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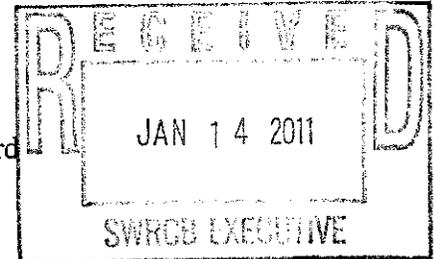
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Chair Charlie Hoppin and Members of the State Water Board  
c/o Jeanine Townsend, Clerk of the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 958121-1000



**Re: COMMENT LETTER - 02/01/11 BOARD MEETING:  
Draft Order Denying Order WR 2010-0002 Petitions**

Dear Chair Hoppin and Members of the State Water Board:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively hereinafter the "County"), we submit the following comments to the Draft Order Denying Petitions for Reconsideration of Order WR 2010-0002.

The County contends that it is improper to deny the Petitions for Reconsideration and it was improper for WR Order 2010-0002 to modify and extend the July 1, 2009 deadline of Order WR 2006-0006. The State Water Board should take seriously its enforcement responsibility for ensuring that DWR and USBR, the largest diverters from the Bay-Delta system, meaningfully comply with their permit terms, conditions and obligations. It is improper to delay any further compliance schedule or enforcement of the southern Delta salinity objectives.

The record is clear. Violations of the southern Delta salinity objectives have occurred on numerous occasions. The only action taken by DWR and USBR to avoid or curtail exceedances of the interior southern Delta salinity objective "was the implementation of the temporary barriers program." WR Order 2010-0002 p. 8, referencing DWR Exhibits DWR-31 and DWR-32. The Order correctly indicates that "the temporary barriers improve salinity levels, but they are not sufficient by themselves to ensure that the objective will be met." WR Order 2010-0002 p.9. However, that is all DWR and USBR did to address salinity in the south Delta. That is not substantial evidence to support an attempt by DWR and USBR to comply with the 2006 CDO nor to support or justify a modification



of the 2006 CDO now. DWR and USBR must be required to do more in a timely fashion. Rather DWR and USBR should have been required by WR 2010-0002 to take immediate corrective action so that the status quo of not doing enough does not continue any longer.

The County supports the need to meet the current salinity objectives in the south Delta at the current salinity standards. Although the State Water Board indicates that the current standards are under review, the objectives have not yet been changed and it is improper and not legally supportable for the current objectives to be ignored until such time as the objectives might be modified by the State Water Board.

The 2006 Appellate Court Decision regarding D 1641 indicated that the principle mechanism of the State Water Board to enforce compliance with water quality control plans is "its regulation of water rights." *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4<sup>th</sup> 674, 732. (Robie Court) citing the *Racanelli* Court at *United States v. State Water Resources Control Bd.*, (1986) 182 Cal. App. 3d 82, 125. The State Water Board has a legal duty to comply with water quality control plans approved or adopted by the State Water Board. *Id.* at p. 730. The *Robie* Court indicates as follows:

"It would be strange if the Board, having determined in a water quality control plan that a water rights proceeding was necessary to achieve the water quality objectives in that plan, could simply decide *not* to take action in that proceeding and thereby refuse to enforce its own plan. Fortunately, the Legislature has not authorized the Board to do any such thing. Thus, the Board cannot – as it attempted to do here- make a de facto amendment to a water quality objective in a water quality control plan by simply refusing to take action that it has identified as necessary to achieve that objective." *Id.* at p. 732.

In the present situation the Board is refusing to take action to *enforce* a water quality objective which was implemented by a water right proceeding. The *Robie* Court indicated that it was improper to not take action to implement a water quality objective through a water rights proceeding. The County submits that it would be similarly improper for the State Water Board to not take action to enforce a water quality objective in which it has implemented in a water waters proceeding. WR 2010-0002 indicates that the only corrective action taken, the temporary barriers, are insufficient to meet the required salinity objectives. A compliance schedule would be acceptable if the schedule was consistent with the water quality control plan. Currently DWR and USBR are operating in violation of D 1641 as salinity objectives are being violated. The State Water Board has no authority to change those objectives in this proceeding and has a legal duty to enforce those objectives. Thus, a compliance schedule that allows for violations to

continue, or does not enforce violations, pending the compliance schedule completion is improper.

The *Robie* Court indicated that approving the San Joaquin River Agreement in lieu of the water quality control plan's Vernalis pulse flow objective, even on a temporary basis, was a "de facto amendment of that plan without complying with the procedural requirements for amending a water quality control plan." *Id.* at p. 734. The same applies to the CDO proceeding. By amending the CDO and indicating that enforcement of the CDO, and thus D1641, will not occur the State Water Board would be undertaking a de facto amendment of the water quality plan without following the proper procedure. The contemplated enforcement is necessary and required by law. The evidence at the hearing is clear that violations of the salinity objectives are occurring. Failing to enforce these violations is a failure to implement the Water Quality Control Plan. By failing to enforce the salinity objective violations of the Water Quality Control Plan, the State Water Board is providing a "de facto amendment to a water quality objective in a water quality control plan by simply refusing to take action that it has identified as necessary to achieve the objective." *Id.* at p. 732.

Order WR 2010-0002 claims that modification of the compliance schedule of the CDO reflects the Board's determination that "further enforcement action would not be warranted, provided that DWR and USBR take steps to obviate the threat of violation in accordance with the modified compliance schedule." Order WR 2010-0002 p. 15. This conclusion is erroneous. First, the hearing record does not support the determination that further enforcement action is not warranted and second the modified compliance schedule is delayed until the objective is otherwise modified; thus no compliance with the existing objective is required. It is illusory to discuss requirements of a revised compliance deadline and plan which WR 2010-0002 delays until D 1641 is modified. This circular argument is not legally defensible.

It is improper to delay the submission of a revised compliance plan until after the Board reviews the southern Delta salinity objective. Such involves a lengthy process and as the *Robie* Court indicated, until such time as changes, if any, are properly made to the water quality control plan, the existing water quality objectives must be implemented by the Board. WR 2010-0002 fails to do so, but rather allows DWR and USBR to continue to operate pursuant to the status quo -- which is demonstrated to be reoccurring violations of the southern Delta salinity objectives.

The County is disappointed in the State Water Board's failure to enforce the permit conditions of DWR and USBR given continuing ongoing violations. The State Water Board must enforce the existing water right permit terms and require DWR and USBR to meaningfully implement salinity control measures. The State Water



Board should be zealously protecting the Bay-Delta by taking enforcement action against the largest diverters from the Delta who significantly alter Delta conditions; instead the current State Water Board enforcement actions are against in-Delta diverters who divert less than 100 cfs and who enjoy area of origin and Delta protections. This is illogical and arbitrary and capricious. The Petitions for Reconsideration regarding WR 2010-0002 should be granted and the Board should require meaningful enforcement of the current water quality control plan.

Very truly yours,



DeeAnne Gillick  
Attorney at Law

DMG/

cc: David Wooten, County Counsel  
C. Mel Lytle, Ph.D., Water Resources Coordinator  
Thomas J. Shephard, Sr.  
John Herrick, Esq., South Delta Water Agency  
Dean Ruiz, Esq., South Delta Water Agency