedied. (See *City of Tracy v. SWRCB*, Sacramento Sup. Ct. Case No. 34-2009-80000392, Final Statement of Decision (May 10, 2011).)

Without a specific and clear translator mechanism, dischargers have no input into the regulatory process and will be simply left to guess how their discharges will be regulated under the narrative criteria “as the Regional Water Board deems appropriate.” (SED at p. 8-6.) Moreover, the proposed Policy for the Application of Narrative Water Quality Objectives (“Policy”) fails to provide permit writers with sufficient guidance for establishing appropriate and reasonable numeric criteria and allows them to simply draw permit limits seemingly out of thin air.

To avoid this type underground rulemaking, which violates the California Water Code and Administrative Procedures Act, U.S. EPA provides that a State’s translator procedure for narrative criteria is needed and should specifically describe:

1. methods the State will use to identify those pollutants to be regulated in a specific discharge;
2. an incremental cancer risk for carcinogens;
3. methods for identifying compliance thresholds in permits where calculated limits are below detection;
4. methods for selecting appropriate hardness, pH, and temperature variables for criteria expressed as functions;
5. methods or policies controlling the size and in-zone quality of mixing zones;

6. design flows to be used in translating chemical-specific numeric criteria for aquatic life and human health into permit limits; and
7. other methods and information needed to apply standards on a case-by-case basis.

(See *U.S. EPA Water Quality Standards Handbook, Second Edition*, EPA-823-B-12-002, March 2012, at § 3.5.2 & Exhibit. 3-3.) In EPA's Technical Support Document for Water Quality-Based Toxics Control ("TSD," March, 1991) at page 31, U.S. EPA stated:

To ensure that narrative criteria for toxicants [not covered by CWA § 303(c)(2)(B)] are attained, the water quality standards regulation requires States to develop implementation procedures (see 40 C.F.R. § 131.11(a)(2)). Such implementation procedures (Box 2-1) should address all mechanisms used by the State to ensure that narrative criteria are attained.

Box 2-1 sets forth the "Components of an Ideal State Implementation Procedure" that satisfy the requirements of 40 C.F.R. § 131.11(a)(2). Importantly, U.S. EPA in Box 2-1 on page 32 of the TSD identified a particularized list of elements that are needed in a State's translation mechanism, and are similar to those set forth in the *Water Quality Standards Handbook* cited above. The translation procedures required and described in detail by U.S. EPA ensure that certainty in the regulatory process is preserved and that the public is properly notified of how it is going to be regulated.² Further, the implementation procedure must ensure that the State complies with relevant state laws (*e.g.*, Cal. Water Code §§13000, 13241 and 13242; APA). The proposed translation mechanism seems to allow any guidance documents or other water quality goals to be used as "de facto" water quality objectives, with no consideration of site

² Since narrative criteria are generalized statements of prohibited chemical, physical or biological conditions, rather than quantitative standards, the State must provide information to EPA and the public identifying how point sources will be regulated based upon narrative criteria. (See, *e.g.*, *U.S. EPA Water Quality Standards Handbook* 2d. Ed. at 2-17 to 2-21 (Aug. 1994)). This requirement not only provides the public and the regulated community with fair notice of what is expected of them, but also ensures that the narrative criteria have clear bounds and a rational basis for their implementation and that permits are not created based on the idiosyncrasies of Regional Water Board staff based on unwritten or non-promulgated agency policy or non-regulatory goals. U.S. EPA itself expressly recognized that any criteria derived from a narrative standard "may invite legal challenge" and that "public participation in development of derived numeric criterion may be limited." (See EPA Memorandum from Rebecca W. Hammer, Acting Assistant Administrator for Water, "Transmittal of Final 'Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B)'" (Dec. 12, 1988) at 10.) Thus, U.S. EPA recommended that States adopt "a sound and predictable method to develop numeric criteria" from narrative standards, which could be used once EPA approved the State's procedure. (*Id.* at 10, 13.) Here, the proposed procedure is neither technically sound nor predictable.

specific factors, ambient water conditions, or effects on beneficial uses. None of the enumerated requirements for a proper translator have been included. Moreover, this translator fails to ensure that the guidance numbers are being utilized in an appropriate manner, which has been rejected previously. For example, the Central Valley Regional Water Board attempted to use a European Union Council Directive to set an ammonia limit in an NPDES permit based on the taste and odor narrative. This action was overturned by the State Water Board because the Regional Water Board implemented the EU ammonia value in a manner not consistent with its intent - to be used for solely as a monitoring purposes and as an indicator parameter - not to address taste and odor regulatory concerns as was imposed. (*See* SWRCB Order No. 2002-0015 at 47.) The failure to indicate which values will be utilized and for what purposes makes the proposed narrative objective translation process impossible to predict.

Without a proper translator describing the exact step-wise process that the Regional Water Board will employ, the proposed narrative objectives will be subject to misuse through the imposition of inappropriate effluent limitations. For example, with the currently proposed translator, the Regional Water Board can identify the lowest number from anywhere in the world in relation to a particular pollutant (*e.g.*, European Union goals or World Health Organization guidance) and then impose this number as an effluent limitation in a permit. This will be done without following the legal procedures normally required when adopting new water quality objectives (*e.g.*, Cal. Water Code, APA, CEQA). Using a narrative objective in this way results in “moving target” regulation, which is especially troubling to publicly owned treatment works that cannot cease treating the public’s sewage and must determine, on a short schedule, how to comply with these ever-changing effluent limitations that may have no relation to actual beneficial use protection or site-specific conditions. This is made clear by the memo and Table included in Appendix E of the proposed amendments, which demonstrates that notwithstanding the adopted water quality objectives contained in Table 3-2 of the current Basin Plan, the Regional Water Board staff has randomly and not uniformly selected lower numbers to place in permits and other regulatory orders. Thus, the Regional Water Board’s claim that this new Policy “will lead to less confusion when developing limits in permits, orders, and other regulatory actions” (SED at pg. 3-13) is unfounded and unsupported. In addition, the proposed Policy contains undefined terms such as “most limiting of these values” and “true background level.” (SED at pg. 4-7, Figure 4-1.) The failure to provide a better explanation of how the ultimate limits are derived will not succeed in reaching the Regional Water Board’s goal of having more streamlined permit renewals and will merely cause additional contentious issues.

The Regional Water Board appears to be trying to impose the “most protective chemical constituent thresholds” (SED at pg. 2-8) when that is not the mandate required by state or federal law. The requirement is to impose limits based on “water quality objectives reasonably required” to “ensure the reasonable protection of beneficial uses.” (Cal. Wat. Code, §13263(a); §13241.) Choosing the most stringent number available for permitting purposes ignores the Water Code’s express recognition that “it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses.” (Cal. Wat. Code, §13241.) In addition, by adopting a narrative objective that facilitates the use of an undefined, but most stringent criteria or guidance number available, completely avoids the factors analysis required under Water Code section 13241. (Cal. Wat. Code, §13241(a)-(f).)

If there is a particular numeric value that Regional Water Board staff believes is the proper value to be used as a water quality objective in order to protect beneficial uses and to impose permit limits, then that value should be adopted through the legally mandated process. Water quality standards are required to be reviewed every three years, so if the value initially selected becomes inappropriate in the future, it can be properly modified through the public process. (Cal. Wat. Code, §13240; 33 U.S.C. §1313(c)(1); *see also* Current BP at 1-4.00 (“Both Porter-Cologne (CWC Section 13240) and the Clean Water Act (Section 303(c)(1)) require review of basin plans at least once each three-year period to keep pace with changes in regulations, new technologies and policies, and physical changes within the Region.”(emphasis added).)

Finally, the proposed amendments, which broaden the scope of existing narrative water quality objectives and the associated Policy, cannot be validly adopted as the Regional Water Board has completely failed to substantively consider the factors set forth in Water Code section 13241. For example, even though the Regional Water Board expressly acknowledges that the proposed amendments will result in the imposition of more stringent requirements, because the Regional Water Board already engages in the practice they are seeking to validate through these amendments, Regional Water Board staff take the position that there will be no additional costs to comply; or, in other words, the cost to comply with the new groundwater toxicity objective, and the revised narrative objectives and Policy will be zero. (SED at pg. 8-6). Regional Water Board staff are grossly mis-stating the baseline for purposes of considering the Water Code section 13241 factors. The factors set forth in Water Code section 13241 must be substantively evaluated as compared to the existing Basin Plan requirements, not as compared to potentially invalid and unauthorized implementation activities. Until this analysis is properly performed, the proposed amendments fail to comply with law.

The Proposed Amendments are Not Supported by Findings or the Findings Made are Not Based on Evidence in the Record

All administrative actions must be supported by findings, and findings must be based on evidence in the record. Orders not supported by findings or findings not supported by evidence constitute an “abuse of discretion” (Cal. Code Civ. Proc., §1094.5(b)). An “agency which renders a challenged decision must set forth findings to bridge the analytical gap between raw evidence and the ultimate decision or order.” *Topanga Ass’n for Scenic Community v. County of LA*, 11 Cal.3d 506, 515 (1974); *see accord 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). Further, an agency must ensure that it “has adequately considered all relevant factors [here, Water Code sections 13000, 13241, 13242, etc.] and has demonstrated a rational connection between these factors, the choice made, and the purposes of the enabling statute.” *Cal. Hotel and Motel Ass’n v. Industrial Welfare Com.*, 25 Cal. 3d 200, 212 (1979). In this case, as discussed herein, the Regional Water Board’s action to adopt the proposed amendment is not supported by findings, and/or the findings made are not based on evidence in the record.

For example, each of the proposed Basin Plan amendments' determinations of "no impact," in either the economic analysis under the Water Code Section 13241 factors or in the CEQA Environmental Checklist, fail to include evidence to support the findings. Thus, the proposed amendments constitute an abuse of discretion.

Site-specific Designation of Beneficial Uses at the Permit Stage is Not Consistent with the Basin Plan and Reduces Regulatory Certainty

The Current BP states that "[a]n essential part of a water quality control plan is an assessment of the beneficial uses, *which are to be designated* and protected." (Current BP at 2-1.00. (emphasis added)) However, the proposed amendments to the Basin Plan purport to remove this "essential part" of the Basin Plan and defer use designations until a permit or other order is adopted. If uses are not uniformly prescribed for the ambient waters, then how will the Regional Water Board and the public be able to know if the designated beneficial uses are being attained or not? Without knowing the specific existing and potential uses, as has been done in Chapter 2 of the existing Basin Plan at Table 2-1, the City will have no certainty as to the protections needed or the regulatory requirements that will apply.

If additional uses need to be added to Table 2-1 because they are now existing uses, that can easily be done in a basin planning process so long as there is evidence to support that change. Similarly, if uses were improperly designated and need to be modified, then the Regional Water Board has an obligation to modify those uses, or risk being challenged for failure to amend the designation. In the recent *Vacaville* decision, the appellate court concluded that "mandamus is available to an aggrieved party who can demonstrate that a regional board has refused to comply with its obligations under the basin plan and under the law," and that "mandamus will lie where a discharger is not satisfied with a determination by either the Regional or the State Board not to amend the basin plan." *California Association of Sanitation Agencies v. SWRCB*, 208 Cal.App.4th 1438, 1460-61 (1st Dt. 2012). The Regional Water Board's proposed action seems to be trying to avoid this situation by removing beneficial use designation from the Basin Plan process altogether. That action not only violates the terms of the Basin Plan, but also violates state and federal law cited herein that require use designation so that appropriate and reasonable water quality criteria or objectives may then be adopted to protect those uses.

The Proposed Amendments Violate CEQA

In the case of *City of Sacto. v. SWRCB*, 2 Cal. App. 4th 960, 969 (3d Dt. 1992), the Court held that the purpose of CEQA is to "compel government at all levels to make decisions with environmental consequences in mind." The proposed amendment fails to consider all potential environmental consequences of the proposed changes.

The Regional Water Board's conclusory statements on pages 5-8 to 5-43 that the proposed amendments will have absolutely "no impact" is not supported by any substantial evidence, or any evidence at all, and is in direct contrast to California Environmental Quality Act ("CEQA") requirements. [*Mountain Lion Coal. v. Fish & Game Comm'n* (1989) 214

Cal.App.3d 1043, 1047; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 404, (Conclusory comments in support of environmental conclusions are generally inappropriate); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721.] A review of the Environmental Checklist provides no evidence to support the Regional Board's conclusion that the proposed amendments will not result in reasonably foreseeable physical changes to the environment through the need for different or additional treatment technologies. Such lack of information and resulting analysis does not comply with an agency's required good-faith effort to disclose the environmental impacts of a project to decision makers and the public. (CEQA Guidelines, Section 15151.) Accordingly, the CEQA Checklist fails to disclose the data or evidence upon which the conclusions of "no impact" rely. (*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal. App. 3d 151 (holding that an initial study must disclose the data or evidence relied upon).).

The conclusions of "no impact" are not only unsupported, they are also inaccurate. For example, on page 5-31, it states that the "Proposed WQO Update Amendment will not ...interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level." However, the newly proposed Groundwater Toxicity Objective may actually adversely affect the ability to use recycled water, which may affect aquifer volume or the groundwater table. This impact was completely ignored. Similarly, it is unclear how the Regional Water Board can conclude on page 5-41 that the "Proposed WQO Update Amendment will not result in a requirement to construct new water or wastewater treatment facilities or expand existing facilities." If new, lower criteria are used in translating the revised narrative objectives into new, lower effluent limitations, then new or expanded treatment facilities are more than likely to be needed, which is an impact not explored. These examples make the Preliminary Staff Determination, which states that "The proposed project COULD NOT has a significant effect on the environment, and, therefore, no alternatives or mitigation measures are proposed," patently false.

In addition, because there is an assumption that no impacts will exist, there has also been no attempt to estimate the aggregate number of projects that would be undertaken as a result of the proposed Basin Plan amendments. [See CEQA Guidelines, Section 15151 (requiring good-faith effort to disclose environmental impacts); CEQA Guidelines, Section 15063; and *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal. App. 3d 151 (holding that an initial study must disclose the data or evidence relied upon)]. The Regional Water Board must examine the impacts of the proposed amendments under review against the backdrop of cumulative conditions. (*Communities for a Better Environment v. California Resources Agency* (3rd Dist. 2002) 103 Cal. App. 4th 98 (holding that an agency may not employ a *de minimis* rationale when evaluating cumulative impacts).)

The Regional Water Board also improperly uses "what is currently occurring under the Regional Water Board's regulatory programs" as the current and proper baseline since those

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“regulatory programs” are not based upon any adopted regulation and never underwent CEQA review, even though staff admits that it has “been implementing the process laid out in the Narrative WQO Policy for many years.” (*See e.g.*, pgs. 5-5, and E-1.) The fact that the new objectives allow for the use of objectives or criteria far lower and more stringent than the current water quality objectives contained in the Basin Plan must be considered, not only under the Water Code’s mandatory factors set forth in section 13241, but also under CEQA. The current numeric water quality objectives set forth in Table 3-1 and elsewhere in the Basin Plan are the baseline, not the unauthorized procedures that the Regional Board now characterizes as standard practice.

For these reasons, the CEQA-related analyses require revision and the proposed amendment should be re-circulated once complete.