

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER: WR 99 - 002

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In The Matter Of Extension Of Order WR 95-6 Or Equivalent Temporary Compliance With The  
1995 Water Quality Control Plan For  
The San Francisco Bay/Sacramento-San Joaquin Delta Estuary  
CALIFORNIA DEPARTMENT OF WATER RESOURCES  
and  
UNITED STATES BUREAU OF RECLAMATION  
Permittees and Licensees

ORDER MODIFYING AND DENYING RECONSIDERATION  
OF ORDER WR 98-09  
REGARDING DIVERSION OF WATERS FROM  
THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN  
DELTA ESTUARY

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BY THE BOARD:

1.0 INTRODUCTION

On December 3, 1998, the State Water Resources Control Board (SWRCB) adopted Order WR 98-09. Order WR 98-09 extended by one year the effective period of temporary changes adopted pursuant to Order WR 95-6 in the water rights of the California Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR). In Order WR 95-6 the SWRCB temporarily approved changes in the requirements to be met by the DWR and the USBR for striped bass spawning salinities, Suisun Marsh salinities, export rates in the southern Delta, and operation of the Delta Cross Channel. It also authorized a change in the USBR's requirement to meet the salinity objective at Vemalis on the San Joaquin River and authorized a limited joint use of each other's points of diversion of water in the southern Delta by

the DWR and the USBR, subject to the approval of the Executive Director of the SWRCB. In the absence of Order WR 98-09, these changes would have expired on December 31, 1998.

In addition to extending the effective period of these changes, Order WR 98-09 requires (1) complete documentation showing that no additional water will be exported on an annual basis as a result of the joint use of the points of diversion, compared with exports in the absence of the joint use of the points of diversion; (2) measures to prevent water level impacts in the channels of the southern and central Delta as a result of joint use of the points of diversion; and (3) studies to develop methods to better predict the effects of export pumping on water levels in the southern Delta as a result of joint use of the points of diversion.

Order WR 98-09 is based on evidence received in Phase 1 of the Bay-Delta Water Rights Hearing. Later phases of the Hearing are ongoing as of the date of this Order.

The SWRCB received two timely petitions for reconsideration. A petition received on December 31, 1998, was filed on behalf of County of San Joaquin, Central San Joaquin Water Conservation District (CSJWCD), Central Delta Water Agency, South Delta Water Agency, Reclamation District No. 2039, Reclamation District No. 2072, R.C. Farms, Inc., Zuckerman Mandeville Inc., and Alexander Hildebrand (referred to hereinafter as County). A petition received on January 4, 1999, was filed on behalf of the Stockton East Water District (referred to hereinafter as SEWD).

## **2.0 GROUNDS FOR RECONSIDERATION**

The SWRCB may order reconsideration on all or part of a decision or order adopted by the SWRCB upon petition by any interested person. (Wat. Code, § 1122.) An SWRCB regulation (Cal. Code Regs., tit.23, § 768) lists the following causes for reconsideration:

1. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
2. The decision or order is not supported by substantial evidence;

3. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
4. Error in law.

County alleges that the causes for reconsideration numbered 1, 2, and 4 above exist in this case. More specifically, County alleges that it has been denied a fair hearing, that Order WR 98-09 is not supported by substantial evidence, and that Order WR 98-09 contains errors in law. SEWD alleges the fourth cause,, that the SWRCB has made an error in law.

### 3.0 FAIR HEARING

**County** alleges that it has been deprived of a fair hearing based on County's allegation that SWRCB members and principal staff participated as members of and received communications from the Governor's Water Policy Council relating to controverted issues before the SWRCB in Order WR 95-6 and in the extension of Order WR 95-6 pursuant to Order WR 98-09. The members of the Governor's Water Policy Council include DWR, whose water rights are a subject of Order WR 98-09. County alleges that the injurious communications occurred during the fall of 1994. County also alleges that the SWRCB has asserted "Deliberative Privilege" as to communications from the Governor's Water Policy Council that occurred in 1994, and has 'precluded County from ascertaining the content of such communications. County alleges that it has been deprived of the opportunity to controvert the matters in the privileged communications and so has been denied a fair hearing. County cites Government Code section 115 13.5 as authority for its claim.

### 3.1 Applicable Law

Most of the general provisions on administrative adjudication within Chapter 4.5 (commencing with Gov. Code ,§ 11400) of the California Administrative Procedure Act (APA), Government Code section 115 13, and Evidence Code sections 80 1-805 govern the conduct of adjudicative proceedings of the SWRCB. (Cal. Code Regs., tit.23,§ 648.) The provisions applicable to the SWRCB's adjudicative proceedings do not include Government Code section **115 13.5**, cited by County, and also do not include Articles 8, 13, and 14 of Chapter 4.5. With the exception of

Government Code section 115 13, the provisions of Chapter 5 of the APA, commencing with Government Code section 11500, do not apply to the proceedings of the SWRCB.

The APA provisions applicable to the SWRCB include sections that apply to requests for recusal or disqualification of members of the SWRCB in the Bay-Delta Water Rights Hearing.

Chapter 4.5 of the APA took effect on July 1, 1997. The APA states that a presiding officer<sup>1</sup> in an adjudicative proceeding is subject to disqualification for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40(a).) This prohibition is qualified, however, by the following:

- “(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:
- (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.
  - (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.
  - (3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.” (Gov. Code, § 11425.40, subd. (b).)

The above provisions governing disqualification of the presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in the proceedings is delegated. (Gov. Code § 11425.40, subd. (c).)

A presiding officer also *may* be disqualified because of receipt of a prohibited ex parte communication. If the presiding officer is disqualified, the record pertaining to the prohibited

<sup>1</sup> “‘Presiding officer’ means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding.” (Gov. Code, § 11405.80.)

communication *may* be sealed by order of the disqualified presiding officer so that the succeeding presiding officer will not see it. (Gov. Code, § 11430.60.) It should be noted that both disqualification and sealing of a record are permissive, not mandatory, under this section, and are intended as tools to remove the effect of an *ex parte* communication. (See Law Revision Commission Comments, 1995 Addition, for section 11430.60; see also 25 Cal. Law Revision Com. Rep. 55 (1995).)

Regarding *ex parte* contacts, the APA provides:

- “(a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
- (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.
- (c) For the purpose of this section, a proceeding is pending from the issuance of the agency’s pleading, or from an application for an agency decision, whichever is earlier.” (Gov. Code, § 11430.10.)

Other sections applicable to *ex parte* communications include Government Code sections 11430.20, 11430.30, 11430.40, 11430.50, 11430.60, 11430.70, and 11430.80.

Some *ex parte* communications are permissible under the APA. Permissible *ex parte* communications include: (1) A communication concerning a matter of procedure or practice,

including a request for a continuance, that is not in controversy. (Gov. Code, § 11430.20, subd. (b).) (2) A communication from an employee or representative of an agency that is a party<sup>2</sup> to the presiding officer if: (a) the communication is from an assistant or advisor to the presiding officer and does not furnish, augment, diminish, or modify the evidence in the record, or (b) the communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor, or (c) the communication is for the purpose of advising the presiding officer concerning a matter in a nonprosecutorial adjudicative proceeding, and it involves an issue in a proceeding of the SWRCB or certain other agencies when they engage in lengthy and complex cases that require policy advice or otherwise unavailable technical information. (Gov. Code, § 11430.30.)

The applicable law relevant to the fair hearing claim in this proceeding can be summarized as follows:

1. With some limitations, members of the SWRCB are subject to disqualification in an adjudicative proceeding for reasons of bias, prejudice, or interest in the proceeding.
2. Only communications during the pendency of a proceeding are subject to the restrictions on ex parte communications.
3. The prohibition of ex parte communications applies only to the issues in the pending proceeding.
4. Both direct and indirect ex parte communications to the presiding officer are prohibited.
5. SWRCB staff are not decision makers in the Bay-Delta Water Right Hearing and consequently are not subject to the prohibition of ex parte communications. (Gov. Code § 11425.40; *Porter County Chap., Izaak*

<sup>2</sup> The definition of “party” includes the agency that is taking action. (Gov. Code, § 11405.60.) Accordingly, employees of the SWRCB technically are employees of a party, and these exceptions are necessary for the purpose of allowing the members of the SWRCB to communicate with their staff advisors. Notwithstanding the apparent breadth of this exception, the SWRCB members avoid otherwise prohibited ex parte communications with employees or representatives of other agencies that are parties.

*Walton League v. Nuclear Regulatory Comm.*, (1979) 606 F.2d 1363, 1371.)

SWRCB staff must, however, protect the members of the SWRCB by avoiding delivery of indirect ex parte communications to the members of the SWRCB from the parties.

6. The applicable provisions of the APA took effect on July 1, 1997.<sup>3</sup>
7. It is permissible for an agency head or presiding officer to have an ex parte communication under specified circumstances, including circumstances in which the communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.
8. If a member of the SWRCB receives a prohibited ex parte communication, the member must place the communication and any response to it in the hearing record, and notify the parties that the communication has been placed in the record. Parties are allowed 10 days to decide whether to address a communication after receiving notice of the communication.
9. If a prohibited ex parte communication causes bias or prejudice on the part of the SWRCB member who received it, there may be grounds for disqualification. If there is disqualification, the record pertaining to the ex parte communication may be sealed.
10. There is a presumption of honesty and integrity that applies to persons serving as adjudicators. (*Izaak Walton League, supra*, and *Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 1464].)

### 3.2 Relevant Material in the Record

On the first day of the phased hearing upon which Order WR 98-09 is based, some of the parties to the County petition for reconsideration (referred to herein as “Central Delta”) made a “Request for Recusal”<sup>4</sup> of the members of the SWRCB and of any staff of the SWRCB who have had

<sup>3</sup> This is after the communications County cites, but before the dependency of the current proceeding.

<sup>4</sup> The parties who jointly, through their attorney, made the Request for Recusal are Central Delta Water Agency, Reclamation District No. 2039, Reclamation District No. 2072, R.C. Farms, Inc., and Zuckerman Mandeville, Inc.

communication with staff or members of the Governor's Water Policy Council regarding Bay-Delta water right matters. The SWRCB heard the request during the first hearing day. In hearing the request, the members of the SWRCB requested and received a reading and an explanation of the applicable law from the staff attorney advising the SWRCB in this proceeding. The applicable law and the advice provided to the SWRCB during the hearing are summarized in section 3.1, above. The members of the SWRCB, after considering the applicable law and their own activities, each declined to recuse himself or herself, denying that he or she had had any prohibited ex parte contacts with respect to substantive issues in the current Bay-Delta Water Right Hearing. (See R.T., pp. 48-69.)

Later on the first hearing day, the Central Delta called as adverse witnesses two senior staff of the SWRCB, Jerry Johns and Walt Pettit. Mr. Johns is Assistant Chief, Division of Water Rights. Mr. Pettit is the Executive Director of the SWRCB. Central Delta's attorney asked Mr. Johns questions about his understanding of constraints on ex parte contacts with parties in the Bay-Delta proceeding, his practice regarding avoidance of prohibited ex parte contacts, and the effects of water project operations by the DWR and the USBR under Order WR 95-6. Central Delta's attorney also asked both Mr. Johns and Mr. Pettit questions about meetings indicated on Mr. Pettit's calendars for 1994 and 1995. None of the responses to questions showed that Mr. Pettit or Mr. Johns had engaged in prohibited ex parte contacts regarding issues in the current proceeding during the pendency of the current water rights proceeding, which commenced on December 2, 1997, at the earliest. Nor did any of the responses show that Mr. Pettit or Mr. Johns had transmitted prohibited ex parte communications to any member of the SWRCB during the pendency of this proceeding. (See R.T., pp. 152 - 172; 182 - 207.) Accordingly, notwithstanding the efforts of Central Delta to present such evidence, there is no evidence that any member of the SWRCB has had any prohibited ex parte communications during the pendency of the current proceeding.

### **3.3 Dates of Pendency of the Current Proceeding**

In the absence of any evidence of prohibited communications since the hearing notice was issued for the current proceeding, County argues that the period of pendency of the current proceeding

should be extended backward to 1985 so as to include any ex parte communications that may have occurred during previous proceedings. In effect, County acknowledges that it has no evidence that during the pendency of the current proceeding a prohibited ex parte communication has occurred. Nevertheless, it attempts to construct a theoretical proceeding that never ends, on the general topic of promulgating and implementing water quality objectives for the Bay-Delta Estuary. This attempt fails, as discussed below.

Notice of the current proceeding was first issued on December 2, 1997, but did not include the issue of whether the effective period of the changes authorized in Order WR 95-6 should be temporarily extended. This issue was added when the revised hearing notice was issued on May 6, 1998, and it is the sole issue decided in Order WR 98-09. In the absence of the revised hearing notice, an extension of Order WR 95-6, resulting in Order WR 98-09, would not have been before the SWRCB for consideration, and Order WR 98-09 would not have been adopted. This linkage between the notice and the resulting hearing and order is critical, and it is necessarily missing in County's theory that the proceeding extends back to 1985. In other words, no notice was issued in 1985 that covered this issue, so the proceeding cannot have started then.

In particular, County seeks to construe communications with SWRCB staff that were made before and in the course of negotiating the Principles for Agreement as being prohibited ex parte communications in the current adjudicative proceeding. Although the Principles for Agreement pertains to the Bay-Delta Estuary, it was not negotiated during the pendency of the current adjudicative proceeding or during any other adjudicative proceeding regarding the Bay-Delta Estuary. Instead, it was negotiated shortly before the SWRCB was to release a draft water quality control plan. Its purpose was to make a joint recommendation to the SWRCB regarding its quasi-legislative proceeding to promulgate water quality objectives. Water quality objectives are regulations, and are governed by statutory procedures for quasi-legislative proceedings, not adjudicative proceedings. (Gov. Code, § 11353; Wat. Code, §§ 13170, 13241 et seq.) In accordance with statutory requirements, the SWRCB conducted a public, quasi-legislative, hearing approximately sixty days after it released the draft water quality control plan. In connection with the hearing, the SWRCB received comments on the draft plan.

Approximately two months later, after preparing responses to the parties' comments, the SWRCB held a Board meeting and adopted a final plan.

The SWRCB was not a party to the Principles for Agreement, although some of its senior staff were present at some of the negotiating sessions to answer questions about the SWRCB's procedures. The staff testified in depositions that they did not enter into the negotiations, and that their role was merely to observe the discussions and to answer questions. The staff was informed immediately upon completion of the negotiated agreement, and incorporated most of the agreement's points into a preferred alternative set of water quality objectives in the draft water quality control plan. This ensured that the objectives proposed in the agreement would receive thorough consideration in the hearing on the draft water quality control plan, but provided no assurance that the proposed objectives would be adopted.

Order WR 95-6, the terms of which were extended and modified in Order WR 98-09, arose from a joint petition of the DWR and the USBR filed on February 28, 1995. The joint petition was prompted by the decision of the DWR and the USBR, shortly after the Principles for Agreement was signed on December 15, 1994, to operate their projects to meet the draft objectives proposed as a preferred alternative in the draft water quality control plan. The draft objectives were consistent with the objectives proposed in the Principles for Agreement. In the petition, the DWR and the USBR requested changes in some of their water right permits. The requested changes were meant to facilitate their changing their operations so as to immediately meet the proposed objectives rather than waiting several years for the SWRCB to conduct the full water right hearing that constitutes the current proceeding. The requested changes included relief from some requirements which, in combination with the proposed objectives, would have reduced the amount of water that could be delivered to their customers south and west of the Delta.

On March 3, 1995, the SWRCB gave notice of an adjudicative water right hearing to consider the joint petition of the DWR and the USBR. The SWRCB conducted the hearing on April 18, 19, and 20, 1995. After considering all of the evidence and arguments in the hearing record, the SWRCB conditionally approved the joint petition on June 8, 1995, with an expiration date of

December 31, 1998. Even assuming for the sake of argument that the pendency of the current proceeding, insofar as it leads to Order WR 98-09 extends backward to include the proceeding leading to Order WR 95-6<sup>5</sup>, the communications of which the petitioners complain did not take place during the pendency of that proceeding, either.

In summary, the petitioners have presented no evidence of any prohibited communication occurring during the pendency of the proceeding leading to Order WR 98-09. This absence of any evidence of a prohibited ex parte contact is notwithstanding that the SWRCB afforded the petitioners an opportunity to present any relevant evidence they had. In the absence of evidence of prohibited ex parte communications during the proceeding, the SWRCB has no evidence that the hearing was unfair to the petitioners. Nor is there a basis for the SWRCB to act to correct any procedural irregularity, since none has been proved.

#### 4.0 EVIDENTIARY BASIS FOR ORDER WR 98-09

County argues that Order WR 98-09 is not supported by substantial evidence. This position is based on assertions that County represents legal users of water, and that such users will be injured as a result of the adoption of Order WR 98-09.

County relies on Water Code section 1702, which provides:

“Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.”

The “no injury” rule codified in section 1702 of the Water Code is a common law rule designed to protect the rights of third party water right holders when a water right is changed. (See *Scott v. Fruit Growers Supply Co. (1927) 202 Cal.47 [258 p.1095].*) The “no injury” rule includes protection of junior water right holders against changes in prior rights that would have the effect

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<sup>5</sup> This is a tenuous assumption. The statements in Order WR 95-6 indicate that the SWRCB fully expected to complete the current proceeding and issue a long-term water right decision before December 31, 1998. The fact that the SWRCB did not even give notice of an issue whether the terms of Order WR 95-6 should be extended until it issued a revised notice on May 6, 1998, for the current proceeding is further indication that no extension was contemplated until well into 1998.

of enlarging those rights to the detriment of junior water right holders. A legal user of water who could be injured would include any party who has an existing legally protectible water right, where the proposed action would adversely affect the legal user's ability to divert and use the water.

County argues that in Order WR 98-09 the SWRCB did not make the finding required by section 1702. County claims that its members are being injured and will continue to be injured by the changes approved in Order WR 95-6 and temporarily continued in Order WR 98-09. In particular, County asserts that there could be reductions in water levels, water quality, or water quantity in the channels of the southern and central Delta as a result of Order WR 98-09. During Phase 1 of the Bay-Delta Water Rights Hearing, the SWRCB received evidence regarding the potential for adverse effects to occur to agricultural users in the Delta as a result of Order WR 98-09. Instead of repeating the findings in Orders WR 95-6 and WR 95-14 regarding compliance with section 1702, the SWRCB incorporated those findings by reference in Order WR 98-09. This satisfies section 1702, but to reinforce the finding, the SWRCB herein finds again that there is no injury to any legal users of water resulting from the adoption of Order WR 98-09. The reasons are stated below.

Notwithstanding County's allegation that Order WR 98-09 allows the USBR to violate the Vemalis salinity objective, the objective has, in fact, been met since the SWRCB adopted Order WR 95-6 in 1995. Nothing in Order WR 98-09 or in Order WR 95-6 authorizes a violation of the objective. Additionally, the SWRCB in Order WR 98-09 found specifically, based on the evidence received during Phase 1, that the Vemalis salinity objective will likely be met during 1999 and that meeting the objective will protect the agricultural users of water. This finding is based on testimony by a USBR witness. Finally, County speculates that if the USBR meets the Vemalis salinity objective in 1999, it might use so much water that it would violate the objective in future years. The SWRCB recognizes a potential for the USBR to have an inadequate water supply to meet all of its uses during a series of drier years, but this potential does not mean that the USBR has permission to violate terms and conditions of its water right

permits. Failure to meet the terms and conditions in its water right permits would be cause for enforcement action, and County could at that time file a complaint with the SWRCB against the USBR.

To prevent the water levels in the Delta from being adversely lowered as a result of the changes continued in Order WR 98-09, the SWRCB added a condition requiring the USBR and the DWR to consult with the South Delta Water Agency and prepare and submit to the SWRCB a response plan before pumping water pursuant to the joint point of diversion authorization. As a condition, water diversions using the joint points of diversion cannot commence until the plan is approved by the SWRCB's Executive Director. The projects are required to implement the approved response plan. With this condition in place, the SWRCB made a finding that there would not be adverse water level problems in the southern and central Delta as a result of Order WR 98-09. County expressed concern in its petition for reconsideration that the response plan would not be established until there was harm. In fact Order WR 98-09 requires that the response plan prevent harm. County's concern is unfounded.

Regarding County's water quantity (supply) allegation, the water supply issue as it applies to the channels of the Delta, is actually an issue of whether the water is of adequate quality for use by agriculture and has an adequate water level to be pumped. The quality and water level issues are addressed above. Accordingly, the SWRCB made factual findings sufficient to meet the requirement of section 1702 in Order WR 98-09, contrary to County's assertion. In making these findings, the SWRCB assumed, without receiving documentation, that there are legal users of water in the southern and central Delta who have rights to divert and use the water during the relevant portions of the year.

County also claims that Order WR 98-09 reduces the water supply for SEWD and CSJWCD. SEWD did not join in County's petition for reconsideration, however. The claimed reduction is alleged to be the result of releasing water from New Melones Reservoir to meet the Vemalis salinity objective.<sup>6</sup> The Vemalis objective physically can be met only by water flowing

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<sup>6</sup> The USBR is also releasing water to provide fish flows under its Interim Stanislaus Plan.

downstream in the San Joaquin River. This water might come either from sources in the San Joaquin watershed or from imported water. County alludes to a proposal it has made in phases of the hearing subsequent to Phase 1, to use imported water, as an alternative way to meet the Vemalis objective. The proposal, however, was not fully explained in Phase 1, and could not be considered for Order WR 98-09. More importantly, the requirement to meet the Vemalis salinity standard is not new. While Order WR 95-6 modified the objective, it did not change the total amount of water needed to meet the objective each year. Accordingly, adoption of Order WR 98-09 does not perpetuate a harm that was caused by Order WR 95-6.

## 5.0 CEQA COMPLIANCE

County asserts that there is no environmental documentation supporting Order WR 98-09. This assertion is incorrect. As the SWRCB did when it adopted Order WR 95-6, the SWRCB used the Environmental Report that supported the 1995 Bay-Delta Plan<sup>7</sup> as the environmental documentation for Order WR 98-09. (See Order WR 98-09, section 4.1, at pp. 16-17.)

Additionally, County argues that the SWRCB should have prepared environmental documentation on various operations being conducted by the DWR and the USBR, including flow releases for fish under the New Melones Interim Operation Plan, make-up pumping under the joint point of diversion, and purchases of water by the projects for fish flows in combination with releases from New Melones. Nothing in Order WR 98-09 requires the USBR or the DWR to provide fish flows from New Melones Reservoir or from anywhere else, however. The fish flows are not precluded by Order WR 98-09, but these flows are not being provided pursuant to Order WR 98-09. With respect to the make-up pumping under the joint point of diversion, the SWRCB has placed restrictions on its authorization, including case-by-case reviews of the use of the joint point, to ensure that there is no adverse effect on the environment as a result of the authorization. Order WR 98-09 added further restrictions, to protect water levels in the Delta and to ensure that the best possible times are selected for use of the joint point of diversion to make up for reduced pumping at other times. With the tight constraints on the use of the joint point of

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<sup>7</sup> County refers to the 1995 Bay-Delta Plan by its document number 95-1WR, and occasionally refers to it as an Order. These references are confusing. The 1995 Bay-Delta Plan is quasi-legislative -- a regulation -- not an adjudicative Order, and the plan does not, in itself, alter any water rights.

diversion, the SWRCB finds that there is no potential for any significant adverse effect on the environment as a result of this temporary authorization. (See Order WR 98-09, section 4.3, at p. 20.)

## 6.0 ALLEGATIONS OF ERRORS IN LAW

County and SEWD both stated causes for reconsideration based on alleged errors of law. County alleges that the SWRCB either did not apply certain statutes governing California water rights or misinterpreted them.

### 6.1 The Delta Protection Statutes

County cites three groups of statutory provisions. The first group of statutes County cites is the Delta Protection Statutes, at Water Code sections 12200-12205. County argues that these sections place certain obligations on the DWR and the USBR. County alleges that its members asked the SWRCB to apply these sections and protect in-Delta beneficial uses, but that the SWRCB had refused to do so. In fact, the SWRCB has included protections for in-Delta uses with respect to the continuing changes it reauthorized in Order WR 98-09. With the terms and conditions in Order WR 98-09, there will not be any water level problems or reverse flow conditions caused by the authorized changes. Further, the SWRCB found that the existing water quality objectives will be met in 1999. With the terms and conditions in Order WR 98-09, the Order will not be the cause of any lack of water supply in the Delta. In other words, the make-up pumping authorized using the joint points of diversion will not be the cause of any deprivation of water supply for in-Delta uses if the DWR and the USBR comply with the terms and conditions. The SWRCB action herein is not intended, however, as representing a position of the SWRCB on the construction of Water Code sections 12200-12205.

### 6.2 The San Joaquin River Act

The second law County cites is the San Joaquin River Act, at Water Code sections 12230-12233. As County recognizes, the SWRCB found that the Act does not apply to the USBR's New Melones permits because the applications for these permits were filed before June 17, 1961. County nevertheless argues that changes in existing rights are subject to these sections. This argument fails, as section 12233 of the Water Code expressly exempts water projects from the

San Joaquin River Act based on the date of filing the applications for those projects, not on the permitting date or the date of any subsequent modifications to the permits. The New Melones applications were on file but not yet permitted as of June 17, 1961. Under this circumstance, it could not be determined in 1961 how the permit would be conditioned or even whether it would be permitted, yet County argues that changes in the permits, which had not even been issued in 1961, are subject to the Act.

Nevertheless, assuming for sake of argument that County is correct and that section 12233 should be disregarded, the changes authorized in Order WR 98-09 would not violate the Act. The only change the SWRCB authorized regarding the New Melones permits in Order WR 98-09 is a change in the requirement to meet the salinity standard at Vernalis. Instead of requiring the USBR to meet the former 500 parts per million total dissolved solids objective at Vernalis, Order WR 98-09 requires the USBR to meet the current Vernalis objective of 0.7 mmhos/cm electrical conductivity during April through August and 1.0 mmhos/cm during September through March. This change requires the same amount of dilution water as the former objective, but requires slightly better water quality during April through August. Accordingly, Order WR 98-09 causes no harm to San Joaquin water quality. If any harm is being caused by the USBR or other entities to the San Joaquin River water quality, such harm is outside of the scope of Order WR 98-09 and is not a basis for reconsidering Order WR 98-09.

### **6.3 The Area of Origin Statutes**

#### **6.3.1 County's Allegations**

*The* third group of laws cited by County are collectively known as the area of origin statutes. County cites: (1) Water Code sections 11460- 11463, known as the Watershed Protection Act; (2) section 11128, which extends the limitations prescribed in sections 11460 and 11463 to any agency of the state or federal government which constructs or operates a unit of the Central Valley Project as described in Division 6, Part 3, of the Water Code (commencing with section 11100); and (3) sections 10505 and 10505.5, known as the County of Origin Act. Under these laws, County argues that the SWRCB is required to order the USBR to deliver water to SEWD and to CSJWCD under the existing contracts, and to require such delivery in

preference to any other permitted use that the USBR has for the water. Such an order would not help mitigate the SWRCB's approval of an extension of the temporary changes authorized in Order WR 95-6, since the only change in the USBR's New Melones permits, to meet the current salinity objective, does not change the amount of water required from New Melones Reservoir under the water right permits. Further, the purpose of the hearing was not to prosecute the USBR for violating its permits, but rather to determine whether to temporarily extend the earlier conditional approval of a petition filed by the USBR and the DWR to make a limited set of changes in their permits. Thus, County's argument is irrelevant to Order WR 98-09, which addresses the temporary changes.

It appears that what County actually is concerned with is the USBR's use of New Melones water to provide flows for fish protection. No change authorized in Order WR 95-6 or in Order WR 98-09 authorizes or otherwise affects the use of water for fish protection. Accordingly, if County wishes to pursue the USBR's use of water for purposes other than contract deliveries, it should do so by initiating a separate proceeding. A separate proceeding could consist of either a complaint of permit violations filed with the SWRCB or litigation filed against the USBR.

### 6.3.2 *SEWD's Position*

SEWD expressed its disagreement with the SWRCB's interpretation of section 11460 in Order WR 98-09. SEWD requested that certain legal conclusions regarding section 11460 be removed from Order WR 98-09 and that the order be reissued without the legal conclusions. The legal conclusions SEWD objects to are set forth in section 3.3.2 of Order WR 98-09, paragraphs 2 and 5. SEWD contends that it is unnecessary in Order WR 98-09 to make findings and conclusions with respect to Water Code section 11460 et seq. because neither of the two parties who have contracts with the USBR for water from New Melones (SEWD and CSJWCD) presented a case-in-chief in Phase 1 of the Bay-Delta Water Rights Hearing or objected to a one-year extension of Order WR 95-6. As SEWD points out, section 3.3.2 addresses the rights of the water purchase contractors. SEWD asserts that retention of the two paragraphs it objects to in section 3.3.2 could force it to file litigation against Order WR 98-09.

The issue discussed in section 3.3.2 was raised in Phase 1 by CDWA, which does not have a contract with the USBR, has no apparent interest in the interpretation of section 11460 with respect to the contracts, and does not itself represent SEWD or CSJWCD. As discussed in section 6.3.1 herein, prosecution of alleged violations of Water Code section 11460 is not the subject of the proceeding leading to Order WR 98-09. Accordingly, the SWRCB now finds that inclusion of section 3.3.2 in Order WR 98-09 is unnecessary to the adequacy of Order WR 98-09, and that the substance of the above discussion in section 6.3.1 regarding the absence of a prosecution under the area of origin statutes adequately addresses the issues raised in Phase 1 regarding Water Code section 11460. Section 3.3.2 would not be understandable without the paragraphs SEWD is complaining of, however. Accordingly, the Order below directs that the entire text of section 3.3.2 is to be considered deleted and replaced with the text set forth therein. The SWRCB does not consider it necessary to physically reprint and reissue Order WR 98-09 to accomplish this result, and consequently will not take that physical step.

#### **7.0 ALLEGATIONS OF PERMIT VIOLATIONS**

County alleges that Order WR 98-09 condones an existing violation of the USBR's water right permits under which the USBR exports water from the southern Delta. The alleged violation is that the USBR is delivering water to places outside of the places of use authorized in its water right permits. The USBR has petitioned the SWRCB to expand and consolidate its places of use so that the places of use include all of the places currently being served and so that the places of use under the different permits are the same.\* County assumes that if the USBR did not deliver water to locations not authorized in a permit, that the USBR would export less water from the southern Delta and consequently would have less of an adverse impact on water levels, reverse flows, and water quality in the Delta than it would have otherwise. In Order WR 98-09, the SWRCB did not order the USBR to stop delivering water to the locations outside the place of use, as requested by CDWA. There are two reasons for this.

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<sup>8</sup> The SWRCB will receive evidence and argument on whether to approve the USBR's petition in a future phase of the Bay-Delta Water Rights Hearing.

First, the hearing notice under which Order WR 98-09 was issued does not give notice that the SWRCB may prosecute the USBR under any provision of the Water Code governing prosecutorial actions, and the hearing was not conducted as a prosecution. In other words, the SWRCB has not initiated an exercise of its prosecutorial discretion with respect to the alleged violation.<sup>9</sup> Thus, County's citation of Water Code section 1825 et seq. is inapposite.

Second, Orders WR 95-6 and 98-09 do not accommodate an increase in export pumping for the unauthorized places of use as compared with D-1485, which is the underlying decision. These orders replace the make-up provision in D-1485 (condition 3) with the current make-up provisions (Conditions 5.a. and 5.b.). Less water can be exported under the 1995 Bay-Delta Plan and Order WR 98-09 than could be exported under D-1485. Order WR 98-09 augments the requirement in Order WR 95-6 that no additional water can be exported through use of the joint point of diversion, by requiring complete documentation. Thus, Order WR 98-09 does not result in an increase in exports, and no further mitigation is needed to ensure that there is no increase.

#### ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration jointly filed by County of San Joaquin, Central San Joaquin Water Conservation District, Central Delta Water Agency, South Delta Water Agency, Reclamation District No. 2039, Reclamation District No. 2072, R.C. Farms, Inc., Zuckerman Mandeville, Inc., and Alexander Hildebrand is denied for the reasons stated above; and that in response to the petition for reconsideration filed by Stockton East Water District, the following text is substituted for the text set forth in Order WR 98-09, section 3.3.2. The following text is to be deemed the entire text of section 3.3.2 in Order WR 98-09. For reasons of economy, a revised order will not be published, however.

#### ***“3.3.2 Watershed Preferences and Place of Use Limitations***

Some parties in the hearing contend that operation of the projects pursuant to Order WR 95-6 contributes to water supply problems in San Joaquin County, has

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<sup>9</sup> One important factor influencing the SWRCB's exercise of its prosecutorial discretion is whether the permittee is taking steps to bring its operations into compliance. Here USBR has filed and the SWRCB is processing a petition to conform the permit to the circumstances under which water is being used.

resulted in frequent violations of the Vernalis salinity standard, and has impaired water diversions in the central and southern Delta through low water levels in the channels of the Central and southern Delta. This Order finds that the salinity standard will be met during the term of this Order, and it requires mitigation of *any* low water levels in the channels of the central and southern Delta that may be caused by operations authorized by this Order. This Order does not cause or mitigate the water supply problems affecting SEWD and CSJWCD. The water supply problems affecting SEWD and SCJWCD apparently are the result of a lack of water deliveries by the USBR from New Melones Reservoir under existing water supply contracts.” This Order expresses no opinion as to how those contracts should be interpreted.

CDWA claims that under Water Code sections 11460-1 1463 and 11128, the SWRCB is required to order the USBR to deliver water to SEWD and to CSJWCD under the existing contracts, and to require such delivery in preference to any other permitted use that the USBR has for the water. Such an order would not help mitigate the SWRCB’s approval of an extension of the temporary changes authorized in Order WR 95-6, since the only change in the USBR’s New Melones permits, to meet the current salinity objective, does not change the amount of water required from New Melones Reservoir under the water right permits. Further, the purpose of the hearing leading to this order was not to prosecute the USBR for violating its permits, but rather to determine whether to temporarily extend the earlier conditional approval of a petition filed by the USBR and the DWR to make a limited set of changes in their permits, Thus, CDWA’s argument is irrelevant to the subjects of the current proceeding and is irrelevant to this Order, which addresses the temporary changes.

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<sup>10</sup> The USBR, executed water supply contracts with SEWD and CSJWCD in the 1980’s, in connection with an authorization by the SWRCB to store water in New Melones Reservoir under the USBR’s water right permits. After the contracts were executed, the USBR made new fish flow commitments from New Melones Reservoir to meet various statutory provisions.

It appears that CDWA's concern is actually with the USBR's use of New Melones water to provide flows for fish protection. No change authorized in Order WR 95-6 or in Order WR 98-09 authorizes or otherwise affects the use of water for fish protection. Accordingly, if CDWA wishes to pursue the USBR's use of water for purposes other than contract deliveries, it could do so by initiating a separate proceeding. A separate proceeding might consist of either a complaint of permit violations filed with the SWRCB or litigation filed against the USBR."

### CERTIFICATION

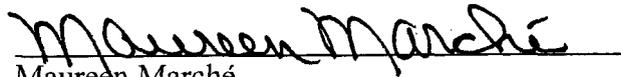
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct **copy** of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 3, 1999.

AYE: James M. Stubchaer  
Mary Jane Forster  
Mark Del Piero  
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant to the Board