



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board



## Division of Water Rights

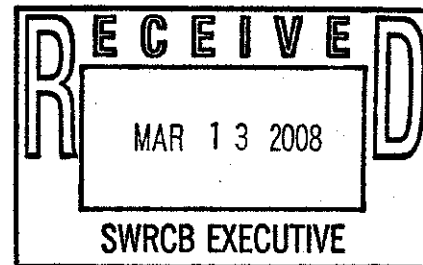
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Arnold Schwarzenegger  
Governor

3/18/08 Bd. Mtg. Item 10  
NSJWCD – CDO/ACL  
Deadline: 3/13/08 by 5 p.m.

March 13, 2008

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor [95814]  
P.O. Box 100  
Sacramento, CA 95812-0100



Dear Ms. Townsend:

COMMENT LETTER—3/18/08 BOARD MEETING, ITEM 10, CONSIDERATION OF A PROPOSED ORDER IN WHICH THE STATE WATER BOARD ISSUES A CEASE AND DESIST ORDER AND ASSESSES AN ADMINISTRATIVE CIVIL LIABILITY AGAINST NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT FOR THE UNAUTHORIZED DIVERSION OF WATER IN SAN JOAQUIN COUNTY

The Division of Water Rights Prosecution Team (Prosecution Team) supports the issuance of a cease and desist order and assessment of administrative civil liability in the amount of \$66,400 against North San Joaquin Water Conservation District (NSJWCD). The Prosecution Team would, however, request a modification to the draft order released February 26, 2008.

The Prosecution Team vigorously supports the State Water Resources Control Board's (State Water Board) determination in section 7.1 of the draft order that violation of a term or condition of a permit is a trespass pursuant to Water Code section 1052 where the term provides that no water may be diverted under the license until the condition or term is met. This determination by the State Water Board comports with the intent of the Water Code and is absolutely essential to continued effective enforcement of water rights by the Division of Water Rights (Division).

The draft order would impose civil liability in the amount of \$66,400. The Prosecution Team believes that liability in a greater amount would be appropriate, but also recognizes that the State Water Board has broad discretion in setting the amount of liability. Of greater concern is the proposal to suspend all but \$20,000 of the liability, a provision that effectively and severely reduces liability. The Prosecution Team urges the State Water Board to modify the draft order to remove the provisions suspending liability.

### I. Liability Should Be At Least \$66,400.

The record of these proceedings strongly supports liability in an amount not less than the \$66,400 proposed, and would support a much higher liability.

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As noted on page 17 of the draft order, the violations at issue stretch back a decade and a half. During that time, the only action that NSJWCD took on the matter was to create a dubious paper trail of correspondence with DFG, which NSJWCD could not reasonably have believed constituted compliance. Indeed, evidence came to light at the hearing that NSJWCD entered the 1992 agreement with DFG regarding fish screens knowing they did not have the fiscal ability to construct those fish screens. (Testimony of Mr. Adams, Reporter's Transcript, pp.121-123.) Mr. Adams testified at the hearing that NSJWCD never thought action was necessary to protect fish at their pumps. (*Ibid.*) These facts suggest that NSJWCD never had any intention of acting to comply with term 15. (Draft Order, p. 10, fn 5.)

Moreover, the cost NSJWCD saved by diverting without complying with its permit exceeds the amount of the proposed liability. (Reporter's Transcript, p. 19 [cost of alternate water source]; p. 122 [cost to construct screens].)

At the same time, nothing in the draft order suggests that the State Water Board found any mitigating circumstances that would warrant reducing or suspending any portion of liability. The Water Code directs the State Water Board to "take vigorous action to enforce the terms and conditions of permits." (Wat. Code, § 1825.) This policy applies to violations by both public and private parties, and the Governor has emphasized that environmental laws should be enforced equally against government entities and private parties alike. (Governor Arnold Schwarzenegger's Action Plan for California's Environment, Final Draft, November 9, 2003.)

Of course, the State Water Board itself determines the appropriate amount of liability, independent of the Prosecution Team's position. (See *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 98, 119 [68 Cal.Rptr.3d 350, 359, 375-376] [upholding liability imposed in amounts that exceeded the liability recommended by the Prosecution Team].) But the facts presented at the hearing strongly indicate that a liability of \$66,400 is lenient, and anything less would be inconsistent with the legislative direction that permit terms should be vigorously enforced.

## **II. Suspension of Liability is Inappropriate**

The proposed order would suspend over two thirds of the liability, reducing the amount that must be paid upon issuance of the order to \$20,000. To avoid paying the balance of the \$66,400, NSJWCD is not required to do anything except comply with its permit and the proposed cease and desist order. Suspension of liability is unnecessary. The Water Code already provides a substantial incentive, in the form of penalties of up to \$1000 per day of violation, to comply with a cease and desist order. (Wat. Code, § 1845, subd. (b).) Suspension of liability would also be inappropriate because it would effectively reduce the liability to an amount that is less than one third of the amount that the State Water Board found appropriate for the violation.

As a comparison, the Regional Water Boards often use Supplemental Environmental Projects (SEPs) in conjunction with a reduction in the amount of liability imposed based on the violator's agreement to carry out the SEP. In contrast, the suspension of liability proposed here does not serve the purposes of a SEP. The use of SEPs provides for environmental improvements. Here, NSJWCD is not being required to contribute to any environmental enhancement. Moreover, a party whose administrative civil liability is reduced based on a SEP still pays out of pocket for the cost of the SEP, and a proper SEP cannot consist of a project that the violator would be required to carry out to comply with its permit or waste discharge requirements. For this reason, the use of SEPs still serves a deterrent function. In the draft order, however, liability is suspended based on compliance with the cease and desist order. The cease and desist order merely establishes a schedule for compliance with the permit.

In a recent review of the Regional Water Boards' use of SEPs, the Legislative Analyst recognized the benefits of SEPs, but recommended that SEPs should not exceed 50% of liability. (Legislative Analysts Analysis of the 2008-09 Budget Bill, Item 3940 - State Water Resources Control Board, available at [http://www.lao.ca.gov/analysis\\_2008/resources/res\\_anl08014.aspx#zsee\\_link\\_1\\_1202666642](http://www.lao.ca.gov/analysis_2008/resources/res_anl08014.aspx#zsee_link_1_1202666642).) Here, liability is being reduced by almost 70%, and the suspended liability is not even going to a SEP, but rather toward compliance with a 15 year old permit term with which NSJWCD is already obligated to comply.

The Prosecution Team urges the State Water Board to delete the paragraphs numbered 1 and 2 on page 20 of the draft order, and instead impose civil liability in the amount of \$66,400 without suspending any portion of that liability. The proposed liability of \$66,400 is itself relatively low. Further reducing that amount through a suspension of liability would not be consistent with the State Water Board's responsibility to set an appropriate liability, considering all relevant factors including the severity of the violation and the length of time over which it occurred.

On behalf of the Prosecution Team, thank you for your thoughtful consideration and conclusions in this matter.

Sincerely,



Matthew Bullock, Staff Counsel  
Division of Water Rights Enforcement Team

Ms. Jeanine Townsend

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March 11, 2008

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Ms. Jeanine Townsend

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