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WATER CONSERVATION DISTRICT

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the State Water Resources Control Board Hearing to Determine Whether to Adopt a Draft Cease and Desist Order No. 262.31XX and Whether to Impose Administrative Liability Complaint No. 262.5-46 against NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT Source: Mokelumne River County: San Joaquin	**CLOSING BRIEF**

I.

INTRODUCTION

North San Joaquin Water Conservation District files this Closing Brief opposing the issuance of Draft Cease and Desist Order No. 262.31XX (CDO No. 262.31XX) and Administrative Civil Liability Complaint No. 262.5-46 (ACL No. 262.5-46). At the close of the June 21, 2007 hearing, Hearing Officer Baggett requested that five issues be addressed in the closing brief:

1. Term 15 of Permit 10477 includes the phrase, "...until the permittee has constructed screening facilities adequate to protect fishlife and/or has entered into an operating agreement*." What is the meaning of the words "and/or" in this phrase?

2. How do the April 1993 letters between Mr. Sorensen and Mr. Broddrick (exhibit NSJ-106) relate, if at all, to North San Joaquin Water Conservation District's compliance with permit term 15?

3. How do the two letters concerning the Mokelumne River Hearings signed by Mr. Schueller (exhibits NSJ-109 and NSJ-110) relate, if at all, to North San Joaquin Water Conservation District's compliance with permit term 23? How does Decision 1641 relate, if at all, to the North San Joaquin Water Conservation District's compliance with permit term 23?

4. If North San Joaquin Water Conservation District is found in violation of permit term 15 or 23, or both, what amount of administrative civil liability, if any, is appropriate? What modifications, if any, should be made to the draft cease and desist order?

5. If North San Joaquin Water Conservation District is found in violation of permit term 15 or 23, or both, what is the harm caused by the violation(s)? Does the Water Code require a finding of harm?

This closing brief will address those questions. Because the State Water Resources Control Board Prosecution Staff failed to meet its burden of establishing that North San Joaquin is in violation of either Permit Term 15 or 23, neither the CDO 262.31XX nor ACL 262.5-46 may issue.

II.

ANALYSIS

1. **Term 15 of Permit 10477 includes the phrase, "...until the permittee has constructed screening facilities adequate to protect fishlife and/or has entered into an operating agreement." What is the meaning of the words "and/or" in this phrase?**

Term 15 of Permit 10477 requires the District to construct "screening facilities adequate to protect fishlife and/or or enter into an operating agreement." The District asserts that it had an operating agreement with the Department of Fish and Game (DFG) which supplanted the need for screening facilities. The Hearing Officer has asked for information on the meaning of "and/or" in Term 15.

California courts define the term "and/or" as meaning either "and" or "or." *Powers Farm v. Consolidated Irrig. Dist.* (1941) 19 Cal.2d 123, 128. The word "or" is disjunctive in nature. *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680. Its purpose is to "mark an alternative such as 'either this or that.'" *Houge v. Ford* (1955) 44 Cal.2d 706, 712. The word "and" is conjunctive in nature. *People v. Pool* (1865) 27 Cal. 572, 58-81; *In re Carr* (2d Dist. 1998) 65 Cal. App. 4th 1525. The term "and/or" is often convenient in contracts and other instruments because, "by its intentional equivocation, it can anticipate alternative possibilities without the cumbersome itemization of each one." *Ex parte Bell* (1942) 19 Cal.2d 488, 499. The leading authority on English language usage finds that "and/or" is a "formula denoting that the items joined by it can be taken either together or as alternatives." *Fowlers Modern English Usage, Clarendon Press Oxford (1996).*

The State Board's use of "and/or" in Term 15 provided the District with three methods of compliance with this term: (1) *either* construct the screening facilities *or* (2) enter into an operating agreement, or (3) both. This interpretation was shared by the Prosecution's witnesses, as they conceded during the hearing that there were two methods of complying with Term 15: *either* install fish screens *or* enter into an operating agreement with the Department of Fish and Game. [R.T. pg. 25]

As will be discussed in detail below, the evidence presented at the hearing confirmed that in 1993 North San Joaquin entered into an operating agreement with DFG, which has neither been rescinded nor revoked. Therefore, the District has been in compliance with Term 15 since that time.

2. **How do the April 1993 letters between Mr. Sorensen and Mr. Broddrick (exhibit NSJ-106) relate, if at all, to the North San Joaquin Water Conservation District's compliance with Term 15?**

North San Joaquin Exhibit 106 is a series of letters exchanged between the District and DFG regarding installation of fish screens for 1993 and addressing the need for development of a long-term solution. The letters culminate in an April 15, 1993 letter requesting DFG signature and DFG's signature was secured on April 19, 1993. The letters clearly comprise a written operating agreement (1993 Agreement) between North San Joaquin and DFG regarding fish screens on District's facilities, which fulfills the Term 15 condition. The 1993 Agreement covered the installation of a temporary fish screen for water year 1993. It also committed the District and DFG to cooperate to "attempt to reach

a permanent solution to adequately protect fish life after resolution of the myriad of issues now before the State Board in the Mokelumne River hearings, including, but not limited to fish screening responsibilities." The 1993 Agreement was signed by both parties. The Prosecution Staff has provided no evidence that the 1993 Agreement has been cancelled or rescinded.

Since execution of the 1993 Agreement, from 1993 – 2006, the District did not hear from DFG. [R.T. pgs. 85, 106] DFG never requested deviation from the terms of the 1993 Agreement, nor did it request the District screen the existing diversions. [R.T. pgs. 85, 106] If DFG did not believe that the 1993 Agreement met the requirements of Term 15 it had other options. Term 15 provides:

> 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.

DFG did not petition the State Board to hold a hearing to determine the appropriate conditions regarding fish screens. Rather, DFG allowed the 1993 Agreement to remain in place for 14 years, without complaint, satisfying the requirements of Term 15.

The most troubling aspect of the Prosecution's claim that the District violated Term 15 is the Prosecution's complete failure to undertake any investigation into whether North San Joaquin had actually complied with the term. The Prosecution Staff's "investigation" was limited to reviewing the State Board's files. The Prosecution Staff asserts that this file review revealed support for a violation; however, Prosecution Staff failed to discover the existence of the 1993 Agreement, and did not produce one document in the evidentiary record supporting lack of an agreement with DFG. Further evidence of the Prosecution Staff's failure is that they failed to make even the simplest inquiry, like a telephone call to anyone at the DFG inquiring as to whether an agreement was in place with the District. [R.T. pg. 24, 32] The Prosecution Staff has failed to meet its burden of proof that Permit Term 15 was violated.

3. **How do the two letters concerning the Mokelumne River Hearings signed by Mr. Schueller (exhibits NSJ-109 and NSJ-110) relate, if at all, to the North San Joaquin Water Conservation District's compliance with permit term 23? How does Decision 1641 relate, if at all, to the North San Joaquin Water Conservation District's compliance with Term 23?**

Similar to Term 15, Term 23 contemplates two methods of compliance: (1) the District could enter into an agreement with DFG regarding bypass flows, or (2) the State Board could enter a subsequent order regarding bypass flows. Here both methods of compliance have been achieved.

First, the District did enter into an agreement with DFG addressing bypass flows: this requirement of Term 23 was satisfied by the 1993 Agreement. [R.T. pg. 144] One of the issues covered by the 1993 Agreement was the commitment to cooperate with DFG to "reach a permanent solution to adequately protect fish life after resolution of the myriad of issues now before the State Board in the Mokelumne River hearings." The agreement contemplated by Term 23 has been in place between North San Joaquin and DFG for fourteen years.

In addition, Term 23 specifically provided its provisions would be met if the State Board entered a subsequent order regarding bypass flows in the Mokelumne River. The State Board did enter such a subsequent order, Water Rights Decision 1641 (D 1641), evidenced by the two letters written by Harry Schueller (North San Joaquin Exhibits 109 and 110). D 1641 constituted compliance with the requirements of Term 23.

In November of 1992, just 5 months after Term 23 was inserted into the District's permit, the State Board held a hearing on fishery issues in the Mokelumne River. The water rights held by EBMUD, Woodbridge Irrigation District **and North San Joaquin** were all subject to this hearing, and were subject to being conditioned for Mokelumne River flows, exactly the issue the State Board wanted to address in Term 23. Upon the conclusion of the hearing, the State Board took the issue under submission, and took no immediate action. At the same time in a different forum, FERC proceedings were underway on the Mokelumne River [NSJ-109, paragraph 3], and resulted in the execution of a Joint Settlement Agreement [NSJ-108] addressing fishery flows in the Mokelumne River.

Finally, on March 23, 2000 the State Board adopted Water Rights Decision 1641 after the Bay-Delta Water Rights Hearings. In D 1641 the State Board adopted an order establishing fishery flows in the Mokelumne River (through the Joint Settlement Agreement). By letter dated October 16, 2000 from Harry Schueller the State Board confirmed that **D 1641 resolved all issues as to flow and public trust for the Mokelumne River** [NSJ 109], and walked through their support for this conclusion. An additional letter dated April 26, 2001 once again confirmed this conclusion. [NSJ-110]

Term 23's requirement that "a further order is entered by the State Water Resources Control Board or its successor with respect to [flows to be bypassed for aquatic life]" was met on March 20, 2000 in D1641. In D 1641 the State Board resolved Mokelumne River fishery issues, for all parties, EBMUD, WID and North San Joaquin. The State Board specifically addressed North San Joaquin's water rights when it found:

> "that the fish should be protected, but consumptive uses nevertheless should be allowed to continue at a reasonable level. The SWRCB finds that it would not be in the public interest to require more water from the Mokelumne River system than will be provided under the JSA. Additional releases could exacerbate the shortage experienced by NJSWCD." [NSJ-131, pg. 63]

Decision 1641 states that "consistent with WID's resolution, this decision establishes WID's responsibility by amending WID's water right licenses to require that WID bypass the expected flows below Woodbridge, as defined in the JSA." The State Board did not need to similarly amend North San Joaquin's permit because existing Term 22 already requires that North San Joaquin bypass water released into the river for fish and wildlife. Permit Term 23 was finally resolved by the State Board's adoption of 1641 finally resolving fishery and bypass flows for the Mokelumne River.

4.a **<u>If North San Joaquin Water Conservation District is found in violation of permit term 15 or 23, or both, what amount of administrative civil liability, if any, is appropriate?</u>**

The State Board should not order any liability in response to ACL No. 262.5-46. First, the State Board does not have the legal authority to issue an ACL in this situation. The State Board's authority for imposing Cease and Desist Orders and Administrative Civil Liability is found at Water Code §§1052, 1055, and 1831. While these provisions grant the State Board authority to issue a Cease and Desist Order for violation of permit terms, they do not provide for the imposition of civil liability.

Water Code section 1831 provides the State Board with the authority to issue a cease and desist order for, among other things,

> A violation or threatened violation of ... (1) [t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water [or] [a]ny term or condition of a permit, license, certification, or registration.."

The Legislature has made a clear and unambiguous distinction between the "unauthorized diversion or use of water," and a violation of a term or condition in a license.

Water Code section 1052 provides that the "unauthorized diversion or use of water" constitutes a trespass, for which "[c]ivil liability may be imposed by the board...". Section 1052 *does not* provide the State Board with the authority to impose civil liability for a violation of a term or condition in a permit or license. It is clear, therefore, that the State Board lacks authority to impose civil liability in the first instance for the violation of a term in a license. (See *People v. Shirkow* (1980) 26 Cal.3d 301, 306-307 [in determining the meaning of a statute, an adjudicator "should construe a statute in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts."]; accord *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th1, 11 ["we do not construe statutory language in isolation, but rather as a thread in the fabric of the entire statutory scheme of which it is a part."].) If the State Board were to read section 1052 as authorizing the imposition of civil liability for violating a term or condition of a license or permit, it would render subdivision (d)(2) of Water Code section 1831 meaningless.

Moreover, the State Board's own regulations recognize the distinction, providing for three distinct remedies in response to a violation of a term or condition of a permit or license:

> "if, after investigation, the board's staff finds that a violation of the terms and conditions of any permit or license has occurred which might be cause for enforcement action by the board, the matter may be referred to the board for hearing in accordance with the provisions of Water Code Sections 1410 et seq., 1675 et seq., or 1825 et seq.." (Cal. Code Regs., tit. 23 § 821.)

Water Code sections 1410 et seq. and 1675 et seq. address the revocation of permits and licenses, not civil liability. Water Code section 1825 et seq. provides the State Water Board with the authority to issue cease and desist orders. There is *no* reference in section 821 of the regulations to Water Code section 1052 or 1055, with regard to civil liability.

This precise reading and interpretation of the relevant statutes is confirmed by the California Court of Appeal, First Appellate District, which explained:

> "[i]f the permit holder or license holder violates any of the terms or conditions or fails to apply the water to a beneficial purpose, the Board may revoke the permit or license. (§§ 1410, 1611.) In 1980, the Board was given increased powers to

> enforce terms and conditions of an appropriation permit. (§§ 1825 et seq. [authorizing cease and desist orders and actions for injunctive relief].) (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102.)

Nowhere in the Water Code, or in the State Water Board's own regulations, is there *any* authority for imposing civil liability for an alleged violation of a term or condition in a permit or license. One cannot give meaning to the entire statutory scheme and come to any other conclusion. To adopt the meaning apparently put forth by the Division, one must impermissibly "read out" an entire provision of Water Code section 1831. It is axiomatic that an administrative agency cannot adopt a meaning of a statute that would render statutory language surplusage. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 14)

In addition to the foregoing, the State Water Board's own publication entitled "Information Pertaining to Investigating Water Right Complaints in California, February 2005," explains the difference between violations of a term or condition in a permit or license, and the "unauthorized diversion" of water. That document provides as follows:

Authority of the State Water Board

The State Water Board has the authority to investigate the following types of complaints:

- Violation of Permit/License Terms – A complaint may be filed if the holder of a water right permit or license issued by the State Water Board is not complying with the terms and conditions of the permit or license. The Division will investigate the allegations to ensure that the water user complies with all terms and conditions of the water right.

- Unauthorized Diversion – A complaint may be filed if a water user does not appear to have a valid water right. The Diversion will investigate to determine whether the State Water Board has issued a permit or license, or whether the water user may have riparian, pre-1914, or other type or water right. If Division staff determines that the water user does not have a valid water right, action will be taken to insure that a valid right is acquired or that the person stops diverting the water.

The distinction between a violation of a term or condition of a permit or license contained in this document is in confirmed in the First Appellate District's opinion, the

State Board's own regulations, and Water Code sections 1052, 1055, and 1831. Staff's insistence on expanding its authority through this enforcement proceeding is an abuse of discretion and exceeds the State Board's jurisdiction.

The State Board does have enforcement mechanisms to correct violations of terms and conditions of permits or licenses. Water Code section 1831 provides the authority to issue a cease and desist order for a violation, or threatened violation, or a term or condition in a permit or license. If, after a cease and desist order is adopted, a party fails to comply with a cease and desist order, the board may impose civil liability. (Water Code, §1845(b)(3).) However, the staff cannot put the cart before the horse. If there is a violation, or threatened violation of a term or condition in a permit or licenses, the State Board must *first* obtain a cease and desist order for that violation. It cannot impose civil liability in the first instance. Accordingly, the District requests that the Hearing Officers dismiss the Administrative Civil Complaint.

However, if the State Board orders liability, the amount should be reduced substantially because: (1) there is no evidence supporting the alleged violations; (2) there is no evidence that any harm was caused by the alleged violation; (3) the District lacks financial resources – it is a small, financially strapped district with an existing annual budget of $235,000-$280,000; and (4) it is not in the public interest to levy this amount of fine as the District in good faith believed that they were in compliance with all of their permit conditions.

The liability amount proposed - $66,400 - exceeds any other enforcement proceeding against a water diverter for violation of permit term. A summary review of several decisions illustrates how completely outrageous the suggested amount is for the alleged violation.

- WRO-2003-0013 - DWR: Omnium Estates – Diverted water without water right for 10 years - ACL ISSUED $3,000
  - Omnium stored water in a reservoir without a permit.
  - Division issued an ACL for unauthorized use of water for irrigation of approximately 76 acres since 1993.
  - The penalty was $3,000 for three years of unauthorized diversion to storage of approximately 16 acre feet at Omnium's reservoir.
  - Omnium failed to file a Notice of Intent to Appear and was ordered to pay $3,000.

- WRO 2004-0032-EXEC: Boulder Creek Golf and County Club (BCGCC) - diverting water without right and failing to meet bypass flows. ACL issued $5,000

    - BCGCC operates three reservoirs for irrigation of its golf course.
    - Division issued an ACL on reservoir no. 3 alleging that BCGCC operated an unauthorized reservoir for more than 10 years.
    - BCGCC failed to comply with term and conditions of its permit, including failure to make releases from storage to maintain flows, failure to install measuring devises, failing to make payment to DFG for replacement of 1,000 steelhead trout yearling, and failure to submit bimonthly records.
    - Fine was assessed at $5,000.

- WRO 2006-001: Lake Arrowhead Community Services District - 25 years of diversion without water right, avoided costs = $5.05 million – ACL $112,000

    - LACSD made unauthorized diversions in excess of 1,566 AF in every year after 1981.
    - Avoided cost for fiscal years 2002-2004, totaled $12.5 million, but factoring in pre-1914 right total avoided cost was reduced to $5.05 million.
    - Fine was proposed at $182,500, which was equivalent to $500 per day for 365 days (based on maximum diversion of 3,157af occurring in 2002).
    - This fine was reduced to $112,000 because pre-1914 right authorized LACSD to divert 1,566 af leaving 1,591 as the actual unauthorized diversion.

The total avoided cost for Lake Arrowhead was approximately $5.05 million, and the proposed fine was $182,500 – less than 4% of the avoided cost. Under the State Water Board analysis, North San Joaquin's avoided cost was $410,000 and the proposed fine is $66,400, more than 15% of the avoided costs. The proposed fine here is more than three times what was proposed for Lake Arrowhead! Based on "avoided cost" numbers, the fine proposed for North San Joaquin should be no more than $15,000. Most importantly, there is absolutely no evidence that any fish were injured or taken as a result of our diversions. As such, there is absolutely no justification for the proposed ACL.

4.b What modifications, if any, should be made to the draft cease and desist order?

The State Board should not adopt CDO No. 262.31.XX. The record does not contain evidence sufficient for the State Board to make a finding that the District violated either Term 15 or Term 23. CDO No. 262.31.XX should not issue.

DFG Requested Change to Draft CDO

If the Draft CDO is adopted, the proposed change recommended by DFG should not be made. Insertion of the term proposed by DFG violates Permit 10477 Term 15. The request is to insert language that "NJSWCD **shall construct** a fish screen at each diversion authorized under permit 10477." Term 15 does not assume that a fish screen *will be* constructed, it contemplates that one *may be* constructed. The term should not be modified by a CDO. Therefore, this request must be denied.

5. If North San Joaquin Water Conservation District is found in violation of Term 15 or 23, or both, what is the harm caused by the violation(s)? Does the Water Code require a finding of harm?

North San Joaquin is the only party to the proceeding that produced any evidence on the issue of "harm" potentially caused by the alleged violation of Term 15 or Term 23. Evidence in the record shows that there have been absolutely NO documented events of fish injury, stranding or take at the District's facilities. [NSJ-103, RT pgs. 59-61, RT pgs. 90-91] District personnel have never witnessed salmon or steedhead in either of the District's shallow, low velocity channels leading to its pumps, nor have they witnessed salmon or steelhead in any of the District's facilities. [NSJ-103, R.T. pgs. 59-61, R.T. pgs. 90-91] The Prosecution Staff acknowledges that they failed to quantify in any manner any alleged "harm" to any fish by the District's alleged violation of permit terms. [WR-6, pg. 3, paragraph 5, WR-3, pg. 2]

Water Code section 1055.3 requires the State Board consider the extent of the harm caused by the violation is assessing civil liability. Assuming a violation of Permit Term 15 or 23 is found by the State Water Board, Prosecution Staff's failure to produce such evidence necessitates a drastic reduction in the amount of the fine proposed. As was discussed above, any fine imposed will have a detrimental affect on the District as it is a small, financially strapped district with an existing annual budget of $235,000- $285,000. It is not in the public interest to levy this amount of fine as the District in good faith believed that they were in compliance with all of their permit conditions.

III.

CONCLUSION

The Prosecution Staff failed to meet its burden of proving either a violation of Permit Term 15 or Term 23. The State Water Board has no factual basis in the evidentiary record to support adopting either Draft Cease and Desist Order No. 262.13XX or Administrative Civil Liability Complaint No. 262.5-46. The District respectfully requests rejection of Draft Cease and Desist Order No. 262.31XX and dismissal of Administrative Civil Liability Complaint No. 262.5-46.

Should the State Water Board determine that the ACL should issue, we request that we be given a time period to comply with the monetary sanctions. We would suggest allowing the District between 5 – 10 years to pay off any civil liability.

DATED: July 31, 2007

Respectfully submitted,

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By: _____
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