

January 31, 2006

Victoria Whitney
Division Chief
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: State Board's January 27, 2006, Revised Draft Cease and Desist Order

Dear Ms. Whitney:

The State Water Contractors' ("SWC") intends to appear at the February 1, 2006, board meeting concerning Agenda Item 8, the January 27, 2006, revised draft Cease and Desist Order against the Department of Water Resources ("DWR") and the United State Bureau of Reclamation ("USBR"). At that time, the Contractors will continue to oppose issuance of any cease and desist order, but may also suggest changes to the revised draft on the assumption that the Board may proceed with this unwise action.

The SWC's review of the revised draft, however, has disclosed a factual error that did not exist in the earlier draft. Because this mistake is so fundamental to the Board's findings and ordering paragraphs, the Contractors believe it is imperative that the error be immediately brought to the State Board's attention in written form.

At the bottom of page 21 and top of page 22, the following statement was added to the proposed cease and desist order:

DWR presented evidence that as the operator of the SWP, DWR has little control over compliance with the interior southern Delta EC objective and that DWR's primary control over improving salinity in the southern Delta lies in its water management and planning authority. [cites] *During the hearing for D-1641, however, DWR and USBR both agreed to backstop the interior southern Delta salinity objectives. DWR did not specify which authority it intended to rely on to backstop the objectives (R.T. (November 17, 2006, p. 158.) As a result, the State Water Board made both DWR and USBR responsible under their permits and license for meeting the objectives. Neither DWR not USBR petitioned for reconsideration regarding this responsibility. Accordingly, the*

requirement still stands unless DWR or USBR successfully petition to change this requirement. (*Italics added.*)

Almost all of this statement, and in particular the italicized portion, is factually incorrect. At no time did DWR, or the USBR, ever agree to backstop San Joaquin River water user obligations, if any, related to the interior south Delta salinity objectives. Thus, the statement that "as a result, the State Water Board made both DWR and USBR responsible ... for meeting the objectives" lacks historical foundation.

The evidence of the problem with the State Board's assertion must begin with the San Joaquin River Agreement itself. Section 10 establishes the backstopping obligations. The relevant provisions read as follows:

10.1.1 In order to achieve the purposes of this Agreement, the USBR shall assume responsibility, for the term of this Agreement, for the San Joaquin River Portion of the 1995 WQCP objectives that can reasonably be met through flow measures. If this Agreement is terminated pursuant to Section 13, the USBR will operate its project in compliance with then applicable provisions of the then existing water quality control plans, then existing biological opinions, the 1994 Bay-Delta Accord and any other requirements then in effect. The requirements of this Paragraph 10.1.1 shall survive the termination of this Agreement for the shorter of two years or until the SWRCB issues a final order implementing the San Joaquin River Portion of the 1995 WQCP.

10.1.2 In order to achieve the purposes of this Agreement, the USBR and, as appropriate, the CDWR shall assume responsibility, for the term of this Agreement, for the San Joaquin River basin share of the "Delta Outflow" objectives of the 1995 WQCP. If this Agreement is terminated pursuant to Section 13, the USBR and the CDWR will operate their respective projects in compliance with applicable provisions of the then existing water quality control plans, then existing biological opinions, the 1994 Bay-Delta Accord and any other requirements then in effect to achieve the San Joaquin River basin share of Delta Outflow. The requirements of this Paragraph 10.1.2 shall survive the termination of this Agreement for the shorter of two years or until the SWRCB issues a final order implementing the San Joaquin River Portion of the 1995 WQCP.

For DWR what this means is that the SWP only backstopped one objective – the X2 Delta Outflow requirement. That limited backstop was reasonable because it could be provided from Sacramento River watershed flows DWR could partially control through Oroville operations. The X2 objective is unrelated to conditions in the south Delta, which can only be affected by changes in the San Joaquin River system or management of interior Delta agricultural or municipal discharges.

For the USBR, one must note that the term “San Joaquin River Portion” is capitalized and is a defined term. Section 3.4 of the Agreement reads as follows:

San Joaquin River Portion" - The segments of the 1995 WQCP relating to flow at Vernalis, specifically: (1) River Flows/San Joaquin River at Airport Way Bridge, Vernalis p 19; (2) San Joaquin River Salinity p. 18, (3) Southern Delta/San Joaquin River at Airport Way Bridge, Vernalis; and (4) the San Joaquin River basin share of all Delta outflow objectives.

The page references are to the 1995 Water Quality Control Plan. Thus, the USBR agreed to backstop, along with DWR, X2, and, without DWR, the Vernalis flow objective, the Vernalis salinity objective, and the San Joaquin River at Jersey Point/Prisoners Point salinity objective for the protection of the fish and wildlife beneficial uses.

The State Board clearly understood the limitations on the backup obligations. At section 6.3.3.3 of Decision 1641, the Board, while considering whether to approve the San Joaquin River Agreement, found it necessary to describe the DWR and USBR backup commitments:

Condition 3 is that the SWRCB commit to enforce the SJRA as it pertains to the DWR and USBR. The commitments of the DWR and the USBR include backstopping both the flow and salinity objectives at Vernalis and the San Joaquin basin's share of Delta outflow, paying money to the SJRGA, and varying project operations within the limits of the projects' permits. (SJRGA 2, pp. 7-9, 13.)

The SJRA specifies three different backstops to be provided by the DWR and the USBR. First, paragraphs 10.1.1 and 3.4 of the SJRA together provide that the USBR will assume responsibility for the agricultural and fish and wildlife objectives in the 1995 Bay-Delta Plan for salinity and flow at Vernalis. (SJRGA 2, pp. 12-13.) Second, paragraph 10.1.2 of the SJRA provides that the USBR and the DWR will assume responsibility for the San Joaquin River basin share of the Delta outflow objectives in the 1995 Bay-Delta Plan. (SJRGA 2, p. 13.) Third, paragraph 10 of the

SJRA provides that if the SJRA is terminated, the USBR and the DWR will operate to provide the San Joaquin basin share of the Delta outflow for up to two years. [footnote omitted] This is intended to allow adequate time for the SWRCB to establish alternative implementation of the San Joaquin portion of the objectives in the 1995 Bay-Delta Plan. (SJGA 2, p. 13.) The DWR and the USBR have agreed to these backstops.

This decision requires that the parties who have agreed to provide water under the SJRA provide that water, so long as the SJRA remains in effect. This decision also requires the DWR and the USBR to provide backstops by ensuring, through water purchases or other measures, that the water and operations needed to conduct the VAMP experiment as modified pursuant to the SJRA are provided through the year 2011. However, the SWRCB is not the appropriate forum to enforce payments of money under the SJRA. This is a matter between the parties, and any enforcement of the payment provisions should be pursued in a court of law.

Given the precise language of the SJRA and the absolutely correct interpretation of that language in Decision 1641, the State Water Contractors cannot fathom how the revised draft cease and desist order concludes that DWR (or for that matter the USBR) agreed to backstop anyone with respect to the South Delta salinity objectives.

This being the case, the existence of such backstops could not have been, and was not, the reason that DWR and the USBR were both given a level of responsibility for the south Delta salinity objectives. It is clear from Decision 1641 that the primary reason was the belief that project operations, such as pumping, might sometimes be the cause of water quality degradation. But Decision 1641 also recognized that there were potential non-SWP and CVP causes of degradation, and that is why exceedances were only to be deemed violations if they were within the control of (i.e., caused by) SWP or CVP operations.

Finally, the last sentence of the quoted paragraph from the revised draft cease and desist order does not make sense when one realizes that Decision 1641 did not find that DWR and the USBR had agreed to backstop the south Delta salinity objectives. Why would DWR or the USBR have sought reconsideration of Decision 1641 when it clearly and correctly stated the San Joaquin River obligations that had been assumed by their respective projects? Why would they seek reconsideration of an ordering paragraph that clearly distinguished exceedances from violations and established a fair process for determining which had occurred?

The State Board continues to misread and/or misinterpret Decision 1641 in ways that are highly prejudicial to the SWP and CVP. In addition to the incorrect reading of the SJRA and Decision 1641 as described above, the revised draft order still seems to be

Victoria Whitney
Page 5
January 31, 2006

premised on the incorrect assumption that Decision 1641 established DWR and the USBR as guarantors of water quality in the south Delta even when the causes of salinity degradation are totally unrelated to SWP or CVP operations. Also, the revised draft order continues to treat DWR and the USBR as entities who have failed to apply themselves diligently to the task of completing the operable-gates. (See page 18 of the revised draft order) Given the intervening CALFED process that had to occur before a site-specific EIR could be produced, and the need to agree with State and federal fishery agencies on operating principles, this characterization is uncalled for and factually incorrect. Yet punishment for this alleged misdeed seems to permeate the rationale for the cease and desist order.

Given the incorrect factual premise of the revised draft order as discussed above, and other major changes that the parties have had little time to absorb, the Board should not adopt this proposed order, or at the very least, should not adopt it at this time. Further comment and analysis should be solicited (beyond what can be orally presented within five minutes) before this flawed order is considered by the State Board.

Very truly yours,

KRONICK, MOSKOVITZ, TIEDEMANN &
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CWS:ll

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