

1 Tim O'Laughlin (State Bar No. 116807)
William C. Paris, III (State Bar No. 168712)
2 Ken Petruzzelli, (State Bar No. 227192)
3 O'LAUGHLIN & PARIS LLP
2580 Sierra Sunrise Terrace, Suite 210
4 Chico, California 95928
Telephone: (530) 899-9755
5 Facsimile: (530) 899-1367
6 Attorneys for Petitioner
7 SAN JOAQUIN RIVER GROUP AUTHORITY

8
9 STATE OF CALIFORNIA

10 STATE WATER RESOURCES CONTROL BOARD

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12)
13 In the Matter of:)
14 SWRCB RESOLUTION 2005-0086)
15)

**PETITION FOR
RECONSIDERATION OF SWRCB
RESOLUTION 2005-0086**

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I. INTRODUCTION

Petitioner, the SAN JOAQUIN RIVER GROUP AUTHORITY (“SJRG”) hereby submits the following Points and Authorities in Support of the Petition for Reconsideration to the STATE WATER RESOURCES CONTROL BOARD (“SWRCB”) of SWRCB Resolution 2005-0086, Approving an Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Control Factors Contributing to the Dissolved Oxygen Impairment in the Stockton Deep Water Ship Channel (“DO TMDL”)

II. BACKGROUND

In January 1998, the SWRCB first adopted a Clean Water Act (“CWA”) §303(d) list that identified DO impairment in the Stockton Deep Water Ship Channel (“DWSC”) and ranked it as a high priority for correction. (DO TMDL, p1.) The SWRCB declined to pursue any further water right actions to meet the DO objectives until the CVRWQCB implemented a TMDL. (Id., p79.)

The CVRWQCB recommended adoption of the Basin Plan Amendments and TMDL by the SWRCB pursuant to Resolution 2005-0005 on September 10, 2004. The Basin Plan Amendments and TMDL were approved by the SWRCB on November 16, 2005, following a severely truncated hearing on October 20, 2005, pursuant to Resolution 2005-0086. The DO TMDL program of implementation only addresses load-related factors after addressing non-load-related factors – DWSC geometry and reduced flows. (DO TMDL, p68.) Mass load limits will only be developed in the future (Id.)

The SJRG hereby requests reconsideration of Resolution 2005-0086.

1 **III. STANDARD OF REVIEW**

2 The standard for reconsideration of SWRCB water right decisions and orders is Title 23,
3 California Code of Regulations §768, which provides that

4
5 No later than thirty (30) days after adoption by the board of a decision or order, any person
6 interested in any application, permit or license affected by the decision or order may petition the
7 board for reconsideration of the matter upon any of the following causes:

- 8
- 9 (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person
 - 10 was prevented from having a fair hearing;
 - 11 (b) The decision or order is not supported by substantial evidence;
 - 12 (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have
 - 13 been produced;
 - 14 (d) Error in law.

15 **IV. GROUNDS FOR RECONSIDERATION**

16 **A. Irregularities in the Proceedings Prevented a Fair Hearing.**

17 **1. The SWRCB Severely Restricted Public Comments.**

18
19 The DO TMDL is an extremely complex regulatory program that was in development since
20 1998. Despite the complexities of the program proposed by the CVRWQCB, the SWRCB severely
21 truncated opportunities for the public comment.

22
23 At the October 20, 2005 hearing, the DO TMDL was the one of the two last items on a long
24 agenda that included three highly complex and controversial matters regarding Basin Plan
25 amendments for the Los Angeles Region and the equally complex and controversial Resolution
26 Approving an Amendment to the Water Quality Control Plan for the Control of Salt and Boron in
27 the San Joaquin River (“S&B TMDL”). (SWRCB Notice of Public Meeting for October 20, 2005.)
28

1 When the DO TMDL was finally considered, the SWRCB only allowed five minutes for each party
2 to present oral comments. Numerous parties, including the SJRGA, were forced to abbreviate their
3 comments and simply could not address a program as complex as the DO TMDL within the time
4 allowed. By the time the SWRCB reached the DO TMDL agenda item, it was more concerned with
5 moving the parties along and finishing quickly than they were with fully considering the comments
6 from the public.
7

8 For the November 16, 2005, workshop, the SWRCB limited written public comments to ten
9 pages. The ten-page limit included any and all supporting documents. The page limit further
10 truncated the substance of public comments that could be submitted, and, just as the SJRGA could
11 not fully address the DO TMDL in the five minutes permitted on October 20, 2005, it could not
12 fully address such a complex program and include any and all necessary supporting documents
13 within the ten pages allowed. By restricting both the opportunity and substance of public comments,
14 the SWRCB severely compromised its ability to make a fully informed decision whether to adopt
15 the DO TMDL.
16

17 **2. Restrictions on Public Comments Constitute a Prejudicial Abuse of Discretion.**

18 The TMDL is a project subject to the California Environmental Quality Act. ("CEQA")
19 (ADO TMDL, p56.) Under CEQA, an "abuse of discretion" occurs if the agency "has not proceeded
20 in a manner required by law..." (Public Resources Code §21168.5.)
21

22 One of CEQA's most fundamental goals is to inform decisionmakers and the public about
23 the potential significant environmental effects of proposed projects. (14 Cal. Code Regs.
24 §15002(a)(1) No Oil, Inc. v. City of Los Angeles (1974) 13 Cal3d 68, 86.) The purpose of CEQA
25 analysis is to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and
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1 considered the ecological implications of its action.” (14 Cal. Code Regs. §15003(d); People ex rel.
2 Dept. Pub. Wks v. Bosio (1975) 47 Cal.App.3d 495, 528.)

3 CEQA uses numerous means to inform the public. First, CEQA insures that the agency is
4 informed of a project’s potential impacts by mandating consultation with all public agencies with
5 jurisdiction over the natural resources affected by the project. (Pub. Res. Code §21080.3; 14 Cal.
6 Code Regs. §15087.) Second, CEQA requires public review and comment on proposed
7 Environmental Impact Reports (“EIRs”) and negative declarations and mandates that the agency
8 consider all comments received within the public review period. (Pub. Res. Code §21091; 14 Cal
9 Code Regs. §15088(a).) Agencies must accept all comments, written or oral, up until the close of
10 public hearings. (Public Resources Code §21177; Galante Vineyards et al. v. Monterey Peninsula
11 Water Management District (1997) 60 Cal.App.4th 1109, 1119-1120.)

14 The Basin Planning process is a certified regulatory program. (Public Resources Code
15 §21080.5.) The Final Staff Report of September 10, 2004 serves as the CEQA document. The final
16 agency action did not occur until the hearing on November 16, 2005. Hence, the SWRCB had to
17 accept all public comments, written or oral, until the final vote on the Salt & Boron TMDL. It could
18 not limit oral comments to five minutes and could not restrict written comments to ten pages.
19 Restricting public comments prior to the close of public hearings is “failure to proceed in a manner
20 required by law” and, consequently, a prejudicial abuse of discretion.

22 **B. The Decision to Adopt the DO TMDL was Not Based on Substantial Evidence.**

23 **1. The DO TMDL Does Not Correlate the Seasonal Nature of DO Impairment**
24 **with Seasonal Changes in Flow.**

25 The DO TMDL concludes that flow in the DWSC is related to DO based on outdated studies
26 and incomplete analysis. The DO TMDL evaluated the relationship between flow and DO based
27 consumptive use, out of basin transfers, and pumping associated with the Central Valley Project and
28

1 State Water Project before and after 1944. (DO TMDL, p31.) The DO TMDL correlates diminished
2 flows and DO, but it does not analyze how flow correlates with DO over time. (DO TMDL, p31-
3 34.) The 15-year moving average of annual discharge at Vernalis was approximately 800,000 acre-
4 feet lower in the 1990's than in the late 1940's, but most of the flow reduction occurred in Wet year
5 types from April through June when DO is not a problem. (DO TMDL, p19.) Therefore, the DO
6 problem is not entirely caused by flow and cannot be solved solely with flow.
7

8 **2. The DO TMDL Does Not Address Deep Water Ship Channel Geometry.**

9 "The DWSC geometry is an important contributing factor because it reduces the assimilative
10 capacity of the DWSC for loads of oxygen demanding substances by reducing the efficiency of
11 natural re-aeration mechanisms and magnifying the effect of oxygen demanding reactions that
12 increase net oxygen demand." (DO TMDL, p7.) Absent the DWSC, there would be no DO
13 impairment. (DO TMDL Appendix 1, p17.)
14

15 The CVRWQCB plans to use its Clean Water Act §401 to require mitigation for future
16 dredging by the US Army Corps of Engineers ("USACOE"), but mitigation for future dredging will
17 not remedy problems caused by the current DWSC geometry. (Id., p26.)
18

19 The USACOE has installed a jet aeration system, but the DO TMDL does not discuss what
20 progress, if any, this system has made in redressing the DO impairment. (DO TMDL, p52.) Neither
21 is there any discussion about how long USACOE will continue operating the jet aeration facility and
22 how the CVRWQCB would respond if the USACOE ever decided to stop operating the jet aeration
23 facility. (Id.)
24

25 The DO TMDL requires no action from the USACOE beyond ordering it to submit a
26 technical report quantifying the "the chemical, biological, and physical mechanisms by which loads
27 of substances into, or generated within the Stockton Deep Water Ship Channel, are converted to
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1 oxygen demand” and “the impact that the Stockton Deep Water Ship Channel has on re-aeration and
2 other mechanisms that affect dissolved oxygen concentrations in the water column”, but takes no
3 other action. (Id., p53.) No other actions are required from the USACOE.

4 The CVRWQCB acknowledges it has “limited regulatory authority to require control of the
5 impacts caused by the existing DWSC geometry...” (Id., p59.) However, by acknowledging that it
6 has limited authority to require control of the impacts caused by the existing DWSC geometry, the
7 CVRWQCB acknowledges that it does have some authority to require control of the impacts caused
8 by the existing DWSC geometry. There is no discussion of what this “limited authority” is or who
9 far it extends.

10 Just like the rest of the DO TMDL, the ability to redress impacts caused by existing DWSC
11 geometry is restricted by the lack of knowledge, both in regard to how it affects DO concentrations
12 and what authority the CVRWQCB has to require mitigation from the USACOE. Action on the DO
13 TMDL should have been delayed until such important matters could be further determined.

14 **C. The DO TMDL is Unsupported By Law.**

15 **1. The DO TMDL is Not a TMDL.**

16 A TMDL is a process to determine the total maximum daily load of pollutants that can be
17 received in a waterway while implementing the applicable water quality objectives. Specifically:
18

19 A TMDL is defined as the sum of the individual wasteload allocations to point sources, load
20 allocations to non-point sources and background loading. Loading from all pollutant sources
21 must not exceed the loading (or assimilative) capacity of a water body, including an
22 appropriate margin of safety. The loading capacity is the amount of pollutant that a water
23 body can receive without violating the applicable water quality objectives.
24

25 (DO TMDL Technical Report, p4; 40 CFR §130(i); 33 USCA §1313(d)(1)(D).) The DO TMDL has
26 no loading capacity and no load or waste load allocations. The DO TMDL is replete with
27 admissions that, although the general causes of DO impairment are known, the understanding of
28

1 each is insufficient to determine a loading capacity or allocate loads with any degree of specificity.
2 Consequently, insufficient knowledge exists to develop and implement the DO TMDL.

3 **a. The DO TMDL Does Not Determine the DWSC Loading Capacity.**

4 According to 40 CFR §130.7(c)(2) however, a TMDL must determine the loading capacity:

5
6 Each State shall estimate for the water quality limited segments still requiring TMDLs
7 identified in paragraph (b)(2) of this section, the total maximum daily thermal load which
8 cannot be exceeded in order to assure protection and propagation of a balanced, indigenous
9 population of shellfish, fish and wildlife.

10 A loading capacity is “The greatest amount of loading that a water can receive without
11 violating water quality standards.” (40 CFR §130.2(f).) The DO TMDL attempts to calculate
12 loading capacity, but “does not include any consideration of the rate of consumptions of oxygen in
13 the DWSC, or the residence time of waters in the DWSC. These factors are the ones that have been
14 altered by changes in the geometry of the DWSC and the diversion of San Joaquin River flows.”
15 (DO TMDL Appendix B, p6.) CVRWQCB Staff acknowledged that the “actual mechanisms and
16 variable affecting the DO concentration profile in the DWSC are more numerous and complex than
17 represented in [the equation calculating load capacity].” (Id.)

18 CVRWQCB Staff did not develop an equation to determine the loading capacity, but
19 instead, developed an equation to allocate responsibility for the low DO problem. (Id.) Without
20 determining loading capacity, calculating loads is impossible. CVRWQCB Staff have contracted
21 with the California Bay Delta Authority to develop a more detailed representation of the numerous
22 mechanisms and variables that will be used in a subsequent revision of the DO TMDL to develop a
23 more detailed allocation of loading capacity and responsibility, because they have no idea how the
24 various mechanisms affecting loading capacity operate and to what extent they influence loading
25 capacity. (Id.) Neither does the DO TMDL provide any timeframe or estimate of when this project
26 may be complete, the funding allocated for the project, or its prospects for completion. (Id., p7.)
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1 Due to the mystery surrounding the “numerous mechanisms or variables”, the DO TMDL
2 does not calculate any loading capacities. It includes a variable for each causative factor, such as
3 flow and DWSC geometry, but it does not define any of these variables. (Technical Report, p26-27.)
4 The CVRWQCB acknowledges that the low DO problem would not exist, but for the DWSC, but
5 how much the DWSC geometry reduces loading capacity, when, and in what areas, are unknown.
6 (DO TMDL Technical Report, p17, 25.) “Further field analysis and modeling studies are required to
7 better understand the specific mechanisms and the variables that affect them.” (Id.) Flows change
8 and, as a consequence of further dredging, so too can DWSC geometry, but the DO TMDL does not
9 calculate how these factors affect loading capacity. It includes graphs depicting a relationship
10 between flow and DO at different temperatures, but does not describe how these relationships were
11 determined and does not disclose the slope of the linear relationship, which would show how much
12 affect changes flow affect changes in DO, or the R-square value, which would show how closely the
13 values represented by the trend line represent correspond to actual data. (DO TMDL, p37.)

14
15
16 Just as little knowledge exists with respect to oxygen demanding substances. The City of
17 Stockton Regional Wastewater Control Facility (“RWCF”), due to constituents contained in its
18 effluent, especially ammonia and organic nitrogen, is the primary point source diminishing DO
19 concentrations. (DO TMDL, p28.) However:

20
21 The influence of numerous environmental variables (i.e. flow rates, temperature) on these
22 oxidation mechanisms in the DWSC is not well understood. Additional field studies and
23 detailed modeling of these oxidation mechanisms in the DWSC is required before it can be
24 quantified how much of the ammonia and other oxygen demanding substances discharged
from the RWCF actually oxidize and contribute to the DO impairment in the DWSC.

25 (Id.) In other words, the CVRWQCB does not know how much the RWCF diminishes DO
26 concentrations.

1 Algae from the San Joaquin River (“SJR”) upstream of the DWSC are is the primary non-
2 point source diminishing DO concentrations. (Id.) However, the fate of algae in the SJR between
3 Mossdale and the DWSC is unknown and questions related to algae growth and removal
4 mechanisms prevent definitive quantification of the relative contribution of algae from different
5 sources in the watershed. (Id., p30.)
6

7 The nearly non-existent scope of knowledge of the problem necessitated a huge margin of
8 safety, but no basis is provided even for the margin of safety. CVRWQCB Staff used a 20% margin
9 of safety based on “best professional judgment,” but there is no explanation as to what this “best
10 professional judgment” is based on. (Technical Report, p24.)
11

12 The DO TMDL observes the fundamental relationships influencing DO in the DWSC, but
13 admits that “more field and laboratory studies are required to better understand and quantify the
14 effects of flow on the various mechanisms that create oxygen demand in the DWSC. (Id., p34.) It
15 further admits that modeling is required to “understand the net effect of all of these mechanisms on
16 DO concentrations and their sensitivity to changing environmental variables.” (Id.)
17

18 By law, a TMDL must calculate a loading capacity, but the DO TMDL has no loading
19 capacity, because the requisite knowledge does not exist. If the CVRWQCB lacks the knowledge to
20 determine a loading capacity, then it lacks the knowledge to develop a TMDL.

21 **b. The DO TMDL Does Not Regulate Loading.**

22 A TMDL, by definition, must allocate “individual wasteload allocations to point sources,
23 load allocations to non-point sources and background loading.” (40 CFR §130.7(c)(2).) If a TMDL
24 does not allocate loads, then it is not, by definition, a TMDL. A “load” is the “amount of matter or
25 thermal energy that is introduced into a receiving water.” (40 CFR §130.2(e).)
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1 The DO TMDL allocated 60 percent of the responsibility for oxygen-demanding substances
2 reducing DO in the DWSC to the RWCF, but no actual load is assigned. (DO TMDL, p48.) The
3 waste load allocation of oxygen demand in the DWSC must be converted to, and expressed in terms
4 of, effluent concentration or mass load limits for the constituents in the RWCF discharge. (Id.)
5 However, nobody knows how the constituents in the RWCF discharge are converted into oxygen
6 demand and how they are impacted by numerous environmental variables.” (Id.) Furthermore, the
7 oxidation rates of different constituents in ammonia discharges and how numerous environmental
8 factors (e.g. flow, temperature, nitrifying bacteria) affect these processes is insufficiently
9 understood. (Id.) The CVRWQCB will not assign the RWCF a specific load to the RWCF until it
10 understands these various oxidation mechanisms, but no studies are expected to shed further light
11 on such matters until at least 2008. (Id., p49.)

14 The DO TMDL allocated 30 percent of the responsibility for oxygen-demanding substances
15 reducing DO in the DWSC to non-point sources, but again, no actual load is assigned. (Id., 51.)
16 Better understanding of the growth dynamics of algae are needed to determine how specific sources
17 of algae, and specific sources of nutrients that contribute to algal growth, are linked to DO
18 concentrations in the DWSC. (Id.) Like the RWCF, specific loads cannot be assigned until these
19 growth dynamics are understood, but no studies will be complete until 2008 at the earliest. (Id.)

21 The DO TMDL does not and cannot allocate loads, because the requisite knowledge and
22 understanding of the problem is still insufficient. Since a TMDL must allocate loads, and there is
23 insufficient knowledge to develop specific load allocations, there is insufficient knowledge to
24 develop and implement the DO TMDL.
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1 **2. The DO TMDL Does Not Analyze the Impacts of Other Programs, Particularly**
2 **the Basin Plan Amendments for the Control of Salt & Boron (SWRCB**
3 **Resolution 2005-0087).**

4 The DO TMDL was developed by the CVRWQCB, and adopted by the SWRCB,
5 concurrently with SWRCB Resolution 2005-0087, which adopted Amendments to the Water
6 Quality Control Plan for the Sacramento and San Joaquin River Basins for the Control of Salt and
7 Boron Discharges into the Lower San Joaquin River. (SWRCB Resolution 2005-0087 (“Salt &
8 Boron TMDL”).)

9 Under CEQA, a proposed project must evaluate and discuss cumulative impacts due to past,
10 present, and probable future projects. (14 Cal. Code Regs. §15130(a).) An adequate discussion of
11 significant cumulative impacts must include either “A list of past, present, and probable future
12 projects producing related or cumulative impacts.” (14 Cal. Code Regs. §15130(b)(1)(B)(1).)

13 The Salt & Boron TMDL has been in development since 1998. (SWRCB Resolution 98-055,
14 Attachment 1.) The Salt & Boron TMDL combines real-time load allocations with drainage re-
15 operation, which alters the timing of releases to the LSJR to coincide with periods of greater
16 assimilative capacity. (Salt & Boron TMDL, p76.) Dischargers must store drainage when flows and,
17 consequently, assimilative capacity, are low, but these are the periods when the DWSC needs more
18 flow, not less. (*Id.*) Drainage can only be released when flows and, consequently, assimilative
19 capacity, are high. (*Id.*) The lowest flows, and consequently the least assimilative capacity, exist
20 from June through September. (Technical Report, p60.) As a result, eight to eighteen-thousand acre-
21 feet of water, and at a minimum, as much as fifty-thousand acre feet, would have to be retained at
22 all times and flows through the DWSC would be reduced. (Salt & Boron TMDL, p76.)
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1 By comparison, the worst months for DO in the DWSC occur from July through October.
2 (Staff Report of the California Environmental Protection Agency Regional Water Quality Control
3 Board Central Valley Region Total Maximum Daily Load For Low Dissolved Oxygen In The
4 San Joaquin River (June 2003), p11.) Retaining drain water would reduce flows in the SJR and,
5 consequently, flows in the DWSC. Conversely, maintaining or increasing flows in the SJR, as
6 recommended in the DO TMDL, would require drain water releases, which would contribute to salt
7 loading in the SJR. Implementation of one TMDL would frustrate implementation of the other and
8 expose water right holders to conflicting legal obligations and the threat of enforcement irrespective
9 of their actions.
10

11 The DO TMDL has no analysis and no discussion of any other projects, past, present, or
12 future, except for the South Delta Improvements Project. (DO TMDL, p54-55.) In particular, there
13 is no discussion, not even a reference, to the Salt & Boron TMDL. Considering that the CEQA
14 checklist in the DO TMDL determines water quality objectives will suffer “no impact”, one must
15 ask whether the CVRWQCB merely “checked the boxes”, rather than conducting any analysis.
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18 V. CONCLUSION

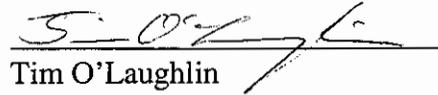
19 TMDLs are scheduled and allocated priority based on knowledge of the problem. (SWRCB
20 Resolution 2004-0063, Water Control Policy for Developing California’s Clean Water Act §303(d)
21 List, §5.) A TMDL, by definition, must determine a loading capacity and allocate loads. The DO
22 TMDL does neither. For both factors involved in developing and implementing a TMDL, the
23 CVRWQCB Staff acknowledge they lack sufficient knowledge to calculate a loading capacity or
24 allocate loads. Since nothing specific is known about the problem, the CVRWQCB should have
25 recommended reducing the priority of the DO TMDL or delaying implementation until the factors
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1 affecting loading capacity could be determined with at least some specificity. For the foregoing
2 reasons, Resolution 2005-0086, adoption of the DO TMDL, must be reconsidered.

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4 Respectfully submitted,

O'LAUGHLIN & PARIS LLP

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6 DATED: 12/5/05



7 Tim O'Laughlin
8 Attorneys for
9 San Joaquin River Group Authority
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