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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)
)
Hearings to Determine Whether to Adopt Draft)
Cease and Desist Orders (CDOs) against the)
United States Bureau of Reclamation and the)
California Department of Water Resources)
(CDO Nos. 262.31-16 and 262.31-17); And)
To Consider Approval of Condition for the)
Water Quality Response Plan for Joint Point)
Of Diversion of Central Valley Project and)
State Water Project)

CLOSING BRIEF
OF THE CALIFORNIA
DEPARTMENT
OF WATER RESOURCES

I. Introduction

The California Department of Water Resources (DWR) requests that the State Water Resources Control Board (SWRCB) not adopt the proposed Cease and Desist Orders against DWR and the U.S. Bureau of Reclamation as there is no substantial evidence to support a finding of threatened violation of their water right permits. The SWRCB Enforcement team misapplied the regulatory requirement of D-1641 when evaluating the potential for a future violation of the water right condition implementing the south Delta water quality objective.

In addition, DWR urges the SWRCB to seriously consider the negative policy promoted by pursuing this enforcement action against DWR and Reclamation, which is contrary and counter-productive to the collaborative process developed during the last ten years to help resolve contentious Delta issues. In the mid-1990s, State and Federal agencies, stymied by the unproductive, adversarial approach of the Bay Delta hearings and the Endangered Species Act regulations, and interested in resolving competing resource needs in the Delta agreed to move forward through cooperation, open discussion, public involvement, and comprehensive planning. The CALFED Bay-Delta Program is central to this commitment. DWR strongly advocates the SWRCB take a broader view of how to improve and influence protection of state water quality than is possible through enforcement proceedings of threatened permit violations. The SWRCB has had a policy of implementing Delta water quality objectives through agreements proffered by the affected parties, such as the Revised Suisun Marsh Agreement and the San Joaquin River Group Agreement. The SWRCB should continue this positive policy and not destroy the progress made towards better management of Delta resources to which we, as State agencies, gave our commitments.

Finally, DWR requests that the SWRCB approve the 2005 Water Quality Response Plan with a similar condition as proposed by the SWRCB Division Chief as it is in the public interest to reasonably implement conditions required for the Joint Point of Diversion operations by the State Water Project and the Central Valley Project.

II. Summary of Facts

On May 3, 2005, the SWRCB, Division of Water Rights, sent notices to DWR and Reclamation of proposed Cease and Desist Orders (CDO) against each of them for a threatened violation of their water right permit condition implementing a south Delta water quality objective (WR-3; WR-4). At the request of DWR and

Reclamation, the SWRCB held a hearing to determine whether the CDO's should be adopted, or modified and adopted.

In April 2005, DWR and Reclamation submitted to the SWRCB a Water Quality Response Plan (WQRP) to protect senior water right users in the Delta during Joint Point of Diversion (JPOD) operations of the State Water Project (SWP) and Central Valley Project (CVP). On July 1, 2005, the SWRCB Chief of the Division of Water Rights (Division Chief) approved the WQRP. The Division Chief conditioned the approval requiring that DWR and Reclamation meet 1.0 EC at the southern Delta agricultural compliance stations if they meet the schedule and actions required in the proposed CDO (Condition 1). Four parties submitted petitions for reconsideration of the approval of the WQRP with Condition 1. On September 22, 2005, the SWRCB ordered the approval of the WQRP excluding Condition 1 and noticed a hearing on the petitions for reconsideration to be held concurrent with the hearing on the CDOs.

At the hearing to consider adoption of the CDO, the SWRCB Enforcement Team testified that DWR and Reclamation submitted letters and petitions to the SWRCB regarding proposed changes to their permit conditions indicating it was likely they would have difficulty meeting the 0.7 Electrical Conductivity (EC) objective and that south Delta water quality often exceeds the 0.7 EC in July and August in average to dry years (WR-1; Oct. 24 R.T. p. 44-45). The Enforcement Team also reviewed historical water quality data from 1996 to 2005 to confirm the likelihood that water quality would exceed 0.7 EC (WR-18; Oct 24 R.T. p. 44-48, 60). In addition, the Enforcement Team testified that DWR did not collect data or submit annual reports in compliance with its water right conditions. Therefore, to correct threatened violations of data collection and reporting, the Enforcement Team proposed additional corrective actions in a modified CDO that require DWR to report when data is not collected for more than 7 days and that restates the annual reporting requirement in D-1641 (WR-17; Oct. 24 R.T. p. 49-59).

DWR witnesses testified that the Enforcement Team's analysis of the threatened violation of Condition 6, which implements the southern Delta agricultural objective, was flawed because of an incorrect interpretation of the SWP permit condition (DWR-18). The SWRCB Enforcement Team failed to consider future hydrology and reservoir operations when evaluating future exceedance of 0.7 EC and failed to consider whether DWR could control conditions causing such exceedance (DWR-18; Oct 24 R.T. pp. 111, 138-145). DWR submitted evidence showing that the SWP has little affect or ability to control water quality in the south Delta, although the temporary barrier program does improve water levels, circulation, and water quality (DWR-19; DWR-20). In addition, DWR testified in rebuttal that the modified proposed CDO action to address collection of data is based on incomplete data, which DWR has now provided (WR-26; Nov 18 R.T. p. 235-240). DWR also testified that it has, or will soon, submit to the SWRCB the required annual monitoring reports and that this year's report will be submitted in early 2006. DWR will submit the report of 2005 monitoring by December 2006, as required by D-1641 (Nov 18 R.T. p. 238).

DWR testified on the approval of the WQRP for the JPOD operations (DWR-24). The testimony focused on the importance of JPOD to transfer water for agricultural, municipal and industrial uses, and the Environmental Water Account. DWR testified that including a change in the schedule for implementing the 0.7 EC objective, consistent with construction of the permanent operable gates, would provide for a more reasonable compliance with conditions required for JPOD operations (DWR-24, p. 2).

Many other parties with interests in the use of Delta waters testified with respect to potential harm from using south Delta channel water in the range of 0.7 to 1.0 EC during April through August. This information was admitted for purposes of showing degree of harm if an enforcement action is considered by the SWRCB and for showing possible harm if the special condition for the WQRP is approved.

III. ANALYSIS

A. The Cease and Desist Order is Defective on its Face and Otherwise is Not Supported by Substantial Evidence Showing a Threatened Violation of DWR's Permit Condition 6, Implementing the South Delta Objective.

A cease and desist order is an enforcement action authorized under Water Code Section 1831 (Water Code Section 1831; Oct. 24 R.T. p. 110). The SWRCB may issue a cease and desist order if it determines that a permittee has violated a condition of its water right permit (Water Code Section 1831(d)(2)). The Enforcement Team has only alleged the potential exceedance of a water quality objective, not a violation of a permit condition. In order for Condition 6 to be violated, there must be both an exceedance and a failure of adequate explanation therefore. Thus the draft CDO is deficient on its face. Moreover, even the allegation of future exceedance is not factually sustainable because the Enforcement Team has not provided substantial evidence showing future conditions in the Delta or that DWR would have the ability to control conditions causing an exceedance of 0.7 EC at the southern Delta compliance stations. For these reasons, the SWRCB should not issue the proposed CDO.

The SWRCB may issue a cease and desist order if it finds there is substantial evidence that DWR is threatening to violate its permit condition (*U.S. v State Water Resources Control Board* (1986) 182 Cal App. 3d 82,115; 227 Cal. Rptr. 161 (citing *Bank of America v. State Water Resources Control Board* (1974) 42 Cal. App. 3d 198, 212); Water Code Section 1831(d)(1)). When reviewing water rights, the SWRCB must have a reasonable factual basis in the record to support its action (*US v. SWRCB, supra*, 182 Cal App. 3d 82, 115 (citing *Bank of America v. State Water Resources Control Board, supra*, 198, 208)). The SWRCB Enforcement Team misapplied the regulatory requirement, failed to consider DWR's full permit condition in its analysis of a threatened violation, and failed to provide substantial evidence of a violation. A SWRCB decision to adopt an enforcement action based on this flawed analysis would be arbitrary and an

abuse of discretion (*Harris Transportation Co. v. Air Resources Board* (1995) 32 Cal.App.4th 1472, 38 Cal.Rptr.2d 431).

1. D-1641 Condition 6 Implementing the Southern Delta Water Quality Objective Is Complex and Includes Special Provision Regarding When Enforcement is Appropriate

When developing conditions to implement water quality objectives, the SWRCB should only require the permittee to be responsible for water quality degradation resulting from the permittees own operations (*U.S. v State Water Resources Control Board, supra*, 182 Cal App.3d 82, 126). Therefore, in D-1641, Condition 6, the SWRCB only found DWR responsible for water quality degradation in the south Delta resulting from its permits for SWP operations. Condition 6 is complex consisting of two components that must be met before an enforcement action would be appropriate: (1) an exceedance of the southern Delta objective occurred, and (2) conditions causing the exceedance was within the control of DWR, as the water right permittee for the SWP.

Condition 6 does not simply require DWR to operate the SWP to achieve the southern Delta 0.7 EC objective, but it provides an exception to this responsibility when conditions affecting southern Delta water quality are not within the permittees control (D-1641, Condition 6, p. 159). Reclamation has the same condition related to its water right permits for operating the Central Valley Project and the New Melones Project (D-1641, Condition 1, p. 159, 160, 162). In 2000, during reconsideration of D-1641, DWR informed the SWRCB that it would use the process established by Condition 6 to explain when the southern Delta agricultural objectives are not met due to factors beyond its control (DWR-18, p. 4).

Condition 6 of D-1641, provides:

“This permit [SWP] is conditioned upon implementation of the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, at the following locations in the southern Delta:

- a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
- b. Old River near Middle River (Interagency Station No. C-8; and
- c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

Permittee [DWR] has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of the Permittee.”

(D-1641, Condition 6, p159, for DWR Delta permits)¹ (Emphasis added)

Table 2, referenced in Condition 6, lists four compliance locations (the fourth is C-10 at Vernalis) where the water quality objectives are measured as 0.7 mmhos/cm EC from April through August and 1.0 EC from September through March. Compliance applies in all year types and is measured by a maximum 30-day running average of mean daily EC.

The SWRCB included the special condition in D-1641 because many factors influence southern Delta water quality and DWR and Reclamation are only

¹ This water right condition also applies to Reclamation in D-1641 as condition 1 at pages 159, 160, and 162, for USBR CVP Delta and New Melones permits.

partially responsible for conditions affecting this water quality (D-1641, p. 87-88). Southern Delta water quality is influenced by San Joaquin River inflow; tidal action; diversions of water by the SWP and CVP, and local water users; agricultural return flows; and channel capacity (D-1641, p. 86). DWR and Reclamation are only partially responsible for salinity problems in the southern Delta because of hydrologic changes caused by export pumping (D-1641, p. 88). The Board also found that exceedance of the objectives in the interior Delta is in part due to water quality impacts within the Delta from in-Delta irrigation activities (D-1641, p. 87).

The SWRCB found that with the temporary rock barriers or with permanent operable gates, DWR may not always be able to control water quality in the southern Delta (D-1641, p. 8-12, 79, and 86-87). The SWRCB noted that “construction of the permanent barriers alone is not expected to result in attainment of the water quality objectives. . . . and that operation of the temporary barriers should achieve water quality of 1.0 mmhos/cm at the interior stations under most hydrologic conditions” (D-1641, p. 88). Therefore, based on this evidence that DWR has limited ability to control water quality in the southern delta, the SWRCB conditioned DWR’s obligation to meet the southern Delta objective only if an exceedance was within its control (Id.). This provision is critical to determining if a violation of the permit condition occurs and an enforcement action should be taken, such as the proposed CDO.

2. Enforcement Team Misapplied D-1641 Regulatory Requirements When Evaluating If DWR Threatens to Violate Permit Condition 6.

This issue before the SWRCB is whether it should adopt a cease and desist order based on DWR’s threat to violate its permit Condition 6, not if water quality in the southern Delta may exceed 0.7 EC during April through August (Water Code Section 1831(d)(2)). The Enforcement Team and other parties at the hearing, such as South Delta Water Agency (SDWA), Central Delta Water

Agency (CDWA), and San Joaquin County, appear to have confused the southern Delta water quality objective listed on Table 2 as the condition of DWR's SWP water right permit. The 0.7 EC on Table 2 is the water quality objective the SWRCB determined would reasonably protect agricultural beneficial uses in the southern Delta (D-1641 p. 5-6; 1995 Water Quality Control Plan). The SWRCB may implement water quality objectives by restricting waste discharges or by amending water rights and assigning responsibility to entities holding the rights (Water Code Sections 13241 – 13243; D-1641, p. 5; *U.S. v. SWRCB*, supra, 182 Cal App. 3d 82, 124-125). In D-1641, the SWRCB assigned Condition 6 to DWR's SWP water right permits to help to achieve the southern Delta objective.

a. DWR's Ability to Control Southern Delta Water Quality.

The SWRCB Enforcement Team evaluation and conclusion that DWR threatens to violate its water right permits focused on the first component of Condition 6, providing evidence to show if exceedance of 0.7 EC is likely in the future until about 2009 (WR-1). The Enforcement Team ignored the second component of Condition 6 requiring a showing of cause of exceedance and the ability of DWR to control the cause. The Enforcement Team, in the "Facts and Information" supporting the CDO, recites the first sentence of DWR's south Delta permit condition but fails to consider the critical two sentences in the condition that specifically addresses enforcement (WR-17, p. 2; D1641, p. 159, Condition 6). The witness for the Enforcement Team, Mr. Larry Lindsay, did not provide evidence of DWR's ability to control south Delta salinity and failed to even consider the ability of the SWP to meet the 0.7 EC objective (Oct. 24 R.T. pp. 111, 162, 184, 189, and 190).

Mr. Lindsay knew that the permit condition included the provision that, prior to enforcement, DWR could provide an analysis of whether an exceedance was within its control (WR-1 pp. 2-3; Oct. 24 R.T. p. 161). However, Mr. Lindsay only

considered whether the 0.7 EC objective would be exceeded to conclude that DWR threatened to violate its permit conditions (WR-1, p. 5; Oct. 24 R.T. p. 111). He found, based on his review of historical EC data, that the water quality objective will be exceeded in the next few years, and therefore, there is a “threat of violation of the 0.7 EC objective” (WR-1, p. 5). Mr. Lindsay evaluated the potential for DWR to “violate” the water quality “objective” of 0.7 EC but not if DWR would “violate” its permit Condition 6 (Id.). The proper analysis to determine a violation would have been a consideration of both components of Condition 6.

b. Future Hydrology and Reservoir Operations Will Affect the Likelihood of Water Quality Exceeding 0.7 EC

The Enforcement Team did not provide any evidence about future hydrology and reservoir operations that will affect water quality in the southern Delta and that would support finding an exceedance of 0.7 EC will occur prior to 2009 (Oct. 24 R.T. pp. 138-145, and 189). The Enforcement Team submitted historical water quality data from 1996 to 2005 to show that in average and dry years water quality would exceed 0.7 EC during April through August (WR 1; WR-18; Oct 24 R.T. p. 44-48, 60). On cross-examination, Mr. Lindsay testified that he did not look at current or future operations of reservoirs upstream of the southern Delta on the San Joaquin River, or ask DWR or USBR for 2006 operating plans of their projects to support a finding of future permit violations (Oct. 24 R.T. p. 138-145).

The Enforcement Team did not consider 2006 probable water year-type, hydrology, or reservoir operations and therefore its evaluation of the likelihood of exceeding 0.7 EC is incomplete and should not be given much weight (Oct. 24 R.T. p. 138-145). The SWRCB should give little weight to evidence related to future water quality conditions, beyond what is immediately ahead, because such evidence is closely related to the future weather condition, which is unpredictable. DWR believes the Enforcement Team’s claim of threatened

violation of the south Delta permit condition so for in the future as 2009 must be arbitrary because it does not know weather conditions for that time. An enforcement of a threatened violation of water quality conditions that are dependent on hydrology and reservoir operations should be restricted to the near future when hydrology is better defined, such as in March or April of that water year, after winter precipitation and snow fall have been measured.

Past hydrological records may not reliably predict water quality conditions. For Example, in February 2005, DWR and Reclamation were concerned that they would have difficulty controlling south Delta water quality without the permanent operable gates. They submitted a temporary urgency change petition to the SWRCB to change the time schedule for the effective date of the 0.7 EC objective. The SWRCB denied the petition partly because it found no basis to claim an urgent need for the change (DWR-18, p. 11). DWR did not contest this denial because it knew in late March that the wet conditions on the San Joaquin River improved water quality in the southern Delta, reducing its concern about controlling conditions to achieve 0.7 EC (DWR-18e). It was not until late March, however, that DWR or the SWRCB could make a decision about water quality in the southern Delta. Therefore, DWR finds the Enforcement Team's claim of an exceedance of 0.7 EC in 2006, 2007, or 2008 arbitrary and should be given little weight as evidence.

The Enforcement Team also did not consider future changes in salinity discharged into the San Joaquin River due to improved water and land management upstream of the Delta (DWR-18A). Millions of dollars have been spent in the last 10 years to reduce saline drainage into the San Joaquin River from the areas upstream of Vernalis (DWR 18A, p.10-12.). The drainage management programs, such as the Grassland Bypass Project, have been very effective in reducing salt loads into the River (DWR-18A, p. 7-9). Since 1995, conditions have improved partly due to improved hydrologic conditions and also because of additional measures taken by DWR, Reclamation, and other

collaborating agencies (DWR-18A, p.2). Reclamation has been in compliance with the salinity objectives at Vernalis the last 10 years (DWR-18A, p.2-3). The Enforcement Team's evaluation of the potential for future exceedance of the 0.7 EC objective did not review effects of improved land and water management upstream of the Delta on the San Joaquin River system. If efforts continue to reduce salt loads to the San Joaquin River, the 30-day average EC measured in the southern Delta may be lower than occurred in the past under similar hydrologic conditions. Such factors affect the reliability of the Enforcement Teams' evaluation of future water quality conditions in the southern Delta.

c. DWR Evidence Demonstrates Water Quality in the South Delta is Predominantly Influenced by the San Joaquin River and Local Discharges

DWR evidence demonstrated that the source of salinity in the southern Delta is primarily from San Joaquin River and local discharges and that the three southern Delta compliance locations are affected differently by hydrology and sources of water (DWR 20). DWR provided new evidence from water quality modeling that improves the understanding of the factors influencing south Delta water quality. The evidence is not submitted for purposes of changing the water quality objective, but is used to demonstrate what information the SWRCB would need to consider when determining if an exceedance is beyond the permittee's control. The evidence demonstrates that an evaluation of an exceedance of 0.7 EC should be specific for each compliance location because of the effect of local discharges on water quality (DWR-20).

The hydrology of the south Delta area is distinguishable from other areas of the Delta because it is heavily influenced by San Joaquin River flows and water quality, as well as local discharges (DWR-20). The south Delta does not receive significant contribution of water from the Sacramento River except when the San Joaquin River flows are below about 1000 cfs or if the temporary barriers are in

place (DWR-20, pp.1 and 8). Because the SWP does not include any facilities on the San Joaquin River system, it has no ability to control flows and drainage from the San Joaquin River into the Delta (*US v SWRCB, supra*, 182 Cal App. 3d 82, 121; Nov 17 R.T. p. 156).

DWR investigated what control it might have over south Delta water quality by reducing or increasing SWP export pumping at its Banks pumping plant (DWR-20). To understand the effects of this investigation, DWR first analyzed the source of the water that occurs in the south delta channels in the areas of the compliance stations (C6, C8, and P12). This investigation, using historical simulations of measured field data, shows that water quality in the south Delta at the three locations is heavily dependent on San Joaquin River water and in-Delta return flows (DWR-20). The analysis at Brandt Bridge (C-6) indicates that water quality is composed entirely of San Joaquin River water and in-Delta returns unless there is reverse flow at Brandt Bridge (DWR 20, p. 1, 3-6, 12-15).

Installation of the temporary rock barriers does not influence the source of water at Brandt Bridge (DWR-20, p. 15 (Figure 3, bottom graph showing no other source of water during 1998 – 2005 when temporary barriers installed). In addition, analysis using field data indicates that average degradation from Vernalis to Brandt Bridge is approximately 8% (DWR-20, p. 5-6).

DWR's analysis of water quality at Middle River near Old River (C-8) shows the water quality heavily dependent upon the flow in the San Joaquin River and in-Delta return sources (DWR-20, p. 6-7, 16). However, if the temporary rock barriers are in place, other sources of water may influence water quality at this location and at times, reduce salinity (Id.). The compliance station at Old River at Tracy Road Bridge (P-12) is farther from the San Joaquin River than the other two stations (DWR-20, p.7-8, 17). Old River at Tracy Road Bridge station is more strongly influenced by the temporary barriers and when they are installed, other sources of water influence water quality in this area (Id.). When the temporary barriers are not in place, the water quality at the Old River at Tracy

Road Bridge station is dependent on San Joaquin River flow and in-Delta sources (DWR-20, p. 8).

After determining the source of water at each compliance station, DWR studied the effects of increasing and decreasing the SWP export pumps on water quality (DWR-20, pp. 8-13). The results show that changes in SWP exports do not effectively control water quality in the southern Delta at the three compliance locations (Id.). However, more investigation is needed to understand the factors affecting water quality in Old River at Tracy Road Bridge (Id., p. 11-12).

To avoid arbitrary enforcement of water quality objectives, the SWRCB crafted the southern Delta permit Condition 6 to allow the permittee to show the cause for increased salinity in the south Delta. The analysis of cause is necessary because a permittee should not be responsible for conditions it cannot control.

d. DWR's Statements Supporting a Change Petition Should Not Be a Basis for Finding a Threatened Violation of its Permits

The Enforcement Team used statements by DWR at SWRCB workshops for revision of the 1995 WQCP and in a change petition submitted to the SWRCB, requesting a revised schedule for the 0.7 EC objective, as evidence of DWR's threat to violate its permit conditions (WR-6, WR-7, Oct 24 R.T. p. 44). However, when DWR submitted the change petition, it was not suggesting it would violate its permit conditions (DWR-18, p. 10-13). DWR and Reclamation noted in their transmittal letter for the petition that the SWRCB has specific authority to not enforce noncompliance of the south delta objective if it finds an exceedance is beyond their control (DWR-18B, p. 4). Despite the specific condition indicating enforcement might not be taken, DWR and Reclamation submitted the petition for purposes of adjusting the implementation time schedule to be consistent with the construction schedule of the permanent operable gates and establish reasonable compliance requirements (DWR-18, pp. 10-13).

The purpose of the change petition was to allow the SWRCB the opportunity to adaptively manage its water right decision to reflect current information. DWR has in the past informed the SWRCB when such adaptive management actions on their part would be in the public interest and the SWRCB has responded positively to these requests (e.g., changes in Suisun Marsh standards; 2004 changes in D-1641 in response to the Jones Tract levee failure). DWR had every expectation that the SWRCB would respond similarly to the change petition request related to the southern Delta standards.

DWR has been diligent in pursuing the physical solutions necessary to help achieve southern Delta water quality but factors beyond its control and actions necessary to comport with the CALFED process have extended the implementation schedule of the permanent operable gates (Nov. 18 R.T p. 95-97). DWR believes that the SWRCB should take these factors into consideration and adjust the implementation schedule for the southern Delta standards in D1641 accordingly. DWR believes the SWRCB could find such a change would provide a reasonable schedule for compliance and be in the public interest (*US v SWRCB, supra*, 182 Cal. App. 3d 82, 141-142 (under reserved jurisdiction SWRCB may impose conditions, after making necessary findings, as would in its judgment best serve the public interest)).

The SWRCB is an active member of the CALFED and understands the importance of working cooperatively through regulatory issues in ways that protect the public interest while maintaining the integrity of the regulatory agencies. The proposed CDO is the antithesis of the CALFED process and would revert the State back to adversarial conflicts that plagued the State in the early 1990's. The SWRCB should reject the CDO based on policy grounds because there are better, more cooperative ways to make progress in achieving southern Delta water quality objectives. Adoption of the CDO would be the SWRCB walking away from the principles of the CALFED process.

3. CDO Corrective Actions to Redress Threatened Violation of South Delta Condition 6 are Inappropriate.

If the SWRCB decides that facts do not support a finding of a threatened violation of Condition 6, it need not consider the Corrective Actions proposed in the CDO, as no remedy is required. However, if the SWRCB should consider adopting the CDO, DWR believes that the proposed Corrective Actions are unnecessary and inappropriate. If the CDO were adopted, DWR would be required to comply with the following Corrective Actions and time schedule:

- Time Schedule and Corrective Actions 1 and 4 - ensure that the permanent operable gates identified in the SDIP are installed and operational by January 1, 2009, that DWR implements a schedule for constructing the gates as approved by the SWRCB Executive Director, and reports every 3 months the status of construction (WR-17, Attachment CDO p. 3),
- Corrective Actions 2 and 3 - report to the SWRCB any projected violation or actual violation of the 0.7 EC south Delta objective and actions proposed or taken to curtail the projected or actual violation (WR-17, Attachment CDO p. 3).

a. Time Schedule to Ensure Installation of the South Delta Permanent Gates, a Project Subject to CEQA, is Inappropriate.

DWR does not believe an enforcement action is necessary or appropriate to ensure construction of a complex project such as the permanent operable gates that is subject to the California Environmental Quality Act (CEQA). The time schedule and Corrective Actions 1 and 4 would require DWR to ensure that the permanent operable gates are installed and operational by January 1, 2009 (WR-

17, p.3). As with any complex CEQA project, DWR cannot control all the factors influencing a project schedule and guarantee that the project will be constructed by a specific date. Also, CEQA requires the project proponent use its independent judgment to determine if a project should be approved (Publ. Res. Code Section 21082.1; CEQA Guidelines Section 15092). The corrective action, however, requiring implementation of an approved time schedule and construction by 2009 appears to prejudge the outcome of the CEQA process and would be inappropriate.

In addition, the corrective action would require DWR to regularly inform the SWRCB of progress on construction, which is not a necessary enforcement action. As part of its CEQA compliance, DWR will hold informational meetings and provide information on its internet website so all interested parties, including the SWRCB, can be kept up-to-date on the status of the permanent gates (Public Resources Code Section 21080.4, 21082.1, and 21092.5; CEQA Guidelines Sections 15086, 15087, 15088, 15201 (requiring public disclosure of project). At the CDO hearing DWR provided a time schedule to the SWRCB for the proposed permanent gate project (DWR-23). The November 10, 2005, release of the Draft Environmental Impact Statement / Environmental Impact Report for the proposed South Delta Improvement Project (Draft EIS/EIR) is evidence that DWR and Reclamation are diligently pursuing the gates (Nov. 17 R.T. p.163, 209-210). Because the information regarding progress on the gates will be available pursuant to CEQA and DWR is diligently pursuing the project, the SWRCB does not need to use an enforcement action for this purpose.

b. Exceedance of 0.7 EC Without Consideration of other Factors Does Not Establish a Permit Violation

As discussed above, the Enforcement Team misapplied the regulatory requirements of D-1641 when it evaluated the potential for DWR to violate its right permit condition. DWR objects to the use of the term "violation" in

Corrective Actions 2 and 3 because it assumes that any exceedance of 0.7 EC would be a violation of Condition 6, which is not the case (WR-17; Oct 24 R.T. p. 72 -73). This assumption of a violation precludes DWR the opportunity to show that an exceedance was caused by conditions beyond its control, and therefore not a violation of the permit.

The Corrective Actions 2 and 3 also infer that DWR would take corrective actions to avoid or curtail a violation by releasing SWP reservoir water or curtailing export pumping (Id.). DWR demonstrated during this hearing that changes in SWP operations have limited affect or control on water quality in the south Delta, beyond the effects provided by the temporary barrier project (DWR-19; DWR-20). Therefore, these Corrective Actions suggest inappropriate and an arbitrary means to redress the threatened violation.

B. CDO is Inappropriate Because DWR Complies with its Compliance Monitoring Requirements and the Threat of Violating an Annual Report Deadline will not Result in Harm Requiring a Remedy.

DWR's chief of the Environmental Water Quality Estuarine Studies Branch testified during rebuttal that the environmental compliance monitoring program (EMP), a component of the Interagency Ecological Program (IEP) is fully committed to meeting DWR's permit conditions to monitor and report water quality in the Delta (See D-1641, Condition 11, page 149; Nov. 18 R.T. p. 238). The SWRCB Executive Director, Celest Cantu, is a Director for the IEP and is regularly informed of the monitoring required in the Delta. (Nov. 18 R.T. p. 238).

The modified CDO would require DWR to report to the Executive Director if EC data at Interagency Stations C-8 or C-10 is not collected for more than 7 consecutive days (WR-17, Attachment CDO p. 3 and 4, Corrective Actions 5 and 6). In addition, the CDO would require DWR to submit the annual monitoring reports beginning with the December 1, 2005, report required by Condition 11

(WR-17, Attachment CDO p. 3 and 4, Actions 5 and 6). The SWRCB should not adopt the CDO for these purposes because DWR provided evidence that it will collect and report the required monitoring data and there is no threat of violation of this permit condition. In addition, the CDO should not be adopted to force submittal of the annual monitoring report because no harm would occur to other water users if this report is submitted in early 2006, therefore no remedy is needed.

1. Data Collection

The Enforcement Team submitted evidence suggesting that DWR failed to collect data over several extended periods during 1996 to 2005 (WR-1; WR-19). The Enforcement Team received additional data from DWR prior to the hearing but after submittal of the written testimony. The additional data showed that DWR had not failed to collect the data as originally portrayed (WR 19). The corrected information shows that DWR had few days when data was not collected. Since 1999 the longest period where data was not collected, during the period of April through August, was 5 days (Nov 18 R.T. p. 242).

In addition, in October 2005, DWR submitted a letter to the SWRCB indicating that DWR installed telemetered monitoring gages at two of the south delta compliance locations (C8 and P12) that were not previously telemetered (DWR-26). Data from all three south Delta locations and from Vernalis are transmitted on a real-time basis and posted on the California Data Exchange Center (CDEC) website (<http://cdec.water.ca.gov/>) (Id.). The compliance monitoring staff at DWR and Reclamation's Project Operations monitor and track water quality at these stations in near real-time. DWR also reports the daily and 30-day average EC values for the stations on its daily water quality report, which is posted on the internet at <http://wwwoco/cmplmon/reports/wqreport.html>(Id.). These facts update and correct the Enforcement Team's information presented during the

CDO hearing and show that there is no evidence that DWR threatens to violate its permit conditions for collecting and reporting data in the future.

2. Annual Reporting

Within the last 18 months, DWR has completed and delivered the 1997-2000 and 2001-2002 annual monitoring reports to the SWRCB required by D-1641 (D-1641, Condition 11, p.149; Nov 18 R.T. p. 238). The 2002-2003 report is in the final editing stage and will soon be submitted (Id.). The 2004 report will be completed and submitted this winter (Nov. 18 R.T. p. 238). Other responsibilities of the DWR monitoring program staff include studies and investigations of the potential effects of water operations on the estuary (D-1641, Condition 11, p. 149; Nov 18 R.T. p. 244). The responsibility to comply with this D-1641 requirement reduces staff time to prepare reports when unexpected events arise in the Delta. This occurred in 2005 when DWR began intense investigations of the current pelagic fish decline. Because of the time sensitive nature of addressing endangered species issues, DWR monitoring staff have been working on the pelagic fish issues. Despite the need to study these issues, DWR will meet its annual reporting requirement in 2006 (Nov 18 R.T. p. 238).

Although DWR will miss the December 1, 2005, due date for the 2005 annual report (reporting on 2004 water quality), it will submit the report in early 2006 (Nov 18 R.T., p. 238). DWR does not believe any water user will suffer harm from the annual monitoring report being submitted a few months late because the information summarized in the annual report has already been made available to the SWRCB and the public on a near real-time basis through CDEC. Therefore, an enforcement action is not needed to provide a remedy because no harm will result from the lateness of the report. DWR's rebuttal testimony indicates that all other reporting requirements will be met and there is no basis for finding a threatened violation of DWR's permit conditions.

C. SWRCB Should Approve the Water Quality Response Plan with A Condition Similar to that Approved by the Division Chief to Best Serve the Public Interest.

The SWRCB has broad authority to implement and enforce water quality objectives (Water Code Sections 1253 and 13000 et seq.; *U.S. v SWRCB, supra*, 182 Cal. App. 3d 82, 113). The Legislature confers broad discretion upon the SWRCB to impose conditions upon appropriation permits which “in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated” (*Id.*). Based on this broad authority, the SWRCB should find that the approval of the WQRP including a condition similar to the Condition 1 approved by the SWRCB Division Chief is reasonable and within the public interest.

In D-1641, the SWRCB delegated to the Division Chief the responsibility to review and approve the WQRP to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of JPOD to the injury of water users in these areas (D-1641, Condition 2(a)(5), p. 156). When determining the appropriateness of the Division Chief’s approval, the SWRCB should consider if facts support finding that no significant water quality degradation will result from JPOD if Condition 1 is part of the approval. DWR evidence during this hearing shows that operation of the SWP Banks pumping plant does not significantly affect south Delta water quality (DWR-20). Therefore, operation of the SWP for JPOD will not significantly cause degradation of water quality in this area, supporting the Division Chief’s approval. DWR requests that the SWRCB recognize the appropriateness of this approval but approve a similar condition based on findings from this hearing under its broad authority and the public interest.

The SWRCB could use its broad discretionary authority to formulate a special condition, like that approved by the Division Chief, for the WQRP that best

conserves and utilizes the water in the public interest (Water Code Section 1253). In other words, because JPOD is used for transfer of needed water supply, it is reasonable to condition approval of the WQRP in a manner that requires compliance on a schedule that furthers the reasonable use of water if no harm would result to other water right holders. DWR testimony on the approval of the WQRP for the JPOD operations explained the importance of JPOD to transfer water for agricultural, municipal and industrial uses, and the Environmental Water Account (DWR-24, p.2). DWR testified that including a change in the schedule for implementing the 0.7 EC objective would provide for a more reasonable compliance with conditions required for JPOD operations and would not cause significant harm to other beneficial uses (DWR-24, p. 2). The evidence presented during the CDO hearing showed that SWP export pumping does not significantly affect south delta water quality (DWR-20). In addition, the evidence on the potential of harm from water quality of 0.7 and 1.0 EC, in April through August, did not demonstrate significant harm to agriculture, as discussed below. Therefore, the SWRCB could condition the WQRP for the JPOD operations with a schedule that allows such operations if water quality does not exceed 1.0 EC, because there will not be a significant effect on water quality and water users.

1. No Significant Harm from Water Quality of 0.7 to 1.0 EC during JPOD Operations

During the hearing for the CDO and WQRP, much of the evidence was submitted with respect to showing whether channel water salinity of 0.7 EC to 1.0 EC would harm agriculture and other beneficial uses of water. With respect to the hearing issues on whether to adopt the proposed CDO, the SWRCB would only need to consider harm if it determines that DWR threatens to violate permit conditions and must consider harm to determine liability and fashion remedies (Water Code Sections 1052, 1055, and 1835). As discussed in Part A and B above, DWR does not believe that substantial evidence supports finding a threatened violation

of DWR permit conditions and the SWRCB does not need to address harm related to the CDO.

DWR requests, however, that the SWRCB consider the evidence on harm to support the approval of a condition for the WQRP that allows JPOD operations when water quality in the south Delta is 1.0 EC or less, similar to the Condition 1 approved by the Division Chief. The evidence submitted regarding harm did not prove that channel irrigation water quality of 0.7 EC to 1.0 EC during April through August has been, or will be, the cause of reduced crop yields in the area. During the CDO hearing, SDWA, CDWA, and San Joaquin County presented evidence claiming that agricultural interests they represent would be harmed by channel water quality between 0.7 and 1.0 EC in April through August (See SDWA-1; SDWA-2; SDWA-3; CDWA-4; SJC-1). This evidence, however, focused on reduced crop yields and did not prove that irrigation water quality of 0.7 EC to 1.0 EC caused the reduced yield. The evidence was inconclusive at best and suggested that other causes, such as high ground water, soils, or poor drainage, more likely were affecting crop yield.

Other evidence suggests that water quality in the range of 0.7 to 1.0 EC is not causing significant harm to agriculture. For example, DWR's land surveys of acreage of beans grown in the south Delta in 1976, 1982, 1988, and 1996 indicate that acreage of beans has not declined, and appears to have increased since 1976 (DWR-21; Nov. 18 R.T. p. 95, 166-167). DWR believes that the experience of other farmers in the San Joaquin Valley, Coachella and Imperial Valleys that grow crops similar to the southern Delta area indicate that with appropriate water and soil management, crops do not suffer losses when irrigated with water measuring about 1.0 EC or less (DWR-18A, p.18; DWR-22 rev1, p. 8;). Also, the testimony of experts, such as Dr. Letey, indicate that 1.0 EC is protective of agricultural production (DWR-18, p. 9; DWR-22 rev1). This testimony highlights the point that new information and understanding of the interaction between soil-water, salinity, and plant response has changed since

the 1970's when the agricultural water quality objectives were developed (DWR-22 rev1, p.1).

Evidence suggesting that current salinity conditions in the south Delta are not adversely affecting agriculture is found in the San Joaquin County 2004 Annual Crop Report (SJC-5). Since 2000, salinity in the Delta during April through August has ranged between 0.2 to about 1.0 EC (DWR-20, p. 34-36). The San Joaquin County 2004 Crop Report describes that the gross value of agricultural production in 2004 was at an all time high despite a levee break that flooded over 11,000 acres of cropland on Jones Tract (1% of County agricultural farmland) and heavy October rains that wreaked havoc with bean and tomato crops (SJC-5, p. 3). The report noted a drop of 5% in harvested acreage, but total production value increased by 9% (Id.). This drop in acreage appears to be explained by the fact that San Joaquin County has the third fastest growing population of Counties in California, farmland loss has increased, and urbanization has accelerated since 2000 (SJC-1, p. 1).

The most specific evidence regarding harm to agriculture was presented by SDWA in the testimony by ABF Farms (SDWA-2). ABF claimed harm from irrigation water quality exceeding 0.7 EC during 2002 and 2005 based on lab reports and apparent reduction in crop yield (SDWA-2, attachments B and C). The lab reports, however, did not establish the source of the chlorides reported in the plant tissues (Id.). Other crop problems, such as disease, were described indicating that the harm would have occurred even with water quality lower than 0.7 EC (SDWA-2; Nov. 17 R.T., p. 85; Nov. 18 R.T. p. 150). In addition, the claim of harm from irrigation water quality in 2005 is inaccurate because irrigation water quality in the southern Delta was below 0.7 EC during the irrigation season and could not have been the source of harm (See DWR-20, p. 34-36).

ABF claimed that it had reduced bean yield on 68 acres in the southern Delta. The reason for the lost yield could have been due to multiple factors, such as

inappropriate soils for adequate bean growth combined with possible poor drainage or high water table. ABF testified that the soils at this site was evaluate to be appropriate for beans (Nov. 17 R.T. p. 76-78). However, if the soils had good drainage, with proper leaching, the salts should not be accumulating and causing problems (Nov. 18 R.T., p. 149). If leaching is not possible, reducing water quality will not correct this problem and salt accumulation will occur over time (Nov 18 R.T., p. 149; Nov. 21 R.T. p. 40-42).

2. Condition for JPOD Operations Modifying Time Schedule for Effective Date of 0.7 EC Water Quality Objective.

The SWRCB has authority to condition the approval of the WQRP to allow a modification in the schedule for achieving the 0.7 EC so it is consistent with a reasonable means of compliance if no significant harm to other water users would occur from the condition. The SWRCB has evidence submitted during this hearing to support a finding that there would be no significant harm from irrigation water quality of 0.7 EC to 1.0 EC during JPOD operations. DWR requests that the SWRCB approve a condition, similar to the condition 1 approved by the Division Chief, for the WQRP, as follows:

“Prior to January 1, 2009, DWR and Reclamation may conduct JPOD operations if electrical conductivity measured at compliance locations C-6, C-8, and P-12 in the southern Delta does not exceed 1.0 mmhos/cm (EC) and if they have submitted to the SWRCB Chief of the Division of Water Resources a detailed schedule, including dates for key events, leading to completion of the permanent operable gates in the south Delta. The schedule is subject to approval by the SWRCB Executive Director in regard to its completeness and the inclusion of significant milestones. DWR (and Reclamation) shall submit any additional information or revisions to the schedule requested by the Executive Director or Division Chief.”

D. SWRCB Should Consider a Combined Hearing Provided Under Its Regulatory Authority of Section 764 to Address Changes to the Water Quality Control Plan and Water Right Permits.

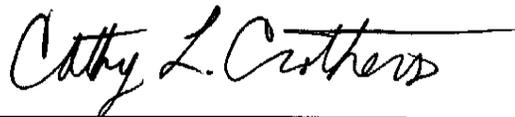
The SWRCB regulations authorize the SWRCB to conduct a “combined” hearing to modify both a water right permit condition and revise the related water quality objective (California Code of Reg., Title 23, Section 764). In such a hearing the SWRCB could consider DWR and Reclamation’s petition to change the schedule of implementing the south Delta objective and revise the applicable provisions of the 1995 Bay-Delta Water Quality Control Plan (WQCP). At a combined hearing the SWRCB could consider many of the complex water quality and water right issues that were not appropriate for the CDO hearing. For example, the SWRCB could consider all demands being made, and to be made, on those applicable waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible when considering revisions of the objective, while determining how to attain the highest reasonable water quality for the area (*U.S. v SWRCB, supra*, 182 Cal App. 3d 82, 116; Water Code Section 13000 and 13241). The SWRCB is in the process of considering revisions to the WQCP, although it is uncertain when the decision on possible revisions will be completed. Because issues of south Delta water quality implementation are arising now, DWR believes the SWRCB should use its authority to move forward with a notice of a hearing on the change petition and hold a combined hearing to address revisions to the WQCP and water rights, as appropriate.

IV. Conclusion

The SWRCB should not adopt the proposed CDO because there is no substantial evidence to support that DWR threatens to violate its water right permit conditions for implementing the south Delta objective or its water quality monitoring requirements. In addition, the SWRCB should not adopt the proposed

CDO for purposes of forcing DWR to submit its 2005 annual monitoring report by December as there is no harm that would be suffered requiring a remedy if the report is submitted in early 2006. Furthermore, DWR requests that the Board approve a special condition for the WQRP, similar to Condition 1 approved by its Division Chief, to enable reasonable compliance of conditions required for JPOD operations. The approval of the WQRP with such a condition will serve the public interest in balancing the beneficial uses of water where no harm will result from such approval. Finally, DWR urges the SWRCB to consider statewide public policy interests when using its broad authority to implement and enforce water quality protection in the Delta. The SWRCB should continue its policy of the last 10-years to seek reasonable solutions to competing water uses through cooperation among those interested parties, instead of adversarial enforcement proceedings.

Respectfully submitted,

A handwritten signature in cursive script that reads "Cathy L. Crothers". The signature is written in black ink and is positioned above a horizontal line.

Cathy L. Crothers
Senior Staff Counsel

December 12, 2005