STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0017

In the Matter of Draft Cease and Desist Order No. 262.31-XX
and Administrative Civil Liability Complaint No. 262.5-46
against

North San Joaquin Water Conservation District

Water Right Permit 10477 (Application 12842)

SOURCE: Mokelumne River tributary to San Joaquin River

COUNTY: San Joaquin

ORDER ADOPTING CEASE AND DESIST ORDER AND IMPOSING ADMINISTRATIVE CIVIL LIABILITY

BY THE BOARD:

1.0 INTRODUCTION[1]

In this order, the State Water Resources Control Board (State Water Board or Board) orders North San Joaquin Water Conservation District (District) to cease and desist its violations and threatened violations of Permit 10477. The District must take corrective actions under a time schedule to correct the violations and threatened violations of its permit. The State Water Board also imposes administrative civil liability against the District in the amount of $66,400. Of this amount, $20,000 is due and payable immediately. The remaining $46,400 is suspended provided that the District complies with the time schedule set forth in this order for compliance with Terms 15 and 23.

On November 30, 2006, the Chief of the Division of Water Rights (Division) issued draft Cease and Desist Order (CDO) No. 262.31-XX and Administrative Civil Liability (ACL)

[1] This order is not a precedent decision and may not be expressly relied on as precedent. (Gov. Code § 11425.60, subd. (a); State Water Resources Control Board Order WR 96-1 at 17, fn. 11.)

Complaint No. 262.5-46 to the District. On request of the District for a hearing, the State Water Board issued a Notice of Public Hearing on April 16, 2007. On June 21, 2007, the State Water Board held an adjudicative hearing governed by certain provisions regarding administrative adjudication in the Administrative Procedure Act (Gov. Code, §§ 11400-11470.50 & 11513) and other statutory provisions, as specified in the State Water Board's regulations at California Code of Regulations, title 23, section 648. The State Water Board has considered all of the evidence and arguments in the hearing record, and the findings and conclusions herein are based on the evidence in the hearing record.

2.0 FACTUAL BACKGROUND

The District holds Permit 10477 (Application 12842), which authorizes a total of 20,000 acre-feet per annum (afa) to be diverted from the Mokelumne River tributary to the San Joaquin River. The permit authorizes a combined total of 80 cubic feet per second (cfs) by direct diversion and collection of 20,000 afa by storage from the source from December 1 of each year to July 1 of the succeeding year for municipal, domestic, industrial, irrigation, and recreational uses. Direct diversion is limited to no more than 40 cfs at each of the two main pumping facilities.[2]

In 1992 the District, Department of Fish and Game (DFG), California Sportfishing Protection Alliance, and East Bay Municipal Utility District (EBMUD) entered into a stipulated agreement to resolve protests filed against the District's 1991 petition for extension of time. As part of the stipulated agreement, the District agreed to include certain conditions in its water right permit. Accordingly, the State Water Board added Permit Terms 15 and 23 to the District's Permit 10477. Term 15 prohibits the diversion of water until the District either (i) constructs fish screens or (ii) enters into an operating agreement with DFG to protect fishlife, or both.[3] Term 23 prohibits the diversion of water until the District and DFG reach an agreement regarding bypass flows for aquatic life or, failing to reach such an agreement, until the State Water Board enters an order regarding such flows.

[2] The State Water Board takes official notice of the fact that another point of diversion was added to Permit 10477 in 2006. (Cal. Code Regs., tit. 23, § 648.2.) The District may divert water to underground storage at a maximum rate of 10 cfs at this new point of diversion. (See Order WR 2006-0018-DWR.)

[3] The Mokelumne River has approximately 38 aquatic species, including the fall run Chinook salmon and Central Valley steelhead. Steelhead is listed under the Federal Endangered Species Act as a threatened species. (DFG-5, p. 2.)

On February 2, 2006, Division staff conducted a field inspection to determine the maximum amount of water that the District has beneficially used and to assess overall compliance with the terms and conditions of Permit 10477. On November 30, 2006, the Division Chief issued draft CDO No. 262.31-XX and ACL Complaint No. 262.5-46 against the District, alleging that the District's diversion and consumptive use of water from the Mokelumne River over the 2003, 2004, and 2005 irrigation seasons violated Terms 15 and 23 as well as the statutory prohibition against the unauthorized diversion or use of water. The draft CDO identified corrective actions for the District to take and a time schedule for completing those actions. The ACL complaint proposed civil liability in the amount of $66,400. The District timely requested a hearing.

3.0 LEGAL AND PROCEDURAL BACKGROUND

3.1 Authority to Issue a CDO

The State Water Board may issue a CDO when it determines that any person is violating, or threatening to violate, any requirement described in Water Code section 1831, subdivision (d). Under subdivision (d), the State Water Board may issue a CDO in response to a violation or threatened violation of any of the following:

> (1) The prohibition set forth in [Water Code section] 1052 against the unauthorized diversion or use of water subject to [division 2 (commencing with § 1000) of the Water Code].
>
> (2) Any term or condition of a permit, license, certification, or registration issued under [division 2 (commencing with § 1000) of the Water Code].
>
> (3) Any decision or order of the board issued under [part 2 (commencing with § 1200) of division 2 of the Water Code], Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7 [of the Water Code], in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order. (Wat. Code, § 1831, subd. (d).)

The State Water Board may issue a CDO only after notice and an opportunity for hearing. A CDO is effective immediately upon being issued. (Wat. Code, § 1832.)

If a person fails to comply with a CDO, the State Water Board may proceed pursuant to Water Code section 1845, subdivision (a). Under section 1845, the penalties for a violation of a CDO are injunctive relief issued by a superior court and liability for a sum not to exceed $1,000 for

each day in which the violation occurs. Either the court or the State Water Board may impose civil liability against a violator of a CDO.

3.2 Authority to Assess Civil Liability

The State Water Board may administratively impose civil liability in an amount not to exceed $500 for each day that a trespass occurs. (Wat. Code, § 1052, subd. (b).) A trespass is defined as the diversion or use of water subject to division 2 (commencing with § 1000) of the Water Code, other than as authorized by that division. (*Id.,* subd. (a).) The State Water Board must provide notice and an opportunity for a hearing. (Wat. Code, § 1055, subd. (b).) An order setting administrative civil liability is effective and final upon being issued. (*Id*., subd. (d).) If the ACL is not paid, the State Water Board may seek recovery of the ACL as provided in Water Code section 1055.4.

4.0 HEARING ISSUES AND PARTICIPANTS' POSITIONS

4.1 Hearing Issues

The Notice of Public Hearing identified the following key issues for the hearing: First, should the State Water Board adopt CDO No. 262.31-XX? If the draft CDO should be adopted, should any modifications be made to the measures in the draft order, and what is the basis for such modifications? Second, should the State Water Board order liability in response to Administrative Civil Liability Complaint No. 262.5-46 against North San Joaquin Water Conservation District? If the State Water Board orders liability, should the amount be increased or decreased, and if so, on what basis?

4.2 Positions of the Hearing Participants

The parties to the proceeding are the Division's Prosecution Team (Prosecution) and the District. The Prosecution asserts that the CDO should be issued without modifications and the ACL should be issued in the amount of at least $76,400 to cover the original ACL amount of $66,400 and the additional staff costs of approximately $10,000 relating to the hearing. The District opposes issuance of the CDO and the ACL and argues that, if civil liability is imposed, the amount of the ACL should be drastically reduced.

Several other persons submitted Notices of Intent to Appear (NOI) at the hearing. During the hearing, the DFG presented a case-in-chief and participated in cross-examination, contending that the State Water Board should adopt the CDO with modifications. The County of

San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority (collectively referred to herein as the County of San Joaquin, et al.) presented a policy statement and arguments supporting the District's position that the District did not violate Permit Terms 15 and 23. The City of Stockton participated in cross-examination. Central Delta Water Agency and South Delta Water Agency submitted NOIs to participate in cross-examination and rebuttal only, but did not actually participate.

4.3 Questions for Closing Briefs

Before adjourning the hearing, Hearing Officer Arthur G. Baggett, Jr., posed the following questions to be addressed in the closing briefs:

1. Term 15 of Permit 10477 includes the phrase ' . . .until the pemittee has constructed screening facilities adequate to protect fishlife and/or has entered into an operating agreement. . . .' What is the meaning of the words 'and/or' in this phrase?

2. How do the April 1993 letters between Mr. Sorensen and Mr. Broddrick (exhibit NSJ-106) relate, if at all, to the [District's] compliance with permit term 15?

3. How do the two letters concerning the Mokelumne River Hearings signed by Mr. Schueller (exhibits NSJ-109 and NSJ-110) relate, if at all, to the [District's] compliance with permit term 23? How does Decision 1641 relate, if at all, to the [District's] compliance with permit term 23?

4. If the [District] is found in violation of permit term 15 or 23, or both, what amount of administrative civil liability, if any, is appropriate? What modifications, if any, should be made to the draft cease and desist order?

5. If the [District] is found in violation of permit term 15 or 23, or both, what is the harm caused by the violation(s)? Does the Water Code require a finding of harm?

The State Water Board received closing briefs from the Prosecution, the District, DFG, and the County of San Joaquin, et al. The briefs were submitted on July 31, 2007.

5.0 ALLEGED VIOLATIONS OF PERMIT 10477

The Prosecution alleges that the District has violated, and threatens to violate, Terms 15 and 23 of Permit 10477. Permit Term 15 states:

> No water shall be diverted under this permit during the 1992 or subsequent water years, until the permittee has constructed screening facilities adequate to protect fishlife and/or has entered into an operating agreement with the Department of Fish and Game that will protect fishlife.
>
> If fish screens are constructed to meet the requirements of this permit condition, the Department of Fish and Game shall review the construction plans and determine whether the facilities are adequate to protect fishlife. The Department of Fish and Game shall notify the Division of Water Rights of its approval of the plans in writing. Construction, operation, and maintenance costs of any required facilities are the responsibility of the permittee.
>
> In the event the permittee and the Department of Fish and Game cannot reach agreement with respect to this condition, either party may petition the State Water Resources Control Board to hold a hearing to determine the appropriate conditions.

Permit Term 23 states:

> No diversion shall be made under this permit until an agreement has been reached between the permittee and the State Department of Fish and Game with respect to flows to be bypassed for aquatic life; or failing to reach such agreement, until a further order is entered by the State Water Resources Control Board or its successor with respect to said flows.

5.1 Term 15

Certain facts are not in dispute. Since 1992, Term 15 in Permit 10477 has required the District to either construct fish screen facilities, to enter into an operating agreement with the DFG to protect fishlife, or both. (WR-7;[4] Reporter's Transcript (R.T.), pp. 9-10, 80.) The District has not installed fish screens at any time since the 1993 diversion season. (R.T., p. 103.) The District diverted water every year from 1993 through 2005, with the exception of 2001 when no water was available. (WR-1, pp. 3, 5; WR-11; WR-8, p. 9.)

The parties, however, dispute whether the District and DFG have entered into an operating agreement that meets the requirements of Term 15, thus obviating the need to construct fish screens. The District's manager and former attorney both testified that the District believed it had entered into an oral operating agreement with the DFG in which fish screens were no longer necessary. (NSJ-100, ¶ 6; NSJ-101, ¶ 8.) The witnesses based their conclusions on a

[4] The exhibits are identified by the following abbreviations: "NSJ" for the District; "DFG" for DFG; and "WR" for the Prosecution.

report by Mr. James Sorenson (a former District engineer) to the District Board.[5] (NSJ-100, ¶ 6; NSJ-101, ¶ 8; R.T. pp. 104-105, 124.) The "report" to which the witnesses refer is a statement by Mr. Sorenson that was entered into the minutes of the District Board meeting held on March 10, 1993. According to those minutes, "Mr. Sorenson advised that after consultations with representatives of the Department, it was determined that no fish screens would be needed after June 15th of each year." (NSJ 100, ¶ 6; NSJ-101, ¶ 8; NSJ-105; R.T., pp. 69-70, 81.)

Mr. Sorenson's statement does not provide a sufficient basis to support a finding that the parties had an oral operating agreement that would protect fishlife, as Term 15 requires. Mr. Sorenson did not personally testify regarding his statement or the existence of any agreement. None of the District's witnesses provided any additional information about the purported agreement. DFG contends that there is no such agreement.[6] Further, the minute entry is ambiguous in that it does not state an agreement exists, does not identify the terms of any such agreement, and does not indicate who made the determination that fish screens were unnecessary. A single, ambiguous statement in the District Board's meeting minutes is unpersuasive evidence of an oral operating agreement.

Moreover, it is unclear why the District interprets Mr. Sorenson's statement to mean that permanent fish screens are not required. The District Board's minutes refer to fish screens not being needed "after June 15th of each year," but the District's diversion season is from December 1 of each year to July 1 of the succeeding year. Thus, even if this statement could be construed as supporting the existence of an oral operating agreement—which it cannot—it would only apply to the last 15 days of the diversion season of each year.

The parties also dispute the import of a series of letters exchanged between the District and DFG in April 1993. On April 8, 1993, Mr. Ryan Broddrick, Regional Manager at DFG, sent a

[5] Specifically, the District's manager states that the District's belief was based on Mr. Sorenson's report and the "14 year silence from the DFG on the issue of fish screens." (NSJ-100, ¶ 6; R.T., 104-105.) DFG's alleged silence neither supports the existence of an oral operating agreement nor excuses the District from complying with Term 15. The District is responsible for complying with the terms of its own permit, and the District cannot avoid that responsibility by waiting to be asked to comply.

[6] In its closing brief, DFG objects to Mr. Sorenson's statement as hearsay, noting that Mr. Sorenson did not personally testify and that his statement should not be relied on for asserting the truth of the alleged existence of the agreement. Although relevant hearsay is admissible in hearings before the State Water Board, its use is subject to restrictions pursuant to Government Code section 11513, subdivision (d). The State Water Board need not reach this issue, however, because the evidence does not support a finding that an oral operating agreement existed.

letter explaining to the District the basis for DFG's position that a fish screening device was necessary for the protection of anadromous fish. (NSJ-106.) He also accepted the District's general plan for screening the District's diversion on a one-time (one-year) basis. Mr. Broddrick further explained, however, that the screening plan was unacceptable on a permanent basis and that the District must develop a long-term solution. (NSJ-106.) On April 15, 1993, Mr. James Sorenson responded on behalf of the District, proposing specific materials to be used in constructing fish barriers in the channels leading to the District's pump stations.[7] He concluded the letter by stating that

> The District will cooperate with the [DFG] to attempt to reach a permanent solution to adequately protect fishlife after the resolution of the myriad of issues now before the [State Water Board] in the Mokelumne River hearings, including, but not limited to, water entitlement of this District, fish screening responsibilities under the provisions of the Fish and Game Code, and the obligation of the District, if any, to bear financial responsibility for same. (NSJ-106.)

Mr. Sorenson concluded by requesting Mr. Broddrick to acknowledge if the foregoing letter properly memorialized their understanding. Mr. Broddrick acknowledged his approval and acceptance on April 19, 1993.

The District claims that these letters comprise a written operating agreement that fulfills the requirements of Term 15. DFG and the Prosecution dispute the District's characterization of these letters as constituting an operating agreement to protect fishlife.

Neither of the authors of the letters—Mr. Sorenson or Mr. Broddrick—testified at the hearing. In their written testimony, the District's witnesses merely describe the letters as an agreement between DFG and the District to install temporary fish screens for the 1993 diversion season and as telling DFG that the District would cooperate with DFG to reach a permanent solution after the resolution of issues in the Mokelumne River hearing. (NSJ-100, ¶¶ 4-5; NSJ-101, ¶¶ 5-7.) It was only at the hearing, for the first time, that the District's manager testified that he understood that these letters between the District and DFG constituted the agreement required under Term 15. (R.T., 84, 91.)

[7] We note that the exchange of letters in April 1993—letters in which DFG and Mr. Sorenson unequivocally address future fish screening needs—belies any serious contention that the there was an oral operating agreement between the entities, as the District asks us to infer from its March 1993 meeting minutes.

These letters do not support a finding that the District had an operating agreement with DFG to protect fishlife within the meaning of Term 15. At best, these letters comprise an agreement to cooperate. An agreement to agree is not enforceable under California law. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 213-214 [45 Cal.Rptr.3d 692].) "Where the minds of parties litigant have not met upon an essential element of the purpose to be achieved, and they have failed to specify the means for determining such element but have indicated that future negotiations are necessary to effect an agreement, the abortive effort, however labeled, is void." (*Putnam v. Cameron* (1954) 129 Cal.App.2d 89, 95 [276 P.2d 102]: *Bustamante, supra,* 141 Cal.App.4th 199 [failure to establish material terms prevents formation of a contract].) The first part of the April 15, 1993 letter addresses the installation of a temporary fish screen for the 1993 diversion season. The last part of the letter merely indicates an agreement by the District and DFG to cooperate with each other to reach a permanent solution to protect fishlife. The letters do not contain any elements concerning project operations, either on a short-term or a long-term basis, that could be construed as an operating agreement to protect fishlife. Beyond 1993, the letters afford no protection to fishlife whatsoever.

Nor can the letters be read to defer implementation of Term 15 indefinitely. The District's agreement to negotiate a permanent solution does not perpetually absolve it from the requirement to comply with Term 15 by either installing fish screens or entering into an operating agreement. DFG's witnesses testified that they never told the District that it did not need to install a permanent fish screen at its diversion. (CDFG-1, p. 2; R.T., pp. 154-155, 162.) Even if the letters could be construed as an agreement to defer compliance with Term 15 until the Mokelumne River proceedings concluded (which is based on an unsupported assumption that the parties could defer such compliance without the State Water Board's approval), the State Water Board made it clear in 2000 and 2001 that it did not intend to take further action on certain hearing issues. (NSJ-109; NSJ-110.) The District did not take any action to install fish screens or reach an agreement with DFG after that time.[8]

In sum, the District and DFG agreed to the language of Term 15 as part of a protest resolution agreement. The State Water Board incorporated Term 15 into Permit 10477 in 1992. Since

[8] Moreover, assuming for the sake of argument, that these letters comprise an agreement between DFG and the District regarding Term 15, they do not constitute an operating agreement to protect fishlife. As explained above, beyond the 1993 diversion season, the letters contain no terms whatsoever to protect fishlife.

1993 the District has diverted water under its permit, but it has not complied with the term to which it agreed—it has neither installed fish screens nor entered into an operating agreement to protect fishlife.[9] The District has diverted water in violation of Term 15, and a threatened violation continues to exist.

5.2 Term 23

Pursuant to Term 23, the District cannot divert water under Permit 10477 unless it has a bypass flow agreement with DFG or the State Water Board enters an order regarding bypass flows. The District claims that the District has achieved both methods of compliance with Term 23.

5.2.1 Alleged Agreement between the District and DFG regarding Bypass Flows

The District first claims that the April 1993 letters, discussed above (NSJ-106), constitute an agreement satisfying the requirement to enter into an agreement with DFG regarding bypass flows. Again, however, those letters merely express an agreement to cooperate in reaching a permanent solution to protect fish and do not constitute an agreement regarding flows. The letters do not even mention bypass flows.[10]

Moreover, the District's argument is not supported by the written testimony of the District's witnesses. The District's former attorney testified that the District and DFG did not have an agreement regarding bypass flows. (NSJ-101, ¶ 11.) The former attorney and current general manager both testified to their understanding that the 1992 Mokelumne River hearings superseded or stayed "the need to enter into an agreement with DFG concerning bypass flows," thus conveying their belief that an agreement with DFG did not already exist. (NSJ-100, ¶ 8; NSJ-101, ¶ 11; R.T., p. 72.) During the hearing, however, the general manager orally testified that he believed the letters satisfied Term 23. (R.T. 144.) Nonetheless, as explained above, the evidence does not support a finding that the 1993 letters constitute an agreement satisfying the requirements of Term 23. For the same reasons that the letters do not constitute an agreement satisfying Term 15, they do not constitute an agreement satisfying the requirements of Term 23.

[9] In fact, there is some question whether the District ever intended to install fish screens. (See NSJ-101, ¶ 10; R.T. 122-123 [District testimony that it knew at the time it entered into the protest resolution agreement in 1992 that it was economically impossible to install the fish screens].)

[10] Moreover, the District has not proposed any studies to determine an adequate bypass requirement. (R.T., p. 161.)

5.2.2. Alleged State Water Board Orders regarding Bypass Flows

The parties' primary dispute over Term 23 is whether the State Water Board has entered an order regarding bypass flows that supersedes the need for an agreement between the District and DFG. The District contends that the Board's revised Water Right Decision 1641 (D-1641), adopted in 2000, is a Board order fulfilling the requirements of Term 23.[11]

In 1992 the State Water Board held a hearing on measures needed to protect fish and public trust resources in the lower Mokelumne River. (NSJ-116.) The hearing focused "primarily on the water rights of [EBMUD], and to a lesser extent, the water rights of Woodbridge Irrigation District (WID) and North San Joaquin Water District (NSJ)." (NSJ-116.) At the same time, the Federal Energy Regulatory Commission (FERC) conducted a proceeding similar in scope, and involving many of the same parties, as the Board's water right proceeding. The State Water Board held its decision in abeyance pending the completion of the FERC proceeding. That proceeding resulted in a Joint Settlement Agreement (JSA), approved by FERC in 1998, between EBMUD, DFG, and the United States Fish and Wildlife Service that included flow and non-flow measures to protect fish and wildlife resources in the lower Mokelumne River system. (NSJ-108; D-1641, p. 56.)

In D-1641, the State Water Board addressed the responsibility of water right holders to help meet the water quality objectives set forth in the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Bay-Delta Plan). EBMUD had entered into an agreement with certain export contractors to propose to the State Water Board that flows under the JSA would satisfy EBMUD's responsibility to meet the flow-dependent objectives in the 1995 Bay-Delta Plan. (D-1641, pp. 56-57.) In D-1641, the State Water Board established EBMUD's and WID's responsibility to help meet Bay-Delta flow-dependent objectives, consistent with the JSA provisions, and amended their water rights accordingly. (D-1641, p. 63.)

Shortly after the adoption of D-1641, the Division Chief issued a letter clarifying the status of issues from the lower Mokelumne River hearing as they related to EBMUD's water rights. The Division Chief's October 16, 2000 letter stated that the State Water Board believed that the

[11] The State Water Board takes official notice of D-1641 and its operative provisions pursuant to California Code Regulations, title 23, section 648.2. The decision is available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf.

issues considered by the Board in the lower Mokelumne River hearing had been resolved through incorporation of the JSA's streamflow conditions in D-1641, and that the Board did not intend to take further action unless the hearing parties identified issues, considered during the hearing, that were not resolved. (NSJ-109, p. 2.) In April 2001 the Division Chief issued a letter responding in part to claims that the issue regarding protection of public trust resources was unresolved. (NSJ-110.) The Division Chief identified various actions undertaken by EBMUD, WID, and the United States Bureau of Reclamation to protect the fishery and public trust resources, and concluded that those actions were appropriate and that no further action needed to be taken on the lower Mokelumne River hearing.

The District argues that the implementation of the JSA flows through the Board's adoption of D-1641 constitutes compliance with Term 23. (NSJ-100, ¶ 8; R.T., p. 144; NSJ-101, ¶ 11.) According to the District, the two letters from the Division Chief confirmed that D-1641 resolved all issues regarding flow and public trust for the Mokelumne River. (NSJ-109, NSJ-110.)

Term 23 contemplated an order regarding bypass flows in the Mokelumne River. D-1641 cannot be characterized as such an order. The purpose of D-1641 was to assign responsibility for meeting water quality objectives in the 1995 Bay-Delta Plan. The State Water Board's conclusion in D-1641 that the flow releases under the JSA would satisfy EBMUD's responsibility to meet Bay-Delta flow-dependent objectives is neither equivalent to, nor a substitute for, an order regarding bypass flows in the Mokelumne River. The District is not a signatory to the JSA.[12] (R.T., p. 116; NSJ-108.) D-1641 did not amend the District's water rights. (D-1641, p. 4, table 1.)

The District's claim that Term 23 is met by a State Water Board order that did not amend its water right permit, that imposed flows contained in a settlement agreement that it did not sign, and that imposed flows for water quality purposes in the Bay-Delta, has no merit. The fact that the Division Chief subsequently issued letters indicating that general public trust issues on the lower Mokelumne River had been addressed did not obviate the need for the District to have an agreement with explicit bypass flows. The District has diverted water in violation of Term 23, and a threat of violation continues to exist.

[12] In fact, the District objected to the JSA's flow provisions being incorporated into D-1641 because the District believed it would adversely affect the District's junior rights. (D-1641, p. 62.)

6.0. ACTION ON CDO

State Water Board finds that the District has violated, and is threatening to violate, Terms 15 and 23 of Permit 10477 and the statutory prohibition against the unauthorized diversion of water. The State Water Board further finds that issuance of a CDO is appropriate for these violations and threatened violations. The purpose and effect of the CDO is to require the District to take measures to comply with Terms 15 and 23. The State Water Board adopts the draft CDO with minor modifications.

The CDO adopted in this order establishes a time schedule for compliance and requires certain corrective actions. With respect to Term 15, the CDO requires the District to immediately cease its diversion of water from any pumping facility covered by Permit 10477 that does not have either a fish screen or an operating agreement, as required by Term 15, until the District submits to the Division a plan and timeline for complying with Term 15 and obtains the Division's approval of the plan and timeline. If fish screens are to be constructed, the District must submit to the Division a copy of its written request for DFG's written approval of the plans within 5 days of the District's request for approval. The District must provide the Division with a copy of any approval by DFG of either the fish screen construction plans or an operating agreement within 30 days of such approval.

DFG recommended modifying the draft CDO to require the District to construct a fish screen at each diversion authorized under Permit 10477 and to develop the plans for fish screens in consultation with DFG. (DFG-3; R.T., pp. 157-158.) DFG's witness also testified that a fish monitoring or salvage program, approved by DFG, should accompany diversion operations to ensure that the fish screens are operating properly. (DFG-5, pp. 4-5; R.T. p. 160.) The State Water Board will not modify the draft CDO to alter Term 15, which allows for either the construction of fish screens or an operating agreement to protect fishlife, or both, to only require construction of a fish screen. It will, however, modify the draft CDO to clarify that the District must consult with DFG before constructing any fish screens and to require the District to seek approval of fish screen operation plans as well.

With respect to Term 23, the CDO requires the District to immediately cease its diversion of water from the pumping facilities currently covered by Permit 10477 until the District submits to the Division either a final agreement with DFG with respect to bypass flows or written confirmation from DFG that a bypass agreement is unnecessary.

If the District fails to reach agreement with DFG regarding bypass flows or the necessity for bypass flows, the District may propose a term to implement Term 23, including a proposal for bypass flows. The District must submit the proposed term with an opinion by a fisheries expert as to whether the proposed term is protective of aquatic life. The proposed term must be submitted to the Division within 90 days from the date the District notifies the State Water Board that the District has failed to reach agreement with DFG, and no later than 180 days of the date of this order. The State Water Board will consider whether or not to incorporate the term only after it provides notice and opportunity for hearing to DFG, EBMUD, California Sportfishing Protection Alliance (CSPA), and any other affected parties the State Water Board deems appropriate. The District may not divert water from its pumping facilities without written authorization by the State Water Board or until the State Water Board renders a final decision on the proposed term.

7.0 ACTION ON ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

7.1 Authority to Impose Civil Liability

The District argues that the State Water Board lacks the legal authority to impose civil liability for a violation of a term or condition in a permit or license in the first instance. In essence, the District's argument is that a CDO issued pursuant to Water Code section 1831, subdivision (d)(2) is the exclusive means for administratively enforcing a violation of a term or condition of a water right permit or license and that an ACL pursuant to section 1052 is only available for trespasses. In the District's view, a trespass excludes the violation of permit or license terms or conditions. According to the District, the State Water Board may only impose civil liability for the violation of a term or condition of a permit or license if the Board first adopts a CDO and then the party fails to comply with that CDO.

We believe, in this case, that the District's violation of Terms 15 and 23 are appropriately characterized as both a trespass and a violation of the permit conditions. Unlike some other permit terms or conditions, Terms 15 and 23 specify that "[n]o water shall be diverted under this permit . . . " (Term 15) and "[n]o diversion shall be made under this permit . . ." (Term 23) unless certain conditions are met. These phrases are clear. No diversion of water is authorized. If, however, the permittee "has constructed screening facilities adequate to protect fishlife and/or has entered into an operating agreement with the Department of Fish and Game that will protect fishlife" and "an agreement has been reached" on bypass flows or "a further order is entered by [the State Water Board] with respect to said flows," water may be lawfully diverted. Those

words modify the prohibition against the diversion of water. No diversion is authorized under Term 15 until screening facilities or an operating agreement is in place. Absent the screens or agreement, there is no authorization to divert. Separately, "until an agreement has been reached" concerning bypass flows or "a further order is entered by [the State Water Board] with respect to said flows," there is no authorization to divert pursuant to Term 23. These prohibited diversions are the very nature of a trespass described in Water Code section 1052, subdivision (a) ("[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass").

The District argues that construing Water Code section 1052 to authorize administrative civil liability for violations of a permit term or condition renders superfluous certain subdivisions of section 1831. We are not persuaded. Section 1831 authorizes a cease and desist order under two relevant provisions: (d)(1) violation of the prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to division 2, or (d)(2) violation of a term or condition of water right permit issued under division 2. In this case, a violation of the above permit terms can be both a trespass and a violation of the permit conditions. Unlike other permit terms or conditions, Terms 15 and 23 specify that water shall not be diverted until certain requirements are met. As discussed above, each violation is therefore an unauthorized diversion constituting a trespass within the meaning of section 1052. Moreover, construing section 1052 to authorize administrative civil liability for the violation of certain terms or conditions does not render superfluous section 1831, subdivision (d)(2). Other terms or conditions may remain subject to enforcement solely under the cease and desist authority of section 1831.[13] For example, a violation of a reporting requirement that occurs after the diversion season would not necessarily be tantamount to a trespass authorizing an ACL because at the time of the diversion the water right holder may have been in full compliance with all terms and conditions of the permit or license. Therefore, initiation of the CDO and the ACL under the allegation of an unauthorized diversion of water is appropriate.

[13] In this order, we do not address the broader issue of whether the violation of any term or condition could be the basis for an ACL pursuant to Water Code section 1052. We do note, however, that the District's contention that the violation of a term or condition of water right permit is not a trespass would lead to the dubious conclusion that violating a water right permit term or condition is somehow authorized within the meaning of section 1052.

7.2 Conclusions regarding Administrative Civil Liability

The basis in the complaint for assessing civil liability is the District's unauthorized diversion or use of water from the Mokelumne River during the irrigation seasons of 2003, 2004, and 2005. During these irrigation seasons, the District diverted water from the Mokelumne River using its two pumping facilities for irrigation purposes within its service area. Permit Terms 15 and 23 both prohibit the District from diverting water unless certain actions are taken. The District did not take those actions. The District's diversion and use of water from the Mokelumne River without complying with Terms 15 and 23 of Permit 10477, or another basis of right, is unauthorized and constitutes a trespass under Water Code section 1052, subdivision (a). The maximum civil liability that can be imposed by the State Water Board in this matter is $500 for each day in which the trespass occurred.

In consideration of the District's unauthorized diversions, the State Water Board finds that an ACL should be issued against the District for a trespass under Water Code section 1052. Pursuant to Water Code section 1055.3, the State Water Board takes into account, in determining the amount of liability, all relevant circumstances, including the extent of harm, the nature and persistence of the violation, the length of time over which the violation occurred, and any corrective action taken by the violator. The State Water Board previously has concluded that the Board's costs associated with conducting the hearing are a relevant circumstance. (See Order WR 2006-0001.)

In order to calculate the maximum civil liability amount, the ACL complaint assumed 150 days of irrigation each year over the 2003, 2004, and 2005 irrigation seasons, for a total of 450 days of unauthorized diversion or use of water by the District.[14] Multiplying 450 days by $500 per day results in a maximum civil liability of $225,000 that can be considered for the trespass. (R.T., pp. 17-18, 39-43; WR-3, p. 2.)

The ACL complaint proposed a minimum liability of $66,400, which is approximately equivalent to three years of violation based on reported water use (114 days over three irrigation seasons at $500 per day) plus $9,400 in Division staff costs. Records submitted to the Division do not identify the actual number of days that the District diverted or used water. Accordingly, the ACL

[14] This assumption is based on the lower end of the range of the District's historical use per year as recorded in EBMUD's records. (WR-3, p. 2; WR-8, p. 5.)

complaint conservatively extrapolated the minimum number of diversion days (114) from monthly total amounts of water diverted over the 2003, 2004, and 2005 irrigation seasons--a total of 8,200 acre feet--as recorded by EBMUD. The total diversion amount for each month over that three-year period was divided by the maximum rate of diversion at any one pumping facility under Permit 10477 (40 cfs or 79.34 acre-feet per day)[15] and rounded up to the nearest whole day. This amount discounted the maximum liability in this case to achieve settlement with the District, streamline the enforcement process, and avoid the expense of a hearing before the State Water Board. (WR-1, pp. 5, 7; WR-8, pp. 18, 19; WR-6, p. 3, R.T., pp. 17-19, 39-44.)

The State Water Board finds that the District has diverted water without complying with Term 15 since 1994 and Term 23 since 1993. Based on unrebutted evidence in the record, the District diverted water, without authorization, a minimum of 114 days and a maximum of 450 days in the three-year period between 2003 and 2005.

Although the Prosecution has not quantified the precise harm caused by the District's unauthorized diversions, the very purpose of Terms 15 and 23 is to protect fishlife and aquatic resources. The District's diversions may adversely affect the salmon, steelhead, and other aquatic resources that Terms 15 and 23 were intended to protect. (WR-6, p. 3.) The State Water Board has incurred considerable costs, including those of the hearing staff, support staff, and prosecution staff. Taking all of these factors into consideration, the State Water Board sets the ACL in the amount of $66,400. In light of the unique circumstances of this case, however, and in order to facilitate the expedited protection of fishlife and aquatic resources, we will allow the District to dedicate a portion of the civil liability towards compliance with Terms 15 and 23 instead of requiring full payment to the State Water Board.

Accordingly, $20,000 of the civil liability is due immediately. The remaining $46,400 of the $66,400 civil liability is suspended provided that the District diligently pursues compliance with Terms 15 and 23 in accordance with the schedule set forth in the CDO adopted in this order. Upon a finding by the Division Chief that the District has not complied with the schedule, the $46,400 in suspended liability shall become immediately due and payable. The imposition of

[15] Between 1993 and 2000, the District's maximum direct diversion rate was 14.4 cfs in June 2000. (WR-1, p. 5.) Thus, the Prosecution's use of the 40 cfs rate benefits the District by reducing the number of days of violation in the calculation.

previously suspended liability does not limit the authority of the Executive Director to issue a new complaint for administrative civil liability for any unauthorized diversions that occur after the issuance of this order.

8.0 CONCLUSIONS

a. The District has diverted water without complying with Terms 15 or 23 of Permit 10477. A violation and a threat of violation of the District's permit terms exist.

b. A CDO should be imposed on the District requiring the District to take corrective actions and establishing a schedule for compliance.

c. The District should pay administrative civil liability in the amount of $66,400. Of this amount, $20,000 is due immediately. The remaining $46,400 is suspended pending the District's compliance with the schedule in the CDO regarding Terms 15 and 23.

ORDER

IT IS HEREBY ORDERED,

A. The State Water Board ORDERS that, pursuant to Water Code sections 1831 through 1836, the North San Joaquin Water Conservation District (District) shall take the following corrective actions and satisfy the following time schedules:

1. The District shall immediately cease its diversion of water at any pumping facility that does not have either a fish screen or an operating agreement, as required by Term 15, until it submits the following to the Division and obtains the Division's approval of: (a) a plan for complying with Term 15; and (b) a timeline for implementing the plan. The District shall submit the compliance plan and timeline within 90 days of the date of this order. The District shall implement the compliance plan and timeline, as approved by the Division.

   If DFG requires fish screens to be constructed, the District shall develop the fish screen construction and operation plans in consultation with DFG. The District shall submit plans for DFG's approval prior to construction. The District must submit a copy of its written request for DFG's written approval of the plans to the Division within 5 days of

the District's request for approval. The District shall not divert at the southern diversion facility until it installs a temporary fish screen in consultation with DFG. Construction of a permanent fish screen, in consultation with DFG, on the southern diversion facility must be completed by December 1, 2009. The District shall not divert from the north diversion facility until a permanent fish screen is constructed, in consultation with DFG.

The District shall provide the Division with a copy of any approval by DFG of either the fish screen plans or the operating agreement within 30 days of such approval.

2. The District shall immediately cease its diversion of water at its pumping facilities until the District submits to the Division one of the following documents to demonstrate compliance with Term 23: (a) a final agreement with DFG with respect to bypass flows, or (b) written confirmation from DFG that a bypass agreement is unnecessary. The District shall submit this information to the Division within 90 days of the date of this order.

   If the District fails to reach agreement with DFG regarding bypass flows or the necessity for bypass flows, the District may propose to the State Water Board a term to implement Term 23, including a proposal for bypass flows. The proposed term must be submitted to the Division within 90 days from the date the District notifies the State Water Board that the District has failed to reach agreement with DFG, and no later than 180 days of the date of this order. The District shall submit the proposed term with an opinion by a fisheries expert as to whether the proposed term is protective of aquatic life in accordance with the intent of Term 23. The State Water Board will consider whether or not to incorporate the term only after it provides notice and opportunity for hearing to the DFG, EBMUD, CSPA, and any other affected parties the State Water Board deems appropriate. The District may not divert water from its pumping facilities unless authorized in writing by the State Water Board or until the State Water Board renders a final decision on the proposed term.

3. The District shall comply with the Division's requests for information, environmental documents, maps, and fees within the designated time frames.

B. The State Water Resources Control Board ORDERS that the District shall pay administrative civil liability in the amount of $66,400.

1. Of this amount, $20,000 is due immediately. If this amount of the ACL is unpaid after the time for review under chapter 4 (commencing with § 1120) of part 1 of division 2 of the Water Code has expired, the State Water Board may seek a judgment against the District in accordance with Water Code section 1055.4.

2. The remaining $46,400 is suspended provided that the District complies with the schedule for compliance with Terms 15 and 23 set forth in section A.1 and A.2. Upon a finding by the Division Chief that the District has not complied with the schedule, the $46,400 in suspended liability shall become immediately due and payable. If this amount of the suspended ACL is unpaid after 30 days of the Division Chief's finding, the State Water Board may seek a judgment against the District in accordance with Water Code section 1055.4.

3. Upon a finding by the Division Chief that the District has complied with ordering sections A.1, A.2, and B.1 of this order, the Division Chief shall issue a letter to the District confirming that the District has satisfied its payment of administrative civil liability and that the District is not obligated to pay the suspended liability amount of $46,400.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 18, 2008.

AYE:	Vice Chair Gary Wolff, P.E., Ph.D Arthur G. Baggett, Jr. Charles R. Hoppin Frances Spivy-Weber
NAY:	None
ABSENT:	None
ABSTAIN:	Chair Tam M. Doduc

Jeanine Townsend

Jeanine Townsend
Clerk to the Board