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Arnold Schwarzenegger
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CLOSING BRIEF OF DIVISION OF WATER RIGHTS PROSECUTION TEAM IN THE MATTER OF HEARING ON ADMINISTRATIVE CIVIL LIABILITY NO. 262.5-46 AND DRAFT CEASE AND DESIST ORDER NO. 262.31-XX AGAINST NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT

I. INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board) based on Administrative Liability Complaint (ACL) No. 262.5-46 and proposed Cease and Desist Order (CDO) 262.31-XX against North San Joaquin Water Conservation District (District).

The Division of Water Rights Prosecution Team (Prosecution Team) presented evidence at the hearing on June 21, 2007. This evidence showed that the District was diverting water while in violation of terms 15[1] and 23[2] of its permit and that the ACL amounts were calculated in a reasonable manner.

II. FACTS

The State Water Board issued Permit 10477 to the District on July 3, 1956. The State Water Board amended the permit in 1992. Among other changes, the Board added terms 15 and 23. These terms were the result of a stipulated agreement between the District, the Department of Fish and Game (DFG), California Sportfishing Protection Alliance, and East Bay Municipal Utility District (EBMUD). (DFG-8.) The agreement resolved protests against the District's 1991 petition for extension of time.

On February 2, 2006, staff from the Division of Water Rights conducted an inspection of the District's facilities. During that inspection, staff discovered that the District was diverting water, but did not have fish screens installed and did not have a bypass flow agreement with

[1] Permit term 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.

[2] Permit term 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.

DFG. (WR-1.) Staff also determined that the District had no operating agreement with regard to fish screens and no order from the Board regarding bypass flows. (Id.) Staff thus determined that the District was in violation of terms 15 and 23 of its permit. (Id.)

Under Water Code section 1052, a diversion or use of water subject to the statutory water right appropriation system established under Division 2 of the Water Code, but not authorized by a permit (or license or small domestic registration) under that system, is a trespass against the State. The violation is subject to administrative civil liability of up to $500 for each day a trespass occurs. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person on whom administrative liability is imposed. This authority is delegated to the Chief of the Division. Water Code section 1831 authorizes the State Water Board to issue a cease and desist order when any person is violating or threatening to violate Water Code section 1052 or any term or condition of a permit. This authority is delegated to the Chief of the Division. On November 30, 2006, the Division Chief issued ACL No. 262.5-46 and Draft CDO No. 262.31-XX against the District, alleging that the District was in violation of terms 15 and 23 of its permit and was making unauthorized diversions. The diversions were unauthorized because the permit does not authorize diversion except when the District is in compliance with terms 15 and 23. The complaint proposed civil liability of $66,400. The Board held a hearing on June 21, 2007 to determine whether to affirm the ACL complaint and the draft CDO.

III. ANALYSIS AND ARGUMENT

Term 15 of the District's permit demands that "no water shall be diverted under this permit" unless the District is in compliance with term 15. Similarly, term 23 orders "no diversion shall be made under this permit" until the District complies with term 23.

Through written testimony, exhibits, and at hearing, the Prosecution Team showed that the District has been out of compliance with term 15 since the end of the 1993 season. The District never had an operating agreement with DFG that would protect fishlife, and the District acknowledged that at no time after the 1993 season did the District have fish screens installed. (Transcript, p. 103.)

Similarly, the evidence showed that the District has been out of compliance with term 23 since the term was added to the permit. There was no agreement between the District and

DFG with respect to flows to be bypassed for aquatic life. (Transcript, p. 14.) The Water Board has entered no further order with respect to those flows, as discussed further in section III.3 of this brief.

Since "no water shall be diverted" unless the District is complying with terms 15 and 23, any diversions made while the District was out of compliance with these terms were not authorized under the permit. As such, all diversions by the District since amendment of the permit on December 11, 1992, have been unauthorized and constitute trespasses against the state subject to civil liability under section 1052 of the Water Code. The maximum and proposed liability were calculated using conservative figures as set out in the ACL complaint and explained at hearing. Submitted exhibits and testimony at hearing prove that there has been a long standing violation of the Water Code and that the recommended liability of $74,400 is reasonable.

At the conclusion of the hearing, Board member Baggett posed five questions. The first two questions relate to term 15. The third relates to term 23. The final two questions address the amount of liability.

1. Term 15 of Permit 10477 includes the phrase, ".....until the pemittee 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?

Permit term 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.

The language in permit term 15 comes verbatim from the 1992 Stipulated Agreement For Permit 10477 (Application 12842) of North San Joaquin Water Conservation District. (DFG-8.) This agreement was entered to resolve protests over the District's 1992 time extension. The agreement was signed in the summer of 1992 by EBMUD, California Sportfishing Protection Alliance, DFG, and the District. James Sorensen was the signatory from the District.

The use of the term and/or means that the District could comply with term 15 of its permit by constructing adequate fish screens or entering into an agreement to use other

measures to protect fishlife. The 'and' portion of and/or implies that in order to adequately protect fish, construction of fish screens may need to be accompanied by further agreement on operation of the screens and the facility as a whole. There may be screens, an agreement, or both. Further, the and/or shows a recognition that screens may take some time to put in place, and thus it might be necessary to have an interim agreement until permanent screens could be installed.

The District admitted at the hearing that they never intended to install fish screens, and that they lacked the financial resources to do so, even had they wanted to. (Transcript, p. 123.) Furthermore, sworn testimony from Mr. Sorensen in the Mokelumne River Hearings, on direct examination by Mr. Adams, shows that the District felt fish protection was solely the responsibility of DFG, and thus screens should be financed by them if installed at all. (Mokelumne River Hearings Transcript, Vol. VII, p. 88-89; see also Transcript, p. 69.)

The District signed an agreement that it would install screens, come to some other agreement, or do both. At the time the District signed the stipulated agreement with DFG, the District had no intention or ability to install screens. This means the District either intended to talk DFG out of the screen requirement, or the District intended to ignore the agreement altogether. Either way, the District led DFG and other protestants to believe that fish screens would be the probable outcome of the stipulated agreement. This shows bad faith on the part of the District. The State Water Board should take into consideration the District's bad faith dealings with DFG when determining the appropriate penalty in this matter.

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 permit term 15?

The District has conceded that there were no fish screens installed subsequent to 1993. (Transcript, p. 103.) Compliance or noncompliance with term 15 therefore rests on whether the District "entered into an operating agreement with the Department of Fish and Game that will protect fishlife" as required by term 15. The April 1993 letters between Mr. Sorensen and Mr. Broddrick are the only evidence of such an agreement. If these letters do not serve to comply with term 15, then the District has been out of compliance since removing the temporary screens in 1993.

Even if the letters constitute an agreement between the District and DFG that the District should take no action to screen or otherwise protect fish, the District is not in compliance with term 15. The plain language of the permit requires "an operating agreement with the Department of Fish and Game *that will protect fishlife*" (italics added). Nothing in the exchange of letters says that doing nothing will be adequate to protect fishlife. An agreement that the District may ignore fishlife protection would not fulfill the requirements of term 15, even if that were what Mr. Broddrick agreed to. Nor is there anything in the letter suggesting that it is an "operating agreement," except as applied to the first year when temporary fish screens were in place. The letter does not reference any other operations to protect fishlife, indeed it makes no reference to any operations at all that do not involve placement of fish screens.

To the extent the letter exchange constitutes an agreement, it certainly was not an agreement that the District need do nothing to comply with term 15. The entire first half of the April 15, 1993 letter (NSJ-106) discusses interim measures to be carried out – namely, construction of fish screens. Nowhere in NSJ-106 does the District suggest that they will remove the screens at some future point, not reinstall them, and not take any further action.

NSJ-106 memorializes an understanding between Mr. Sorensen and Mr. Broddrick. There are two parts to this agreement. The first part is covered in the first three paragraphs of the letter, where the District announces it will install fish screens in the interim until a permanent agreement can be reached.

The second part of the agreement can be found in the last paragraph on the first page of the April 15, 1993 letter. "The District will cooperate with the Department of Fish and Game to attempt to reach a *permanent* solution to adequately protect fish life *after* the resolution of the myriad of issues now before the State Water Resources Control Board." (NSJ-106, italics added.) To the extent that these letters constitute an agreement between DFG and the District, that is as far as the agreement goes. A permanent solution will be delayed until a future date. Nowhere is there an agreement that the District is permitted to do nothing in the interim. To the contrary, the whole first half of the letter discusses work that will be done in the interim period until a permanent solution is reached. Nowhere in the letter does the District disclose that it intends to take out the temporary screens without implementing a permanent solution. Delaying a permanent solution does not negate the District's responsibility to implement interim

protection. There is simply nothing in NSJ-106 that even implies, much less states explicitly, "after this year, we are going to take out the temporary screens and take no further action for the next 13 years." The words of the letter should be given their plain meaning (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 690.) The plain language of the letter does not absolve the District from taking action to protect fishlife.

Finally, it is important to remember that NSJ-106 was written by the District, and that a settlement agreement is a contract. (*Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618; Cal.Jur.3d (2007) Accord, § § 72, 73.) It is a standard tenet of contract law that ambiguities in agreements are to be construed against their author. (*Lassing v. James* (1895) 107 Cal. 348, 355; Cal.Jur.3d (2007) Contracts, § 174; see also Code Civ. Proc. § 1864.) As discussed above, there is not even an ambiguity here, because complete failure to take any action after 1993 is not contemplated in NSJ-106. To the extent that the District attempted at hearing to introduce such ambiguity, however, construction against the author is highly appropriate. It is unreasonable to make the monumental assumptive leap that, by faxing NSJ-106 back to the District, Mr. Broddrick believed he was permitting the District to take out the temporary screens at the end of the season, never reinstall them or other screens, and never take any further action to comply with term 15 for as long as it takes to reach a permanent solution.

NSJ-106 acknowledged that the District was installing temporary screens, and the agreement in that letter permitted the District to continue with a temporary solution until a more permanent solution could be reached. Nothing in NSJ-106 allowed the District to treat inaction as a solution, temporary *or* permanent.

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 permit term 23?[3]

Permit term 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.

The District did not argue at hearing that they had reached a bypass agreement with DFG; if they were in compliance with term 23, it would have to be the result of a further order entered by the State Water Board with respect to flows bypassed for aquatic life.

A. Mokelumne River Hearings

The first thing to note is that NSJ-109 and NSJ-110 are not Board orders.[4] To the contrary, both these documents announce that the Board took no action on the Mokelumne River Hearings. As such, neither NSJ-109 nor NSJ-110 is a "further order" as required to fulfill term 23 of the District's permit.

Second, the Mokelumne River Hearings "focused primarily on water rights held by East Bay Municipal Utility District (EBMUD), and to a lesser extent, on water rights held by the Woodbridge Irrigation District (WID) and North San Joaquin Water District." (NSJ-109.) The absence of Board action on a hearing focused on EBMUD hardly qualifies as a Board order with respect to North San Joaquin's flows.

Most importantly, the purpose of the hearings, as stated in the Notice of Public Hearing, was to "evaluate both interim and long-term measures that could be taken to protect fish and other public trust resources and . . . determine if additional conditions should be included in the water right permits and licenses of EBMUD, WID, and NSJ." (NSJ-42.) A brief chronology of the Mokelumne River Hearings and the District's permit amendment will clarify the relation between the two letters (NSJ-109 and NSJ-110) and the District's compliance with term 23.

As previously discussed, the stipulated agreement that resolved protests on the District's 1992 time extension was signed on June 30 and July 1, 1992. (DFG-8.) This agreement is the origin of terms 15 and 23.

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[3] The District also argued that the Joint Settlement Agreement (JSA) somehow constituted an agreement with DFG or a Board order. The District was not a signatory to the JSA, the JSA did not reference or affect the District's permit, and Board Member Baggett did not ask for a discussion of that document in closing briefs.

[4] Although the State Water Board labels its adjudicative decisions as either Decisions or Orders, they both constitute actions taken in adjudicative proceedings that determine the rights, duties or other interests or responsibilities of the parties. (See Gov. Code, § 11405.50.) Examples include permits, licenses, actions on change petitions, decisions in

Notice of the Mokelumne River Hearings was sent out just over one month later, on August 6, 1992. (NSJ-42.) The hearings were conducted November 9 through 18 of that year. (*Id.*)

Less than a month later, on December 11, 1992, the State Water Board ordered that the District's permit be amended to include terms 15 and 23. (Prosecution Team Exhibit WR-7.) As stated in NSJ-110, "all issues raised in the original complaints have been remedied through means other than the 1992 hearing." To the limited extent which the District's responsibilities were at issue in the Mokelumne River Hearings, they had indeed been dealt with through other means. Namely, following the Mokelumne River Hearings, the State Water Board added term 23 to the District's permit. For the District to argue that it need not comply with term 23 because the Board felt it unnecessary to take any action following the Mokelumne River Hearings, when the addition of term 23 to the District's permit is one of the developments that made it unnecessary to complete the hearings, is circular at best.

B. Decision 1641

At the conclusion of the hearing, Board Member Baggett also queried how Decision 1641 (D1641) relates, if at all, to the District's compliance with permit term 23. The very simple answer is that D1641 has no relation to term 23 of the District's permit. Mr. Adams, long time counsel for the District, testified at hearing that he had never even seen D1641 before the day of the hearing. (Transcript, p. 114.) The only reason D1641 was invoked in the current matter is because the District never made an effort to reach a bypass agreement with DFG, so the only argument available to the District at hearing was that there had been a subsequent order of the Board that fulfills term 23. As irrelevant as D1641 is to the current matter, it was the best available post *hoc* rationalization the District could substitute for what it actually needs to comply with term 23 - a further order entered by the State Water Board with respect to what flows the District must bypass for aquatic life in the Mokelumne River.

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public trust proceedings and enforcement orders. No action – canceling an adjudicative proceeding without issuing any order or decision – does not constitute an order.

As the Board is well aware, Decision 1641 relates to flows necessary to protect the Bay-Delta. (D1641, pp. 6, 63; *see also* http://www.waterrights.ca.gov/baydelta/d1641.htm[5].) The District would have the Board believe that bypass flows for fish in the Mokelumne, outside the Delta, are addressed by "Water Right Decision 1641, which addressed water quality objectives for the San Francisco Bay/Sacramento San Joaquin Delta Estuary." (NSJ-109, p. 2.) D1641 contemplates flows *from* the Mokelumne, American, Stanislaus, Yuba and other rivers in the Sacramento-San Joaquin River system into the Delta. D1641 does not address flows to protect fishlife *in* the Mokelumne, or any other of these rivers, outside the Delta, which is the subject matter of term 23. If D1641 somehow resolved the issue of flows necessary *in* the Mokelumne and other Central Valley rivers, then why would the SWRCB have later issued D1644, addressing flow in the Yuba River?

To comply with term 23, a Board order would need to address what flows the District must bypass to protect fish in the Mokelumne. D1641 neither directs flows for the District, nor aims to protect fishlife in the Mokelumne. D1641 simply does not address term 23 of the District's permit. D1641 does not affect the District's permit at all. Page 4 of D1641 includes a table entitled, "Permits and Licenses Affected by This Decision." Neither the District nor its permit is listed. The State Water Board could not have given any clearer indication to the District - D1641 had no effect on the District's permit.

4. If the 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?

Administrative Civil Liability against the District is based upon sections 1052 and 1055 of the Water Code. Section 1052 makes it a trespass to divert water other than as authorized by permit. Section 1055 authorizes liability for violations of section 1052. Section 1055 requires that the complaint allege the act or failure to act that constitutes a trespass or violation, the

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[5] "The State Water Resources Control Board adopted Decision 1641 on December 29, 1999. The Decision implements flow objectives for the Bay-Delta Estuary, approves a petition to change points of diversion of the Central Valley Project and the State Water Project in the Southern Delta, and approves a petition to change places of use and purposes of use of the Central Valley Project."

provision of law authorizing civil liability to be imposed, and the proposed civil liability. Neither code section requires a finding of harm.[6]

Water Code section 1055.3 directs the Board to take all relevant circumstances into consideration when determining the amount of liability.[7] Harm caused is a relevant circumstance of the violation. (Wat. Code § 1055.3.) It is important to note, however, that terms 15 and 23 were added following protests from DFG. Protection of fishlife is much more soundly within the expertise of Fish and Game than the State Water Board. The trespass at issue is unauthorized diversion of water, not harm to fish. While harm is a relevant factor, it is not central or essential to the violation of the Water Code.

Violation of either term 15 or 23 results in the same harm. Term 15 requires screens or some other operating agreement to protect fishlife. Failure to implement procedures to protect fishlife will have a direct negative impact on fishlife. Failure to bypass flows sufficient to sustain fishlife will have the same effect.

Mr. Weinzheimer testified at hearing that in all his time as watermaster, he had never seen a fish in the canal leading to the pumps, and thus screens were not necessary. The prosecution team objected to this testimony as Mr. Weinzheimer was not designated as an expert witness and presented no credentials qualifying him to testify to fish health or life processes.

Mr. Weinzheimer's lack of qualification was only underscored by the testimony that he gave. Screening is necessary primarily to protect fry and immature fish, not fully mature fish. Fry would not be visible to the casual observer, and would certainly not be observable from Mr. Weinzheimer's occasional glance into the canal. No other monitoring was being done to count fry at the pumps. Indeed, it is also worth noting that fish losses are often determined by evaluating salvage at fish screens. By failing to comply with the requirement for fish screens or

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[6] Counsel for the District made a brief argument at hearing that the State Water Board lacks authority under Water Code section 1052 to issue liability for violations of permit terms and conditions. This issue was fully discussed and briefed in proceedings before the Board earlier this year on ACL Complaint No. 262.5-44 against the Vineyard Club. The Prosecution Team would incorporate by reference the same arguments it made in that hearing, which can be found at http://www.waterrights.ca.gov/Hearings/docs/vineyardclub/ptresp2motion2dismiss.pdf.

[7] Wat. Code, § 1055.3. "In determining the amount of civil liability, the Board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator."

other operations to protect fish life, the District deprived the State Water Board and DFG of the means of determining how substantial the damage to fishlife was. The absence of this information is itself harm attributable to the Districts violations, which will hinder further efforts to protect fishlife, and should be taken into account in setting liability.

By the wording of term 15, the District has an obligation to take steps adequate to protect fishlife from the District's pumps. The responsibility lies with the District. The District took no such steps. The District did not even make any observations to determine what actions other than fish screens might be adequate, notwithstanding casual glances by an untrained employee who was not even looking for the appropriate life stage. There are fish in the Mokelumne River. Term 15 was included for a reason. To whatever extent there is uncertainty regarding the degree of harm, that uncertainty is attributable to the District.

Additionally, whether fish were entering the canal had no effect on the need for bypass flows under term 23. Failure to bypass flows sufficient to protect fishlife causes harm to fishlife.

5. If the 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?

The Prosecution Team does not request any modifications to the Cease and Desist Order.

Maximum liability was based on irrigation seasons 2003, 2004, and 2005. The Division of Water Rights assumed 150 days of irrigation each year, which is a conservative estimate based on historical use by the District. (WR-8, p. 5.)

The District's violations date back at least 13 years. Although the Division has not quantified the precise harm caused by the unauthorized diversions, the terms were added to protect salmon, steelhead, and aquatic resources.

The District also received an economic advantage over other legal users by foregoing the costs of fish screen construction and bypass flows. Using a conservative cost for replacement water of $50 per acre foot, the District avoided costs of $410,000. The Prosecution Team also considered its costs to conduct the field inspection, prepare and inspection report, and prepare documents up to issuance of the ACL and CDO. This figure was approximately

$9,400. Additional Prosecution costs incurred to prepare for the hearing since issuance of the ACL and CDO were at least $10,000.

The District violated two separate terms of their permit for a period of over 13 years, from 1993 to 2006. During that time the District did not take a single step to come into compliance, preferring to keep quiet and hope no one would notice the violations. Term 23 directs the District to attempt to reach an agreement with DFG. There is no evidence that the District ever tried to reach any sort of agreement with DFG on term 23 bypass flows. (See Transcript, p. 123.) This is further proof of bad faith on the part of the District.

The District has never shown anything but complete contempt for the requirements imposed upon it in exchange for the right to use waters of the State of California. Those permit requirements were imposed to protect valuable resources of this State. The District should not be permitted to use the resources of this state while operating in disregard for those same resources.

Considering the extended period of this violation and the District's disregard for any concern other than pumping with as few restrictions as possible, the liability proposed at hearing is reasonable unto the point of leniency. As explained at hearing, the numbers used to determine maximum liability were conservative estimates based on historical use, and the actual recommended liability equates to a time period so short that it assumes round-the-clock pumping at rates significantly higher than any the District has ever utilized. (Transcript, p. 39-40.)

Further, maximum liability was calculated only based upon the last three years. Section 1055.3 of the Water Code directs the Board to consider the length of time over which the violations occurred, over thirteen years in this case.

Finally, the proposed liability set forth in the ACL complaint was reduced in an attempt to achieve settlement and avoid the time and expense of conducting a hearing. Such a reduction in the interest of achieving settlement is no longer reasonable, since no settlement was achieved.

Taking all these factors into consideration, liability in the amount of $76,400 is eminently reasonable.

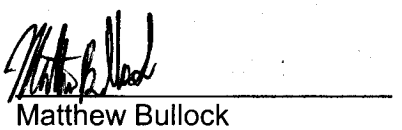
IV. CONCLUSION

Terms 15 and 23 require compliance before the District can legally divert water. For over thirteen years, the District has failed to comply with these terms and has been making unauthorized diversions of water. Under Water Code section 1052, this is a trespass against the state subject to liability up to $500 per day.

Term 15 of the District's permit requires the District to install fish screens and/or reach an operating agreement with DFG. The District has done neither. The District entered a stipulated agreement and accepted the permit knowing it had no intention of ever constructing fish screens, and thus entered the agreement and accepted the permit in bad faith. At hearing, the District presented a new and novel theory not discussed in the written testimony, arguing that they had entered an agreement with DFG allowing them to do absolutely nothing - neither construct fish screens nor do anything else. This shows further bad faith.

Term 23 of the District's permit requires the District to reach an agreement with DFG on bypass flows or obtain a further order from the State Water Board regarding its bypass requirements for the benefit of the fishlife in the Mokelumne. The District has done neither. At hearing the District presented post hoc rationalizations that they were in compliance with term 23 because of the Mokelumne River Hearings, which were held before the permit was amended, and D1641, which addresses a separate issue from term 23 and expressly does not affect the District's permit. Liability of $76,400 is exceedingly reasonable considering the long duration of this violation and the District's utter failure to take responsibility for its inaction over the past 13 years.

I declare that the foregoing is true and correct. Executed this 31st day of July, 2007, at Sacramento, California.



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