

TESTIMONY OF STEVEN MARQUEZ

I. Introduction

My name is Steve Marquez. I am a professional engineer, registered in California, and a Water Resource Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). I have over nine years of experience working in the Division's Licensing Unit. My experience with the Licensing Unit includes performing field inspections and examination of permitted water right projects for works constructed, compliance with permit terms and conditions, and beneficial use of water, and preparing pre-license reports which includes observations, measurements and calculations leading to a finding and recommendation. Recommendations include offering the permittee a water right license, more time to complete the project and develop the full beneficial use of the water, revocation of the permit, or issuing administrative civil liability and/or a cease and desist order for non-compliance with permit terms and conditions. A copy of my resume is attached as WR-2.

The pre-hearing and hearing notice, dated April 16, 2007, identifies two hearing issues. My testimony addresses these hearing issues and identifies my personal knowledge of the evidence and actions leading to the Division's notice of its intent to issue a Cease and Desist Order (CDO) consistent with draft CDO No 262.31-XX (WR-5) and an Administrative Civil Liability (ACL) consistent with ACL 262.5-46 (WR-6) against North San Joaquin Water Conservation District (District). My abbreviated responses to these first two hearing issues are presented immediately below and more detailed information follows.

Hearing Issue 1: "Should the State Water Board adopt CDO No. 262.31-XX? If the draft CDO should be adopted, should any modifications be made to the measures in the draft order, and what is the basis for such modifications?"

Answer: Yes, the State Water Board should adopt Draft CDO No. 262.31-XX. No modification to the CDO is required.

Hearing Issue 2: “Should the State Water Board order liability in response to Administrative Civil Liability Complaint No. 262.5-46 against North San Joaquin Water Conservation District? If the State Water Board orders liability, should the amount be increased or decreased, and if so, on what basis?”

Answer: Yes, the State Water Board should order liability in response to Administrative Civil Liability Complaint No. 262.5-46.

II. Draft Cease and Desist Order

Under California Water Code Section 1831, the State Water Board may issue a Cease and Desist Order (CDO) in response to a violation, and or threatened violation, of any of the terms or conditions of a permit or license. The CDO shall require the water right holder to comply immediately or in accordance with a time schedule set by the State Water Board. The purpose of draft CDO No. 262.31-XX is to enforce terms 15 and 23 of District’s amended Permit 10477, dated December 11, 1992 (WR-7), and to establish an enforceable schedule of compliance with those terms.

A. Requirements to Comply with the Fish Screen and Bypass Flow Terms

North San Joaquin Water Conservation District (District) holds amended water right Permit 10477 (Application 12842.) (WR-7.) The original permit issued on July 3, 1956 to the District was amended by order, dated December 11, 1992. Amended Permit 10477 authorizes the direct diversion of 80 cubic feet per second (cfs) and collection of 20,000 acre-feet per year from the Mokelumne River from December 1 of each year to July 1 of the succeeding year for Municipal, Domestic, Industrial, Irrigation and Recreational uses. Direct Diversion is limited to no more than 40 cfs at any one of the District’s pumping facilities and the total amount of water taken from the source is not to exceed 20,000 acre-feet per water year. Conditions of the amended permit require the District to comply specifically with the following terms included on Permit pages 3 and 4:

15. No water shall be diverted under this permit during the 1992 or subsequent water years, until the permittee has constructed screening facilities adequate to protect fishlife

and/or has entered into an operating agreement with the Department of Fish and Game that will protect fishlife.

If fish screens are constructed to meet the requirements of this permit condition, the Department of Fish and Game shall review the construction plans and determine whether the facilities are adequate to protect fishlife. The Department of Fish and Game shall notify the Division of Water Rights of its approval of the plans in writing. Construction, operation, and maintenance costs of any required facilities are the responsibility of the permittee.

In the event the permittee and the Department of Fish and Game cannot reach agreement with respect to this condition, either party may petition the State Water Resources Control Board to hold a hearing to determine the appropriate conditions.
(0000063)

23. No diversion shall be made under this permit until an agreement has been reached between the permittee and the State Department of Fish and Game with respect to flows to be bypassed for aquatic life; or failing to reach such agreement, until a further order is entered by the State Water Resources Control Board or its successor with respect to said flows.
(0360400)

There is nothing unclear or confusing about the District's fish screen or bypass flow requirements or methods to petition the State Water Board to ensure compliance with the subject permit terms if agreement with Fish and Game cannot be reached. Without compliance to these specific terms, Permit 10477 prohibits diversion from the District's facilities on the Mokelumne River.

B. Violation and Threatened Violation of Permit Terms

The District's violations of the terms in its permit do not begin at the time of my pre-license inspection conducted on February 2, 2006. Based on the information in the Division's records, the District has diverted and used water in violation of Term 23 since 1992 and of Term 15 since 1993. DFG has informed Division staff that DFG is not aware of any construction of permanent fish screens or of any operating agreement. The District has complied with Term 15 in only one year—1993—when the District installed a temporary fish screen loaned to it by DFG for that single diversion season. By letter, dated April 8, 1993 (WR-9, p. 5), DFG informed the District that the temporary installation would be unacceptable on a permanent basis and that DFG expected the District to develop a long-term solution. A District letter to the Division, dated

October 13, 2005, (WR-9) states that at that the end of the 1993 diversion season, an employee in the DFG's Screen Shop said not to bother installing fish screens in the future. The Division, however, has no record confirming this conversation occurred or that this is DFG's official position with respect to compliance with Term 15. Accordingly, with the exception of 1993, the District has diverted water without complying with Term 15.

Term 23 similarly prohibits the District from diverting water until the District and DFG reach an agreement regarding bypass flows or, failing to reach such an agreement, until the State Water Board enters an order regarding those flows. The State Water Board has not entered any such order for Permit 10477 and there is no evidence that the District has entered into an agreement with DFG. The District's letter, dated October 13, 2005, (WR-9) to the Division states that it believes that bypass flows are provided pursuant to the "EBMUD-FERC agreement" (the Joint Settlement Agreement for the Lower Mokelumne River Project, which was approved by the Federal Energy Regulatory Commission in November 1998). This agreement is between other entities. (WR-12, p. 19.) The District is not a signatory to that agreement. The agreement does not consider the responsibilities of the District, and it does not constitute an order of the State Water Board or an agreement between the District and DFG as required under Term 23 of the District's permit.

The District has also submitted its Annual Progress Report by Permittee for 1993-1998 and 2001-2005. (WR-11). On this form, signed under penalty of perjury, the District's consultant certified that he had reviewed the permit and the District was complying with the conditions under which the permit was issued. However, the District was operating in violation of the permit terms and conditions during this time, diverting illegally for over 13 years.

C. Inspection by the Division in 2006

The inspection meeting conducted on February 2, 2006 was attended by Edward Steffani, Fred Weybret, and C. L. Weinzheimer, Jr. representing the District and Richard Satkowski, Kathryn Gaffney and myself representing the Division. We conducted a field inspection of the District's permitted project to determine the District's maximum amounts beneficially used and overall compliance with terms and conditions of the permit. During the meeting, we discussed the

permit terms and conditions, the District's proposed North San Joaquin Pilot Recharge project, and obtained pump capacity data. The District's representatives were aware of the permit terms and conditions and acknowledged that fish screens were not in place at the District pumps nor was there a DFG negotiated bypass agreement. District's staff stated that they did not think that fish screens were needed and the bypass flow agreement was already taken care of in the "EBMUD-FERC agreement."

We conducted the field inspection of the District's project works after the meeting, and Mr. Weybret did not accompany us on the field inspection. Following the inspection, I filed a report of the inspection. (WR-8.) We visited the District's project works including the north pump and south pump (WR-8, p. 11), and discharge points along Pixley Slough and Bear Creek (WR-8, p.15). Although we were unable to gain access to the top of Camanche Dam, we inspected the base of the dam. The District's proposed North San Joaquin Pilot Recharge Project site was also visited. We took photographs, pump information and GPS points during the field inspection and they are included in the report. (WR-8.)

Upon a review of the file and available water use data along with my inspection findings, I concluded the following: between 1993 and 2000 the District's maximum direct diversion amount was 14.4 cfs in June 2000. (WR-8, p. 9.) The maximum amount collected to storage was 2,110 acre-feet per annum (AFA) during the 1992-1993 water year. (WR-8, p. 9.) The maximum amount taken from the Mokelumne River and placed to beneficial use also occurred during the 1992-1993 water year and was 3,200 AFA. (WR-8, p. 9.) The purpose of use was limited solely to irrigation of a reported 680 acres. (WR-8, p. 4.) After the permit expired in 2000, East Bay Municipal Water District records show the District also diverted a three year total of 8,200 acre-feet over the 2003, 2004 and 2005 irrigation seasons. (WR-8, p. 18.) Neither point of diversion covered by the permit was equipped with a fish screen that complies with Term 15. The District's non-compliance with the terms and conditions constitutes a violation, and a threat of continued violation, of amended Permit 10477. These violations, and threat of future violation, are the basis for the ACL and CDO.

D. Provisions of the Draft Cease and Desist Order

The CDO requires the District to take diligent actions to either secure DFG's approval and install fish screens on the north and south diversion pumps or enter into an agreement in accordance with Term 15. Until the District has done so, the CDO requires the District to cease its diversion of water from the two pumping plants currently covered by Permit 10477. The CDO also requires the District to submit a compliance plan and timeline for the Division's approval within 90 days of the date the CDO is made final. The District will need to comply with the compliance plan and timeline approved by the Division. If fish screens are to be constructed, the District will be required to submit a copy of its written request for DFG's written approval of the plans to the Division within five days of its request. The District will also need to provide the Division with a copy of any approval by DFG of either the fish screen construction plans or the operating agreement within 30 days of such approval.

The CDO also requires the District to immediately cease its diversion of water from the two pumping facilities currently covered by Permit 10477 until the District submits to the Division a bypass agreement with DFG or written confirmation from DFG that a bypass agreement is unnecessary. The District will be required to submit this information to the Division within 90 days of the date of this order. The CDO further provides that if the District cannot reach agreement with DFG, they may seek a decision from the Water Board regarding bypass flows.

E. Recommended Modifications to the Draft CDO

No modifications to the CDO are recommended.

III. Administrative Civil Liability Order

In Administrative Civil Liability Complaint No. 262.5-46, the District is alleged to have violated Water Code Section 1052, subdivision (a) by committing a trespass against the State of California through its diversion of water other than as authorized in its water right license. Water Code section 1052, subdivision (b), provides that the State Water Resources Control Board may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.

A. Requirement to Comply with the Fish Screen and Bypass Flow Terms

The requirement to comply with the fish screen and bypass flow terms specified in Permit 10477 has already been discussed in paragraph II.A. above. The terms are clear and unambiguous, and linked to the District's authority to legally divert water. The terms originate from a stipulated agreement with the East Bay Municipal Utility District, the Department of Fish and Game (DFG), and the California Sportfishing Protection Alliance to resolve the protests over the District's 1991 time extension petition. (WR-10.) As part of the District's 1992 extension of time, the State Water Board incorporated terms of the stipulated agreement by adding Terms 15 and 23 to the District's permit.

B. Violation of License Term

As of the date of the ACL, the District has not demonstrated compliance with Term 15 or 23. Since 1993 the District has diverted and used water in violation of Term 23 (bypass flows), and it has diverted water in violation of Term 15 (fish screens) since at least 1994. On February 2, 2006, I was informed by District staff that no fish screens were in place at the District's two pumping facilities in clear violation of Term 15, nor have any screens been in place since the end of the 1993 season.

C. Actions to Correct the Violation since the Inspection

No actions have been taken by the District to correct the violation of Permit Terms 15 and 23.

D. Formulation of the Amount of Liability

The reasoning for the determination of the amount of liability imposed in Administrative Civil Liability Complaint No. 262.5-46 is partially provided in my inspection report. (WR-8.) The 114 days arrived at in attachment 11 (WR-8, p. 19) were calculated using the District's monthly diversion amounts over the 2003, 2004 and 2005 irrigation seasons divided by the maximum rate of diversion from any one facility under Permit 10477 (40 cfs or 79.34 acre-feet per day¹) and rounded up to the nearest whole day. As such, this was a very conservative calculation for days of violation over the past three years and acts as a baseline figure.

¹ The Division used a conversion factor of 1 cfs equaling 1.9835 acre-feet per day.

IV. Recommendation

In considering this matter, the State Water Board should remember that these violations have occurred over 13 years after a stipulated agreement was signed by the District. The District has shown disregard for Permit Terms 15 and 23 and has failed to diligently pursue resolution or dismissal of these terms through negotiations and agreement with DFG or filing a petition with the State Water Board for resolution.

In summary, the CDO does not impose any standards on the District that it is not already required to fulfill. Its history demonstrates that a violation, and threat of further violation, continues to exist. I support issuance of the ACL and CDO. I believe the only question up for debate is the amount of the liability.