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17 IN THE UNITED STATES DISTRICT COURT  
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
19 (San Francisco Division)

20 NATURAL RESOURCES DEFENSE  
COUNCIL, *et al.*,

21 Plaintiffs,

22 v.

23 GINA MCCARTHY, Administrator of the  
24 United States Environmental Protection  
Agency, *et al.*,

25 Defendants.

Case No. 3:16-CV-02184-JST

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT**

Judge: Hon. Jon S. Tigar  
Date: November 3, 2016  
Time: 2:00 p.m.  
Ctrm: 9

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1 **INTRODUCTION**

2 Section 303(c) of the Clean Water Act (“CWA”), 33 U.S.C. §1313(c), is built on the  
 3 foundation of cooperative federalism. Congress gave states the authority to adopt and revise water  
 4 quality standards, but directed the United States Environmental Protection Agency (“EPA”) to  
 5 ensure that those new or revised standards comply with the baseline requirements of the CWA.  
 6 Plaintiffs bring this lawsuit to compel EPA to carry out its mandatory federal oversight role – a role  
 7 that EPA has failed to fulfill during the last three years as California’s State Water Resources  
 8 Control Board (“SWRCB” or “Board”) has issued 14 orders revising more than two dozen water  
 9 quality standards in the San Francisco Bay/Sacramento-San Joaquin Delta estuary (“Bay-Delta”),  
 10 allowing water quality to deteriorate and leading to catastrophic population declines in fish species  
 11 that these water quality standards are designed to protect.

12 EPA concedes that “if the [SWRCB] Orders [challenged by Plaintiffs] constitute revisions to  
 13 the State’s water quality standards, EPA has a statutory duty to review and act on those State  
 14 decisions.” Defs.’ Mtn. to Dismiss Pls.’ Compl. (“MTD”) 9-10 (Doc. 38).<sup>1</sup> Yet EPA’s motion to  
 15 dismiss side steps the key question of what actions constitute revisions to state water quality  
 16 standards, ignoring its own regulatory guidance (cited in Plaintiffs’ Complaint), which recognizes  
 17 EPA’s obligation to exercise federal oversight and review state action when a state order “*has the*  
 18 *effect of changing an existing water quality standard.*” Poole Decl. Ex. A at 6 (EPA Water Quality  
 19 Standards Handbook 6, EPA 820-B-14-008 (Sept. 2014)) (“EPA Handbook”) (emphasis added).<sup>2</sup>  
 20 EPA would hide from its own guidance and the “effects” test because there can be no doubt that the  
 21 Board’s orders have the effect of changing the water quality standards for the Bay Delta and thus are  
 22 revisions subject to mandatory EPA review.

23 In California, SWRCB promulgates water quality standards and gives effect to those  
 24 standards through SWRCB water rights permitting decisions. *See U.S. v. State Water Resources*  
 25 *Control Bd.*, 182 Cal.App.3d 82, 111 (1986) (“*U.S. v. SWRCB*”) (SWRCB issued water right  
 26

27 <sup>1</sup> All pincites to docket entries use CM/ECF pagination, not the documents’ internal pagination.

28 <sup>2</sup> Each exhibit cited herein is referenced in Plaintiffs’ Complaint, Doc. 1, or is subject to judicial notice.

1 decision “to maintain the water quality standards set in [water quality control plan]”). For the Bay-  
2 Delta, SWRCB has allocated primary responsibility for maintaining water quality standards to the  
3 U.S. Bureau of Reclamation (“Reclamation”) and the State Department of Water Resources  
4 (“DWR”) in Water Right Decision 1641 (“D-1641”). There is no dispute that the challenged orders  
5 expressly modified the water quality standards set forth in D-1641 and “did not provide for full  
6 attainment of the [Bay-Delta Plan’s] water quality objectives.” MTD 18; *see also* Compl. ¶¶6-7, 9.  
7 Accordingly, and under EPA’s own guidance, SWRCB’s orders were revisions to the water quality  
8 standards and subject to EPA review.

9       Having ignored the key question of the effect of the SWRCB orders on Bay-Delta water  
10 quality standards, EPA’s motion instead makes a number of irrelevant and meritless arguments.  
11 EPA argues that it, as well as the Court, is bound by California’s assessment that it need not submit  
12 the challenged SWRCB orders to EPA for review. But that is clearly not the law. The CWA does  
13 not permit a state to circumvent federal oversight by simply choosing not to submit changes to water  
14 quality standards to EPA. *See Friends of Merrymeeting Bay v. Olsen*, 839 F.Supp.2d 366, 375 (D.  
15 Me. 2012) (“The EPA is under an obligation to review a law that changes a water quality standard  
16 regardless of whether a state presents it for review.”). Nor does the CWA permit a state to enact  
17 revisions to water quality standards by simply labeling those revisions as something other than  
18 revisions. *See, e.g., Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070,  
19 1080 (11th Cir. 2004) (“*FPIRG*”) (despite Florida’s assertions to the contrary, state regulation had  
20 effect of changing water quality standards and was subject to review).

21       EPA also erroneously argues that Plaintiffs are seeking to expand EPA’s oversight duties or  
22 that the review Plaintiffs seek falls outside EPA’s purview, but Plaintiffs seek only to require EPA to  
23 comply with its admitted mandatory duty to review revisions to state water quality standards by  
24 applying the effects test established by EPA’s own regulatory guidance. EPA’s refusal to do so  
25 violates the CWA.

26       Finally, there is no basis for EPA’s mootness defense because its failure to review SWRCB’s  
27 revisions is certainly “capable of repetition, yet evading review.” SWRCB’s repeated modification  
28 of water quality standards, paired with EPA’s ongoing insistence that it has no obligation to review

1 such revisions, establishes a reasonable expectation that the dispute will recur.

## 2 **STATUTORY AND REGULATORY BACKGROUND**

3 Congress declared that the goal of the CWA is “to restore and maintain the chemical,  
4 physical, and biological integrity of the Nation’s waters” and to attain “water quality which provides  
5 for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. §1251(a), (a)(2).

6 Under the CWA, federal and state governments share responsibility for meeting that goal. *FPIRG*,  
7 386 F.3d at 1080. At issue in this case is EPA’s responsibility to review state revisions to water  
8 quality standards. 33 U.S.C. §1313(c)(2)(A), (c)(3) – (c)(4).

9 States must include three core components in their water quality standards: the “designated  
10 uses” of waterbodies; water quality criteria (in state parlance, “water quality objectives”) sufficient  
11 to protect the designated uses; and an anti-degradation policy to prevent water quality from  
12 worsening. *See* 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. §131.6(a), (c) – (d). As to the first two  
13 components, EPA has explained that “[d]esignated uses establish the environmental objectives for a  
14 water body and water quality criteria define the minimum conditions necessary to achieve those  
15 environmental objectives.” *Water Quality Standards Reg. Revisions*, 80 Fed. Reg. 51020-01, 51021  
16 (Aug. 21, 2015).

17 Although the CWA allows states to adopt their own water quality standards, Congress  
18 established a system of mandatory federal oversight to ensure that those standards meet the  
19 minimum requirements of the CWA. The CWA directs in no uncertain terms that “[w]henver the  
20 State revises or adopts a new [water quality] standard, such revised or new standard *shall be*  
21 submitted to the Administrator” of EPA. 33 U.S.C. §1313(c)(2)(A) (emphasis added). EPA has an  
22 affirmative duty to review any new or revised standard regardless of whether the state submits it.  
23 *FPIRG*, 386 F.3d at 1073; *Friends of Merrymeeting Bay*, 839 F.Supp.2d at 375; *see also* MTD at 9-  
24 10 (conceding “statutory duty to review and act on” state decisions to revise state water quality  
25 standards); EPA Handbook 4 n.2 (“[T]he EPA’s authority and duty to approve or disapprove a new  
26 or revised [water quality standard] is not dependent upon whether the provision was submitted to the  
27 EPA for review.”).

28 In its review, EPA must determine whether the new or revised standards comply with the

1 requirements of the CWA and its implementing regulations including, *inter alia*, whether new or  
 2 revised criteria sufficiently protect designated uses. 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. §§131.5,  
 3 131.6, 131.11, 131.21. If a new or revised standard meets the requirements, EPA must approve it.  
 4 40 C.F.R. §131.5(b). If it does not, EPA must disapprove it and, unless the state timely cures the  
 5 defect, promulgate a federal water quality standard that meets the CWA’s strictures. 33 U.S.C.  
 6 §1313(c)(4); 40 C.F.R. §131.5(b). An existing water quality standard “remains the applicable  
 7 standard until EPA approves a change, deletion, or addition to that water quality standard, or until  
 8 EPA promulgates a more stringent water quality standard.” 40 C.F.R. §131.21(e); *FPIRG*, 386 F.3d  
 9 at 1074.

10 The CWA’s citizen suit provision authorizes suit against “the Administrator where there is  
 11 alleged a failure of the Administrator to perform such act or duty under this chapter which is not  
 12 discretionary with the Administrator,” 33 U.S.C. §1365(a)(2), such as those duties set forth in 33  
 13 U.S.C. §1313(c). *FPIRG*, 386 F.3d at 1080.

#### 14 **FACTUAL AND PROCEDURAL BACKGROUND**

15 This case concerns water quality protections for California’s 1600-square-mile Bay-Delta  
 16 estuary, where the Sacramento and San Joaquin Rivers merge to form an inland delta and then enter  
 17 San Francisco Bay. The Bay-Delta provides habitat for more than 120 fish species, many of which  
 18 are listed as endangered or threatened under the Federal and State Endangered Species Acts. Compl.  
 19 ¶¶3, 25; *see* 16 U.S.C. §1533; Cal. Fish & Game Code §§2050, *et seq.*; *Water Quality Standards for*  
 20 *Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay*, 60 Fed. Reg.  
 21 4664-01, 4664-65 (Jan. 25, 1995). The Bay-Delta’s water quality directly affects the quality of fish  
 22 habitat and the survival of native fish.

23 Anadromous fish species that migrate through the Delta to reach fresh and salt water habitats  
 24 depend on minimum freshwater flows to provide navigational orientation cues. Their migration is  
 25 impaired when those flows are decreased and the Delta Cross Channel (“DCC”) gates are opened to  
 26 divert Sacramento River water from its natural westerly trajectory to a southerly course towards the  
 27 Central Valley Project (“CVP”) and State Water Project (“SWP”) pumps. Compl. ¶¶27, 37, 41.  
 28 When this occurs, juvenile Chinook salmon and steelhead are pulled off their migratory path into the

1 central and south Delta where they suffer increased mortality from increased predation, entrapment  
2 in the pumping screens, and other hazards. *Id.* ¶¶26-28.

3 Pelagic, or open-water, fish species that live most of their lives in the Delta also suffer  
4 adverse impacts from poor water quality. Species such as the Delta smelt spawn in an area known as  
5 the “low-salinity zone” at the saltwater-freshwater interface in the Bay-Delta. *Id.* ¶¶29-30, 36. As  
6 flows decrease or exports increase, the low-salinity zone shifts upstream from open-area large, food-  
7 rich habitats, to narrow, deep-river channels that are less productive and where fish are more  
8 susceptible to predation. *Id.* Delta smelt are also killed in large numbers when flows and exports  
9 draw them into the CVP and SWP pumping facilities. *Id.* ¶¶29-30, 38.

10 SWRCB is charged with establishing “statewide policy for water quality control” and  
11 formulating water quality control plans. *City of Arcadia v. SWRCB*, 191 Cal.App.4th 156, 164  
12 (2010); Cal. Water Code §§13000, 13160, 13170, 13240; *see also U.S. v. SWRCB*, 182 Cal.App.3d  
13 at 109-10. In 1995, SWRCB issued water quality standards for the Bay-Delta as part of a water  
14 quality control plan (“1995 Plan”). Compl. ¶31. The 1995 Plan designates multiple uses for the  
15 Bay-Delta including, *inter alia*, “estuarine habitat,” “fish migration,” “fish spawning,” and  
16 “preservation of rare and endangered species.” 60 Fed. Reg. at 4665. It revised or issued new water  
17 quality criteria for salinity, flows, exports, dissolved oxygen, and DCC gate operation. Compl. ¶31.  
18 These criteria anticipated drought scenarios by varying (and generally weakening) species  
19 protections in drier years. *Id.* For instance, the Net Delta Outflow Index (“NDOI”) criterion, which  
20 sets flow requirements in the Delta, is a minimum monthly average of 8,000 cubic feet per second  
21 (“cfs”) in July in wet and above-normal years, but a far less protective 4,000 cfs in critically dry  
22 years. *Id.* ¶¶35-36; Poole Decl. Ex. B (1995 Bay-Delta Plan, Table 3). In this way, SWRCB  
23 designed flexible criteria to adapt to different hydrological circumstances, and EPA reviewed and  
24 approved the Plan with those flexible criteria built into it. Compl. ¶31.

25 In 2006, SWRCB issued the Water Quality Control Plan for the San Francisco  
26 Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta Plan” or “Plan”), which updated the 1995  
27 Plan without amending the water quality standards. *Id.* ¶33. Additionally, SWRCB has periodically  
28 approved updates to the 1994 Water Quality Control Plan for the Sacramento River Basin and San

1 Joaquin River Basin (“Central Valley Plan”), which contains dissolved oxygen criteria for the area  
 2 below Goodwin Dam on the San Joaquin River – criteria which affect anadromous fish species’  
 3 ability to survive the migration between the Delta and their upriver spawning grounds. *Id.* ¶¶4-5, 40  
 4 (the water quality standards in the Bay-Delta Plan and the dissolved oxygen criteria in the Central  
 5 Valley Plan are referred to herein collectively as the “Bay-Delta water quality standards”).

6 After adopting the Bay-Delta water quality standards in 1995, SWRCB allocated primary  
 7 responsibility for meeting several of the standards to Reclamation and DWR, as the owners and  
 8 operators of the dams, reservoirs, canals, and pumps in the CVP and SWP that convey water through  
 9 the Delta. *Id.* ¶¶5, 32. SWRCB confirmed that allocation of responsibility in its 1999 decision  
 10 regarding “Implementation of Water Quality Objectives” for the Bay-Delta known as D-1641. *Id.*  
 11 The water quality criteria of D-1641 are identical to the criteria of the Bay-Delta Plan, and  
 12 Reclamation and DWR commit to maintaining those criteria as a condition of their licenses and  
 13 permits.<sup>3</sup> *Id.* ¶¶5, 32-33; *compare* Poole Decl. Ex. B, tables 2, 3 *with id.* Ex. C, tables 2, 3.

14 On January 17, 2014, Governor Brown issued the first in a series of executive orders in  
 15 response to California’s current drought. Among other things, the Governor’s executive actions  
 16 suspended California Water Code §13247. Exec. Dep’t, State of Cal., Drought State of Emergency  
 17 ¶9 (Jan. 17, 2014); *see also* Procl. Continuing Emergency ¶20 (Apr. 25, 2014); Exec. Order B-28-14  
 18 (Dec. 22, 2014); *id.* Exec. Order B-29-15 (Apr. 1, 2015). Water Code §13247 is a state law  
 19 requiring state agencies to comply with SWRCB’s adopted water quality objectives, mandating that  
 20 “State offices, departments, and boards, in carrying out activities which may affect water quality,  
 21 shall comply with water quality control plans approved or adopted by the state board unless  
 22 otherwise directed or authorized by statute, in which case they shall indicate to the regional boards in  
 23 writing their authority for not complying with such plans.” Cal. Water Code §13247. On November  
 24 13, 2015, Governor Brown suspended Section 13247 indefinitely. Exec. Order B-36-15. Governor  
 25 Brown’s executive actions did not modify the water quality standards or D-1641.

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27  
 28 <sup>3</sup> Along with D-1641, SWRCB adopted Water Rights Decision 1422 (“D-1422”) to assign  
 responsibility for meeting dissolved oxygen objectives in the Central Valley Plan. Compl. ¶5.

1 Since the Governor waived the state-law requirement for state agencies to comply with water  
 2 quality objectives, SWRCB has issued 14 orders weakening or waiving adopted Bay-Delta water  
 3 quality criteria by revising over two dozen water quality criteria in D-1641. Compl. ¶¶43-49, 51.  
 4 Specifically, on January 31, April 11, May 2, and October 8, 2014; on February 3, March 5, April 6,  
 5 and July 3, 2015; and on April 19, 2016, SWRCB revised flow, export, salinity, or DCC gate closure  
 6 criteria. *Id.* Additionally, on August 4, 2015, SWRCB approved changes to the dissolved oxygen  
 7 criterion in D-1641 and D-1422. *Id.* ¶50. The changes indisputably reduced Delta inflow and  
 8 outflow, allowed salinity to intrude further upstream, opened gates designed to prevent migrating  
 9 fish from straying into the central Delta, and made numerous other changes that are not permitted  
 10 under the Bay-Delta water quality control plan approved by EPA. *Id.* ¶¶26-30, 43-53.

11 As SWRCB weakened the operative water quality criteria, fish populations that the Bay-  
 12 Delta water quality standards are designed to protect suffered severe declines. For instance, there  
 13 has been a near-total collapse of the 2014 and 2015 generations of winter-run Chinook that migrate  
 14 through the Delta. *Id.* ¶55. And species such as the Delta smelt are at their lowest abundance in  
 15 history as a result of the poor water quality. *Id.* ¶56.

## 16 ARGUMENT

### 17 I. Legal Standard

18 Defendants move to dismiss Plaintiffs' claim for lack of subject matter jurisdiction pursuant  
 19 to Federal Rule of Civil Procedure ("Rule") 12(b)(1) or, in the alternative, for failure to state a claim  
 20 pursuant to Rule 12(b)(6). MTD 21-22. The pleading standard for a motion to dismiss under Rules  
 21 12(b)(1) and 12(b)(6) are the same. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

22 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint, and "all  
 23 allegations of material fact" in the complaint "are taken as true and construed in the light most  
 24 favorable to the non-moving party." *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). "A  
 25 claim may be dismissed only if it appears beyond all doubt that the plaintiff can prove no set of facts  
 26 in support of his claim which would entitle him to relief." *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th  
 27 Cir. 2011) (internal quotations omitted). Under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), so long as a  
 28 plaintiff has pleaded sufficient factual content to "allow[] the court to draw the reasonable inference

1 that the defendant is liable for the misconduct alleged[,]” a motion to dismiss should be denied. *Id.*  
 2 at 678 (internal quotations omitted).

3 *Iqbal*’s standard also applies to motions to dismiss under Rule 12(b)(1). *Leite*, 749 F.3d at  
 4 1121. When based on a facial attack, as here, MTD 21, the court must determine whether the  
 5 allegations are sufficient to invoke jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,  
 6 1039 (9th Cir. 2004); *cf. Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599, 603 (11th Cir.  
 7 1997) (finding “issue of fact” precluded dismissal for lack of subject matter jurisdiction where  
 8 district court had not “decide[d] independently the effect of the [challenged law] on existing state  
 9 standards”). A plaintiff need only provide “a short and plain statement of the grounds for the court’s  
 10 jurisdiction” and sufficient supporting factual allegations to survive a motion to dismiss for lack of  
 11 subject matter jurisdiction. Fed. R. Civ. P. 8(a); *Leite*, 749 F.3d at 1121.

12 **II. EPA Has Failed to Carry Out Its Non-Discretionary Duty to Review and Take**  
 13 **Appropriate Action in Response to Revisions of the Bay-Delta Water Quality**  
 14 **Standards.**

15 **A. Applying EPA’s own guidance, SWRCB’s orders in 2014, 2015, and 2016 revised**  
 16 **water quality standards and triggered EPA’s federal oversight duty.**

17 EPA asserts that the agency’s interpretation of the CWA and its implementing regulations is  
 18 entitled to deference, but, shockingly, completely fails to mention EPA’s own regulatory guidance  
 19 that is directly on point. That guidance, set forth in the EPA Handbook, contradicts EPA’s litigation  
 20 position and makes clear that the challenged SWRCB orders triggered EPA’s non-discretionary duty  
 21 to review and take appropriate action before SWRCB’s orders were implemented. EPA Handbook  
 22 at 4-6.

23 Section 303(c)(2)(A) of the CWA requires that “[w]henver the State revises or adopts a new  
 24 [water quality] standard, such revised or new standard shall be submitted to the Administrator,” and  
 25 reviewed for compliance with the CWA. 33 U.S.C. §1313(c)(2)(A). The parties agree that this clear  
 26 statutory duty is non-discretionary. MTD 9-10.

27 EPA’s regulations and regulatory guidance define the scope of activities that, in the agency’s  
 28 view, trigger EPA’s non-discretionary duty by constituting revisions to water quality standards. In  
 40 C.F.R. Part 131, EPA has adopted regulations for its section 303(c) review of water quality

standards, including new or revised standards. 40 C.F.R §§131.3(i), 131.5, 131.6, 131.21. EPA’s regulations define “water quality standards” but are silent on when a water quality standard is “new or revised” such that it triggers the CWA’s review requirements under Section 303(c)(2)(A). But EPA’s Handbook provides clarity. By its own terms, EPA’s “Handbook serves as guidance for implementing 40 CFR Part 131.” Where an implementing regulation is silent, courts defer to the implementing agency’s interpretation of its own regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Pine Creek Valley Watershed Ass’n v. EPA*, 137 F.Supp.3d 767, 772 (E.D. Pa. 2015) (cited by EPA; applying *Auer* deference to EPA’s regulatory interpretation of phrase “revised or new water quality standard”).<sup>4</sup>

Chapter 1.5.1 of the EPA Handbook sets forth EPA’s interpretation on the precise question at issue in this case, describing a four-element test EPA applies to “evaluat[e] whether a provision constitutes a new or revised [water quality standard (“WQS”)] that the EPA has the authority and duty to review and approve or disapprove under Section 303(c)(3)”:

- (1) Is it a legally binding provision adopted or established pursuant to state or tribal law?...
- (2) Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?...
- (3) Does the provision express or establish the desired condition (e.g. designated uses, criteria) or instream level of protection (e.g., anti-degradation requirements) for waters of the United States immediately or mandate it will be expressed or established for such waters in the future?...

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<sup>4</sup> EPA’s regulatory interpretations in its Water Quality Standards Handbook was not at issue in *Pine Creek*, and the court there deferred to EPA’s litigation position. 137 F.Supp.3d at 774-75. Here, EPA cannot argue that the Court should defer to its litigation position, which directly conflicts with its currently effective guidance for interpreting water quality standards. The Supreme Court has explained that an agency’s interpretation of its own regulations *during litigation* is not accorded deference if it is “plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.” *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011) (internal quotations and alterations omitted). An agency’s litigation position does not “reflect the agency’s fair and considered judgment” when it “conflicts with a prior interpretation.” *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012). Similarly, no deference is owed an agency’s litigation position where it is a “post hoc rationalization,” as EPA’s position is here. *See Auer*, 519 U.S. at 462; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”); *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962) (“The courts may not accept appellate counsel’s *post hoc* rationalizations for agency [orders].”).

1 (4) Does the provision establish a new WQS or revise an existing WQS? . . . A provision  
 2 that establishes a new WQS or has the effect of changing an existing WQS would meet  
 3 this consideration. In contrast, a provision that simply implements a WQS without  
 4 revising it would not constitute a new or revised WQS.

5 EPA Handbook 1.5.1 (emphasis added).

6 SWRCB's orders meet each of these four elements and therefore trigger EPA's  
 7 nondiscretionary duty to review and take appropriate action.

8 **1. SWRCB's orders are "legally binding provisions adopted**  
 9 **pursuant to state . . . law."**

10 The first element of EPA's test, that SWRCB's orders were issued pursuant to state law and  
 11 have legally binding effect, is easily met. Since 2014, the Board has acted pursuant to California  
 12 Water Code §§1435-1441 to issue 14 orders amending D-1641. Compl. ¶¶64. The Board's January  
 13 31, 2014 order, for instance, specifies that it was issued in compliance with Water Code §1435.  
 14 Poole Decl. Ex. G at 13. The order states that "[f]or a period not to exceed 180 days or until such  
 15 time as this Order is amended or rescinded . . . the requirements of D-1641 for DWR and  
 16 Reclamation to meet specified water quality objectives are amended," and then lists the specific  
 17 water quality criteria subject to the order. *Id.* at 13-14. The order is signed and dated by the Board's  
 18 Executive Director, to whom the Board delegated authority to approve such orders. *Id.* at 7, 15  
 19 (citing State Wat. Bd. Res. 2012-0029, ¶¶2.2, 4.4.1 (June 5, 2012)).

20 **2. SWRCB's orders "address water quality criteria to protect designated**  
 21 **uses for waters of the United States."**

22 The second element of EPA's test requires that the challenged orders "address" at least one  
 23 of the three core components of water quality standards: designated uses, water quality criteria, or  
 24 antidegradation requirements. EPA Handbook 1.5.1. Each of the SWRCB orders address the water  
 25 quality criteria in D-1641, which are identical to those in the Bay-Delta Plan. Compl. ¶¶43-51. For  
 26 example, D-1641 and the Bay-Delta Plan specify that in dry years, depending on the location of the  
 27 low salinity zone, the base flow criterion in the San Joaquin River from May 16 – June 30 is a  
 28 minimum monthly average of either 1,420 or 2,280 cfs. *Id.* ¶51. In 2016, the base flow criterion  
 under the Bay-Delta Plan and D-1641 was 2,280 cfs. *Id.* SWRCB's April 19, 2016 order, however,  
 revised the base flow criterion downward to 1,000 cfs from May 15 through May 31, and to 500 cfs

1 for the month of June. *Id.*

2 SWRCB's orders thus satisfy the second element of EPA's test: they address water quality  
3 criteria, one of the three core components of water quality standards. EPA Handbook 1.5.1.

4 **3. SWRCB's orders "express or establish a desired condition" both**  
5 **"immediately" and "in the future."**

6 The third element of EPA's test requires that the challenged orders "express or establish the  
7 desired condition," such as water quality criteria, either "immediately" or by mandating that the  
8 condition will be expressed or established "in the future." EPA Handbook 1.5.1. The orders meet  
9 this requirement. Compl. ¶¶43-51. The July 3, 2015 order, for instance, was immediately effective  
10 because it expressed and established a desired condition for that month – specifically, a change in  
11 Delta outflow, measured as NDOI, from a minimum monthly average for July of 4,000 cfs to 3,000  
12 cfs. *Id.* ¶49; Poole Decl. Ex. H at 26. And, in the example noted above, *supra*, section II.A.2,  
13 SWRCB's April 19, 2016 order mandated that the water quality criteria for flows on the San Joaquin  
14 River would be established for a future period covering May 15 through June 30, 2016.

15 SWRCB's orders thus satisfy the third element of EPA's test: they expressed or established a  
16 desired condition effective immediately, or at a specific future time. EPA Handbook 1.5.1.

17 **4. SWRCB's orders effectively "revise existing water quality standards."**

18 The fourth element of EPA's test requires that SWRCB's orders represent a new or revised  
19 water quality standard, rather than "a provision that simply implements a water quality standard  
20 without revising it." EPA Handbook 1.5.1. The Handbook clarifies that "a provision that . . . *has*  
21 *the effect* of changing an existing [water quality standard] would meet this consideration." *Id.*  
22 (emphasis added). Several federal courts have applied the "effects test" to determine whether EPA's  
23 non-discretionary duty under Section 303(c) of the CWA has been triggered. *See, e.g., FPIRG*, 386  
24 F.3d at 1076; *Micosukee Tribe of Indians of Fla.*, 105 F.3d at 603; *Nw. Env'tl. Advocates v. EPA*,  
25 855 F.Supp.2d 1199, 1211 (D. Or. 2012). SWRCB's orders meet that test.

26 In *FPIRG*, the Florida Department of Environmental Protection ("FDEP") issued an  
27 "impaired waters rule" for the declared purpose of "interpret[ing] existing water quality criteria and  
28 evaluat[ing] attainment of established designated uses." 386 F.3d at 1075. The rule stated that "it is

1 not the intent of this chapter to establish new water quality criteria or standards,” *id.*, and that the  
2 rule only “expresses how the State implements its water quality standards,” *id.* at 1076 n.6 (internal  
3 alterations omitted). Plaintiffs in *FPIRG* argued that EPA had a non-discretionary duty to review the  
4 rule under Section 303(c) of the CWA because it “ha[d] the effect of modifying the existing water  
5 quality standards” as it allowed “multiple exceedances [of water quality criteria] to occur without  
6 triggering classification of a waterbody as impaired.” *Id.* at 1076.

7         The Eleventh Circuit reversed the district court’s holding that FDEP’s rule did not trigger  
8 EPA’s non-discretionary duties under Section 303(c), explaining that “Florida’s decision not to  
9 describe its own regulations as new or revised water quality standards simply cannot circumvent the  
10 purposes of the [CWA], if in *effect* the Impaired Waters Rule established new or revised standards.  
11 If it could, Florida could radically modify its water quality standards, simply disavow that a change  
12 had taken place, and the EPA could rely on Florida’s disavowal to avoid its mandatory review of the  
13 modified standards.” *Id.* at 1089. The court rejected EPA’s argument that the rule was merely an  
14 implementation mechanism setting forth techniques for measuring compliance. *Id.* at 1090. The  
15 proper inquiry, the court explained, is “whether the practical impact” of the rule is to revise the  
16 state’s water quality standards. *Id.* at 1088.

17         The court in *Northwest Environmental Advocates v. EPA*, 855 F.Supp.2d at 1209, similarly  
18 rejected EPA’s attempt to avoid its duty to review a water quality standards revision by labeling the  
19 state’s action an “implementation” decision. There, Oregon promulgated a series of regulations that  
20 exempted certain industries from complying with the state’s water quality standards. For instance,  
21 several regulations provided that if foresting, ranching, and agricultural operations used best  
22 management practices, they would not be subject to the state’s water quality criteria. *Id.* EPA  
23 argued that Oregon’s regulations did not trigger its federal oversight duties because the regulations  
24 did not revise the underlying water quality standards, but rather “merely address[ed] how the water  
25 quality standards are to be implemented.” *Id.* Rejecting EPA’s argument, the court held that the  
26 regulations triggered EPA’s nondiscretionary review duty because they were “intrinsically  
27 intertwined with the promulgated water quality standards and have the potential to supplant or, at the  
28 very least, delay the attainment of those standards.” *Id.* The court explained that it would

1 “undermine the purposes of the [Clean Water] Act,” if the EPA failed to review provisions that “may  
2 enable or disable the attainment of [water quality] criteria.” *Id.* at 1211.

3 As in *FPIRG* and *Northwest Environmental Advocates*, the proper inquiry here is whether the  
4 Board’s orders had the “practical impact” or “effect” of amending the Bay-Delta water quality  
5 standards. See *FPIRG*, 386 F.3d at 1088; *Nw. Env’tl. Advocates*, 855 F.Supp.2d at 1211. As in those  
6 cases, EPA argues that it has no duty to review SWRCB’s orders because SWRCB characterized its  
7 orders as mere implementation decisions and because the underlying Bay-Delta water quality  
8 standards have not formally been amended. See MTD 24-25. But the challenged orders clearly had  
9 the “practical impact” of modifying the Bay-Delta water quality standards by reducing Delta  
10 outflow, allowing salinity to intrude further upstream, opening gates designed to prevent migrating  
11 fish from straying into the central Delta, and making numerous other changes that would not  
12 otherwise be permitted under the Bay-Delta water quality control plan. Compl. ¶¶26-30, 43-53.

13 Moreover, SWRCB’s orders directly amend D-1641 which is “intrinsically intertwined with  
14 the promulgated water quality standards.” *Nw. Env’tl. Advocates*, 855 F.Supp.2d at 1209. D-1641  
15 contains identical water quality criteria to those in the Bay-Delta Plan, and assigns responsibility for  
16 complying with those criteria to Reclamation and DWR, which control the major water  
17 infrastructure in the Delta. Compl. ¶33. Thus, by allowing water quality to degrade below the levels  
18 permitted under adopted standards, and amending the terms of D-1641, SWRCB’s orders “supplant,  
19 or at the very least, delay the attainment of th[e] standards” in the Bay-Delta and Central Valley  
20 Plans. *Nw. Env’tl. Advocates*, 855 F.Supp.2d at 1209.

21 The reasoning of *FPIRG* and *Northwest Environmental Advocates* aligns with the purposes  
22 of the CWA. *U.S. v. City of Redwood City*, 640 F.2d 963, 968 (9th Cir. 1981) (remedial statutes  
23 must be construed liberally to accomplish their purposes); *Miccosukee Tribe*, 105 F.3d at 602  
24 (same). The purpose of the CWA is “to restore and maintain the chemical, physical, and biological  
25 integrity of the Nation’s waters” and to attain “water quality which provides for the protection and  
26 propagation of fish, shellfish, and wildlife.” 33 U.S.C. §1251(a), (a)(2). EPA’s argument  
27 undermines that purpose. As the *FPIRG* court accurately observed, it would “circumvent the  
28 purposes of the [CWA]” if EPA could allow a state to “radically modify its water quality standards,

1 [and] simply disavow that a change had taken place,” by recasting the change as something other  
2 than a revision. *FPIRG*, 386 F.3d at 1089. EPA should not be permitted to avoid its  
3 nondiscretionary federal oversight duties simply because SWRCB chose to modify its standards  
4 through revisions to the water quality objectives set forth in D-1641, which are the same as the  
5 objectives in the Bay-Delta Plan. Section 303(c) of the CWA would be useless if SWRCB could  
6 promulgate water quality standards, secure EPA approval for those standards, allocate responsibility  
7 for maintaining those standards in D-1641, and then revise D-1641 to allow operations of the CVP  
8 and SWP based on “radically modif[ied] water quality standards.” *See id.* That is what the Board  
9 has done for the last three years without federal oversight. Any reasonable construction of Section  
10 303(c) of the CWA – let alone a liberal construction, as applies here – requires that EPA review and  
11 take appropriate action in response to the Board’s orders.

12 **5. EPA does not dispute the effect of SWRCB’s orders and its arguments**  
13 **that the orders were temporary and necessitated by the drought are**  
14 **irrelevant.**

15 EPA concedes that the challenged orders conflict with existing water control standards and  
16 do not provide for “full attainment of the water quality objectives specified in the Bay-Delta Plan.”  
17 MTD 18-19. Although EPA entirely fails to apply the analysis required by its own guidance, it  
18 attempts to downplay the effects of the Board’s orders on water quality standards in two ways –  
19 insinuating that because the orders are temporary and were enacted to address a drought, their effects  
20 on existing water quality standards may be disregarded. *See, e.g.*, MTD 8, 13, 18, 25, 28. These  
21 arguments are unavailing.

22 First, there is no statutory or regulatory requirement establishing that revisions trigger EPA  
23 review only if they are permanent, and for good reason. EPA’s reasoning would allow SWRCB to  
24 effectively revise its water quality standards without federal oversight by making incremental  
25 revisions on a real-time basis, making one “temporary” change after another. Using this piecemeal  
26 approach, the water quality in the Bay-Delta, and the ecosystems and fish species that depend on it,  
27 are susceptible to “death by a thousand cuts.” In fact, that is precisely what is occurring.

28 To provide one example, SWRCB has revised the water quality criterion for the Vernalis  
spring pulse flow for three consecutive years. Compl. ¶¶44, 48, 51. The spring pulse flow is a

1 month-long surge of water released from reservoirs in the San Joaquin River system designed to  
2 stimulate and facilitate the outmigration of juvenile fish, including the fall-run Chinook and Central  
3 Valley steelhead, from their upriver spawning grounds to the ocean. *Id.* ¶37. The National Marine  
4 Fisheries Service (“NMFS”) has concluded that spring flows are a primary factor affecting salmonid  
5 survival as they migrate out of the San Joaquin River and its tributaries and through the Delta. *Id.*;  
6 Poole Decl. Ex. J at 423-26 (NMFS Biological Opinion on the Long-Term CVP/SWP Operations  
7 (June 4, 2009)). In 2014, the Board reduced the spring pulse flow objective from 3,540 cfs to 700  
8 cfs; in 2015, from 3,540 cfs to 710 cfs; and, in 2016, from 4,880 cfs to 3,000 cfs. Compl. ¶¶44, 48,  
9 51. Although pulse flow revisions were “temporary,” they have cumulatively spanned the three-  
10 year life cycle of the fall-run Chinook. During those years, abundance estimates for fall-run  
11 Chinook in the San Joaquin River have plummeted. *Id.* ¶55. SWRCB’s temporary changes  
12 therefore created conditions that could extirpate a species without EPA ever reviewing the changes.

13 State court precedent further undercuts EPA’s contention that temporary changes to D-1641  
14 do not constitute revisions to water quality standards. In *SWRCB Cases*, 136 Cal.App.4th 674, 726  
15 (2006), the Board attempted to temporarily change the Vernalis pulse flow criterion by taking what it  
16 called a “staged implementation” approach to the criterion in D-1641. The court rejected SWRCB’s  
17 characterization: “In our view, the Board’s action was a *delayed* implementation of the objective,  
18 accompanied by the immediate implementation of an alternate (albeit temporary) experimental flow  
19 regime which, by the Board’s own admission, provided for the possibility of a lesser flow than the  
20 Vernalis pulse flow objective.”<sup>5</sup> *Id.* The court concluded that by adopting a criterion in D-1641 that  
21 deviated, “even on a temporary basis,” from the criterion in the Bay-Delta Plan, SWRCB  
22 “accomplished a de facto amendment” of the criterion in the Plan. *Id.* at 734. Similarly, SWRCB’s  
23 orders in the past three years temporarily changing criteria in D-1641 are “de facto amendment[s]”  
24 of those criteria.<sup>6</sup> *See id.*

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25  
26 <sup>5</sup> The term “water quality objective” is state parlance for water quality criterion. *See* MTD 10 n.4.

27 <sup>6</sup> The court in *SWRCB Cases* determined that the amendment to the Vernalis pulse flow objective  
28 violated California Water Code §13247. *SWRCB Cases*, 136 Cal.App.4th at 730. Governor  
Brown’s executive action suspending Section 13247 may allow SWRCB to make those amendments

1 Second, that SWRCB issued its orders in response to drought conditions does not change  
 2 EPA's non-discretionary duty to review revisions to water quality standards. While drought  
 3 conditions present challenges, they are neither unexpected in California's semi-arid climate nor does  
 4 drought provide SWRCB or EPA with *carte blanche* to ignore federal law. In fact, the CWA's  
 5 implementing regulations provide mechanisms for SWRCB to respond to droughts, but SWRCB  
 6 chose not to utilize those lawful mechanisms. For instance, one regulation allows states to include  
 7 policies in their water quality standards addressing low-flow conditions during a drought, which  
 8 could conceivably include a Temporary Urgency Change process. 40 C.F.R. §131.13. In fact, the  
 9 U.S. Department of Interior ("DOI") repeatedly urged SWRCB to include provisions in the Bay-  
 10 Delta Plan allowing Reclamation to petition for modifications to D-1641 using the TUC process.  
 11 *See* Poole Decl. Ex. E (DOI, Comments regarding SWRCB's Consideration of an Amended Water  
 12 Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 5, 7, 11  
 13 (Nov. 9, 2006)). SWRCB, however, rejected that recommendation, and did not submit the TUC  
 14 process to EPA for review and approval with the Bay-Delta Plan. *See* Poole Decl. Ex. D at 11-12.

15 EPA regulations also allow the SWRCB to seek a temporary variance from water quality  
 16 standards during droughts.<sup>7</sup> EPA defines a "water quality standards variance" as "a time-limited  
 17 designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the  
 18 highest attainable condition during the term of the WQS variance." 40 C.F.R. §131.3(o). Like  
 19 revisions to water quality standards, states must submit proposed water quality standards variances  
 20 to EPA for review. 40 C.F.R. §131.14.

21 Either of these alternate routes would have afforded EPA the opportunity to place bounds on  
 22 the scope of changes that could be made to water quality standards during droughts, or require  
 23 stronger standards in non-drought years to compensate for the harsh impacts suffered by fish and  
 24 \_\_\_\_\_

25 under state law. But the Governor cannot unilaterally establish an exemption from federal statutes.  
 26 EPA was thus required to review and take appropriate action in response to SWRCB's "de facto  
 amendments."

27 <sup>7</sup> EPA adopted its regulations for seeking variances from water quality standards in 2015. *See* 80  
 28 Fed. Reg. 51020. Although EPA's new variance regulation became effective on October 20, 2015,  
*id.*, SWRCB did not utilize it when it issued subsequent TUC orders, such as its order modifying the  
 Vernalis flow objectives on April 19, 2016. *See* Compl. ¶51.

1 wildlife in drought years, or otherwise satisfy its statutory obligation to ensure that state water  
2 quality standards comply with the minimum requirements of the CWA.

3 While it is certainly up to the state and SWRCB to choose how to respond to drought,  
4 SWRCB's failure to utilize regulatory mechanisms that would have ensured the requisite EPA  
5 review does not eliminate EPA's obligation to review and approve revisions to water quality  
6 standards before SWRCB implements them. 40 C.F.R. §131.21(e); *see also FPIRG*, 386 F.3d at  
7 1074. EPA's failure to do so violated Section 303(c) of the CWA.

8 **B. There is no basis for EPA's arguments that the CWA does not impose a duty to**  
9 **review SWRCB's orders revising water quality standards.**

10 **1. Section 303(c) of the CWA clearly requires EPA to review revisions to**  
11 **water quality standards.**

12 EPA argues that it has no duty to review SWRCB's orders modifying the Bay-Delta water  
13 quality standards because the CWA does not establish a clear duty to act. MTD 24-25. However,  
14 Section 303(c) of the CWA, 33 U.S.C. §1313(c)(2)(A) – (c)(4), includes a “specific, unequivocal  
15 command,” requiring that it review and take appropriate action when a state revises its water quality  
16 standards. *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). That statutory  
17 command satisfies the “clear statement rule.” *See id.*

18 EPA's contention that the CWA only establishes a mandatory duty to review and take  
19 appropriate action when states make “bona fide” revisions to the actual text of water quality  
20 standards, boils down to an assertion that EPA has no duty to review changes that have the effect of  
21 revising water quality standards. MTD 24 (arguing no duty since “Water Board's TUCP Orders ‘did  
22 not amend the text of the Bay-Delta and Central Valley Plans themselves.’”). But that litigation  
23 position is clearly contrary to its own regulatory guidance. *See supra* II.A; EPA Handbook Ch.  
24 1.5.1. EPA cannot contend that it was unable to discern a mandatory duty to review state orders that  
25 have the effect of changing existing water quality standards, or that such a duty is somehow at odds  
26 with the CWA, given EPA's own regulatory guidance recognizing just such a duty.

27 EPA's position here is also contrary to caselaw, *see supra* II.A.4, and positions taken by EPA  
28 in other litigation. *See Florida Clean Water Network, Inc. v. U.S. EPA*, Case No. 4:09cv165, 2012  
WL 1072216, \*3 (N.D. Fla. Mar. 30, 2012) (EPA asserted that Florida regulations “affect[ing]

1 attainment decisions made by the State and that define, change, or establish the level of protection to  
2 be applied in those attainment decisions, affect[ed] existing standards” and thus “constitute new or  
3 revised water quality standards”); *see also Pine Creek*, 137 F.Supp.3d at 776 (in addressing  
4 “whether the EPA has a duty to review revisions to the standards’ component parts, even when those  
5 parts are not packaged in a way to meet the definition of a water quality standard”, court notes that  
6 “[t]he EPA’s position pretty clearly dispenses with the idea that something must actually be a water  
7 quality standard to trigger EPA review.”).

8 **2. Plaintiffs’ position does not expand EPA’s duties under the CWA or**  
9 **conflict with states’ primary role in setting water quality standards.**

10 Plaintiffs do not attempt, as EPA argues, to expand the scope of EPA’s duties under the  
11 CWA or to infringe upon the states’ primary role in setting water quality standards. Rather,  
12 Plaintiffs seek to preserve the cooperative federalism that allows states to establish and revise water  
13 quality standards, subject to federal oversight.

14 EPA’s statement that “Plaintiffs aver [that] EPA has [a] nondiscretionary duty to review  
15 [SWRCB’s orders], deem them illegal, and presumably disapprove them,” MTD 24,  
16 mischaracterizes Plaintiffs’ allegations. While Plaintiffs argue that EPA must review SWRCB’s  
17 orders revising water quality standards, Plaintiffs do not allege that EPA must exercise its discretion  
18 in any particular manner. Plaintiffs argue only that EPA has a duty to conduct a review and *either*  
19 approve or disapprove the revisions. EPA concedes that it has such a duty. MTD 9-10.

20 The lone case that EPA cites for support, *American Wildlands v. Browner*, 260 F.3d 1192  
21 (10th Cir. 2001), is not to the contrary. There, the court simply explained that “*States* have the  
22 primary role, under § 303 of the CWA (33 U.S.C. § 1313), in establishing water quality standards.  
23 EPA’s sole function, in this respect, is to review those standards for approval.” *Id.* Here, Plaintiffs  
24 argue that EPA must carry out its “sole function,” and nothing more. *See id.*

25 **3. SWRCB’s orders “fall within the purview” of the CWA.**

26 EPA also lacks basis for its red herring arguments that SWRCB’s orders somehow do not  
27 “fall within the purview” of the CWA. MTD 26-28.

1 First, EPA asserts that SWRCB did not need permits under Section 402 of the CWA, 33  
2 U.S.C. §1311, to issue its orders because Section 402 applies only to point source pollution, not  
3 non-point source pollution. MTD 26 (citing *Ore. Natural Res. Council v. U.S. Forest Serv.*, 834  
4 F.2d 842 (9th Cir. 1987)). But Plaintiffs do not argue that EPA’s Section 402 permitting authority is  
5 at issue. Plaintiffs’ claim addresses EPA’s duty under Section 303(c) to review revisions to water  
6 quality standards. Compl. ¶¶43-51. The Court should thus ignore EPA’s strawman argument.

7 Next, EPA contends that, because SWRCB’s orders were not issued under Section 402, they  
8 “are not of a type that EPA has authority to overturn under the CWA,” and that, by reviewing them,  
9 EPA would infringe on states’ authority to regulate compliance with water quality standards. MTD  
10 27. Relatedly, EPA asserts that Plaintiffs’ argument would require that EPA “review and overturn  
11 any state decision bearing on the attainment of water quality standards.” *Id.*

12 These arguments simply ignore EPA’s clear duty under section 303(c) of the CWA. The  
13 court in *Northwest Environmental Advocates* rejected a similar argument by EPA that requiring  
14 review of provisions that exempted certain industries from Oregon’s water quality standards would  
15 infringe on state authority to regulate non-point source pollution. 855 F.Supp.2d at 1211-13. The  
16 court explained that the disputed regulations were “so bound up with Oregon’s water quality  
17 standards” that EPA was required to determine whether they would “supplant, delay the  
18 implementation of, or in some other way undermine the application of Oregon’s standards.” *Id.* at  
19 1212. The court clarified, though, that its holding did not require EPA to “decide which method of  
20 regulating [water quality standards] is best.” *Id.* at 1213. “All that EPA is required to do,” the court  
21 concluded, “is decide if Oregon’s nonpoint source provisions are lawful.” *Id.*

22 Similarly here, Plaintiffs do not argue that EPA should regulate or enforce compliance with  
23 water quality standards, but rather decide whether SWRCB’s orders “are lawful” – that is whether  
24 they comply with the CWA and its implementing regulations. *See id.*; 33 U.S.C. §1313(c); 40  
25 C.F.R. §§131.5, 131.6, 131.11(a)(1), 131.21. Like the provisions in *Northwest Environmental*  
26 *Advocates*, D-1641 is “bound up with” the water quality standards in the Bay Delta. *See* 855  
27 F.Supp.2d at 1212. Because the water quality criteria in D-1641 are identical to those in the Bay-  
28 Delta Plan and, without D-1641, there is no mechanism in place for meeting those criteria, there is a

1 direct relationship at issue: amending the criterion in D-1641 will necessarily “supplant, delay the  
 2 implementation of . . . or undermine the application of” the corresponding water quality criterion in  
 3 the Bay-Delta Plan. *See id.* at 1212. It is this closely bound relationship between D-1641 and the  
 4 Bay-Delta water quality standards, and the direct effect that the amendments to D-1641 have on the  
 5 Bay-Delta water quality standards, that sets this situation apart from “any state decision bearing on  
 6 the attainment of water quality standards.”<sup>8</sup> *See* MTD 27.

7 In fact, EPA has strongly suggested that it has federal oversight authority over D-1641 when  
 8 the criteria in D-1641 change the corresponding Bay-Delta water quality standards. On January 25,  
 9 2000, EPA sent a letter to SWRCB regarding “the recently-adopted Decision 1641,” stating that  
 10 “[w]e are providing our comments to you in our oversight capacity under the Federal Clean Water  
 11 Act.” Poole Decl. Ex. K (Letter from Felicia Marcus, Region IX Administrator, EPA, to James  
 12 Stubchaer, Chairman, SWRCB (Jan. 25, 2000)). EPA’s letter addressed a provision of D-1641, the  
 13 San Joaquin River Agreement (“SJRA”), which provided for flow levels that were not as stringent as  
 14 those in the Bay-Delta Plan’s water quality standards. *Id.* EPA explained that “there is [not] a  
 15 biological justification for this reduced protection, and for that reason believes that the SJRA alone  
 16 cannot be relied upon as the sole implementation mechanism for the 1995 [Plan].” *Id.* Rejecting  
 17 SWRCB’s decision to request that Reclamation supplement flows to meet the criteria in the 1995  
 18 Plan, EPA explained that “it is inappropriate to rely solely on voluntary approaches to  
 19 implementation.” *Id.* EPA concluded that “appropriate action . . . is necessary to ensure . . . a level  
 20 of protection equivalent to” the water quality standards, and that “[s]uch action is necessary not only  
 21 to implement the 1995 [Plan] adequately, but also to put in place criteria that are consistent with the  
 22 Clean Water Act.” *Id.* There is no basis for EPA to claim in this litigation that it lacks the federal  
 23 oversight authority that it claimed to have in the past.

24 Finally, EPA cites *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006),  
 25 for the proposition that “the [CWA] does not supersede, abrogate, or otherwise impair ‘the authority  
 26

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27 <sup>8</sup> To the extent that EPA argues that the relationship is not direct *enough*, or that SWRCB’s orders  
 28 amending D-1641 do not have *enough* of an effect to rise to the level of a revision requiring EPA  
 review, that is a factual issue that must be construed in Plaintiffs’ favor at this stage in the litigation.  
*See Miccosukee Tribe*, 105 F.3d at 603; *Jackson*, 84 F.3d at 1217.

1 of each state to allocate quantities of water within its jurisdiction.” MTD 28 (citing 33 U.S.C.  
 2 §1251(g)). EPA would not, however, infringe upon states’ authority to allocate water by ensuring  
 3 that it does so in compliance with the CWA. *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of*  
 4 *Ecology*, 511 U.S. 700, 719-20 (1994) (rejecting “artificial distinction” between water “quality” and  
 5 “quantity,” and explaining that while 33 U.S.C. §1251(g) “preserve[s] the authority of each State to  
 6 allocate water quantity as between users; [it does] not limit the scope of water pollution controls that  
 7 may be imposed on users who have obtained, pursuant to state law, a water allocation”).

8 Further, *Great Basin* does not stand, as EPA appears to argue, for the proposition that  
 9 SWRCB may amend D-1641 without federal oversight because Governor Brown waived California  
 10 Water Code section 13247. *See* MTD 27-28. *Great Basin* held that if a state does not set minimum  
 11 flow criteria, no certification is necessary under Section 401 of the CWA, 33 U.S.C. §1341, to  
 12 establish that the withdrawal of water from a waterbody complies with state water quality standards.  
 13 456 F.3d at 963. That holding is inapplicable to this case. First, Plaintiffs do not argue that Section  
 14 401 certification is required here. Second, SWRCB *has* adopted flow criteria for the Bay Delta and  
 15 nothing in *Great Basin* allows the Governor to unilaterally remove flow criteria from the CWA’s  
 16 coverage without federal oversight. Last, even if the Governor could somehow suspend federal  
 17 oversight of Bay-Delta flow criteria (which he cannot), SWRCB has revised water quality criteria  
 18 for salinity, dissolved oxygen, exports, and DCC gate operation, not just flow. Compl. ¶¶43-51.

19 **4. EPA’s argument that it has no obligation to review D-1641 because it has**  
 20 **no prior history reviewing D-1641 is irrelevant.**

21 EPA’s argument that it does not need to review the SWRCB’s orders amending D-1641  
 22 because it did not review D-1641 when it was issued is irrelevant. There is nothing in the CWA or its  
 23 implementing regulations providing that EPA’s duty to review revisions is tied to its prior history of  
 24 review. Nor should there be. EPA’s duty to review D-1641 arises only if D-1641, or a change to it,  
 25 effectively revises the Bay-Delta water quality standards. As discussed above, D-1641 adopts  
 26 standards identical to those approved in the Bay-Delta Water Quality Control Plan. It is the  
 27 challenged SWRCB orders that revise those standards that trigger EPA’s duty to review, regardless  
 28 of EPA’s previous review of D-1641.

1           Moreover, EPA’s argument is a fact-based one that is inappropriate for a motion to dismiss.  
 2 The court’s review is limited to the contents of the complaint, documents referenced therein, and  
 3 judicially noticeable documents. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); *see*  
 4 *also Leite*, 749 F.3d at 1121 (court “resolves a facial attack as it would a motion to dismiss under  
 5 Rule 12(b)(6)”). “[F]actual challenges to a plaintiff’s complaint have no bearing on the legal  
 6 sufficiency of the allegations.” *Lee*, 250 F.3d at 688.<sup>9</sup>

### 7 **III. Plaintiffs’ Claim is Not Moot**

8           This Court should reject EPA’s contention that Plaintiffs’ claim is moot. EPA’s “burden of  
 9 demonstrating mootness ... is a heavy one.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329  
 10 (9th Cir. 1992). Courts will not dismiss a case for mootness unless, after considering the “broad  
 11 discretion” courts have in “shaping remedies,” “there can be [no] effective relief.” *Garcia v. Lawn*,  
 12 805 F.2d 1400, 1403 (9th Cir. 1986). Even if injunctive relief is not available, the Court may grant  
 13 declaratory relief if the dispute in the case is “capable of repetition, yet evading review.” *Davis v.*  
 14 *Fed. Election Comm’n*, 554 U.S. 724, 735 (2008); *Webster v. Mesa*, 521 F.2d. 442, 443 (9th Cir.  
 15 1975). That exception to mootness applies if: “(1) the duration of the challenged action is too short  
 16 to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs  
 17 will be subjected to it again.” *Greenpeace Action*, 14 F.3d at 1329.

18           The dispute at issue in this case meets the first prong because it is “inherently limited [in]  
 19 duration,” and is “too short to be fully litigated.” *Shell Offshore, Inc. v. Greenpeace*, 709 F.3d 1281,  
 20 1287 (9th Cir. 2013). The Supreme Court has clarified that “[j]udicial review *invariably* takes more  
 21 than nine months to complete.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester*  
 22 *Cnty. v. Rowley*, 458 U.S. 176, 186 n.9 (1982) (emphasis added). And, the Ninth Circuit has held

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23  
 24 <sup>9</sup> Similarly, EPA’s argument that it has no duty to review the orders because SWRCB intended when  
 25 it issued the 1995 Plan to separate the processes of setting water quality standards and assigning  
 26 responsibility for implementing them is also an inappropriate basis for a motion to dismiss. *See*  
 27 MTD 28. SWRCB’s intent is a factual challenge that “ha[s] no bearing on the legal sufficiency of  
 28 the allegations.” *See Lee*, 250 F.3d at 688. Further, a state’s intent in taking that action is irrelevant  
 if the *effect* of the action is to revise the water quality standards. *See FPIRG*, 386 F.3d at 1089.  
 Here, the relevant question is whether SWRCB’s orders effectively revised the Bay-Delta water  
 quality standards, and SWRCB’s description of its intent in issuing the Bay-Delta Plan and D-1641  
 simply has no bearing on that inquiry.

1 that a permit lasting less than two years, *Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851,  
2 855 (9th Cir. 1999) (“ACE”), and a regulation in effect for less than one year, *Greenpeace Action*, 14  
3 F.3d at 1329–30, satisfy the durational requirement.

4 Here, EPA acknowledges that SWRCB’s orders which EPA has failed to review are “limited  
5 to no more than 180 days.” MTD 8. In fact, SWRCB’s orders are often shorter. For instance,  
6 SWRCB’s April 19, 2016 order revising criteria covering a key migratory period for Central Valley  
7 steelhead and fall-run Chinook, expired on June 30, 2016, less than 90 days after adopted. Compl.  
8 ¶¶37 & n.4; Poole Decl. Ex. I. Plaintiffs could not fully litigate a claim in such a short time span. An  
9 order lasting “no more than 180 days”, is “inherently limited [in] duration,” and thus evades review.  
10 *See Shell Offshore*, 709 F.3d at 1287.

11 The dispute in this case can also reasonably be expected to recur. Courts require that there is  
12 “some indication that the challenged conduct will be repeated.” *ACE*, 189 F.3d at 856. The  
13 possibility of recurrence need only be “reasonable,” not “probable.” *Honig v. Doe*, 484 U.S. 305,  
14 318 n.6 (1988). Past conduct is evidence of the likelihood of repetition. *Demery v. Arpaio*, 378 F.3d  
15 1020, 1027 (9th Cir. 2004); *see also Greenpeace Action*, 14 F.3d 1324, 1329-30 (two instances of  
16 disputed conduct sufficient to find reasonable expectation of recurrence); *San Luis & Delta-Mendota*  
17 *Water Auth. v. U.S. Dep’t of Interior*, 870 F.Supp.2d 943, 963 (E.D. Cal. 2012) (same). The Ninth  
18 Circuit has also explained that when an agency applies the “same rationale . . . year after year, there  
19 is a reasonable expectation that the same issue will recur in future years.” *NRDC v. Evans*, 316 F.3d  
20 904, 910 (9th Cir. 2003).

21 Here, SWRCB’s and EPA’s past conduct shows a strong likelihood, and certainly a  
22 reasonable expectation, that SWRCB’s revisions and EPA’s failure to review them will continue.  
23 First, SWRCB has issued 14 orders revising over two dozen water quality criteria during the last  
24 three years, and EPA has failed to review any of those revisions. Compl. ¶¶42-52. The Ninth  
25 Circuit has determined that two instances of repeated past conduct is enough to satisfy the standard,  
26 *see Greenpeace Action*, 14 F.3d at 1329-30, and that a dispute over an agency’s decision to reduce  
27 flow in just *one year* established a capability of repetition, *Upper Snake River Chapter of Trout*  
28 *Unlimited v. Hodel*, 921 F.2d 232, 233 n.1 (9th Cir. 1990). Here, SWRCB has reduced flow

1 requirements multiple times over the last three years, establishing a pattern or repetition. Compl.  
2 ¶¶43-49, 51.

3 Second, the conditions prompting SWRCB's actions remain in place, indicating a reasonable  
4 likelihood of recurrence. Governor Brown's executive action declaring a drought and waiving the  
5 requirement for state agencies to comply with water quality objectives will "remain in effect"  
6 indefinitely. MTD 17. EPA itself asserts that this executive action enabled SWRCB to issue its  
7 orders without violating state law. *Id.* Thus, it is likely that SWRCB will continue to issue orders  
8 revising water quality objectives for the foreseeable future.

9 Further, EPA's brief establishes that EPA has no intention of reviewing SWRCB's water  
10 quality revisions because it asserts that it has no duty to review them under the CWA. *See* MTD 24-  
11 29; *see also Env'tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 811 (D.C. Cir. 1983) (EPA's briefing  
12 position supported finding that alleged violation was capable of repetition).

13 Thus, given SWRCB's and EPA's pattern and practice over the last three years, the now-  
14 indefinite term of the Governor's enabling executive action, and EPA's stated rationale, there is not  
15 only "some indication," but a very strong indication, that SWRCB will continue to issue its revisions  
16 and that EPA will continue its ongoing lapse in federal oversight.<sup>10</sup> *See ACE*, 189 F.3d at 856.

17 Finally, courts have recognized that "the existence of a public interest in having the legality  
18 of the practices settled ... militates against a mootness conclusion." *Alaska Fish & Wildlife Fed'n &*  
19 *Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 939 (9th Cir. 1987) (internal citations and quotes  
20 omitted). Here, there is a "continuing public interest" in determining the scope of EPA's duty to  
21 maintain federal oversight over water quality revisions, particularly when they have a direct and  
22 potentially decisive effect on the health of an entire ecosystem and the survival of several fish  
23 species, as is the case here. *See Greenpeace Action*, 14 F.3d at 1330; Compl. ¶¶25-30; *cf. Friends of*

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25  
26 <sup>10</sup> There can be no dispute that Plaintiffs' interests will be affected by EPA's recurring failure to  
27 review SWRCB's orders. Compl. ¶¶16-23 (discussing each Plaintiff's continuing interest in water  
28 quality and the protection of the fish species that depend on it, and their ongoing engagement in  
relevant issues and proceedings); *see also Gorsuch*, 713 F.2d at 811 (explaining that environmental  
organization's interests would be harmed by EPA's recurring failure to conduct permitting process  
for waste incinerators).

1 *the Earth v. U.S. Navy*, 841 F.2d 927, 933 (9th Cir. 1988) (explaining that “the public interest tip[s]  
2 heavily in favor of endangered species”).

3 Plaintiffs’ case is not moot because the dispute is capable of repetition, yet evading review,  
4 and the public interest at stake favors resolving that dispute.

5 **CONCLUSION**

6 For the reasons stated above, the Court should deny EPA’s Motion to Dismiss.

7 Dated: August 19, 2016

8 Respectfully submitted,

9 /s/ Katherine Poole

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