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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

WATER RIGHTS ORDER 2006-0018-DWR In the Matter of Permit 10477 (Application 12842) Regarding Draft Cease and Desist Order 262.31-XX and Administrative Civil Liability Complaint 262.5-46 against North San Joaquin Water Conservation District	**CLOSING BRIEF** **COUNTY OF SAN JOAQUIN**

I. INTRODUCTION

The County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority, (collectively hereinafter "County" or "County of San Joaquin") hereby submits its Closing Brief regarding the State Water Resources Control Board ("State Water Board") Draft Cease and Desist Order 262.31-XX and Administrative Civil Liability Complaint 262.5-46 against North San Joaquin Water Conservation District ("North San Joaquin" or "District") related to Permit 10477.

II. LIMITED STATEMENT OF FACTS

1. North San Joaquin's Water Right Permit 10477 dated December 11, 1982 contained 23 terms. At issue in this proceeding are Terms 15 and 23. Permit Term 15 provides in full as follows:

No water shall be diverted under this permit during 1992 or subsequent water years, until 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 protest 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. WR-7, p.3; NSJ-104.

2. Permit Term 23 provides in full as follows:

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 bypasses 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. WR-7, p. 4; NSJ-104.

3. There was a series of correspondence in 1993 by and between the North San Joaquin's Consulting Engineer, James F. Sorenson, and L. Ryan Broddrick, Regional Manager of the Department of Fish and Game ("DFG") regarding the District's compliance with Terms 15 and 23. The April 15, 1993 correspondence by District Engineer James F. Sorensen to L. Ryan Broddrick of DFG provides in relevant part as follows:

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 in the Mokelumne River hearings, including, but not limited to, water entitlements of this District, fish screening responsibilities under the provisions of the Fish and Game Code, and the obligation of the District, if any, to bear financial responsibility for same.

If the foregoing properly memorializes our understanding, kindly acknowledge approval and acceptance on a copy of this transmission and

return same tot his office by facsimile transmission to (209) 73207937. (NSJ- 106; WR-9,p.7-8.)

4. Mr. Broddrick acknowledged approval of the foregoing and "approved and accepted" the terms of Mr. Sorenson's letter by signature dated April 19, 1993. (NSJ-109; WR-9, p. 9.) Mr. Broddrick did also respond to Mr. Sorenson's letter by clarifying item 3 relating to the temporary loan of fish screens to the District; however, Mr. Broddrick did not comment upon, clarify, or change the terms related to the above cited paragraph. (Letter by Mr. Broddrick dated April 19, 1993, NSJ-109, WR-9, p. 10.)

5. The Mokelumne River hearing by the State Water Board which was referenced in the District's letter to DFG (NSJ-106) involved the water rights of North San Joaquin, among others, and was to evaluate the measures that could be taken to protect fish and other public resources. Additional conditions could be included in the water right permits of NSJ as a result of this 1992 State Board Mokelumne River hearing. (NSJ-116) The hearing notice dated August 6, 1992 noticed the subject of the hearing as follows:

> The purpose of this hearing is to receive evidence that will assist the State Water Resources Control Board (State Water Board) in determining the measures needed to protect fish and public trust resources in the lower Mokelumne River. The hearing will focus primarily on the water rights of East Bay Municipal Utility District (EBMUD), and to a lesser extent, the water rights of Woodbridge Irrigation District (WID) and North San Joaquin Water Conservation District (NSJ). The hearing will evaluate both interim and long-term measures that could be taken to protect fish and other public resources and will determine if additional conditions should be included in the water right permits and licenses of EBMUD, WID, and NSJ. (NSJ-116.)

6. A formal decision of the 1992 Mokelumne River hearing was never issued by the State Water Board. By letter dated October 16, 2000 the Harry M. Schueller, Chief of the Division of Water Rights for the State Water Board indicated that "the issues considered by the SWRCB

during the Lower Mokelumne River Hearing have been resolved. The SWRCB does not intend to take any further action on these issues unless the parties identify issues considered during the hearing that are not resolved." (NSJ- 109) This letter provides that "the primary purpose of the hearing was to determine what action should be taken by the SWRCB to protect fishery resources of the lower Mokelumne River." (NSJ-109, p.1.) The letter continues that in order to avoid duplication of efforts, the SWRCB held its 1992 Mokelumne River hearings in abeyance during the FERC process (NSJ-109, p.1) and that the State Board in D 1641 amended the water right permits of EBMUD and WID to include the streamflow conditions described in the FERC Joint Settlement Agreement. (NSJ- 109, p.2.)

7. By letter dated April 26, 2001 by Harry M. Schueller, Chief of the Division of Water Rights, formally concluded that "Further action on the Lower Mokelumne hearings is not required." NSJ- 110, p.2.) This April 26, 2001 letter indicates that the U.S. Fish and Wildlife Service ("USFWS") and the California DFG determined that the non flow measure proposed by EBMUD and WID "along with the flows specified in the Joint Settlement Agreement, are adequate to protect the public trust resources." (NSJ-110, p.1.)

8. One of the primary purposes of D 1641 issued by the State Water Board in March of 2000 was to determine the "responsibilities of water right holders to implement the flow-dependent objectives of the 1995 Bay-Delta Plan." (NSJ-131, D 1641 p. 56.) The flow-dependent objectives of the 1995 Bay Delta Plan are for the protection of fish and wildlife uses. (See WR 95-1, 1995 Bay Delta Plan, p. 14.)

9. The State Water Board in D 1641 determined, among other things, the water flows on the Mokelumne River. D 1641 provides that "This decision approves the schedule of flows attached to the 1996 MOU as the limit of the responsibility of EBMUD, Woodbridge Irrigation District, and North San Joaquin Water Conservation District to meet the objectives in the 1995 Bay-Delta Plan."

(NSJ-131, D 1641 p. 2, item 5.) D 1641 accepted the flows of the "1996 MOU" which is the Joint Settlement Agreement or "JSA" between EBMUD, USFWS and DFG to establish The Federal Energy Regulatory Commission ("FERC") conditions to protect fish and wildlife on the lower Mokelumne River. (NSJ-131, D 1641 p. 56.)

III. ARGUMENT

I. NO VIOLATION OF PERMIT TERMS, THUS NO GROUNDS FOR CDO OR ACL

A. North San Joaquin had reasonable belief it was operating in compliance with Permit Term 15.

Term 15 of the District's Water Right Permit Number 10477 relates to the protection of fishlife and requires the installation of fish screens and/or the entering into of an agreement with the Department of Fish and Game ("DFG") to protect fishlife. The District had a reasonable belief that it was in compliance with this Term 15 due to the letter agreement by and between the District's Engineer, James F. Sorenson, and L. Ryan Broddrick, Regional Manager of the DFG. (NSJ-109; WR- 9, p.7.) This agreement was adequate to provide the District a reasonable belief that it was in compliance with Permit Term 15.

1. Permit Term 15 allows for either the installation of the screens "or" an agreement with DFG.

Hearing Officer Baggett requested hearing participants to discuss the meaning of the words "and/or" in Permit Term 15. In this regard the plain meaning of the phrase allows for either the installation of the screening facilities or an agreement with DFG. Permit Term 15 provides in full as follows:

> No water shall be diverted under this permit during 1992 or subsequent water years, until 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

> protest 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 sots 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. (WR-7, p.3; NSJ-104. Emphasis added.)

In interpreting any contract, the provisions must be construed in accordance with the plain meaning of the words. *Nationwide Mut. Ins. Co. v. Devlin* (Cal. Ct. App. 1992) 11 Cal. App. 4th 81, 84. In seeking to ascertain the ordinary sense of words, courts regularly turn to general dictionaries. It is thus safe to say that the "ordinary" sense of a word is to be found in its dictionary definition. *Scott v. Cont'l Ins. Co.* (Cal. Ct. App. 1996) 44 Cal. App. 4th 24.

The Random House Dictionary of the English Language Provides: "And/or is used to indicate that either 'and' or 'or' is appropriate for linking two words or phrases." Unabridged ed., ©1966 Random House, Inc. The Merriam Webster's Collegiate Dictionary provides that "and/or--used as a function word to indicate that two words or expressions are to be taken together or individually." Merriam Webster's Collegiate Dictionary (10th Ed.) © 1993 Merriam-Webster, Inc. Yet another dictionary provides that and/or is "Both or either of two options." The American Heritage® Dictionary of Idioms by Christine Ammer. Copyright © 1997 by The Christine Ammer 1992 Trust. Published by Houghton Mifflin Company.

The definitions above all commonly define the phrase "and/or" as meaning one or both of two given options. In the instant case, this means that North San Joaquin had three different options: 1) installing fish screens; 2) entering into an operating agreement with DFG; or 3) both installing fish screens and entering into an operating agreement with DFG. The record demonstrates that the District installed fish screens in 1993 satisfying its obligations for 1993. (NSJ-109) Thereafter the

District had a signed letter agreement by DFG (NSJ-106, WR-9, pp.7-9.) that could reasonably be considered an operating agreement satisfying Term 15.

B. North San Joaquin had reasonable belief it was operating in compliance with Permit Term 23.

Term 23 of the District's Water Right Permit Number 10477 relates to flows to be bypassed for aquatic life. Term 23 provides that the District must enter into an agreement with the DFG regarding such flows, or failing such an agreement until a further order is entered into by the State Water Board. The District had a reasonable belief that it was in compliance with this Term 23 due to the correspondence in 1993 by and between the District's Engineer, James F. Sorenson, and L. Ryan Broddrick, Regional Manager of the DFG that provided that a "solution to adequately protect fish life" would be addressed by the District and DFG after the resolution of the State Board 1992 Mokelumne River hearing which included as an issue the water entitlement of the District. (NSJ-106; WR-9, p.7-8.) As previously discussed, the 1992 Mokelumne River hearing was formally resolved in 2001 following the adoption of D 1641 and the determination by State Water Board staff that "the issues considered by the SWRCB during the Lower Mokelumne River Hearing have been resolved." (NSJ-109, p.2.)

1. The District and Department of Fish and Game Letter Agreement included Term 23 requirements regarding By Pass Flows, which was an issue of the 1992 Mokelumne River Hearings.

The letter agreement between the District and DFG also applied to Term 23 relating to by pass flow requirements as it referred to a solution to "protect fish life" and referred to the District's "water entitlement" at issue in the Mokelumne River hearing. (NSJ- 106; WR-9, p.7-8.)

The purpose of the State Water Board Mokelumne River hearing was to determine the measures needed to protect fish and public trust resources in the lower Mokelumne River and included the water rights of the District. According to the hearing notice it was to evaluate "both

interim and long-term measures that could be taken to protect fish and other public resources and will determine if additional conditions should be included in the water right permits" of the District, among others. (NSJ-116.) The District participated in the hearing and was concerned that its water right would be reduced due to additionally imposed conditions by the State Water Board to protect fish resources. (NSJ-101, p. 4; Testimony of Stewart C. Adams, Jr.)

2. D 1641 addressed fish flow obligations and fish flow obligations on the Mokelumne River.

The Mokelumne River hearings were conducted in November of 1992; however, when the water right hearing for the Bay-Delta was noticed in 1998 there was still no resolution of the 1992 Mokelumne River hearing. One of the issues before the State Water Board at the Bay Delta hearings was the obligations of the water right holders on the Mokelumne River to meet the flow-dependent objectives of the 1995 Bay-Delta Plan" (NSJ-131, D 1641 p. 56.) which are requirements for fish purposes.

D 1641 approved the 1996 MOU or JSA which established flow requirements on the Mokelumne River "as the limit of the responsibility of EBMUD, Woodbridge Irrigation District, and North San Joaquin Water Conservation District to meet the objectives in the 1995 Bay-Delta Plan." (NSJ-131, D 1641 p. 2, item 5.) Although the JSA may have been intended to be a limited settlement agreement between EBMUD, USFWS and DFG. The State Water Board accepted it as meeting the obligations for fish flows on the Mokelumne River for North San Joaquin as well. This was thus a State Board proceeding that addressed the by pass flow requirements of the District satisfying the requirements of Term 23.

A total of eleven separate actions were filed challenging D 1641 and ultimately eight cases remained which were subject to Sacramento Superior Court Decision in 2003 by Judge Roland L. Candee. *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674. Eight timely

appeals resulted and the Third District Court of Appeal issued a decision in February of 2006. As a result of these legal proceedings, the State Water Board order in D 1641 related to Mokelumne River flow requirements remain.

3. The Mokelumne River Hearings were formally resolved by State Water Board Letter in 2001.

The State Water Board's 2001 letter resolving the 1992 Mokelumne River Hearing indicated that the primary purpose of the 1992 hearing was to "protect fishery resources of the lower Mokelumne River" (NSJ-109, p.1.) and concluded that "further action on the Lower Mokelumne hearings is not required." (NSJ- 110, p.2.) According to the letter this was due to the State Water Board's approval of the JSA in D 1641 and the State Water Board's amendment of the water right permits of EBMUD and WID to include the streamflow conditions described in the FERC Joint Settlement Agreement. (NSJ- 109, p.2.) The State Water Board letter indicates that the U.S. Fish and Wildlife Service and the California DFG determined that the non flow measure proposed by EBMUD and WID "along with the flows specified in the Joint Settlement Agreement, are adequate to protect the public trust resources." (NSJ-110, p.1.) Thus, with the adoption of D1641 and the subsequent determination by the State Water Board's April 2001 letter the 1992 Mokelumne River hearing was resolved and the obligations for the protection of fishery resources on the Mokelumne River were met, including the obligations of the District, which satisfies Term 23.

II. IF VIOLATION OCCURRED, AMOUNT OF PROPOSED CIVIL LIABILITY IS UNREASONABLE

If it is concluded that the District violated permit term conditions, the amount of civil liability proposed by the enforcement team in the amount of $66,400 (WR-6,p.3.) is unreasonable and not supported by the factors which the Water Code requires to be considered when determining civil liability. Water Code Section 1055.3 specifies the factors to be considered by the State Water Board

in determining the amount of any violation; this includes an evaluation of harm. Water Code section 1055.3 provides in full as follows:

> 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.

1. There is no evidence of harm caused by the District due to the alleged violation of its Permit Terms.

Assuming for argument, that the District violated Permit Terms 15 and 23, in determining the amount of any civil liability imposed by the State Water Board the Water Code requires the consideration of harm. The Water Rights enforcement team failed to present evidence during the hearing in this proceeding that any harm has resulted due to the allege violations of the permit terms by the District.

There is no evidence of harm caused due to the alleged violations by the District. District watermaster who has been employed by the District in this capacity since 1976 submitted testimony and testified at the hearing that he has never seen any evidence of dead fish within the District's intake channels or at the District's pumps. (NSJ-103, p. 2.) In his experience working on the River and operating the District's pumps, channels and diversion for over 31 years, it is his opinion that fish do not enter the District's channels by the pumps, partly due to the warmer water within the District's pump channel. (NSJ-103, p.2.) Again he testified that he has never seen any salmon or stealhead within the District's channels. The District's General Manager also testified that he was not aware of any evidence and has not witnessed any fish within the District channels or any evidence of fish kills due to the District's pumps. (NSJ-100. Paragraph 9.)

The witnesses that testified on behalf of the enforcement team including those who are employed by the Department of Fish and Game were not aware of any instances of dead fish within the District channels and were not aware if fish enter the District's channels. (See WR Exhibits 1-12.) The enforcement team presented no evidence that the alleged violations of the District's permits caused any harm or was likely to cause any harm to fishery resources on the Mokelumne River. There was no evidence presented at the hearing that additional water was needed on the River for by pass flows for the protection of fish resources on the River.

In addition, as previously discussed in this brief, the State Water Board held two extensive hearings in the 1990s whereby it received evidence and evaluated the fishery needs on the Mokelumne River. In both D-1641 and in the Mokelumne River hearings, the State Water Board concluded that no further conditions were to be imposed on North San Joaquin for fishery resource purposes. (NSJ-109, 110, 131.)

2. The calculation of the penalty evaluating the District's economic advantage is misplaced.

The enforcement team calculated the amount of the civil liability to be imposed on the District by evaluating the alleged economic advantage of the District utilizing water from the Mokelumne River pursuant to its Permit. In determining replacement water the enforcement team evaluated the cost of Central Valley Project ("CVP") water or State Water Project ("SWP") water (WR-3,p.3.) As indicated at the hearing this analysis is misplaced as it is not physically possible for CVP or SWP water to reach the District. In addition, in the absence of the delivery of the District's Mokelumne River water, the District's alternate source of water is groundwater. The District indicated that the District relies too heavily on groundwater and due to the unavailability of surface water the District's users have to develop and rely upon dual water distribution systems. Thus, these growers water costs in the absence of the surface water supply subject to the District's

permit, is the costs associated with operating their groundwater pumps, which is already being born by the growers. The District's permit is of limited duration, of limited supply, and in limited years. (WR-7.) Thus, these growers have already incurred the cost of a back-up groundwater system due to the limited availability of this surface water supply. It is disingenuous to calculate the District's purported civil liability due to a comparison of the cost of replacement water from either the CVP or the SWP.

3. A balance of the factors indicates that the proposed amount of civil liability is unreasonable.

The District presented evidence of its reasonable belief that it was in compliance with its Permit terms. Mr. Fred Weybret a Director of the District for over 31 years and throughout the time that the Permit was issued in 1992 until now, testified that it was his belief and understanding that the District was in compliance with its permit terms and that the District's obligations to satisfy either fish screen responsibilities or bypass flow requirements were resolved. (NSJ-102.) The District has not knowingly violated its Permit terms.

In addition, the evidence demonstrates that this is a District of limited financial resources (NSJ-102) within a groundwater basin that is critically overdrafted (Bulletin 118-80) and in desperate need for additional surface water to be put to beneficial use. It would be unreasonable for the State Water Board to impose such a significant administrative penalty in the proposed amount of $66,400 on this District of limited resources, which did not knowingly violate its Permit terms and where there is no evidence that the alleged violations caused any harm to fish resources. In addition, the amount of proposed limited is substantially disproportional to recent enforcement decisions and liability imposed by the State Water board in other proceedings. See NSJ-117 through 128.) The District's limited funds could be otherwise used to install infrastructure to comply with the permit terms, if necessary, or to develop projects to use additional amounts of surface water.

III. IF VIOLATION OCCURRED, TERMS OF THE PROPOSED CEASE AND DESIST ORDER SHOULD BE MODIFIED

In the event it is determined that the District is operating in violations of its Permit Terms 15 and 23, the draft Cease and Desist Order should be modified to allow the District to continue its diversion of water for a reasonable period of time while the District complies with the Permit terms. As indicated there has been no evidence presented at the hearing that any harm as resulted from any alleged violations by the District. In addition, as the State Water Board is aware the District's groundwater basin is one of critical overdraft and any amount of surface water put to beneficial use within the District has a direct impact on the amount of water pumped from this critically overdrafted groundwater basin. In order to assist with the recovery of this overdrafted basin the District is diligently pursuing projects to put more surface water to beneficial use. Allowing the continued use of this limited surface water is reasonable in order to assist in the recovery of the groundwater basin while there is no evidence that fish are impacted due to the surface water diversions. In light of these circumstances it would be reasonable for the draft Cease and Desist order to be modified to allow the District a reasonable period of time (perhaps two years) to comply with the permit terms.

IV. CONCLUSION

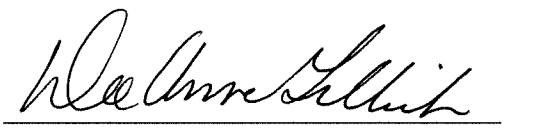
The County of San Joaquin respectfully requests the State Water Board to not issue the draft Cease and Desist Order and Administrative Civil Liability Complaint which is the subject of these proceedings. As the evidence demonstrates North San Joaquin had a reasonable believe that it was in compliance with its permit terms 15, related to fish screens, and 23, related to bypass flows. There is no evidence presented that the District's use of surface water from the Mokelumne River has caused any harm to fishery resources on the Mokelumne River. The State Water Board thoroughly evaluated the needs of the fishery resources on the Mokelumne River in both D 1641 and the

Mokelumne River hearings and concluded that no further conditions shall be imposed on North San Joaquin. In addition, the proposed civil liability is disproportional to the potential harm due to the District's current operations, the alleged economic advantage of the District due to any alleged diversion of water in violation of its permit or the similar enforcement orders imposed by the State Water Board in other proceedings.

Dated: July 31, 2007

Respectfully Submitted,

NEUMILLER & BEARDSLEE
A Professional Corporation

By: 

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