

1 Julia R. Jackson (SBN 255506)  
2 JACKSON & TUERCK  
3 429 Main Street, Suite C  
4 P.O. Box 148  
5 Quincy, California 95971  
6 Tel.: (530) 283-0406  
7 Fax: (530) 283-0416  
8 Email: [Julia@jacksontuerck.com](mailto:Julia@jacksontuerck.com)

9 Attorney for California Water Impact Network

10 Michael B. Jackson (SBN 053808)  
11 Law Office of Michael B. Jackson  
12 429 Main Street, Suite B  
13 P.O. Box 207  
14 Quincy, California 95971  
15 Tel.: (530) 283-1007  
16 Fax: (530) 283-4999  
17 Email: [mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net)

18 Attorney for California Sportfishing Protection Alliance

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the matter of: ) **PETITION FOR RECONSIDERATION**  
WR Order 2010-0002, ) **OF WR ORDER 2010-0002**  
Modifying Part A of WR Order 2006-0006 )  
\_\_\_\_\_ )

Pursuant to California Water Code § 1120 et seq. and Title 23, California Code of Regulations § 768 et seq., the California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) hereby jointly petition the State Water Resource Control Board (hereinafter "SWRCB" or "the Board") to reconsider Order WR 2010-0002, signed on January 5, 2010 which modifies Order WR 2006-0006.



1 and USBR again applied for a modification of the July 1, 2009 compliance deadline contained in  
2 Order WR 2006-0006, and a hearing was noticed six (6) days later on June 5, 2009.

3 C-WIN and CSPA both participated in the CDO hearings and presented evidence to the  
4 SWRCB. Testimony presented by both organizations included evidence regarding the current  
5 condition of fish and wildlife in the Delta, as well as testimony that a failure to enforce the 0.7  
6 EC standard would likely result in a deterioration of Delta fisheries and other beneficial uses. In  
7 its decision to modify WR Order 2006-0006, the Board largely dismissed fish and wildlife  
8 concerns under the public trust, and failed to consider whether continued non-compliance with  
9 the interior southern Delta salinity standards would exacerbate the already dramatic decline of  
10 fish and wildlife in the Delta.

### 11 **ERROR IN LAW**

12 As stated above, a petition for reconsideration may be made if there is an error in the law.  
13 C-WIN and CSPA hereby allege that the Board erred in its application and consideration of the  
14 public trust doctrine, Article X, section 2 of the California Constitution, California Water Code  
15 Section 275, the Clean Water Act, and Porter-Cologne before modifying WR Order 2006-0006.  
16 This assertion is supported by the attached Memorandum of Points and Authorities, and is  
17 attached hereto and incorporated herein by reference.  
18

### 19 **THE ORDER IS NOT SUPPORTED BY THE EVIDENCE**

20 A petition for reconsideration may be made if the order is not supported by the evidence.  
21 C-WIN believes that the Board's decision is not supported by substantial evidence, and therefore  
22 warrants reconsideration by the Board.

23 In Order WR 2010-0002, the Board addresses fish and wildlife beneficial uses only once  
24 in footnote 9. In the reference, the Board largely dismisses C-WIN and CSPA's testimony and  
25 evidence regarding fish and wildlife beneficial uses, stating that:

26 [a]lthough the southern Delta salinity objectives were established in order  
27 to protect agricultural beneficial uses, not fish and wildlife beneficial uses,  
28 CSPA and C-WIN assume that achieving the objectives also will serve to  
protect fish and wildlife. CSPA and C-WIN are correct that some salinity

1 control measures, such as reducing highly saline drainage, may have  
2 incidental benefits to fish and wildlife. Other measures, however, such as  
3 recirculation, may have incidental adverse impacts to fish and wildlife.  
4 Even increasing San Joaquin River flows, which CSPA favors, could have  
5 incidental adverse impacts to fish and wildlife, to the extent that water is  
6 released from storage in order to meet salinity objectives later in the  
7 irrigation season, which could reduce the amount of water available to  
8 protect fishery resources during other periods of the year when the water  
9 would be more beneficial to fishery resources.

7 The Board did not define the harms to fish and wildlife by evading salinity objectives in  
8 the interior southern Delta because it chose to define salinity control narrowly, as strictly for the  
9 benefit of agriculture, thus bypassing any analysis of the effects of salinity compliance on fish  
10 and wildlife in the public trust. The Board's treatment of the salinity objectives as solely for the  
11 benefit of agricultural uses directly contradicts the express language of D-1641, in which the  
12 Board held that "drainage problems in the San Joaquin Valley threaten water quality, agriculture,  
13 *fish and wildlife, and the public health.*" Staff Exhibit 2, D-1641 at p. 85 (emphasis added). The  
14 Board largely disallowed presentation of fish and wildlife evidence from C-WIN and CSPA, and  
15 only paid cursory attention to public trust concerns in its written decision. *See* WR 2010-0002.  
16 Accordingly, the Board lacked sufficient evidence to determine that salinity compliance would  
17 be only "incidentally" beneficial to the already devastated fish and wildlife in the Delta, and  
18 further lacked sufficient evidence to determine whether DWR and USBR's present use of water  
19 is harmful to fish and wildlife protected under the public trust.

20 /

21 /

22 /

23 /

24 /

25 /

26 //

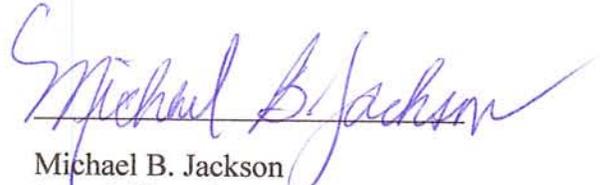
1 **REQUEST FOR RELIEF**

2 C-WIN and CSPA hereby respectfully request that the Board reconsider WR Order 2010-  
3 0002 and order DWR and USBR to immediately comply with interior southern Delta salinity  
4 standards.

5  
6 Respectfully submitted this 4<sup>th</sup> day of February, 2010  
7  
8

9 

10 Julia R. Jackson  
11 JACKSON & TUERCK  
12 Attorney for C-WIN

13 

14 Michael B. Jackson  
15 Law Office of Michael B. Jackson  
16 Attorney for CSPA  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Julia R. Jackson (SBN 255506)  
2 JACKSON & TUERCK  
3 429 Main Street, Suite C  
4 P.O. Box 148  
5 Quincy, California 95971  
6 Tel.: (530) 283-0406  
7 Fax: (530) 283-0416  
8 Email: [Julia@jacksontuerck.com](mailto:Julia@jacksontuerck.com)

9 Attorney for California Water Impact Network

10 Michael B. Jackson (SBN 053808)  
11 Law Office of Michael B. Jackson  
12 429 Main Street, Suite B  
13 P.O. Box 207  
14 Quincy, California 95971  
15 Tel.: (530) 283-1007  
16 Fax: (530) 283-4999  
17 Email: [mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net)

18 Attorney for California Sportfishing Protection Alliance

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the matter of: ) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF C-WIN**  
WR Order 2010-0002, ) **AND CSPA'S JOINT PETITION FOR**  
17 Modifying Part A of WR Order 2006-0006 ) **RECONSIDERATION OF WR ORDER**  
18 ) **2010-0002**

19  
20 The California Water Impact Network (C-WIN) and the California Sportfishing  
21 Protection Alliance (CSPA) hereby present this Memorandum of Points and Authorities in  
22 support of their joint Petition for Reconsideration of State Water Resource Control Board  
23 (hereinafter "SWRCB" or "the Board") WR Order 2010-0002, signed on January 5, 2010 which  
24 modifies Part A of WR Order 2006-0006.

25 **I. STATEMENT OF FACTS**

26 Between June 25th and June 30th, 2009, the State Water Resources Control Board held  
27 public hearings regarding possible modifications of the Cease and Desist Order issued against  
28 the Department of Water Resources (DWR) and the United States Bureau of Reclamation

1 (Reclamation) as contained in Part A of State Water Board Order WR 2006-0006. After  
2 presentation of evidence, testimony, and closing briefs, the Board issued WR Order 2010-0002  
3 on January 5, 2010 which modified the CDO contained in Part A of WR Order 2006-0006. C-  
4 WIN and CSPA thereby jointly filed the attached Petition for Reconsideration of WR Order  
5 2010-0002 claiming that the Board made an error in the law, and that the decision was not based  
6 on substantial evidence.

## 7 **II. ERROR OF LAW**

### 8 **A. The Board Failed to Consider The Public Trust Doctrine In Modifying WR** 9 **Order 2006-0006**

10 The public trust doctrine embodies the principle that the state as sovereign owns all of its  
11 navigable waterways and the lands lying beneath them “as trustee of a public trust for the benefit  
12 of the people.” *Colberg, Inc. v. State of California ex rel Dept. Pub. Works* (1967) 67 Cal.2d  
13 408, 416 (citing *People v. Gold Run Ditch & Min. Co.* (1884) 66 Cal. 138, 151). The California  
14 Supreme Court explained the public trust doctrine and its application to the California water  
15 rights system in *National Audubon Society v. Superior Court*, (1983) 33 Cal.3d 419. In  
16 *Audubon*, the court held that the state had authority as sovereign to “exercise a continuous  
17 supervision and control over the navigable waters of the state and the lands underlying those  
18 waters.” *Id.* at 425. California law has expanded traditional public trust uses to include “non  
19 consumptive, in-stream uses, including navigation, fishing, recreation, ecology and aesthetics.”  
20 *United States v. State Water Resources Control Board ("Racanelli")* (1986) 182 Cal.App.3d 82,  
21 149 (footnote 41).

22 Once the SWRCB has granted a permit or license, the public trust imposes a "duty of  
23 continuing supervision" over the use of the water, and the SWRCB may reconsider past water  
24 rights allocations. *Audubon, supra*, 33 Cal.3d.at 447. Even though the SWRCB, as a matter of  
25 practical necessity, may have to approve some appropriations which harm trust uses, the State  
26 still has an affirmative duty to take the trust into account when it allocates water and to protect  
27 public trust uses *whenever* feasible. *Id.*at 446. The public interest in the allocation of water  
28 resources is not confined by past allocation decisions which are incorrect “in light of *current*

1 *knowledge or inconsistent with current needs.*” *Id.* at 447(emphasis added). Accordingly,  
2 because the Board has the obligation to protect trust uses whenever feasible, when present uses  
3 of water are harmful to ecosystems protected by the public trust the SWRCB may reconsider the  
4 current allocations of water. *Id.* at 446. The public trust doctrine empowers the SWRCB or the  
5 courts to *modify or limit* existing water rights in order to protect fish and wildlife and other  
6 ecosystem elements in the Delta and its tributaries. In *Racanelli*, the court held that the  
7 SWRCB’s authority to impose new conditions on existing appropriative permits to protect fish  
8 and wildlife resided in the public trust doctrine, as held in *Audubon*:

9           In [*National Audubon*], the Supreme Court clarified the scope of the  
10           ‘public trust doctrine and held that the state as trustee of the public trust  
11           retains supervisory control over the state’s waters such that no party has a  
12           vested right to appropriate water in a manner harmful to the interests  
13           protected by the public trust. . . . This landmark decision ... firmly  
14           establishes that the state ... has continuing jurisdiction over appropriation  
15           permits and is free to reexamine a previous allocation decision.

16 *Racanelli, supra*, 182 Cal.App.3d at 149-150.

17 The court concluded that “[i]n the new light of *National Audubon*, the Board unquestionably  
18           possesse[s] legal authority under the public trust doctrine to exercise supervision over  
19           appropriators in order to protect fish and wildlife. That important role was not conditioned on a  
20           recital of authority. It *exists* as a matter of law itself.” *Id.* at 150 (emphasis in original).

21           In modifying WR 2006-0006, the Board rejected evidence and testimony regarding  
22           potential harm to fish and wildlife that would occur if the interior southern Delta salinity  
23           standards were not enforced immediately. In doing so, the Board failed to adequately consider  
24           the Public Trust doctrine. C-WIN and CSPA provided important testimony and evidence to  
25           demonstrate the appalling condition of Delta fish and wildlife since WR Order 2006-0006 was  
26           decided. The evidence presented strongly indicated that optimal water conditions were warranted  
27           to improve Delta fish and wildlife habitat, which would logically require immediate compliance  
28           with the interior southern Delta salinity standards. *See* C-WIN Exhibit 5 (“Estimated Numbers of  
29           All Races of Adult Chinook [Salmon]”, U.S. Fish and Wildlife, 04-17-09.) Despite  
30           acknowledging that improved salinity would benefit Delta fish and wildlife, (*See* WR Order  
31           2010-0002, footnote 9) the Board strictly limited the scope of their decision to agriculture uses,

1 and utterly failed to consider its duties for improving and maintaining threatened public trust  
2 resources. Further, the Board failed to hear evidence or make a determination regarding whether  
3 a delay in enforcement of the 0.7 EC standards *would* injure other beneficial uses. Because it  
4 neglected this crucial step, the Board did not have sufficient evidence before it to determine that  
5 modifying Part A of WR Order 2006-0006 would not cause harm to already devastated Delta  
6 fisheries. The California Supreme Court has held that approval of diversions without considering  
7 public trust values may result in needless destruction of those values. *Audubon, supra*, 33 Cal.3d  
8 at 426. Accordingly, the Court held that “before state courts and agencies approve water  
9 diversions they should consider the effect of such diversions upon interests protected by the  
10 public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.” *Id.*  
11 Despite this clear mandate from the court, WR Order 2010-0002 fails to consider what effects of  
12 DWR and USBR divisions will have on public trust resources, and thereby fails to adequately  
13 consider the Public Trust.

14 **B. The Board Failed to Consider Article X, Section 2 of the California**  
15 **Constitution and Water Code Section 275 in Modifying WR Order 2006-**  
16 **0006**

17 The SWRCB is required by law to take all appropriate proceedings or actions before  
18 executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable  
19 method of use, or unreasonable method of diversion of water in this state. Water Code § 275.  
20 This statute has been clearly interpreted to mean that “[n]o one can have a protectable interest in  
21 the unreasonable use of water.” *City of Barstow v. Mojave Water Agency*, (2000) 23 Cal.4th  
22 1224, 1242. Section 275 also gives substantial authority to determine whether a particular use,  
23 method of use, or method of diversion of water is unreasonable. But what constitutes a  
24 reasonable use of water is a question of fact that must be decided in each case. *Joslin v. Marin*  
*Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.

25 It is also true that “[w]hat is a beneficial use at one time may, because of changed  
26 conditions, become a waste of water at a later time.” *Tulare Irr. Dist. v. Lindsay-Strathmore Irr.*  
27 *Dist.*, (1935) 3 Cal.2d 489, 567. In other words, what was once considered reasonable may be  
28

1 considered unreasonable at present, and what is reasonable in times of abundance may be  
2 unreasonable in times of shortage. Both the SWRCB and the courts have concurrent jurisdiction  
3 to limit a water rights holder who is wasting water, using water unreasonably, or using an  
4 unreasonable method of use or an unreasonable method of diversion. *Environmental Defense*  
5 *Fund v. East Bay Municipal District* (1980) 26 Cal.3d 183, 200; *People ex rel. State Water*  
6 *Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 753; *Imperial Irrigation District v.*  
7 *State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 557-561.

8         The court in *Environmental Defense Fund*, 26 Cal.3d at 200, held that the courts have  
9 concurrent jurisdiction with the SWRCB over claims of unreasonable use under article X, section  
10 2 of the California Constitution. Article X, section 2 provides “that the water resources of the  
11 State be put to beneficial use to the fullest extent of which they are capable, and that the waste or  
12 unreasonable use or unreasonable method of use of water be prevented, and that the conservation  
13 of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the  
14 interest of the people and for the public welfare.” In *Environmental Defense Fund*, Plaintiffs  
15 alleged that diversion of water for a single use in East Bay Municipal District’s service area was  
16 unreasonable in light of a lower diversion point of diversion that would protect *both* in-stream  
17 uses and the consumptive uses of the East Bay Municipal District service customers. The court  
18 noted that, in determining whether methods of use or diversion are unreasonable, “the board  
19 must consider the relative benefit to be derived from all beneficial uses of the water concerned,  
20 including domestic, irrigation, municipal, and industrial use, as well as use for preservation and  
21 enhancement of fish, wildlife, and recreational uses.” *Environmental Defense Fund, supra*, 26  
22 Cal.3d at 196 (citing Water Code § 1257.)

23         In issuing WR Order 2010-0002, the Board failed to adequately consider both article X,  
24 section 2 and Water Code § 275. The Board failed to consider whether DWR and USBR’s use of  
25 water in violation of the southern Delta salinity standards is unreasonable in light of the  
26 substantial deterioration of Delta fisheries during the period in which the standards have been  
27 ignored. The Board largely dismisses C-WIN’s testimony regarding the benefit to fish and  
28 wildlife if compliance is achieved in the interior southern Delta. Although the Board concluded

1 that reducing highly saline drainage in the Delta “may have incidental benefits to fish and  
2 wildlife,” (WR 2010-0002, footnote 9) the clear language in D-1641 unambiguously held that  
3 “drainage problems in the San Joaquin Valley threaten water quality, agriculture, *fish and*  
4 *wildlife*, and the public health.” Decision 1641 at p. 85. The connection between the enforcement  
5 of salinity objectives and the health of fish and wildlife cannot be so easily dismissed without  
6 real consideration by the Board.

7 C-WIN testimony presented during the June, 2009 CDO hearings warned that “in the  
8 absence of implementation of the 1995 Bay-Delta Plan, *fish and wildlife* resources and water  
9 quality in the Delta could decline and the measures to reverse the decline of fish and wildlife,  
10 particularly those that are threatened or endangered under the state or federal Endangered  
11 Species Act, could result in severe and unpredictable water shortages.” D-1641 at 145-146  
12 (emphasis added). USBR has a duty to meet the fish and wildlife objectives in the southern  
13 Delta. *Id.* at 25. Fish and wildlife in the Delta are presently in decline, and are in a far worse state  
14 than when D-1641 was drafted. *See* C-WIN exhibit 5. Immediate compliance with Delta water  
15 quality objectives “is in the greater public interest.” D-1641 at 25. CWIN further argued that “if  
16 the Board allows USBR and DWR to continue to elude compliance with the interior southern  
17 Delta salinity objectives, the Board will be disregarding its duty to protect public trust  
18 resources.” CWIN and CSPA urged the Board for those reasons to order DWR and USBR to  
19 begin immediately complying with the interior southern Delta salinity objectives to protect water  
20 quality and fish and wildlife. In light of the substantial deterioration of Delta fisheries, the  
21 Board’s decision to allow DWR and USBR to continue to divert water without fully complying  
22 with the 0.7 EC permit/license requirement constitutes an unreasonable method of use and  
23 unreasonable method of diversion.

24 **C. The Board Failed to Enforce the Clean Water Act and Porter-Cologne**  
25 **(Water Code § 13000 *et seq.*) in Modifying WR Order 2006-0006.**

26 The Board has authority to impose conditions on water rights to protect water quality.  
27 This authority is derived from the federal Clean Water Act and the Porter-Cologne Water Quality

1 Control Act (Water Code, § 13000 et seq.). In *Racanelli, supra*, the court discussed the Board's  
2 obligations under the Porter-Cologne Act:

3 In its *water quality* role of setting the level of water quality protection, the  
4 Board's task is not to protect water rights, but to protect 'beneficial uses.'  
5 The Board is obligated to adopt a water quality control plan consistent  
6 with the overall statewide interest in water quality (§ 13240) which will  
7 ensure 'the reasonable protection of *beneficial uses.*' (§13241) (emphasis  
8 added). Its legislated mission is to protect the 'quality of all the waters of  
9 the state ...for use and enjoyment by the people of the state.'" (§ 13000, 1st  
10 par., italics added.)

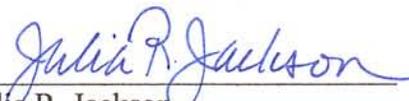
11 *Racanelli*, 182 Cal.App.3d at 116.

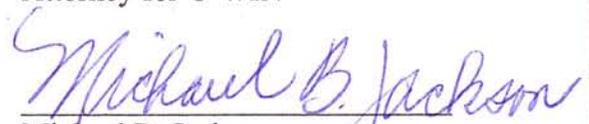
12 The court noted that prior appropriations are, by definition, conditional and subject to  
13 continuing jurisdiction; the provisions of article X, section 2; and the priorities of senior rights  
14 holders. *Id.* at 147. By allowing DWR and USBR to indefinitely evade compliance with the  
15 interior Delta salinity standards in WR Order 2010-0002, the Board undermines its duties under  
16 the Clean Water Act and Porter-Cologne (Water Code § 13000 *et seq.*).

#### 17 CONCLUSION

18 The Board failed to adequately consider the public trust, the doctrine of waste and  
19 unreasonable use and unreasonable method of diversion in article X, section 2 of the California  
20 Constitution, failed to properly apply Water Code section 275, the Clean Water Act and the  
21 Porter-Cologne Act (Water Code § 13000 *et seq.*) in the hearing and therefore made an error in  
22 law. The Board should therefore reconsider its decision to modify Part A of WR Order 2006-  
23 0006 in WR Order 2010-0002.

24 Respectfully submitted this 4<sup>th</sup> day of February, 2010

25   
26 Julia R. Jackson  
27 JACKSON & TUERCK  
28 Attorney for C-WIN

  
Michael B. Jackson  
Law Office of Michael B. Jackson  
Attorney for CSPA