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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)	
)	
Proposed Modification of Order WR 2006-0006)	CLOSING BRIEF OF THE
)	CALIFORNIA SPORTFISHING
)	PROTECTION ALLIANCE
)	
_____)	

The California Sportfishing Protection Alliance (hereinafter CSPA) files this closing brief in Opposition to the California State Water Resources Control Board (hereinafter State Board) Modifying State Board Order 2006-0006. On June 25, 2006, the State Board began a hearing on the proposed modification of State Board Order 2006-0006. The issues for the hearing were:

1. What modification, if any, should the State Water Board make to the compliance schedule set forth in Part A of Order WR 2006-0006, and how should any modifications be structured to take into account any potential changes to the southern Delta salinity objectives or the program of implementation that may occur as a result of the State Water Board's current review of the Bav-Delta Plan? and;

2. If the compliance schedule contained in Part A of Order WR 2006-0006 is modified, what interim protective measures, if any, should be imposed?

CSPA does not believe the hearing evidence supports any modification of the compliance schedule set forth in Part A of Order WR 2006-0006, and therefore recommends that the compliance schedule be unchanged. The evidence in the record does not support the requested change for the following reasons:

I. The salinity problem in the Delta caused by the Water Projects has been long known and extensively documented

California Water Code Section 12202 states, “Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. Water Code Section 12203 states, “It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled.” The foregoing pertains to both the quantity and quality of water. Water Code Section 12204 states, “In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter.”

As the State Board found in WRD-990 in 1961, salinity control in the Delta was one of the primary purposes of Shasta Dam (Water Code § 11207(c)) and one of the purposes of the federally authorized Central Valley Project (CVP). WRD-990, p. 48. Salinity control was also a purpose to the water rights applications and assignments. WRD-990, p. 49. The State Board reserved continuing jurisdiction over water rights permits for the purpose of formulating terms and conditions relative to salinity control in the Delta.

Indeed, between 1958 and 1971, the State Board, in seven different decisions, acknowledged the salinity problems created by the CVP. Continuing jurisdiction to include additional salinity protection in water rights permits was reserved each time. Interestingly, in WDR-1379 (1971) the State Board also noted that the Federal Water Pollution Control Act in 1970 included requirements for federal agencies having jurisdiction over facilities or engaged in public works activity to insure compliance with applicable water quality standards. WDR-1379, p. 19.

The State Board approved permits for the U. S. Bureau of Reclamation's (USBR) New Melones Reservoir by WRD-1422 in 1973. The permits were conditioned on USBR meeting salinity standards in the Delta. Following the completion of a comprehensive study of the impacts of salinity on Delta crops by the University of California in 1976, the State Board adopted the 1978 Water Quality Control Plan and Decision 1485 in 1978. The 1978 Plan established the interior Delta salinity objectives in place today.

The State Board later updated and adopted the 1995 Water Quality Control Plan for the Delta in 1995. The salinity standards remained the same as before. That same year the State Board amended DWR's and the USBR's water rights for the SWP and CVP to be consistent with the recently adopted water quality plan. The USBR was required by the State Board to release water from New Melones Reservoir on the Stanislaus River to meet the Vernalis salinity standard.

II. DWR and USBR were assigned responsibility for meeting salinity standards in WRD-1641

The State Board began to address the implementation of the 1995 Water Quality Control Plan in a series of hearings between 1998 and 1999. These hearings culminated in WRD-1641 in December 1999 and a revised WRD-1641 in March 2000. Sole responsibility

for meeting the Vernalis salinity standards was assigned to USBR, and DWR and USBR were held jointly responsible for complying with the interior Delta water quality standards in three locations, at San Joaquin River at Brandt Bridge, Old River near Middle River, and Old River at Tracy Blvd. These last three locations are commonly referred to as the “interior salinity standards.” The interior salinity standards require that salinity be maintained at a running 30-day average of 0.7 mmhos/cm EC April through August and 1.0 mmhos/cm the rest of the year.

The State Board adopted a revised Water Quality Control Plan for the Delta in December 2006, which retained the long-adopted Delta salinity standards and reiterated that the water rights of DWR and USBR are conditioned upon implementation of the southern Delta salinity objectives. It also noted that the Operable Gates (permanent barriers) were expected to be operational in the spring of 2009. It is now clear that the gates will not be installed due to their effect on endangered species.

III. The State Board issued a Cease & Desist Order (CDO) against DWR and USBR in 2006 to prevent threatened violations of the interior Delta standards.

Faced with continuing exceedance of interior Delta salinity standards, the State Board’s Division of Water Rights instituted a proceeding in late 2005 to consider whether a CDO should be issued to DWR and the Bureau due to the threatened violations of the terms and conditions in their permits. CSPA was a party to that hearing. The Division of Water Rights Prosecution Team filed exhaustive evidence indicating a pattern of violation of water quality standards by the DWR and USBR. Following the evidentiary hearing, the SWRCB adopted Order WR 2006-0006. WR 2006-0006 extended the D-1641 compliance date for the Projects to meet the interior Delta salinity standards to July 2009 (Condition A.2) and required a compliance plan to achieve salinity objectives. Condition A.2 specifies that the compliance

plan may include the implementation of operable barriers in the south Delta but that a range of other measures that would provide the same degree of salinity control are acceptable.

In a June 1, 2009 letter to the State Board Executive Director, DWR acknowledged that the 30-day running average 1.0 EC salinity standard at the Old River near Tracy Road Bridge station had been violated from 19 December 2008 through 10 March 2009 and from 23 March 2009 through 20 April 2009. The 0.7 EC salinity standards continued to be violated throughout the month of April, until 6 May 2009. This violation was not a surprise to the State Board or its staff. For over 30 years, interior Delta salinity standards have been ignored, discarded or violated without meaningful enforcement by the State Board.

IV. DWR and the USBR have the ability to comply with salinity standards

State Board Order WR 2006-0006 identified the extensive toolbox available to DWR and USBR to comply with south Delta salinity standards. These include additional releases from upstream CVP facilities or south of the Delta SWP or CVP facilities, modification of the timing of releases from Project facilities, reduction in exports, recirculation of water through the San Joaquin River, purchases or exchanges of water under transfers from other entities, modified operations of temporary barriers, reductions in highly saline drainage from upstream sources, or alternative supplies to Delta farmers.

Salinity concentration in the south Delta is largely determined by export rates, inflow from the San Joaquin River and operation of the temporary interior barriers, all of which determine net flow through local channels. To CSPA's recollection, neither DWR nor the Bureau have ever proposed to purchase water, transfer water, or exchange water in order to meet the interior salinity standards. Nor, to our knowledge, have they ever proposed to restrict export pumping or reserve additional water in upstream reservoirs in order to meet the interior salinity standards.

Additional water flow in the San Joaquin River will likely be necessary in the future to dilute salt concentration in the river caused by saline discharges from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP, primarily through the Delta-Mendota Canal and the San Luis Unit. To date, that burden has fallen on New Melones reservoir storage alone. Congress made it clear in PL 108-361 (HR 2828 [October 25, 2004]) that the Secretary of the Interior “shall acquire water from willing sellers and undertake other actions designed to decrease releases from the New Melones Reservoir for meeting water quality standards and flow objectives for which the Central Valley Project has responsibility to assist in meeting.” This clear Congressional mandate requires USBR to acquire additional water from other sellers and undertake other actions such as releasing more water from upstream storage. Water is clearly available for purchase. The State Board has numerous petitions to transfer water pending and the Bureau can and should obey the Congressional mandate. The State Board should not substitute its discretion for the law of the United States and thereby prevent water quality standards from being met.

V. The State Board may not dictate the manner of compliance with salinity standards and so cannot continue to allow reliance on operable barriers alone to meet standards

The Delta salinity standards contained within the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary are developed pursuant to the federal Clean Water Act and Porter-Cologne Act, subject to approval by U.S. EPA. Water Code Section 13360 states, “No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.”

The State Board has relied on the concept of operable barriers as a reason for not requiring the SWP and CVP to meet the interior Delta salinity standard. It is now clear that the State Board's previous reliance on the operable barriers as a long term solution to the salinity problems in the interior Delta was flawed. The Biological Opinion (BO) for salmon, steelhead, green sturgeon and southern resident killer whales issued by NMFS in June 2009 is explicit: "DWR shall not implement the South Delta Improvement Program, which is a program to replace temporary barriers with permanent operable gates," because the project would adversely modify critical habitat. Biological Opinion, p. 659. The NMFS BO observes that after analyses are completed regarding the existing temporary barriers, DWR can request that USBR reinitiate ESA consultation with NMFS. In any case, the operable barriers are not likely to be constructed in the near-term.

VI. Potential modifications of salinity objectives are speculative and should not be considered as a new reason to delay enforcement of the interior Delta salinity standards

The present salinity standards, despite being the subject of numerous proceedings, have remained in place for more than three decades. The State Board has recently begun yet another review of the salinity objectives, as part of its Periodic Review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. This extremely complex review will be both contentious and lengthy. The salinity standards may ultimately be strengthened or relaxed.

Any effort to weaken standards would require an exhaustive anti-degradation and alternatives analysis and would be subject to approval by U.S. EPA, which in turn would trigger a Section 7 consultation with NMFS and USFWS. There is a growing body of scientific literature concerning the harmful effects of salinity to freshwater fish that would have to be considered. Section 131.12(a)(1) of Title 40 requires that the level of water quality necessary

to protect existing uses shall be maintained and protected. The federal Antidegradation Policy establishes an absolute floor: Tier 1 waters such as the Delta must maintain and protect existing beneficial uses and water quality conditions necessary to support uses that have occurred since November 28, 1975. Salt sensitive crops, like beans and blueberries, have been grown in the Delta since 1975. South Delta farmers have a fundamental, historical and legal right to grow crops irrigated with water of appropriate quality and the Antidegradation Policy protects that right.

VI. State Board failure to enforce salinity standards is contrary to the federal Clean Water Act and Porter-Cologne Water Quality Control Act and will undermine confidence in government. It cannot be in the public interest to fail to enforce the law

The Clean Water Act and Porter-Cologne Act mandate the development and enforcement of water quality standards. The enforcement of Delta salinity standards, first issued in 1978, has been repeatedly ignored. Since 2000, DWR and USBR have been tasked with ensuring compliance with those standards. Continuing exceedance of salinity standards and DWR's admission that it wouldn't meet the schedule for installing operable barriers led the State Board, on February 15, 2006, to issue a CDO and extend the compliance schedule until July 1, 2009. In May 2007, DWR notified the State Board that it couldn't meet the July 1, 2009 deadline until July 2011. In August 2007, DWR notified the State Board that it needed until November 2012. In June 2009, DWR estimated it might have the operable barriers in by 2016. Suddenly, on May 29, 2009, DWR realized that the July 1, 2009 compliance date was only 33 days away and submitted a two-paragraph letter asking the State Board to consider modifying the CDO. Apparently on its own motion, the State Board immediately noticed an expedited hearing to consider, yet again, measures to protect DWR and USBR from the consequences of failing to comply with water quality standards.

Enough is enough. Thirty years of noncompliance is enough. DWR and the USBR have turned delay in meeting these standards into an art form. Their testimony provided no substantive evidence of a plan to meet the standards in the near future, and it is clear that they believe the State Board will never enforce the standards against them. They have alternatives at their disposal to ensure compliance. These alternatives may be difficult. They may be expensive. They may be unpleasant. But they are available.

CONCLUSION

This hearing was not about DWR and USBR; it was about the State Board and the Board's ability and willingness to enforce the law. It is about whether anyone can ever rely on the Board's assurances, guarantees and promises to implement, comply with, and enforce statutory and regulatory requirements. For the foregoing reasons, CSPA asserts that if the State Board again gives more time for DWR and the USBR to continue to violate the interior Delta water quality standards, it would be an arbitrary and capricious act by the State Board that would violate Article 10, Section 2 of the California Constitution, would violate the Clean Water Act and Porter-Cologne Act, would violate the evidentiary standards for State Board hearings, and would damage the public interest and public trust rights of the citizens of California.

Dated: August 11, 2009

/s/ Michael B. Jackson
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