



77045-34740

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January 29, 2009

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*Via E-Mail to commentletters@waterboards.ca.gov and
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Chair Tam Doduc and Members of the State Water Board
c/o Jeanine Townsend, Clerk of the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828

**Re: COMMENT LETTER - 02/03/09 BOARD MEETING:
JPOD PETITIONS FOR RECONSIDERATION DRAFT ORDER**

Dear Chair Doduc 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 the Draft Order Denying South Delta Water Agency et al's JPOD Petition for Reconsideration scheduled as item 13 on the February 3, 2009 State Water Board Meeting Agenda.

The County is disappointed in the State Water Board's failure to enforce the permit conditions of the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR). In addition, Order WR 2008-0029-EXEC improperly excused DWR and USBR from meeting their permit conditions regarding southern Delta salinity during 2008. The State Water Board must meaningfully review these actions so that additional violations do not occur in 2009. Given DWR and USBR's past actions combined with the current lack of precipitation, it is more than likely that the salinity violations will continue in 2009 unless the State Water Board takes action. As a result, it appears that the State Water Board's Draft Order denying the Petitions for Reconsideration is merely a response to political pressure to support the export projects, rather than a meaningful exercise of the State Water Board's duty to enforce California water law and its prior water right decisions and orders, including D 1641 and Cease and Desist Order WR 2006-0006 (CDO).

The San Joaquin County Board of Supervisors provided a letter dated August 19, 2008 to the State Water Board explaining the importance of this matter to the County, which encompasses almost half of the legal Delta. In this letter the County indicated that the Urgency Petition is precluded due to DWR and USBR's failure to exercise due diligence in petitioning for the change. *Wat. Code* § 1435(c). The County continues to assert that the Urgency Petition was granted in error, and should be reconsidered.

DWR and USBR did not pursue due diligence in petitioning for the urgency change to modify the terms of their water right permits. According to D 1641 and the CDO, it is clear that JPOD cannot be utilized when permit terms and conditions are being violated by DWR and USBR. This fact was clearly set forth in the CDO as well as in a letter to DWR and USBR by State Water Board Executive Director Dorothy Rice, dated November 28, 2007, in which Director Rice stated:

“ . . .DWR and USBR may petition the State Water Resources Control Board to change the permit and license requirements applicable to their use of the JPOD. If DWR or USBR are considering submitting such a change petition, *I suggest that they submit it as soon as possible to assure that the matter can be considered prior to any need for JPOD diversions next year.*” (emphasis added)

The direction to DWR and USBR to petition for a temporary change in their permit if they anticipated that salinity standards would not be met, and to do so well ahead of time, is abundantly clear. Rather than heed this advice, DWR and USBR neglected to undertake the appropriate process to change their permits in a timely manner, a process that calls for more detailed review by the State Water Board as well as a public notice and comment period, and instead elected to wait until the last minute, thereby causing the alleged “emergency” situation that purportedly justified the Urgency Petition.

A determination of urgency need is precluded where the Board, in its judgment, concludes that the petitioner has not exercised due diligence either (1) in petitioning for a [permit] change; or (2) in pursuing that petition for change. *Wat. Code* §1435(c). Given the myriad circumstances that created the strong likelihood that DWR and USBR would violate the salinity standards in 2008 (low precipitation, the Wanger decision, and violations in 2007), and given that DWR and USBR were cautioned to begin the petition process a full seven months prior to the filing of the Urgency Petition, it cannot be reasonably asserted that DWR and USBR made a showing of “due diligence” justifying this situation as an actual “urgency need.” As a result, DWR and USBR's attempt to circumvent the system by alleging an urgency need that they themselves created is contrary to law and does not support the issuance of a Temporary Urgency Change for the water rights permits at issue.

DWR and USBR have endlessly delayed, through both wet and dry periods, dealing with the very real problem of salinity in the San Joaquin River and south Delta. The USBR and DWR have been repeatedly advised and ordered to address the problem, but have continued to ignore all advice and have failed to follow orders. The time has come to tackle the salinity problem, and that time is now. Both DWR and USBR have the obligation and the ability to do so, but apparently fail to take their responsibilities and permit conditions seriously. If this is not addressed by the State Water Board now, violations and salinity problems will continue in 2009 and beyond.

The County asserts that DWR and USBR have failed to take actions which are available to, and within the control of, both parties which would allow them to meet the interior Delta salinity standards, which would then allow them to operate the JPOD legally, as opposed to continuing to operate the JPOD in blatant disregard of the law. As is pointed out in SDWA's Request for Reconsideration, there are actions the DWR and USBR could take, including but not limited to recirculation, which would allow the USBR and DWR to meet their requirements for water quality at the interior points and allow the utilization of the JPOD.

This matter was considered at length during the Bay Delta evidentiary hearings that resulted in D 1641. The State Water Board's decision in D 1641 is the controlling decision regarding the salinity issues in the Bay Delta. D 1641 is clear --- the responsibility for meeting the salinity objective belongs to DWR and USBR. D 1641 is also clear that the root cause of the salinity problems is not due to in-Delta users (although it is recognized that in-Delta users add some salt to the waterways) but rather the export projects.

Regarding the responsibility to meet the Delta salinity objectives the State Water Board in WR Decision 1641 summarizes as follows:

"Salinity problems in the southern Delta result from low flows in the San Joaquin River and discharges of saline drainage water to the river. The actions of the CVP are the principal causes of the salinity concentrations exceeding the objectives at Vernalis. Downstream of Vernalis, salinity is influenced by San Joaquin River inflow, tidal action, diversions of water by the SWP, CVP, and local water users, agricultural return flows, and channel capacity. Measures that affect circulation in the Delta, such as barriers, can help improve the salinity concentrations." D 1641 p. 89.

D 1641 continues stating that the circulation problems in the Delta are caused by “. . .export pumping by the SWP and CVP and in-Delta diversions in the southern Delta [which] cause null zones, areas with little or no circulation.” D 1641 p. 87.

In D 1641 the State Water Board found that the circulation issues that contribute to the salinity violations are due to the export pumping of the CVP and the SWP, not just the in-Delta diversions. Although the State Water Board found that in-Delta users contribute in part to the southern Delta salinity, based on substantial evidence it was reasonable to place the entire burden and obligation to meet the southern Delta salinity objectives on DWR and USBR. Now, DWR and USBR repeatedly point to the in-Delta diversions and claim that there is nothing that the CVP and SWP do to influence these objectives. This is simply not accurate.

D 1641 continues that the “. . .construction of permanent barriers alone is not expected to result in attainment of the water quality objectives.” D 1641 p. 88. Thus, since 2000, it was made quite clear by the State Water Board that more needs to be done by DWR and USBR to address the salinity problems in the South Delta as D 1641 imposes the responsibility of meeting the salinity objectives on DWR and USBR.

The need to implement additional mitigation measures should not be a surprise to DWR or USBR now. The periodic reports by DWR and USBR and the reasoning relied upon by DWR and USBR to support the need for the urgency petition was that “no additional reasonable control measures exist.” To the contrary, D 1641 indicates that measures that affect circulation in the Delta can be used to implement the southern Delta salinity objectives. DWR and USBR are just choosing not to implement them. The State Water Board needs to make them do so.

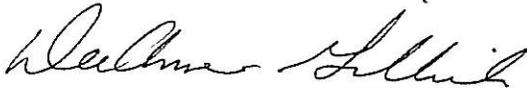
It is disingenuous to repeatedly receive reports and letter updates from DWR and the USBR that assert that the southern Delta salinity problem is “beyond their control.” Their operations are the cause of the problem. Since they are in control of their operations, they are likewise in control of the impacts on salinity caused by those operations. The State Water Board identified the measures that needed to be implemented in order to address salinity in the southern Delta stating that salinity objectives for the interior southern Delta “. . . can be implemented by providing dilution flows, controlling in-Delta discharges of salts, or by using measures that affect circulation in the Delta.” D 1641 p. 87. Additionally, the declaration and letters submitted by South Delta Water Agency et al. indicate that there are meaningful measures that are available and that can be undertaken to immediately improve water quality. Thus, there are measures within the control of DWR and USBR that could be immediately implemented to address the salinity violations in the South Delta.

The State Water Board must enforce the existing water right permit terms and require DWR and USBR to meaningfully implement these and other measures. Alternatively, consistent with State water law, DWR and USBR should not be receiving water pursuant to their water right permits while these salinity objective terms are being violated.

The County desires a solution, not the blatant disregard of the law and the State Water Board decisions and orders. San Joaquin County is not opposed to the use of the JPOD but maintains that such use governed by, and limited by, the rules for the use of the JPOD established by D-1641.

For the reasons stated above, the County disagrees with the draft order and requests that South Delta Water Agency's Petition For Reconsideration in the matter of Order WR 2008-0029-EXEC should be granted. It is too late for the State Water Board to take meaningful action to affect the 2008 season but it is not too late to affect 2009. The State Water Board needs to meaningfully consider this issue and take action following a noticed proceeding which allows all interested parties to participate. It is improper to allow DWR and USBR to file another urgency petition in 2009 and to continue to allow DWR and USBR to operate the JPOD in direct violation of the terms and conditions of the underlying permits, as well as D-1641 and the Cease and Desist Order (WR 2006-0006).

Very truly yours,



DeeAnne Gillick
Attorney at Law

DMG/cmp

cc: Each Member of the Board of Supervisors
David Wooten, County Counsel
T.R. Flinn, Director of Public Works
Thomas M. Gau, Chief Deputy Director
C. Mel Lytle, Ph.D., Water Resources Coordinator
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February 17, 2009

Via Hand Delivery

Arthur G. Baggett
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Charles R. Hoppin
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**Re: FEBRUARY 17, 2009 PUBLIC HEARING REGARDING
EMERGENCY DROUGHT CONDITIONS
COUNTY OF SAN JOAQUIN – OPENING STATEMENTS**

Dear Hearing Officers Baggett and Hoppin:

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 opening statements at the February 17, 2009 Public Hearing Regarding Emergency Drought Conditions.

The County recognizes that California is experiencing unique and challenging hydrologic conditions. The current condition of lack of precipitation following a prior drought year is problematic and results in water shortages. Addressing these water shortages requires making tough decisions and adopting unique solutions. The State Water Board must require the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) to take serious, meaningful actions to meet their water right permit condition requirements. The status quo is not acceptable.

Delay in Meaningful Action by USBR and DWR

Given the current lack of precipitation this winter season and the prior water year drought, it was most likely not unexpected or unpredictable that DWR and USBR would have difficulty meeting their permit term obligations for February and beyond. If USBR and DWR continue the status quo it is quite predictable that the USBR and DWR will claim they will be unable to meet not just the February Delta outflow objectives, but future obligations including the spring VAMP flows and the summer water quality requirements. Given the Wanger decision and the current pumping limitations, impacts throughout the State will most likely be significant. Serious consideration of this situation and the actions of DWR and USBR by the State Water Board must occur.

Unfortunately, due to DWR and USBR's request to the State Water Board on February 10, 2009, regarding a requirement that is to be met from February 1 through February 14, it is quite difficult for the State Water Board to take any meaningful action regarding the X2 permit condition. DWR and USBR's delay in presenting a potential permit condition situation to the State Water Board is not new. This pattern of delay in meeting their permit conditions or to request a relaxation of their permit conditions to the State Water Board must end.

As the State Water Board is aware, DWR and USBR did not meet the southern Delta salinity objectives during the summer of 2007. In response to the violations in 2007 and the continuation of the use of joint points of diversions (JPOD) in violation of DWR and USBR's permit conditions, the State Water Board Executive Director suggested by letter dated November 28, 2007 that USBR and DWR file a change petition "... as soon as possible to assure that the matter can be considered prior to any need for JPOD diversions next year."

DWR and USBR did not follow the State Water Board staff's direction and did not file a timely petition for continued diversions in 2008. Rather on June 17, 2008, well into the water delivery season, DWR and USBR filed for an urgency petition to allow JPOD while southern salinity objective violations occurred. DWR and USBR's urgency petition was granted by Order dated July 1, 2008. Two parties filed timely petitions for reconsideration on July 22, 2008 and July 31, 2008. JPOD continued throughout the summer and water quality violations continued as well. No response to the petitions for reconsideration occurred until January 2009 which was after the water delivery season was over and after the effective period of the urgency petition Order had expired.

Now, on February 10, 2009, with 1/3 of the month of February past, and only 4 days of a 14 day period remaining, DWR and USBR file another urgency petition in 2009 regarding the February flow requirements. This establishes a pattern by DWR and USBR to respond to permit condition obligations in such a way that precludes the State Water Board from providing meaningful consideration of these important permit terms and

conditions; thus, allowing the status quo as established by DWR and USBR to continue by default.

The County appreciates that the State Water Board noticed the pending urgency petition and scheduled this hasty public hearing regarding this petition. These are important issues and careful consideration of all interested parties perspectives must occur. Although, the State Water Board cannot provide meaningful guidance for meeting the February flow requirements that have already lapsed, the State Water Board can meaningfully evaluate possible violations and alternatives for potential future permit term violations during this water year. As such the State Water Board must require DWR and USBR to submit a meaningful operations plan on addressing water use during the remainder of this water year regarding all permit condition requirements. The State Water Board must carefully consider the ability for DWR and USBR to meet its permit conditions and require DWR and USBR to comply with state law and its permit terms and conditions.

It is the County's opinion that DWR and USBR did not pursue due diligence in petitioning for the urgency change to modify the terms of their water right permits in 2008 and again not in February of 2009. Let's not let this continue throughout 2009.

San Joaquin River Flows

The hearing notice for today's proceeding identifies as key issue number 8 whether there are "operational modifications or any other actions that could be taken, either as opposed to or in addition to the modifications identified in Key Issues 1 and 2., above." The County asserts that DWR and USBR have failed to take actions which are available to, and within the control of, the parties which would allow them to take reasonable actions to supplement the San Joaquin River Flows and possibly meet the San Joaquin River Flows objectives for the month of February 2009.

As pointed out on numerous occasions by the South Delta Water Agency, there are actions that DWR and USBR could take, including but not limited to recirculation, which would increase the flow on the San Joaquin River without requiring additional releases of fresh water from New Melones Reservoir. Recirculation is a feasible and reasonable alternative that can increase the flow on the San Joaquin River without requiring significant additional fresh water flow.

Implementing recirculation should not be met with reluctance by USBR as recirculation was mandated by Congress in 2004. In meeting the San Joaquin River flow requirements the Bureau must adhere to the Congressional mandates of HR 2828 (Public Law 108-261, signed October 25, 2004) which contains important direction for the Secretary of the Interior and Reclamation regarding operation of New Melones Reservoir. This Congressional mandate could be implemented now, if

the USBR took their permit conditions imposed by the State Water Board seriously.

HR 2828 directed the Secretary of Interior to develop and initiate implementation within one year of enactment of a program to meet all existing water quality standards and objectives for which the Central Valley Project is responsible. The Program is to include recirculation to provide flow, reduce salinity concentrations and reduce the reliance on New Melones Reservoir for meeting water quality and fishery objectives through the use of excess capacity in export pumps and conveyance facilities.

In addition, HR 2828 directs the Secretary of the Interior to update the New Melones operating plan to take into account the actions in HR 2828 that are designed to reduce the reliance on New Melones Reservoir for meeting the water quality and fishery flow objectives. Since adoption in 2004, USBR has neither implemented a meaningful Program within the parameters of HR 2828 nor moved forward with a Revised Plan of Operation for New Melones Reservoir. Doing so could have potentially addressed the permit violations at issue in this proceeding as well as the summer southern Delta salinity objective violations.

The need to implement additional mitigation measures should not be a surprise to DWR or USBR now. DWR and USBR are just choosing not to implement them. The State Water Board needs to make them do so.

Conclusion

The State Water Board must enforce the existing water right permit terms and require DWR and USBR to meaningfully implement these and other measures. Alternatively, consistent with State water law, DWR and USBR should not be receiving water pursuant to their water right permits while these flow and water quality objectives are being violated. In addition, in times of water shortage, California water law is clear. Those holding junior water rights suffer while more senior water rights may continue. In periods of water shortages, these water principles must be applied by the State Water Board. The County desires a solution, not the blatant disregard of the law and the State Water Board decisions and orders. DWR and USBR indeed have significant responsibilities in supplying large quantities of municipal and agricultural water, but these responsibilities do not excuse them from complying with the law.

As the County asserted in its recent January 29, 2008 letter to the State Water Board regarding South Delta Water Agency's Petition For Reconsideration in the matter of Order WR 2008-0029-EXEC which allowed the relaxation of the Southern Delta salinity objectives in 2008, it is too late for the State Water Board to take meaningful action to affect the 2008 season but it is not too late to affect 2009. The State Water

Board needs to meaningfully consider all of USBR and DWR's permit conditions and obligations and take action following a noticed proceeding which allows all interested parties to participate. It is improper to allow DWR and USBR to file untimely urgency petitions in 2009 and to continue to allow DWR and USBR to export water and operate the JPOD in direct violation of the terms and conditions of the underlying permits and D-1641, as well as the Cease and Desist Order (WR 2006-0006).

Very truly yours,



DeeAnne Gillick
Attorney at Law

DMG/ect

cc: Each Member of the Board of Supervisors
David Wooten, County Counsel
T.R. Flinn, Director of Public Works
Thomas M. Gau, Chief Deputy Director
C. Mel Lytle, Ph.D., Water Resources Coordinator
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May 18, 2009

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c/o Jeanine Townsend, Clerk of the Board
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**Re: COMMENT LETTER - 5/19/09 BOARD MEETING: ITEM 5.
CONSOLIDATION OF PLACES OF USE OF CVP AND SWP**

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 item 5 of the Tuesday, May 19, 2009 State Water Board meeting regarding the Draft Order to consolidate the place of use for certain Department of Water resources (DWR) and United States Bureau of Reclamation (USBR) water right permits.

The County recognizes that California is experiencing unique and challenging hydrologic conditions. The current condition of lack of precipitation following a prior drought year is problematic and results in water shortages. San Joaquin County is concerned for the many who are suffering water shortages during this drought year throughout the State, including water users in our own County. Addressing these water shortages requires making tough decisions and adopting unique solutions. Due to the unique water shortages the State is currently experiencing, the County does not object to the petition to temporarily consolidate the State Water Project and Central Valley Project places of use to more easily facilitate water transfers.

However, the County is gravely concerned about the continuing failure of USBR and DWR to observe, and the State Water Board's failure to enforce, the permit conditions

applicable to the CVP and SWP, particularly related to salinity control requirements. The draft order should be amended to include a specific condition requiring DWR and USBR to meet the permit conditions of D1641 and Cease and Desist Order WR 2006-0006 regarding salinity objectives. These conditions must be met by DWR and USBR and enforced by the State Water Board.

D- 1641 provides that the CVP permits of USBR and the SWP permits of DWR are conditioned as follows: "This permit 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." (D 1641 p. 159, Conditions 6 and 1, Footnote omitted referring to the USBR permit condition.)

In 2005 the State Water Board reiterated this requirement in the Cease and Desist Order WR 2006-0006 (CDO). The CDO states "DWR and USBR are each fully responsible to meet the objectives in the interior southern Delta, as described in Table 2 of D 1641." CDO p. 26, Conclusion Paragraph 1.)

Despite these clear directives the USBR's attorney during closing arguments states that she disagreed with the County's position and that USBR was not responsible for meeting such salinity objectives. This lack of appreciation on behalf of USBR and DWR of their responsibilities under this Board's Orders needs to end. In order to ensure that permit conditions are satisfied, including the southern Delta salinity objectives, the draft order needs to require strict compliance with the Southern Delta salinity objectives in order for any of the proposed transfers or exchanges approved under this Order to occur. The County respectfully requests that the draft order be amended by adding an additional condition which states:

"If DWR or USBR violate any permit or license condition implementing the water quality objectives, the transfers and/or exchanges under this order shall cease until such time as the water quality objectives are met."

This proposed condition parallels the language approved by the State Water Board in WR 2006-0006 related to joint points of diversion.

The County appreciates the limitations placed on the Petitioners in the draft order limiting approval of transfers initiated prior to January 1, 2010 and limiting the Drought Water Bank transfers to 16,000 acre feet under this Petition. Although these conditions place certain limitations on the approved actions, the County's proposed condition is also needed. DWR and USBR have, and continue to demonstrate, a lack of commitment to meet the water quality standards and any permit amendments for continued operation of the Projects needs to be conditioned on meeting the water quality objectives.

The standards were violated in 2007 and 2008, and have already been violated in 2009. Initial modeling demonstrates that operational changes can allow for salinity standards in

State Water Resources Control Board
May 18, 2009
Page 3

the South Delta to be met, even in this time of drought. These modifications could be implemented this water year and such modifications must be required and facilitated in order to protect beneficial uses within the Delta and within the County of San Joaquin. Nearly two-thirds of the legal Delta is located within the County of San Joaquin and the County is an interested stakeholder in the future viability of the Delta. The southern Delta salinity objectives are critical for the continued viability of this most important part of San Joaquin County's economy.

In summary, the County does not object to the pending petitions to temporarily consolidate the places of use for the CVP and SWP. However, even in this time of water shortage DWR and USBR must be required to meet their permit conditions, including meeting the salinity objectives for the south Delta. The County respectfully requests that the draft order include the proposed condition to require DWR and USBR to take meaningful action to implement measures to meet their Southern Delta salinity obligations.

Very truly yours,



DeeAnne Gillick
Attorney at Law

DMG/ect

cc: David Wooten, County Counsel
C. Mel Lytle, Ph.D., Water Resources Coordinator
Thomas J. Shephard, Sr.