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BEFORE THE
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Hearing on)	
)	CALIFORNIA SPORTFISHING
)	PROTECTION ALLIANCE
DELTA SALINITY DRAFT CEASE AND)	CLOSING BRIEF
DESIST ORDERS and WATER QUALITY)	
RESPONSE PLAN)	

The California Sportfishing Protection Alliance (CSPA) submits this closing brief in support of its testimony and exhibits filed in this SWRCB hearing on the proposed Cease and Desist Orders (C&DO) for the State and Federal water projects in the San Francisco Bay/Delta and the Water Quality Response Plan (WQRP) approved by the Water Rights Division Chief. CSPA makes the following points about the evidence in the hearing:

1. Threatened violations of water quality standards were proven by the enforcement team in the hearing. WC 1831.

CSPA believes that the SWRCB prosecutorial team proved “threatened violations” of the agricultural objectives of .7 EC at Delta water quality compliance points. CSPA also

believes that the evidence presented at the hearing shows that Condition Number 1 of the proposed WQRP is unlawful and should not be approved by the SWRCB Board. Water Code section 1831 authorizes the issuance of a cease and desist order if the permittee is violating or “threatening to violate” any condition of a permit or license. Water Right Decision 1641 requires the USBR and the DWR to meet the .7 EC water quality objective of the 1995 Bay/Delta Water Quality Control Plan at three interior Delta locations from April 1 to August 31 of each year. (D-1641, p.182, Table 2) The SWRCB Prosecutorial Team’s exhibit 5B established the standard; exhibit 6 was a letter from the USBR and DWR indicating that they would violate the standard in the future if it were .7EC; exhibit 7 indicated past violations by USBR and DWR at 1.0 EC at the interior Delta locations; and; past practice indicated that .7 EC would be regularly exceeded by the Delta pumping agencies even in wet and normal years. (Prosecutorial Team Exhibits 11-13) USBR and DWR offered no evidence to refute this testimony, nor did they propose other measures that would bring them into compliance with the .7 EC condition of their permits.

2. CSPA agrees with many other parties that the Cease and Desist order should be amended to explicitly require DWR and USBR to meet the agricultural standards at the interior Delta locations.

CSPA believes that the evidence in the hearing supports amending the proposed C&D Orders to require certainty in the regulatory enforcement scheme laid out in the Water Code. Water Code section 1845 sets out an enforcement scheme that allows enforcement of C&D Orders. Obviously the C&D Order must be in place, and provide enforceable standards, for the statutory provisions to be effective. The draft C&D Orders to the USBR and DWR are much too open-ended for effective enforcement. The DWR

testimony indicated that DWR does not believe it is required by the proposed order to meet the standard unless it is “within their control” to do so. This potential defense will result in many more hearings and much waste of time unless the C&D Orders are clear. D-1641 made specific findings about the USBR responsibility for the water quality problems in the Delta, and the C&D Orders must recognize that responsibility and provide an enforceable order so that the water quality plan and the water rights order can be carried out.

CSPA agrees with San Joaquin County’s proposed amended language as far as it goes. However, the SWRCB must modify the C&D order to comply with Water Code section 13360. It is unlawful for the SWRCB to link a water quality standard with a method of compliance as the SWRCB proposes to do here. “That order reveals a significant error in the development of the current D-1641, that is, the linking of the determination of compliance with the development of the South Delta operable barriers. Water quality standards should not be dependent on, or considered equivalent to, a particular method of compliance.” CSPA Exhibit 1-Testimony of G. Fred Lee.

The SWRCB does not have a technically reliable basis upon which to assume that the existence/operation of the operable barriers will affect the meeting of the 0.7 mmhos/cm salinity objective. It should be noted that on page 88 of D-1641 the SWRCB (2000) stated,

“The construction of permanent barriers alone is not expected to result in attainment of the water quality objectives. (R.T. pp. 3672, 3710, 3787-3788; DWR 37, p. 15; SWRCB 1e, pp. [IX 30]-[IX-41].) The objectives can be met consistently only by providing more dilution [water] or by treatment. (R.T. p. 3737.)”

Therefore, the SWRCB should proceed with the Cease and Desist Order without any reference to the existence/operation of the operable barriers. There is no doubt that the impact of the presence and operation of the permanent operable barriers will have water quality impacts, many of which are currently unrecognized. There are a variety of factors that should ultimately govern how the operable barriers will be operated. Salinity is only one of those factors. Others include potential implications for the low DO problems, excessive bioaccumulation of mercury and organochlorine “legacy” pesticides and PCBs that accumulate in fish that are a threat to the health of those who use the fish and some other organisms as food, aquatic life toxicity and other pollutants in several of South Delta channels. *See* CSPA Exhibit 1 - Testimony of G. Fred Lee

3. D 1641 salinity standards cannot be modified in the present hearing or by the Water Rights Division Chief as proposed by Condition 1 of the WQRP.

The hearing officer correctly excluded evidence on the need to modify the D-1641 agricultural standard in the hearing of these matters. Unfortunately, the Water Rights Division Chief had already unlawfully modified the agricultural standards found necessary by D-1641 in Condition 1 of the WQRP. The Division Chief has no authority to modify water rights orders unilaterally. Water Code sections 1394, 1611, and 1703, taken collectively, require a hearing noticed for that purpose with testimony, cross-examination, and full notice to interested parties of their right to participate. This hearing notice did **not** include such issues. Therefore, Condition 1 of the WQRP is illegal and should be withdrawn.

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Conclusion

The evidence in this hearing supports the issuance of a C&D Order requiring the USBR and DWR to meet the agricultural water quality standards in D-1641 that are now part of the project permits. The Prosecutorial Team has met its burden to establish “threatened violations” of the interior Delta agricultural standards by evidence showing past violations and by past operations and statements by the project managers that they won’t meet the standards in the future. Substantial damage will be done to Delta agriculture and to other Delta water quality and fishery resources if the agricultural standards are not enforceable. The C&D Orders should be issued in revised form to hold the projects responsible for their actions in the same way any other permit holder would be held accountable for its diversion.

The WQRP should be amended to delete Condition 1 and the illegal approval of the water rights Division Chief should be revoked. The USBR and DWR should finally be required to meet the standards of D-1641 and the 1995 Delta Water Quality Control Plan.

Dated December 12, 2005

 /s/ Michael B. Jackson
Attorney for CSPA