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16 LAFAYETTE RANCH

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18 **STATE OF CALIFORNIA**

19 **STATE WATER RESOURCES CONTROL BOARD**

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In the matter of WR 2010-0002	REQUEST FOR RECONSIDERATION OF ORDER MODIFYING WR 2006-0006 (CDO)
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The South Delta Water Agency and Lafayette Ranch, Inc., ("Petitioners") herein request the State Water Resources Control Board reconsider its Order WR 2010-0002 ("Order"), and pray for the relief set forth below.

1. The Name and Address of the Petitioner.

The Petitioners (or "SDWA") are the South Delta Water Agency; its address is 4255 Pacific Avenue, Suite 2, Stockton, California 95207 and Lafayette Ranch, Inc., which may be contacted at the same address.

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1 2. **The Specific Board Action of Which Petitioner Request Reconsideration.**

2 Petitioners request the SWRCB's reconsideration of its ORDER WR 2010-0002
3 modifying State Water Board Order WR 2006-0006 (CDO) which required that the Department
4 of Water Resources ("DWR") and the U.S. Bureau of Reclamation ("USBR") to devise, pursue,
5 and implement measures to obviate the threat of violating salinity water quality objectives
6 designed to protect agricultural beneficial uses in the south Delta by July 1, 2009.
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8 3. **The Date on Which the Order was Made by the Board.**

9 WR 2010-0002 was adopted by the Board on January 5, 2010.
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11 4. **The Reason the Action Was Inappropriate or Improper.**

12 Issuance of the Order was contrary to law because the Petitioners therein, DWR and
13 USBR were not diligent in pursuing or implementing measures to obviate the threat of violations
14 of water quality violations in the south Delta by July 1, 2009, The only action DWR and USBR
15 did pursue was the permanent gates/barriers project which they knew, by May of 2007, could not
16 be implemented by July 1, 2009. DWR and USBR were unequivocally aware that the temporary
17 gates project was insufficient in and of itself to obviate the threat and, thus meet the deadline.
18 DWR and USBR were fully aware that additional actions were necessary to meet the standards
19 and obviate the threat, were informed of those additional actions, yet chose not to seek approval
20 or implementation of those actions.
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22 The Order is not supported by substantial evidence in that the record is clear that DWR
23 and USBR knew as of May of 2007 that the permanent gates could not be implemented by July 1,
24 2009 yet chose to pursue the permanent gates as the only means for complying with the deadline.
25 Bureaucratic delays in project implementation are normal, expected, and were assumed as
26 reflected in the extended July 1, 2009 deadline. The NOAA Fisheries biological opinion was not
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1 issued until June 4, 2009 yet the Board cites this occurrence as partial justification for the failure
2 of DWR and USBR to implement a project or projects to obviate the threat by the July 1, 2009
3 deadline. Further, the actions herein alleged also constitute an abuse of discretion in that the
4 Order impermissibly fails to set a specific, concrete, meaningful deadline by which DWR and
5 USBR must comply with its terms.
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7 **5. The Specific Action Which Petitioners Requests.**

8 Petitioners herein requests that the Board rescind WR 2010-0002 and immediately
9 commence enforcement action against DWR and USBR for failing to meet the unequivocal July
10 1, 2009 deadline as set forth in WR Order 2006-0006.
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12 **6. A Statement That Copies of the Petition and Accompanying Materials Have
13 been Sent to All Interested Parties.**

14 Petitioners herein are providing electronic copies of the Request for Reconsideration to
15 all those parties contained on the enclosed mailing list and will request the SWRCB distribute it
16 to its Bay-Delta contact list.
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18 **POINTS AND AUTHORITIES**

19 **I. STANDARD OF REVIEW FOR REQUEST FOR RECONSIDERATION**

20 An interested party may petition the State Board for reconsideration of a decision or order
21 based on the following grounds: (1) irregularity in the proceedings, or any ruling, or abuse of
22 discretion, by which the person was prevented from having a fair hearing; (2) the decision or
23 order is not supported by substantial evidence; (3) there is relevant evidence, which in exercise of
24 reasonable diligence, could not have been produced; and (4) error in law. Cal. Code Regs., Title
25 23, § 768.
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27 Petitioners herein assert the Board's adoption of Order WR 2010-0002 modifying Order
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1 WR 2006-0006 (CDO) is not supported by substantial evidence in the record and constitutes a
2 prejudicial abuse of discretion.

3 II. STATEMENT OF FACTS

4 BACKGROUND

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6 In 2000, the SWRCB adopted the Revised D-1641, a water rights decision which sought
7 to enforce the 1995 Water Quality Control Plan for the San Francisco Bay-Sacramento Bay/San
8 Joaquin Delta Estuary ("1995 Plan"). D-1641 assigned most of the water quality objectives
9 contained in the 1995 Plan to the USBR and DWR as the operators of the Federal Water Project
10 and State Water Project, respectively, and as the permit/license holders of the permits authorizing
11 the projects to store, divert, transport and use water.

12
13 D-1641 assigned USBR the obligation of meeting the Water Quality Objective for
14 Agricultural Beneficial Uses (with a compliance monitoring location) at Vernalis to USBR, and
15 the Objectives at Brandt Bridge, Old River at Middle River, and Old River at Tracy Blvd. Bridge
16 to USBR and DWR. These Objectives, or "salinity standards," were/are contained in Table 2 of
17 both D-1641 and the 1995 Plan. D-1641 also contained a footnote [5] which applied to each of
18 the latter three standards and which stated:

19
20 The 0.7 EC objective becomes effective on April 1, 2005. The
21 DWR and USBR shall meet 1.0 EC at these stations year round
22 until April 1, 2005. The 0.7 EC objective is replaced by the 1.0
23 EC objective from April through August after April 1, 2005 if
24 permanent barriers are constructed, or equivalent measures are
25 implemented, in the southern Delta and an operations plan that
26 reasonably protects southern Delta agriculture is prepared by
27 the DWR and the USER and approved by the Executive
28 Director of the SWRCB. The SWRCB will review the
salinity objectives for the southern Delta in the next review of
the Bay-Delta objectives following construction of the barriers.

1 The Third Appellate District held that D-1641 improperly delayed implementation of the
2 three interior southern Delta standards until April of 2005 (even though the 1995 Plan required
3 the Brandt Bridge standard to be immediately implemented, and the two Old River standards be
4 implemented by the end of 1997), and improperly allowed those three standards to revert back
5 (worsen) to the 1.0 EC standard all year (even though the 1995 Plan required 0.7 EC April
6 through August, 1.0 EC and September through March). SDWA commented many times about
7 the impropriety of this footnote, the conditions of which were not discussed of the more than 80
8 days of hearing which led to D1641.

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11 The Appellate Court agreed with SDWA's view of this footnote in its decision in the
12 State Water Board Cases Third Appellate District, Case No. C044714. In that decision, the
13 Court held that the footnote improperly changed the 1995 Water Quality Control Plan in the
14 water rights hearings held to implement the Plan. Setting standards or objectives is part of the
15 SWRCB's quasi-legislative functions, while implementing the Plan through a water rights
16 hearing is part of the SWRCB's quasi-adjudicatory functions, The Appellate Court noted that the
17 standards could only be changed in another quasi-legislative hearing, and not through the quasi-
18 adjudicatory water rights hearing of D-1641. The Appellate Court therefore nullified the suspect
19 footnote. [See State Water Board Cases pages 87-89.] As a consequence and pursuant to D-
20 1641, all four of the salinity standards are now fully in effect and are the responsibility of USBR
21 (all four) and DWR (the three interior standards).

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24 Importantly, the Appellate Court also confirmed that the SWRCB cannot delay or
25 partially implement water quality standards contrary to the plan of implementation contained in
26 the 1995 Plan. (See State Water Board Cases at pages 87-88) Hence, the SWRCB cannot
27 I extend the implementation of the southern Delta salinity standards. Modifying the CDO appears
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1 to do just that, by contemplating further delay in requiring the projects to meet the standards.

2 In 2005, DWR and USBR notified the SWRCB that they may not be able to meet the 0.7
3 EC standards as of April 1, 2005, and that installation of the permanent barriers would not occur
4 for a number of years hence. This notification resulted in the hearing which resulted in the CDO.
5 Among other things, the CDO ordered DWR and USBR to:
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7 **ORDER**

8 ~~1. A.~~ The State Water Resources Control Board (State Water Board) **ORDERS**
9 that, pursuant to Water Code sections 1831 through 1836, the Department of Water Resources
10 (DWR) and the United States Bureau of Reclamation (USBR) shall take the following corrective
11 actions and satisfy the following time schedules:
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13 1. DWR and USBR shall implement measures to obviate the threat of
14 non-compliance with Condition 5 on page 159, Condition 1 on pages 159 and 160, and Condition
15 I on pages 160 and 161 of Revised Decision 1641(D-1641) regarding the 0.7 mmhos/cm
16 electrical conductivity (EC) objective by July 1, 2009. Beginning April 1, 2005, these conditions
17 require DWR and USBR to meet the 0.7 EC Water Quality Objective for Agricultural Beneficial
18 Uses at the following locations specified in Table 2 of D-1641 at page 182:
19

- 20 1) San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
21 2) Old River near Middle River (Interagency Station No. C-8);
22 and
23 3) Old River at Tracy Road Bridge (Interagency Station No. P-
24 12);

25 2. Within 60 days from the date of this order, DWR and USBR shall submit a
26 detailed plan and schedule to the Executive Director for compliance with the conditions
27 mentioned above, including planned completion dates for actions that will obviate the current
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1 threat of non-compliance with the 0.7 EC objective at stations C-6, C-8, and P4 2 by July 1,
2 2009. If the plan provides for implementation of equivalent measures, DWR and USBR shall
3 submit information establishing that those measures will provide salinity control at the
4 three compliance stations equivalent to the salinity control that would be achieved
5 by permanent barriers. The plan and schedule are subject to approval by the Executive Director
6 of the State Water Board, shall be comprehensive, and shall include significant project
7 milestones. DWR and USBR shall submit any additional information or revisions to the schedule
8 and plan that the Executive Director requests within the period that the Executive Director
9 specifies: DWR and USBR shall implement the plan and schedule as approved by the Executive
10 Director.
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13 3. Within 60 days from the date of this order, if DWR And USBR decide to
14 implement the permanent barriers project or equivalent measures, DWR and USBR shall submit
15 a schedule to the Chief of the Division of Water Rights (Division) for developing an operations
16 plan that will reasonably protect southern Delta agriculture. DWR and USBR shall submit the
17 final plan to the Executive Director for approval no later than January 1, 2009. To ensure that the
18 plan is adequate prior to the required compliance date, DWR and USBR shall submit a
19 draft of the operations plan by January 1, 2008, to the Division Chief for review and comment.
20 Although DWR and USBR eventually submitted a plan to "obviate the threatened violations" to
21 the standards, they implemented virtually no measures before July 1, 2009, to ensure that the
22 standards would/will be met. The record from the hearing clearly indicates that the projects relied
23 solely on installation of the permanent barriers, or "gates" as they call them, and ignored, or only
24 belatedly considered and pursued other measures which would or could result in compliance with
25 the standards. The other measures are/were necessary because D-1641 and DWR modeling
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1 indicated that barriers alone would not result in compliance. SDWA repeatedly identified these
2 other measures and petitioned DWR and USBR to pursue and implement them. To the contrary,
3 DWR and USBR did nothing except hope that the permanent barriers would eventually be
4 permitted and constructed and allowed to operate.
5

6 III. ARGUMENT

7 A. THE ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN 8 THE RECORD.

9 1. Key Issue Number 1 Raised in the Notice for the Subject Hearing.

10 Key Issue 1 of the notice for the subject hearing asked if the SWRCB should modify the
11 compliance requirement in Part A of the CDO, and how potential changes to the standards
12 (which are currently under review) should be taken into consideration in such modifications. As
13 stated before, Part A required DWR and USBR to implement measures to obviate the threatened
14 violations of the three interior southern Delta salinity standards. No such changes or
15 modifications are justified or appropriate because nothing has changed since the CDO was
16 adopted. The findings in the CDO eerily reflect the current situation. The CDO found that DWR
17 and USBR had not taken the appropriate steps to meet their obligations under D-1641 even when
18 they knew they had to do so before April 1, 2005, that barriers alone would not be sufficient, and
19 that other measures were required but not undertaken. Nothing has changed; DWR and USBR
20 have not taken the appropriate steps to meet their obligations by July 1, 2009 (under the CDO);
21 barriers alone are known to not be sufficient; and they failed to undertake other measures made
22 known to them which would result in compliance with the standards.
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26 Before addressing each of these reasons, it should be noted that on February 18, 2005
27 DWR and USBR submitted a long term petition to change the effective date of the 0.7 EC
28 standard (at the three interior southern Delta locations) from April 1, 2005 to December 31,

1 2008. Between those dates, the SWRCB issued the CDO, the Third Appellate Court issued its
2 Decision in the State Water Board Cases, the SWRCB issued and adopted the 2006 Water
3 Quality Control Plan for the Bay-Delta, and the permanent barriers were never approved or
4 permitted. The requested date (in the February 18, 2005 letter) of December 31, 2008 passed
5 without DWR or USBR seeking any other relief from their permit conditions as set forth in
6 D-1641, until their letter of May 29, 2009. At that time, they asked the SWRCB to once again
7 bail them out, and the Board inexplicably complied. This persistent failure to act diligently or to
8 adequately plan to meet their obligations is a constant theme in these proceedings.

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10 If for no other reason than this, the Board should have refused to modify the CDO and finally,
11 once and for all forced the projects to meet the standards or penalize them for their repeated
12 failure to do so. This "reward/punishment" approach is the only way a regulator can meet its
13 obligations to protect other beneficial uses. The "constant delay/excuse" approach assures harm
14 to those for whom the standards protect.
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17 As it did during the hearing and in its closing brief SDWA again addresses the second
18 part of Key Issue 1.

19 2. **Future, Unknown, Potential Changes to the Salinity Standards Should Not**
20 **Have Been Taken into Consideration.**

21 The second part of Key Issue 1 asked how modifications to the CDO compliance
22 schedule "be structured to take into account any potential changes to the southern Delta salinity
23 objectives or the program of implementation" thereof which may result from the ongoing review
24 of those objectives? Such a consideration is impossible. Changes to the standards, or the
25 implementation thereof, will occur after further studies, deliberations, evidence, testimony, and
26 hearings occur in both quasi-legislative and quasi-adjudicatory processes. Such unknowns
27 should not have been "considered" as part of the hearings on the order unless the SWRCB had
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1 already made undisclosed conclusions about what is necessary to protect southern Delta
2 agriculture and what water rights should be burdened to insure such protection.

3 Besides being unable to logically or legally consider an unknown future occurrence two
4 points must be made. The first is that the existing standards might be tightened, whereas the
5 question in Key Issue I apparently assumed they will be relaxed. If tightened, then any delay in
6 requiring enforcement of the standards would result in more harm now, and thus be unjustified.
7
8 Second, The existing findings of D-1641 indicate that the CVP is responsible for the salinity
9 problems in the southern Delta (D-1641 at page 63). Hence, the only justifiable position to be
10 taken regarding maintenance of the standards is that the projects' permits will continue to be
11 burdened with these responsibilities. In its ruling and order, the SWRCB should acknowledge
12 that this second part of Key Issue is inappropriate.
13

14 3. **The Record Does Not Support Any Changes to the CDO**

15 There Has Been too Much Delay in Implementing the Standards. The salinity standards
16 were first adopted by the SWRCB in 1978 via D-1485; 31 years ago (see CDO page 8). Although
17 the Board did not assign the responsibility for meeting these standards in D-1485, the adoption
18 was the Board's recognition that they were necessary to
19 protect southern Delta agriculture. The standards were not implemented by the Board until
20 D-1641 was adopted in 2000. At that time, only the Vernalis standards went into effect, the three
21 interior standards were set at 1.0 EC year round. D-1641 incorrectly delayed full
22 implementation, and the CDO in practice further delayed it. Since the standards are necessary to
23 protect southern Delta agriculture, they should be enforced.
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26 4. **The CDO Specifically Addressed the Projects Failure to Plan Ahead and**
27 **Meet Their D-1641 Obligations.**

28 D-1641 provides at page 8: "That the construction of permanent barriers alone is not

1 expected to result in attainment of the water quality objectives." Obviously then, DWR and
2 USBR have known since 2000 that reliance on permanent barriers alone would not result in them
3 complying with their permit terms and conditions. The CDO confirmed that barriers were not
4 enough, and that the projects had not acted properly in trying to meet their obligations.
5

6 First, the CDO notes that DWR and USBR are "fully" responsible for meeting the interior
7 salinity standards (CDO at page 7). The Order even noted that in the absence of the CDO, the
8 projects must meet these standards (CDO at page 18, Footnote 12).

9 Second, the CDO notes that DWR and USBR "did not take adequate measures to ensure
10 future compliance with their permit/license conditions by April 1, 2005" which was their
11 deadline in D-1641 to comply with the standards (COO at page 20).

12 Third, the CDO concluded that the projects were relying solely on the permanent barriers
13 as the means of meeting the standards (CDO at page 21).

14 Fourth, the CDO noted that the existence of other pending actions did not excuse DWR
15 and USER from taking adequate steps to comply with their permit/license conditions (CDO at
16 page 22).

17 Fifth, the CDO confirmed that SDWA and other parties notified (and in fact put on
18 evidence) that other measures were available and necessary to meet their obligations. Those
19 measures included water purchases/additional river flows, recirculation, modified operations of
20 temporary barriers, control of drainage, etc. (CDO at page 15).

21 Sixth, the CDO encouraged the projects to "consider all potential means" to comply with
22 their permits/licenses and meet the salinity standards (CDO at page 23).

23 Seventh, the CDO confirms that the time frame granted to "obviate" the threatened
24 violations "does not relieve DWR and USBR of the requirement to meet" the interior standards.
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1 Eighth and last, the CDO states unequivocally that [C]onsidering that the objectives were
2 first adopted in the water quality control plan in 1978, and there is evidence that salinity is a
3 factor in limiting crop yields for southern Delta agriculture, the State Water Board will not
4 extend the date for removing the threat of non-compliance beyond July 1, 2009." (CDO at
5 page 27) (Emphasis added). Ignoring the SWRCB's cautious caveat about there (only) being
6 evidence that salinity is bad for crops (instead of confirming it does cause harm as was shown in
7 the CDO hearing) we see that the CDO expressly states the projects are to be given no third,
8 fourth or fifth chance; they must do what has to be done to meet the standards by July of 2009.
9 This should have been the end of the arguments, the issues and the discussions. The
10 projects put all of their eggs in one basket (permanent barriers/gates), did not plan ahead and
11 ended up violating their permits and D-1641. The CDO provided DWR and USBR ample time to
12 meet their responsibilities (because the standards were not being regularly violated at the time).
13 The result? The projects again did not plan ahead, relied again solely on permanent barriers and
14 violated not just D-1641 and their permits, but now the CDO also. One could not construct a
15 more perfect scenario justifying enforcement of the standards or a worse one to support
16 extending the CDO deadline.

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20 This case should turn on a re-reading of the CDO by the SWRCB Board members.
21 Everything covered in the subject hearing is a mere repetition of that which was covered in the
22 CDO hearing; everything. There is virtually no new evidence; no new arguments and certainly
23 even less reason to excuse DWR and USBR from acting appropriately under their permits.
24

25 5. **The Evidence Submitted During the Hearing Did Not and Does Not Support**
26 **Modifying the CDO)**

27 The testimony of Alex Hildebrand on behalf of SDWA answered all of the relevant
28 questions regarding DWR and USBR's failure to diligently act to meet their obligations under

1 D-1641, their permits and the CDO. Mr. Hildebrand confirmed what the CDO stated; that he had
2 personally informed DWR and USBR that there were other measures which could be taken
3 which would improve southern Delta water quality and meet the standards (SDWA 12, at page
4

5 1). Mr. Hildebrand also confirmed that, eventually, after his repeated prodding, DWR
6 and USBR engineers evaluated some of these measures and agreed that if implemented, the
7 measures would establish net flows in the southern Delta channels which would control salt and
8 likely meet the standards; all at little or no water cost to any party. There was also agreement that
9 these measures could be implemented for the 2009 irrigation season (SDWA 12 at page 1-2).
10

11 Mr. Hildebrand also confirmed that rather than proceed with these measures (which were
12 not evaluated until 2008), the projects instead asserted they were not responsible for the
13 standards, meeting the standards would entail large releases from reservoirs, that other measures
14 were beyond their authority, that the standards should be relaxed, and that compliance with the
15 standards could not be achieved without the permanent barriers'(via the South Delta
16 Improvement Project or SDIP) (SDWA 12 at page 2).
17

18 Mr. Hildebrand explained how SDIP does not establish net flows in all channels and thus
19 would not result in full compliance with the standards. Because of this, he explained how the
20 other measures he had suggested were necessary regardless of SDIP and would establish net
21 flows with temporary barriers (SDWA 12 at page 2-3). It should be noted that SDWA and not
22 DWR submitted SDWA 3, the technical analysis of some of these other measures. It is clear
23 from the evidence that just as DWR and USBR did not diligently pursue measures to meet their
24 April 1, 2005 deadline, they did not pursue measures to meet their July 1, 2009 deadline.
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26 6. **Evidence Presented By DWR and USBR Did Not Support Modifying The**
27 **CDO**

28 USBR's sole witness Paul Fujitani provided testimony which sought to excuse the

1 projects from complying with the southern Delta salinity standards. On cross-examination, Mr.
2 Fujitani admitted his testimony was aimed at amending the projects' permits and not the CDO.
3 (DVD Segment I, beginning at 2:05:06).
4

5 DWR put on a number of witnesses who attempted to show that DWR had little or no
6 control over southern Delta salinity (Tara Smith), that the permanent barriers were the only
7 method by which DWR could meet the standards (Kathy Kelly), and how the temporary barriers
8 affect flow, water level heights, and quality (Mark Holderman). Mr. Holderman also updated the
9 SWRCB on minor changes to temporary barrier operations undertaken in 2007 and 2008 and
10 proposed changes for which permitting approvals were only recently sought.
11

12 The DWR testimony is important for a number of reasons. First, it echoed that which
13 was given in the CDO hearing itself. As stated above, the CDO noted that DWR and USBR
14 were pursuing only the permanent barrier/gate project; a position confirmed by Ms. Kelly's
15 testimony (DWR-04 at page 1). Importantly, DWR's evidence of its impacts to southern Delta
16 salinity were found irrelevant in the CDO when the SWRCB found noted that the projects failed
17 to appeal their obligations created in D-1641 (CDO at pages 20 and 21).
18

19 Second, in answering cross-examination questions the DWR witnesses significantly
20 clarified their testimony. Ms. Kelly noted that DWR still sought permanent barriers as the only
21 actions to meet water quality standards even though it was believed those barriers could not
22 accomplish this goal. Ms. Kelly also testified that DWR has not considered changing its plan
23 (permanent barriers only) to obviate the threatened violations even though the barriers will not be
24 enough (DVD Segment 1, beginning at 2:28:10).
25

26 Mr. Holderman confirmed that the SDWA suggestions for other measures to obviate the
27 threat were first offered "several years ago" (DVD Segment 1, beginning at 2:40:42 and 2:44:18).
28

1 Mr. Holderman also confirmed that the modeling for some of these measures did not include
2 flows above 1,200 cfs on the San Joaquin River (DVD Segment 1, beginning at 2:44:28) which
3 contradicts DWR and USBR assertions that large river flows are necessary to meet the standards,
4 and that such flows would be an unreasonable use of water.

5
6 Mr. Holderman also confirmed that DWR knew by at least 2006 that permanent barriers
7 would not be installed before the July 1, 2009 deadline as set forth in the CDO. (DVD Segment 1
8 beginning at 2:45:10 and :48). Finally, Mr. Holderman confirmed that the decision to pursue
9 some of these measures (raising the Middle River barrier by one foot) was not made until 2009,
10 although it could have been made in 2008, and that if these measures had been studied by DWR
11 earlier, the measures could have been pursued even earlier. (DVD Segment 1, beginning at
12 2:46:20 and 2:47:05).

13
14 It should be noted here that an argument was made during the hearing which suggested
15 that these other measures required time and significant environmental and permitting review
16 before they could be implemented. Mr. Hildebrand, however, testified as to the speed at which
17 USBR had sought and obtained recirculation approvals and referenced Mr. Holderman's
18 testimony that Mr. Holderman had sought permission to raise the Middle River barrier height in
19 just the last two months (Transcript, June 30, 2009, at pages 159-161).

20
21 Ms. Smith demonstrated the SWRCB particle tracking animations. On cross-examination
22 Ms. Smith admitted that she did not model water quality in locations other than the compliance
23 sites (DVD Segment 1, beginning at 2:52:58), did not model different San Joaquin River flows
24 (2:53:55), did not model San Joaquin River salt concentrations and loads (DVD Segment 1,
25 beginning at 2:54:12), did not model export pump effects on ocean salts entering the system
26 (DVD Segment 1, beginning at 2:55:00), and did not model a "pre-project" scenario showing
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1 good quality San Joaquin River flows (DVD Segment 1, beginning at 2:57:15).

2 In response to further questions, Ms. Smith confirmed that her modeling was not aimed at
3 showing the best operations scenarios for imposing water quality with temporary or permanent
4 barriers, and that other operational parameters could show improved water quality (DVD
5 Segment 1, beginning at 3:59:35).

6
7 The evidence elicited during the cross-examination of the DWR and USBR witnesses
8 showed that the projects were not diligent in seeking to evaluate and implement other measures,
9 even though they were aware these other measures were necessary to meet the southern Delta
10 water quality standards as provided by D-1641 and the CDO.
11

12 The only other "evidence" of note was presented by the San Luis Delta-Mendota Water
13 Authority. The Authority put on a witness to show what actions local farmers/districts have done
14 to decrease salt loads into the San Joaquin River. Though interesting, the evidence was not
15 connected to any actions by DWR or USBR and thus does not provide a basis for modifying the
16 CDO. That is to say, actions by third parties to improve river conditions do not take away from
17 the fact that DWR and USBR have not taken steps to meet the salinity standards.
18

19 7. **The NOAA Fishery Biological Opinion Issued June 4, 2009 Does Not Support**
20 **the Board's Findings That DWR and USBR Acted Diligently**

21 In discussing the compliance plan approved by the executive director in 2006, section 4.0
22 of the order provides:

23 "That plan is no longer viable, however, in light of NOAA
24 Fishery's biological opinion, and the associated delay and
25 uncertainty regarding the feasibility of constructing the
26 permanent gates".

27 As discussed above, and as confirmed by DWR and USBR witnesses, DWR and USBR
28 knew that the construction of permanent operable gates in the southern Delta was not achievable

1 by July 1, 2009 by as early as May 2007. The fact that the NOAA biological opinion determined
2 approximately three weeks before the July 1, 2009 deadline that construction of the permanent
3 operable gates are not feasible from a ESA standpoint at this time, is unrelated to the fact that
4 DWR and USBR were dilatory in implementing a plan to obviate the threat of continuing water
5 quality violations in the south Delta by the July 1, 2009 compliance deadline.
6

7 **B. ADOPTION OF THE ORDER CONSTITUTES AN ABUSE OF**
8 **DISCRETION**

9 The record is replete with evidence that DWR and USBR were not diligent in meeting the
10 July 1, 2009 deadline.

11 Additionally, the Order constitutes an abuse of discretion in that it impermissibly extends
12 DWR and USBR's deadline to comply with the CDO to a date uncertain and one that is
13 contingent on the occurrence of additional factors. The CDO at page 27 clearly provided that *the*
14 *State Water Board will not extend the date for removing the threat of non-compliance beyond*
15 *July 1, 2009.* (Emphasis added). The CDO correctly provided a date certain for compliance.
16 Now, despite the fact that DWR and USBR did not meet the date certain deadline, they were
17 rewarded with a uncertain and, therefore, largely meaningless deadline by which to comply with
18 the CDO.
19

20
21 More specifically, the Order delays the requirement for compliance until after completion
22 of the Board's pending proceeding to consider changes to the interior-southern Delta salinity
23 objectives and the associated program of implementation included in the 2006 Bay-Delta Plan
24 and any subsequent water right proceeding to consider whether to change DWR or USBR's
25 responsibility for meeting the objectives as a result of any change to the 2006 Bay-Delta Plan
26 (See, section 2 of the order at page 21). Thus, DWR and USBR are not required to submit a
27 revised plan for compliance until 180 days after completion of the Board's pending proceedings
28

1 which, in itself, does not have a date certain for completion. Moreover, section 2 of the order at
2 page 21 impermissibly contemplates the Board adopting an order or decision modifying DWR's
3 or USBR's responsibility for meeting the interior southern and Delta salinity standards, and
4 further provides that if such event shall occur, DWR and USBR shall submit a revised detailed
5 plan based on the uncertain potential for a modified and, presumably, lessened the level of
6 responsibility to meet the standards.
7

8 Further, section 2 of the Order at pages 21 and 22 provides that "The Board's associated
9 program of implementation and any subsequent water rights proceedings shall be deemed to have
10 been completed if the State Water Board has not issued a final order in the water right proceeding
11 by January 1, 2013, unless the deputy director for water rights determines that the water right
12 proceeding has been initiated, is proceeding as expeditiously as reasonably possible, and will be
13 completed no later than October 1, 2014." Thus, the compliance deadline can be easily expended
14 beyond January 1, 2013 so long as the deputy director for water rights determines the associated
15 program of implementation and any subsequent water rights proceedings will be completed by no
16 later than October 1, 2014. Thus, even October 1, 2014 is not a date certain deadline.
17
18

19 The Board's action in qualifying and conditioning the deadline for DWR and USBR to
20 finally comply with the terms of the CDO based on a variety of uncertain factors represents an
21 abuse of its discretion and exceeds the bounds of its enforcement discretion.
22

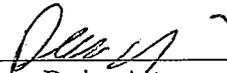
23 CONCLUSION

24 There is no substantial evidence in the record that supports the Board's findings that
25 DWR and USBR acted diligently to comply with the July 1, 2009 deadline to obviate the threat
26 of water quality violations in the south Delta. By extending the deadline to comply with the
27 CDO to a date uncertain, the Board has abused its discretion and rewarded DWR and USBR for
28

1 its blatant repeated failures to comply with law.

2 For these reasons, and the reasons set forth above, Petitioners herein request that the
3 Board rescind WR Order 2010-0002 and immediately commence enforcement actions against
4 DWR and USBR.
5

6 Dated: February 4, 2010

7 
8 S. Dean Ruiz, Attorney for South Delta
9 Water Agency and Lafayette Ranch, Inc.
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CERTIFICATE OF SERVICE

I am employed in the County of San Joaquin, State of California, over the age of eighteen years, and not a party to the within action. My business address is Harris, Perisho & Ruiz, 3439 Brookside Road, Suite 210, Stockton, California 95219.

On, February 4, 2010, I served the following document(s) described as:

REQUEST FOR RECONSIDERATION OF ORDER MODIFYING WR 2006-0006 (CDO)

[X] (BY ELECTRONIC MAIL)

I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Harris, Perisho & Ruiz, originating from the undersigned at 3439 Brookside Road, Suite 210, Stockton, California, to the address(es) indicated above.

To the interested parties and/or their counsel addressed as follows:

Table with 2 columns and 3 rows containing recipient names and contact information. Row 1: Jeanine Townsend (Clerk to the Board) and Bob Baiocchi (CA Salmon and Steelhead Assoc.). Row 2: Erick D. Soderlund (Department of Water Resources) and Jon D. Rubin (Diepenbrock Harrison). Row 3: Amy L. Aufdemberg (U.S. Department of the Interior) and Mike Taugher (Environment Report).

<p>1 DeeAnne M. Gillick 2 POB 20 3 Stockton, CA 95201-3020 4 <u>dgillick@nuemiller.com</u> <u>tshephard@neumiller.com</u> 5 <i>Rep: County of San Joaquin and</i> 6 <i>San Joaquin County Flood Control and</i> 7 <i>Water Conservation District</i></p>	<p>Heather Lea Merenda Environmental Services Division 23920 Valencia Blvd. #300 Santa Clarita, CA 91355 <u>HMERENDA@santa-clarita.com</u></p>
<p>8 Tim O'Laughlin 9 O'Laughlin & Paris LLP 10 POB 9259 11 Chico, CA 95927 12 <u>towater@olaughlinparis.com</u> 13 <u>Kpetruzzelli@olaughlinparis.com</u> 14 <i>Rep: San Joaquin River Group Authority</i></p>	<p>Alexis K. Galbraith, Esq. Herum Crabtree 2291 W. March Lane, Suite B-100 Stockton, CA 95207 <u>agalbraith@herumcrabtree.com</u> <u>kharrigfeld@herumcrabtree.com</u> 15 <i>Rep: Stockton East Water District</i></p>
<p>16 Paul R. Minasian 17 Minasian Law Firm 18 POB 1679 19 Oroville, CA 95965 20 <u>pminasian@minasianlaw.com</u> 21 <u>dforde@minasianlaw.com</u> 22 <u>awhitfield@minasianlaw.com</u> 23 <i>Rep: San Joaquin River Exchange</i> 24 <i>Contractors Water Authority</i></p>	<p>Carl P.A. Nelson Bold, Polisner, Maddow, Nelson & Judson 500 Ygnacio Valley Road, Ste. 325 Walnut Creek, CA 94596 <u>cpanelson@bpmni.com</u> 25 <i>Rep: Contra Costa Water District</i></p>
<p>26 Clifford Schulz 27 State Water Contractors 28 Kronick, Moskovitz, Tiedemann & Firard 400 Capitol Mall, 27th Floor Sacramento, CA 95814-3363 <u>cschulz@kmtg.com</u></p>	<p>Patrick Porgans Patrick Porgans and Associates, Inc. POB 60940 Sacramento, CA 95860 <u>porgansinc@sbcglobal.net</u></p>

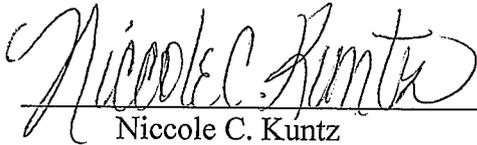
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1 [X] (BY MAIL) by placing [] the original a true copy thereof enclosed in sealed
2 envelopes for collection and mailing with the United States Postal Service that same day in the
3 ordinary course of business. I am aware that on motion of party served, service is presumed
4 invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit
5 for mailing in affidavit.
6

7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Mike Robinson 1970 Bowman Road Stockton, CA 95269	Barbara Barrigan-Parrilla Restore the Delta POB 691088 Stockton, CA 95269
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 4th day of February 2010 at Stockton, California.


Nicole C. Kuntz