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VIA: Electronic Submission
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For Petitioner California Sportfishing Protection Alliance

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the matter of _____) **REQUEST FOR RECONSIDERATION**
WR 2008-0029-EXEC)
_____)

1. The Name and Address of the Petitioner

The Petitioner is the California Sportfishing Protection Alliance (CSPA); its address is 3536 Rainier Avenue, Stockton CA 95204.

2. The Specific Board Action of Which Petitioner Request Reconsideration

CSPA requests the State Water Resources Control Board (SWRCB) to reconsider ORDER WR 2008-0029-EXEC (Order) that granted a Temporary Urgency Change Petition to the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) for operation of the Joint Points of Diversion (JPOD). The Order also modified Corrected Order 2008-0014 of Yuba County Water Agency's Permit 15026. This Request for Reconsideration should also be considered an objection to the Urgency Permit that was granted.

3. The Date on Which the Order was Made by the Board

Board member Arthur G. Baggett, Jr. signed WR 2008-0029-EXEC on 1 July 2008.

4. The Reason the Action Was Inappropriate or Improper

The Order was inappropriate, improper and illegal because DWR and the Bureau failed to exercise due diligence in seeking changes that could have been avoided. Despite the fact that both DWR and the Bureau knew that South Delta salinity standards would likely be violated this summer and that changes would be necessary, they took no actions to avoid the problem and thereby created an artificial and unnecessary situation that they used to justify an emergency order. The Order is not supported by substantial evidence that there are no readily available actions that would enable DWR and the Bureau to improve water quality in the South Delta and meet salinity standards. Actions available to DWR and the Bureau would enable them to comply with their permit terms and conditions and allow JPOD operations without having to resort to an urgency petition. The actions constitute an abuse of discretion because information was available but not submitted to the SWRCB and not reviewed by the SWRCB because of the haste to issue the expedited Order. The Order constitutes an illegal ad hoc change of Revised Water Rights Decision 1641 (D-1641), a decision that was issued pursuant to due process and public proceedings.

The Order was inappropriate, improper and illegal because it ignores the serious threat the action poses to species listed pursuant to state and federal endangered species acts. The Biological Opinions issued pursuant to the federal Endangered Species Act have been found to be inadequate and not protective of Delta smelt, Chinook salmon and steelhead. The DWR does not have a "Take Permit" pursuant to the California Endangered Species Act (CESA). No interim measures are presently in place that would protect these species. The Order is not supported by substantial evidence that there are no readily available actions that would lessen threats to these threatened and endangered species. It constitutes an abuse of discretion because information was available that would enable DWR and the Bureau to comply with their permit terms and conditions and protect threatened and endangered species but was not submitted to the SWRCB and not reviewed and analyzed by the SWRCB because of the haste to issue the expedited Order.

The Order was inappropriate, improper and illegal because it ignores the effect the project will have on other water quality parameters that have degraded and threaten to degrade the identified beneficial uses of the Delta. Salinity is not an acceptable surrogate for numerous contaminants that pose a threat to aquatic life and human health. The Order is not supported by substantial evidence that there are no readily available actions that would reduce the impacts from these other constituents. It constitutes an abuse of discretion because information was available that would enable DWR and the Bureau to comply with their permit terms and conditions and protect beneficial uses from harmful pollutants but was not submitted to the SWRCB and not reviewed and analyzed by the SWRCB because of the haste to issue the expedited Order.

The Order was inappropriate, improper and illegal because it violated CSPA's due process rights. DWR and the Bureau failed to provide CSPA with timely copies of anticipated salinity violations and potential actions to address the anticipated violations, as mandated by the SWRCB's 2006 Cease and Desist Order (CDO) against the DWR and

Bureau. CSPA was thus deprived of the opportunity to review and comment on actions DWR and the Bureau were pursuing with respect to their anticipated violations of salinity standards. CSPA could have provided information on potential adverse consequences of the Order and readily available actions that would have enabled DWR and the Bureau to comply with salinity standards.

5. The Specific Action Which CSPA Requests

CSPA requests that the SWRCB rescind WR 2008-0029-EXEC and conclude that JPOD and the Yuba Transfer not be allowed unless the conditions established in D-1641 and WR 2006-0006 are met. Since WR 2008-0029-EXEC was issued by a single SWRCB Member and reversed requirements in Corrected WR Order 2008-0014 that was adopted on 20 May 2008 by a unanimous vote of the entire SWRCB, a stay of WR 2008-0029-EXEC would be appropriate.

6. A Statement That Copies of the Petition and Accompanying Materials Have been Sent to All Interested Parties

The Urgency Petition contained no mailing list and it is unknown if either DWR, Bureau or the SWRCB provided copies of it to any party other than the South Delta Water Agency. However, CSPA is providing this Petition to parties on the enclosed mailing list and is requesting that the SWRCB provide it to the Bay-Delta contact list.

POINTS AND AUTHORITIES

CSPA incorporates by reference the Points and Authorities submitted by the South Delta Water Agency (SDWA) in their Petition for Reconsideration of WR 2008-00299-EXEC submitted to the SWRCB on 18 July 2008. It incorporates the Declaration of Alex Hildebrand that was attached to the SDWA Petition and further incorporates the record and subsequent communications from the SWRCB's Cease and Desist Order proceeding against the DWR and Bureau for threatened violations of Delta salinity standards herein.

I. STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION

An interested party may petition the SWRCB for reconsideration of a decision or order based on: 1) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; 2) the decision or order is not supported by substantial evidence; 3) there is relevant evidence, which in exercise of reasonable diligence, could not have been produced; and 4) error in law.

CSPA asserts that the SWRCB order granting the DWR and Bureau Urgency Change constitutes an error in law and is not supported by substantial evidence. The actions also constitute an abuse of discretion and relevant information was available to the SWRCB but not reviewed due to the haste of the process.

II. STATEMENT OF FACTS

The SWRCB adopted D-1641 in March of 2000. The order implemented the 1995 Bay-Delta Water Quality Control Plan. D-1641 granted the DWR and Bureau the authority to use each other's Delta export facilities under certain circumstances. This authority was described as JPOD and was allowable only if the export projects were in compliance with all of the terms and conditions in their permits, including the obligation to comply with salinity objectives in the south Delta. *See pages 150, 156 and 159. The water quality objectives are set forth in Table 2 of D-1641 on page 182.*

The Order also modified Corrected Order 2008-0014 which added Clifton Court Forebay and the Jones Pumping Plant as points of diversion under Yuba County Water Agency's permit 15026 to facilitate a long-term transfer of up to 200,000 acre-feet annually. The Order deleted requirements that the transfer was conditioned upon Project operator's compliance with the water quality objectives set forth in Tables 1, 2 and 3 on pages 181 to 187 of D-1640.

The Bureau is responsible for meeting the standard at Vernalis and the Bureau and DWR are jointly responsible for complying with the standards 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 became effective in 2006 and require that salinity be maintained at a running 30 average of 0.7 mmhos/cm EC between April through August.

The DWR and Bureau predicted that the interior salinity standards would not be met in 2005 but claimed that they were not responsible for exceedances. In response, the SWRCB's Division of Water Rights instituted a proceeding 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. Following an evidentiary hearing, the SWRCB adopted a CDO on 15 February 2006. The CDO found, among other things, that both DWR and the Bureau are responsible for meeting the interior salinity standards and that operation of JPOD is not authorized when DWR and the Bureau are not meeting the 0.7 EC objective and that DWR must serve copies of all reports, plans, and other communications required by the order on all parties, including CSPA.

In the spring of 2007, SDWA, anticipating low flows into the southern Delta and likely violations of the interior salinity standards, asked DWR and the Bureau to undertake actions to prevent violations. DWR and the Bureau belatedly notified SDWA of anticipated violations but failed to notify CSPA. DWR maintained that it had no ability to affect southern Delta flows and quality and the Bureau claimed that any additional San Joaquin River flows would be a "waste of water."

The DWR notified the SWRCB that the Old River near Tracy Road standard had been violated from 30 April through 22 May on 22 May 2007. In fact, the standard was violated until 1 September 2007. The Bureau made a similar disclosure on 25 May 2007.

Neither of the notifications contained proposed remedies to alleviate the problem. CSPA understands that, pursuant to a private understanding with SDWA, DWR agreed to change operations of the flap gates on Old River near Tracy barrier and DWR and the Bureau agreed to undertake an experimental recirculation project to increase flow in the south Delta between 7 August and 12 September 2007.

The DWR and Bureau continued to operate JPOD during the period of exceedances and in violation of their permit and the conditions of the CDO. On 28 November 2007, the SWRCB's Executive Director sent a memo to DWR and a letter to the Bureau that clarified that JPOD could not occur during periods where standards were being violated and explicitly suggested that if the DWR and Bureau wanted to seek to change their permit and license requirements applicable to their use of JPOD, they should do so as soon as possible to assure that the matter can be considered prior to any need for JPOD diversion next year.

In the spring of 2008, the SDWA again requested that DWR and the Bureau undertake actions to insure water quality standards in the southern Delta would be maintained during the summer. On 11 June 2008, DWR notified the SWRCB that it again anticipated violations of the interior salinity standards and failed to notify CSPA and SDWA. The DWR and Bureau jointly petitioned for an urgency change to its permits to allow JPOD when interior standards were being violated on 16 June 2007 and sought to add "clarifying language" which was directly contrary to the language of D-1641, the CDO and SWRCB letters of 27 August 2007 and 28 November 2008. SWRCB Board member Arthur Baggett granted the Urgency Petition on 1 July 2008.

CSPA was a formal party to the evidentiary hearing that resulted in the SWRCB issuing the 2006 CDO against the DWR and Bureau. Among other requirements, the CDO directed the DWR and Bureau to provide CSPA and other parties with copies of all reports, plans and other communications required by the conditions of the order. CSPA was not provided a copy of the DWR's 11 June 2008 letter to the SWRCB regarding anticipated salinity exceedances of south Delta objectives until 8 July 2008, twenty-six days after the letter was sent to the SWRCB and seven days after the Order was issued. CSPA was not informed about or provided a copy of DWR and the Bureau's 16 June 2008 Urgency Petition until SEWA provided CSPA with a copy of both the Urgency Petition and issued Order on 18 July 2008, thirty-two days after the Urgency Petition was submitted and seventeen days after the Order was issued.

On 20 May 2008, the SWRCB adopted Corrected Water Rights Order 2008-0014 that authorized a long-term water transfer by the Yuba County Water Agency (YCWA). Corrected Water Rights Order 2008-0014 specified that:

"Rediversion of water at the Clifton Court Forebay and the Jones Pumping Plant pursuant to this Order is subject to compliance by the operators with the objectives currently required of the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) set forth in Tables 1, 2, and 3 on pages 181 to 187 of State Water Board Revised

Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those plants, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and USBR.”

Corrected Water Rights Order 2008-0014, Page 60.

Given the history of interior salinity standards violations and the near certainty of another dry year, the SWRCB and parties to the YCWA hearing could not have been unaware of the likelihood that standards would again be violated in 2008.

Notwithstanding that awareness, the SWRCB unanimously voted to include compliance with interior salinity standards as a condition of the order. Yet, little more than a month later, a single Member of the Board issued WR 2008-0029-EXEC and authorized the elimination of that compliance condition from the order.

According to the Water Quality Control Plan (Basin Plan) for the Sacramento River and San Joaquin River Basins, the Delta’s beneficial uses include: domestic and municipal supply, irrigation, stock watering, industrial supply, contact and non-contact recreation, warm and cold freshwater habitat, warm and cold freshwater migration, warm spawning, wildlife habitat and navigation.

Numerous species that are dependant upon the Delta and Sacramento and San Joaquin Rivers have been listed pursuant to state and federal endangered species acts. These include: Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha* - federal and state listed as threatened); Central Valley steelhead (*Oncorhynchus mykiss* - federal listed as threatened); winter-run Chinook salmon (*Oncorhynchus tshawytscha* - federal and state listed as endangered); fall/late-fall-run Chinook salmon is both a federal and California species of concern; delta smelt (*Hypomesus transpacificus* - federal and state listed as threatened); Sacramento splittail (*Pogonichthys macrolepidotus* – proposed federal listed as threatened, California species of concern); green sturgeon (*Acipenser medirostris*) - federally listed as threatened and California species of concern; longfin smelt (*Spirinchus thaleichthys*), hardhead (*Mylopharodon conocephalus*) and Sacramento perch (*Archoplites interruptus*) are identified as California species of concern; river lamprey (*Lampetra ayresi*) and Kern brook lamprey (*Lampetra hubbsi*) are federal and state species of concern and the Pacific lamprey (*Lampetra tridentate*) is a federal species of concern.

The Delta outflow limits, export limits, interior Delta salinity standards and Vernalis standards constitute the total existing protection for fish contained in D-1641. As evidenced by the Pelagic Organism Decline and the closure of salmon fishing in the Central Valley, those standards have grievously failed to keep pelagic and anadromous fisheries from continuing to decline.

The Urgency Petition states that “DFG has no objection to the petition to temporarily set aside compliance with the south Delta EC standards as a condition of using JPOD, based on the assessment that south Delta water quality will not be made

worse, i.e., EC will not increase, compared to conditions with JPOD use. Thus water quality for fish will not be adversely affected.” DFG’s approval was based solely upon DWR’s representation that EC will not increase. It does not reference other water quality parameters. While the Order refers to DFG’s approval it ignores DFG’s further cautionary admonition, “[h]owever, since the Old River/Middle River limits per Judge Wanger’s interim remedy end on June 20, there needs to be a discussion among the WOMT agencies about SWR/CVP operations plans on fish species conditions after that date, including use of JPOD and application of the fish response plan, and a decision will have to be made about operations and the ongoing risk of impact to delta smelt.” DFG clearly points out that Judge Wanger’s interim protections would end on 20 June and that concerns about the use of JPOD and its effect on Delta smelt after that date would have to be resolved through discretionary decision-making by WOMT agencies. CSPA notes that WOMT agencies have repeatedly rejected the technical recommendations of the Delta Smelt Action Team in the past, pelagic and salmonid fisheries have collapsed despite previous actions of the WOMT and the SWRCB has no authority over the WOMT. There is no reference to potential JPOD impacts to other fish species.

Because of the failure to publicly circulate the Urgency Petition and the haste in issuing the Order, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) were deprived of the opportunity to comment on the Urgency Petition. The federal Biological Opinions for protection of winter-run Chinook salmon, spring-run Chinook salmon, Central Valley steelhead and Delta smelt were issued assuming that D-1641 restrictions on JPOD would be in place.

On 25 May 2007, U.S. District Court Judge Oliver Wanger found that “[t]he Delta Smelt is undisputedly in jeopardy as to its survival and recovery. The 2005 BiOp’s no jeopardy finding is arbitrary, capricious, and contrary to law.” Subsequent interim measures ordered by the Court to protect Delta smelt ended in June 2008. There are no interim protective measures currently in place. The latest information from the Department of Fish and Game’s (DFG) 2008 20mm Delta Smelt Survey shows that, between 7 July and 11 July 2008, the largest concentration (84.6%) of Delta smelt in the estuary are in the Sacramento River where they are susceptible to being drawn across the Delta to the export facilities.

On 17 July 2008, U.S. District Court Judge Oliver Wanger found that, contrary to the “no jeopardy” finding in the 2005 NMFS’s Biological Opinion for the endangered Sacramento River winter-run Chinook salmon, the threatened Central Valley spring-run Chinook salmon and the threatened Central Valley steelhead, all three species are “unquestionably in jeopardy.” Judge Wanger ruled that “[i]t is undisputed that Project operations over the next eight months will increase mortality of eggs, fry, and juveniles of all three species” and that “irreparable harm will likely result during the interim period” until new biological opinions are released. Young-of-the-year and yearling Chinook salmon and steelhead emigrate through the system all months of the year.

On 4 October 2006, CSPA filed a lawsuit against DWR for illegally “taking” threatened spring-run Chinook salmon, endangered winter-run Chinook salmon and

threatened Delta smelt without securing the legally required authorization from DFG, pursuant to CESA. Alameda Superior Court Judge Frank Roesch issued an 18 April 2007 Peremptory Writ of Mandate ordering DWR to cease and desist from further operation of the Harvey O. Banks Pumping Plant until they obtained authorization, in compliance with CESA, from DFG. That decision was appealed and mutually stayed until December 2008. To date, DWR has failed to secure necessary take authorization or consistency determination from DFG, as required by CESA.

The Delta is an exceedingly complex network of channels, sloughs, and shallow open waters. Delta waterways have been included, pursuant to the federal Clean Water Act, on the California 2002 and 2006 CWA Section 303(d) List of Water Quality Limited Segments as incapable of supporting identified beneficial uses because of diazinon, chlorpyrifos, Group A pesticides, DDT, mercury, electrical conductivity, unknown toxicity and dissolved oxygen deficiencies. Pursuant to California's Bay Protection and Toxic Cleanup Program, the Delta has been identified as a toxic hot spot for mercury, low dissolved oxygen in the Stockton Ship Channel and pesticides from agricultural return flows and agricultural and urban stormwater runoff.

DWR and the Bureau evaluated the potential impacts from waiving requirements to meet interior salinity standards in terms of salt. However, salt isn't the only constituent in the aquatic environment that is likely to be affected by the Order. Salt is an unacceptable surrogate for the suite of dissolved pesticides, metals, oxygen demand constituents, etc. that are routinely found in south Delta channels because salt is a conservative constituent and its fate and transport is significantly different than less conservative substances like dissolved pesticides, nutrients or metals. The Order could not have considered the effects of JPOD on other toxic and impairing pollutants routinely found in Delta waterways because DWR failed to model and evaluate the potential impacts on these other constituents.

Water quality and water quantity are irrevocably connected. Changes in hydrology inevitably alter the assimilative capacity of water to absorb or dilute pollutants. Failure to provide sufficient flows to maintain interior salinity standards will directly affect the fate and transport of an array of other toxic and environmentally harmful pollutants. Lack of flow generally leads to an increase in residence time. Less quantity of water reduces assimilative capacity and generally increases the concentration of constituents. As a recent article by U.S. Geological Survey scientists titled *Effects of Flow Diversions on Water and Habitat Quality: Examples from California's Highly Manipulated Sacramento-San Joaquin Delta* in the July 2007 edition of *San Francisco Estuary & Watershed Science* put it:

“Processes that change concentration fields of pollutants are ecologically important because the toxicity and accumulation of pollutants in food webs are concentration dependent. The new pyrethroid pesticides are extremely toxic to invertebrates with sublethal effects at concentrations measured in parts per trillion (Oros and Werner 2005); the herbicide diuron inhibits phytoplankton photosynthesis in the Delta at

concentrations $> 2 \mu\text{g L}^{-1}$ (Edmunds et al. 1999); phytoplankton accumulate methyl mercury at concentrations 10,000 times those in water (Davis et al. 2003); bioaccumulation of toxic metals (e.g. copper, cadmium, silver, chromium) in invertebrates and fish depends on concentrations of those elements in water and prey (Luoma and Rainbow 2005). We have learned empirically how individual diversions modify salt concentrations across the Delta, but we have not yet considered how they modify distributions of land-derived pollutants and their threats to wildlife or human health.

The DWR and Bureau's export operations increase salt loading to San Joaquin Valley farms by as much as million pounds a year. Much of this salt is subsequently disposed of into the San Joaquin River in tailwater and groundwater accretion flows. The San Joaquin River is identified as impaired because of salt. Salt loading from the San Joaquin River is a contributing factor in salinity problems in the south Delta. Elimination of requirements to comply with interior salinity standards will likely increase salt loading to the Valley. CSPA could find nothing in the record that indicates that DWR evaluated or the Order considered the potential effects of increasing salt loading to the Central Valley.

III. ARGUMENT

This decision continues the history of failed attempts, including one by the State Board enforcement team, to enforce the law (D-1641) against the state and federal water projects. As the prosecution team in the CDO hearing wrote in their 2006 letter to the Board: "Government should be held accountable for environmental protection to the same extent as private parties and should be held to the same enforcement standards." Of course, that noble sentiment, and the law behind it, was again tossed out the window when a single member of the SWRCB, allegedly on behalf of the entire SWRCB, ignored previous orders and enforcement standards and issued WR Order 2009-0029-EXEC in order to politically please the Governor and the water projects.

1. DWR and Bureau Failed to Exercise Due Diligence as Required by Water Code Section 1435

Urgency Petitions are governed under Water Code §§ 1435 et. seq. An "Urgency Need" is defined § 1435(c) which precludes a determination of an urgency need if the petitioner has not exercised due diligence in petitioning for a change. Specifically, § 1435(c) requires a petitioner to be diligent in seeking a proposed change under provisions other than those providing for an urgency change, which have little or no public participation. In other words, a petitioner must have been diligent in seeking changes through normal avenues such as applying for a new or different permit, requesting a temporary change to an existing permit or by requesting a permanent change to an existing permit.

DWR and the Bureau could have petitioned for a temporary change, as recommended by the SWRCB's Executive Director's 28 November 2007 letter. This issue arose in 2000 when D-1641 was adopted, in 2005 when the standards were fully implemented, in 2006 when the CDO is issued and yet again in Ms. Whitney's August 2007 letter. DWR and the Bureau knew they could not use JPOD if standards were violated. They knew that they had violated standards in 2007 and were likely to again violate standards in 2008. As their description of the emergency as well as the Order's recounting of the 2008 hydrology and the Petition show, they knew that they would likely use JPOD in 2008 and that it was likely that salinity standards would be violated. They had been warned to file a petition "as soon as possible" so that the issue could be addressed prior to the need for JPOD in the summer of 2008. Yet they waited until the very last moment, until 16 June 2008, to file an urgency petition. DWR and the Bureau undertook no actions to ensure that interior salinity standards would be met. Indeed, exports were extremely high in 2006/2007 and they made no effort to provide reserve storage to assist in maintaining salinity standards in the event of a second dry year. They intentionally delayed submitting a timely petition until the last moment in order to avoid the normal procedures for seeking permit changes that would have allowed the SWRCB the opportunity to more fully investigate the issue, allowed interested parties to work out acceptable conditions or the public to comment on the proposal. The Order must be revoked as DWR and the Bureau failed to exercise due diligence.

2. The Order Illegally Alters the Required Analysis Contained in Water Code § 1435

The Order modifies the permit terms of DWR and the Bureau to allow JPOD when standards are being violated if the Executive Director finds there are no additional reasonable control measures that could be taken this summer or fall to meet the objectives. First, it encourages and rewards DWR and the Bureau for waiting until the very last moment when they can claim there is nothing they can do to comply with salinity standards. This ensures that DWR and the Bureau will never be required to plan ahead and reserve sufficient upstream storage to meet standards. Second, it contravenes the express requirements in § 1435 that require a petitioner to exercise due diligence and not wait until the last moment. Third, it constrains the Executive Director by only allowing control measures that will "meet" the standard, thus eliminating measures that would improve water quality but not fully meet the standards. Of course, if the Executive Director finds that there are actions to be taken to meet standards, then there was no basis for granting the Urgency Petition in the first place.

3. The Time to Appeal the JPOD Restriction is Past

The JPOD restrictions were adopted in 1999 and revised in the final D-1641 on 15 March 2000. Neither DWR or the Bureau timely petitioned the courts to change the conditions. The final ruling on challenges to D-1641 was issued in 2007. The CDO was adopted 15 February 2006. Neither DWR nor the Bureau sought judicial review nor did they request the SWRCB to reconsider the Executive Director's 28 November 2007 letter clarifying the conditions and appropriate timeframe to seek changes in permit conditions.

Instead, DWR and the Bureau waited until the last moment to avoid reasonable SWRCB analysis and public participation.

IV. THE ORDER IS NOT SUPPORTED BY THE EVIDENCE

1. DWR and the Bureau Can Comply with JPOD Limitation

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 the DWR or 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. The Yuba transfer and other pending transfers evidence the fact that there is water available for purchase that could be used to meet salinity standards in the Delta. The DWR and Bureau have always considered their obligation to use junior water rights to supply south-of-Delta contract users to be superior to any responsibility to protect fisheries or meet water quality standards for water used by senior water rights holders in the Delta.

2. DWR and the Bureau' Models Fail to Justify the Order

The Order refers to model runs that predict compliance with interior salinity standards throughout the summer but, since the model "underestimates the salinity discharges from local agriculture and municipal drainages into the south Delta Channels," the modeling predicts exceedances during the summer. In other words, the modeling predicts that standards won't be violated and that standards will be violated. DWR tries to explain this contradiction by claiming that the model may not be accurate in predicting water quality but it is accurate in showing changes. However, there is no evidence to buttress this claim.

DWR and the Bureau claim that modeling predicts that water quality may actually improve under JPOD. Again, there is no evidence to support this hope. The 2006 Water Quality Control Plan states that, while the interior Delta standards are measured at three compliance points, the standards apply throughout the channels. However the modeling does not evaluate changes in water quality at points other than the three compliance locations. There is no evidence or analysis in the record to support the assertion that JPOD may improve water quality. Indeed, as the Declaration of Alex Hildebrand suggests, it is likely to make it worse.

The modeling conducted by DWR focused exclusively on salinity. As previously discussed, salt is an unacceptable surrogate for the suite of dissolved pesticides, metals, oxygen demand constituents, etc. that are routinely found in south Delta channels because salt is a conservative constituent and its fate and transport is significantly different than less conservative substances like dissolved pesticides or metals. The Order could not

have considered the effects of JPOD on other pollutants because DWR failed to model and evaluate the potential impacts on these other constituents.

The Delta is an exceedingly complex network of winding channels and sloughs of varying width and depth and shallow open waters. DWR's model (DSM2) is simply not suitable for evaluating specific localized water quality conditions or the concentration, fate and transport of various constituents.

3. The Order Will Have An Unreasonable Effect on Fish, Wildlife and Other Instream Beneficial Uses

In accordance with Water Code § 1435, the SWRCB must make mandatory findings of fact to justify the Order. Among these are that the Order must not cause unreasonable impacts to fish, wildlife, and other instream beneficial uses. The Order bases its finding on the fact that: a) DFG has stated that the proposed temporary urgency change is not likely to have an adverse impact on fish, b) JPOD pumping will be in conformance with the criteria contained in D-1641 (with the exception of the southern Delta salinity objectives) and mandated under the biological opinions for protection of Sacramento River winter-run Chinook salmon, Delta smelt, spring-run Chinook salmon and steelhead, c) federal court actions have placed additional restrictions on the Projects to protect fish species which limit the export of water from late December through June, and d) DWR and the Bureau will modify export operations to comply with any new biological opinions issued by USFWS and NMFS in 2008.

- a. With respect to DFG's approval, CSPA notes that DFG's approval was based solely upon a DWR representation that EC will not increase, which was based upon flawed modeling. It pointedly fails to reference other water quality parameters, like toxic and bioaccumulative pollutants. It only refers to Delta smelt and ignores other listed species. It fails to acknowledge that following the end of Judge Wanger's interim protections on 20 June, any problems arising from the use of JPOD and its effect on Delta smelt would have to be resolved through discretionary decision-making by WOMT agencies that have repeatedly rejected the technical recommendations of the Delta Smelt Action Team in the past. Previous WOMT actions have failed to prevent collapse of salmonid and pelagic fisheries. Delta smelt are presently in the Sacramento River where they can be drawn to the pumps and sensitive life stages of salmon and steelhead are in the system twelve months a year.
- b. With respect to the claim that JPOD pumping will be in conformance with D-1641 (with the exception of the southern Delta salinity objectives) and the biological opinions, CSPA notes that the D-1641 has not prevented the collapse of pelagic and anadromous fisheries, the federal biological opinions have been

found to be grossly deficient and DWR has failed to secure the necessary CESA authorization to operate its export facility.

- c. With respect to Judge Wanger's interim measures, CSPA notes the interim measures for Delta smelt have already ended and no interim measures to protect salmon and steelhead have been imposed.
- d. With respect to potential new biological opinions, CSPA notes that the biological opinions are running behind schedule and are not expected during 2008.

The facts buttressing the mandatory findings for fish are inconsistent and disingenuous. The Order trades certainty of protection for fish for a WOMT process that is susceptible to political pressure and has historically failed to protect fisheries.

The mandatory finding of no unreasonable impact on instream beneficial uses completely ignores the potential for JPOD to impact numerous identified beneficial uses. The SWRCB has determined that the south Delta waterways are "impaired" and incapable of supporting identified beneficial uses because of diazinon, chlorpyrifos, Group A pesticides, DDT, mercury, electrical conductivity (EC or salt), unknown toxicity, dissolved oxygen deficiencies and exotic species. Many of these same waterways have been identified by the SWRCB as Toxic Hot Spots because of various pesticides, low dissolved oxygen and mercury.

As we've previously observed, failure to provide sufficient flows to maintain interior salinity standards will directly affect the fate and transport of an array of other toxic and environmentally harmful pollutants. Salt is an unacceptable surrogate for the suite of pollutants routinely found in south Delta channels because its fate and transport is significantly different than dissolved pesticides, nutrients, metals or bioaccumulative constituents like mercury and selenium. Consequently, as neither the DWR nor the Bureau evaluated the impacts to the environment from these other pollutants if JPOD were allowed when salinity standards were violated versus the conditions that would exist if JPOD use was conditioned on compliance with salinity standards, the SWRCB could not have made the required findings required by WC § 1435.

Use of JPOD when interior salinity standards are violated will increase salt loading beyond what would likely occur if use of JPOD were conditioned on compliance with the salinity standards. The destination of water from the YCWA transfer is apparently the selenium-impaired lands in the Westland Water District. Consequently, the Order will likely result in increased loading of both salt and selenium to the San Joaquin River watershed, which is identified as "impaired" by salt and selenium. As neither the DWR nor Bureau evaluated the increase in salt and selenium loading that would occur if JPOD was allowed when salinity violations were occurring versus the loading that would occur if JPOD were conditioned on compliance with salinity standards, the SWRCB could not have made the required findings required by WC §

1435.

4. The Order Does Not Qualify For An Exemption From CEQA

JPOD was originally analyzed as part of the CEQA equivalent review of D-1641. The Order makes a significant change to D-1641 and to implementing permits without any CEQA analysis. The Order claims that the actions is exempt from CEQA because a) the projects have previously pumped more export water, b) there may be improvements in water quality, c) the action is exempt under the California Code of Regulation, Title 12 Section 15301 (exemptions which involve negligible or no expansion of existing use).

- a. With respect to having pumped more water previously, CSPA notes that previous pumping was authorized and CEQA reviewed when all other permit conditions were being met. The Order authorizes pumping and increased salt loading when standards are not being met.
- b. With respect to possible improvements, an improvement in water quality at a compliance location can result in worse water quality at another location. Standards must be met throughout the south Delta. The modeling is insufficient to support this claim.
- c. Section 15301 addresses repairs, maintenance to already approved actions and conditions. However, additional export pumping beyond what is allowed under the conditions of the permits is a new action that has never been allowed or authorized. JPOD analyses were always during times of compliance with standards. Adding a new benefit under an existing permit cannot be considered equivalent to previous "legal" pumping.

The lengthy evidentiary proceedings of D-1641 and the CDO found that JPOD could only occur if the interior salinity standards were met. It cannot be concluded that allowing JPOD in the absence of meeting those standards is within the meaning of § 15301s exemptions.

Respectfully Submitted,

Dated 29 July 2008



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

PROOF OF SERVICE BY E-MAIL AND MAIL

I declare as follows:

I am over eighteen years of age and not a party to the within entitled action. My business address is 3536 Rainier Avenue, Stockton, California 95204. I am employed in San Joaquin County, California. Based upon an agreement of the parties to accept service by e-mail or electronic transmission, I, on July 30, 2008, at approximately 12:30 AM, caused the REQUEST FOR RECONSIDERATION regarding WR 2008-0029 EXEC to be sent to the persons at the e-mail addresses listed below. I will monitor for a reasonable time to see if I receive any electronic message or other indication that the transmission was unsuccessful.

drice@waterboards.ca.gov	Dorothy Rice
VWHITNEY@waterboards.ca.gov	Victoria Whitney
RMILLIGAN@mp.usbr.gov	Ron Milligan
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choppin@waterboards.ca.gov	Charles R. Hoppin
fweber@waterboards.ca.gov	Frances Spivy-Weber

On July 30, 2008, at approximately 10:00 AM, I will serve the within REQUEST FOR RECONSIDERATION regarding WR 2008-0029 EXEC by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and placed for collection and mailing on said date to be deposited with the United States Postal Service following ordinary business practices at Stockton, California. I will then resend a final copy of the Proof of Service to the e-mail addresses above.

Ms. Tam M. Doduc, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Mr. Lester Snow, Director
California Department of Water Resources
1416 9th Street
Sacramento, CA 95814

Regional Director
Mid-Pacific Regional Office
U.S. Bureau of Reclamation
U.S. Department of the Interior
2800 Cottage Way
Sacramento, CA 95825-1898

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on July 30, 2008 at Stockton, California

A handwritten signature in black ink, appearing to read "Bill Jennings". The signature is written in a cursive, flowing style with some loops and flourishes.

Bill Jennings