

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 - 0003

In the Matter of
Approval of Water Level Response Plan
Submitted by
Department of Water Resources and U.S. Bureau of Reclamation
Under SWRCB Decision 1641.

SOURCES: Sacramento and San Joaquin Rivers and their Tributaries and the
Sacramento-San Joaquin Delta Estuary.

**ORDER DENYING RECONSIDERATION AND AMENDING DECISION APPROVING
WATER LEVEL RESPONSE PLAN**

BY THE BOARD:

1.0 INTRODUCTION

In this Order, the State Water Resources Control Board (SWRCB) denies reconsideration of a decision by the Executive Director of the SWRCB and amends the decision as provided below.

In SWRCB Decision 1641 (D-1641), among other actions, the SWRCB approved changes in the points of water diversion in permits held by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) to add each others' points of diversion to their respective permits. The resulting operation is referred to as the joint points of diversion (JPOD). D-1641 authorizes the DWR and the USBR to divert or redivert water at the added points of diversion only if the DWR and the USBR prepare and receive the approval of the Executive Director of the SWRCB of a response plan. The purpose of the response plan is to mitigate for the effects of changes in points of water diversion in the southern Delta that the SWRCB approved in D-1641 by ensuring that water levels in the southern Delta will not be lowered to the injury of water users in the southern Delta. D-1641 requires that the DWR and the USBR prepare the response plan with input from the South Delta Water Agency (SDWA).

The DWR and the USBR first submitted a temporary response plan in 2000. On October 6, 2000, the acting Executive Director of the SWRCB approved the temporary plan for one year, and the Executive Director later extended the approval of the temporary plan until January 10, 2002. The DWR and the USBR, as the water right holders whose water right permits were amended, submitted their current Water Level Response Plan (Plan) on January 28, 2002. The Plan is based on current physical, operational, and regulatory conditions in the Delta, and may require revision when any of the current conditions changes. By letter dated February 5, 2002, the SDWA raised several objections to the Plan. By letter dated March 12, 2002, the Executive Director of the SWRCB approved the Plan, subject to conditions that add protections for diverters in the southern Delta. On April 11, 2002, the SDWA filed a timely request for reconsideration with the SWRCB.

2.0 EXECUTIVE DIRECTOR'S DECISION

The Executive Director, in approving the Plan, addressed the objections of SDWA to the Plan. The objections were that, (1) the Plan should be made a component of an integrated South Delta Water Management Plan; (2) JPOD operations should not be allowed when water levels are inadequate for agricultural diversion, regardless of the cause; and (3) a number of specific parts of the Plan should be revised. To make clear the protection to be provided to southern Delta diverters due to JPOD operations, the Executive Director conditioned the approval of the Plan upon the implementation of the following conditions:

- “1. The DWR and the USBR shall implement modifications needed to protect agricultural diversions by water right holders in the southern Delta if the diversions are susceptible to low water levels. Such modifications are required only if the diverters demonstrate to the satisfaction of the Chief of the Division of Water Rights that they have a valid right to the water during the period when water levels due to JPOD operations may be too low.
- “2. This Plan is based on the facilities, Clifton Court Forebay (CCF) operational criteria, and regulatory restrictions on exports that exist as of autumn 2001. If facilities, CCF operations or export restrictions change, then the DWR and the USBR must consult with the Executive Director of the SWRCB to determine whether the Plan requires changes and further approval. I am retaining continuing authority over my approval of the Plan for the purpose of requiring changes as needed to meet the conditions in the water rights of the DWR and the USBR on use of the JPOD and to protect the public welfare, protect public

trust uses, and prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of the water involved.

“3. Condition II in the Plan provides that if an action covered by the Plan is proposed, and if the criteria in Condition I in the Plan are not met, the action may still occur if the DWR and the USBR determine that no diversions will occur at a location and during a period when the action will have an incremental effect on water levels (Condition II(c)). If the DWR or the USBR acts based on this condition, the DWR or the USBR must demonstrate to the SDWA and the SWRCB that it has communicated with the potentially affected diverters prior to the action and that the diverters have no plans for diversions during the period the diversions will occur.

“4. The DWR and the USBR shall meet all of the applicable commitments in the proposed Plan.

“Under the proposed Plan, the DWR and the USBR commit themselves to work in good faith with local diverters to provide portable pumps, or to make physical modifications to specific diversions where water level problems have been experienced. The Plan also commits them to implement a site-specific dredging program to benefit agricultural diversions, subject to their securing the necessary regulatory permits. Continuing approval of this Plan is contingent upon these commitments being met.

“With the above conditions, the proposed Plan meets the requirements of D-1641 and I approve it subject to the foregoing conditions and the commitments in the proposed Plan. I reserve continuing authority to modify the Plan as may be needed, or to terminate my approval of the Plan.”

3.0 THE PETITION FOR RECONSIDERATION

3.1 Basis for Petition for Reconsideration

The SWRCB may order reconsideration on all or a part of a decision adopted by the SWRCB upon petition by any interested person or entity. (Wat. Code, § 1122.) The SWRCB’s regulation lists the following causes upon which a petition for reconsideration may be filed:

“(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

“(b) The decision or order is not supported by substantial evidence;

“(c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

“(d) Error in law.”

(Cal. Code Regs., tit. 23, § 768.)

SDWA argues that its petition for reconsideration is based on all four of the above causes. A review of the arguments shows allegations that arguably fall within subdivisions (a), (b), and (d). To support a cause of reconsideration under subdivision (c) as well, SDWA submitted a declaration by its attorney, John Herrick. In the declaration, Mr. Herrick lists additional evidence he would present in a hearing on the petition for reconsideration. The test in subdivision (c) for presenting additional evidence in a petition for reconsideration is that the evidence is relevant and that it could not have been produced in the exercise of reasonable diligence. The administrative record for considering whether to approve the Plan is the administrative record for D-1641 plus the documents in the files of the SWRCB regarding the development of the Plan after the SWRCB approved the revised D-1641 in March, 2000. The declaration states that SDWA presented certain evidence to the SWRCB during the hearing that resulted in D-1641. In addition, Mr. Herrick states in his declaration that he would present additional evidence to the SWRCB for a hearing to reconsider approving the Plan. Item 4 in the declaration states, however, that the additional evidence “was not submitted as part of the comment process leading to the approval of the Response Plan under D-1641 because it was assumed that such information having already been presented to the Board and referenced in comments would be acknowledged by the SWRCB.” (Emphasis added.) This statement in Item 4 indicates that this is not new evidence, and that since it allegedly was produced earlier, it is not evidence that could not have been produced earlier. Accordingly, the petition for reconsideration does not meet the criteria for citing new evidence as the basis for reconsideration.

3.2 Alleged Causes of Reconsideration and Discussion

3.2.1 Background

The DWR and the USBR prepared the Plan in response to Conditions 1(a)(3) and 2(a)(5) on pages 150 and 155, respectively, of D-1641. D-1641 conditions the SWRCB’s approval of the DWR’s and the USBR’s use of each other’s points of diversion in the southern Delta (known as Joint Point of Diversion, or JPOD) on numerous requirements, including a requirement that use of the JPOD shall not lower water levels in the southern Delta channels to a point where local

agricultural diversions are impaired.¹ The DWR and the USBR may only conduct JPOD operations after the Executive Director of the SWRCB has approved all required submittals, including a water level response plan. The DWR and the USBR are required to implement the Plan.

The current Plan replaced a temporary water level response plan that remained in effect for fifteen months. The temporary plan differed in its protections of southern Delta diversions from the current Plan. The temporary plan required JPOD operations to cease if water levels were inadequate at any location, without regard to whether the cause of low water levels was JPOD operations. The current Plan would not require JPOD operations to cease if the JPOD operations do not cause an incremental lowering of water levels or if there will be no diversions at a location and during a period when the JPOD operation will have an incremental effect on water levels.

By letter dated February 5, 2002, the SDWA objected to the Plan. SDWA argued that the Plan should be a component of an integrated South Delta Water Management Plan, which CALFED is developing. CALFED's South Delta Water Management Plan is not a condition of approval of the JPOD. SDWA also argued that JPOD operations should not be allowed when water levels are inadequate for agricultural diversions in the southern Delta, regardless of the cause. The SDWA has complained from time to time about water levels in the southern Delta, and it filed a formal complaint with the SWRCB on March 10, 1999, alleging that the low water levels were caused by the ongoing operations of the DWR and the USBR. By letter dated February 25, 2000, the SWRCB's Division of Water Rights (Division) offered to schedule a hearing on the complaint if the SDWA first provided prima facie evidence to support its complaint. The SDWA did not respond and the Division dismissed the complaint.

¹ Some of the conditions on use of the JPOD are required only during Stage 2 and Stage 3 diversions under the JPOD. Conditions 1(a)(3) and 2(a)(5) on pages 150 and 155, however, are applicable to all uses of the JPOD.

3.2.2 Alleged Causes for Reconsideration

SDWA asserts the following causes for reconsideration of the Executive Director's approval of the Plan.

3.2.2.1 In Cause A, SDWA asserts that the first added condition in the approval (Condition 1) is inconsistent with D-1641 because the condition, while it requires the DWR and the USBR to implement modifications to protect agricultural diversions that are susceptible to low water levels, only helps agricultural diverters who demonstrate that they have water rights at the times when the water level may be too low. Condition 1 provides added protection beyond that contained in the Plan and beyond that required in D-1641, but makes the added protection available only to water users who prove that they have water rights during the periods when water levels due to operations using the JPOD may be too low for diversions.

SDWA supports its argument by citing a finding in D-1641, on page 35, that the USBR is responsible for meeting water quality objectives for agriculture in the southern Delta. SDWA also cites a condition of approval of stage 3 of the JPOD on page 153 of D-1641 which requires the USBR to protect water levels in the southern Delta at levels adequate to divert water for agricultural uses. In effect, SDWA is arguing that agricultural diverters in the Delta should be able to demand special measures by the DWR and the USBR to facilitate their diversions even if they do not have water rights to divert water at their points of diversion at the times when the water may be too low to divert.

Neither of the quoted passages from D-1641 supports SDWA's assertion that the added condition is inconsistent with D-1641. The findings on the JPOD are in Part 11 of D-1641. The paragraph SDWA quotes on page 35 of D-1641 is in Part 6 of the decision, addressing the San Joaquin River Agreement. The paragraph on page 35² discusses whether the salinity levels

² The referenced paragraph on page 35 states in full: "Notwithstanding the unavailability of water to satisfy existing water rights in the southern Delta during certain periods, the SWRCB had determined that protection of agriculture in the southern Delta is in the public interest. Water quality objectives have been set for this purpose, and the USBR is responsible for meeting the Vernalis salinity objective. The months in which the southern Delta water users' needs exceed their rights to water under riparian claims are the same months in which water quality violations tend to occur. Consequently, the southern Delta agricultural uses should not be deprived of water of useable quality as a result of this decision. However, the SWRCB urges the SDWA to seek water supply contracts [footnote continues on next page]

will be adequate to meet the objectives in the water quality control plan for agricultural beneficial uses. It states the expectation that the southern Delta water users will have useable quality water even if some of the agricultural diverters do not have a right to divert it. It does not say that they can divert water without a right. In fact, the part of the paragraph that SDWA does not quote goes on to suggest that SDWA seek water supply contracts to fill its water supply needs during shortages.

As SDWA notes in introducing the partial quotation on page 153 of D-1641 of term (1)(d)(2), this term will not be applicable until the DWR and the USBR are authorized to divert under Stage 3 of the JPOD. In Stage 3, the DWR and the USBR will be able to use the JPOD for any purpose under their permits, at rates of diversion limited only by the physical capacity of the pumping plants. The DWR and the USBR will not be able to use the JPOD operations under Stage 3, however, until the limits on pumping rates in the Corps of Engineers permit are lifted and three permanent tidal barriers in the southern Delta or equivalent measures are in place to maintain water levels. Condition 2 of the Executive Director's approval specifically limits the approval to the conditions existing in autumn 2001, which do not meet the Stage 3 requirements. In other words, Stage 3 requirements are not applicable to the current Plan, and there are no Stage 3 operations authorized under the current Plan.

SDWA further argues that Condition 1 of the approval unfairly burdens southern Delta diverters by requiring them to prove they have water rights. SDWA misunderstands Condition 1. Condition 1 does not require southern Delta diverters generally to prove they have water rights before receiving the benefits in the Plan, but instead provides an additional benefit for those diverters who do prove they have water rights. Condition 1 also does not change the general requirement in Conditions 1(a)(3) and 2(a)(5) on pages 150 and 155 of D-1641 that JPOD operations shall not cause water levels for agricultural diversions to be lowered to the harm of water users. Conditions 1(a)(3) and 2(a)(5) on pages 150 and 155 in D-1641 effectively assume that the water users have water rights, and the conditions protect the water users. The SWRCB has no evidentiary basis to support SDWA's assertion that proving one's water rights in order to

to fill its water supply needs during water shortages. These shortages occur relatively frequently because of natural changes in the water supply." (Emphasis is added to the two sentences that SDWA did not quote in its petition for reconsideration.)

obtain the Condition 1 protections would be an unreasonable burden. Indeed, a diverter who does not have water rights should not be diverting water.

Because Condition 1 requires the DWR and the USBR to do special work that may entail some expense, including implementing modifications to diversion facilities in areas of the southern Delta where diversions are susceptible to low water levels, Condition 1 is restricted to circumstances where the diverter is a water right holder. This condition requires that the DWR and the USBR take additional measures, such as modifications to siphons, to help water right holders divert water if their diversions are in locations that are susceptible to low water levels. This condition should help both the projects and the southern Delta water right holders, since after completing the modifications, the JPOD will likely be unrestricted more often, and the diverters who have water rights will have fewer problems with their diversions. This order modifies Condition 1 of the approval to clarify its meaning.

3.2.2.2 In Cause B, SDWA asserts that the approval is based upon a “factual” mistake regarding Delta water rights. SDWA argues that all diverters downstream of the tidal barrier sites in the southern Delta are by definition riparian water right holders entitled to protection from inadequate water levels, because their lands are below sea level. Therefore, SDWA argues, the protections in the Plan should be accorded to all riparian diverters and all senior appropriators.³ SDWA cites no legal authority for its argument that diverters whose lands are below sea level have riparian rights to any water that is in the surrounding channels. The claims of SDWA to riparian rights and other water rights are analyzed in D-1641, and there is no basis in the petition for reconsideration to change those analyses. This cause is denied.

3.2.2.3 In Cause C, SDWA asserts that the approval excuses violations of the previous, temporary, water level response plan, which stated: “To obtain approval beyond one year, the DWR and the USBR must complete their program of diversion modifications and establish an ongoing program of dredging in the southern Delta.” SDWA asserts that the SWRCB should require the ongoing maintenance dredging program that was required in the temporary approval.

³ Interestingly, this argument excludes water users who might not have water rights, even though the Plan in fact protects them. The water right holders do receive additional protection beyond that which is provided to all water users, however, under Condition 1 of the Executive Director’s approval.

SDWA argues that the dredging program is required mitigation under the California Environmental Quality Act (CEQA) for impacts to water elevation caused by the DWR's and the USBR's export pumping. This is not, however, a CEQA issue, and water depth problems for agricultural diversions are not identified in the environmental documentation for D-1641 as a significant impact on the environment during Stage 2 JPOD operations (JPOD Alternative 9).

The SWRCB's purpose in D-1641 of requiring the Plan and imposing other terms and conditions to protect agricultural diverters in the southern Delta is to prevent injury to other legal users of water under Water Code section 1700, et seq.,⁴ in connection with its approval of the water right change petitions for the JPOD. No term or condition in D-1641 specifically requires dredging. Nevertheless, dredging is potentially a means of ensuring that agricultural water users in the southern Delta are not deprived of water due to JPOD operations. Dredging does not affect the water levels in the Delta, but it may prevent lowered water levels from causing injury to agricultural water users. Dredging removes material from the bottom of the Delta channels, increasing the depth of the water in the channels. With deeper water, the agricultural diverters are less likely to pull air into their pumps or siphons when they attempt to divert water. If they can divert the water they need, it is unlikely that they will be injured even if the water level is lowered. Accordingly, dredging is a potential means for the DWR and the USBR to meet the requirement in D-1641 to avoid injuring users of water in the southern Delta. It is not, however, the exclusive means of avoiding injury.

SDWA argues that the SWRCB should reject the Plan or mandate dredging, because the commitment in the Plan regarding dredging does not ensure that dredging will be implemented. SDWA is misreading the approval of the Plan. The Executive Director's approval states that, "The Plan also commits them to implement a site-specific dredging program to benefit agricultural diversions, subject to their securing the necessary regulatory permits." This

⁴ Water Code section 1702 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." To avoid injury to legal users of water in the southern Delta, the SWRCB based the conditions on the JPOD approval on an assumption that there are some legal users of water in the southern Delta who could be injured by lower water levels caused by JPOD operations. Because water levels do not vary between neighboring diversions because of the existence or absence of water rights, some illegal diverters may take advantage of the water level protections required for legal users of the water under the JPOD approval.

statement is in fact a requirement that the DWR and the USBR treat the site-specific dredging program as part of the Plan.⁵ This statement is followed by a sentence stating, “Continuing approval is contingent upon these commitments being met.” In other words, the approval says that if the DWR and the USBR do not implement a site-specific dredging program, the Executive Director can withdraw the approval of the Plan. This order adds a condition requiring that the DWR and the USBR apply for and diligently pursue dredging permits.

3.2.2.4 In Cause D, SDWA asserts that the approval is inadequate to satisfy mitigation requirements under CEQA. As explained above, this is not a CEQA issue.⁶ Apparently, SDWA is concerned that in the absence of permanent barriers installed in the channels of the southern Delta, implementation of the Plan will not be adequate to avoid impacts due to JPOD operations.⁷

SDWA points out that the DWR and the USBR have not yet completed the mitigation measures it believes are needed to avoid the incremental water level impacts of the JPOD. The measures SDWA is requesting to be completed before JPOD operations can occur are dredging, temporary installation of portable pumps, and diversion modifications. SDWA also wants tidal barriers to

⁵ Because the SWRCB has no control over whether DWR and the USBR will be able to obtain permits, it would be disingenuous to delete the clause that acknowledges the need for dredging permits.

⁶ The purpose of the Plan is to satisfy a requirement under Water Code section 1702 to avoid injury to legal users of water when the SWRCB approves a change petition. The authorization of the JPOD operations is an approval of a water right change petition and is subject to the findings made under section 1702 to protect southern Delta water right holders. Thus, the conditions imposed on the DWR and the USBR are to satisfy section 1702.

⁷ SDWA quotes a finding on pages 104-105 of D-1641, arguing it is CEQA mitigation. SDWA quotes the finding as follows: “However, D-1641 at pages 104-105 clearly requires the projects to not adversely affect water levels by developing a Response Plan to ‘insure water levels in southern Delta channels are not lowered to elevations inadequate for diversion of water for agricultural uses.’” This is a misquote. In fact, the sentence in D-1641 reads: “Prior to using the JPOD, the DWR or the USBR will be required to consult with SDWA and prepare and submit to the Chief of the Division of Water Rights a response plan specifying actions the DWR or the USBR will take to ensure that water levels in southern Delta Channels are not lowered to elevations inadequate for diversion of water for agricultural uses because of increased pumping resulting from the JPOD.” (Emphasis added.) SDWA’s use of this quotation makes it appear that SDWA is trying to rewrite D-1641 to require that the DWR and the USBR protect water levels for agricultural diversions regardless of the cause of water level changes, instead of requiring protection against the incremental effects of approving the JPOD changes. With respect to water levels, the conditions in D-1641 requiring preparation of a water level response plan protect agricultural diversions in the southern Delta only from the incremental effects of the JPOD operations, and do not protect against water level impacts that have other causes.

be constructed in the Delta channels to raise the water levels in the channels. Permanent tidal barriers or their equivalent are not required until the DWR or the USBR wants to conduct Stage 3 JPOD diversions. SDWA asserts that the Executive Director's approval is an abuse of discretion in that the mitigation measures have not yet been done.

Although parts of the above mitigation measures are not currently in place, the conditions listed in the Plan under which JPOD operations can be conducted require certain of these mitigation measures, as well as forecasting, to avoid water level problems during JPOD operations. As appropriate, the mitigation measures in the Plan that will be used during JPOD operations include the presence of three temporary tidal barriers, operational constraints, the use of forecasting procedures, and temporary installation of equipment including portable pumps at the locations of agricultural diversions. The Plan also requires additional analyses of water levels, updated modeling, and preventive measures that include site-specific dredging if permitted. Obviously some measures, such as operational constraints, forecasting, temporary installation of barriers or equipment, and site-specific dredging cannot be done once for all times. These must be done at or near the time of the JPOD operations. Construction of permanent tidal barriers is a longer-term measure, and it will require permits and careful planning.

If the temporary tidal barriers are not in place, at least one of the conditions in the plan under which JPOD operations may be conducted will be precluded. If the DWR or the USBR does not implement the appropriate measures during JPOD operations, and impacts result to agricultural diversions, the DWR or the USBR will be subject to enforcement measures by the SWRCB. Enforcement measures, not disapproval of the Plan, are the appropriate response to a failure to do the mitigation required under the Plan. Therefore, this order does not require that the mitigation measures precede approval of the Plan. This cause is denied.

3.2.2.5 In Cause E, SDWA asserts that JPOD operations should not be allowed at any time that local water levels are inadequate for agricultural diversion or public trust needs, regardless of whether the inadequate water levels are caused or exacerbated by JPOD operations. In other words, SDWA is asking that the SWRCB prohibit JPOD operations during periods when non-JPOD operations are already causing water level problems and the JPOD operation does not cause additional harm. SDWA points out that in the temporary plan that preceded the current

Plan the DWR and the USBR had agreed not to use the JPOD at times when water levels in the southern Delta were inadequate due to non-JPOD causes. SDWA interprets the current Plan as allowing JPOD operations to worsen low water levels if the water levels already are inadequate. SDWA argues that the Plan encourages the DWR and the USBR to impact water levels with their non-JPOD operations so that they can add the JPOD operations. SDWA's interpretation is not entirely accurate. Under the current Plan, if the water level is inadequate due to a non-JPOD cause, and the JPOD operation does not have an incremental effect on the water level, the DWR and the USBR can implement the JPOD operation. If the JPOD operation makes the water level incrementally lower, however, the JPOD operation must cease. In short, nothing in the Plan gives the DWR or the USBR an incentive to conduct non-JPOD export operations that would cause water level impacts.

SDWA's basic concern is that under non-JPOD operations, there are times when the water levels in the southern Delta are too low, or the water depth is too shallow, for the agricultural diverters to operate their siphons or pumps to take water from the channels of the southern Delta. Export pumping by the DWR and the USBR can be a major factor in water level changes. Water depth and water level problems also can be caused by low river flows entering the southern Delta, agricultural diversions in the southern Delta, tidal variations, fluctuations in atmospheric pressure, wind direction and velocity, and limited capacity in the channels. Effectively, SDWA is asking the SWRCB to use its conditional approval of the JPOD in D-1641 as if it were instead an order after an enforcement action aimed at requiring the DWR and the USBR to mitigate for water level impacts of their ongoing non-JPOD operations. The requirement for a water level response plan in D-1641 is not, however, part of an enforcement order.

The appropriate way for SDWA to raise its concern about ongoing impacts of export pumping on water levels in the southern Delta is by filing and pursuing a complaint with the SWRCB against the DWR and the USBR. On March 10, 1999, the SDWA filed such a complaint. On February 25, 2000, the SWRCB advised SDWA that it would schedule a hearing to consider the complaint if SDWA would first submit prima facie evidence to support the complaint. The SDWA did not respond, and the SWRCB dismissed the complaint. The SDWA can file another such complaint. If it does so, the SWRCB will expect SDWA to supply the evidence to prove its allegations.

3.2.2.6 In Cause F, SDWA asserts that the approval improperly sanctions a definition of harm in the Plan. The “definition” in the Plan states that “Water levels of concern shall be the levels at which ongoing or scheduled diversions in the southern Delta are no longer possible.” SDWA asserts that harm occurs when there is any diminution in the amount or ability to divert. Apparently, SDWA is interpreting the above sentence to mean that southern Delta agricultural diverters will not be able to divert all the water they need for their beneficial uses when water levels are at the “level of concern.” SDWA does not, however, provide any information that would confirm this view. Further, the SWRCB does not interpret the definition as meaning that the incremental effects of JPOD operations can deprive agricultural diverters of water. The purpose of the Plan and its approval is to prevent incremental impacts to agricultural diverters in the southern Delta due to JPOD operations.

3.2.2.7 In Cause G, SDWA asserts that the approval should mitigate for changes in non-JPOD operations that are facilitated by the availability of JPOD operations (i.e., the approval should mitigate for changes in which diversions are reduced during some periods of the year and increased at other times by using the JPOD when there is less harm to fish in the Delta). SDWA states that the DWR and the USBR have increased their non-JPOD diversions during some periods, principally the summer, to make up for decreased pumping at other times. SDWA argues that the Plan should address the effects of increased non-JPOD pumping on water levels.

The Plan is required only to address the incremental effects of JPOD operations, not other operations that could occur in the absence of the JPOD. Further, the record does not support SDWA’s assertion that the DWR and the USBR are taking advantage of the JPOD approval to change their non-JPOD operations in ways that cause adverse effects to water levels in the Delta. If non-JPOD export operations have changed, they have done so without needing additional approvals from the SWRCB. Further, the overall effect of D-1641, including the JPOD approval, is to reduce the annual exports of water by the DWR and the USBR. Exports may be further impacted by fish protection measures imposed by other agencies. The conditions of approving the JPOD in D-1641 do not apply to changes in operations that are allowed under other conditions in the permits of the DWR and the USBR. As is the case with SDWA’s concerns discussed above in subpart 3.2.2.5, the appropriate way for SDWA to address this concern is to file a complaint with the SWRCB. This cause is denied.

3.2.2.8 In Cause H, SDWA asserts that the approval should define the specific measures that will be adequate to offset the incremental effects of JPOD operations on water levels. Citing item b) under Condition II in the Plan,⁸ SDWA expresses concern that inadequate measures will be deemed adequate. SDWA wants the specific protections worked out in advance of approving the Plan, because SDWA believes the DWR and the USBR will not determine the specific protections until they have commenced a JPOD operation and SDWA complains about inadequate water levels. This concern is valid only if the DWR and the USBR continue to pump using the JPOD when the JPOD operation is causing an incremental effect to water levels and no immediate measures are implemented to offset the effects on water levels. Under the Plan, the JPOD operation could not occur if the measures were not implemented. This cause is denied.

3.2.2.9 In Cause I, SDWA asserts that the response plan should not allow the DWR and the USBR to assess a “fair cost” to in-Delta diverters as stated on page 4 of the Plan in the last sentence of the first paragraph under “Preventive Measures.” This statement in the Plan refers to measures in which the parties seek out the diversions that are most susceptible to having low water levels, and take actions to make the low water levels less likely to impair the diversions. Such actions could include dredging or other measures.

Since the purpose of the Plan is to mitigate the incremental effects of the JPOD, it is not clear why the Plan indicates that a cost should be assessed to the in-Delta diverters. Likewise, if the measures were intended to offset the effects of non-JPOD pumping by the DWR or the USBR, there appears to be no reason why the in-Delta diverters should pay for the measures, since the measures would apparently merely offset impacts of the export pumping. Therefore, this order includes a condition disapproving the sentence as a part of the Plan.

4.0 CONCLUSIONS

1. With the conditions added by the Executive Director, as modified herein, the Plan is adequate to satisfy the requirement in Conditions 1(a)(3) and 2(a)(5) on pages 150 and 155, respectively, of D-1641. SDWA requests, however, that the Plan be approved for only one year, and reviewed

⁸ Under item b), a JPOD action that does not meet the requirements under Condition I may occur if “Adequate measures are available to offset the incremental effects of the action to water levels of concern.” Under this provision, the DWR and the USBR would adjust their operations and install equipment to avoid adverse effects.

again. With a year's experience in operating under the Plan, any inadequacies may be exposed. This order therefore limits the approval of the Plan to one year.

2. SDWA's concerns regarding the effects of non-JPOD pumping by DWR and the USBR can be addressed in a complaint filed with the SWRCB. These concerns are not relevant to the Plan, which is meant to address only the incremental effects of JPOD pumping operations on water levels in the southern Delta.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied, with the inclusion of the following conditions in the March 12, 2002, approval by the Executive Director of the Water Level Response Plan submitted by the Department of Water Resources and the United States Bureau of Reclamation on January 28, 2002:

1. Condition 1 of the approval by the Executive Director is amended to read:

“With the permission of the agricultural water right holders involved, the DWR and the USBR shall implement physical modifications to agricultural diversion structures in the southern Delta as needed to protect any agricultural diversions that are susceptible to low water levels resulting from the incremental impacts of JPOD operations. Such modifications may include changes in the intake structures that will facilitate agricultural diversions from shallow water. The DWR and the USBR are required to implement such modifications only if the diverters demonstrate to the satisfaction of the Chief of the Division of Water Rights that they have a valid right to the water during the period when water levels due to JPOD operations may be too low.”

2. The last sentence of the first paragraph under “Preventive Measures” on page 4 of the Plan is deleted from the Plan. The deleted sentence reads: “It is the goal of the parties that such measures would be at fair cost to the diverters and would minimize any interference thereto.”

3. The DWR and the USBR shall, within thirty days after the date of this order, apply for dredging permits in the southern Delta to help ensure that agricultural water diverters will have adequate water depths at their points of diversion to divert water during JPOD operations. The DWR and the USBR shall diligently and expeditiously pursue the approval of the dredging permits and shall notify the Chief, Division of Water Rights, upon receipt of the permits.

4. This approval of the Plan shall expire on June 1, 2003. Prior to June 1, 2003, the DWR and the USBR may, under Conditions 1(a)(3) and 2(a)(5) on pages 150 and 155 of D-1641, seek a new approval of the Plan or may submit for approval a new water level response plan to be in effect after June 1, 2003.

CERTIFICATION

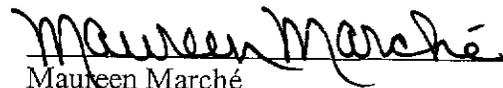
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 28, 2002.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: Gary M. Carlton

ABSTAIN: None


Maureen Marché
Clerk to the Board