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For Petitioners California Water Impact Network and California Sportfishing Protection Alliance,

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

California Water Impact Network (C-WIN) and California Sportfishing Protection Alliance (CSPA),
Petitioners

vs.

U.S. Bureau of Reclamation and California Department of Water Resources,
Respondents

PUBLIC TRUST, WASTE AND UNREASONABLE USE AND METHOD OF DIVERSION

COMPLAINT

Central Valley Rivers, Tributary to the Sacramento and San Joaquin River thence Bay Delta Estuary thence Pacific Ocean

In accordance with Title 23 of the California Code of Regulation, the California Water Code, the California Fish & Game Code, the California Constitution and other applicable provisions, the California Water Impact Network and the California Sportfishing Protection Alliance ("CWIN/CSPA") hereby complain against the U.S. Bureau of Reclamation and the California Department of Water Resources as follows:

INTRODUCTION

The Bay-Delta is the largest estuary on the west coast of the Americas, and serves as one of California's most environmentally important and economically valuable ecosystems. It provides a recreational resource for millions of people. Millions of Californians depend upon the Bay-Delta Estuary as one of the sources of their drinking water. An extraordinary variety of wildlife, including many species found nowhere else, lives in the Bay-Delta. Many other species depend upon the Bay-Delta for migratory habitat, and several commercial and sport fisheries depend upon the Bay-Delta for their continued existence.

The Bay-Delta Estuary is one of California's most threatened ecosystems. Violations of federal and state water quality standards are chronic, and the California State Water Resources Control Board has designated the Delta's channels, the Sacramento and San Joaquin Rivers, and areas throughout the Bay as water-quality-limited water bodies. *See* Final 2002 Clean Water Act Section 303(d) List of Water Quality Limited Segments, Region 2 (San Francisco) and Region 5 (Central Valley). Many of the Bay-Delta's fish are threatened with extinction, and in the last three years populations of several previously healthy species are suffering catastrophic declines. Other species, including plankton that support the Bay-Delta's entire food chain, are in similarly poor health. Congress has passed legislation intended to restore the Bay-Delta's health, and

millions of public dollars have gone to restoration projects, but environmental problems persist unabated.

A primary cause of these problems is the network of massive federal and state diversion pumps that supply the Central Valley Project (CVP) and State Water Project (SWP). Those pumps have altered the entire Bay-Delta ecosystem, reducing the quantity and quality of freshwater within the Bay-Delta, altering flow patterns, and killing thousands of fish. Any substantial increase in the amount of water delivered through those pumps will inevitably produce significant adverse environmental effects, thus compounding already existing problems.

The Central Valley Project is the United States government's largest water storage and diversion project, and one of the largest water projects in the world. It diverts and delivers an annual average of about seven million acre-feet of water, and manages an average of approximately 12 million acre-feet of water per year. Much of that water is pumped from the CVP's Tracy Pumping Plant, located at the southern edge of the Delta, into the Delta-Mendota Canal, which transports that water to predominantly agricultural users south of the Delta

California's State Water Project is a similarly massive water storage and diversion project. More than 20 million people rely on water that comes at least partly from the SWP. Table A of the SWP contracts reference approximately 4.2 million acre-feet of annual delivery amounts. In practice, annual deliveries from the SWP have averaged approximately 2 to 2.5 million acre-feet of water, almost all from northern California, to supply agricultural and urban users south of the Delta. Almost all of that water is pumped from the SWP's Banks pumping facility, located at the southern edge of the Delta close to the federal Tracy Pumping Plant, into the California Aqueduct. The California Aqueduct then conveys the water to southern California

users. The SWP is the subject of a coordinated operations agreement with the CVP, and shares the use of the San Luis Reservoir and other facilities with the CVP.

PARTIES

Petitioner California Water Impact Network is a non-profit public benefit corporation formed under the laws of the State of California for the purpose of protecting and restoring fish and wildlife resources, scenery, water quality, recreational opportunities, agricultural uses, and other natural environmental resources and uses of the rivers and streams of California, including the Bay/Delta, its watershed and its underlying groundwater resources. Members of the California Water Impact Network reside in, use, and enjoy the Bay/Delta and inhabit and use its watershed. They use the rivers of the Central Valley and the Bay/Delta for nature study, recreation, and aesthetic enjoyment. The "collapse" of the pelagic and anadromous fishery in the Bay/Delta and its watershed harms the California Water Impact Network and its members by threatening impairment of their use and enjoyment of these species and their habitat.

Established in 1983, the CSPA is a recognized 501(c)(3) non-profit organization whose mission is to protect, preserve and enhance the fisheries and associated aquatic and riparian ecosystems of California's waterways, including the Central Valley Rivers leading to the Bay/Delta. This mission is implemented through active participation in water rights and water quality processes, education and organization of the fishing community, restoration efforts, and vigorous enforcement of environmental laws enacted to protect fisheries, habitat and water quality. Members of CWIN/CSPA reside along the Central Valley watershed and in the Bay/Delta and enjoy the habitat and species that live there.

I. STATEMENT OF FACTS AND REASONS FOR THE PUBLIC TRUST, WASTE AND UNREASONABLE USE AND METHOD OF DIVERSION COMPLAINT BY CWIN/CSPA.

Action to protect the Bay/Delta fishery has begun with Judge Oliver Wanger's recent ruling addressing the state of the Delta smelt in NRDC v. Kempthorne in which the judge says in discussing the Pelagic Fish Decline and the endangered Delta smelt:

> The agency's recognition that the Delta smelt is increasingly in jeopardy; that its operative BiOp is inadequate, as evidenced by its second initiation of re-consultation for the 2004 OCAP, now pending, and its insistence that it will nonetheless operate the Projects under the challenged BiOp is unreasonable. The agency could have, but did not, offer a viable protective alternative. Adaptive management is within the agency's discretion to choose and employ, however, the absence of any definite, certain, or enforceable criteria or standards make its use arbitrary and capricious under the totality of the circumstances. *The agency's failure to reasonably estimate the Delta smelt population and to analyze most recent smelt abundance data make the take limits based on historical data unreliable and unreasonable.* The Delta smelt is undisputedly in jeopardy as to its survival and recovery. The 2005 BiOp's no jeopardy finding is arbitrary, capricious, and contrary to law.

(Emphasis added).

The Central Valley watersheds also sustain fall, winter, and spring-run Chinook salmon *(Oncorhynchus tshawytscha)* and their habitat. The management and use of water by the USBR, DWR and their contractors under permitted water rights issued by the SWRCB have adversely affected the fall-run Chinook salmon and their habitat. *See* Subsection (b) below. The Central Valley winter and spring-run Chinook salmon species have been listed as threatened by the NMFS pursuant to the federal ESA. The management and use of water by the USBR and DWR under the permitted water rights issued by the SWRCB have adversely affected Central Valley winter and spring-run Chinook salmon and their habitat and present project operations further endanger their survival. The flow regime of the Central Valley Rivers have been fundamentally altered by the construction of upstream dams and subsequent construction of Delta pumping

facilities to export water into the California Aquaduct and the Delta Mendota canal. Historically, the river's hydrology was characterized by highly variable flows during winter and rapid attenuation of flows in the summer. Under the present hydrologic regime, the magnitude of winter flows has been significantly reduced while the magnitude and consistency of summer flows for water export has dramatically increased. Populations of anadromous and pelagic fish have dropped dramatically in recent years, due to insufficient stream flows and export pumping during critical times of the year, impairment of migration due to dams, and unscreened agriculture and municipal diversions.

The Central Valley watersheds sustain a remnant population of steelhead trout *(Oncorhynchus mykiss)* and their habitat (Consultation with California Department of Fish and Game (Hereinafter "DFG") and U.S. National Marine Fisheries Services (hereinafter "NMFS"). In 1998, the Central Valley steelhead Evolutionarily Significant Unit Was listed as "threatened" by NMFS pursuant to the provisions of the federal Endangered Species (ESA). In addition, the Central Valley rivers and the Bay/Delta were listed as critical habitat for Central Valley steelhead trout in February 2000 and September 2005.

There are no mandatory minimum daily flows from upstream dams sufficient to protect the anadromous and pelagic fisheries of the Central Valley Rivers and the Bay/Delta below the Central Valley rim dams owned by the projects. The SWRCB has failed to order the USBR and DWR to maintain mandatory daily flows from the upstream dams to the confluence of the Sacramento and San Joaquin River to keep pelagic and anadromous fisheries in good condition. The Bureau and DWR control most releases of water stored in Central Valley watershed dams, with the exception of releases for flood control purposes, water in the minimum pool and prior riparian entitlements.

Restoration of California's anadromous fish populations is mandated by the Salmon, Steelhead, and Anadromous Fisheries Program Act of 1988 (SB 2261) which states that it is the policy of the State to significantly increase the natural production of salmon and steelhead by the end of the last century. The recent "unprecedented collapse" makes it clear that existing actions to restore the Central Valley fisheries have failed.

CWIN/CSPA believes that the operation, management, diversion, and use of water from the Central Valley rivers controlled by the projects rim dams is in direct violation of California Fish and Game Code Section 5937, due to USBR and DWR's failure to keep the anadromous and pelagic fisheries in good condition at all times. CWIN/CSPA therefore file this complaint in conformance with SWRCB complaint procedures and herein allege that the Bureau of Reclamation-Central Valley Project (CVP) and the California Department of Water Resources-State Water Project (SWP) are violating their water rights permits at their upstream dams and at the Jones and Banks pumping plants in the Bay/Delta by the following actions:

1) export pumping that violates the California Public Trust in that anadromous and pelagic fisheries and ecological conditions have been gravely damaged by project water exports;
2) export pumping that violates Article 10, Section 2, of the California Constitution in that the projects' present operations cause environmental impacts that result in an unreasonable method of diversion and cause waste and unreasonable use of water; and;
3) export pumping, combined with unreasonable diversion and storage operations at upstream dams, that is causing an unprecedented collapse of the anadromous and pelagic fisheries of the Central Valley;

4) export pumping that violates California Water Code sections 100, 275, 1831 and California Fish & Game Code section 5937.

Delta pumping by the state and federal projects has been identified as a cause (stressor) of the general decline of the health of the San Francisco Bay/Delta estuary by numerous scientific and legal investigations including: 1) the SWRCB D-1485 hearing record; 2) the 1995 Water Quality Control Plan EIR/EIS; 3) the CALFED programmatic EIS/EIR; and, 4) the SWRCB D-1641 hearing record, and 5) even the unlawful 2004 USBR Operating Criteria and Plan (OCAP).

II. LEGAL AUTHORITY FOR THE SWRCB TO ACT

The enumerated duties of the SWRCB include:

a. Consideration of the pubic trust when allocating water;

b. Re-examination of past allocations whenever circumstances change or the passage of time warrants the review;

c. Balancing public trust needs against other traditional water rights requirements under Article 10, Section 2; and

d. Entertain and adjudicate petitions raising violation of the public trust.

[Atwater and Markle, Overview of California Water Rights and Water Quality Law (1988) 19 Pac. L.J. 957, 988.

CSPA/CWIN allege that current Delta conditions caused by excessive export pumping of fresh water necessary for Delta species survival is a violation of the public trust doctrine, and the SWRCB has a duty to reduce permitted pumping levels for the projects.

A. THE SWRCB HAS A DUTY TO ADJUDICATE PETITIONS RAISING VIOLATIONS OF THE PUBLIC TRUST, WHICH ARE ALLEGED HEREIN BY CSPA/CWIN.

The SWRCB may consider public trust issues in complex, multi-party proceedings that concern water rights and water quality based on reserved jurisdiction or under the doctrine of reasonable use. The SWRCB may also modify permits of "the projects" that require the appropriator to reduce the quantity of exports. United States v. SWRCB (1986) 182 Cal.App. 3d 82, 124-131. The SWRCB has a complaint procedure that can exercise authority over both federal and state water projects by virtue of having state water rights permits issued by the Board.

B. THE SWRCB HAS AUTHORITY OVER WATER RIGHTS AND THE PUBLIC TRUST.

The State's management responsibilities include broad discretion to promote trust uses, such as the continued survival of the Bay/Delta estuary and dependent endangered species, provided the discretion is exercised consistent with constitutional and statutory constraints. *People v. California Fish Co*. (1913) 166 Cal. 576, 597. While the State has discretion to promote trust issues, the SWRCB has "an affirmative duty" to protect trust resources. *See* Illinois Central Railroad v. Illinois, 146 U.S. 387; and National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 (The state may not abdicate its supervisory role any more than the state may abdicate its police power)*; see also* Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis Law Review 195, 223.

Fish and wildlife are natural resources unequivocally protected by state sovereignty, whereby ownership of the resource is reserved to the states. Geer v. Connecticut, (1896) 161 U.S. 519. The court in Audubon v. Superior Court, (1983) 33 Cal.3d. 419 held that "no one may obtain a vested right to undertake an act that is harmful to the trust." *See also* SWRCB D-1644

(Yuba River) at page 29. The supremacy of the public trust over private individuals is reflected in a "judicial presumption against state or legislative alienation of trust resources." People v. California Fish*; see also* Illinois Central v. Illinois (1892) 146 U.S. 387*;* Montana v. U.S., (1981) 450 U.S.544. Historically, state sovereign ownership was limited to "the traditional triad of uses" – commerce, navigation, and fishing. However, in 1971 the California Supreme Court expanded the protected uses to cover the environment generally. Marks v. Whitney (1971) 6 Cal 3d. 251, 259-260. State sovereign ownership imposes restraints on the state's discretion regarding the use of navigable waters. The use of trust resources must be consistent with the general trust purposes or it is invalid. State of California v. Superior Court (Lyon) (1981) 29 Cal 3d. 210, 220-230; Marks v. Whitney, *supra;* City of Long Beach v. Mansell, (1970) 3 Cal 3d. 462, 482-485. Preservation of a public trust resource such as the San Francisco Bay/Delta estuary is a legitimate disposition of the public trust resource, and is consistent with general trust purposes. Thus, tidelands and water may be burdened with a negative easement against any active use or disposition of the trust reserve. *Id*; National Audubon, *supra;* State of California v. Superior Court (Fogerty), (1981) 29 Cal 3d. 240, 249-250.

C. RE-EXAMINATION OF PAST WATER ALLOCATIONS ARE WARRANTED IN LIGHT OF CHANGED CIRCUMSTANCES

Article X, Section 2 of the California Constitution provides that:

> The right to water or to the use of the flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or *unreasonable method of diversion of water.*

Because of this Constitutional requirement, the SWRCB must consider the reasonableness of a particular method of diversion of water when evaluating (or reevaluating) all permitted uses of

water. "The limitations of Art. X, Section 2 … apply to all water users of the state and serve as a limitation on every water right and method of diversion." See Yuba River D-1644 at p. 29. Here both the CVP and the SWP are water users subject to Art. X, Section 2 in the operation of their respective projects in the Central Valley.

1. THE BALANCE OF HARMS WEIGHTS IN FAVOR OF THE PUBLIC TRUST NEEDS DUE TO UNREASONABLE METHODS OF DIVERSION OF EXPORT WATER.

a) The Pelagic Fish Crash

The CVP/SWP Method of Diversion from the Bay/Delta at the export pumps to sustain present export levels is unreasonable, as it has overwhelmingly contributed to the Pelagic Fish Crash, and the listing of several species as endangered.

Evidence presented at hearing will prove that there have been changes in the freshwater input flows to the Delta in recent years, including a slight increase in average Sacramento River flow since 2001 and a substantial reduction in peak San Joaquin flows from 1999 until 2006, and that there is no evidence of a recent major change in residence time for Bay/Delta water flows, consistent with the findings by scientists of a lack of change in chlorophyll-a in the water column. Further, the increases in the pattern of wintertime fish "salvage" (kill) are consistent with hydrodynamic changes occurring each winter since 2001. These changes correspond closely in time with reductions in the abundance of several pelagic species. A recent analysis completed after the 2005 POD Synthesis Report indicates that these salvage levels are similar to those that occurred in the 1980's, even though the current fish population is much smaller); 4) historic water diversions by Contra Costa and Pittsburg power plants may have reached 3,200 cfs (both facilities combined at peak loads), but has been reduced with the retirement of generating units in 1995 and 2003. Current maximum diversion flows are 1,460 cfs combined. The fish

population impacts of these diversions have not been evaluated since the early 1980's but, given the location of the power plants and the potentially large cooling water flux through them, the impacts could still be substantial. The Board should investigate the role of these power plants.

State and federal agency scientists have formed logical hypotheses for the recent step decline in abundance of pelagic species in the context of their long-term trends and previous patterns. To date, two narrative models have been developed by the POD scientists: 1) the Winter Entrainment Hypothesis, which focuses on sources of mortality in the central and southern Delta; and 2) the Bad Suisun Bay Hypothesis, which focuses on food web effects in Suisun Bay and the west Delta. Since fixing Suisun Bay will take decades, the rest of their work in the POD scientists' 2007 Pelagic Fish Action Plan focuses on the winter entrainment hypothesis and additional actions that may be necessary to protect the estuary in the summer and fall. This Action Plan is the best scientific knowledge at the present time and the recommended actions provide a starting place for the Board in addressing the issues in this complaint.

Operation of the projects without harm to listed species is a requirement of both project permits and existing law and above summarized evidence indicates that project operations are presently harming the pelagic fishery of the Bay/Delta. Currently, 45 Pelagic Organism Decline [POD]-related studies and monitoring programs are under way. A report synthesizing all the information and data gathered in 2005 was prepared, presented at a public workshop in November 2005, and reviewed by an independent peer review panel in November and December 2005. Based on these peer review comments and recommendations and information gained in 2005, a work plan for 2006-07 was prepared. The next synthesis report available to the Board and stakeholders was due in December 2007 and was prepared in collaboration with the National Center for Ecological Analysis and Synthesis at U.C. Santa Barbara.

As far back as late 2005, the Interagency Ecological Program [IEP] POD Management Team, along with several invited outside experts, reviewed all available data and white papers and summarized this information into the 2005 POD Synthesis Report (IEP 2005b). This report was presented at a public workshop in November 2005 and was subjected to an independent peer review in November and December 2005 that was arranged through the CALFED Science Program. Of the recommendations provided by this peer review panel, four have been completed, 20 are underway, and 10 are under consideration for implementation. The summary of this report follows below. The full text of the report can be found at: *http://science.calwater.ca.gov/pdf/workshops/POD/CDFG_POD_2005_POD_Synthesis_Report_v5b.pdf*.

The initial conceptual model designed by agency scientists of the POD considered three general factors that may be acting individually or in concert to lower pelagic productivity: toxins, invasive species, and water project operations. The overall scientific approach since 2005 is based on a "triage" model to identify the most likely causes and then to assign priorities to studies according to where funds and resources could be best used. Early work fell into four general types: an expansion of existing monitoring (four expanded surveys); analyses of existing data (nine studies); new studies (six studies); and ongoing studies (four studies).

Preliminary results from these studies have found that the present low numbers of pelagic fish are not rebounding. This conclusion was based on the following facts and analysis:

1) Higher outflow conditions in 2005 did not increase the abundance of the POD fish species;
2) there was no evidence of a recent decrease in the amount of physical habitat for either Delta smelt or juvenile striped bass;

3) there was no evidence of a recent major decline in growth rates for Delta smelt, longfin smelt, or striped bass in the fish that remained;

4) in 1999 and 2004 Delta smelt in Cache Slough had higher growth than other locations; and

5) adult striped bass age-fecundity relationships in 2005 did not appear to differ substantially from relationships developed in the 1970s and 1980s

Experts have also concluded that the effect of exotic species on the Delta food web neither explain nor validate the POD. This conclusion was based on the following data:

1) Re-analysis of the zooplankton data revealed that there had been no recent step-change (i.e. a sharp decline) in the abundance of calanoid copepods (smelt and other fish food) system-wide; however, work continues to determine whether regional declines occurred, e.g. in Suisun Bay;
2) there has been no recent major decline in chlorophyll-a (an index of phytoplankton biomass);
3) a newly introduced species of zooplankton, Limnoithona, has become the most dominant zooplankton in the estuary and is apparently not a good food source for many fishes;
4) the toxic blue-green alga Microcystis was present throughout the Delta at substantially higher levels in 2005 than 2004;
5) although there has been a recent expansion in the range of the clam Corbula (an exotic species), recent distribution is comparable to the late 1987-1992 drought; and
6) changes in sediment composition and benthic assemblages (species that grow in Delta mud) occurred estuary-wide in 1999 and 2000.

Noted scientists have determined that "based on the results of the POD study, it is reasonable to assume that efforts to reduce fish mortality would benefit pelagic fishes." (2005 Pelagic Organism Study by the Interagency Ecological Program). Another key area of emphasis of the 2007 Pelagic Fish Action Plan included actions to assess and reduce mortality caused by water project operations. Examples included: use of water from the Environmental Water Account, Section 7 OCAP re-consultation for Delta smelt, a comprehensive review of SWP and CVP impacts, and efforts to assess and reduce power plant entrainment.

The preliminary POD study revealed that mortality has likely been affected by Delta water diversions. Specifically, water project diversions by the SWP, CVP, and power plants may have increased the direct loss of pelagic fishes. Key observations leading to this conclusion include the following (additional details are available in IEP [2005b]):

1) Winter exports from the CVP and SWP have increased since the late 1990's;
2) Winter Old River and Middle River [ORMR] flows have been consistently negative (e.g., net flow is upstream) since 2000;
3) in recent years, there appears to have been a step increase in "salvage density" (number of fish killed per acre-foot of water diverted) of adult Delta smelt, threadfin shad, and longfin smelt at the SWP and CVP pumps, even as these fish have declined in species numbers. Although the increased "salvage" levels are not unprecedented, increased entrainment is consistent with recent-year changes in winter water export operations;
4) there is a strong relationship between winter "salvage" of adult Delta smelt and the occurrence of negative flows in Old and Middle Rivers;

5) recent modeling analyses suggest that losses of larval Delta smelt at the SWP and CVP pumps can be very high (up to 40 percent) in early spring under certain conditions that can occur in some dry years;
6) preliminary results from Bodega Marine Laboratory suggest that losses of early (winter) spawning Delta smelt and their progeny may be especially important to the population. Their evidence indicates that the quality of eggs and young from these winter spawning events may be superior to those produced in spring; and
7) diversions by Contra Costa and Pittsburg power plants may reach 1,460 cfs (maximum for both facilities combined at peak loads), potentially resulting in entrainment and impingement of Delta smelt and other pelagic species.

The problem is so wide-spread and so serious according to the 2007 Delta Smelt Action Plan, that in light of the existing situation for Delta smelt in the Bay/Delta, "to reduce the risk of extinction a high priority should be placed upon developing and maintaining refuge populations of Delta smelt for conservation purposes, since the natural population may go extinct before action can be taken by state and federal regulators." Because of its view of the urgency for smelt survival, federal species agency USFWS supports the establishment of captive populations of Delta smelt, held specifically for conservation purposes, and is attempting to develop the knowledge and expertise needed to culture and maintain Delta smelt for conservation purposes. The Pelagic Fish Crash and the clear understanding that we are diverting too much water supply out of the Delta to sustain the estuary means that the Board needs to act and grant the remedies requested in this complaint immediately.

Additional factors have also contributed to the fish crash, including the unnatural levels of selenium entering the Bay/Delta from lands served by federal water on the Westside of the San Joaquin river. Therefore, CWIN/ CSPA join the more limited, but crucial, complaint filed January 10, 2008 by Felix Smith against the San Luis Unit of the Bureau of Reclamation under its permits 12721, 11967, 12723, 12727, 12860 11315 and 13 others. CWIN/CSPA so joins without repeating the allegations outlined in the complaint. The use of water on salt and selenium impaired lands in the San Luis Unit is causing grave damage to agricultural lands and other beneficial uses in the San Joaquin Valley and the Bay/Delta. The application of this water to drainage impaired soils has far-reaching and long lasting impacts. Not only is such an application a waste and unreasonable use of water, but it also violates the public trust requirement of state protection of trust resources, uses and values (including water quality) and is a continuing public nuisance.

b) The Central Valley Salmon Collapse

The state's largest salmon run (the Central Valley fall Chinook salmon) is suffering an "unprecedented collapse," part of a broader decline throughout the West that has scientists vexed and likely will trigger immediate severe fishing restrictions, according to federal fishery regulators. The number of chinook, or king, salmon returning from the Pacific Ocean to spawn in the Sacramento River and its tributaries this past fall dropped 67 percent from a poor year earlier, according to an internal memo to members of the Pacific Fishery Management Council (Exhibit B) published in many newspapers in California around the first of February, 2008.

According to the Management Council memorandum, the Central Valley salmon population has fallen by more than 88 percent from its high five years ago, when salmon restoration efforts in the Sacramento watershed were being touted as a wildlife management

success story. However, recent years have seen salmon populations steadily dwindle in the Sacramento and emergency action to save the species is necessary. In his e-mail to members of the fishery management council, Executive Director Donald McIsaac offered "an early alert to what at this point appears to be an unprecedented collapse in the abundance of adult California Central Valley ... fall Chinook salmon stocks." The magnitude of the low abundance ... is such that the opening of all marine and freshwater fisheries impacting this important salmon stock "will be questioned."

About 90,000 returning adult salmon were counted in the Central Valley in 2007, the second lowest number on record, the memo said. The population was at 277,000 in 2006 and 804,000 five years ago. It's only the second time in 35 years that the Central Valley has not met the agency's conservation goal of 122,000 to 180,000 returning fish. More worrisome is that only about 2,000 2-year-old juvenile chinooks returned to the Central Valley last year, by far the lowest number ever counted. On average, about 40,000 juveniles, or "jacks," return each year. The low number of juvenile salmon means this year's runs are likely to be even smaller.

Salmon that spawn in Central Valley rivers form the backbone of the West Coast's commercial and recreational salmon fishery and are caught by fishers from Southern California to British Columbia. More than 90 percent of the wild salmon harvested in California originate in the Sacramento River system. "Sacramento fish are really what the fishery depends on," said Chuck Tracy, the council's salmon management officer. "When Central Valley fish are low, it gets really hard to catch fish even if you're given the opportunity." The council plans to meet in Sacramento in March to discuss possible restrictions, including a complete closure of the salmon season that begins in May. Final decisions will be made at its meeting in Seattle in April. "Even if they have a salmon fishing season, there won't be very much salmon to catch without a strong

Central Valley component," said Alan Grover, a biologist with the state Department of Fish and Game.

Dick Pool, a member of CSPA who owns Concord-based fishing gear manufacturer Pro-Troll, said the salmon collapse will be felt in fishing communities all along the coast, noting that a recent study found that recreational anglers spend more than $2 billion annually in California. The economic contribution of sportfishing to California is very large. There are 2.4 million sport fishermen in the state. The activity generates $2.4 billion in retail sales with an economic impact of $4.9 billion. It also generates $1.3 billion in wages and salaries and supports 43,000 jobs in the state. All of these are threatened if the fishery declines are not reversed. "The impact is going to be huge," said Pool, a former board member of the American Sportfishing Association. "It will take its toll on manufacturing, retailers, wholesalers, fishermen and the charter fleet."

The salmon fishing industry is still reeling from severe limits on West Coast salmon fishing in 2006 to protect dwindling populations on the Klamath River in Northern California and Oregon. After three years of poor returns, the number of returning Klamath chinook in 2007 exceeded minimums set by federal fishery managers. Preliminary counts showed about 50,000 spawners, though low numbers of juvenile fish indicate there may be poor returns of adult salmon this year. The precipitous decline of Central Valley chinook marks a dramatic reversal for what's traditionally been one of the West Coast's most abundant salmon runs. After hitting a record low of 83,000 returning adult salmon in 1992, Sacramento River salmon returns rose steadily during the next decade as the state and federal government spent about $1 billion to restore salmon runs throughout the river system. The salmon decline parallels the decline of every other species in the Delta impacted by the increased pumping. From 2001 to 2006 delta exports increased from 5 million acre feet to peak at over 6.3 million acre feet.

The fish and the fishermen have been given a temporary pumping reprieve by the federal courts. Pumping in the San Francisco Bay Delta will be reduced in 2008 as a result of the federal court decision that the Endangered Species Act has been violated for delta smelt. The state and federal fishery agencies must now respond to the court action with new biological opinions that include the flows necessary to sustain listed species while providing better management of the Delta and its tributaries.

By virtue of their ownership of the major dams on most of the river systems in the Central Valley, the USBR and DWR also have a duty and responsibility to comply with California Fish and Game Code Section 5937 and the California public trust to provide adequate daily flows and other protective measures to sustain and keep in good condition all fish, including fall-run Chinook salmon, winter-run Chinook salmon, spring-run Chinook salmon, Steelhead trout and pelagic species and their habitat in the Bay/Delta that are found below the dams.

2. THE DELTA EXPORT PROJECTS ARE HAVING DELETERIOUS EFFECT ON THE WATER QUALITY AND OTHER BENEFICIAL USES IN THE BAY/DELTA ESTUARY

California implements the Clean Water Act through the Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Water Code §§ 13000-13953.4. *See City of Arcadia*, *supra*, 135 Cal. App. 4th 1392 at 1405. Specifically, "water quality standards are established through regional water quality control plans, known as basin plans, which are approved by the State Board." *Communities for a Better Env't, supra,* 132 Cal. App. 4th at 1321. Consistent with the Clean Water Act, the Porter-Cologne Act directs the nine regional water quality control boards to ensure that their basin plans (1) designate one or more "beneficial uses" for a particular water body and (2) specify "water quality objectives" necessary to "ensure the reasonable

protection of beneficial uses and the prevention of nuisance." Water Code § 13421. If the adoption or amendment of a basin plan is approved by EPA, the designated beneficial uses and water quality objectives set forth in the basin plan become the water quality standards for the applicable water body for purposes of the federal Clean Water Act. *See PUD No. 1 of Jefferson Co.*, *supra*, 511 U.S. at 707 (citing 33 U.S.C. § 131)

After water quality standards are established, "[t]he actual administration of the Porter-Cologne Act rests on the power of the regional boards to prescribe waste discharge requirements for all persons discharging waste into inland surface waters enclosed bays and estuaries within their jurisdiction." *Waterkeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal. App. 4th 1448, 1452 (citing Water Code § 13263). Waste discharge requirements are the equivalent of National Pollution Discharge Elimination System ("NPDES") permits under the federal Clean Water Act, *see* Water Code § 13374, and they must "require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicality." *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163 (Exh. 2 hereto). Waste discharge requirements are thus the "primary means for enforcing effluent limitations and [water quality] standards under the Clean Water Act." *City of Burbank*, *supra*, 35 Cal. 4th at 621.

The state and federal export projects, which typically export about 10,000 to as much as 13,000 cfs of Delta water per annum, change the fate and transport of contaminates and significantly alter the impacts on Delta waters of a variety of pollutants, such as mercury, organochlorine pesticides, PCBs, organophosphorus and other pesticides, herbicides, aquatic plant nutrients, aquatic life toxicity, etc. Water quantity and water quality are flip sides of the same coin and changes in the location and volume of water directly affects the concentration of

existing pollutants. As one example of this, the export of South Delta water by the two projects, which causes at least 8,000 cfs of Sacramento River water to be drawn through the Central Delta to the South Delta export pumps, carries mercury and selenium into regions of the Delta where it would not otherwise exist at the concentrations found, if the export projects did not occur. The same applies with respect to altering the location and impacts of a number of other constituents that are on the CVRWQCB 303(d) list of constituents causing impaired water quality in the Delta. Another example is the pervasive oxygen depletion existing in Old River and the Stockton Deep-water Ship Channel, where the residence time and spatial extent of oxygen demanding constituents in those areas is, in large measure, determined by the timing and volume of exports.

Waters from north of Redding to south of Fresno gather in the Delta estuary. Human population increases, coupled with a failure to provide sufficient resources to the regional board and to aggressively enforce the explicit regulatory requirements of the federal Clean Water Act and Porter-Cologne Water Quality Control Act, have led to massive increases in pollutant loading that has overwhelmed the ability of the Delta to assimilate these wastes. These pollutants are discharged by municipalities, business, industry and irrigated agriculture. They include an astonishing array of pesticides, metals, fertilizers, pathogens, industrial chemicals and pharmaceuticals know to be harmful to aquatic life. For example, the Central Valley Regional Water Quality Control Board's review of data collected from some 313 sites in the Central Valley, pursuant to the irrigated lands program, reveals that a majority of sites violated crucial water quality criteria for toxicity, pesticide, metal, pathogen and general parameters. Data collected over the last two years at some 15 Department of Fish and Game sites in the Delta found significant mortality to test species and significant growth/biomass effects at a majority of the sites. Sediment sampling throughout the Central Valley has identified pervasive sediment

toxicity from pyrethoid pesticides. A review of discharge and ambient monitoring data collected by industrial and municipal discharges, under the NPDES program, reveal numerous violations of fundamental water quality standards. Examination of temperatures regimes below major rim dams surrounding the Central Valley demonstrates that protective temperature criteria are routinely exceeded. Unfortunately, present water quality standards and monitoring programs encompass only a small subset of the universe of chemicals discharged into these waters and essentially ignore the additive and synergistic interactions of these chemicals, as well as their sublethal, chronic and bioconcentration effects. Notwithstanding uncertainties, it is clear, as noted above, that the volume and timing of exports affects the distribution and concentration of contaminates in tributary waterways and the Delta. Reverse flows that draw water through numerous Delta channels and sensitive nursery areas to the export facilities bring with them an array of pollutants harmful to aquatic life.

None of the historical environmental documents prepared by DWR, USBR or the SWRCB have addressed the potential effects of project operations on water quality and pollutants identified as harmful to aquatic life. Because of the limited scope that the DWR, USBR and SWRCB have assumed for potential impacts of the state and federal export projects, there has been no proper evaluation of the full range of water quality impacts of the export of Delta water by the state and federal projects.

"The quality of our nation's waters is governed by a complex statutory and regulatory scheme that implicates both federal and state administrative responsibilities." *City of Burbank v.State Water Resources Control Bd.* (2005) 35 Cal. 4th 613, 618. Under Section 303 of the federal Clean Water Act, 33 U.S.C. § 1313 (Exh. 5 hereto), "each state, subject to federal approval, [must] institute comprehensive water quality standards establishing water quality goals

for all intrastate waters." *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 704 (Exh. 1 hereto). "A water quality standard for any given waterway or water body has two components: (1) the designated beneficial uses of the water body and (2) the water quality criteria sufficient to protect those uses." *Communities for a Better Env't v. State Water Resources Control Bd.* (2005) 132 Cal. App. 4th 1313. *See also* 40 C.F.R. § 131.2 ("A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.")

It is time for the SWRCB to exercise its authority to determine whether or not the State and Federal export projects meet the requirements under State and Federal law. Existing conditions do not allow delay.

RELIEF REQUESTED BY CWIN/CSPA

CWIN/CSPA respectfully request that the SWRCB conduct an investigation of this complaint and take action as shown below:

1) The SWRCB should re-visit and modify the water right permits of the export projects operated by the USBR and DWR and the Board should order terms and conditions that keep in good condition and protect all life stages of the anadromous and pelagic fisheries and their habitats in the Central Valley Rivers and the Bay/Delta;

2) The SWRCB should order mandatory daily flow requirements from upstream rim Dams owned and operated by the two projects which keeps in good condition at all times all life stages of the anadromous and pelagic fisheries and their habitat below project reservoirs all the way through the Bay/Delta;

3) The SWRCB should order necessary pulse flows from upstream project dams sufficient to attract and enable adult anadromous fish to escape into theBay/Delta as well as enabling juvenile anadromous fish to escape the upstream Central Valley rivers and Bay/Delta to the Pacific Ocean;

4) The SWRCB should order daily in-stream flow that sustains all life stages of the anadromous and pelagic fisheries in the Bay/Delta and its watershed below the projects' rim dams;

5) The SWRCB should order that functional fish passage facilities be provided on all project rim dams to enable anadromous up-migrants to reach their natal spawning grounds and later out-migrants to reach the sea.

6) The SWRCB should order the USBR and DWR to implement the CALFed Record of Decision's requirement for state-of-the-art screening for all project diversions in the Bay/Delta to prevent the entrainment of all life stages of anadromous and pelagic fish.

7) The SWRCB should require that the USBR and DWR to fully comply with the provisions of the federal Water Pollution Control Act, the Porter-Cologne Water Quality Control Act and the Central Valley Basin Plan.

8) The SWRCB should direct the USBR and DWR to establish a comprehensive water quality monitoring program in the Delta to provide information on the fate and transport of the various pesticides, metals, nutrients, pathogens, industrial chemicals and pharmaceuticals that have been identified as present in the Delta and harmful to aquatic life. The SWRCB should also direct USBR and DWR to provide an evaluation of project operations on water quality.

9) The SWRCB should order mandatory minimum pool requirements in all project reservoirs in the Central Valley and mandatory water temperature requirements for releases of water from the upstream rim dams sufficient to

protect all fish and macroinvertebrate species;

10) In conducting the requested investigative report related to this complaint, the SWRCB should obtain recommendations from the USFWS, DFG, and NMFS regarding the protective measures necessary to protect anadromous and pelagic fisheries in the Bay/Delta and the Central Valley watershed.

CONCLUSION

CWIN/CSPA requests the SWRCB to have the USBR and DWR answer this complaint in a timely manner. As further information becomes available, we request the opportunity to amend this complaint. Following the SWRCB's investigation of this complaint, we requests that an evidentiary hearing be scheduled as time is of the essence.

All letters and actions from the SWRCB, USBR and DWR regarding this complaint should be forwarded by first class mail to Michael Jackson, Carolee Kreiger, Bill Jennings, and Jim Crenshaw at their addresses on the first page of this complaint. Copies of this CWIN/CSPA public trust, waste and unreasonable use and method of diversion complaint have been served on the USBR and DWR by first class mail.

Dated: March 18, 2008

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Michael B. Jackson
Attorney for C-WIN/CSPA