

STATE OF CALIFORNIA  
 CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
 STATE WATER RESOURCES CONTROL BOARD

**DIVISION OF WATER RIGHTS**

**ORDER WR 2006-00XX**

In the Matter of Unauthorized Diversion by the  
**North San Joaquin Water Conservation District**  
**Cease and Desist Order No. ~~XXX.XX-XX~~ 262.31**

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SOURCE: Mokelumne River tributary to San Joaquin River  
 COUNTY: San Joaquin County

The State Water Resources Control Board (State Water Board) is authorized under California Water Code section 1831 to issue a cease and desist order (CDO) when it determines that any person is violating or threatening to violate any of the following:

- (1) The prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code.<sup>1</sup>
- (2) Any term or condition of a permit, license, certification, or registration issued under division 2 of the Water Code.
- (3) Any decision or order of the State Water Board issued under part 2 (commencing with section 1200) of division 2 of the Water Code, section 275, or article 7 (commencing with section 13550) of chapter 7 of division 7 of the Water Code, in which decision or order the person to whom the CDO will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

On {DATE}, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against North San Joaquin Water Conservation District (District) for the violation and threatened violation of the prohibition against unauthorized diversion and use of water.

**FACTS AND INFORMATION**

The facts and information upon which this CDO is based are as follows:

1. The District is owner of Permit 10477 (Application 12842), which 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,

<sup>1</sup> Water Code section 1052, subdivision (a) states that "The diversion or use of water subject to this division other than as authorized in this division is a trespass."

*SM 11-29-06*      *RSS 11/29/06*      *mgb 11/29/06*      *JO 11/29/06*      *- Kasse/ 11/29/06*      *- JAW 11/30/06*

Irrigation and Recreational uses. Direct diversion is limited to no more than 40 cfs at any one pumping facility. The permit allows a total of 20,000 acre-feet per annum (afa) to be diverted per water year.

2. The State Water Board has granted the District three extensions of time to complete full beneficial use of water under Permit 10477. In 1992 the District entered into a stipulated agreement with the East Bay Municipal Utility District (EBMUD), the Department of Fish and Game (DFG), and the California Sportfishing Protection Alliance (CSPA) to resolve the protests over its 1991 time extension petition. As part of the last order granting an extension of time in 1992, the State Water Board incorporated terms of the stipulated agreement by adding Terms 15 and 23 to the District's permit. Term 15 states, "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 [DFG] that will protect fishlife." If fish screens are constructed, then DFG is required to notify the Division of its approval of the plans in writing. Term 23 provides that: "No diversion shall be made under this permit until an agreement has been reached between the permittee and the [DFG] with respect to flows to be bypassed for aquatic life," or failing to reach such agreement, until further order is entered by the State Water Board.
3. Term 15 prohibits the District from diverting water until the District constructs fish screens or enters into an operating agreement with DFG that protects fishlife. The Division's records indicate that in 1993 the District installed a temporary fish screen loaned to it by DFG for that diversion season. By letter dated April 8, 1993, 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.
4. In a letter to the Division dated October 13, 2005, the District states that, at the end of the 1993 diversion season, an employee in DFG's Screen Shop said not to bother installing fish screens in the future. The Division, however, has no record that this is DFG's official position with respect to compliance with Term 15. In fact, in 2005, DFG staff informed the State Water Board that DFG does not agree with the District's statement that the District does not need to comply with Term 15.
5. Term 23 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 pertaining to Permit 10477 and there is no evidence that the District has entered into an agreement with DFG.
6. The District filed a fourth petition for extension of time in December 2000, and a petition to add a point of diversion and a place of underground storage in May 2004. The latter petition is for a proposed pilot groundwater recharge and extraction project funded by a Cal-Fed Conjunctive Use Grant Application that was revised in 2003. As part of the Division's review and consideration of these petitions, Division staff conducted a field inspection of the District's permitted project on February 2, 2006, to determine the District's maximum amounts beneficially used and overall compliance with terms and conditions of the permit. Division staff found that between 1993 and 2000, the District's maximum direct diversion amounts were 14.4 cfs and 3,200 afa being taken from the Mokelumne River. The District has diverted a total of 8,200 acre-feet over the 2003, 2004 and 2005 irrigation seasons. Neither point of diversion covered by the permit was equipped with a fish screen that complies with Term 15. In addition, Division staff contacted DFG, which informed Division staff that DFG is not aware of any construction of permanent fish screens or of any operating agreement as required by Term 15.
7. In June 2005, the United States Bureau of Reclamation (Bureau) made a Finding of No Significant Impact for the District's proposed pilot recharge project. The Bureau concluded that the threatened Central Valley steelhead occurs in the Mokelumne River near the project site with some steelhead residing in the area and other steelhead migrating upstream from about late summer through early spring, and juveniles migrating downstream April through June. The Bureau's finding was made with

an understanding that the new pump would be screened to National Marine Fishery Service's standards to avoid impacting the endangered Central Valley steelhead. The District's existing two pumping facilities are not currently equipped with suitable fish screens and, therefore, may adversely impact the steelhead.

- 8. As of the date of this order, the District has not demonstrated compliance with Terms 15 or 23.
- 9. Since 1993 the District has diverted and used water in violation of Term 23 and it has diverted water in violation of Term 15 since at least 1994. The District's unauthorized diversion of water constitutes a trespass against the State under Water Code section 1052.
- 10. The District's violation of permit Terms 15 and 23 and the statutory prohibition against the unauthorized diversion of water is subject to issuance of a CDO in accordance with Water Code section 1831.

**IT IS HEREBY ORDERED**, that the District shall take the following corrective actions and satisfy the following time schedule:

- 1. The District shall immediately cease its diversion of water from the two pumping facilities currently covered by Permit 10477 until it submits a plan and timeline to the Division for complying with Term 15. The District shall submit the compliance plan and timeline for the Division's approval within 90 days of the date of this order. The District shall comply with the compliance plan and timeline approved by the Division.

If fish screens are to be constructed, the District shall submit a copy of its written request for DFG's written approval of the plans to the Division within 5 days of its request. The District shall 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.

- 2. The District shall immediately cease its diversion of water from the two pumping facilities currently covered by Permit 10477 until the District submits to the Division one of the following documents to demonstrate its efforts to comply with Term 23: (1) a final agreement with DFG with respect to bypass flows; or (2) written confirmation from DFG that a bypass agreement is unnecessary. The District shall submit this information to the Division within 90 days of the date of this order.

If the District fails to reach agreement with DFG regarding bypass flows or the necessity for bypass flows, the District may propose a term to implement Term 23, including a proposal for bypass flows, to the State Water Board. The District shall submit the proposed term with an opinion by a fisheries expert as to whether the proposed term is protective of aquatic life in accordance with the intent of Term 23. The State Water Board will consider whether or not to incorporate the term only after it provides notice and opportunity for hearing to the DFG, EBMUD, CSPA, and any other affected parties the State Water Board deems appropriate. The District may not divert water from the two pumping facilities unless authorized in writing by the State Water Board or until the State Water Board renders a final decision on proposed term.

- 3. The District shall comply with the Division's requests for information, environmental documents, maps, and fees within the designated time frames.

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Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845 subd. (a).) Any person or entity that violates a CDO issued pursuant to chapter 12 may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

STATE WATER RESOURCES CONTROL BOARD

*Victoria A. Whitney, Chief*  
*Division of Water Rights*

Dated:

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