

JEANNE M. ZOLEZZI (State Bar No. 121282)  
 KARNA E. HARRIGFELD (State Bar No. 162824)  
**HERUM CRABTREE BROWN**  
*A Professional Corporation*  
 2291 West March Lane, Suite B100  
 Stockton, California 95207  
 (209) 472-7700  
 (209) 472-7986 Fax  
[jzolezzi@herumcrabtree.com](mailto:jzolezzi@herumcrabtree.com)  
[kharrigfeld@herumcrabtree.com](mailto:kharrigfeld@herumcrabtree.com)

Attorneys for  
**STOCKTON EAST WATER DISTRICT**

**STATE OF CALIFORNIA  
 STATE WATER RESOURCES CONTROL BOARD**

In the Matter of:	)	
	)	
HEARING TO DETERMINE WHETHER TO	)	
ADOPT CEASE AND DESIST ORDER	)	<b>CLOSING BRIEF</b>
AGAINST THE UNITED STATE BUREAU OF	)	
RECLAMATION AND THE CALIFORNIA	)	
DEPARTMENT OF WATER RESOURCES,	)	
AND RECONSIDER THE CONDITIONAL	)	
APPROVAL OF THE APRIL 25, 2005 WATER	)	
<u>QUALITY RESPONSE PLAN</u>	)	

I.  
INTRODUCTION

This brief is filed on behalf of Stockton East Water District (Stockton East), a participant in the above-referenced hearing. Three key issues were set forth in the notice for this hearing:

1. Should the State Water Board issue a CDO to the USBR in response to Draft CDO No. 262.31-16? If a CDO should be issued what modifications should be made to the measures in the draft order, and what is the basis for such modifications?
2. Should the State Water Board issue a CDO to the DWR in response to Draft CDO

No. 262.31-17? If a CDO should be issued what modifications should be made to the measures in the draft order, and what is the basis for such modifications?

3. What, if any, action should the State Water Board take with respect to the Division Chief's July 1, 2005 conditional approval of the WQRP for use by the USBR and the DWR of each other's points of diversion in the southern Delta? If the State Water Board modifies the conditional approval of the WQRP or takes other appropriate action, what actions or modifications are recommended, and what is the basis for such actions or modifications?

## II. BACKGROUND

Stockton East holds a contract with the United States Bureau of Reclamation to receive water from the New Melones Project on the Stanislaus River. Congress authorized, and the State Board has confirmed, that the counties of Tuolumne, Calaveras, Stanislaus and San Joaquin are entitled to priority preference to water from the New Melones Project based on the provisions of Public Law 87-874 and the California County of Origin Law (Water Code Sec. 10505). State Water Resources Control Board Decision D 1422 at pp. 3, 16. The State Board further determined that the yield of the New Melones Project would be needed in that local preference area. *Id.*

It was Reclamation, not Congress, that authorized use of New Melones for water quality purposes; but it did so only to the extent that use of water for water quality purpose did not interfere with the authorized purposes of the project. Consistent with this limitation, the water right permits for the New Melones Project [Permits 16597, 16600, and 20245] have been conditioned with the obligation to meet the salinity objectives for agricultural beneficial use established at Vernalis, as point on the lower San Joaquin

River before it enters the southern delta. However, the State Board has more recently imposed that obligation more broadly.

In D1641 the State Board concluded that the operation of units of the CVP *other than New Melones* are the principal cause of the salinity concentrations exceeding the objectives at Vernalis. WR-05 [D 1641] at p. 83. Based upon this evidence, the SWRCB determined not only that Reclamation, through the CVP operation, was “responsible for significant deterioration of the water quality,” but further identified those components of the CVP that were specifically responsible for the salinity problem:

**The source of much of the saline discharge to the San Joaquin River is from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP, primarily through the Delta-Mendota Canal and the San Luis Unit. The capacity of the lower San Joaquin to assimilate the agricultural drainage has been significantly reduced through the diversion of high quality flows from the upper San Joaquin River by the CVP at Friant. Reclamation, through its activities associated with operating the CVP in the San Joaquin River basin, is responsible for significant deterioration of the water quality in the southern Delta.** WR-05 [D 1641] at p. 83.

The SWRCB also evaluated the impact of diversions made from upstream tributaries to the San Joaquin River and concluded that the New Melones Project of the CVP has no more than a *de minimus* impact on San Joaquin River salinity levels:

Return flow from upstream diversions of water does not contribute significantly to the salt loading in the San Joaquin River. From 1977 through 1997, return flows from the . . . Stanislaus river contributed . . . six percent. . . of the annual salt load of the river. WR-05 [D 1641] at p. 81.

Despite some confusing testimony at these hearings, in D 1641 the State Board imposed conditions upon all Central Valley Project permits requiring compliance with the southern delta salinity standard at Vernalis, and directed the Bureau of Reclamation to consider sources of dilution water other than New Melones. WR-05 [D 1641] at pp. 83, 159-160. The CVP and State Water Project permits are jointly responsible for complying with salinity standards at the remaining southern delta compliance points. WR-05 [D 1641] at pp. 159-160. Despite the State Board's direction to Reclamation, Reclamation has nevertheless continued to solely rely upon releases from New Melones Reservoir to meet southern Delta salinity standards. This is despite the fact that the State Board in D 1641 stated:

“Although releases of dilution water could help meet the southern Delta objectives, regional management of drainage water is the preferred method of meeting the objectives. WR-05 [D 1641] at pp. 83-83.

Congress has recently directed Reclamation to cease continued reliance on New Melones to improve south delta water quality. In HR 2828 [Public Law 108-361] Congress directed the Secretary of the Interior to develop a program to implement all existing water quality standards and objectives for which the CVP has responsibility, and begin initiation of that plan, no later than October 25, 2005.<sup>1</sup> That plan is to specifically include methods to “reduce the reliance on the New Melones Reservoir for meeting water quality and fishery flow objectives”, using various methods. Public Law 108-361§103(d)(2)(D). The State Legislature has imposed a similar requirement upon DWR for a plan to be adopted in January of 2006. Water Code Section 138.10.

---

<sup>1</sup> Sadly, this deadline has passed and Reclamation has not met the congressionally imposed deadline.

## SOUTH DELTA SALINITY OBJECTIVES

In D 1641 the State Board determined that the water quality benefits of the barriers could also be achieved by other means, but noted that requiring additional flows “could result in an unreasonable use of water.” WR-05 [D 1641] at p. 87. DWR and the USBR have represented that increasing flow from the San Joaquin River does not improve circulation in interior delta channels and cannot guarantee water quality compliance in the southern delta. WR-07 at p. 2.

The State Board staff has acknowledged that the permanent barriers will not be built before 2009, if that soon. WR-01 at p. 7. Prior to that time the CDO should provide specific direction to DWR and USBR on what steps should be taken to ensure compliance with the standards. If the State Board simply directs DWR and USBR to comply with the standards without further direction, they will look solely to release from New Melones Reservoir to meet those standards; as they have stated:

“ . . . imposition of the more stringent 0.7 EC agriculture salinity objective could force DWR and Reclamation to release large quantities of water from upstream reservoirs in an attempt to meet the 0.7 EC objective in the southern Delta.” WR-06 at p. 2.

The State Board has acknowledged that to do so would likely constitute an unreasonable use of water in violation of the California Constitution. WR-05 [D 1641] at p. 10.

To mitigate harm to water right users from the New Melones project for the delay in construction of the permanent barriers, Items 1 and 2 of the Draft CDO should be reworded and expanded. Board staff has come to the realization that directing DWR and Reclamation to comply with requirements does not insure that compliance will be

achieved. As stated by Charles Lindsay in his testimony, DWR and USBR are in a “probationary period”. WR-01 at p. 9. During this period there should be heightened State Board oversight that should include specific direction for what compliance actions will be considered reasonable. Items 1 and 2 should impose limitations on the methods that can be used to avoid an anticipated violation of the 0.7 EC objective, including, but not limited to, the following:

- (1) Water quality releases can be used to meet the standards only after non-flow alternatives are exhausted, including reducing exports, purchasing water, restrictions on discharge from wetlands receiving water from the CVP, and re-circulation<sup>2</sup>.
- (2) Water quality releases cannot be the exclusive method used to meet the standards.
- (3) If water quality releases are used as one of the methods to achieve compliance, USBR cannot release all water from one source for that purpose, and a cap should be imposed upon the quantities of water to be released from non-export facilities.
- (4) Actions taken by the USBR should expressly comply with the limitations imposed by Congress in HR 2828.

### RESPONSE PLAN

The State Board must rescind staff’s approval of the proposed Response Plan. First, because it was approved in violation of due process requirements. The approval purported to waive compliance with water quality standards imposed as permit conditions by the State Water Resources Control Board in a noticed hearing. Such permit terms can be changed only after an additional noticed hearing.

---

<sup>2</sup> While re-circulation and water purchases for meeting water quality both include flow, they do not constitute an unreasonable use of water because they are not taking water away from beneficial uses. Rather, they both involve the voluntary re-cycling of water that can ultimately be reused for beneficial purposes.

Most importantly, however, D 1641 required that all water quality objectives are met before DWR and USBR can enjoy the benefit of the Joint Point of Diversion authorization under their permits. WR-05 [D 1641] at p. 150. Once again, to change that requirement requires a public hearing with notice to all parties participating in the D 1641 process.

Interestingly, in D 1641 the State Board concluded:

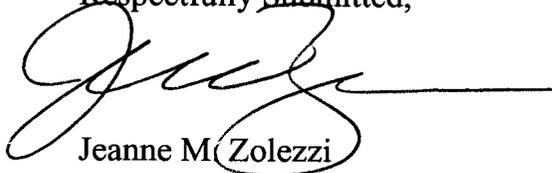
“[t]he actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernalis. . . . The source of much of the saline discharge to the San Joaquin River is from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP, primarily through the Delta-Mendota Canal and the CVP Unit.” At p. 83

“The DWR and the USBR are partially responsible for salinity problems in the southern Delta because of hydrologic changes that are caused by export pumping.” WR-05 [D 1641] at p. 88.

Despite these findings, staff approved use of Joint Point of Diversion to increase export pumping while at the same time waiving compliance with water quality requirements in the south delta. By its own determination the Board acknowledges that authorizing increased exports will and exacerbate water quality in the San Joaquin River and south delta. Approving such increased pumping while at the same time waiving compliance with water quality standards does not fulfill this body’s legislative mandate to protect the quality of waters in this state.

Dated: December 12, 2005

Respectfully Submitted,



Jeanne M. Zolezzi

**PROOF OF SERVICE BY ELECTRONIC MAIL AND U.S. MAIL**

I, Rosie Lopez, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 2291 West March Lane, Suite B100, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On December 12, 2005 at my place of business a copy of **CLOSING BRIEF** was placed for deposit following ordinary course of business as follows:

**[XX] BY U.S. MAIL** with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelope(s) were addressed as follows:

Patrick Porgans  
Patrick Porgans & Assoc., Inc.  
Post Office Box 60940  
Sacramento, California 95860

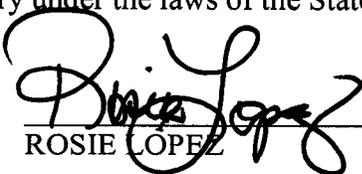
Gary Bobker, Program Director  
The Bay Institute  
500 Palm Drive, Suite 200  
Novato, California 94949

**[XX] BY ELECTRONIC MAIL.** Based on an agreement of the parties to accept service by e-mail or electronic transmission, on December 12, 2005, at approximately 2:45 p.m. I caused the **NOTICE OF INTENT TO APPEAR** for Stockton East Water District, to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**SEE ATTACHED SERVICE LIST.**

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 12, 2005

  
\_\_\_\_\_  
ROSIE LOPEZ

## SERVICE LIST

Cathy Crothers, Senior Staff Counsel  
Department of Water Resources  
1416 Ninth Street, Room 1118  
Sacramento, California 95814  
[crothers@water.ca.gov](mailto:crothers@water.ca.gov)

Amy L. Aufdemberge  
Assistant Regional Solicitor  
Room E-1712  
2800 Cottage Way  
Sacramento, California 95825  
[Jstruebing@mp.usbr.gov](mailto:Jstruebing@mp.usbr.gov)

Erin K.L. Mahaney  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814  
[emahaney@waterboards.ca.gov](mailto:emahaney@waterboards.ca.gov)

Dante John Nomellini, Esq.  
Nomellini, Grilli & McDaniel  
Post Office Box 1461  
235 East Weber Avenue  
Stockton, California 95201  
[ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net)

Carl P.A. Nelson  
Bold, Polisner, Maddow, Nelson & Judson  
500 Ygnacio Valley Road, Suite 325  
Walnut Creek, California 94596-3840  
[cpanelson@prodigy.net](mailto:cpanelson@prodigy.net)

Clifford W. Schulz  
Kronick, Moskovitz, Tiedemann & Girard  
400 Capitol Mall, Suite 2700  
Sacramento, California 95814  
[cschulz@kmtg.com](mailto:cschulz@kmtg.com)

Paul R. Minasian  
Post Office Box 1679  
Oroville, California 95965  
[pminasian@minasianlaw.com](mailto:pminasian@minasianlaw.com)  
[msexton@minasianlaw.com](mailto:msexton@minasianlaw.com)  
[dforde@minasianlaw.com](mailto:dforde@minasianlaw.com)

Tim O'Laughlin  
O'Laughlin & Paris LLP  
2571 California Park Drive, Suite 210  
Chico, California 95928  
[klanouette@olaughlinparis.com](mailto:klanouette@olaughlinparis.com)

Thomas J. Shephard, Sr.  
Neumiller & Beardslee  
Post Office Box 20  
Stockton, California 95201  
[tshephard@neumiller.com](mailto:tshephard@neumiller.com)

Jon D. Rubin  
400 Capitol Mall, 27<sup>th</sup> Floor  
Sacramento, California 95814  
[jrubin@kmtg.com](mailto:jrubin@kmtg.com)

John Herrick, Esq.  
South Delta Water Agency  
4255 Pacific Avenue, Suite 2  
Stockton, California 95207  
[jherrlaw@aol.com](mailto:jherrlaw@aol.com)

Michael Jackson  
Post Office Box 207  
429 W. Main Street  
Quincy, California 95971  
[mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net)

Arthur F. Godwin  
700 Loughborough Drive, Suite D  
Merced, California 95348  
[agodwin@mrgb.org](mailto:agodwin@mrgb.org)

David J. Guy, Executive Director  
Northern California Water Association  
455 Capitol Mall, Suite 335  
Sacramento, California 95814  
[dguy@norcalwater.org](mailto:dguy@norcalwater.org)

Tina R. Cannon  
700 Loughborough Drive, Suite D  
Merced, California 95348  
[tcannon@dfg.ca.gov](mailto:tcannon@dfg.ca.gov)