**D R A F T** February 28, 2006

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2006 -**

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In the Matter of
Petition For Reconsideration of the Approval of Application 30531A
and the Issuance of Permit 21176
to the
City of Stockton

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**ORDER DENYING RECONSIDERATION AND REISSUING PERMIT**

BY THE BOARD:

## 1.0 INTRODUCTION

On December 20, 2005, the Chief of the Division of Water Rights (Division) of the State Water Resources Control Board (State Water Board) conditionally approved Application 30531A and issued Permit 21176 to the City of Stockton (City). The permit authorizes the diversion and use of up to 33,600 acre-feet per year (afa) of water to be diverted from the San Joaquin River for municipal and industrial purposes. The maximum rate of diversion is 317 cubic feet per second (cfs). Because the water to be appropriated under this permit is made available pursuant to Water Code section 1485, the amount of water available under this permit also is limited to the amount of the fifteen-day running average of properly treated effluent discharged from the City of Stockton's Regional Wastewater Control Facility into the San Joaquin River, or less.

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The State Water Resources Control Board (State Water Board) received a timely petition for reconsideration of the Division Chief's approval of the application on behalf of the San Luis & Delta-Mendota Water Authority (Authority) acting on behalf of its member agencies[1] and the Westlands Water District. This order denies reconsideration and amends the permit by adding a condition reserving the State Water Board's jurisdiction to amend the permit, after notice and opportunity for hearing, if the Board receives certain evidence.

## 2.0 BASES FOR RECONSIDERATION AND POSITION OF THE AUTHORITY

The State Water Board's regulation at California Code of Regulations, title 23, section 768, authorizes reconsideration based upon any of the following causes:

a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
b. The decision or order is not supported by the evidence;
c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
d. Error in law.

The Authority requests reconsideration under the first, second, and fourth bases for reconsideration. The Authority claims that although City filed Application 30531 nearly ten years ago, Authority did not understand the true nature of Application 30531 until 2005 when the State Water Board bifurcated Application 30531 at City's request. The Authority also claims that the environmental documentation shows that there will be harm to the water rights of the CVP and that Water Code section 7075 requires a limit on Permit 21176 to avoid reducing the amount of water available to the CVP under its appropriations.

[1] The Authority states that its members include: Banta-Carbona Irrigation District, Broadview Water District, Byron Bethany Irrigation District, Central California Irrigation District, Centinella Water District, City of Tracy, Columbia Canal Company, Del Puerto Water District, Eagle Field Water District, Firebaugh Canal Water District, Fresno Slough Water District, Grassland Water District, James Irrigation District, Laguna Water District, Mercy Springs Water District, Oro Loma Water District, Pacheco Water District, Pajaro Valley Water Management Agency, Panoche Water District, Patterson Irrigation District, Pleasant Valley Water District, Reclamation District 1606, San Benito County Water District, San Luis Canal Company, San Luis Water District, Santa Clara Valley Water District, Tranquility Irrigation District, Turner Island Water District, West Side Irrigation District, West Stanislaus Irrigation District, Westlands Water District, and Widren Water District.

The Authority did not file a timely protest against Application 30531. In 2005, years after the period had expired to file a protest, Authority requested that the Division re-notice the application so that the Authority could file a protest of the application. The Authority contended that the proposed appropriation had changed and that the regulatory environment had changed. On December 16, 2005, the Division denied the request to re-notice and pointed out that there were no remaining unresolved protests against the application, that the Delta Water Supply Project (DWSP) of the City would use the application to appropriate the water, and that the DWSP included a series of phases of development. The first phase of the DWSP is the part that will use Application 30531A. Phase I of the project, which will use water under Application 30531A pursuant to Water Code section 1485, has not changed except to the extent that it now is called Phase I. As discussed below, the State Water Board finds no substantial basis to re-notice the application so that the Authority can file a protest.

The Authority claims that the City's environmental documentation is defective, and consequently the Authority has filed a challenge to the City's action based on an alleged violation of the California Environmental Quality Act (CEQA). (Pub. Resources Code, § 21000, et seq.) The Authority's concern is that its supply of water from the federal Central Valley Project (CVP) will be reduced in some measure because the CVP will have to release additional water to control the higher salinity of the discharges from the City, leaving less water for the CVP contractors, including the members of the Authority. The Authority believes that Permit 21176 is not adequately conditioned to prevent injury to CVP contractors.

## 3.0 DISCUSSION

### 3.1 Allegation That Denial of Re-Noticing Is Procedural Error

The Authority's allegation of procedural error because the Division did not re-notice the application is not adequately supported. Under its regulation at California Code of Regulations, title 23, section 684, the State Water Board will re-notice an application if the hearing has been delayed for more than one year after the close of the protest period "when, in its judgment, the record does not reflect up-to-date circumstances because of changes in the project or in the circumstances of affected downstream water users or other interested persons." Where, as with

Application 30531, all of the protests have been dismissed and no hearing is needed based on the timely protests, a delay in processing is not cause for re-noticing the application. Further, formally bifurcating the project into phases is not a substantive change in the project, and Permit 21176 represents only the first part of the project.[2] Accordingly, the Division did not err in refusing to re-notice the application.

### 3.2 Other Alleged Bases for Reconsideration

The Authority claims that the diversions under Permit 21176 will reduce the amount of water available to the CVP and the water supply contractors of the CVP, which include the Authority's members, thereby impairing their contractual rights to water from the CVP. The CVP, which is operated by the United States Bureau of Reclamation (Bureau), is the holder of the water rights that the Authority claims will be injured by the diversions. The Bureau, however, which holds the allegedly impaired water right, has agreed to the diversions under Permit 21176 as conditioned.

The Bureau agreed and stipulated in writing, dated November 29, 2004, to dismiss its protest against Application 30531 subject to the inclusion in any permits of Standard Permit terms 80 and 90. The stipulation also provides that Standard Permit Term 91 will be included for certain diversions by the City. The Bureau agreed that Standard Terms 80, 90 and 91 will not apply to diversions pursuant to Water Code section 1485. As discussed herein, Permit 21176 was issued

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[2] Additionally, the State Water Board has no basis for finding that the circumstances of downstream water users or other interested persons have changed such as to justify re-noticing the application. The City alleges that the Authority has met with the City three times since November of 2003 regarding the project, and that the City sent the Authority a copy of the Notice of Preparation of the EIR in 2003.

solely for diversions pursuant to Water Code section 1485.[3] Accordingly, it does not contain terms 80, 90 and 91. It does, however, contain the other provisions that the city and the Bureau agreed to, to ensure compliance with Water Code section 1485. These conditions require record-keeping of diversions and discharges, computation of running averages, a limit of the amount of water diverted to an amount less than or equal to the amount discharged from the treatment plant, and reporting requirements.

Considering that the Bureau has withdrawn its protest after agreeing to the terms and conditions that in fact are contained in the permit, and the CVP holds the water rights involved, the water rights of the CVP cannot be deemed injured by the issuance of Permit 21176. The Authority claims to have contracts and thereby claims to be a legal user of the CVP's water. It has not, however, provided evidence that its members are CVP contractors and it also has not provided evidence, assuming it has contracts, to show that it has a right under its contract to any water that may be required for salinity control as a result of the diversions under Permit 21176. Under the reasoning of the Third District Court of Appeal in *State Water Resources Control Board Cases*, No. C044714, JCCP No. 4118, filed February 9, 2006, to claim injury as a result of a change petition, contractors must show that they have a right to a larger amount of water than would be provided after the Bureau meets its other obligations.[4] The Authority has not done this. If they have contracts that contain a clause allowing the Bureau to deliver less water than the full amount of the contract, a clause that many Bureau contracts contain, any claim they may have is

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[3] Section 1485 provides:

> Any municipality, governmental agency, or political subdivision operating waste disposal plants producing disposal water meeting the requirements of the appropriate regional board, and disposing of said water in the San Joaquin River may file an application for a permit to appropriate an equal amount of water, less diminution by seepage, evaporation, transpiration or other natural causes between the point of discharge and the point of recovery, downstream from said disposal plant and out of the San Joaquin River or the Sacramento-San Joaquin Delta. A permit to appropriate such amount of water may be granted by the board upon such terms and conditions as in the board's judgment are necessary for the protection of the rights of others. Water so appropriated may be sold or utilized for any beneficial purpose. The right to the use of water granted by this section shall not include water flowing in underground streams.
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> The Legislature finds and declares that the problems incident to the full utilization of the waters of the San Joaquin River and the Sacramento-San Joaquin Delta into which it flows, are unique and that a general law cannot be made applicable thereto.

[4] At the date of this order, the opinion in State Water Resources Control Board Cases is not yet final.

against the Bureau[5] if the Bureau agrees to allow an appropriation that arguably may reduce the supply it delivers to its contractors. This alone does not result in dismissal of the Authority's petition for reconsideration, because any interested party may file a petition for reconsideration.

### 3.3 Physical Effect of the DWSP Diversions Under Water Code Section 1485

The Authority complains that the diversions will diminish the quantity of water appropriated by the CVP in its upstream reservoirs or will diminish the quantity of water delivered to the members of the Authority. Accordingly, the State Water Board now examines whether the approval of Application 30531A will, based on the evidence in the file, diminish the amount of water available to any existing appropriator of water from the San Joaquin River. The primary technical evidence in the file for this project is the Environmental Impact Report (EIR) for the DWSP. Based on the evidence in the State Water Board's record, the Authority's members likely would not be deprived of a measurable amount of water as a result of the diversions.

The EIR analyzes the potential effects of the DWSP on upstream CVP and State Water Project (SWP) reservoir storage levels and river flows, and Delta flows and export water operations with DWR's and Reclamation's California Simulation Model (CALSIM) II. According to the EIR, CALSIM II is generally regarded as the best available planning tool for analysis of the CVP and SWP system and regions tributary to the Delta. The EIR interprets model results using various statistical measures such as long-term or dry year-type averages.[6] Project alternatives were modeled at the existing (2003) level-of-development (LOD) and at the future (2015) LOD. For the project-level cumulative analysis, the EIR compares the DWSP to the No Project alternative at a 2015 LOD.[7] The project-level analysis of DWSP diversions of water from the Delta under

[5] Because the current case addresses the approval of an application to appropriate water and not a change petition, the measure of whether the application can be approved is whether there is water available for the appropriation under Water Code, § 1202, not whether there will be injury to another legal user of water as would be the case when addressing a petition for change under § 1702.

[6] Dry periods are May 1928-October 1934, October 1976–September 1977, and June 1986–September 1992 for CVP and SWP deliveries and reservoir carryover storage.

[7] The analysis evaluates the combined effects of the proposed project and other water supply programs and actions. The analysis estimates the conditions in 2015, corresponding to the approximate end of Phase 1 of the DWSP.

section 1485 of the California Water Code compares the existing conditions (2003) with the effects of the diversions under the 2015 LOD.[8]

### 3.3.1 Effects on Upstream Water Storage

The Authority contends that the City's EIR projects reductions in storage that demonstrate a clear harm to the rights of the CVP and its water users and to their ability to continue to appropriate water for CVP purposes. In support of this contention, the Authority provides the following excerpt of summary results of reservoir carryover storage taken from the City's EIR.[9]

**Excerpt from Table 4-3**

Summary Results, DWSP Compared to Future No Project, Cumulative Conditions, 2015 LOD

| **Reservoir Carryover Storage (1,000 AF)** | **DWSP, Cumulative Conditions, 2015 LOD** | | **Future No Project, Cumulative Conditions, 2015 LOD** | | **Difference: DWSP Minimum Future No Project** | |
|---|---|---|---|---|---|---|
| | Long-Term | Driest Periods | Long-Term | Driest Periods | Long-Term | Driest Periods |
| Trinity Lake | 1250 | 661 | 1253 | 668 | -3 | -7 |
| Lake Shasta | 2466 | 1427 | 2471 | 1439 | -5 | -13 |
| Folsom Lake | 485 | 336 | 486 | 337 | -1 | -2 |
| CVP total NOD Storage | 4432 | 2644 | 4442 | 2666 | -10 | -21 |
| CVP San Luis Reservoir | 244 | 239 | 245 | 243 | -1 | -4 |

The excerpted CALSIM II modeling data results, however, show relatively small changes in CVP carryover storage. For the 2015 LOD, the long-term average changes in the total CVP carryover storage is 11 thousand acre-feet (TAF), and the driest periods average change in the total CVP carryover storage is 25 TAF.[10]

The Authority contends that these projected reductions in storage demonstrate harm to the rights of the CVP and its water users, but these changes are small compared to the total average carryover storage of about 4.7 million acre-feet (MAF) (long-term) and 2.9 MAF for the CVP (driest periods), or 0.002 percent and 0.008 percent, respectively. These changes in carryover storage are primarily an artifact of CALSIM II modeling, rather than reflecting a potential

[8] Modeling Technical Appendix to the Draft Environmental Impact Report – Delta Water Supply Project. (MWH, 2005).

[9] *Id.*, p. 4-7

[10] CVP total north-of-Delta Storage plus CVP San Luis Reservoir.

change in project operations.[11] Further, as the modeling technical appendix notes in citing a CALFED report, there appears to be no accepted standard for a threshold of significance with regard to model determinations of project impacts. CALFED estimates modeling uncertainty at 10 percent and identifies all impacts below 10 percent as less than significant.[12]

### 3.3.2 Effects on Delta Exports

Another measure of potential water supply impacts to CVP contractors is the modeled data relating to "Exports at Tracy Pumping Plant," summarized in Table 4-7 of the EIR.[13]

**Excerpt from Table 4-7 of the EIR**

Average Annual Flows: Proposed DWSP Compared To 2015 No Project Conditions

| **Delta (1,000 AF)** | **Proposed DWSP** | | **No Project** | | **Difference: DWSP Minus No Project** | |
|---|---|---|---|---|---|---|
| | **Long-Term** | **Driest Periods** | **Long-Term** | **Driest Periods** | **Long-Term** | **Driest Periods** |
| Export at Banks Pumping Plant | 3631 | 2030 | 3636 | 2039 | -5 | -9 |
| Export at Tracy Pumping Plant | 2358 | 1610 | 2359 | 1612 | -1 | -2 |
| Total Exports | 5989 | 3640 | 5994 | 3651 | -6 | -10 |

The summarized data show that changes to CVP exports attributed to the DWSP would be 6 TAF (long-term) and 10 TAF (driest periods). These changes are small compared to the total exports of 5.9 MAF (long-term) and 3.6 MAF (driest periods), or 0.001 percent and 0.003 percent, respectively. Based on modeling uncertainties, these water supply impacts are less than significant.

The Authority contends that if the CVP or SWP is required to meet water quality standards when the City operates its new diversion during dry years, the water required to meet those standards might be obtained by reducing exports from the southern Delta, because the SWP and CVP might not be able to re-operate their north of Delta reservoirs to provide additional water for Delta needs due to regulatory requirements for listed species.

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[11] *Id.*, p. 4-3.

[12] *Id.,* p. 3-21

[13] DWSP - EIR, Vol. II, Ch. 4, p. 4-38.

To support these contentions, the Authority provides an assessment of potential impacts to water deliveries. The Authority's assessment concludes that a reduction in agriculture deliveries of approximately 42 percent (36,000 af), 20 percent (45,000 af) and 20 percent (65,000 af) occurred in representative dry years 1977, 1991 and 1992. These estimates are based on the following summarized data.

**2015 Study Results for Dry Year Periods**
**(1928-34, 1976-77, 1987-92)**
**(TAF)**

| Year | CVP North of Delta Storage Impact | CVP Ag. Contractors South of Delta Delivery Impact | South of Delta Base Delivery Ag. Contractors | Adjusted Combined Impact* |
|---|---|---|---|---|
| 1928 | -10 | -3 | 1179 | -13 |
| 1929 | -19 | 0 | 0 | 0 |
| 1930 | -21 | -5 | 483 | -26 |
| 1931 | -9 | 0 | 125 | -9 |
| 1932 | 1 | -4 | 150 | -3 |
| 1933 | -19 | 11 | 17 | -8 |
| 1934 | -11 | -5 | 169 | -16 |
| 1976 | -18 | 0 | 314 | -18 |
| 1977 | -37 | 1 | 85 | -36 |
| 1987 | -13 | 9 | 440 | -4 |
| 1988 | -30 | 0 | 0 | 0 |
| 1989 | -35 | -12 | 790 | -47 |
| 1990 | -29 | 0 | 0 | 0 |
| 1991 | -45 | 0 | 234 | -45 |
| 1992 | -46 | -19 | 354 | -65 |

*Adjusted combined impact adds the storage and delivery impact only in years where the base is greater than zero

Table 4-7 of the EIR provides a summary of the potential water supply impacts to CVP and SWP Deliveries.[14]

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[14] *Id.*, p. 4-38.

**Excerpt from Table 4-7**

AVERAGE ANNUAL FLOWS, PROPOSED DWSP COMPARED TO 2015 NO PROJECT CONDITIONS

| CVP/SWP Deliveries (1,000 AF) | Proposed DWSP | | No Project | | Difference: DWSP Minus No Project | |
|---|---|---|---|---|---|---|
| | Long-Term | Driest Periods | Long-Term | Driest Periods | Long-Term | Driest Periods |
| CVP NOD[15] Agricultural Deliveries | 230 | 32 | 230 | 32 | 0 | 0 |
| CVP NOD M&I Deliveries | 38 | 41 | 38 | 41 | 0 | 0 |
| CVP SOD Agricultural Deliveries | 1071 | 159 | 1071 | 159 | 0 | -1 |
| CVP SOD M&I Deliveries | 122 | 84 | 122 | 84 | 0 | 0 |
| SWP Table A Deliveries | 3182 | 1692 | 3186 | 1694 | -4 | -2 |
| SWP Article 21 Deliveries | 130 | 112 | 131 | 120 | -2 | -8 |

The data show that the 2015 LOD long-term and driest year average changes in CVP North of Delta (NOD) and South of Delta (SOD) deliveries (agricultural deliveries, M&I) would be zero and 1 TAF, respectively. The 2015 LOD long-term and driest year average change in SWP deliveries (Table A and Article 21) would be 6 TAF and 10 TAF, respectively. Compared to the total CVP north-of-Delta and south-of-Delta deliveries and total SWP deliveries, this is less than 1 percent. Based on the accepted modeling uncertainties, these water supply impacts would be less than significant.

### 3.3.3 Effects of the DWSP Diversions on Delta Salinity

The Authority's arguments are based on the assumption that the DWSP will add salts to the Delta that will either result in violations of the salinity objective in the Delta, or cause the CVP and SWP to release water to dilute the salts, or cause the CVP and SWP to reduce deliveries to the export areas. The southern Delta salinity objectives for agricultural beneficial uses are the closest upstream objectives to the DWSP diversion.

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[15] NOD means north of Delta.

Table 5-12 of the EIR's Modeling Technical Appendix to the Draft EIR shows the baseline and change in EC at selected locations in the Delta for the 16-year period of simulation 1976-1991.[16] The following table compares this data for the four southern Delta compliance stations: the San Joaquin River at the Brandt Bridge site (Station C-6), Old River near Middle River (Station C-8), Old River at Tracy Road Bridge (Station P-12), and the San Joaquin River at Airport Way Bridge, Vernalis (Station C-10). The data show that DWSP would have virtually no effect on salinity at the four compliance locations. Therefore, it appears that no additional water would have to be released by the USBR to meet current water quality objectives because of the DWSP.

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[16] The water quality impact analysis was based on Delta Simulation Model, Ver. 2 (DSM2). CALSIM II was used to simulate monthly statewide reservoir operations, river flows and CVP–SWP deliveries for a 73-year period based on the 1922–1994 hydrologies. CALSIM II output provided flow (and salinity for the San Joaquin River) boundary conditions for DSM2. DSM2 calculated corresponding changes in water quality in the Delta compared to baseline conditions for a 16-year period (1976–1991). This 16-year period includes the 1976-77 two-year drought and the 1987–1992 six-year drought. This shorter period of simulation compared to CALSIM II (16 years vs. 72 years) is standard practice for DSM2 planning studies because of the modeling complexity for the water quality analysis and the availability of an astronomical tide. The Modeling Technical Appendix (MWH, 2005) to this EIR lists the DSM2 input assumptions and other factors that were used to assess potential impacts of the DWSP.

| Water Quality Objectives (mmhos/cm)[17] | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep |
| Water Quality Objectives | 1 | 1 | 1 | 1 | 1 | 1 | 0.7 | 0.7 | 0.7 | 0.7 | 0.7 | 0.7 |
| **AVERAGE MONTHLY EC, 2015 LOD (mmhos/cm)** | | | | | | | | | | | | |
| Old River near Middle River | | | | | | | | | | | | |
| NO PROJECT: | 0.520 | 0.528 | 0.556 | 0.543 | 0.536 | 0.571 | 0.257 | 0.426 | 0.511 | 0.588 | 0.549 | 0.582 |
| DWSP: | 0.521 | 0.528 | 0.556 | 0.543 | 0.536 | 0.571 | 0.257 | 0.426 | 0.511 | 0.588 | 0.550 | 0.583 |
| Old River at Tracy Road Bridge | | | | | | | | | | | | |
| NO PROJECT: | 0.607 | 0.587 | 0.573 | 0.552 | 0.554 | 0.586 | 0.290 | 0.435 | 0.432 | 0.453 | 0.470 | 0.554 |
| DWSP: | 0.608 | 0.587 | 0.573 | 0.552 | 0.554 | 0.586 | 0.290 | 0.434 | 0.431 | 0.453 | 0.470 | 0.556 |
| San Joaquin River near Vernalis | | | | | | | | | | | | |
| NO PROJECT: | 0.686 | 0.631 | 0.581 | 0.517 | 0.529 | 0.563 | 0.288 | 0.441 | 0.513 | 0.616 | 0.744 | 0.934 |
| DWSP: | 0.686 | 0.631 | 0.581 | 0.517 | 0.529 | 0.563 | 0.288 | 0.441 | 0.513 | 0.616 | 0.744 | 0.934 |
| San Joaquin River at Brandt Bridge | | | | | | | | | | | | |
| NO PROJECT: | 0.686 | 0.634 | 0.593 | 0.547 | 0.536 | 0.571 | 0.296 | 0.449 | 0.518 | 0.617 | 0.733 | 0.927 |
| DWSP: | 0.686 | 0.634 | 0.593 | 0.547 | 0.536 | 0.571 | 0.296 | 0.449 | 0.518 | 0.617 | 0.733 | 0.927 |

[17] Note: Salinity is determined by measuring the ability of water to conduct an electrical current. Salinity is expressed in two different ways, either as electrical conductivity (ECw) or total dissolved salts (TDS). There are several units commonly used to express ECw: deciSiemens per meter (dS/m), siemens per meter (S/m), microSiemens per centimeter (µS/cm), millimhos per centimeter (mmhos/cm), or micromhos per centimeter (µmhos/cm). The relationship between these units is: 1 dS/m = 0.1 S/m = 1000 µS/cm = 1 mmhos/cm = 1000 µmhos/cm.

### 3.4 Conclusions as to Impacts to the Authority

Based on the modeling analyses in the EIR, the State Water Board concludes that there is inadequate evidence in the record to establish that the diversions under Water Code section 1485 for the DWSP will result in a reduction in the amount of water delivered to the Authority's members, assuming that they are water supply contractors and that they have a right to receive the full amount of water under their contracts from the CVP.

Under Water Code section 1201, however, the State Water Board will not permit a new appropriator to take water that is already appropriated except in certain circumstances, such as cases where the area of origin statutes allow a new appropriator to obtain priority over an existing appropriator. No such reversal of priority is involved in this case. In this case, the basis for making water available for the proposed appropriation is not an area of origin claim, but rather is Water Code section 1485, which allows the City to appropriate an amount of water equal to or less than its discharge of treated wastewater from its disposal plant into the San Joaquin River. The amount appropriated is to be reduced for the amounts of seepage, evaporation, transpiration, or other natural causes between the point of discharge and the point of diversion, downstream from the disposal plant. Under section 1485, the State Water Board may issue a permit to appropriate the water upon such terms and conditions as are necessary for the protection of the rights of others. To ensure that, despite any lack of information available at this time, the City's diversion does not result in a measurable diminution of the water supplies of the CVP, the SWP, or other existing water right holders, this order requires that Permit 21176 be re-issued to the City with all of the original terms and conditions and an additional condition. The additional condition requires that if the State Water Board determines, in the future, that the CVP or the SWP is releasing a measurable amount of additional water to dilute the discharges from the Stockton wastewater treatment plant that are recaptured under Permit 21176, the Board may reduce the amount of water that can be appropriated under Permit 21176 to protect the rights of the CVP or the SWP.

## 4.0 CEQA COMPLIANCE

### 4.1 Mitigation Measures

The City of Stockton has certified the Final Program Environmental Impact Report (EIR) and made findings and a Statement of Overriding Considerations. The State Water Board, as responsible agency, is required to consider the EIR and reach its own conclusions on whether and how to approve Application 30531A. The EIR lists the adverse impacts of the project as being less than significant with mitigation measures, or significant and unavoidable.

The EIR finds that 25 of the potential environmental effects[18] would be reduced to less than significant with mitigation measures. The State Water Board, as responsible agency, has included terms and conditions numbered 17, 18, and 19 in the permit to mitigate for the effects of those parts of the project that it approves.[19] These conditions require compliance with the water quality requirements of the Central Valley Regional Water Quality Control Board, fish screening to avoid entrainment of fish, and measures to protect special-status species.

Except for the impacts for which the State Water Board provides mitigation measures in the permit, the mitigation measures or alternatives that would avoid or substantially lessen the significant and unavoidable environmental effects are within the responsibility of the City, not the State Water Board, and have been, or should be adopted.

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[18] Fish Entrainment and Impingement Mortality; Construction Noise, Turbidity, and Stranding Impacts to Fish; Interfere with Recreational Facilities; Williamson Act Contract; Agricultural Land Use Conflicts; Loss of Agricultural Land; Acceleration of Soil Erosion; Settlement and/or Associated Ground Failure; Hazards Associated with Regional Subsidence; Flooding; Impacts on Surface Water Quality; Increased Storm Water Runoff; Loss of Jurisdictional Waters of the U.S.; Impacts to Special-Status Species and Sensitive Communities; Impacts to Native Wildlife Migration Corridors or Nursery Sites; Conflict with City and/or County Tree Preservation Ordinances; Operation Air Emissions; Noise Impacts; Hazardous Materials and Wastes; Construction Disturbance of Contaminated Soil and/or Groundwater; Traffic Impacts; Block Access Routes; Construction Parking Demand; Disruption of Utility Services; Impacts on Police, Fire and Emergency Services.

[19] These impacts are: Fish Entrainment and Impingement Mortality; Stranding Impacts to Fish; Impacts on Surface Water Quality; Loss of Jurisdictional Waters of the U.S.; Impacts to Special-Status Species and Sensitive Communities.

### 4.2 Findings of Overriding Considerations

The EIR found that four of the potential environmental effects of the project would be significant and unavoidable. The following adverse impacts of the project are listed in the EIR as being significant and unavoidable:

- The construction of the water treatment plant, proposed as part of the Delta Water Supply Project (Project), would result in the conversion of 56 acres of important farmland. Because all the surrounding lands are designated as Prime Farmland or Farmland of Statewide Importance, no alternative site is available that would reduce or avoid conversion of farmland.

- The construction of the Project's intake facility would create significant visual impacts. The Project will damage scenic resources within a scenic route as well as degrade the existing visual quality. The Project will also create a substantial new source of nighttime light. Design of the facility and outdoor lighting will attempt to lessen the visual impacts of the intake facility. However, these effects are inherent in new construction in a natural setting.

- Project construction will cause a short-term increase of the emission of air pollutants. Generation of $PM_{10}$ emissions (dust) from construction activities and equipment will contribute to both Project and cumulative emissions for other ongoing construction projects. Also the generation of nitrogen oxide and reactive organic gas emissions from construction vehicles will contribute to both project and cumulative emissions for other ongoing construction projects. These effects will abate when Project construction is complete.

- Planned growth within the City of Stockton Metropolitan Area, supported by phased expansion of the Project, will have significant secondary effects including loss of agricultural land, loss of habitat, increased traffic and traffic congestion, air quality impacts, increased traffic noise, increased wastewater treatment demand, alteration of the region's visual character, and increased use of non-renewable fossil fuels. The social and

economic benefits of appropriating the water to use for planned urban growth outweigh the secondary effects.

The City found that mitigation measures would not reduce these effects to less than significant. Changes or alterations to the project that would avoid or substantially lessen these environmental effects are within the responsibility of the City, not the State Water Board, and have been, or should be adopted.

The State Water Board, having reviewed and considered the information contained in the EIR, finds that no additional mitigation measures within the responsibility of the State Water Board are available for the identified environmental impacts.

The social and economic need for the requested appropriation of water outweighs the impacts described in the EIR. Therefore, on the basis of substantial evidence in the record and the findings set forth above, the State Water Board finds that the benefits of, and the need for, the Project outweigh the significant environmental impacts identified in the EIR.

## 5.0 CONCLUSIONS

1. None of the causes for reconsideration alleged by Authority is supported by the petition for reconsideration.

2. The Authority raises an important issue regarding the availability of water for appropriation by the City, due to the potential for the CVP and the SWP to be required to dilute salinity caused by the City's diversion of water under Permit 21176.

3. The Authority has filed an action against the City under CEQA and has notified the State Water Board of the action, but no stay or injunction has been granted. Accordingly, this order authorizes the City to proceed with the project at the City's risk.

## ORDER

**NOW, THEREFORE, IT IS ORDERED** that the petition for reconsideration of the Chief of the Division issuance of Permit 21176 is denied, and the action approving Application 30531A is amended. Permit 21176 shall be reissued in its entirety with the following additional conditions:

1. Condition 20 is added to read:

   "The State Water Board reserves jurisdiction to amend this permit, after notice and opportunity for hearing, to reduce the maximum amount authorized to be diverted or require other appropriate action if the State Water Board receives new substantial evidence showing that, due to the diversion of water under this permit, the SWP or the federal CVP is required to forego exports from the southern Delta or release from upstream storage additional water to meet salinity objectives in the Delta compared with the amount of water that the SWP or the federal CVP would have to forego exporting or release from upstream storage for salinity control in the absence of diversions under this permit."

2. Condition 21 is added to read:

   "In accordance with Public Resources Code, section 21167.3, the City is authorized under this permit to proceed with the project at the City's risk."

## 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 8, 2006.

AYE:

NO:

ABSENT:

ABSTAIN:

**DRAFT**

Song Her
Clerk to the Board