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7 STATE OF CALIFORNIA

8 STATE WATER RESOURCES CONTROL BOARD

9 In the Matter of:

10 Hearing to Determine whether to) CLOSING STATEMENT OF
11 Adopt Draft Cease and Desist) CALIFORNIA DEPARTMENT OF
12 Order No. 262.31-XX and) FISH AND GAME
13 Whether to Impose Administrative)
14 Civil Liability as Proposed in Administrative)
15 Civil Liability Complaint No. 262.5-46 against)
16 North San Joaquin Water Conservation District)

17 I.

18 INTRODUCTION

19 CDO No. 262.31-XX should be adopted by the State Water Resources Control Board
20 (SWRCB). The North San Joaquin Water Conservation District (NSJWCD) should not be
21 allowed to continue to divert water from the Mokelumne River without a fish screen. The
22 NSJWCD should not be allowed to continue to divert water from the Mokelumne River without
23 bypassing a certain amount of water and contributing toward the recovery of anadromous fish
24 species and protection of other public trust resources in the Mokelumne River. Steelhead trout
25 were in abundance in the Mokelumne River at the beginning of the 20th Century. Now steelhead
trout are listed as threatened under the Federal Endangered Species Act. Diverting water without
a fish screen and jeopardizing the health of existing fish populations happened in the 20th
Century. This is the 21st Century. We can and should do better in the 21st Century.

1 The Hearing Officer requested that several issues be discussed in closing statements. The
2 issues addressed in this closing statement are:

- 3 1. What is the meaning of the words "and/or" in the phrase "...until the permittee
4 has constructed screening facilities adequate to protect fish life and/or has entered
5 into an operating agreement..." that appears in Permit Term 15 of Permit 10477?
- 6 2. How do the April 1993 letters between Mr. Sorenson and Mr. Broddrick relate, if
7 at all, to the NSJWCD's compliance with Permit Term 15 of Permit 10477?
- 8 3. How do the two letters signed by Mr. Schueller (exhibits NSJ-109 and NSJ-110)
9 relate, if at all, to the NSJWCD's compliance with Permit Term 23 of Permit
10 10477? How does D-1641 relate, if at all, to the NSJWCD compliance with
11 Permit Term 23 of Permit 10477?
- 12 4. If the NSJWCD is found in violation of Permit Term 15 and 23, or both, what is
13 the harm caused by the violation(s)? Does the Water Code require a finding of
14 harm?
15

16 **II.**

17 **THE "AND/OR" LANGUAGE DERIVES FROM THE 1992 STIPULATED**
18 **AGREEMENT, THEREFORE CONTRACT PRINCIPLES APPLY**

19 Permit Term 15 of NSJWCD Amended Permit 10477 reads as follows:

20 No water shall be diverted under this permit during the
21 1992 or subsequent water years, until the permittee has constructed
22 screening facilities adequate to protect fish life and/or has entered
23 into an operating agreement with the Department of Fish and Game
24 that will protect fish life.
25

1 A Stipulated Agreement for Permit 10477 (Application 12842) of the North San Joaquin Water
2 District (DFG Exhibit 8) was executed in 1992 by the NSJWCD, the California Department of
3 Fish and Game (DFG), the California Sport fishing Protection Alliance (CSPA) and East Bay
4 Municipal Water District (EBMUD) (Stipulated Agreement). Term 3 of that Stipulated
5 Agreement reads, in part,

6 No water shall be diverted under this permit during the
7 1992 or subsequent water years, until the permittee has constructed
8 screening facilities adequate to protect fish life and/or has entered
9 into an operating agreement with the Department of Fish and Game
10 that will protect fish life.

11
12 The term “and/or” is simply ambiguous. According to Merriam Webster, and/or is “used to
13 indicate that either and or may be used for connecting words, phrases or clauses *depending upon*
14 *the meaning intended.* (*Webster’s 11 New Riverside Dictionary, p. 27, emphasis added*). The
15 American Heritage Dictionary of the English Language defines “and/or” as “used to indicate that
16 either or both of the items connected by it are involved”. (“and/or” *The American Heritage*
17 *Dictionary of the English Language, 4th ed. Boston: Houghton Mifflin, 2000 available at*
18 *www.bartleby.com*). Courts disfavor the term “and/or” due to its imprecision and ambiguity.
19 *See e.g. In restate of Massey, 317 N.J. Super. 302 (Ch. Div. 1988), Fisher v. Healey’s Special*
20 *Tours, Inc. 121 N.J.L. 198, 199 (E. & A. 1938).*

21
22 A contract provision is ambiguous if it is capable of two or more reasonable interpretations.
23 *Badie v. Bank of Am., 67 Cal.App. 4th 779, 79 Cal.Rptr. 2d 273,286 (1998); see also Local*
24 *Motion Inc. v. Niescher; 105 F.3d 1278, 1280 (9th Cir. 1997).* If the terms of a contract are
25 ambiguous, reference can be made to extrinsic evidence and surrounding circumstances to

1 resolve the ambiguity. *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 204 Cal. Rptr. 435, 682 P.2d
2 1100, 1104 (1984). If the terms of a promise are in any respect ambiguous or uncertain, it must
3 be interpreted in the sense in which the promisor believed, at the time of making it, that the
4 promisee understood it. *Cal. Civil Code section 1649.* DFG's then Regional Manager, Ryan
5 Broddrick's April 8, 1993 letter clearly states the DFG's understanding and interpretation of the
6 term "and/or" as set forth in the Stipulated Agreement. That letter also references discussions
7 about the meaning of that provision that occurred prior to April 8, 1993. That letter states in
8 part, "[a]s you know, it is the Department's position that a fish screening device is necessary on
9 your diversion for the protection of anadromous fish." (WR Exhibit 9, emphasis added.) The
10 April 8, 1993 letter later references an "understanding you will be developing a long-term
11 solution" as a basis for agreeing to a one time use of a temporary fish screen for diversions in
12 1992. As will be discussed below, the April 8, 1993 DFG letter clearly and thoughtfully
13 describes the DFG's position and the legal mandates to protect anadromous resources.

14 **III.**

15 **HOW DO THE APRIL 1993 LETTERS RELATE, IF AT ALL, TO THE NSJWCD'S**
16 **COMPLIANCE WITH PERMIT TERM 15?**

17 The NSJWCD is not in compliance with Permit Term 15. No fish screen exists at either of the
18 existing diversions. In 1993 the California Department of Fish and Game (CDFG) loaned the
19 NSJWCD some screen panels and assisted the NSJWCD with installing those panels in the main
20 stem of the Mokelumne River. (CDFG Exhibit 1, pp1-2). That fish screen was never intended to
21 be permanent. (CDFG Exhibit 1, p. 2). At the end of the diversion season in 1993, NSJWCD
22 asserts that it returned the fish screen panels to the DFG Elk Grove Screen Shop. (NSJ Exhibit
23 103, p. 3) No other fish screen has been installed at any diversion of the NSJWCD since the
24 temporary fish screen panels, loaned to the NSJWCD by CDFG, were removed from the main
25 stem of the Mokelumne River.

1 *Assuming* that Permit Term 15 could be satisfied by an operating agreement that protects fish
2 life, no such operating agreement *that protects fish life* exists. In its written testimony,
3 NSJWCD asserted that “the District believed that it had entered into an **oral** operating agreement
4 with the DFG upon which it was determined that fish screens were no longer necessary, based
5 upon James Sorenson’s report to the Board and the 14 year silence from the DFG on this issue of
6 fish screens.” (NSJ Exhibit 100, p. 2, emphasis added). A portion of the transcript of the
7 NSJWCD minutes of the March 3, 1993 board meeting included the statement, “Mr. Sorenson
8 advised that after consultations with representatives of the Department, it was determined that no
9 fish screens would be needed after June 15th of each year.” (WR Exhibit 9). No other report
10 from Mr. Sorenson was presented into evidence. Mr. Sorenson’s statement is hearsay and should
11 not be relied on for asserting the truth of an alleged existence of such an agreement. Mr.
12 Sorenson did not personally testify as to such an agreement. Even, *assuming arguendo*, that the
13 statement is true, an alleged determination that a fish screen is not necessary after June 15th of
14 each year is very different than an “oral operating agreement with DFG upon which it was
15 determined that fish screens were no longer necessary”. There was no such oral operating
16 agreement.

17
18 In a letter to the Steve Herrera, Chief of the Water Rights Permitting Section of the SWRCB
19 dated October 13, 2005, the NSJWCD devised another basis for an oral operating agreement. In
20 that letter, the NSJWCD asserted, “Watermaster Weinzheimer told me that he delivered the
21 screen material to Mr. Dave Rose at the Elk Grove office of DFG, at the conclusion of the 1993
22 test, and was told to not bother trying to install fish screens in the future because DFG agreed
23 that warmer water in the District’s pump supply channel would discourage fish entrance.” (WR
24 Exhibit 9). Dave Rose is not a biologist. (CDFG Exhibit 1, p. 1). Dave Rose never told anyone
25

1 from the NSJWCD that they did not need to install a permanent fish screen at their diversion.
2 (CDFG Exhibit 1, p. 1). There was no oral operating agreement.

3
4 Faced with the problem of having no oral operating agreement, despite using that as its
5 justification for not complying with Permit Term 15 since 1993 in its October 13, 2005 letter to
6 the Chief of the Water Rights Permitting Section, NSJWCD tried another tactic. On the day of
7 the hearing, the NSJWCD came up with a new theory. Sensing problems with relying on the
8 Sorenson hearsay statement regarding taking the screens out after June 15th of each year and
9 faced with a clear statement from Dave Rose that he did not say what Conrad Weinzheimer had
10 alleged he had said and clear evidence that Mr. Rose is not a biologist, Mr. Ed Steffani, on direct
11 examination omitted the word "oral" from his statement of the New Permit Term 15 Compliance
12 Theory. (See Recorder's Transcript, hereinafter "RT", pp. 80-85 and p. 91, lines 9 to 22..)

13
14 The New NSJWCD Permit Term 15 Compliance Theory uses a "patchwork" of letters sent back
15 and forth in April, 1993 as its basis for a written operating agreement with CDFG. On April 8,
16 1993, L. Ryan Broddrick, then Regional Manager for CDFG, sent a thoughtful letter to the
17 NSJWCD clearly stating "the Department's position that a fish screening device is necessary on
18 your diversion for the protection of anadromous fish." (WR Exhibit 9.) Mr. Broddrick went on
19 to state his reasons for needing a fish screen by citing to several sections of the Fish and Game
20 Code and referring to policy of the Fish and Game Commission (WR Exhibit 9.) Mr. Broddrick
21 also went on to refer to a plan presented by Mr. Soranson (*sic*) and stated, regarding that plan,
22 that it did not meet established CDFG criteria for salmonids and on a permanent basis would be
23 unacceptable. "However, *on a one time (year) basis* with the conditions we have in the
24 Mokelumne River this year (high flows, cool water temperatures, etc.) *and with the*
25 *understanding you will be developing a long-term solution*, we believe that the plan would be

1 tolerable provided the structure be covered with perforated plate (3/16 opening).” (WR Exhibit
2 9, emphasis added). Tolerable. Not in compliance with established CDFG criteria for
3 salmonids. Tolerable. Not acceptable, but, given the unique water temperature and quantity
4 conditions of that particular year; tolerable. Tolerable for that year based on the unique
5 conditions of that year. Mr. Broddrick then goes on to generously offer to loan the NSJWCD
6 several perforated plates and concludes by stating, “I look forward to working with you to
7 develop a long-term solution.” (WR Exhibit 9.)
8

9 The New NSJWCD Permit Term Compliance Theory asserts that a mere *one week later* Mr.
10 Broddrick abandoned all of what was set forth in the April 8, 1993 letter and absolved the
11 NSJWCD of having to install a permanent fish screen. The April 8, 1993 letter was written by
12 the CDFG. It clearly articulates the CDFG position regarding protecting anadromous fish in the
13 Mokelumne River. The April 15, 1993 letter was written by James Sorensen, a consultant to the
14 NSJWCD. The bulk of the letter addresses the temporary screen that will be put in place in
15 1993, as authorized by Mr. Broddrick in his April 8 letter. The April 15, 1993 letter then goes on
16 to state that the District will cooperate with CDFG to attempt to reach a permanent solution to
17 adequately protect fish life. That is consistent with Mr. Broddrick’s April 8, 1993 letter. And,
18 then the April 15, 1993 letter takes a turn. After saying that the NSJWCD will cooperate in
19 reaching a permanent solution, the consultant to the NSJWCD then slips in a qualifying
20 statement that the NSJWCD will do so **after** the resolution of the myriad of issues then before
21 the SWRCB in the Mokelumne River hearings. (WR Exhibit 9.) That is not consistent with Mr.
22 Broddrick’s April 8, 1993 letter. The consultant to the NSJWCD asked Mr. Broddrick to sign a
23 statement accepting the April 15, 1993 letter. Knowing that Chinook salmon were then at a
24 vulnerable life stage and present in the Mokelumne River and at risk for entrainment in an
25 unscreened diversion, (See CDFG Exhibit 5, paragraph 12, page 4) and desiring to get a

1 temporary screen in the river and move on to his many other duties as the Regional Manager, just
2 days later, Mr. Broddrick signed such a statement. Most of the April 15, 1993 letter appears to
3 be consistent with the April 8, 1993 letter. CDFG had put time and effort into the April 8, 1993
4 letter. The April 15, 1993 letter does not indicate it was sent via facsimile. Assuming it was sent
5 via postal mail, as was often the case in 1993, the April 15, 1993 letter could have arrived on
6 April 17 or April 18, traveling from Visalia to Rancho Cordova. Mr. Broddrick arguably
7 received the letter on April 18, 1993 and signed it the next day, most likely assuming it was
8 consistent with his thoughtful and clear April 8, 1993 letter.

9
10 The New NSJWCD Permit 15 Compliance Theory does not satisfy the requirements of Permit
11 Term 15. Permit Term 15 requires a fish screen or an operating agreement with CDFG to protect
12 fish life. The April 8, 15 and 19, 1993 series of letters is not an operating agreement *to protect*
13 *fish life*. The April 15, 1993 letter is at best confusing. It refers to the NSJWCD constructing
14 fish "barriers" in the "channels leading to the Districts pump stations". (WR Exhibit 9.) In fact,
15 the NSJWCD did not construct a "barrier", it constructed fish screen panels. (CDFG Exhibit 1,
16 p. 2) And those fish screen panels were constructed in the Mokelumne River itself, not the
17 diversion channel. (CDFG Exhibit 1, p. 2). So, by the April 15, 1993 letter, CDFG did not agree,
18 as seemingly indicated by the language drafted by the consultant to the NSJWCD, that the
19 NSJWCD could construct a barrier in the diversion channel. The CDFG, instead, required fish
20 screen panels in the Mokelumne River itself.

21
22 In summary, NSJWCD is not in compliance with Permit Term 15. No fish screen exists. The
23 April 8, 15 and 19, 1993 series of letters is not an operating agreement. Assuming *arguendo* that
24 the SWRCB finds that these letters constitute an operating agreement, they do not constitute and
25 operating agreement *to protect fish life*, as required by Permit Term 15. Further, the New

1 Compliance Theory was not included in Mr. Steffani's written testimony. (NSJ Exhibit 100.)
2 Mr. Steffani's written testimony does not make reference to Exhibit NSJ 115, the April 1993
3 letters. Yet, on the day of the hearing, Mr. Steffani mysteriously declared that his claim of an
4 **oral** operating agreement stated in NSJ Exhibit 100, paragraph 6 was based on NSJ- 115, the
5 April 1993 letters. (See RT p. 91.)

6 **IV.**

7 **HOW DOES SWRCB D-1641 RELATE, IF AT ALL, TO THE NSJWCD COMPLIANCE**
8 **WITH PERMIT TERM 23?**

9 SWRCB Decision D-1641 does not apply to the NSJWCD's non-compliance with Permit Term
10 23. The SWRCB adopted Water Right Decision 1641 in 1999 and adopted Revised Water Right
11 Decision 1641 in March 15, 2000. Revised D-1641 is referred to as "In the Matter of:
12 Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin
13 Delta Estuary; A Petition to Change Points of Diversion of the Central Valley Project and the
14 State Water Project in the Southern Delta; and A Petition to Change Places of Use and Purposes
15 of Use of the Central Valley Project." The NSJWCD points of diversion are not in the legal
16 delta. (RD-1641, p. 62.) Table 1 of Revised D-1641 lists the "Permits and Licenses Affected by
17 This Decision". (RD-1641, page 4). No permit or license owned by the NSJWCD is listed in
18 Table 1. Therefore, on its face, the NSJWCD Permit 10477 is not affected or covered by
19 Revised D-1641.

20
21 Table 1 of RD-1641 does list permits held by EBMUD and the Woodbridge Irrigation District as
22 being affected by RD-1641. RD-1641 establishes EBMUD's responsibility to help meet the
23 Bay-Delta flow objectives consistent with the Joint Settlement Agreement that was executed for
24 the Lower Mokelumne River Project in 1996 (JSA) (CDFG Exhibit 7). The JSA was executed
25 by EBMUD, CDFG and the United States Fish and Wildlife Service (USFWS). The JSA

1 requires the EBMUD to not only to implement flow requirements for the Mokelumne River, but
2 also to do a variety of non-flow measures outlined in the JSA. The JSA does not purport to
3 declare that the fish in the Mokelumne River will be in good condition as a result of the JSA
4 actions. Instead, the JSA states, "The Parties agree that implementation of the flow requirements
5 and non-flow measures set forth in this Agreement constitutes a **reasonable contribution by**
6 **EBMUD to provide reasonable protection and enhancement from current conditions** for the
7 anadromous fishery and ecosystem of the lower Mokelumne River, and constitutes a **reasonable**
8 **contribution on the part of EBMUD** toward state and federal fishery restoration goals for the
9 River set forth in the California Salmon, Steelhead Trout, and Anadromous Fisheries Program
10 Act and the CVPIA. (CDFG Exhibit 7, p. 9, emphasis added.)

11
12 The NSJWCD is not a signatory to the JSA. The NSJWCD does not contribute financially to the
13 Partnership Fund established in the JSA. The NSJWCD does not participate in the Mokelumne
14 River Technical Advisory Committee or the Mokelumne River Partnership Coordinating
15 Committee, both established by the JSA.

16
17 Outside the JSA, EBMUD has taken steps to protect steelhead trout and other anadromous fishes.
18 For example, in 1994 EBMUD installed a Super Oxygenation cone in Camanche Reservoir in an
19 effort to increase dissolved oxygen levels below Camanche Dam. (CDFG Exhibit 5, paragraph 6,
20 page 3.) In addition, in 2006, Woodbridge Irrigation District completed construction of a new
21 and improved dam and its associated fish ladders to improve flow control at the dam and provide
22 attraction and passage for upstream migration of anadromous fishes.(Id.) Currently, Woodbridge
23 Irrigation District is in the process of constructing a new fish screen at their diversion. (Id.)
24 While these other diverters were taking affirmative steps to increase the protection of
25 anadromous fish species in the Mokelumne River, what did the NSJWCD do during this same

1 time period to help protect the anadromous fishes in the Mokelumne River? Nothing. NSJWCD
2 continued diverting through unscreened diversions and failed to comply with Terms 15 and 23 of
3 Permit 14077.

4
5 RD-1641 states, in dicta, "The SWRCB finds that it would not be in the public interest to require
6 more water from the Mokelumne River system that will be provided under the JSA." (RD-1641,
7 p. 63.) This statement is dicta because flows in the Mokelumne River for the protection of fish
8 was not a subject of the D-1641 or RD-1641 hearings. Flows for the protection of fish were not a
9 key hearing issue and parties were not given the opportunity to provide testimony on that subject.
10 The purpose of the proceeding was, in part, to determine responsibilities of water right holders to
11 help meet the objectives set forth in the 1995 Bay-Delta Plan. (RD-1641, p. 6.) The 1995 Bay-
12 Delta Plan involves flows in the Bay-Delta region, not the Mokelumne River. Because D-1641
13 and RD-1641 contain a statement that is clearly dicta and not the subject of testimony and cross
14 examination by the parties, the letters sent by Mr. Schueller regarding D-1641 should not be
15 interpreted to overreach the purpose or scope of that decision.

16 **V.**

17 **WHAT HARM IS CAUSED BY NSJWCD VIOLATIONS? DOES THE WATER CODE**
18 **REQUIRE A FINDING OF HARM?**

19 NSJSCD diversion of water without a fish screen causes harm. The Mokelumne River has
20 approximately thirty eight aquatic species. These species include five anadromous fish species:
21 fall run Chinook salmon, Central Valley steelhead, striped bass, American shad, and pacific
22 lamprey. (CDFG Exhibit 5, paragraph 4, page 2.) Central Valley steelhead are currently listed
23 under the Federal Endangered Species Act as a threatened species. (Id.) A number of factors
24 for over 100 years, including water use and availability, have contributed to the sparse returns of
25 steelhead to the lower Mokelumne River in recent years. (CDDFG Exhibit 5, paragraph 6, page

1 3). Unscreened water diversions can entrain fry and juvenile Chinook salmon and steelhead.
2 Unscreened diversions have been known to entrain fry and juvenile salmonids because the fry
3 are not able to escape the current caused by the diversion, and therefore are entrained in the
4 diversion. (CDFG Exhibit 5, paragraph 11, page 4.) Steelhead fry and juvenile rearing is year
5 round and they tend to migrate to the ocean as juveniles in one to two years following their
6 emergence. (CDFG Exhibit 5, paragraph 13, page 4) Due to the year round residence of
7 Mokelumne River juvenile steelhead in fresh water, they are particularly vulnerable to flow
8 changes and unscreened water diversions. (Id.)

9
10 As discussed above in Section IV, EBMUD and the Woodbridge Irrigation District have recently
11 taken steps to help protect anadromous fishes in the Mokelumne River. The new fish ladder
12 completed in 2006 by the Woodbridge Irrigation District is designed to pass more fish, such as
13 steelhead trout, up into the area of the NSJWCD diversion. Thus, more steelhead trout should
14 soon be in the area of the NSJWCD diversion. Without an adequate screen, those fish, and their
15 progeny, will be harmed by the unscreened NSJWCD diversion.

16
17 The California Water Code does not require a finding of harm for the SWRCB to adopt a cease
18 and desist order, such as Draft Cease and Desist Order No. 262.31-XX. Water Code section
19 1825 sets out the intent of the Legislature regarding enforcement of SWRCB permits, licenses
20 and other SWRCB orders.

21 It is the intent of the Legislature that the state should take
22 vigorous action to enforce the terms and conditions of permits,
23 licenses, certifications, and registrations to appropriate water, to
24 enforce state board orders and decisions and to prevent the unlawful
25 diversion of water. (Water Code Section 1825).

1
2 Water Code section 1831 specifically authorizes the SWRCB to issue a cease and desist orders.
3 Among other reasons, the SWRCB may issue a cease and desist order when the SWRCB
4 determines that any person is violating, or threatening to violate, "any term or condition of a
5 permit, license, certification, or registration issued under this division." (Water Code Section
6 1831 (a) and (d).) Permit 10477 was issued by the SWRCB to the NSJWCD. Draft Cease and
7 Desist Order No. 262.31-XX covers NSJWCD's past and future violations of Terms 15 and 23 in
8 Permit 10477. Because Water Code section 1831 allows the SWRCB to issue a Cease and
9 Desist Order for *threatened* violations of a permit, the SWRCB clearly need not wait until harm
10 has actually happened in order to adopt a cease and desist order. In addition, Water Code
11 sections 1825 through 1836 give many details regarding the process by which the SWRCB must
12 give a permittee notice and opportunity to be heard prior to the issuance of a cease and desist
13 order by the SWRCB. Nowhere in those sections did the Legislature include a requirement of a
14 finding of harm by the SWRCB prior to issuing such an order. As stated above, rather than
15 burden or delay the issuance of a cease and desist order by requiring such a finding, the
16 Legislature instead enumerated an intention for vigorous action to enforce permit terms and gave
17 the SWRCB clear authority to issue a cease and desist order in the face of a threatened violation.

18 VI.

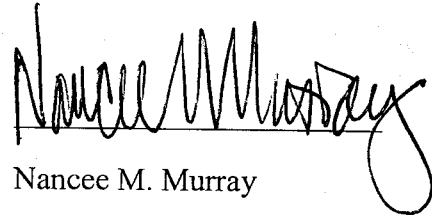
19 CONCLUSION

20 The NSJWCD is in violation of Permit Terms 15 and 23. The SWRCB should adopt Draft Cease
21 and Desist Order No. 262.31-XX in order to prevent additional harm to the public trust resources
22 of the Mokelumne River. The NSJWCD has illegally operated without having to incur the
23 expense of a fish screen since 1993. The NSJWCD has simply diverted and watched while other
24 diverters expended enormous sums of money to improve conditions in the Mokelumne River for
25 the anadromous fishery above and below the unscreened NSJWCD diversion. The NSJWCD has

1 benefited from the effort and expense of its neighbors. The NSJWCD argues that the CDFG was
2 at fault for not contacting the NSJWCD in writing after the 1993 letters or vigorously enforcing
3 Permit Terms 15 and 23. It would be nice if the CDFG had an army of biologists roaming
4 every river in the state checking to see if SWRCB permit and license terms were being complied
5 with. It would be nice if the CDFG had teams of biologists ready on any given day to use its vast
6 scientific data base to determine stream flow recommendations for every diverter and permittee
7 in California. That would be nice. And the fact remains that it is not CDFG's obligation to
8 either monitor compliance with SWRCB permits or develop bypass conditions for diverters.
9 Compliance with Permit 10477 Terms 15 and 23 are the obligation of the NSJWCD, not the
10 CDFG.

11
12 Steelhead trout ran up the Mokelumne River in abundance at the beginning of the 20th Century.
13 By the end of that century, steelhead trout were listed as threatened with extinction under the
14 Federal Endangered Species Act. This is the 21st Century. The SWRCB has the authority and the
15 obligation to issue Cease and Desist Order 262.31-XX and stop the continued harm to steelhead
16 and other aquatic species caused by the NSJWCD unscreened diversions. The SWRCB has the
17 authority and the obligation to issue Cease and Desist Order 262.31-XX and take "vigorous
18 action" to enforce the terms of its permits and demonstrate to all Permittees and Licensees that
19 there are actual consequences of non-compliance with a SWRCB permit or license. The
20 SWRCB has the authority and the obligation to protect the public trust resources of this State
21 more vigorously in this century than was done in the last.

1 Dated: July 31, 2007



2 Nancee M. Murray

3 Senior Staff Counsel

4 Department of Fish and Game

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