

**Department of
Conservation &
Development**

Community Development Division

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**Contra
Costa
County**



Catherine Kutsuris
Director

April 25, 2011

Erin Foresman
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Re: US EPA's February 2011 Advance Notice of Proposed Rulemaking

Dear Ms. Foresman:

Contra Costa County supports the efforts of the U.S. Environmental Protection Agency (EPA) in seeking input on how better to achieve water quality and aquatic resource protection goals for the San Francisco Bay-Delta Estuary. Contra Costa County borders onto Northern San Francisco Bay and the Sacramento-San Joaquin Delta. The residents of Contra Costa County rely on the Delta for their municipal and industrial water supply, for fishing and other forms of recreation, for work and as a place to live. The County has a strong interest in protecting Delta water quality, restoring the Delta to a sustainable ecosystem, and preserving the values of the Delta as a place to live, work and enjoy. The County looks to EPA as a leader by taking an independent look at the panoply of issues impacting the Bay-Delta today and providing its scientific expertise as necessary components of a comprehensive solution to these problems.

Restoration of Fall X2 to pre-1995 Conditions

As discussed in the February 2011 Advance Notice of Proposed Rulemaking (ANPR), the Sacramento-San Joaquin Delta ecosystem is now significantly degraded and native fisheries, once thriving, are now on the point of extinction. The replacement water quality standards promulgated by EPA in the early 1990s led to the December 1994 *"Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government"* (also referred to as the Bay-Delta Accord). The new February-June estuarine habitat (X2) standard was an important step in protecting the Delta ecosystem. However, as discussed on page 52 *et seq.* of the unabridged ANPR, the February-June restrictions on Delta export operations have resulted in

unintended adverse impacts to the Delta in the fall. As shown in Figure E (page 54 of the unabridged ANPR), fall X2 has increased dramatically. While there have been contentious

debates whether there is a causal relationship between fall X2 and fish abundance, e.g., in the lawsuits over the Delta smelt and salmon biological opinions, this degradation in fall X2 does coincide with the dramatic decline

in pelagic organisms in the Bay-Delta Estuary. Restoring fall X2 values to historical values prior to the 1995, would help provide habitat conditions necessary to promote recovery of Delta smelt and other key fish species.

Sadly, the Bay-Delta Conservation Plan proposed project released at the end of 2010 appeared to decrease rather than increase Delta outflows in the fall. Contra Costa County encourages EPA to again provide leadership in synthesizing the ongoing work of the Pelagic Organism Decline team, the State Water Resources Control Board flows report, findings coming out of the National Academy of Sciences Review, and the submissions in the biological opinion lawsuits. With this information, EPA should develop proposed standards under the Clean Water Act that would increase flows, decrease X2, and improve ecosystem habitat in the delta in the fall.

Membership of the California SWRCB and Regional Water Quality Control Boards

EPA, through the ANPR, also suggests there may be a range of changes to EPA's activities in the Bay-Delta that would be constructive, including enforcement, research, revisions to water quality standards, etc. The ANPR also acknowledges the important role of the California State Water Resources Control Board (SWRCB) and Regional Water Quality Control Boards (RWQCB) in setting water quality standards and assisting EPA in implementing necessary actions to restore aquatic resources in the Bay-Delta Estuary.

Contra Costa County is concerned that the federal Clean Water Act contains provisions that currently inhibit some qualified and experienced individuals from serving on the SWRCB and RWQCBs. This restriction comes from Section 304 [33 USC 1314] Information and Guidelines, FWPC Sec. 304(i)(2)(D):

"(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

This restriction was incorporated into California Water Code Section 13388:

*"Notwithstanding any other provision of this division or Section 175, **no person shall be a member of the state board or a regional board** if he receives or has received during the previous two years a significant portion of his income directly or indirectly from any person subject to waste discharge requirements or applicants for waste discharge requirements pursuant to this chapter. This section shall become operative on March 1, 1973."*

Today, there are many water agencies, municipalities or counties in California that do not treat and discharge wastewater, but still hold small (or general) waste discharge permits related to stormwater, sludge disposal or construction. Highly qualified and knowledgeable former or retired employees of these entities are prohibited by the Clean Water Act and California Water Code Section 13388 from serving on the state water boards, even though a major portion of the work of the SWRCB deals with water rights and basin plans and only a small portion with actions related to National Pollutant Discharge Elimination System (NPDES) permits.

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This issue was previously raised in July 2004 by the California Association of Sanitation Agencies, California State Association of Counties, League of California Cities, and the Regional Council of Rural Counties. The joint letter to the Honorable Jerry Lewis, U.S. House of Representatives by these agencies is included as an

attachment to this letter. The four groups agreed that the logic behind the income restriction provision is sound, and that it is not good public policy to have persons voting on NPDES permits in which they have a financial

interest, direct or indirect. However, they pointed out that the universe of entities subject to NPDES permits has grown over the years, as EPA has extended NPDES permit coverage to municipal and industrial stormwater, construction runoff, combined animal feeding facilities, and others. Permit holders in California now include cities, counties, special districts, school districts, universities, small businesses, aquaculture, marine research centers, military bases, and many others. The available pool of persons with knowledge of, and an interest in, water quality issues who are not barred by the Clean Water Act income restriction has shrunk significantly.

The four agencies proposed the following Clean Water Act Income Restrictions Proposed Amendment:

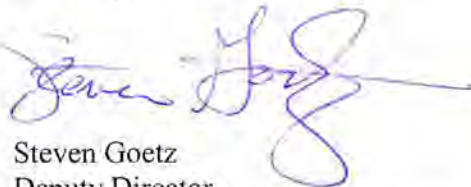
Delete 33 U.S.C. § 1314(i) in its entirety and replace with the following language:

“No member of a board or body that approves permit applications may vote upon, or seek to influence, any permit in which the member of the board or body has a direct or indirect financial interest, as defined in applicable State law.”

The County agrees that this income restriction in the Clean Water Action should be amended through legislation or administratively by EPA to allow qualified individuals to serve on the SWRCB and make important decisions regarding restoration of water quality and restoration of aquatic species and other non-NPDES related issues like water rights and drinking water quality protection. An amendment or administrative interpretation such as that above would allow Board members to recuse themselves on a case by case basis where there is a potential conflict of interest in an NPDES or any other matter.

The County appreciates this opportunity to provide input on these important issues. If you have any questions, please contact Steven.Goetz@dcd.cccounty.us or at (925) 335-1240.

Sincerely,



Steven Goetz
Deputy Director,
Transportation and Conservation Programs
Department of Conservation & Development

Attachment: July 12, 2004 letter from four California groups to the Honorable Jerry Lewis, U.S. House of Representatives, on Clean Water Act Income Restrictions.

cc: Paul Schlesinger, Alcalde & Faye



July 12, 2004

The Honorable Jerry Lewis
U.S. House of Representatives
2112 Rayburn House Office Building
Washington, DC 20515

SUBJECT: CLEAN WATER ACT INCOME RESTRICTIONS

Dear Representative Lewis :

On behalf of the undersigned organizations, we are writing to request your assistance with an issue of importance to local government in California. The Clean Water Act and its implementing regulations specify that no person who receives a "significant portion" of his or her income directly or indirectly from a National Pollutant Discharge Elimination System (NPDES) permit holder may sit on a board or other body that acts on permits. "Significant portion" is defined as ten percent of the person's income. (40 C.F.R. § 123.25(c).) Both the Act and the regulations must be revised to allow qualified individuals to serve on behalf of the public. We enclose suggested language that would amend the statutory provisions, and hope that you will support its enactment.

California is having difficulty identifying qualified applicants to serve on its nine regional water quality control boards, which are responsible for basin planning, total maximum daily load (TMDL) adoption, permitting and enforcement. Seats on these boards are uncompensated. In most states, permits are issued by staff of state agencies rather than appointed, part-time boards. Thus, the income restrictions affect only California and a few other States. To ensure that persons appointed to the regional boards have the knowledge, abilities and experience necessary to be effective board members, our organizations support amendment of the law to replace the income restrictions approach with a conflict-of-interest provision.

The logic behind the income restriction provision is sound. It is not good public policy to have persons voting on NPDES permits in which they have a financial interest, direct or indirect. However, the regulatory landscape has changed in at least two significant ways since the provision was added to the Act. First, the universe of entities subject to NPDES permits has grown over the years, as EPA has extended NPDES permit coverage to municipal and industrial stormwater, construction runoff, combined animal feeding facilities, and others. Permit holders in California include cities, counties, special districts, school districts, universities, small businesses, aquaculture, marine research centers, military bases, and many others. Thus, the available pool of persons with knowledge of, and an interest in, water quality issues who are not barred from serving on boards due to the income restriction, is shrinking.

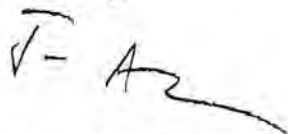
The other significant change is in the business of the boards themselves. Up until the 1990s, the majority of the regional board actions dealt with traditional point source permitting and enforcement. Now, however, a sizeable portion of the regional boards' workload involves other programs, such as the Total Maximum Daily Load (TMDL) program, nonpoint source management, and watershed programs. Some of these programs have real regulatory consequences, and they are being adopted and implemented by the same boards. TMDLs, for example, may have significant consequences for non-NPDES permit holders, such as agriculture and timber. Persons who receive income from those entities are allowed to serve on the regional boards because a TMDL, despite its potential effects on a regulated entity, is not a "permit."

NPDES permits are issued every five years. It simply does not make sense to continue to exclude an otherwise qualified person from participation on these boards because he or she receives income from a permit holder whose permit may not even be before the board during a four-year term.

As an alternative to the categorical income restriction, members of boards issuing permits should be subject to a conflict-of-interest test. The law should allow persons with income derived from permit holders to be appointed to boards, but prohibit a board member from voting on, or influencing, any permit or other action in which the board member has a direct or indirect financial interest.

We hope you will agree that Congress should address this issue. We would be pleased to meet with you or your staff to discuss this further. Thank you for your consideration.

Sincerely,



John A. Coleman
President
California Association of
Sanitation Agencies



Steven C. Szalay
Executive Director
California State Association
of Counties



Chris McKenzie
Executive Director
League of California Cities



Brent Harrington
President and CEO
Regional Council of Rural
Counties

Clean Water Act Income Restrictions
Proposed Amendment

Delete 33 U.S.C. § 1314(i) in its entirety and replace with the following language:

“No member of a board or body that approves permit applications may vote upon, or seek to influence, any permit in which the member of the board or body has a direct or indirect financial interest, as defined in applicable State law.”