

Coalition for a Sustainable Delta

July 1, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Re: Notice of Intent to Sue for Violations of the Clean Water Act and Endangered Species Act

To Whom It May Concern:

On behalf of the Coalition for a Sustainable Delta, Belridge Water Storage District, Berrenda Mesa Water District, Cawelo Water District, North of the River Municipal Water District, Wheeler Ridge-Maricopa Water Storage District, and Mr. Dee Dillon (collectively, the "Coalition"), I write to provide you notice pursuant to section 505(b) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(b) and section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), of the Coalition's intent to file a citizen suit against the City of Stockton ("City") and County of San Joaquin ("County") (collectively, the "Permittees") for ongoing violations of the CWA, 33 U.S.C. § 1251 *et seq.* and the ESA, 16 U.S.C. § 1531 *et seq.* Specifically, the above entities and individual will seek civil penalties and injunctive relief under the CWA for ongoing discharges of pollutants by the Permittees in violation of the CWA, and injunctive relief under the ESA for take of listed fish species in violation of the ESA. These violations are related to discharges from the Permittees' municipal separate storm sewer system into the Sacramento-San Joaquin Delta ("Delta") and waters tributary to the Delta.

The Coalition includes agricultural water users, water districts, and an interested citizen, all residing in the San Joaquin Valley. The Coalition is concerned about harm to the overall health of the Delta and its ecosystem – including the quality of water in the

Delta waterways – caused by Permittees’ illegal discharges. The Coalition is prepared to initiate litigation if these violations are not adequately addressed.

I. Factual Background.

The Delta is a unique and invaluable natural resource that provides myriad ecosystem services to the State of California, including providing water for 25 million Californians and irrigation of more than 3 millions acres of farmland. But, for more than a century the Delta has undergone significant changes caused by human activity ranging from introduction of invasive species to urbanization that collectively pose a threat to the Delta ecosystem. Degradation of water quality due to multiple factors, including urbanization combined with inadequate regulation and enforcement of various environmental regulations has contributed to the present circumstances, in which degradation of water quality is having numerous deleterious effects on human health and the environment. Though the macro-level effects of water quality contaminants on the Delta and its native species are not well understood, it is clear that contaminants do harm the ecosystem of the Delta and its native species. *E.g.*, Interagency Ecological Program, *Pelagic Organism Decline Progress Report 2007 Synthesis of Results* 13-15 (Jan. 15, 2008); State of California, *Pelagic Fish Action Plan* 63-65 (March 2007); State of California, *Delta Smelt Action Plan* 16-18 (Oct. 2005). Elevated levels of numerous contaminants – including metals and pesticides – have been reported in the Delta. *E.g.*, Jewel Bennett et al., *Tissue residues and hazards of water-borne pesticides for Federally-listed and candidate fishes of the Sacramento-San Joaquin River Delta, California: 1993-1995* (2001); Kathryn M. Kuivila & G. Edward Moon, *Potential exposure of larval and juvenile Delta smelt to dissolved pesticides in the Sacramento-San Joaquin River Delta, California*, 39 American Fisheries Society Symposium 229 (2004).

Pollutants can affect both native fishes and other aquatic organisms that are critical elements of the Delta ecological food web. The effects may be lethal. But likely more often, the effects are sublethal. These effects can range from decreased ability to detect prey and avoid predation to impaired reproductive function. For example, copper has been found to interfere with the sensory physiology of juvenile coho salmon. David H. Baldwin et. al, *Sublethal Effects of Copper on Coho Salmon: Impacts on Nonoverlapping Receptor Pathways in the Peripheral Olfactory Nervous System*, 22 Environmental Toxicology & Chemistry 2266 (2003). Nevertheless, chronic exposure and synergistic effects of multiple contaminants along with other stressors are likely to cause significant ecosystem deterioration in the Delta.

Contaminant concentrations are usually highest following rain events that deposit substantial stormwater runoff in the Delta. V. Connor et. al, *Sacramento River Basin Biototoxicity Survey Results 1988-1990* (1993). For this reason, effective regulation of municipal storm sewer system discharges is important to the overall health of the Delta, including its native fish species and other aquatic organisms.

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The introduction of contaminants into the Delta not only harms and results in take of aquatic organisms, including listed fish species, but it also is one of the many factors that contribute to significant population-level declines in a number of listed fish species. The affected species are as follows.

A. Sacramento River winter-run chinook salmon

The Sacramento River winter-run chinook salmon is an anadromous fish that migrates through the Delta to the upper Sacramento River from December to May. Anadromous fish spend most of their life in the ocean, but must enter fresh water rivers and streams to spawn. NMFS listed the Sacramento River winter-run chinook salmon as an endangered species on January 4, 1994. 59 Fed. Reg. 440 (Jan. 4, 1994). NMFS designated critical habitat for the Sacramento River winter-run chinook salmon on June 16, 1993. 58 Fed. Reg. 33,212 (June 16, 1993).

B. Central Valley spring-run chinook salmon

The Central Valley spring-run chinook salmon is an anadromous fish that migrates through the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley spring-run chinook salmon as a threatened species on September 16, 1999. 64 Fed. Reg. 50,394 (Sept. 16, 1999). NMFS designated critical habitat for the Central Valley spring-run chinook salmon on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

C. Central Valley steelhead

The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and San Joaquin rivers and their tributaries. Steelhead and rainbow trout are the same species; the distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow trout permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened species on March 19, 1998. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS designated critical habitat for the Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005). The City of Stockton and surrounding areas fall within the area designated as Critical Habitat. *Id.* at 52,621.

D. The Delta Smelt

The delta smelt is small, translucent pelagic fish, with a narrow geographic range that is limited to low-salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule listing the delta smelt as threatened). The delta smelt is “the only true native estuarine species found in the Delta.” *Id.* The delta smelt is one of a number of pelagic organisms that are in decline in the Delta. “Pelagic organisms live in the ocean or estuaries like the Delta.” Resources Agency et al., *Pelagic Fish Action Plan* at 4 (March 2007). The sources of the pelagic organism decline in the Delta are manifold

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and poorly understood. *Id.* at 10 (identifying numerous contributors to the decline of the Delta's health, and indicating that more research is essential to evaluate those contributors). FWS listed the delta smelt as a threatened species on March 5, 1993. 58 Fed. Reg. at 12,854. FWS designated critical habitat for the delta smelt on December 19, 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994). A significant proportion of the City of Stockton and surrounding areas fall within the area designated as Critical Habitat. *See* United States Department of the Interior Fish and Wildlife Service Sacramento, California, Delta Smelt (*Hypomesus transpacificus*) Final Critical Habitat Map (June 16, 2003), available at http://www.fws.gov/sacramento/es/maps/delta_smelt_ch.pdf.

These fish species reside in Delta waters at or near-downstream of locations of pollutant discharge by the City of Stockton and the County of San Joaquin; those locations have been and are being subjected to diminished habitat quality, compromising areas used by those federally protected species for reproduction, foraging, shelter, and dispersal. The fish and the biotic resources upon which they depend are being subjected by conditions that cause either direct mortality, or alterations in behavior or physiological condition that diminish their vigor or capacity to reproduce.

II. Legal Violations of the Clean Water Act.

The CWA prohibits the discharge of any pollutant from a point source into the waters of the United States, except pursuant to and in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a); 1342(a). The CWA defines "navigable water" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The CWA defines "pollutant" broadly to include:

[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

Section 402 of the CWA requires the Environmental Protection Agency ("EPA"), or the state agency administering the CWA, to issue permits for municipal stormwater discharges. 33 U.S.C. § 1342. EPA has defined "stormwater" as "stormwater runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Section 402(p)(3)(B) of the CWA provides that permits for discharges from municipal separate storm sewer systems: (1) be issued on a system- or jurisdiction-wide basis; (2) include requirements to effectively prohibit non-stormwater discharges into the storm sewers; and (3) require controls to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B).

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On October 18, 2002, the Central Valley Regional Water Quality Control Board (“Regional Board”) issued NPDES No. CAS083470 (Order No. R5-2002-0181) to the City of Stockton and County of San Joaquin Service Area No. 54 for stormwater discharges from the jurisdictions of the City and County (“MS4 Permit”). Prior to the issuance of the MS4 Permit, the City’s and County’s stormwater discharges were covered under the NPDES area-wide MS4 permit, Order No. 95-035 (NPDES No. CA0082597), adopted on February 24, 1995.¹ The portion of the County covered by the MS4 Permit contains urbanized areas and areas of potential growth, which are enclosed within the boundaries of the City or surround the City. Due to the proximity of the County’s urbanized areas to the City, their physical interconnections to the City’s storm sewer system, and the locations of their discharges relative to the City’s system, the County is designated as part of the medium MS4 in accordance with 40 C.F.R. § 122.26(b)(7)(iii). MS4 Permit, ¶ 4, p. 1. The Permittees have jurisdiction over and/or maintenance responsibilities for storm drains in the City and the urbanized area surrounding the City, which is referred to as the “Stockton Urbanized Area” in the MS4 Permit. According to the MS4 Permit, the stormwater discharges from the City and County covered by R5-2002-0181:

[C]onsists of surface runoff generated from various land uses that discharge into storm drains, which in turn discharge to natural drainage watersheds. The major natural drainage watersheds in the Stockton Urbanized Area are Bear Creek, Mosher Slough, Five Mile Slough, Fourteen Mile Slough, the Calaveras River, Smith Canal, the Deep Water Channel, Mormon Slough, Walker Slough, Duck Creek, and Little Johns Creek. Smith Canal and Five Mile Slough receive stormwater runoff only from the Stockton Urbanized Area. In addition to stormwater runoff from the Stockton Urbanized Area, Calaveras River, Mosher Slough, and Walker Slough also at times receive stormwater runoff from agricultural areas and agricultural return (tail water) upstream of the Stockton Urbanized Area. All of these water bodies discharge to the Sacramento-San Joaquin River Delta and are tidal freshwater within the Stockton Urbanized Area with a one- to three-foot tide.

MS4 Permit, ¶ 5, p. 2.

The MS4 Permit issued to the City and County contains the following conditions:

¹ On December 6, 2007 the Regional Board issued a revised MS4 permit to the City and County, NPDES No. CAS083470 (Order No. R5-2007-0173) (“New MS4 Permit”). The Permittees are not yet required to submit annual monitoring reports under the New MS4 Permit, and thus the violations of the CWA that form the basis for this claim primarily relate to the MS4 Permit issued to the Permittees in 2002; however, there is substantial evidence that these violations of the CWA by the Permittees are continuing.

- The City and County must submit, and substantially comply with, a Stormwater Management Plan (“SWMP”) to reduce the discharge of pollutants in stormwater to the maximum extent practicable (“MEP”), and to effectively prohibit non-stormwater discharges into the municipal storm drain system. MS4 Permit, ¶ 42, p. 9.
- The City and County must implement and evaluate the SWMP to the MEP to “improve water quality and protect beneficial uses.” MS4 Permit, ¶ 43, p. 9.
- The City and County must implement a Smith Canal Water Quality Improvement Program, including additional receiving water monitoring, BMP evaluation and recommendations for approach to improving water quality in Smith Canal, which is tributary to the Delta. MS4 Permit, ¶ 48, p. 11.
- Discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance as defined in Section 13050 of the California Water Code are prohibited. MS4 Permit, § A.1., p. 16.
- Discharges from MS4s, which cause or contribute to exceedances of receiving water quality standards for surface waters or groundwater are prohibited. MS4 Permit, § A.2., p. 16.
- Discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited. MS4 Permit, § A.3., p. 16.
- Discharges from the MS4 must not cause degradation of aquatic communities and populations in receiving waters, including vertebrate, invertebrate and plant species. MS4 Permit, § C.1.l., p. 19.
- Discharges from the MS4 must not cause toxic pollutants to be present in the water column, sediments or biota in concentrations that adversely affect beneficial uses, that produce detrimental response in human, plant, animal or aquatic life or that bioaccumulate in aquatic resources at levels which are harmful to human health. MS4 Permit, § C.1.m., p. 19.
- Discharges from the MS4 that result in pathogen concentrations to be present in receiving waters that exceed criteria or threaten public health are prohibited. MS4 Permit, § C.1.n., p. 19.
- Discharges from the MS4 that result in a violation of any water quality standard for receiving waters are prohibited. MS4 Permit, § C.1.o., p. 19.

- Discharges from the MS4 must not cause or contribute to a violation of any applicable water quality standard for receiving waters contained in the Basin Plan. MS4 Permit, § C.2., p. 19.
- If exceedances of receiving water standards persist, specific procedures are to be followed, including, notification to the RWQCB through a Report of Water Quality Exceedance (“RWQE”), development of a plan to deal with the exceedance(s), including additional BMPs and monitoring, revision of the SWMP to include the actions necessary to deal with the exceedance(s) and implementation of those actions. MS4 Permit, § D.1., pp. 19-20.
- The City and County must develop and implement a Pesticide, Pathogens and Dissolved Oxygen Plans. MS4 Permit, §§ D.18.a., D.18.b., D.18.c. and D.18.d., pp. 45-49.
- The City and County must comply with a detailed Monitoring and Reporting Program, including receiving water monitoring, water column toxicity monitoring, bioassessment monitoring, detention basin monitoring, and participation in a region-wide a BMP effectiveness study. MS4 Permit, Monitoring and Reporting Program.

The Permittees have continuously failed to comply with the terms of the MS4 Permit by: (1) failing to adequately and effectively implement the SWMP; (2) failing to adequately and effectively implement the plans and management measures set forth in the MS4 Permit; and (3) discharging stormwater into the Delta and its tributaries, which contains pollutants, resulting in exceedances of applicable water quality standards and failing to adequately respond to those exceedances.

The Permittees have failed to adequately and effectively implement the plans and best management practices (“BMPs”) set forth in the MS4 Permit and SWMP, including the plans specifically required by the MS4 Permit to control discharges of pesticides, pathogens, and dissolved oxygen in receiving waters. The Permittees have also failed to fully and properly implement the numerous BMPs and other management measures required by the MS4 Permit, so as to reduce pollutants in stormwater discharges from the Stockton Urbanized Area to the MEP.

In addition, the Permittees have failed to comply with the terms of the MS4 Permit by failing to respond to and address numerous violations of receiving water standards associated with stormwater discharges from the Stockton Urbanized Area. Attachment A is a summary of exceedances, both urban discharge and receiving water exceedances, associated with stormwater discharges from the Permittees. These exceedances include, but are not limited to the following examples:

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- Over 15 exceedances of the applicable receiving water standard for aluminum from 2004-2006, including one exceedance at 600 times above the applicable receiving water standard.
- Over 15 exceedances of the applicable receiving water standard for copper from 2004-2006.
- Over 15 exceedances of the applicable receiving water standard for mercury from 2004-2006 averaging 20 times above the applicable receiving water standard.
- Over 20 exceedances of the applicable receiving water standard for bis (2-ethylhexyl) phthalate from 2004-2006.
- At least 8 exceedances of the applicable receiving water standard for DDT/DDE from 2004-2005, including one exceedance at 150 times above the applicable receiving water standard.
- Over 15 exceedances of the applicable receiving water standard for iron from 2004-2005 averaging 8 times above the applicable receiving water standard.
- At least 7 exceedances of the applicable receiving water standard for aldrin for 2004 averaging 50 times above the applicable receiving water standard.
- At least 8 exceedances of the applicable receiving water standard for heptachlor in 2004 averaging 50 times above the applicable receiving water standard.
- At least 3 exceedances of the applicable receiving water standard for diazinon in 2004-2005.
- During the August 28, 2006 monitoring period, exceedances of receiving water standards were found for at least 7 different pollutants, including turbidity, copper, and bacteria.

The Permittees have failed to comply with section D.1 of the MS4 Permit with respect to repeated exceedances of water quality standards by failing to undertake the required procedures to address exceedances of receiving water standards. Section D.1 of the MS4 Permit requires that certain procedures be followed when exceedances of receiving water standards are found to have occurred, including implementation of additional BMPs and other measures to address the exceedance(s), and revision of the SWMP to incorporate such additional management measures. Exceedances of water quality standards cause degradation of aquatic communities and populations in receiving

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waters in the Delta, and adversely impact beneficial uses of those receiving waters in violation of the MS4 Permit.

The Permittees have violated and continue to violate the CWA by failing to comply with the terms and conditions of the MS4 Permit, including applicable receiving water standards and response requirements, monitoring and reporting requirements, and operation and maintenance requirements, and these violations will continue into the future unless enjoined by a court.

III. Legal Violations of the Endangered Species Act

The ESA prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B) (stating, in part, that “with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ... take any such species within the United States or the territorial sea of the United States”). The ESA expressly provides that the United States Fish & Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) can extend this take prohibition to threatened species, such as the delta smelt. 16 U.S.C. § 1533(d) (“The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife...”). And FWS and NMFS have by regulation extended the take prohibition to the threatened delta smelt, Central Valley spring-run chinook salmon, and Central Valley steelhead. 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

“Any taking and every taking – even of a single individual of the species – is prohibited by the Act.” *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995) (citing 16 U.S.C. § 1538, emphasis omitted); *see also Seattle Audubon Society v. Sutherland*, 2007 U.S. Dist. LEXIS 55940 (W.D. Wash. Aug. 1, 2007) (granting, in part, a preliminary injunction and stating that “[t]he loss of a single listed species is an irreparable harm.”). Under the ESA, “take” is defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.” 16 U.S.C. § 1532(19). FWS and the NMFS have defined the term “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

The Permittees are responsible for discharges of pollutants in violation of legal limits and these discharges are resulting in the take of listed fish species, including the Sacramento River winter-run chinook salmon, the Central Valley spring-run chinook salmon, the Central Valley steelhead, and the delta smelt.

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IV. Conclusion.

The Permittees have violated and continue to violate the CWA by failing to comply with the terms and conditions of the MS4 Permit. In addition, the Permittees have violated and continued to violate the ESA by discharging pollutants at levels that result in the take of listed species. These violations will continue unless enjoined by a court. These illegal actions by the Permittees have contributed to the decline of the overall health of the Delta ecosystem and its native species.

Very truly yours,



Steven D. Jackson
Founding Member, Coalition for a Sustainable Delta, on behalf of

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