

PUBLIC HEARING
STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

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APPEARANCES

BOARD MEMBERS

Ms. Tam Doduc, Chairperson

Mr. Arthur Baggett

STAFF

Ms. Celeste Cantu, Executive Director

Ms. Barbara Leidigh, Staff Counsel

Mr. Charles Lindsay, Water Resources Control Engineer

Ms. Erin Mahaney, Staff Counsel

Ms. Jean McCue, Water Resources Control Engineer

Ms. Diane Riddle, Environmental Scientist

ALSO PRESENT

Mr. Gary Bobker, The Bay Institute of San Francisco

Ms. Tina Cannon, Department of Fish and Game

Ms. Cathy Crothers, Department of Water Resources

Dr. Richard Denton, Contra Costa Water District

Ms. DeeAnne M. Gillick, San Joaquin County

Mr. David Guy, Northern California Water Association

Mr. John Herrick, South Delta Water Agency

Mr. Michael B. Jackson, California Sportsfishing
Protection Alliance

Mr. Paul Ryan Minasian, San Joaquin River Exchange
Contractors

Mr. Dante John Nomellini, Central Delta Water Agency

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APPEARANCES CONTINUED

ALSO PRESENT

Mr. Dan Bowman Odenweller, California Sportfishing
Protection Alliance

Mr. Tim O'Laughlin, San Joaquin River Group Authority

Mr. Patrick Porgans, Porgans and Associates

Mr. Jon Rubin, San Luis and Delta Mendota Water Authority

Mr. Clifford Schulz, State Water Contractors

Ms. Janice Webb, U.S. Department of Interior, Bureau of
Reclamation

Ms. Jeanne Zolezzi, Stockton Eastern Water District

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1 PROCEEDINGS

2 CHAIRPERSON DODUC: Good morning. We're going to
3 go ahead and get started.

4 I'm told that Member Art Baggett is parking his
5 car and he'll be here momentarily.

6 But good morning to all. This is the time and
7 place for the hearing regarding Draft Cease and Desist
8 Orders Nos. 262.31-16 against the United States Bureau of
9 Reclamation, or USBR, and 262.31-17 against the California
10 Department of Water Resources, or DWR. And to hear
11 evidence regarding four petitions for reconsideration of
12 the Division of water rights Chief's July 1st, 2005,
13 conditional approval of the April 25th, 2005, Water
14 Quality Response Plan submitted by the USBR and the DWR
15 for their use of each other's points of diversion known as
16 joint points of diversion in the southern Sacramento/San
17 Joaquin Delta.

18 The petitions were submitted by Contra Costa
19 Water District, South Delta Water Agency, Central Delta
20 Water Agency and Westside Irrigation District.

21 This hearing is being held in accordance with the
22 revised notice of public hearing dated September 23rd,
23 2005.

24 I am Tam Doduc, Chair of the State Water
25 Resources Control Board. Joining me shortly is Co-Hearing

1 Officer and State Water -- well, joining me right now is
2 Co-Hearing Officer and State Water Board Member Art
3 Baggett. We will be assisted by Staff Counsel, Barbara
4 Leidigh, to my left, Staff Environmental Scientist, Diane
5 Riddle, and Staff Engineer, Jean McCue.

6 The purpose of this hearing is to afford the
7 Division of Water Rights prosecution team, the USBR and
8 the DWR, the petitioner for reconsideration, and other
9 participants an opportunity to present relevant oral
10 testimony and other evidence which address the key issues.

11 With respect to the cease and desist orders under
12 consideration in this hearing the key issue asks whether
13 the Board should adopt each of the draft orders against
14 the USBR and the DWR with changes or without changes. The
15 key issue also asks: What is the basis of any changes to
16 the draft orders if they are adopted?

17 With respect to the Board's determination on four
18 petitions for reconsideration of the Water Rights Division
19 Chief's July 1st, 2005, conditional approval of the April
20 25th, 2005, Water Quality Response Plan submitted by the
21 USBR and the DWR, the key issue asks: What, if any,
22 changes should be made to the Division Chief's conditional
23 approval of the Water Quality Response Plan and what is
24 the basis for such actions or modification?

25 We will not hear testimony or other evidence that

1 is not relevant to the key hearing issues. The following
2 subjects are not relevant to the key issues:

3 First, any amendment of the Southern Delta EC
4 objectives must be made in the proceeding to consider
5 amending the 1995 Bay Delta Water Quality Control Plan,
6 not this hearing.

7 Second, actions that would involve changing the
8 requirements of State Water Board Decision 1641 are not
9 relevant to the draft cease and desist orders.

10 Third, actions on the temporary urgency and
11 long-term change petitions followed by the DWR and the
12 USBR to change the Southern Delta EC objectives are not
13 part of this hearing.

14 Fourth, pelagic organism declines in the Delta
15 are relevant only to the extent that they are affected by
16 compliance with the Southern Delta EC objectives.

17 Requests for changes in the San Joaquin River
18 flow and other flow and salinity objectives for the
19 protection of fish and wildlife are not part of this
20 hearing.

21 San Joaquin River TMDLs for salt, boron and
22 dissolved oxygen are not part of this hearing.

23 And, finally, proposals to remove the San Joaquin
24 River from the list of impaired water bodies for salinity
25 and boron are not a part of this hearing.

1 At this time I would ask Barbara Leidigh, our
2 hearing staff attorney, to cover a few procedural items.

3 STAFF COUNSEL LEIDIGH: Thank you.

4 First off, the Board's Division of Water Rights
5 has served copies of both the first and the second notices
6 of hearing on the parties listed in the mailing lists that
7 are attached to the notices by certified mail with return
8 receipt requested.

9 We do have certified mail return receipts that
10 show that all parties received the notices of hearing.
11 All parties who were sent the notices of hearing received
12 them.

13 I would also like to point out that a court
14 reporter is present and will make a transcript of the
15 hearing. Any party who wants a copy of the hearing
16 transcript must make separate arrangements with the court
17 reporter.

18 And, finally, I'd like to point out that there
19 have been some changes in the notice of intent to appear
20 on the witness list for the Department of Water Resources.
21 And I wanted to make sure that everybody is aware of that,
22 since those were received after the date when the notices
23 of intent were due.

24 That's all I have.

25 CHAIRPERSON DODUC: All right. Our order of

1 proceeding in this hearing will be to first provide an
2 opportunity for persons who are not presenting cases in
3 chief to present nonevidentiary oral policy statements.

4 Next we will receive testimony from the Division
5 of Water Rights prosecution team, followed by Central
6 Delta Water Agency, et al., South Delta Water Agency and
7 Lafayette Ranch -- thank you -- County of San Joaquin,
8 California Sport Fishing Protection Alliance, the DWR, and
9 San Joaquin River Group Authority.

10 Direct testimony of the above participants will
11 be followed by cross-examination by all the participants,
12 Board staff and Hearing Officer Art Baggett and myself.

13 For cross-examination, presentation of rebuttal
14 evidence and cross-examination of rebuttal evidence we
15 will call the participants who are presenting cases in
16 chief in the order I just stated in each round of
17 cross-examination and for rebuttal. We will then call in
18 the following order the participants who are not
19 presenting cases in chief but have requested the
20 opportunity to conduct cross-examination and rebuttal.

21 The order is the Bay Institute, the California
22 Department of Fish and Game, Contra Costa Water District,
23 Merced Irrigation District and San Luis Canal Company, the
24 Northern California Water Association, San Joaquin River
25 Exchange Contractors Water Authority, San Luis and Delta

1 Mendota Water Authority and Westland Water Districts,
2 State Water Contractors, Stockton East Water District, and
3 USBR.

4 At this time I would like to invite appearances
5 by participants. Will those making appearances please
6 state your name, address and whom you represent so the
7 court reporter can enter this information into the record.

8 First, who is representing the Division of Water
9 Rights prosecution team?

10 STAFF COUNSEL MAHANEY: Erin Mahaney representing
11 the enforcement team.

12 CHAIRPERSON DODUC: Name, address.

13 STAFF COUNSEL MAHANEY: Oh, address. Sorry.

14 I gave you my name. My address is 1001 I Street,
15 Sacramento, California 95814.

16 CHAIRPERSON DODUC: Who is representing the
17 Central Delta Water Agency, RC Farms, Inc., Curt Sharp and
18 Rudy Musey?

19 MR. NOMELELLINI: Dante John Nomellini, P.O. Box
20 1461, Stockton, California 95201, representing Central
21 Delta Water Agency, et al. And I gave you a card with my
22 name.

23 CHAIRPERSON DODUC: South Delta Water Agency and
24 Lafayette Ranch.

25 MR. HERRICK: John Herrick representing the South

1 Delta Water Agency and Lafayette Ranch; 4255 Pacific
2 Avenue, Suite 2, Stockton 95207.

3 CHAIRPERSON DODUC: Who is representing the
4 County of San Joaquin?

5 MS. GILLICK: DeeAnne Gillick representing the
6 County of San Joaquin; P.O. Box 20, Stockton, California
7 95201.

8 CHAIRPERSON DODUC: Who is representing the
9 California Sport Fishing Protection Alliance?

10 MR. JACKSON: Michael B. Jackson, Post Office Box
11 207, Quincy, California 95971.

12 CHAIRPERSON DODUC: Thank you.

13 Who is representing DWR?

14 DWR STAFF COUNSEL CROTHERS: Cathy Crothers at
15 1416 9th Street, Sacramento 95814.

16 CHAIRPERSON DODUC: Thank you.

17 And the San Joaquin River Group Authority.

18 MR. O'LAUGHLIN: Good morning. Tim O'Laughlin
19 representing the San Joaquin River Group Authority; 2571
20 California Park Drive, Suite 210, Chico, California 95928.

21 Thanks.

22 CHAIRPERSON DODUC: Thank you.

23 The Bay Institute.

24 MR. BOBKER: Gary Bobker, The Bay Institute, 500
25 Palm Drive, Suite 200, Novato, California 94949.

1 CHAIRPERSON DODUC: Thank you.

2 Department of Fish and Game.

3 MS. CANNON: Good morning. Tina Cannon, 1416 9th
4 Street, Suite 1341, Sacramento, California 95814.

5 CHAIRPERSON DODUC: Thank you.

6 Contra Costa Water District.

7 DR. DENTON: Richard Denton representing Contra
8 Costa Water District, 1331 Concord Avenue, P.O. Box H20,
9 Concord, California 94524.

10 CHAIRPERSON DODUC: Thank you.

11 Merced Irrigation District.

12 Anyone representing Merced Irrigation District?

13 Okay. The San Luis Canal Company?

14 The Northern California Water Association.

15 MR. GUY: Good morning. David Guy, Executive
16 Director, Northern California Water Association, 455
17 Capitol Mall, Suite 335, Sacramento.

18 CHAIRPERSON DODUC: Thank you.

19 MR. GUY: Thank you.

20 CHAIRPERSON DODUC: Who is representing Patrick
21 Porgans and Associates?

22 MR. PORGANS: Yes, Patrick Porgans. It's P.O.
23 Box 60940, Sacramento. And I'm the guy that -- I'm not
24 going to be involved. I'm just making a policy statement.

25 Thank you.

1 CHAIRPERSON DODUC: Thank you.

2 The San Joaquin River Exchange Contractors Water
3 Authority.

4 MR. MINASIAN: I'm Paul R. Minasian. My address
5 is 1681 Bird Street, Oroville, California 95965.

6 CHAIRPERSON DODUC: The San Luis and Delta
7 Mendota Water Authority.

8 MR. RUBIN: Good morning. Jon D. Rubin with
9 Kronick, Moskovitz, Tiedemann & Girard, 400 Capitol Mall,
10 27th Floor, Sacramento, California.

11 CHAIRPERSON DODUC: Thank you.

12 Westlands Water District.

13 MR. RUBIN: Currently I'll be representing both
14 the San Luis and Delta Mendota Water Authority and
15 Westlands Water District. Again, this is Jon Rubin.

16 CHAIRPERSON DODUC: Thank you.

17 State Water Contractors?

18 MR. SCHULZ: Good morning. Clifford Schulz
19 representing the State Water Contractors, 400 Capitol
20 Mall, 27th floor, Sacramento 95814.

21 CHAIRPERSON DODUC: Thank you.

22 Stockton East Water District.

23 MS. ZOLEZZI: Good morning. Jeanne Zolezzi
24 representing Stockton East Water District; Herum,
25 Crabtree, Brown, 2291 West March Lane, Suite B100,

1 Stockton 95207.

2 CHAIRPERSON DODUC: Thank you.

3 Who is representing the USBR?

4 MS. OFFTENBERG: Amy Oftenberg at -- just a
5 minute -- 2800 Cottage Way, Sacramento 95825. And with me
6 is Ron Milligan from the USBR Central Valley Operations
7 Office.

8 CHAIRPERSON DODUC: All right. Go back to Merced
9 Irrigation District and San Luis Canal Company.

10 All right. I will now administer the oath.

11 Will all those persons wishing to testify during
12 this proceeding please stand and raise your right hand.

13 Do you promise to tell the truth in this
14 proceeding?

15 PROSPECTIVE WITNESSES: I do.

16 CHAIRPERSON DODUC: Thank you. You may be
17 seated.

18 Does anyone wish to make a non-evidentiary policy
19 statement?

20 MR. BOBKER: I'm Gary Bobker, a Program Director
21 at the Bay Institute.

22 Thank you, Madam Chairwoman, Mr. Baggett. Nice
23 to see you all again.

24 My --

25 CHAIRPERSON DODUC: Actually -- excuse me. I

1 think I'm supposed to read you a whole bunch of
2 directions.

3 MR. BOBKER: You are?

4 CHAIRPERSON DODUC: Barbara, am I supposed to
5 read --

6 MR. BOBKER: But I'm here already.

7 (Laughter.)

8 CHAIRPERSON DODUC: You know, doesn't Gary
9 already know how to make a policy statement?

10 All right. I have to read you a bunch of
11 directions. Not just for you, but everyone else too, I
12 guess.

13 A policy statement is a non-evidentiary
14 statement. It may include the policy, views and position
15 of the speaker and non-expert analysis of evidence that
16 already has been presented.

17 The Board will also accept written policy
18 statements. Persons who wish to make only a policy
19 statement may do so subject to the following provisions:

20 Welcome to water rights.

21 Persons making such statements will not be sworn
22 or asked to affirm the truth of their statements. Such
23 persons must not attempt to use their statements to
24 present evidence of facts, either orally or by
25 introduction of written exhibits.

1 At the discretion of the hearing officers,
2 questions may be addressed to persons making only policy
3 statements for the purpose of clarifying their statements.
4 However, such persons shall not be subject to
5 cross-examination.

6 Participants who intend to present both a case in
7 chief and a policy statement may not make policy
8 statements at this time. They will have an opportunity to
9 make their policy statements during their opening
10 statements.

11 Now you may begin.

12 MR. BOBKER: My policy statement's going to be
13 very brief.

14 I just wanted to emphasize that the primary cause
15 of high salinity in the Delta and problems with complying
16 with the EC objective are essentially upstream and
17 essentially -- or largely the responsibility of the Bureau
18 of Reclamation for two reasons: One is salt loading from
19 lands irrigated in San Joaquin valley. And the second is
20 the reduction in flow from the main stem San Joaquin River
21 because of the operation of Friant Dam.

22 These primary causes are exacerbated by a
23 secondary cause of export operations obviously.

24 The reason that I think it's important to
25 emphasize this right up front is that to the extent that

1 the Board looks at compliance options that look at not --
2 complying with the objective but rather complying with a
3 CDO that has implementation measures in it, I think it's
4 important to remember this for two reasons.

5 One is that a CDO that focuses on complying with
6 a schedule for barrier construction may not be adequate
7 for a variety of reasons. I mean the barriers are going
8 through environmental documentation under both NEPA and
9 CEQA. They may be significantly modified, they may not
10 happen. They may not happen on any kind of schedule that
11 we can predict today, especially considering the things
12 that are happening in the Delta today. And I won't go
13 into those things that are happening in the Delta, but
14 there are many, many factors that are making us rethink
15 how we're managing the Delta. And that could have a
16 significant effect on the process of preparing
17 environmental review and actually implementing the
18 barriers.

19 The second is that I think it's appropriate to
20 look at the other factors, which are the primary factors,
21 that affect compliance with this objective, which are, as
22 I mentioned, upstream salt loading and upstream operation
23 of Friant Dam. And to the extent that you look at any
24 CDOs that include compliance with implementation measures,
25 then you should look at compliance measures that address

1 those factors just as much as the ag barriers.

2 And that concludes my policy statement.

3 Thank you.

4 CHAIRPERSON DODUC: Thank you.

5 Any questions?

6 DR. DENTON: Chairwoman Doduc, Mr. Baggett.

7 Contra Costa submitted a policy statement in
8 writing on October 14th, and I just wanted to just
9 summarize a few points.

10 We believe with respect to the joint point of
11 division Water Quality Response Plan that Condition 1AI in
12 the July 1st approval letter is highly irregular. And if
13 it were a mistake or an error, then CCWD requests that
14 that mistake be rescinded and the approval be reissued
15 without that particular condition in there.

16 If it was in fact the State Board staff's intent
17 to have the Water Quality Response Plan approval letter
18 supercede a portion of D-1641, then we'd ask -- we believe
19 that that's an inappropriate mechanism for making that
20 change.

21 There are ongoing activities or ongoing
22 procedures, including an upcoming hearing on long-term
23 change, where that would be more appropriate or even as
24 part of the periodic review.

25 Regarding the draft cease and desist orders, Key

1 Issues 1 and 2 in the hearing notice, our request is that
2 any Bay Delta standards or salinity objectives in Water
3 Rights Decision 1641 be enforced whether through cease and
4 desist orders or through other means.

5 We do notice that the cease and desist orders
6 really just lay out things that the Bureau and DWR need to
7 do to avoid exceeding the standard and violating the
8 standard. But I don't see any language in there saying,
9 "What will happen if that standard is violated?" It's
10 really saying, "Here's things you need to do to avoid
11 violating. Or if you do violate, here's the information
12 we need to assist the situation."

13 But I'd like to see some guidance from the Board
14 as to whether you then still intend to follow up and
15 actually issue some sort of violation or take some sort of
16 sanction if there is a violation.

17 And the other point I'd make -- I think you
18 already dealt with it, Chairwoman Doduc, in your
19 introduction -- that there's a lot of -- there seems to be
20 a lot of technical evidence in the hearing exhibits, that
21 this really comes down to legal issues: If there's a
22 violation, what should the State Board do about it?
23 That's Key Issues 1 and 2. And the second one, Key Issue
24 3, is: Can you change D-1641 without a hearing? And I
25 think those are the issues. And I don't necessarily want

1 to sit through a lot of technical hearings, and I'm sure
2 you don't either -- or technical evidence, and I'm sure
3 you don't either.

4 So that is our points. If something else comes
5 up later on, we may do some rebuttal or cross-examination.

6 Thank you.

7 CHAIRPERSON DODUC: Thank you.

8 MS. ZOLEZZI: Good morning. Jeanne Zolezzi
9 representing Stockton East Water District. We also have a
10 written policy statement that we'll submit copies of this
11 morning. And I won't read that statement. I will just
12 make a couple of key issues.

13 Stockton East Water District does believe that
14 the Board should adopt the cease and desist orders
15 because, as mentioned, the standards imposed by D-1641
16 cannot be changed until we proceed through the hearings to
17 change those standards. Our concern today is that the
18 content of the cease and desist orders need to be much
19 more carefully crafted to comply with both state and
20 federal law.

21 And we know in 1641 that the State Board made
22 several findings, one of which was that although releases
23 of dilution water could help to meet the standards, all
24 the South Delta objectives, that regional management of
25 drainage water was the preferred method to meet that

1 objective.

2 They made other similar findings. The barriers
3 alone would not ensure compliance with the objectives, and
4 that compliance would require treatment or more dilution
5 flows.

6 It also concluded that because DWR and the Bureau
7 were partially responsible for the degradation of the --
8 other than Vernalis, they were focusing on the other
9 southern Delta standards -- were affected by hydrologic
10 changes because of export pumpings, they felt comfortable
11 imposing those standards on DWR and USBR. But it also
12 determined that additional flows could result in an
13 unreasonable use of water if flows were released to meet
14 these interior Delta standards.

15 The Bureau of Reclamation in its submittals
16 before this Board on this issue has stated that it doesn't
17 know that it could meet the standards solely by releases
18 of flow, and has asserted that it would be an unreasonable
19 use of water.

20 Obviously Stockton East Water District is
21 concerned that the cease and desist order would require
22 the release of additional flows to meet the standards. We
23 believe that this would be an unreasonable use of water.
24 It would also, to the extent that releases were made from
25 New Melones Reservoir, constitute a violation of federal

1 directives recently made from Congress and also state law.

2 So we recommend that items 1 and 2 of both the
3 draft cease and desist order should be reworded and
4 expanded. We think this is important for the same reason
5 that the enforcement staff has stated that even though the
6 CDOs do nothing more than tell the Bureau and DWR --

7 BOARD MEMBER BAGGETT: Is this a policy
8 statement?

9 MS. ZOLEZZI: Yes, it is a policy statement. And
10 it completely follows the guidelines that the Chair has
11 outlined.

12 Thank you.

13 Items 1 and 2 of the draft CDO should be expanded
14 to give more direction, as staff has indicated is
15 important here.

16 We believe that it should include, but not be
17 limited to, some of the following directions to the Bureau
18 and DWR: That water quality releases should be used to
19 meet the standards only after non-flow alternatives have
20 been attempted and exhausted, such as reducing exports,
21 restrictions on discharge from ag lands, as well as
22 wetlands receiving water from the CDP and after
23 recirculation is attempted.

24 Second, water quality releases should not be the
25 exclusive method of meeting the standards.

1 Third, if water quality releases are used as one
2 of the methods to achieve compliance, the Bureau should
3 not release all water from one source for that purpose,
4 and a cap should be imposed upon the quantities of water
5 to be released to ensure that no unreasonable use of water
6 is allowed.

7 And, finally, actions taken by the Bureau to
8 comply with the standards should expressly comply with the
9 limitations imposed by Congress in HR 2828.

10 So we would appreciate consideration of these
11 issues. And I appreciate your time.

12 Thank you.

13 CHAIRPERSON DODUC: Thank you.

14 Any questions?

15 MR. GUY: Good morning again. David Guy,
16 Northern California Water Association. Thank you for the
17 opportunity to submit the policy statement here early in
18 the process. We have submitted the written policy
19 statement and provided copies to all of the parties, so
20 that is obviously part of your proceeding here.

21 Northern California Water Association, we
22 represent the water right holders on the Sacramento River
23 and it's tributaries. And on its face this proceeding
24 does not appear to have any bearing on those water right
25 holders. With that said, obviously we're just closely

1 watching this proceeding. And our basic objective here is
2 just to try to ensure that there is no responsibility
3 shifted from the San Joaquin River side to the Sacramento
4 River Basin, which as you all know there's a separate
5 proceeding that took place there, the Phase 8 proceedings,
6 and now the Sacramento Valley Water Management Agreement,
7 which we are beginning to implement.

8 So it's our hope that as this process moves
9 forward -- we're very supportive of folks resolving these
10 issues obviously, and it's not our intent to meddle in
11 those issues. But we do hope that there will be no
12 shifting of the responsibility upstream.

13 Thank you.

14 CHAIRPERSON DODUC: Thank you.

15 I think we have the Bureau and Mr. Porgans left
16 for policy statements.

17 No?

18 MR. PORGANS: I'm giving this back, you know, for
19 everybody that sent this, maybe -- because, quite frankly,
20 I don't have the inclination or the desire to read it.
21 And I don't even want to recycle it.

22 Oh, excuse me.

23 Patrick Porgans, Porgans and Associates. Forgive
24 me for not following the protocol.

25 Ms. Chairman, members of the Board. My name is

1 Patrick Porgans.

2 And while it may not seem relevant, what I'm
3 saying, it's all going to be relevant. And I only have 75
4 fact findings on -- volumes on water alone and I only have
5 33 years in it. So I don't want to make it sound like I
6 know what I'm talking about. God forbid.

7 Anyway, it seems to me like the proceedings are
8 inundated with a lot of legalese and myopic perspectives.

9 And, you know, when I'm going to make the
10 following statement, I do with all due respects.

11 If it was our policy to exploit the public trust
12 resources for the self -- for the benefits of the
13 mega-dollar water districts or the state water project
14 contractors and the CDP contractors or to placate the
15 political dictates of the well connected, then we'd have
16 no reservations in partaking in this so-called hearing
17 process.

18 If it was our policy to force the unreasonable
19 use of the public trust resources and to condone the
20 pollution and degradation of the waters of the state, then
21 we would also have no reservations about partaking in this
22 hearing. Let's remember that we're doubling the salt
23 loads every five years in the San Joaquin Delta.

24 If it was our intention to amass fortunes from
25 unsuspecting victims of the government water projects,

1 such as -- which are at the mercy of their attorneys, then
2 that would be a different story.

3 If it was our policy to portray ourselves as some
4 sort of self-called environmental group to give the donor
5 members the illusion that we're remotely concerned about
6 the environment instead of making backroom deals to ensure
7 the cash flow and the status as a stakeholder, then we'd
8 have no issue in participating.

9 However, these are not the types of policies that
10 Porgans and Associations have been involved in.

11 Our policy is to protect the trust resources and
12 to hold your agency and every other agency in this state
13 accountable for its failure to enforce their laws. And
14 we'll give you some specifics.

15 In good faith we participated in the Bay Delta
16 hearings back in the 1970s through the 1980s and into the
17 end of the 1990s. And we objected to the way that those
18 proceedings were carried out because they essentially
19 preempted meaningful public participation. When I say
20 public participation, I mean by people like myself. And
21 the same thing's happening here again. This is
22 reminiscent of the Suisun marsh protracted compliance. I
23 respectfully suggest that you all go back and read up on
24 that, because we're back in the same sort of boat again.

25 Being they was forced -- during those hearing

1 processes, you know, on the D-1641, while you were
2 going -- you were in the process -- your predecessors were
3 making knew rules to put more stringent requirements in
4 place, the Department and the Bureau violated the
5 standards on 289 occasions during water year 1991 and '92
6 and illegally exported 300,000 acre-feet of water, with a
7 street value of worth about \$30 million. Now, we have
8 those exhibits here that were part of that hearing
9 process. But I don't want to break the protocol. But if
10 you need them, I'll give them to you.

11 At any rate, while all that was going on they
12 were taking water out of the north, putting it in the
13 Delta -- below the Delta, coming back to the Board and
14 saying, "Hey, look, we can't meet the standard because we
15 don't have water in the north." I told them, "You're
16 going to fill those reservoirs in the south." They filled
17 them. And they were dumping water during the drought.

18 Your Board took no enforcement action at all
19 against them. So when we sit here today talking about,
20 oh, we're going to go through this process to see about
21 issuing a cease and desist order against the Bureau and
22 the Department, well, let me say this: If that happens,
23 we're going to be talking about a miracle, because that
24 would be a political act of suicide by this Board -- a
25 political act of suicide -- and Wall Street would be on

1 the telephone getting on your case el pronto. So that's
2 not going to happen.

3 So let's look at reality here for a minute. As
4 one individual human being -- and in all due respects,
5 because I have a lot of respects for everybody here, you
6 know, I met with some of you -- it would be disingenuous
7 for me to even partake in this because I'd be
8 disrespecting myself. It would be a disrespect for me to
9 partake here.

10 So I'm not even going to go into all the rest of
11 it. I'm just going to tell you this: It happened in
12 Mesopotamia 2500 years ago. You know, we brought you the
13 stuff, the hieroglyphics. We explained to you what went
14 on, you know, the salt deposition problem. You didn't pay
15 attention then. And I only say, "God help you," because,
16 you know, you think this is like a game. This is not a
17 game.

18 Anyway, excuse me. Whoever wants this -- I
19 already gave Nomellini a -- did I give you a box, Mr.
20 Nomellini?

21 MR. NOMELLINI: Yes, thank you very much.

22 (Laughter.)

23 MR. PORGANS: Is it okay if I leave it there?

24 CHAIRPERSON DODUC: It's not ticking, is it?

25 (Laughter.)

1 MR. PORGANS: Excuse me? No, it's not ticking.

2 As a matter of fact, if it had a purpose of
3 ticking, I would do that. But I'm not hear to create
4 destruction. I have a lot of love for all of you. God
5 love all of you.

6 CHAIRPERSON DODUC: Thank you.

7 STAFF COUNSEL MAHANEY: Actually someone may trip
8 on that.

9 MR. PORGANS: Oh, excuse me.

10 CHAIRPERSON DODUC: Are there any other policy
11 statements?

12 Hearing none, we'll now move to the testimony,
13 starting with the Division of Water Rights prosecution
14 team.

15 STAFF COUNSEL MAHANEY: Good morning, Chair
16 Doduc, Board Member Baggett, and members of the hearing
17 team. My name is Erin Mahaney and I represent the
18 Division of Water Rights prosecution team.

19 This hearing concerns the issuance of proposed
20 cease and desist orders against the United States Bureau
21 of Reclamation and the Department of Water Resources for
22 the threatened violation of permit and license terms
23 requiring compliance with water quality standards imposed
24 by Water Right Decision 1641.

25 The enforcement team's evidence will show that it

1 is appropriate for the Board to adopt the cease and desist
2 orders with modifications. Issuance of these orders will
3 best serve the Board's commitment to enforcement with the
4 terms and conditions that it imposes.

5 The enforcement team presents one witness, Mr.
6 Larry Lindsay, in this case. His testimony will
7 demonstrate that there's a threat of the violation of the
8 .7 EC objective in effect from April through August at
9 interior Delta locations and that a compliance schedule
10 with Board oversight and monitoring is necessary to ensure
11 that the agencies comply with their permit and license
12 terms.

13 We will limit the level of detail in our direct
14 exam. But if you have any questions, please ask.

15 The enforcement team does not present any
16 evidence on the third hearing issue regarding the Water
17 Quality Response Plan.

18 The Department of Water Resources defends against
19 the proposed cease and desist order, claiming that D-1641
20 establishes a different and more limited process than the
21 one at issue here. The issue of the Board's discretion to
22 enforce permit and license terms however is a legal issue
23 and not an evidentiary one. The Board should not
24 interpret D-1641 as limiting its discretion to enforce the
25 agency's permit and license terms, and certainly there is

1 no limitation on the Board's authority to exercise its
2 enforcement discretion under a statute enacted subsequent
3 to the D-1641.

4 If there's any question in the hearing officer's
5 mind regarding this issue, I request that they provide the
6 parties an opportunity to address this issue in closing
7 briefs.

8 The enforcement team supports the Hearing
9 Officer's ruling on the relevance of certain issues. And
10 I'd like to clarify that this ruling extends to the issue
11 of harm and whether or not compliance or noncompliance
12 with water quality standards extends to that issue.

13 We will object to any line of questioning that
14 addresses the issue of harm simply because it is not
15 relevant to this proceeding.

16 Finally, at about 9:57 this morning the Bureau of
17 Reclamation and the prosecution team reached a settlement
18 agreement on the cease and desist order. We propose to
19 submit it to the Executive Director, for a decision by
20 settlement is authorized under the Administrative
21 Procedures Act. We are unable due to the late date of
22 this settlement to provide you with copies at this time.
23 But we fully intend to provide the participants in this
24 hearing and the Board members with copies of the proposed
25 settlement.

1 If approved, the settlement may simplify the
2 issues for the Board's decision.

3 A hearing is still necessary for the Board to go
4 forward with issues concerning the notice of proposed
5 cease and desist against the Department of Water Resources
6 and to deal with the Water Quality Response Plan issue.

7 Thank you.

8 BOARD MEMBER BAGGETT: When do you expect to have
9 copies of the settlement? Later today?

10 STAFF COUNSEL MAHANEY: Yes, later today.

11 BOARD MEMBER BAGGETT: After lunch?

12 STAFF COUNSEL MAHANEY: Yeah, we would need lunch
13 time to finish them up.

14 BOARD MEMBER BAGGETT: Take a long lunch then?
15 That would be my proposal so we have an opportunity.

16 CHAIRPERSON DODUC: Any other questions?

17 BOARD MEMBER BAGGETT: Great.

18 STAFF COUNSEL LEIDIGH: I think Mr. Jackson has a
19 problem.

20 MR. SCHULZ: Mr. Jackson, will you address the
21 issue of the impact of the settlement --

22 MR. JACKSON: Yes.

23 CHAIRPERSON DODUC: Go ahead.

24 MR. JACKSON: Madam Chairman, on behalf of the
25 California Sportsfishing Protection Alliance, I would move

1 to continue the hearing until all parties have an
2 opportunity to review the settlement.

3 I would also object to the settlement being
4 allowed on the grounds that this was a settlement between
5 the State Water Resources Control Board prosecutorial team
6 and one of the parties to this particular lawsuit. I
7 believe that that is completely outside the hearing rules,
8 and I believe it to be a violation of all of the rest of
9 the parties' rights under both the federal and the state
10 constitution.

11 It seems to me that this is not only
12 procedural -- a lack of procedural due process, but it is
13 a violation of a substantive due process under both the
14 state and federal constitution.

15 CHAIRPERSON DODUC: I see others standing up.

16 Mr. Schulz.

17 MR. SCHULZ: Thank you.

18 I'm not going to clothe myself in the
19 constitution, but just in the practical reality of what I
20 have to deal with this morning in terms of trying to cross
21 examining the prosecution team and others who are
22 supporting the issuance of the cease and desist. Without
23 knowing what's in the settlement with the Bureau, I find
24 myself unable to figure out exactly how to approach that
25 because I don't know if the settlement shifts -- possibly

1 shifts burdens to the state water project, which is what I
2 am mostly concerned about, or whether there are terms in
3 that which I need to ask staff about and figure out if
4 they are things that also ought to be applicable to DWR.

5 So I'm just at a loss as to how to proceed with
6 my examination of witnesses until I've had an opportunity
7 to see that document.

8 CHAIRPERSON DODUC: Mr. O'Laughlin.

9 MR. O'LAUGHLIN: Tim O'Laughlin representing the
10 San Joaquin River Group Authority.

11 While I don't think there's any constitutional or
12 state law that's been violated, it's just a -- and
13 actually when you look at how the cease and desist order
14 process is set up, the Bureau has every right to enter
15 into a settlement agreement. So that's not the issue
16 here.

17 The real issue here is how are other parties like
18 my clients going to respond without knowing what the
19 settlement issue is. And all we need -- and I can't
20 imagine that this is an extensive document -- is we
21 probably should just have a long lunch, take a look at the
22 document, and come back start again. I doubt that -- I
23 doubt that what's in that document is going to cause a
24 delay of any substantial portion. And that would allow
25 then us to prepare so that when the prosecution -- if they

1 wanted to put in their case in chief right now, they could
2 do so. We could take a break, come back 1, 1:30, start
3 the process again and move forward.

4 That's my suggestion.

5 CHAIRPERSON DODUC: I'm sorry. One last comment.

6 MR. HERRICK: This is Jon Herrick, South Delta
7 Water Agency. I don't mind clothing myself in the
8 constitution under due process.

9 Madam Chairman, I just don't understand how we
10 can proceed like this. The public was noticed that we're
11 going to have a hearing. They developed testimony to
12 comment on the proposals. And now part of it is resolved
13 probably outside of the public purview. What sort of
14 testimony would have been different -- presented
15 differently, cross-examination different? We don't know.
16 The point about how it might affect the State Water
17 Contractors, although they're not my friends, is --

18 (Laughter.)

19 MR. HERRICK: -- is right on point.

20 My cross-examination of DWR is based upon the
21 existing facts, not upon some unknown settlement document
22 that nobody wants to give to us.

23 CHAIRPERSON DODUC: I think there is a general
24 agreement between Co-Hearing Officer Art Baggett and
25 myself that an adjournment until after lunch so that the

1 settlement document can be released, that the parties
2 could have adequate -- well, some time anyway to review
3 and prepare accordingly.

4 Will you be able to provide that settlement
5 agreement within the next hour or so?

6 STAFF COUNSEL MAHANEY: Absolutely.

7 CHAIRPERSON DODUC: All right. Will 2 o'clock be
8 adequate for everyone, two hours, to review the documents?

9 BOARD MEMBER BAGGETT: Well, I would propose --
10 Tam, I'd propose that the prosecution team make -- well we
11 should have some idea how many copies available here by
12 noon.

13 I would take strong disagreement with the
14 constitutional issues raised here. This is no different
15 than a criminal trial that settles just before the trial
16 begins. This happens routinely. This is a cease and
17 desist order. It's an enforcement action brought by the
18 Division of Water Rights, not by this Board under
19 petition.

20 Obviously there's always opportunities for a
21 settlement agreement then be petitioned, as we will no
22 doubt see in some other issues. But --

23 STAFF COUNSEL MAHANEY: And I'd be happy to
24 respond on that point if necessary. This is an
25 enforcement action against one party. The APA allows for

1 a decision by settlement. And I believe that the -- well,
2 specifically an agency may formulate or issue a decision
3 by settlement pursuant to an agreement of the parties
4 without conducting an adjudicative proceeding. "Pursuant
5 to an agreement of the parties" in this case and in any
6 enforcement proceeding I believe refers to the party
7 against which the enforcement proceeding -- enforcement
8 action is taken as well as the prosecution team.

9 I understand the hearing participants' concerns
10 about how this may affect their direct and cross-examine.
11 And for that reason I'm more than happy to give them a
12 copy of the settlement agreement. But I do have to say
13 that I do not believe that under the constitution or other
14 authority they have an absolute right to veto or review
15 this settlement.

16 I'd also like to point out that the settlement is
17 subject to the Executive Director's approval and that the
18 parties can petition for reconsideration if that approval
19 is tendered.

20 MR. MINASIAN: Chair Doduc, Paul Minasian for the
21 exchange contractors.

22 May I reiterate the constitutional arguments that
23 we raised in regard to due process, both substantive and
24 procedural, in the Redwood Valley case approximately five
25 months ago in regard to this procedure.

1 However, I would like to add the following:
2 Unless you hold a good faith hearing to determine the
3 effects of the settlement upon other parties, I'm not sure
4 that you can enter into the settlement. There will be
5 severe prejudice to parties such as the exchange
6 contractors, who are dependent upon enforcement of the
7 drainage obligations of the Bureau. How would DWR, as an
8 example, be able to raise evidence and determine the
9 fairness of a settlement that ignored the Bureau's
10 responsibility under San Luis Act and under Decision 1641?

11 So when we have joint responsibility for
12 conditions, I think you've got to hold a good faith
13 hearing to determine that you will not be prejudicing
14 other parties, including the Delta interests.

15 BOARD MEMBER BAGGETT: This Board is not entering
16 into the settlement, you understand. This is the
17 executive officer that is entering into this. That's a
18 significant difference.

19 MR. MINASIAN: I understand the formalistic
20 difference. I don't understand the substantive
21 difference. How can you enter into -- and the Board may
22 not. But the Board has the ability to refuse the
23 settlement and the dismissal of the charges, just as a
24 court has the ability to find prejudice from accepting a
25 plea from one criminal. And I don't like the criminal

1 analogy in this circumstance, but --

2 (Laughter.)

3 BOARD MEMBER BAGGETT: Right, I know. I suspect
4 some in this room would. But --

5 MR. MINASIAN: Let us use a polluter analogy.
6 Let us imagine a sweetheart deal between one oil company
7 and an enforcement agency, with leaving another oil
8 company on the barbecue. Now, the bottom line of it is
9 that in order to know how your CDO is going to work if
10 you're going to issue it against DWR, you have to know
11 what your limitations are going to be with the Bureau.
12 And I think holding a brief good faith hearing will allow
13 us to get to that.

14 STAFF COUNSEL MAHANEY: May I respond?

15 I'd like to point out that two separate cease and
16 desist orders were issued against the Department and the
17 Bureau. Action was taken against them separately.

18 And I'd also like to point out again that there
19 is an opportunity for public comment and review through
20 the petition for reconsideration process.

21 MR. RUBIN: Chair Doduc, I suggest -- Jon Rubin
22 for the record. I suggest that we follow the
23 recommendations that the Board members had stated just
24 previously. Allow the parties to review the settlement,
25 and we'll be able to reconvene either this afternoon or

1 tomorrow morning and address this based on the substance
2 of what the settlement contains. We can argue about the
3 process all we want. But without knowing what's in the
4 document, it's pretty hypothetical.

5 MR. NOMELLINI: Dante John Nomellini for Central
6 Delta parties.

7 What I see happening to us is we're going to
8 waste a lot of time. We're going to get the document.
9 The basic concerns are going to be the same. We need time
10 to look at it, need time to alter testimony,
11 cross-examination et cetera.

12 So if you're really going to go through this
13 process, then I think you ought to renote the hearing
14 for a later date.

15 Another alternative would be to have the
16 prosecution team proceed with their case, let's
17 cross-examine with what we have, keep the hearing open for
18 additional opportunity to cross-examine further with
19 regard to the impact of the settlement. But I think it's
20 going to take time to digest that. I don't think it's
21 going to be done in an hour or two. I think what you're
22 going to hear is that it's an inadequate opportunity to
23 prepare.

24 So either we're going to all sit around and waste
25 time or we're going to work. And I would opt for working.

1 Either let them come up, let's start working on them.
2 We've got cross-examination with regard to the state. And
3 then continue it to develop the other issues based on what
4 we see in the settlement agreement. Or renote the
5 hearing.

6 BOARD MEMBER BAGGETT: Dante, I've got a
7 question.

8 So is your proposal to bifurcate this and proceed
9 with the full hearing on the Department of Water Resources
10 action?

11 MR. NOMELLINI: Well, I didn't use the term
12 "bifurcate." But I think --

13 BOARD MEMBER BAGGETT: Well, I mean that's, in
14 essence -- there's two separate hearings really going on
15 here simultaneously. So --

16 MR. NOMELLINI: I don't know that we're going to
17 completely separate the Bureau's actions associated with
18 the river and their responsibilities from the state. I
19 think the hearing is going to involve, you know, a mix of
20 the issues. But obviously the hearing on the settlement
21 agreement, if there's going to be one -- and I don't know
22 if you indicated that there would not be a hearing on the
23 settlement agreement --

24 BOARD MEMBER BAGGETT: It appears to me it will
25 be petitioned --

1 MR. NOMESELLINI: Yeah, and I --

2 BOARD MEMBER BAGGETT: -- just from some comments
3 that were being --

4 MR. NOMESELLINI: Yeah, I don't even know the
5 purpose of this hearing on the cease and desist order, you
6 know. I mean somebody else is more familiar with the
7 regulations than I am. But a proposed cease and desist
8 order and a hearing on that. You know, I don't know.
9 We're here to respond to the notice of hearing and
10 participate. We have interests that are at stake. We
11 want to take the opportunity to be heard. We want to also
12 participate in any discussion and hearing on the
13 settlement agreement, because it may have repercussions as
14 the other parties' lawyers have indicated. So I think in
15 fairness you've got to give us a shot at that one. Not
16 that anything is going to come of it.

17 Thank you.

18 CHAIRPERSON DODUC: Thank you.

19 MS. GILLICK: DeeAnne Gillick representing San
20 Joaquin County.

21 I have some concerns as Dante represented, that a
22 break this afternoon may not be enough time.

23 I have heard people comment that this settlement
24 may change their cross-examination. Well, I submit that
25 this settlement may also change the parties' direct

1 examination and testimony. The testimony for the hearing
2 was prepared for an enforcement action against the Bureau
3 and the Department. With taking the bureau out, I submit
4 that perhaps the testimony of the parties on direct
5 examination may change as well; and have concerns that we
6 break for run and we come back and when we proceed with
7 our direct testimony, that we will not have enough time to
8 properly respond to the changed circumstances.

9 CHAIRPERSON DODUC: Any final words from the
10 prosecution team, who started all this mess?

11 (Laughter.)

12 STAFF COUNSEL MAHANEY: Believe me, we tried to
13 get it through sooner.

14 Again, I'd like to make a couple points. One is
15 which I think it is within the Hearing Officers'
16 discretion to the extent to which they allow the hearing
17 participants review the settlement. As I mentioned, we're
18 more than happy to provide a copy for purposes of allowing
19 people to consider whether their direct or cross-examine
20 needs to be changed. But I do not think that there should
21 be a hearing on the proposed settlement, and that there is
22 a process to review it through the petition for
23 reconsideration process.

24 That said, the parties don't need to take my word
25 for it, and I'm sure they won't, but the settlement for

1 all purposes repeats the cease and desist order, with
2 very, very few substantive changes. So I don't believe it
3 will take much time for them to look at that. And, again,
4 they will have their own opinions on that.

5 But what I suggest to the Hearing Officers is
6 that the prosecution goes ahead with its case in chief;
7 and because we do not have a signed settlement yet, I will
8 go ahead and make the case against both agencies; and that
9 when we break for lunch, we get that copy of that
10 settlement and are able to distribute it to the parties at
11 your direction.

12 CHAIRPERSON DODUC: We're going to break now.
13 The prosecution team will have copies of settlement
14 agreement available by noon. And we will presume at 2
15 o'clock.

16 (Thereupon a lunch break was taken.)
17
18
19
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25

1 AFTERNOONSESSION

2 CHAIRPERSON DODUC: All right. Good afternoon.

3 I see that we have a full house once again. So
4 let's go ahead and resume with the hearing.

5 By now you should have received copies of the
6 proposed settlement agreement and had some time to look it
7 over. And, in fact, our Executive Director did as well.

8 And at this point I want to ask Ms. Cantu to give
9 us a report on the settlement agreement.

10 EXECUTIVE DIRECTOR CANTU: Good afternoon. My
11 name is Celeste Cantu, Executive Director, State Water
12 Resources Control Board.

13 We've had a brief time -- a chance to review the
14 proposed settlement agreement presented by the Bureau.
15 We've met with staff.

16 We have some questions on timing and we have some
17 questions on the role of the Division Chief relative to
18 CEQA, and a few other things that we're still exploring.

19 We'd recommended to you that we'd like to take
20 this under advisement and we'll pursue those questions,
21 and hopefully this hearing will shed some light on some of
22 those issues as well.

23 CHAIRPERSON DODUC: All right. Thank you.

24 Any other comments from staff?

25 STAFF COUNSEL LEIDIGH: No.

1 EXECUTIVE DIRECTOR CANTU: Right. Division Chief
2 brings to my attention that I need to clarify that
3 communications would be with our hearing team staff, not
4 prosecution staff. An important detail.

5 CHAIRPERSON DODUC: All right. Thank you very
6 much.

7 With that then, we are going to resume with the
8 testimony for this hearing.

9 Prosecution team please.

10 STAFF COUNSEL MAHANEY: Erin Mahaney for the
11 Division of Water Rights prosecution team.

12 Would it be all right with the Hearing Officer if
13 I remained seated here as opposed to at the podium?

14 CHAIRPERSON DODUC: That's fine.

15 Just one note. The settlement agreement is not a
16 subject for this hearing.

17 STAFF COUNSEL MAHANEY: All right.

18 WATER RESOURCES CONTROL ENGINEER LINDSAY: Where
19 do you want me? Over here?

20 (Charles L. Lindsay testifies)

21 DIRECT EXAMINATION

22 by STAFF COUNSEL MAHANEY:

23 Q All right. Please state your name and place of
24 employment.

25 A My full name is Charles L. Lindsay. I'm also known as

1 Larry Lindsay. I work for the State Water Resource
2 Control Board's Division of Water Rights in the Compliance
3 and Enforcement Unit.

4 Q Have you taken the oath in this proceeding?

5 A Yes, I have.

6 Q Did you prepare the Statement of Qualifications that
7 is submitted as Enforcement Team Exhibit WR-2?

8 A Yes.

9 Q Is Exhibit 2 a true and accurate statement of your
10 qualifications?

11 A Yes.

12 Q Did you prepare the written statement that is
13 submitted as Enforcement Team exhibit WR-1?

14 A Yes, I did.

15 Q Are the statements in Enforcement Team Exhibit 1 true
16 and accurate to the best of your knowledge?

17 A Yes.

18 Q Will you please summarize the terms of the
19 Department's and the Bureau's permits and license that are
20 the subject of the cease and desist orders?

21 A Yes. Decision 1641 states that the permits and the
22 license of the two agencies are conditioned upon the water
23 quality objectives in Table 2 of Decision 1641. And
24 That's Water Right Exhibit 5B.

25 The table lists minimum electroconductivity, or

1 EC, standards at compliance locations in the southern
2 Delta.

3 That's not time for that yet.

4 For three of the compliance locations in Table 2,
5 there's a footnote 5, which states that a 0.7 EC objective
6 becomes effective on April 1st, 2005 for the period April
7 through August of each year. Prior to that date the
8 standard was 1.0.

9 Footnote 5 states that the 0.7 objective may
10 revert back to 1.0 EC from April through August if
11 permanent barriers are constructed or equivalent measures
12 are implemented.

13 Q In your opinion, is there a threatened violation of
14 those terms?

15 A Yes. First, in their own words USBR and DWR advised
16 the Division that they would have difficulty in meeting
17 the 0.7 EC objective. This problem was communicated to
18 the Division first in a joint letter dated February 14th,
19 2005, from USBR and DWR to the Chief of the Division of
20 Water Rights.

21 This is Water Right Exhibit 6. This letter was
22 the cover letter for a change petition and a petition for
23 temporary urgency change, both aimed at changing the 0.7
24 EC standard to avoid a violation.

25 Also, in a letter dated March 25th, 2005, from

1 DWR to the Chairman of the State Water Resources Control
2 Board -- and that's Water Right Exhibit 7 -- this was also
3 communicated in that document. This letter was a petition
4 for reconsideration of Water Right Order 2005-009, and it
5 stated -- and I quote -- "Water quality often exceeds 0.7
6 EC in July and August in average to dry years. While in
7 most wet years, the values may be much less than 0.7,
8 graphs of hydrologic conditions in some wet year types
9 show that water quality in the southern Delta may be
10 slightly higher than 0.7 EC."

11 Q Do you have additional information as of the time you
12 submitted your exhibits on October 13th to support your
13 conclusion that future violations of the .7 objective are
14 likely?

15 A Yes. I looked at some historical data myself.

16 (Thereupon an overhead presentation was
17 Presented as follows.)

18 WATER RESOURCES CONTROL ENGINEER LINDSAY: I
19 obtained data from DWR's Compliance and Modeling Section.
20 It was not obtainable on the California Data Exchange --
21 California Data Exchange Center's website, better known as
22 CDEC, so I got it directly from DWR's Compliance and
23 Modeling Section, prepared my own charts. The results are
24 summarized here in Water Right 9.

25 Note this only includes days in the enforcement

1 period, from April 30th to August 31st. I'm saying April
2 30th, because of course you need 30 days, you know, to get
3 the 30-day moving average after April 1st.

4 I looked at data back to 1996. And I went back
5 to 1996 because that was the first year all of the
6 temporary barriers were in place. Note in 1996 and '97 --
7 those were wet years -- there were some times where the EC
8 exceeded .7. Those are the number of days where the
9 moving -- 30-day moving average exceeded.

10 Also, in 2001, the first dry year following a
11 period of three wet years and then two above normals, we
12 go right into EC exceeding .7 at all three of those
13 stations.

14 I want to emphasize that these exceedances of .7
15 EC are not violations. The standard was 1.0 EC at this
16 time. But DWR and USBR told the Division that .7 EC was
17 exceeded in the past. And I wanted to see to what extent
18 and when.

19 So I agree with DWR and USBR in what they've
20 communicated to the Division. There is a strong
21 possibility of exceeding .7 EC.

22 STAFF COUNSEL MAHANEY: At this time I have a
23 procedural question for the hearing officer.

24 This chart was developed for submittal off
25 testimony which the enforcement team submitted on October

1 13th. This past Friday, October 21st, at approximately
2 2:30, the Department of Water Resources communicated to
3 Mr. Lindsay that they had updated data. We can either
4 present a revised chart reflecting that data at this time
5 or on rebuttal, as you wish.

6 CHAIRPERSON DODUC: We'll go ahead and accept
7 that now.

8 STAFF COUNSEL MAHANEY: Okay. We've labeled this
9 updated chart -- again, this reflects changes in data that
10 were submitted to Mr. Lindsay on Friday afternoon of
11 October 21st. And we've labeled this as Water Right
12 Exhibit -- WR-18. I have 30 copies here that we can
13 distribute.

14 This will also affect one other exhibit, which
15 I'll raise when we get to that.

16 Q Mr. Lindsay, can you explain how the data you received
17 on Friday afternoon changes this chart?

18 A The only thing that changed is that DWR gave me data
19 for 2004 at Old River at Tracy Road Bridge Station P12.
20 So the "no data" -- where it says "no data," that is
21 incorrect. But the 30-day running average EC was exceeded
22 for 28 days in the period April through August in 2004.

23 So that's the only number that changed there.
24 Instead of "no data," now it says "28".

25 Q Had the Department or the Bureau actually violated a

1 term of their permits or license requiring them to meet a
2 water quality standard?

3 A Yes. Next.

4 Next slide please.

5 --o0o--

6 WATER RESOURCES CONTROL ENGINEER LINDSAY: As you
7 can see on Exhibit Water Right 15, the 30-day moving
8 average 1.0 EC standard was exceeded in 2003. This is at
9 Station C6.

10 Next slide please.

11 --o0o--

12 WATER RESOURCES CONTROL ENGINEER LINDSAY: They
13 also exceeded it at Station P12, roughly the same time
14 period, a little over three months.

15 STAFF COUNSEL MAHANEY:

16 Q At the time you submitted exhibits on October 13th,
17 did the Department or Bureau report this violation?

18 A Before I submitted written testimony I could not find
19 any evidence that these violations had been reported by
20 either agency.

21 Q Are they required to report it?

22 A Yes, they are. Decision 1641 requires immediate
23 reporting of violations of the water quality objectives.
24 And in this case both agencies are responsible for meeting
25 the standard at these two locations and both are

1 responsible to report it.

2 Q Did you find any other violations of the agencies'
3 permit or license terms?

4 A Yes I did -- slide off for a moment.

5 --o0o--

6 WATER RESOURCES CONTROL ENGINEER LINDSAY: Yes, I
7 did. First, Decision 1641 requires a monitoring program
8 at the compliance locations. In looking at the data
9 provided by DWR, I found some significant gaps in data
10 collection. They're summarized in Water Right 10.

11 Now the next one please, the last one.

12 --o0o--

13 WATER RESOURCES CONTROL ENGINEER LINDSAY: Okay.
14 These are days of missing data, April 1st to August 31st.
15 Again, it shows -- this is times when the data was just
16 not available to be studied.

17 While some data problems are always expected, in
18 my opinion some of the gaps are quite large. And
19 specially when the standard is a moving average, when you
20 start losing many days, you start running into problems
21 developing a moving average.

22 STAFF COUNSEL MAHANEY:

23 Q In response to the data that you received Friday
24 afternoon, October 21st, does this chart change?

25 A Yes, it does. You want me to describe it?

1 Q Yes.

2 This will be -- again, in light of the recent
3 data, the chart will be -- the new chart will be labeled
4 WR-19.

5 A At Tracy Road Bridge, 2004, where it says, "entire
6 period," there was now no data missing. So that would be
7 a dash now on the slide.

8 You can turn that one off now.

9 Q Will you please summarize -- I'm sorry.

10 A Continuing on, you're asking me if there are any
11 other -- any violations of permit or license terms.

12 A second. D-1641 also requires both agencies to
13 submit an annual report to the Executive Director by
14 December 1st of each year. The report is supposed to
15 summarize the previous year's findings related to
16 monitoring the water quality objectives. And it's
17 supposed to provide detail of future study plans. To my
18 knowledge, these annual reports have not been submitted by
19 either agency.

20 Q Will you please summarize the requirements of the
21 draft cease And desist orders.

22 A Yes. First they establish a timeline for compliance
23 with Decision 1641. They require that the permanent
24 barriers or equivalent measures be implemented by January
25 1st, 2009. They require that USBR and DWR provide a

1 timeline with milestones and quarterly updates of their
2 progress to install the barriers or implement equivalent
3 measures. And they reiterate a requirement to report
4 actual and threatened violations.

5 Q Do the cease and desist orders establish any new water
6 quality standards?

7 A No, they do not.

8 Q Do the cease and desist orders limit any options
9 currently available to the Department or to the Bureau to
10 comply with the water quality standards?

11 A No. They may still implement equivalent measures
12 instead of installing the permanent barriers.

13 Q Do you recommend modifying the draft cease and desist
14 orders?

15 A Yes I do. I propose three modifications. And these
16 are included in Water Right 16 and 17?

17 First of all, an error in the DWR's cease and
18 desist order. I held them accountable for Vernalis. That
19 was an error. It needs to be taken out of there.

20 I also -- I would need to add that we should
21 reiterate the requirement for an annual water quality
22 report starting with the one due this December, and also
23 require reporting of outages to the data collection system
24 if they exceed seven days.

25 Those three modifications.

1 Q In your opinion, should the Board issue the cease and
2 desist orders to the Department and to the Bureau?

3 A Yes. A threatened violation exists and the CDOs
4 should be issued with the recommended modifications.

5 Q In your opinion, why is it important for the State
6 Water Board to issue the cease and desist orders?

7 A Well, first, Water Code Section 1825 states a
8 legislative policy directing the Board to vigorously
9 enforce permit and license terms and conditions. And in
10 my opinion, issuing the CDO demonstrates compliance with
11 this policy.

12 And, finally, in my opinion, water right terms
13 may become meaningless without active enforcement.

14 STAFF COUNSEL MAHANEY: At this time I'd like to
15 offer into evidence Enforcement Team Exhibits WR-1 through
16 WR-19.

17 STAFF COUNSEL LEIDIGH: Could we wait until these
18 have been cross-examined before --

19 STAFF COUNSEL MAHANEY: Sure.

20 STAFF COUNSEL LEIDIGH: -- they're offered?

21 And I was wondering whether you really want to
22 offer 9 and 10 since they've been replaced by 18 and 19.

23 STAFF COUNSEL MAHANEY: We can withdraw them. I
24 didn't know it was easier in terms of accounting for them.

25 STAFF COUNSEL LEIDIGH: I think it would probably

1 be easier not to have them in the record.

2 STAFF COUNSEL MAHANEY: Okay. I'll take care of
3 that.

4 STAFF COUNSEL LEIDIGH: Thanks.

5 CHAIRPERSON DODUC: We are ready now for the
6 cross-examination, starting with the participants who are
7 presenting cases in chief.

8 Specifically Central Delta Water Agency, et al.

9 MR. NOMESELLINI: Dante John Nomellini for Central
10 Delta Water Agency, et al.

11 First of all, I think procedurally, we should
12 have those exhibits served on the various parties. There
13 weren't enough copies to hand out to everybody, so we're
14 without the copies.

15 I hate to give you mine back Mr. Lindsay --

16 STAFF COUNSEL LEIDIGH: Mr. Nomellini, would
17 you -- if Ms. Mahaney provides copies this afternoon,
18 would that be adequate for your purposes?

19 MR. NOMESELLINI: Oh, that's fine. There may be
20 parties who aren't here today that are going to come in
21 with rebuttal or something like that at some stage that
22 may not receive them. I think there ought to be a process
23 whereby these exhibits are --

24 STAFF ENVIRONMENTAL SCIENTIST RIDDLE: Mr.
25 Nomellini, we can post those exhibits on our website

1 today.

2 MR. NOMELLINI: Okay.

3 All right. That will do it.

4 STAFF COUNSEL MAHANEY: I'm sorry. Just to
5 clarify. Should we provide paper copies -- additional
6 paper copies, or is posting sufficient?

7 STAFF COUNSEL LEIDIGH: Additional paper copies
8 for the people who are here. And we'll post.

9 Is that okay?

10 STAFF COUNSEL MAHANEY: (Nods head.)

11 CROSS-EXAMINATION

12 by MR. NOMELLINI:

13 Q All right. Mr. Lindsay, you're part of a separate
14 prosecution unit within the Division of Water Rights; is
15 that correct?

16 A I'm in the Compliance Enforcement Unit. Yes, that's
17 correct.

18 Q And you're under the Division Chief for the Division
19 of Water Rights?

20 A Yes, I am.

21 Q And did you participate in the proposal for the cease
22 and desist order that we're dealing with today -- or there
23 were two of them --

24 A Yes.

25 Q -- when Victoria Whitney was the Division Chief?

1 A Yes.

2 Q And are you aware that at the same time you were
3 processing a cease And desist order for compliance with
4 these southern Delta agricultural standards that the
5 Division Chief had in effect waived those from the joint
6 point of diversion?

7 STAFF COUNSEL OLSON: Objection. That assumes a
8 fact not in evidence.

9 MR. NOMELLINI:

10 Q Do you know what took place with regard to the
11 response plan on the joint points of diversion?

12 A I'm aware of her letter.

13 Q Are you aware that she in effect waived the
14 requirement for the southern Delta standards as part of
15 that response plan?

16 STAFF COUNSEL OLSON: I'll have to object again,
17 assuming a fact not in evidence, at this time.

18 CHAIRPERSON DODUC: Sustained.

19 MR. NOMELLINI: Okay. Meaning you're granting
20 her objection?

21 CHAIRPERSON DODUC: Yes.

22 MR. NOMELLINI:

23 Q Okay. Do you know whether or not the response plan
24 for the joint points of the diversion require compliance
25 with the very South Delta agricultural requirements that

1 you're addressing with the cease and desist order?

2 A I believe it does.

3 Q Okay. And your belief is that they must comply with
4 the .7 EC for Brandt Bridge, Old River and Middle River
5 and Old River at Tracy Road Bridge during the required
6 period in order to have a use of the joint points of
7 diversion provisions?

8 A You know, I don't recall reading that exactly in the
9 decision.

10 Q Have you made any effort to see whether or not your
11 proposed cease and desist orders were consistent with the
12 other action by the Division Chief with regard to joint
13 point of diversion?

14 A No.

15 Q Okay. And that's not your job, I gather; is that
16 correct?

17 A I don't see it as my job in regards to these cease and
18 desist orders.

19 Q What is your purpose that you seek to achieve with the
20 cease and desist order?

21 A To bring the parties into compliance with Decision
22 1641.

23 Q And that would be the .7 standards at Brandt Bridge,
24 Old River, Middle River and Old River at Tracy Road
25 Bridge?

1 A The Table 2, footnote 5.

2 Q Okay. And you wouldn't check to see whether or not
3 that was particularly relevant to a given period of time,
4 to see if those standards were still being implemented?

5 A Well, the decision in my mind is very clear on when
6 those are required.

7 Q Is it your understanding that the Division Chief
8 cannot change those requirements?

9 A That's my understanding.

10 Q Okay. You indicated you had investigated for other
11 violations. And you pointed out in your testimony today
12 that you found violations of the 1.0 EC at these
13 interior -- I'll call them South Delta agricultural
14 standards; is that correct?

15 A Yes.

16 Q All right. And you had proposed your cease and desist
17 order based on an anticipatory breach of the .7
18 requirements; is that correct?

19 A That's correct.

20 Q Is there any reason why you haven't reevaluated what
21 mechanism should be applied as an appropriate mechanism to
22 achieve enforcement of the clear violations of the 1.0 EC?

23 STAFF COUNSEL MAHANEY: Objection. Assumes a
24 fact not in evidence, the reference to clear violations.

25 MR. NOMEILLINI:

1 Q All right. Is there a violation -- did you find that
2 there was a violation of the 1.0 EC at the southern Delta
3 agricultural station?

4 MR. RUBIN: Objection. The question is
5 ambiguous.

6 CHAIRPERSON DODUC: The objections are overruled.
7 Please answer the question.

8 THE WITNESS: Repeat the question please.

9 MR. NOMELLINI:

10 Q All right. Is it true -- I'm going to rephrase it a
11 little bit. Is it true that you found based on the report
12 given you by the Department of Water Resources that there
13 was a violation of the 1.0 EC requirement for the interior
14 Delta -- or any of the interior Delta -- South Delta
15 agricultural standards?

16 A Yes, in my opinion I believe I found some violations.

17 Q And then I had asked you whether it was true that you
18 had fashioned the cease and desist order based on an
19 anticipatory breach of the .7 requirements. And you
20 answered affirmatively, that you did, correct?

21 A Yes.

22 Q Okay. Have you determined that the cease and desist
23 order is still the appropriate mechanism for enforcement
24 of the actual violation?

25 A There could be other avenues for enforcement of the

1 1.0 violation.

2 Q Okay. So then with regard to the newly found
3 violations, it is not the intent of your department to
4 utilize the cease and desist order that's being discussed
5 in this hearing as the mechanism for enforcement?

6 STAFF COUNSEL MAHANEY: Objection. Calls for
7 speculation. And it is a little bit confusing. If you
8 could restate it.

9 MR. NOMELLINI:

10 Q Are you going to cover these newly found violations by
11 the existing proposed cease and desist order that we're
12 discussing in this proceeding?

13 A I'm not recommending any further changes to the cease
14 and desist order.

15 Q All right. Is the cease and desist order that you
16 proposed intended to apply to these newly discovered
17 violations?

18 A I'm not sure how -- not necessarily.

19 Q Okay. But the question is: Is DWR off the hook --

20 A No.

21 Q -- with regard to these newly found violations?

22 A No.

23 Q All right. What procedure are you going to go through
24 to decide what's going to be done for enforcement with
25 regard to the newly found violations that you put into

1 evidence a few minutes ago?

2 A Well, now realize I'm staff. You're asking me what my
3 superiors might suggest is a -- might pursue. In my own
4 mind as a staff member, it's possible to pursue a civil
5 liability for those.

6 CHAIRPERSON DODUC: Okay. I'm going to cut in
7 here.

8 The new violations that were recently just
9 presented are for the 1.0 EC standard. The subject of the
10 cease and desist order are the 0.7.

11 MR. NOMELLINI: You allowed them to put the
12 exhibits up here and present them. Is that for the
13 purpose of this particular hearing and the relevance of
14 the cease and desist order, or is that for something else,
15 just information?

16 STAFF COUNSEL MAHANEY: May I respond?

17 The purpose of showing the actual violation shows
18 that when they tend to violate the 1.0 EC standard, that
19 they are more likely to violate the lower threshold of .7.
20 It is relevant to show that there is a threatened
21 violation.

22 MR. NOMELLINI:

23 Q In evaluating what should be done with regard to
24 enforcement, do you take into account the previous conduct
25 of the permittee in question with regard to violation

1 frequency or anything like that?

2 A In general or in this case?

3 Q In this case.

4 A I did not.

5 Q Okay. Did you look to see whether there were
6 violations with regard to deliveries of water outside the
7 permitted place of use?

8 A No.

9 Q Is there any reason why you didn't look for that?

10 A I didn't feel that I needed that to make any points
11 regarding the EC objective.

12 Q Okay. And your finding with regard to the alleged
13 failure to file the reports was simply discovered in your
14 process of working with this anticipatory breach question
15 with the .7?

16 A If I understand that right, yes.

17 Q Okay. And is there a procedure in your enforcement
18 division to check the files to see whether there have been
19 previous violations by the particular permittee when
20 you're fashioning a remedy such as the cease and desist
21 order?

22 A I looked for -- I mean in this case I looked for
23 previous violations of the .7 in the files -- well, I'm
24 sorry -- because the .7 of course wasn't the standard.
25 Yes, I looked in the file for previous violations, if

1 anything had been reported.

2 Q Did you notice any violations for the 15 years of
3 deliveries of water outside the permitted place of use by
4 the Bureau between 1985 and 2000?

5 A No.

6 Q Did you look at any part of the record for D-1641 with
7 regard to the violations of the permitted place of use by
8 the Bureau of Reclamation?

9 STAFF COUNSEL MAHANEY: Objections on grounds of
10 relevance. The cease and desist orders were issued based
11 on a threatened violation of the .7 EC objective. And I'm
12 not sure how the place of use issues are relevant to those
13 cease and desist orders.

14 MR. NOMELLINI: The witness testified that in his
15 procedure he checked the files to see whether or not there
16 were other violations by the permittee. And that came
17 after some questions, I must admit, where it was --

18 STAFF COUNSEL LEIDIGH: Mr. Nomellini, are you
19 addressing your arguments to the Hearing Officer --

20 MR. NOMELLINI: Yeah, I apologize. I should
21 address them to the Chair.

22 Yeah, I was.

23 STAFF COUNSEL MAHANEY: Actually if the Hearing
24 Officer allows, perhaps the court reporter could read back
25 that question, because I believe it did go to violations.

1 I could be mistaken though.

2 CHAIRPERSON DODUC: Please read the question
3 again.

4 (Thereupon the record was read as requested.)

5 CHAIRPERSON DODUC: All right. The objection is
6 sustained.

7 MR. NOMEILLINI:

8 Q Are you aware of a current ongoing violation by the
9 Bureau of Reclamation with regard to deliveries outside
10 the permitted place of use --

11 STAFF COUNSEL MAHANEY: Objection.

12 MR. NOMEILLINI:

13 Q -- for Friant Dam?

14 STAFF COUNSEL MAHANEY: Sorry. Next time I'll
15 let you finish your sentence. Sorry about that.

16 Objection. Assumes facts not in evidence.

17 CHAIRPERSON DODUC: Sustained.

18 MR. NOMEILLINI:

19 Q Are you aware of any violations of permitted place
20 of use of the Bureau of Reclamation with regard to the
21 Friant permits?

22 A No.

23 Q Did you look for any?

24 A No.

25 Q Now, in fashioning your cease and desist order you

1 indicated that your desire was to secure performance in
2 the future; is that correct?

3 A Well, in the sense that we're looking for the barriers
4 or equivalent measures to be implemented, yes. Yes. I
5 would say yes.

6 Q Compliance with the standards?

7 A Yes.

8 Q And the permit terms and conditions?

9 A Yes.

10 Q And are you aware of any decisions by the State Water
11 Resources Control Board with regard to enforcement
12 proceedings whereby the Board had indicated that the
13 penalty ought to be greater than the gain in a particular
14 violation?

15 A No.

16 Q Is there any guidance given to you for this
17 enforcement process that you're involved in?

18 A That sounds very general.

19 Q All right. Maybe you can tell me -- can you tell me
20 the procedure you go through or you went through leading
21 up to this proposed cease and desist order from your
22 superiors on down to you?

23 A Sure. My Program Manager, John O'Hagan, brought me
24 into his office, said he wanted me to investigate
25 potential problems with the EC objective and asked me to

1 look into that. And if I thought there was some problems
2 there that would require a cease and desist order, to
3 consider it and prepare it and send it forward. And
4 that's what I did. I focus -- and my focus was on the the
5 .7 EC objective, particularly the Table 2 in footnote 5.

6 Q Do you know how much water is being -- or would be
7 exported in a given day when a permit term such as the
8 South Delta .7 -- the South Delta X standards would be
9 violated?

10 MR. RUBIN: Objection. Question is irrelevant.

11 CHAIRPERSON DODUC: Please repeat the question.

12 Sorry. I was distracted. Repeat please.

13 MR. NOMELLINI: I wanted to know if he knew how
14 much water would be exported by the projects on a given
15 day in violation of the permit term. For example, if they
16 were violating the .7, you know, how much water would they
17 be taking illegally in violation of the term?

18 CHAIRPERSON DODUC: I agree. That question is
19 not relevant.

20 MR. NOMELLINI:

21 Q In fashioning this cease and desist order did you give
22 any consideration to a provision that would prohibit the
23 export of water while the violation was occurring?

24 A No.

25 Q Did you discuss that in any way?

1 A I don't recall.

2 Q You don't recall discussing it.

3 Did it come to mind?

4 A No.

5 Q Okay. Nobody told you not to and it didn't come to
6 mind?

7 A If what you're suggesting is do we propose shutting
8 down the water rights, no. It didn't come to mind and it
9 wasn't proposed to me.

10 MR. NOMELLINI: All right. That's all I have.
11 Thank you very much.

12 CHAIRPERSON DODUC: Thank you.
13 South Delta Water Agency.

14 MR. HERRICK: Thank you, Madam Chairman. This is
15 John Herrick for the South Delta Water Agency.

16 Before I start my questions I just want to
17 clarify. Are we precluded from asking questions that
18 touch on the Bureau, given the proposed settlement? Or
19 are we covering all topics until the settlement is adopted
20 or not?

21 CHAIRPERSON DODUC: We are covering all topics.

22 MR. HERRICK: Thank you.

23 CROSS-EXAMINATION

24 by MR. HERRICK:

25 Q Mr. Lindsay, in your testimony on page 2, in a

1 footnote you list the various permits that are affected by
2 the water quality standards that we're talking about here;
3 is that correct?

4 A Yes.

5 Q And do those permits include the export pumps for DWR
6 and the Bureau?

7 A I don't know.

8 Q Do those permits include the Delta Mendota Canal or
9 the California Aqueduct?

10 A I don't know.

11 Q Do those permits include San Luis Reservoir?

12 A I don't know.

13 Q Do those permits include other CVP reservoirs other
14 than CVP reservoirs other than New Melones?

15 A I don't know.

16 Q So in your investigation of what permits were bound by
17 the standards that were anticipated to be violated, you
18 did not seek to find out what permits those were?

19 A Yes, I did.

20 Q Okay. And what are those permits?

21 A The ones listed in Decision 1641.

22 Q Okay. Mr. Lindsay, I believe in your testimony you
23 said that there is no issue that the temporary barriers'
24 current operation will not result in consistent meeting of
25 the 0.7 standard at the three interior South Delta

1 stations during the summer period; is that correct?

2 A I heard a lot of negatives in that question. Could
3 you repeat that please.

4 Q Is it your testimony that it is likely that with
5 current temporary barrier operations that the three
6 interior South Delta water quality standards from April
7 through August are likely to be violated?

8 A Yes.

9 Q And, Mr. Lindsay, in your testimony on page 5, the
10 very top paragraph there -- or partial paragraph, you note
11 that -- I take it this is your conclusion, that
12 accordingly construction and operation of the permanent
13 barriers is the only practical and effective method of
14 achieving the water quality objective. Do you see that?

15 A I'm looking.

16 Q Top of page 5. Actually it's the first full sentence.

17 A I believe I obtained that from Water Right 7.

18 Let me see which one that was.

19 Q It's not in quotes. I was just trying to figure out
20 if that's your conclusion or you're referencing somebody
21 else's statement.

22 A I'm referencing somebody else's statement.

23 Q Oh, I thought you were looking for the reference.

24 A No. I'm sorry. I was through answer.

25 Q You think it's from D-1641, is that your --

1 A I think we're -- isn't that the one that it quotes --
2 the reference here is Water Right 7, page 2, right after
3 that, if I'm looking at what you're looking at.

4 Q Yes. Again, I'm not trying to make a big deal of
5 this. But the cite is to the previous sentence. I'm
6 asking you for the next sentence.

7 A Oh. I see what you're asking me.

8 No, I'm getting that from these documents that I
9 referenced in preparing the testimony.

10 Q Given that statement, Mr. Lindsay, would you agree
11 that the permanent operable barriers are not anticipated
12 to be used to meet the 0.7 under D-1641?

13 STAFF COUNSEL MAHANEY: Objection. Could you
14 rephrase that please?

15 MR. HERRICK:

16 Q Mr. Lindsay, earlier you talked about footnote 5 to
17 Table 2. And that footnote, I'll say, lessens the water
18 quality standard from 0.7 to 1.0 once permanent barriers
19 are installed, correct?

20 A Yes.

21 Q And so construction and operation of the permanent
22 barriers is not geared to meet 0.7, it's geared to meet
23 1.0; is that correct?

24 A I think what you're asking me is to interpret the
25 standard, interpret what was decided in D-1641. I don't

1 know. I just know it's there. It's a standard in the
2 table.

3 Q Is it your understanding though that when the
4 permanent operable barriers are in that the standard is
5 not .7, it's 1.0?

6 A Yes.

7 Q So a delay of the enforcement of 0.7 until the
8 barriers are in results in 0.7 not being enforced; is that
9 correct?

10 A Repeat that please.

11 Q If installation of the permanent barriers changes the
12 standard back to 1.0, then any delay in the effective date
13 of 0.7 to the time that the barriers are installed
14 effectively means 0.7 never applies; is that correct?

15 A That sounds --

16 CHAIRPERSON DODUC: I'm not sure I follow that
17 question.

18 THE WITNESS: That sounded different the second
19 time.

20 MR. HERRICK:

21 Q Would you like me to restate it?

22 A Sure. I really want to answer it for you. It just --

23 Q It's a very important point. There's a lot of
24 laughter here, but...

25 The footnote 5 for Table 2 states generally that

1 once the permanent barriers are installed the standard of
2 0.7 from April through August for the three interior Delta
3 stations reverts back to 1.0; is that correct?

4 A Yes.

5 Q So would you agree that if you delay the April 1st,
6 2005, application of that 0.7 standard until barriers are
7 in, then you've effectively deleted the enforcement of
8 0.7; it never applies then; is that correct?

9 A If you don't install the barriers, the .7 applies.
10 There's something missing in there and I'm not following
11 you.

12 Q Well, the draft cease and desist order that you've
13 proposed gives the Bureau and DWR three years by which to
14 install the barriers; is that correct?

15 A Yes.

16 Q And it says that if they think they might violate the
17 standard they need to tell the State Board; is that
18 correct?

19 A Yes.

20 Q And it says if they actually do violate the standard,
21 it says that they should also tell the State Board that
22 they've done that and what they did to try not to violate
23 it; is that correct?

24 A Yes.

25 Q And so would you agree that by those terms then DWR --

1 excuse me -- Division of Water Rights is not enforcing the
2 0.7; they're allowing the bureau until --

3 STAFF COUNSEL MAHANEY: Objection. Assumed a
4 fact not in evidence, that the Division of Water Rights is
5 not enforcing. Or speculation.

6 MR. HERRICK: Well, that's the question, Madam
7 Chairman. I'm not speculating. I'm asking him if that's
8 what it means. I'm not speculating and he's not
9 speculating. He's telling me what his cease and desist
10 order would mean.

11 CHAIRPERSON DODUC: Answer the question please.

12 THE WITNESS: No, that doesn't mean we -- the
13 Division would not enforce that standard.

14 MR. HERRICK:

15 Q So what is the purpose of giving them three years to
16 build barriers?

17 A It's to establish a timeline to bring them into
18 compliance with Decision 1641.

19 Q I thought you just said that they needed to be in
20 compliance with the 0.7 right now.

21 A They do.

22 Q Okay. So, again, what's the three years for?

23 A To set a timeline.

24 Q For compliance with the standard or for something
25 else?

1 A For compliance with the standard.

2 Q Okay. And again I'm not trying to badger you, but to
3 me those sound like two mutually exclusive things. Either
4 it applies to them now or they have three years in which
5 to start complying.

6 A They are responsible for the .7 now.

7 Q Okay. So if next June 1st, any of the three interior
8 South Delta stations exceed 0.7 you would anticipate that
9 the Division of Water Rights would investigate and perhaps
10 begin an enforcement action?

11 A Yes.

12 Q And what is your opinion as to how you would react if
13 their response would be, "Well, you gave me three years to
14 build the barriers and I don't have to meet the standard"?

15 A My personal opinion?

16 Q Yes.

17 A I think we would read whatever they submitted under
18 the cease and desist order, assuming that was in effect,
19 where we asked for them to explain the violation. We
20 would consider that and proceed accordingly.

21 Q Mr. Lindsay, you referenced a number of permit
22 violations by DWR and the Bureau in your testimony; is
23 that correct?

24 A Yes.

25 Q And those included the failure to make reports; is

1 that correct?

2 A Yes.

3 Q And those included the failure to report water quality
4 violations; is that correct?

5 A Yes.

6 Q Is there some person or group under the State Water
7 Resources Control Board who would normally be monitoring
8 whether or not DWR and the Bureau sent reports required
9 under their permits?

10 A You're asking me to assume the duties of another
11 section. The Compliance and Enforcement Unit would not.

12 Q No, I asked you if there were a person or entity -- or
13 person or group who is responsible for that, not if you
14 were personally.

15 Is there?

16 A I don't know.

17 Q Okay. And I believe you testified that you're not
18 seeking any penalties for those violations or sanctions or
19 directions; is that correct?

20 A No, I don't think I said that.

21 Q Okay. Are you seeking any penalties or sanctions for
22 the violation of the 1.0 water quality standard?

23 A Not at this time.

24 Q Okay. And can you explain why you would not be
25 seeking that?

1 A That's not relevant to the cease and desist order.

2 Q I understand that. But the objections would have to
3 come from your lawyer or the Chair. Otherwise you have to
4 to answer the question.

5 A I'm sorry.

6 (Laughter.)

7 THE WITNESS: I don't do this very often.

8 CHAIRPERSON DODUC: No, that would not be
9 relevant.

10 MR. HERRICK:

11 Q In your determination that three years was a
12 reasonable amount of time by which the Bureau and DWR
13 would implement and -- or would implement a permanent
14 barrier program, did you conclude that a permanent
15 barrier's necessary in order to meet the 0.7 standard?

16 STAFF COUNSEL MAHANEY: Objection. Anything
17 related to the exercise of prosecutorial discretion is
18 beyond the scope of this hearing.

19 CHAIRPERSON DODUC: Sustained.

20 MR. HERRICK: Can I comment --

21 CHAIRPERSON DODUC: No.

22 MR. HERRICK: -- Madam Chair?

23 I cannot?

24 CHAIRPERSON DODUC: Please proceed with your next
25 question.

1 MR. HERRICK:

2 Q Mr. Lindsay, have you done any investigation to see
3 whether or not purchases of dilution water on the San
4 Joaquin River would assist the Bureau and DWR meeting
5 their water quality requirements for, say, at Brandt
6 Bridge?

7 A No.

8 Q If they could make such purchases, would that change
9 your opinion as to when you might require them to
10 implement the permanent barriers?

11 STAFF COUNSEL MAHANEY: Objection on several
12 grounds. Relevance, speculation.

13 MR. HERRICK: Well, before the --

14 CHAIRPERSON DODUC: Sustained.

15 MR. HERRICK: -- Chair rules, I would like to
16 comment.

17 If the enforcement team who's trying to make the
18 Bureau and DWR live up to their obligations determine that
19 there were things other than the construction of permanent
20 barriers in three years and those other things would help
21 meet the standard, I think that's completely relevant to
22 why he chose this cease and desist order language and why
23 other language would not be more appropriate. I think
24 that's the subject of the hearing.

25 CHAIRPERSON DODUC: But it is also outside the

1 scope of the cease and desist order at this point. So my
2 ruling is to sustain the objection.

3 MR. HERRICK: Thank you, Madam Chair. I would
4 just note that the hearing notice says what other terms
5 and conditions might be part of the notice -- or excuse
6 me -- part of the cease and desist order rather than just
7 the ones in it. And so I would ask you to reconsider your
8 ruling.

9 CHAIRPERSON DODUC: Counsel, my counsel has
10 advised that you may consider rephrasing the question to
11 ask whatever it is that you want to ask more directly.

12 MR. HERRICK: I will try. Thank you, Madam
13 Chair.

14 Q Mr. Lindsay, would releases of water from the
15 tributaries of the San Joaquin River during the time frame
16 of April through August help meet the Brandt Bridge 0.7
17 standard?

18 A I think they probably would.

19 Q Do you have any reason to believe that such purchases
20 could not happen in order to meet the standard in the
21 future?

22 A I don't know. I have no reason to --

23 CHAIRPERSON DODUC: Did I here an objection from
24 the back?

25 MR. RUBIN: Yes, Madam Chair. The issue before

1 the Board is not the manner in which the objective is
2 going to be implemented. That's where these questions are
3 going. So I object for relevancy.

4 MR. HERRICK: My response to that, Madam Chair,
5 would be the cease and desist order could easily say, "You
6 shall comply with the standard as it now exists because in
7 addition to building barriers in three years, you have
8 numerous other options which include releases of water on
9 the tributaries, modifications to the temporary barriers,
10 exchanges of water," other things such as that, which are
11 part of our case in chief later. I'm just trying to
12 explore whether or not the enforcement officer took that
13 in consideration when he limited the cease and desist
14 order to only a discussion of the permanent barriers built
15 in three years.

16 CHAIRPERSON DODUC: I think he's answered your
17 question, that he did not take those things into
18 consideration. So let's move on.

19 MR. HERRICK: That's all I have. Thank you.

20 CHAIRPERSON DODUC: County of San Joaquin.

21 MS. GILLICK: I think I like the table over here.
22 That way we can see everyone.

23 DeeAnne Gillick representing the County of San
24 Joaquin.

25 CROSS-EXAMINATION

1 by MS. GILLICK:

2 Q I believe you testified that one of the reasons that
3 you investigated and prepared the cease and desist order
4 was an anticipated breach of the standard by the Bureau
5 and the Department of Water Resources; is that correct?

6 A Yes.

7 Q Does the draft cease and desist order require
8 compliance with that standard of .7?

9 A You know, I think -- let me think. It implements the
10 time schedule, requires reporting. But It doesn't alter
11 any of the terms of Decision 1641. So I think the
12 requirement to comply is still within the Decision 1641.

13 So does the draft cease and desist order require
14 compliance with the .7 standard that was set in D-1641?

15 STAFF COUNSEL MAHANEY: Objection. Asked and
16 answered, I think.

17 CHAIRPERSON DODUC: Sustained.

18 MS. GILLICK: I'm not sure what that answer was
19 if it was asked and answered.

20 Q You stated just previously in response to my question
21 that the cease and desist order does not alter D-1641.
22 How does the cease and desist order require compliance
23 with the .7 which was established in D1614?

24 MR. RUBIN: Objection, your Honor. It assumes
25 facts not in evidence.

1 CHAIRPERSON DODUC: No, I want to hear the answer
2 to that question.

3 MS. GILLICK:

4 Q How does the draft order require compliance with the
5 standards set in D-1641 which was .7 as of April of 2005?

6 A Could you give me a moment to look at it again?

7 STAFF COUNSEL MAHANEY: They're three.

8 MS. GILLICK: Yeah, it's Water Rights -- the
9 draft cease and desist order's your Exhibit No. 4, I
10 believe.

11 STAFF COUNSEL MAHANEY: Could you restate the
12 question please?

13 MS. GILLICK:

14 Q How does the draft cease and desist order require
15 compliance with the standard of .7 which was established
16 in D-1641?

17 A What I see in the cease and desist order -- the intent
18 is that the cease and desist -- the standard enforces
19 itself. D-1641 still stands. What the cease and desist
20 order does is lay out a timeline for compliance with the
21 decision and directs some actions to take place if a
22 violation occurs or is threatened. But the basis for the
23 requirement for .7 still resides in Decision 1641.

24 Q Okay. You just testified that it provides -- and I
25 don't want to misstate you -- but it provides a timeline

1 as well as measures to be taken if the standard is
2 violated. What are those measures?

3 A You want me to read through --

4 Q How does the cease and desist -- what are the measures
5 in the cease and desist order if the standard is violated?

6 A All right. In the page 3: "It is hereby ordered..."
7 Paragraph 2, they're required to timely notify the State
8 Water Resources Control -- I'm paraphrasing here
9 obviously. If there's a violation of the .7 EC objective,
10 they have to timely -- prior to the construction of the
11 barriers timely inform the State Water Resources Control
12 Board of potential violations, describe the corrective
13 actions being initiated to avoid the violation, describe
14 the corrective actions, those sorts of things.

15 Number 3: If a violation occurs, again report to
16 the Board the length of time, different aspects of the
17 violation.

18 And then every three months we're looking for an
19 update on the progress to install the barriers.

20 And that's it in a summary.

21 Q Other than you say the reporting and notifications to
22 the State Board of violations will occur or have occurred,
23 is there anything further in the cease and desist order
24 that the Department or Bureau must do?

25 A Are we still aiming at this .7?

1 Q That's correct.

2 MR. RUBIN: I object, Madam Chairwoman. The
3 questions asked about violations are ambiguous as to
4 whether those are asking about violations to the 1995
5 Water Quality Control Plan or the permit term and
6 conditions imposed on the Bureau of Reclamation and DWR.

7 MS. GILLICK: I believe this line of questioning
8 has been focused upon meeting the established .7 standard,
9 which was established in D-1641.

10 CHAIRPERSON DODUC: I understand that.
11 Please answer the question.

12 THE WITNESS: Okay. I'm sorry. I'm going to
13 need to hear the question again.

14 MS. GILLICK: Why don't we have it read back
15 then.

16 (Thereupon the record was read as requested.)

17 MS. GILLICK: And again for clarification, that's
18 a violation of the .7 standard.

19 THE WITNESS: I don't see anything --

20 STAFF COUNSEL MAHANEY: I'd like to object
21 because I'm getting a little confused here.

22 You may be mischaracterizing Mr. Lindsay's
23 testimony in that --

24 CHAIRPERSON DODUC: Please address your comment
25 to me.

1 STAFF COUNSEL MAHANEY: Sorry.

2 -- in that the .7 -- as he can testify and has
3 testified, the .7 isn't contained within Table 2 of
4 D-1641, but it's .7 or unless the permanent barriers or
5 equivalent measures are installed. And I think there may
6 be some glossing over of that later fact or that last
7 provision.

8 MS. GILLICK: Well, we're assuming at this point
9 the permanent barriers are not in place as we sit here
10 today. And according to D-1641, that means .7 standards
11 should be in place right now. So as we sit here today
12 based on the facts of today, the standard is .7. So
13 that's what we're talking about in this proceeding in
14 here.

15 Q So I believe you had testified that other than
16 notifying State Board or reporting to the State Board,
17 there's nothing further the cease and desist order does or
18 requires if the .7 standard is violated prior to the
19 installation of the permanent barriers?

20 A No.

21 Q Okay. Didn't 1641 already required that reporting and
22 notification?

23 A Yes.

24 Q So what more does this cease and desist order do?

25 A Emphasizes it.

1 Q Emphasizes it. Okay.

2 If in fact the vio -- the .7 standard is violated
3 in the future, if the cease and desist order is issued as
4 it's prepared and presented today, would the cease and
5 desist order create any penalties or sanctions in the
6 event the .7 standard is violated?

7 A Yes.

8 Q And what would those sanctions or penalties be?

9 A Well, violation of a cease and desist order, as I
10 remember, carries a \$1,000 per day liability.

11 Q And I asked: If the .7 standard was violated, would
12 that violate the cease and desist order? And you
13 responded that that would -- that would mean that civil
14 penalties would be in place; is that correct?

15 A Yes, potentially.

16 Q I believe you testified that you did not evaluate
17 whether or not a reduction of the export pumps, the amount
18 of the export pumps would have any effect on meeting the
19 salinity objective within the Southern Delta and the
20 Vernalis. Is that a correct --

21 A That's correct.

22 Q Okay. I also believe you testified that you did not
23 evaluate whether or not more releases from either the
24 state facilities or even tributaries on the San Joaquin
25 River would have any effect on meeting the Delta

1 standards; is that correct?

2 A That's correct.

3 Q However -- and I also understand that you were the
4 main drafter and prepared the cease and desist order; is
5 that correct?

6 A Yes.

7 Q Several alternatives to meeting the Delta standards --
8 the interior Delta standards of .7 are included within the
9 draft cease and desist order; is that correct?

10 A Yes.

11 Q And some of those alternatives are actually additional
12 releases from the state water project facilities,
13 reduction in exports, and purchase of water under
14 transfers from other entities; is that correct?

15 A Yes.

16 Q So those alternatives were proposed in the cease and
17 desist order, but you as the drafter of the cease and
18 desist order did not evaluate their effect on meeting
19 salinity standards; is that correct?

20 A You know, we're talking -- what do you mean by
21 evaluate the effect?

22 Q I think you just testified previously in answer to my
23 question --

24 CHAIRPERSON DODUC: I think he's already answered
25 that question.

1 MS. GILLICK: Okay.

2 STAFF COUNSEL MAHANEY: And I'd also like to
3 object again about the exercise of prosecutorial
4 discretion not being relevant to the issuance of the cease
5 and desist.

6 MS. GILLICK: I have nothing further then.

7 CHAIRPERSON DODUC: Thank you.

8 California Sport Fishing Protection Alliance.

9 MR. JACKSON: Yes, for the purposes of this
10 cross-examination, would it be possible to put up Exhibit
11 Water Rights 18?

12 STAFF COUNSEL MAHANEY: No. We can hand out a
13 copy to you. But we do not have it in computer form.

14 MR. JACKSON: It was Exhibit 9, I believe.

15 STAFF COUNSEL MAHANEY: Is that right?

16 THE WITNESS: I think we do have that one.

17 STAFF COUNSEL MAHANEY: Exhibit 9 is the days
18 that -- the 30-day running average EC exceeded?

19 MR. JACKSON: Yes.

20 STAFF COUNSEL MAHANEY: Is that the correct one?

21 Yes, that was Exhibit 9, and we can put that up.

22 MR. JACKSON: Thank you.

23 CROSS-EXAMINATION

24 by MR. JACKSON:

25 Q Mr. Lindsay, you used Water Rights Exhibit 9 as part

1 of your direct testimony; is that correct?

2 A Yes, I did.

3 Q And you indicated that basically you yourself created
4 this exhibit?

5 A Yes.

6 Q And you did that by going back through DWR records
7 which were not on the DWR website?

8 A That's correct.

9 Q Where did you find those records?

10 A I was provided them by the Compliance and Enforcement
11 Section at DWR.

12 Q Do you have any way to independently verify whether or
13 not those records were full and complete?

14 A No.

15 Q So this table is based upon data given to you by
16 the --

17 A There are -- one of the stations -- two of the
18 stations are maintained by DWR. Two of the -- you know,
19 Vernalis and one of these other stations is maintained by
20 USBR. Let me see. C8, Old River near Middle River, is
21 maintained by the Bureau. And I can cross-check -- I can
22 cross-check those.

23 But for C6 and P12, no, I can't cross-check
24 those.

25 Q All right. Calling your attention to year 2001. Do

1 you have any way of knowing whether the 76 days of
2 violation -- presuming that it had been .7. I understand
3 this is an analysis of potential violation.

4 -- the 76 days of being over .7 at Old River at
5 Tracy Road Bridge, at station P12 are the same violations
6 or were on the same days as those that are listed as
7 violations at C6, the San Joaquin River at Brandt Bridge?

8 MR. RUBIN: Objection, Madam Chair. The use of
9 the word "violation" assumes fact not in evidence.

10 CHAIRPERSON DODUC: Yes, we've --

11 MR. JACKSON: Potential violation.

12 CHAIRPERSON DODUC: -- understood that.

13 THE WITNESS: Yes, I have a way of looking to see
14 if, for example, some of those days overlap. I do.

15 Q And did they -- did they all overlap or were some
16 independent of others?

17 A You know, honestly I don't remember.

18 Q And how would someone like me interested in the extent
19 of the potential violation determine that?

20 A I think that's in our exhibits.

21 Q Could those exhibits -- do you believe that those
22 exhibits were supplied originally?

23 A Let's double check.

24 Yes, there are exhibits.

25 Q All right. Now, checking the exhibits, can you tell

1 me whether in the year 2001 the 76 days -- let me step
2 back.

3 Is it fair to say that 76 days of potential
4 violations would be one-half of the time between April 1st
5 and August the 31st, a five-month period?

6 A Sure, approximately.

7 Q All right. And the 90-days violation then for
8 potential violation for 2002 would be approximately
9 three-fifths of the time?

10 A Without doing the exact math, yeah, that sounds about
11 right to me.

12 Q Okay. Now, again going back to 2001 from your
13 records. How many of the days of violation at Old River
14 at Tracy Road Bridge were common to violation at C6?

15 A Okay. Just looking at the charts here, I would say
16 that all the violations at Station P12, that's the 76
17 violations in 2001 --

18 CHAIRPERSON DODUC: Potential violations.

19 THE WITNESS: Potential violations.

20 "Exceedances" is really the word I've been trying to make
21 myself use.

22 -- exceedances --

23 MR. JACKSON: I'll try that too and we'll both
24 try to do better.

25 THE WITNESS: The 37 are included within the 76,

1 the same days.

2 MR. JACKSON:

3 Q Okay. Now, you have a note on this table, do you not?

4 A Yes.

5 Q And in the second sentence of that note you indicate
6 that actual days of violation however would be greater
7 because they would be calculated pursuant to revised
8 Decision 1641, Table 2, note 2, which provides that, in
9 quote, if the objective is not met on the last day of the
10 averaging period, all days in the averaging period are
11 considered out of compliance.

12 So you altered the exceedance table in a way
13 different from that described in D-1641 in making this
14 table; is that correct?

15 A No.

16 Q Well, what do you mean by actual days of violation
17 would be greater than this table reflects?

18 A This table is the -- as the heading says, is "Days -
19 30-day running average EC exceeded .7 millimhos per
20 centimeter."

21 Let's take, for example -- and here's my
22 interpretation of that footnote that's in the decision.
23 Let's take, for example, Station C6, 1997. It exceeded
24 the moving average exceeded on 10 days. The way I
25 interpret that is that the averaging period -- if there's

1 a violation, the averaging period now becomes part of the
2 violation.

3 So, for example, if we were considering an
4 administrative civil liability, for example, and trying to
5 decide the number of days of violation, because there's
6 monetary, you know, per day -- \$500 per day generally for
7 an ACL. In that case there would be 29 days of violation
8 plus the 10. In other words, when you have the first day
9 of violation, you also now bring in the whole averaging
10 period, the entire 30 days. I haven't misrep -- this is
11 just the tables, the days this EC exceeded .7.

12 Q So in other words, it would be the 10 days plus 29
13 days?

14 A That's my interpretation of that footnote.

15 Q All right.

16 A And that was difficult.

17 Q Assuming your interpretation is correct then, applying
18 that footnote to the exceedance listed in 2002, a dry
19 year, at Old River at Tracy Station, P12, how many days is
20 it likely that the -- that where -- where the standard
21 would have been exceeded if it had been in effect?

22 A Ninety.

23 Q No increase?

24 A Are you asking me the days of violation for --

25 Q You've indicated 90.

1 Now, I'm asking you to apply the same footnote to
2 that number.

3 A Okay. And double check here. We're talking about the
4 90?

5 Q Yes.

6 A Okay. So that was 2002, station P12. In that case
7 the standard was exceeded -- again, I'm just looking at my
8 table here that's in the exhibit. It appears there were a
9 couple days at the end of April where the point -- where
10 the EC was exceeded.

11 So we actually have two periods of time in that
12 90 where it exceeded .7 EC. It came down below .7 in May.

13 The point of this is that we would tack on --
14 again considering violation days for penalty purposes,
15 we'd add on 29 to the first time it went below .7 -- or
16 above .7. Then it dropped below. And then when it
17 dropped -- came up above .7 again in June, another 29
18 would go on to that first day because the averaging period
19 comes in. So actually we'd add 2 times 29 to that 90.

20 Q So 58 more?

21 A Yes.

22 Q And that would take us to the point that if there are
23 150 days in that period, basically under this standard
24 there's a violation every day that year at that station?

25 A Let me make sure I'm clear on one thing. If the

1 second time it went above .7 was less than -- you know,
2 about 30 days from the time it came down before, you know,
3 these -- so the two averaging periods bumped into each
4 other, for lack of a better term, we would look at that.
5 So it may not be 29 adding the second time.

6 But there is the potential with the -- you know,
7 the EC starting above .7, for example, dropping below for
8 a period of time and then coming back again, that all
9 those -- that entire time period could be considered as a
10 violation for purposes of figuring an administrative civil
11 liability.

12 CHAIRPERSON DODUC: Which is not the subject of
13 the cease and desist order. So let's --

14 MR. JACKSON: I understand that the subject of
15 the cease and desist order is to determine whether or not
16 it's strong enough and could be made stronger by
17 appropriate action by the State Board. Is that not one of
18 the purposes of this hearing?

19 CHAIRPERSON DODUC: Okay.

20 MR. JACKSON: And so, first of all, we need to
21 determine what's been happening and then I guess I would
22 ask the next question, which is: How does the present
23 proposed cease and desist order -- well, let me back away
24 one step.

25 Q There is and always has been a requirement for the

1 Bureau and DWR to report, isn't that right?

2 A Yes.

3 Q And you indicated that they never have.

4 Did I understand your testimony correctly, you
5 couldn't find any reports?

6 A I couldn't find any reports of violation, looking
7 specifically for the .7 EC standard.

8 Q Right. And you couldn't find any of this data in the
9 normal part of the website, correct?

10 A You mean the data on my table here?

11 Q Yes.

12 A No, I did that.

13 Q Okay. What is in the proposed cease and desist order
14 that deals with this problem in the future?

15 STAFF COUNSEL MAHANEY: Objection. Could you
16 explain specifically which problem, since we've
17 identified --

18 MR. JACKSON:

19 Q Yeah, the problem of a history of an exceedance of
20 this standard by present -- by past operation about 100
21 percent of the time in the year 2002 and, too, at Old
22 River at Tracy?

23 CHAIRPERSON DODUC: The standard in effect was
24 1.0.

25 MR. JACKSON: I understand that. That's going to

1 be my next -- the next slide I ask for.

2 Q What I'm saying is again, Mr. Lindsay, you carefully
3 went back and recrafted this to indicate what the
4 historical record indicated about potential violations,
5 did you not?

6 A Yes, I -- yes, I did.

7 Q And at the level of .7 if it had been in effect in the
8 year 2002, we've determined that at Old River at Tracy
9 under the rules of D-1641 it is possible that that
10 standard was exceeded pretty much everyday?

11 CHAIRPERSON DODUC: It was not exceeded because
12 the standard was not in effect.

13 MR. JACKSON:

14 Q That the standard would have been exceeded pretty much
15 everyday?

16 STAFF COUNSEL MAHANEY: Objection. Misstates the
17 witness's testimony in that he said they would have to
18 consider some other factors depending when those occurred.

19 MR. JACKSON:

20 Q What other factors would you have had to consider?

21 A Well, we're getting -- I don't want to get confused
22 here between days of violation for computing and figuring
23 penalties versus days that the standard -- that the 30-day
24 moving average exceeds .7.

25 MR. SCHULZ: Madam Chairman?

1 CHAIRPERSON DODUC: Actually please come up to
2 the microphone for the court reporter's benefit.

3 MR. SCHULZ: I just wanted to object to this on
4 the grounds that it requires speculation on the part of
5 the witness. In the years that he's talking about the
6 Bureau and the Department were trying to operate to 1.0.
7 You can't say that, therefore, if .7 had been in effect,
8 those same results would have occurred. So it's a
9 hypothetical question that is not relevant to the question
10 of future violations. And it also calls for speculation
11 on the part of the witness.

12 CHAIRPERSON DODUC: Do you have a comment as
13 well?

14 MR. NOMELLINI: Dante Nomellini with Central
15 Delta, et al.

16 I have one witness that has to leave at 3:30. Is
17 it permissible that I would call that witness out of order
18 tomorrow rather than --

19 CHAIRPERSON DODUC: Sure.

20 MR. NOMELLINI: -- serve on -- I don't if we're
21 going to get to my panel or not.

22 MR. NOMELLINI: Is that okay?

23 CHAIRPERSON DODUC: Okay. Tomorrow's fine.

24 MR. NOMELLINI: And then South Delta has one
25 witness that has to get on today. We would let South

1 Delta put that witness on, if you want, ahead of us.

2 CHAIRPERSON DODUC: Can that witness come back
3 tomorrow? If not, then we'll accommodate him or her
4 today.

5 MR. NOMELLINI: Very good. Thank you.

6 CHAIRPERSON DODUC: The objections have been
7 noted.

8 I think we've been very patient with your line of
9 questioning. But I do need to ask you to move on please.

10 MR. JACKSON:

11 Q All right. Would you put up the 1.0 slide.

12 Ten.

13 A That would be my second one, I think.

14 Is this the one you're looking for?

15 Q This is not. It's the --

16 A Go back.

17 Q That one.

18 Yeah, any of those.

19 We're now at station -- Water Rights Section --

20 Water Rights Exhibit 15. We're at Station P12, which
21 we've been talking about, in the months of April through
22 August. But I notice that the water quality standard that
23 was in existence at the time in the year 2003 was
24 violated, I believe you said, about three months in a row?
25 The existing standard.

1 A Yes.

2 Q Did you check each of the years between 1996 and 2006
3 to see if that was a regular occurrence?

4 A No, I'd like to explain that.

5 Q Please do.

6 A Well, to be honest with you, I was really
7 concentrating in this analysis in that April to August
8 time period. I don't remember how I caught this one. I
9 think I caught it just scanning through the data.

10 But if you're asking me did I have a systematic
11 way of checking all those other years, no, I don't think I
12 did that.

13 Q Where did you find this data set?

14 A It was provided to me.

15 Q By?

16 A DWR.

17 Q Okay. So 2003 is the only year that we know about?

18 A That's the only year I'm aware of where the 1.0 EC
19 standard was exceeded.

20 Q Did you look at the other years?

21 A I don't remember.

22 Q Is there anything in the cease and desist order that
23 is designed to deal with this kind of exceedance in the --
24 it looks like it's the time period from January to about
25 the time the vamp begins in April?

1 A Let me look at the cease and desist for a moment.

2 STAFF COUNSEL MAHANEY: It might be helpful to
3 restate this question.

4 And also with respect to relevance, the cease and
5 desist order addresses the threatened violation of the .7
6 EC objective, which is in effect from April through
7 August. And I believe you're inquiring about January.

8 MR. JACKSON: I'm trying to be nice.

9 The cease and desist order, such as it is, looks
10 at a limited period of violations that might happen in the
11 future. It doesn't seem to do a thing for real life
12 violations that have clearly occurred in the past. And so
13 my question is, since there have been no reports turned in
14 by the people obligated to do so under D-1641, and since
15 there's been no activity of the compliance unit of the
16 State Board until now, I'd like to know whether or not
17 these actual violations are going to be dealt with in the
18 future in a cease and desist order.

19 STAFF COUNSEL MAHANEY: Again, I'll need to
20 object on prosecutorial discretion grounds. This
21 proceeding deals with the issuance of cease and desist
22 order based on threatened violations. And you're
23 inquiring about possible future enforcement actions. And
24 I -- that is not relevant to the issue before the hearing
25 officers.

1 CHAIRPERSON DODUC: I'll sustain that objection.
2 But I will note that that is an excellent question on your
3 part.

4 MR. JACKSON: Madam Chairman, I would also like
5 to point out that this was part of direct. And I'm not
6 aware of any -- any reason that direct evidence which is
7 relevant is suddenly not relevant when you're asked hard
8 questions about it on cross.

9 STAFF COUNSEL MAHANEY: May I respond?

10 CHAIRPERSON DODUC: I think you've made your
11 point regarding the lack of activity with respect to
12 following up on violations, of not reporting. And I must
13 concur though with the prosecution team that, while
14 acknowledging your very excellent point, we do need to
15 move on the hearing -- move with the hearing in terms of
16 the cease and desist order's focus on the potential
17 violation of the 0.7 EC objective.

18 MR. JACKSON: Thank you.

19 Q Mr. Lindsay I'd like to call your attention to Water
20 Rights Water Code Section 13360 out of Article 6, general
21 provisions relating to enforcement and review -- the
22 section is "Manner of Compliance" -- and ask you whether
23 or not you've reviewed -- you reviewed that section prior
24 to developing the proposed cease and desist order?

25 STAFF COUNSEL MAHANEY: Objection based on

1 relevance. And also it appears this line of questioning
2 is going towards a legal opinion.

3 CHAIRPERSON DODUC: All right.

4 MR. JACKSON: I didn't ask him for a legal
5 opinion. I asked him whether or not he took a look at the
6 section. It is, after all, the Water Board's own
7 compliance section.

8 CHAIRPERSON DODUC: Please answer the question.

9 THE WITNESS: I'll have to look at it. Let's
10 see.

11 CHAIRPERSON DODUC: So you haven't looked at it
12 is your answer?

13 THE WITNESS: No, I don't know what section that
14 is. I'm sorry. I don't know a lot of the Water Code just
15 by number.

16 STAFF COUNSEL MAHANEY: May I point out that's a
17 part of Porter-Cologne, which is not part of the Water
18 Right statutory authority.

19 CHAIRPERSON DODUC: All right.

20 THE WITNESS: No. This paragraph A, is that what
21 we're talking about? No.

22 MR. JACKSON:

23 Q Now, without going back over very much of the ground
24 that was so ably plowed by the lawyer in front of me,
25 you're Water Rights order -- do you see your cease and

1 desist order as changing the D-1641 in any fashion?

2 CHAIRPERSON DODUC: He's already answered that.

3 MR. JACKSON:

4 Q Do you see the extension of time as weakening the
5 D-1641 agricultural standard or not?

6 A No.

7 Q Do you -- as you wrote the order, what was the purpose
8 in exchanging the existence of the -- no, let me back up.

9 If there is an order in effect from something
10 like D-1641 that covers a water quality standard like .7
11 EC, is it enforceable by the State Board?

12 A Yes.

13 Q In what way is it improved by the reporting sections
14 to the Division Chief the ability to enforce it?

15 STAFF COUNSEL MAHANEY: Objection. Assumes facts
16 not in evidence, I mean the issue of whether or not it is
17 improved. I think it could be rephrased.

18 CHAIRPERSON DODUC: Please rephrase.

19 MR. JACKSON: I will attempt to rephrase.

20 Q Right now, if Reclamation, for instance, violates the
21 .7 EC objective at C6, C8, and P12, they have violated
22 D-1641, correct?

23 A Correct. Well, during that time period, yeah.

24 Q Right.

25 In the cease and desist order it indicates that

1 if they violate, they shall timely inform the Executive
2 Director of the State Water Board of the potential
3 violation, correct?

4 A Correct.

5 Q Don't they have to do that anyway?

6 A Yes.

7 Q And they haven't in the past. For instance, is there
8 any indication that the Executive Director of the State
9 Board was notified of the violation of the 1.0 standard
10 for three months in 2003?

11 A Not at the time I submitted by exhibits.

12 Q Have you been told since then that there is any
13 information indicated that there was a timely reporting in
14 2003?

15 A No.

16 Q Now, under the D-1641, reporting the violations to the
17 Executive Director of the State Water Board did not excuse
18 a violation, correct?

19 A That's correct.

20 Q Do you believe -- and in that sense there were no
21 corrective actions suggested in D-1641, correct? It was
22 just a violation?

23 A I'm sorry. I'm getting a little confused. Which
24 violation -- we're talking about this violation we have in
25 front of us here?

1 Q Yeah, let's just say this violation or the potential
2 ones that are threatened.

3 CHAIRPERSON DODUC: We've covered this ground
4 already in terms of talking about violations and reporting
5 violations of the 1.0. Let's move forward please.

6 MR. JACKSON:

7 Q And the next question is: Does your cease and desist
8 order provide a list of potential corrective actions, such
9 as additional releases from the Central Valley Project,
10 reduction in exports, recirculation of diverted water to
11 the San Joaquin River, or purchases of water under
12 transfers from other entities?

13 A It does make those suggestions.

14 Q Have those suggestions been subjected to CEQA in
15 regard to the effectiveness of those suggestions that you
16 are incorporating in your cease and desist order?

17 A You mean through the cease and desist order?

18 Q Yes.

19 A No.

20 Q Were there any studies done to determine whether or
21 not those were the appropriate corrective actions to
22 recommend in your cease and desist order?

23 A No.

24 Q Is your cease and desist order subject to or in any
25 way contingent upon federal or State appropriations?

1 A No, I don't think so.

2 Q Then why is the draft settlement agreement contingent
3 upon those?

4 STAFF COUNSEL MAHANEY: Objection.

5 CHAIRPERSON DODUC: All right. Sustained.

6 MR. JACKSON: No further questions.

7 CHAIRPERSON DODUC: The court reporter has
8 requested break. So at this point we'll take a ten-minute
9 break. Let's resume at 3:50.

10 (Thereupon a recess was taken.)

11 CHAIRPERSON DODUC: All right. We're ready to
12 resume.

13 Before you begin, Ms. Crothers, let's talk a
14 little bit about scheduling.

15 MS. GILLICK: That's my comments, procedural
16 scheduling.

17 CHAIRPERSON DODUC: Yes, procedural matter.

18 A quick question -- hopefully quick -- for DWR
19 and the San Joaquin River Group Authority. How much time
20 do you anticipate needing for a cross-examination?

21 DWR STAFF COUNSEL CROTHERS: Oh, I would say 10
22 to 15 minutes.

23 CHAIRPERSON DODUC: San Joaquin River Group?

24 MR. O'LAUGHLIN: Half hour to 45 minutes.

25 Tim O'Laughlin, San Joaquin River Group

1 Authority. Half hour to 45 minutes.

2 CHAIRPERSON DODUC: All right. Here's the plan
3 then. We'll go ahead and finish all the cross --
4 hopefully try to finish all the cross-examination today
5 for the prosecution team. And we'll resume tomorrow
6 morning with direct testimony from Central Delta Water
7 Agency -- actually I have a request that was made by the
8 South Delta Water Agency, who cannot -- one of their
9 experts cannot be here tomorrow. So they've requested
10 that a change in the order of proceeding for South Delta
11 Water Agency to be moved to November 7th.

12 Is there any objection concerns to that?

13 MR. HERRICK: Excuse me, Madam Chair. John
14 Herrick, South Delta Water Agency.

15 We didn't request to move our entire case. I
16 understand the Chair wants to keep the case together. The
17 other witnesses, I don't think, can make the 7th. But the
18 one -- we have one witness that can't make tomorrow but
19 can take the 7th.

20 CHAIRPERSON DODUC: Correct.

21 MR. HERRICK: So I don't mean to break up the
22 case, but I think I might have to with one witness, if you
23 don't mind.

24 CHAIRPERSON DODUC: Well, let's hear from other
25 members.

1 MR. RUBIN: Madam Chair, just to --

2 CHAIRPERSON DODUC: Could you please come up.

3 MR. RUBIN: I apologize.

4 Jon Rubin for San Luis and Delta Mendota Water
5 Authority and Westlands Water District.

6 Regarding the schedule for today, you indicated
7 that we'll finish cross-examination on the prosecutorial
8 team.

9 CHAIRPERSON DODUC: We'll try.

10 MR. RUBIN: Yeah. And I just wanted to make it
11 clear, I do intend to cross-examine -- have some
12 cross-examination for the team, and I believe the State
13 Water Contractors do as well. Don't know if any of the
14 other parties that are not presenting cases in chief but
15 are here to examine have time.

16 CHAIRPERSON DODUC: How much time do you
17 anticipate requiring?

18 MR. RUBIN: I expect probably 10 to 20 minutes.

19 MR. SCHULZ: I expect -- for the State Water
20 Contractors I expect at least a half hour.

21 CHAIRPERSON DODUC: Okay.

22 MS. GILLICK: DeeAnne Gillick representing the
23 County of San Joaquin.

24 We're talking about scheduling. And it sounds
25 like the Delta agencies are planning and intending on

1 going tomorrow.

2 The San Joaquin County has a conflict with their
3 witness tomorrow afternoon. He's available in the morning
4 but not in the afternoon. So would it please, you know,
5 the Board -- perhaps going over to the 7th might be
6 appropriate for the county, if that's at all possible as
7 well. Because it sounds like we're going to -- we might
8 not finish cross-examination of the state today, and then
9 that would commence tomorrow morning. And then we do have
10 a conflict in the afternoon, unfortunately.

11 Thank you.

12 CHAIRPERSON DODUC: All right. Any other
13 comments?

14 Any objections -- actually I let me re-ask the
15 question. I would like to keep the South Delta Water
16 Agency panel together. But that would mean moving both
17 South Delta Water Agency and County of San Joaquin to
18 November 7th.

19 Is the South Delta Water Agency prepared to have
20 your entire panel on the 7th?

21 I see some heads shaking.

22 MR. HERRICK: John Herrick again.

23 Unfortunately, I don't -- the rest of my panel is
24 not available necessarily on the 7th. One or two maybe.
25 But the panel as a whole is not available for that day.

1 CHAIRPERSON DODUC: Okay. So we're back to South
2 Delta Water Agency being on tomorrow with direct
3 testimony, with the exception of one expert. And County
4 of San Joaquin requesting rescheduling of your direct
5 testimony to November 7th?

6 MS. GILLICK: Yeah, because most likely it won't
7 occur tomorrow morning.

8 CHAIRPERSON DODUC: All right. Any objections?

9 Then that's what we'll do. We'll try to finish
10 cross-examination today. We will meet tomorrow -- by the
11 way, we're moving to the bigger room, the Byron Sher
12 Auditorium at 10 o'clock tomorrow -- and resuming with
13 direct testimony beginning with the Central Delta Water
14 Agency. And resuming again on November 7th.

15 MR. HERRICK: Thank you.

16 MR. SCHULZ: So we're going to go to around 6
17 o'clock tonight, is that what you're saying?

18 CHAIRPERSON DODUC: Yes. That's my incentive to
19 keep the cross-examination direct and on point.

20 All right. With that, Department of Water
21 Resources.

22 DWR STAFF COUNSEL CROTHERS: Good afternoon. My
23 name is Cathy Crothers, Staff Counsel with the Department
24 of Water Resources.

25 CROSS-EXAMINATION

1 by DWR STAFF COUNSEL CROTHERS:

2 Q Mr. Lindsay, good afternoon.

3 A Good afternoon.

4 Q Is the issuance of a cease and desist order an
5 enforcement action?

6 A Yes.

7 Q On page 3 of your written testimony you make a
8 reference to the page 159 of D-1641 wherein if there is an
9 exceedance that DWR is to report to the Executive Director
10 about the noncompliance and then a recommendation would be
11 made to the Water Board about whether enforcement
12 action -- or whether the action was beyond DWR's control.
13 You make a reference to that statement.

14 If this CDO is issued, would DWR be able to
15 assert its right under that provision of D-1641?

16 STAFF COUNSEL MAHANEY: Objection. Calls for
17 legal speculation.

18 CHAIRPERSON DODUC: Sustained.

19 STAFF COUNSEL MAHANEY: Or legal opinion.

20 DWR STAFF COUNSEL CROTHERS: I'll rephrase the
21 question then.

22 Q Let me put it this way:

23 When you wrote this cease and desist order which
24 you say is an enforcement action, did you consider whether
25 the threat of violation would be also -- did you also

1 consider whether the action that caused the violation
2 would have been within the control of DWR?

3 A In crafting the cease and desist order, no, If I
4 understand that question.

5 Q Let me ask the first part too. Are you familiar -- in
6 your written statement you do acknowledge that, isn't it
7 correct, that DWR under the permit conditions for
8 implementing this southern Delta objectives there is a
9 process whereby DWR upon exceedance is to submit a report
10 to the Executive Director?

11 A Yes, I understand there's a process for that in
12 D-1641.

13 Q Does the cease and desist order -- is it consistent
14 with that process?

15 STAFF COUNSEL MAHANEY: Objection. Calls for
16 legal conclusion.

17 CHAIRPERSON DODUC: Rephrase.

18 DWR STAFF COUNSEL CROTHERS: I'll rephrase.

19 Q Does the cease and desist order that you wrote allow
20 DWR the opportunity to submit a report to the Executive
21 Director regarding whether the threat of violation is
22 within the control of DWR?

23 A Yes, I think so.

24 Q The portion in D-1641 that you've referenced in your
25 written testimony -- on page 3 it says then that the State

1 Board will make -- the Executive Director will make a
2 recommendation to the State Board as to whether an
3 enforcement action is appropriate.

4 By issuing the cease and desist order, does this
5 cease and desist order allow the Board to take that into
6 consideration before they issue the cease and desist
7 order?

8 A I'm sorry. To take what into consideration before
9 they issue the cease and desist order?

10 Q I'll try to -- okay. You say that the cease and
11 desist order is an enforcement action?

12 A Yes.

13 Q So --

14 A It's a type of an enforcement action.

15 Q Okay. On top of page 3 you talk about that under
16 D-1641 DWR is to submit a report that must be submitted
17 prior to enforcement action being taken.

18 Does this cease and desist order prevent DWR from
19 submitting that report prior to this enforcement action?

20 A Prior to the cease and desist order?

21 Q Yes.

22 A I'm getting lost.

23 Q I'll try to rephrase it.

24 Okay. You know what I'm talking about on page --

25 A Yes, I see it.

1 Q So for DWR to follow this process, we are to submit an
2 enforcement -- I mean -- I'm getting mixed up now -- a
3 written report to the Executive Director of the State
4 Board regarding the exceedance --

5 A Yes.

6 Q -- before an enforcement action is determined. How
7 does this cease and desist order provide for DWR to carry
8 that out?

9 A The cease and desist order lays out the compliance
10 schedule. It is not -- any further enforcement of the
11 cease and desist order would take into account your
12 points.

13 Q Do you know if DWR has submitted a report to the
14 Executive Director regarding the threats of violation that
15 this cease and desist order will cover?

16 A I'm not aware of any.

17 Q Okay. This is in regards to the chart on the 2003,
18 January through April, period where you showed that you
19 have found this exceedance in 2003. Are you aware that
20 the Department of Water Resources submitted to the State
21 Water Board on October 14th a report about that
22 exceedance?

23 A Yes. I'm not sure about the date. But, yes, I'm
24 aware of that report.

25 Q So has DWR then met the requirement under D-1641 to

1 submit a report to the State Board regarding the
2 exceedance?

3 STAFF COUNSEL MAHANEY: Objection. Calls for a
4 legal conclusion.

5 CHAIRPERSON DODUC: Sustained.

6 DWR STAFF COUNSEL CROTHERS:

7 Q When you were preparing the cease and desist order,
8 Mr. Lindsay, did you take into consideration the
9 information that was provided during the March workshop to
10 the Water Board and from the San Joaquin River Group that
11 talked about recent analysis of flows and salinity on the
12 San Joaquin River?

13 A No, not -- I took in --

14 CHAIRPERSON DODUC: Which March workshop is this?

15 DWR STAFF COUNSEL CROTHERS: Oh, March 2005. I'm
16 sorry.

17 CHAIRPERSON DODUC: For what purpose?

18 DWR STAFF COUNSEL CROTHERS: On the periodic
19 review of the State --

20 CHAIRPERSON DODUC: That is not the subject of
21 this hearing today.

22 DWR STAFF COUNSEL CROTHERS: No, I --

23 CHAIRPERSON DODUC: I see two people standing up
24 with objections, comments.

25 MR. JACKSON: Yeah, my objection -- I think

1 you've ruled on it. The objection is that it is not
2 relevant to the purpose of this hearing. And the other
3 thing is it's not been supplied to anyone if you did take
4 it into account.

5 CHAIRPERSON DODUC: Microphone please for the
6 court reporter's benefit. He keeps looking at me.

7 MR. RUBIN: Madam Chair, if I understand the
8 question correctly, it was asking about the quality of
9 water within the San Joaquin above Vernalis. If that's
10 where the question was, I think that is relevant to the
11 question of whether there's a threatened violation and the
12 basis for the enforcement team's conclusion that there is
13 a threat. The data that was used as part of the exhibits
14 were historical data. The counsel for DWR is asking a
15 question about either current or future potential
16 violations, and it goes to the issue of whether there's a
17 threatened violation prerequisite for issuing a cease and
18 desist order.

19 CHAIRPERSON DODUC: I hear a rebuttal coming.

20 MR. HERRICK: Thank you, Madam Chair. John
21 Herrick, South Delta Water Agency.

22 I think this illustrates Mr. Jackson's point in
23 that my understanding of the previous evidence dealt with
24 Vernalis, not with these three interior standards which
25 we're talking about today. So absent the ability to clear

1 that up and go into it, it's clearly something that should
2 not be explored in this forum.

3 CHAIRPERSON DODUC: I'm going to keep this scope
4 narrow. So please move to your next question, as long as
5 it's not related to Vernalis and the review of the Water
6 Quality Control Plan.

7 DWR STAFF COUNSEL CROTHERS: No, this question is
8 related to, as Mr. Rubin stated, is related to whether
9 there is indeed a threat of a violation.

10 Q Mr. Lindsay, when you prepared the CDO you looked at
11 some historical data to -- which, you know, you've given
12 us a summary of -- historical data to determine whether
13 you think there's a genuine threat of violation in the
14 future of the .7 standard; is that correct?

15 A Yes.

16 Q In terms of the CDO that's been drafted and proposed
17 against DWR, isn't it similar to the CDO that's been
18 drafted against Bureau of Reclamation?

19 A Yes.

20 Q For instance, if Reclamation were to meet the terms of
21 that settlement --

22 CHAIRPERSON DODUC: Don't go there please.

23 DWR STAFF COUNSEL CROTHERS: Oh, we can't talk
24 about the Bureau's --

25 CHAIRPERSON DODUC: No.

1 DWR STAFF COUNSEL CROTHERS: -- the Bureau's
2 actions, what the Bureau would be doing --

3 CHAIRPERSON DODUC: The settlement agreement is
4 not to be discussed during this hearing.

5 DWR STAFF COUNSEL CROTHERS: Because what we're
6 trying to talk about here is is there truly a threat of
7 violation in the future. And Mr. Lindsay has used some
8 historical data to make that point. And what we're trying
9 to show is the future may change.

10 CHAIRPERSON DODUC: The future is always subject
11 to change.

12

13 DWR STAFF COUNSEL CROTHERS: The future
14 operations may change. In fact, we have a suspicion
15 that -- and also -- well, the point of the information at
16 the Water Quality Control Panel workshops was information
17 that, you know, Mr. Lindsay referred to --

18 CHAIRPERSON DODUC: We're not going to link those
19 two items.

20 DWR STAFF COUNSEL CROTHERS: Well, he used that
21 information to come up with his threat of violation. He
22 took data that DWR submitted during those workshops and
23 said, based on the data of the workshops for the periodic
24 review, that data shows him there is a threat of
25 violation. And that is part of the record here as his

1 testimony.

2 CHAIRPERSON DODUC: Is that correct?

3 THE WITNESS: I didn't get the data from the
4 workshop.

5 DWR STAFF COUNSEL CROTHERS: Well, our letter
6 that you --

7 CHAIRPERSON DODUC: We're not going to debate
8 this point. He's answered the question. Please move on.

9 DWR STAFF COUNSEL CROTHERS: Yes, that's --
10 sorry.

11 I have to skip a few things that have already
12 been asked. So I don't want to repeat myself here.

13 CHAIRPERSON DODUC: Thank you.

14 DWR STAFF COUNSEL CROTHERS:

15 Q I wanted to kind of review the monitoring data that
16 you spoke of earlier. And I appreciate the tables that
17 you have submitted to correct the missing data.

18 I would like to know, did you receive the data
19 from DWR timely upon the request that you made to DWR?

20 A Which set?

21 Q The recent information that you discovered was missing
22 and then you made a request -- well, when you made the
23 request to DWR for the data, and then it was identified
24 there was missing data, did you obtain the data that was
25 missing in a timely manner?

1 A I don't know how to answer that. I'd like to just
2 explain this whole data thing, if I could --

3 CHAIRPERSON DODUC: Please.

4 THE WITNESS: -- please. Okay.

5 I've worked with three data sets. The first set
6 I got was from our Bay Delta Unit. It was provided by
7 Tracy Hiniyosa to Gita Kapahi. And I understood that came
8 from DWR through Gita. I worked with that for a while,
9 found some huge breaks. That was represented as being the
10 data that I should work with. Admittedly it didn't come
11 straight from DWR. I found some huge breaks in data
12 collection at Brandt Bridge.

13 I contacted Tracy Hiniyosa and said, "This can't
14 be right. A lot of data missing. I want it to show
15 everything that's possibly there." On about October 5th
16 she provided me a new data set, which I worked with in
17 preparation for this hearing and developing, you know, my
18 testimony. And then this past Friday at 2:20 in the
19 afternoon, I received an E-mail from Tracy Hiniyosa that
20 says, "Oh, by the way, we have discovered some additional
21 data that fills that missing spot." So whether it's
22 timely or not, I don't know how to answer that. I don't
23 know how long she's had that.

24 But those are the data sets I've worked with.

25 DWR STAFF COUNSEL CROTHERS:

1 Q Thank you.

2 In the chart with the missing data, as revised,
3 you begin in 1996 to represent data collection. Can you
4 tell me when the compliance requirements began for those
5 three compliant -- those three locations?

6 A You mean under Decision -- whenever Decision --

7 Q Under Decision 1641.

8 A When Decision 1641 came into effect. Was it December
9 29th, 1999? Revised March 15th, 2000.

10 Q So on the chart as revised, Water Right 19, after 2000
11 you show the missing data points for purposes of trying to
12 show -- what were you -- were these data points showed for
13 purposes of data collection to meet the 0.7 requirement?

14 A Decision 1641 has a monitoring requirement. And
15 having a complete set of data would certainly address the
16 monitoring requirement. If there are big gaps in the
17 data, the monitoring requirement in 1641 is not being met.

18 Q So these data before 2000 weren't in regards to any
19 sort of compliance requirements?

20 A Yes, they were.

21 Q A compliance with the southern Delta objectives which
22 is the matter of this hearing?

23 A They don't address the .7 requirement. They address
24 another aspect of Decision 1641.

25 Q And the draft CDOs as I originally saw then were

1 really to address the future enforcement -- you know,
2 threat of enforcement of .7.

3 So these charts, as I understood you saying
4 earlier, were to go to the matter of a history of whether,
5 you know, that threat of enforcement is real; is that
6 correct?

7 A Yes. I was looking at those -- I did that data
8 analysis because in those documents that I referenced in
9 my testimony put out by DWR and USBR, they say that
10 there's a threat of violation. I was looking to see just
11 to what extent that may have been in the past.

12 Q Did you consider when you were looking at those
13 documents, which I believe are our petition to change our
14 water rights permits, and was referenced for comments to
15 the State Water Board regarding our periodic review -- I
16 think those are the documents that you looked at -- did
17 you consider that those documents were there for purposes
18 of trying to show whether compliance was reasonably able
19 to be implemented -- was able to be reasonably
20 implemented?

21 A No.

22 Q Well, in the chart on Water Right 19, if you were to
23 show this chart as to the future requirement for meeting
24 the three compliance locations, do you believe that once
25 these compliance locations do become obligation, or are

1 now as of this year, 2005, that the actions of DWR and
2 Reclamation may be different than what they were in the
3 past before these compliance locations became real?

4 A Yes.

5 Q And when I look at chart -- oh, thank you -- Water
6 Right revised 19, after 2000 it shows when the stations
7 would become a compliance under D-1641, not just the
8 monitoring station but now would become part of a
9 compliance monitoring program. At Brandt Bridge we see
10 there was some -- about a month of missing data. But
11 after that date do you see any days that are greater than
12 seven days of missing data?

13 A Brandt Bridge after when now?

14 Q After the initial 31 days in 2000.

15 Are there any days greater than seven days of
16 missing data?

17 A I'll go by with what's there on the chart. So, no.

18 Q In your draft CDO as revised you have a term that
19 would require the Department to report any days that are
20 greater than seven days of non-missing data under the CDO;
21 is that correct?

22 A Yes.

23 Q If we were only to consider the years after 2000 when
24 this objective became a compliance requirement, does --
25 except for that 31 days, does your table support the fact

1 that DWR does not -- would not -- would not be intending
2 to comply with the monitoring requirement? In other words
3 let me say this: Does it appear to support that there is
4 a threat that DWR would not comply with its monitoring
5 requirement?

6 CHAIRPERSON DODUC: I don't hear an objection.

7 STAFF COUNSEL MAHANEY: Objection. There you go.
8 For one thing, the question is confusing, and it also
9 assumes facts not in evidence. And I'm not entirely sure
10 about the relevance to compliance in the future on a
11 proposed modification to the cease and desist that has not
12 yet been adopted by the Board.

13 MR. SCHULZ: May a speak?

14 CHAIRPERSON DODUC: Mr. Schulz.

15 MR. SCHULZ: For us the crux of this hearing is
16 whether or not there has been a proper factual showing of
17 threat. And that is what we plan on cross-examining on
18 presenting direct testimony on, because that's the key
19 statutory language. And "threat" is not a -- is a
20 question of fact, not a question of law.

21 So, it's -- I think it really is appropriate to
22 look at this part of the chart, see that 2001 was the
23 first full year that D-1641 became applicable as those
24 being compliant stations, and asking the question as to
25 whether or not this witness believes that based on that

1 data there is a threat that DWR will not comply with the
2 monitoring requirements in the future. And it is so
3 important that we be allowed to ask questions that go to
4 the question of: Has there been an appropriate showing of
5 threat for a cease and desist order of this type? So I
6 think the question is very proper.

7 CHAIRPERSON DODUC: All right. I would agree.

8 Please answer the question.

9 THE WITNESS: Okay. I'm sorry. I'm going to
10 need to hear it one more time, the question.

11 DWR STAFF COUNSEL CROTHERS:

12 Q Oh, the question is: Do you believe that the data on
13 your table, revised WR-19, suggests that there is a --
14 that DWR's actions -- that there is a threat that DWR will
15 violate its monitoring requirement?

16 A Yes.

17 Q Can you explain what the basis of that threat is?

18 A Well, there's really no number as to what sets a
19 threat. There's seven days there where there's no data
20 available. I went looking for this data several times,
21 made a good effort to get it, and it wasn't even --
22 whether it was collected or not, it wasn't available until
23 Friday afternoon at 2 o'clock. So, yes, I believe there's
24 a threat.

25 Q Have you had a chance to see the report that was

1 submitted by DWR regarding the 2003 exceedance?

2 A Yes.

3 Q So you read DWR's report that was submitted to

4 Executive Director Cantu?

5 A Yes.

6 DWR STAFF COUNSEL CROTHERS: I'm not sure if this
7 might be more appropriate for rebuttal later, because it's
8 not been -- they haven't submitted our report into
9 evidence, Hearing Officer. So I would like some guidance
10 on what I should -- how I should proceed here.

11 CHAIRPERSON DODUC: I recommend you save it for
12 rebuttal.

13 DWR STAFF COUNSEL CROTHERS: Okay. Thank you.

14 I think with that, that's all the questions I
15 have.

16 Thank you, Mr. Lindsay.

17 CHAIRPERSON DODUC: The San Joaquin River Group
18 Authority.

19 MR. O'LAUGHLIN: Tim O'Laughlin representing the
20 San Joaquin River Group Authority.

21 CROSS-EXAMINATION

22 by MR. O'LAUGHLIN:

23 Q Can you define for me what you mean by exceedance?

24 A In the case of my exhibits, it was -- I was using that
25 term to avoid using the word "violation." And in the

1 context of that exhibit, it was when the historical data
2 exceeded .7 EC.

3 Q And do you have a definition for "violation"?

4 A Yes.

5 Q And what is your definition?

6 A In this case, when a water rights standard is
7 violated, exceeded. I mean water rights standards come in
8 lots of shapes and sizes. So I mean it may be a number,
9 it may be a date, it may be a -- but something is not
10 followed in a water right.

11 Q Okay. And in this case that would be the -- and I'm
12 going to focus just on one station, C6, Brandt Bridge. So
13 that would be the EC requirement at Brandt Bridge,
14 correct, set forth in the 1995 Water Quality --

15 A What would be the EC requirement at Brandt Bridge?

16 Q No. What would be the violation at Brandt Bridge?

17 A Since April 1st of this year, during the period of
18 April through August, it would be a 30-day moving average
19 EC higher than .7.

20 Q Okay. Let's talk about the moving day average to
21 start with.

22 On April 1st of this past year, if there was a
23 1.0 reading at Brandt Bridge, would that be an exceedance
24 or a violation?

25 A Well, the exceedance was just a term I tried to use

1 for my testimony, again, to avoid using the word
2 "violation".

3 But to answer your question, it would not be a
4 violation, just one day.

5 Q And if the next day --

6 A Let me make sure I understand. You said the 30-day
7 moving average EC --

8 Q No, no. I just want one day.

9 A Just one day, 1.0?

10 Q One point oh --

11 A No, no.

12 Q -- Brandt Bridge --

13 A No violation.

14 Q No violation. Okay.

15 So if you had 10 days of 1.0, April 1st through
16 April 10th, would there be a violation of the 1995 Water
17 Quality Control Plan standard for Brandt Bridge?

18 A Not yet.

19 Q Okay. At some point in time after the 30-day period
20 and you've reached the 30-day period and you average it
21 now, if the average exceeds .7, you would have a violation
22 for that 30-day period, correct?

23 A Correct.

24 Q And according to Table 2, that violation would be
25 applicable to the 30 preceding days as well as the day on

1 which the violation accumulated, correct?

2 A Correct.

3 Q Thank you.

4 Are you aware of how the -- or the basis for the
5 State Water Resources Control Board finding for the
6 salinity standard at Vernalis and -- I mean for the
7 salinity standard at Brandt Bridge in the 1995 Water
8 Quality Control Plan?

9 A How it came about?

10 Q Yes.

11 A No.

12 Q Do you try -- did you when you were doing your CDO try
13 to differentiate between the 1995 Water Quality Control
14 Plan and D-1641, which is the implementation plan for the
15 1995 Water Quality Control Plan?

16 CHAIRPERSON DODUC: Before you answer that, I --

17 MR. JACKSON: I'm going to object to this line of
18 questioning for CSPA on the grounds that we are now
19 entering information from the 1995 plan and from D-1641,
20 which is opening up this hearing to a whole bunch of
21 rebuttal evidence that may or may not be relevant to the
22 cease and desist order.

23 MR. O'LAUGHLIN: Well, if I can respond to that
24 briefly. That's almost hilarious. I mean the basis of
25 the cease and desist order is the 1995 Water Quality

1 Control Plan standards and objective at Brandt Bridge,
2 which was then put in to place through the D-1641, which
3 is the implementation plan for the 1995 Water Quality
4 Control Plan, which then becomes the basis for the cease
5 and desist order for the permit holders who have now had
6 that implemented through D-1641.

7 So to not talk about the standards and objectives
8 for the 1995 Water Quality Control Plan or the
9 implementation plan as outside the scope of this hearing,
10 well, then there is no hearing because that's the basis of
11 the hearing.

12 MR. RUBIN: Madam Chair, I would add the
13 testimony that was submitted by the enforcement team is
14 not clear, at least in my mind, I think based on the
15 questions that Mr. O'Laughlin's asking, it's not clear in
16 his mind, as to the distinction that is drawn within the
17 testimony as to what is required under the 1995 Water
18 Quality Control Plan versus what's required under the
19 permits that are applicable -- or the permits held by the
20 United States Bureau of Reclamation and the Department of
21 Water Resources. I do think these questions are extremely
22 relevant for that basis.

23 CHAIRPERSON DODUC: Advice from counsel.

24 Yes, my counsel was just telling me how this is
25 such a fine line, and I agree.

1 I appreciate that we need to discuss the content
2 obviously of the Water Quality Control Plan and the
3 decision. What I don't want to get into is a discussion
4 of the basis for those standards and objectives, because
5 that's when I think I agree with Mr. Jackson that we're
6 opening the door to the issue of the tri-annual review and
7 other matters, which is not within the scope of this
8 hearing.

9 MR. O'LAUGHLIN: Correct. And I believe my
10 question as asked does not go to the factual basis
11 underlying the 1995 Water Quality Control Plan. I just
12 asked if he made a differentiation between the plan and
13 the implementation plan, which is D-1641.

14 CHAIRPERSON DODUC: All right. Please answer the
15 question.

16 THE WITNESS: I'm not -- no.

17 MR. O'LAUGHLIN:

18 Q In the 1995 Water Quality Control Plan is the standard
19 and objective at Brandt Bridge to have an operable head of
20 Old River barrier in place?

21 MR. NOMEILLINI: I'm going to object to that.
22 He's doing exactly what you told us all not to do at the
23 beginning of the hearing; and that's go beyond accepting
24 D-1641. The 1995 plan is not relevant.

25 MR. O'LAUGHLIN: Well --

1 STAFF COUNSEL MAHANEY: And I'd like to object on
2 grounds that my witness's testimony does not address that
3 plan at all.

4 MR. O'LAUGHLIN: Yeah, but it has to, counsel,
5 address the plan because it's the basis of your CDO. And
6 if you don't have a plan, you don't have an implementation
7 plan, which is the basis of their water right permits and,
8 therefore, you don't have anything. So if you're saying
9 that the 1995 Water Quality Control Plan is inapplicable,
10 then what is the standards and objectives at Brandt
11 bridge? Because it isn't D-1641. D-1641 is purely the
12 mechanism to implement the plan. The standards and
13 objectives are contained in D16 -- are in the 1995 Water
14 Quality Control Plan; they are not in the implementation
15 plan.

16 CHAIRPERSON DODUC: All right. Let's keep this
17 as clean-cut as possible.

18 The water rights decision provides the basis for
19 the permits which leads to this issue of the CDO. And I'm
20 very concerned about debating the Water Quality Control
21 Plan, debating the water rights decision. Let's keep our
22 focus on the CDOs and the direct testimony that was
23 presented by the prosecution team.

24 MR. O'LAUGHLIN: Okay. So then that means I can
25 ask questions about D-1641? Because D-1641 is the

1 action -- see, you can't have it -- you can't have it
2 either way. You got to pick one or the other of your
3 poisons and pick -- I don't care which one you pick. But
4 D-1641 is the implementation plan which was put into place
5 and put their permits with these standards and objectives
6 as set forth in the 1995 Water Quality Control Plan.

7 So if this is the person who decided what the
8 basis for the alleged violations were, he would have to
9 understand D-1641. And I think I am fairly entitled to
10 request of him the background and information upon which
11 he based his decisions.

12 CHAIRPERSON DODUC: I think I'll give you a
13 little bit of leeway on this one.

14 MR. O'LAUGHLIN: Okay.

15 Q In D-1641, in the implementation plan, is it a
16 standard or objective to have an operable head of Old
17 River barrier in place?

18 STAFF COUNSEL MAHANEY: Objection on grounds
19 of --

20 CHAIRPERSON DODUC: Hold on.

21 STAFF COUNSEL MAHANEY: Sorry.

22 CHAIRPERSON DODUC: Okay. I'm sorry.

23 Your objection?

24 STAFF COUNSEL MAHANEY: I was going to object on
25 grounds of relevance. My witness has testified as to the

1 basis of his finding of threatened violation. We're
2 looking at the four corners of the proposed cease and
3 desist order, which talks about the violation of the .7
4 objective.

5 MR. O'LAUGHLIN: Yeah, but wait a second. That's
6 not correct, because -- the reason that's not correct is
7 it says within the 1995 -- within D-1641 an operable head
8 of old river barrier or other measures. So I am fairly
9 entitled to ask and request what he means by operable head
10 of old river barriers and other measures and what he
11 looked at. That's all part of the CDO -- And if that's
12 not part --

13 CHAIRPERSON DODUC: The terms that we are looking
14 at are the terms that are specified in the permits and the
15 potential violation associated with that. We're not going
16 to reopen this all the way back to the water rights
17 decision, the Water Quality Control Plan. We need to keep
18 focused on the terms that are being considered as part of
19 the CDO.

20 MR. O'LAUGHLIN: Madam Chairman, with all due
21 respect, the authority of the State Water Resources
22 Control Board on those permits and to request those permit
23 terms and conditions emanates from your power solely to
24 put it in the implementation plan which is the basis of
25 the --

1 CHAIRPERSON DODUC: And it's there and we're not
2 going to debate the fact that it's there right now.

3 MR. O'LAUGHLIN: Yeah. I'm debating whether or
4 not it's there or not. What I'm asking of this witness is
5 what he looked at in regards to the 1995 -- or D-1641.
6 Because, remember, this hearing --

7 CHAIRPERSON DODUC: He's required to look at the
8 permits that were issued to --

9 MR. O'LAUGHLIN: Right. And the permits --

10 CHAIRPERSON DODUC: -- DWR and USBR.

11 STAFF COUNSEL MAHANEY: And that's not how the
12 question was phrased.

13 MR. O'LAUGHLIN: Yes, but here's the -- I know,
14 because I asked a specific question in regards to the
15 barrier. But the issue says a head of Old River barrier
16 or other operable measures. And in your CDO you've put in
17 a new timeline. And it's absolutely kind of funny to me
18 to think that you can put a timeline into a CDO and think
19 that you're going to amend the 1995 Water Quality Control
20 Plan or D-1641 in a cease and desist order, because those
21 are separate matters. You can't implement a timeline in a
22 CDO hearing which changes the basin plan, and your counsel
23 knows that. And that's the -- that's one of the problems
24 with this whole cease and desist order matter, is that it
25 has the cart before the horse.

1 CHAIRPERSON DODUC: Mr. Jackson.

2 MR. JACKSON: This will be one of the few times
3 in which I agree wholeheartedly with Mr. O'Laughlin.

4 (Laughter.)

5 MR. JACKSON: I do not believe that you can amend
6 D-1641 by extending the time period for the compliance
7 with this law. And I think the present -- I think there's
8 grave harm from doing that. And so as you begin to take a
9 look at the relevance of redoing D-1641, I think you're
10 going to have to take a look at the harm caused by the
11 head of Old River barrier if you --

12 CHAIRPERSON DODUC: Which is not what we're doing
13 in this hearing.

14 MR. JACKSON: Well, it --

15 MR. O'LAUGHLIN: Oh, yeah, you are, and that's a
16 major flaw.

17 MR. JACKSON: And I think we agree that you are
18 as well.

19 MR. O'LAUGHLIN: Yeah, that's -- I mean I heard
20 earlier from the prosecution team -- and I respect what
21 the prosecution team wants to do. But we firmly disagree
22 with the prosecution team. Because the basis of moving
23 forward for injunctive relief -- which is basically what
24 this is. It's a cease and desist order. It's applying to
25 this State Board to use its discretion and injunctive

1 power. When you do that as a State Water Resources
2 Control Board, okay, you have to look at the threatened
3 harm, to the actions that you are looking to cease or
4 desist. Okay? And that's only heightened -- when you go
5 back and you look at the case law under injunctive relief
6 and under cease and desist orders, that's only -- is
7 greatly lightened when the harm is threatened and it's not
8 actual.

9 And in this case, as far as I know -- and I
10 haven't asked this question yet, but I'm sure he'll agree
11 with it -- since there is no violation currently under
12 2005 of this standard, then what we need to look at is if
13 it's a threatened harm, well -- or potential to violate
14 the standard, then we need to look at the threatened
15 impacts from that. And this Board in using its
16 discretionary powers needs to weigh and balance that.
17 Because if you don't do that, then the problem becomes if
18 you have a threatened violation and you have diminimous
19 impacts, then the potential -- then why are you issuing a
20 cease and desist order?

21 And I'll give you an answer. Joe Blow's going to
22 walk across the intersection and violate the crosswalk
23 standard. Okay? If there's no traffic and there's nobody
24 there, are you going to issue a cease and desist order
25 against that person? No. Now, maybe you would -- if

1 there was six lanes of traffic and he was walking against
2 the red light, you'd say, "Don't do that."

3 Well, here's the problem here. There's been no
4 evidence entered into the record showing what the
5 potential threatened violation is. And not only that,
6 there's no discussion from the prosecution team of what
7 that impact means.

8 So what we're talking about is something that's
9 totally theoretical, and they're asking this body to use
10 its power under injunctive relief to issue an order. And
11 it is relevant. And in fact if it's not relevant, then
12 this will go up in a writ of mandate. And I'm sure the
13 superior court would agree wholeheartedly that one of the
14 inquiries of this Board in using its discretion is to
15 evaluate the potential impact to farmers within the South
16 Delta Water Agency.

17 Now, we can argue about what that potential
18 impact is or isn't. But I think very clearly that the
19 parties participating anticipate putting on a case of what
20 that threatened impact is. Because if I look at South
21 Delta Water Agency and Central Delta Water Agency's
22 witness list, it is what it means when this violation
23 is -- when this standard is not being met how it impacts
24 their farmers.

25 CHAIRPERSON DODUC: Enough. Thank you. Your

1 points have been made. It's on the record. And the
2 prosecution has also made its concern regarding
3 questioning its witness regarding a matter that is
4 related, though not directly on point with respect to the
5 CDO and the permits and the potential violations of permit
6 conditions and terms.

7 So let us move on please.

8 MR. O'LAUGHLIN: Okay. And I'm just going to say
9 this once for the record. I want this section noted and I
10 want an exception, so when we go up on a writ of mandate,
11 then we'll have it in the record.

12 MR. JACKSON: I'd like to join in that, make the
13 same exception please.

14 The point being that the harm to the farmers from
15 the cease and desist order is the flip side, if we're
16 allowed to put on our evidence, of the harm to the estuary
17 and the fisheries from not issuing the cease and desist
18 order.

19 MR. O'LAUGHLIN: Either way you cut it. I don't
20 care which way you cut it.

21 Okay. Moving on.

22 Q I want to go through your reasoning and analysis in
23 regards to the strong -- and the quote I wrote down was
24 "the strong possibility of potential future violations."

25 From what I understand you put together this

1 table showing the previous exceedances of .7 at the three
2 stations, correct?

3 A Correct.

4 Q In addition to that work have you done any other work
5 in regards to the potential for exceedances at those three
6 stations?

7 A No.

8 Q Have you looked at the carry-over storage in New
9 Melones Reservoir this year?

10 A No.

11 Q Have you looked at the carry-over storage reservoir in
12 New Don Pedro this year?

13 A No.

14 STAFF COUNSEL MAHANEY: Objection. Relevance
15 grounds.

16 MR. O'LAUGHLIN: Well, it's entirely relevant,
17 because if you have a lot of water upstream and it's going
18 to come downstream, you're going to meet the EC standard
19 at Brandt Bridge in the interior Delta. And that's
20 entirely relevant to whether or not there's a threatened
21 or potential violation of the EC standard at Brandt
22 Bridge.

23 CHAIRPERSON DODUC: But that's not an issue for
24 this year.

25 MR. O'LAUGHLIN: Well, yeah. But wait. It's not

1 an issue for 2005. But the basis of your CDO going
2 forward -- and I'll pin him down further with some more
3 questions -- is where is the potential? Is there a
4 potential violation tomorrow or is there a potential
5 violation in June of 2006? Or is it really 2007? And if
6 it's 2007, why are we issuing a cease and desist order in
7 2005?

8 CHAIRPERSON DODUC: Okay. That's fair.

9 MR. O'LAUGHLIN: Thank you.

10 Q Can you answer the question?

11 A What was the question?

12 Q Do you know what the carry-over storage in New Don
13 Pedro is?

14 A No.

15 Q Do you know what it is in Exchequer Reservoir?

16 A No.

17 Q Do you know what the in-stream flow of release
18 requirements of those three reservoirs are?

19 A No.

20 Q Have you reviewed or asked to review any Calcium 2
21 modeling that was done as part of the periodic review?

22 A No.

23 Q Have you asked DWR, the Department of Water Resources,
24 to assist you in any modeling of potential hypothetical
25 situations for operations in 2006?

1 A No.

2 Q 2007?

3 A No.

4 Q Since you've perceived this threatened harm to -- or
5 threatened violation to occur, can you tell me when you
6 believe it will occur?

7 A I don't know. Sometime -- I feel there's a strong
8 chance of violation between now and when either the
9 permanent barrier project is implemented or the --

10 Q Is that 2009?

11 A I don't know. If they say so.

12 Q So you don't even know when that might be?

13 A I know when they told us it would be -- DWR told us it
14 would be.

15 Q But you have no independent knowledge, correct?

16 A Other than what DWR has told us, no.

17 Q Okay. Do you know if their draft EIR/EIS is on the
18 street yet?

19 A No, I don't know.

20 Q Do you know if they have any funding for the barrier
21 project yet?

22 A No, I don't know.

23 Q Okay. Well, let me ask it a different way.

24 Do you believe that there will be a violation --
25 and I'm going to focus on Brandt Bridge because it's just

1 easy for me; I'm a San Joaquin River guy -- in January of
2 2006?

3 A I don't know if there would be in that year versus any
4 other year between now and when the permanent barriers or
5 the -- I've forgotten the term in the decision -- the
6 other measures are implemented.

7 Q Well, how is it that you think that there's a
8 potential for a threatened violation when you don't know
9 how the upstream reservoirs operate?

10 A Because DWR and USBR told us so.

11 Q Okay. So what you're relying upon is that they wrote
12 you a letter last year that said before it started to rain
13 that they might violate the standard. That's it? Is that
14 it? Is that the sum total of why we're here?

15 A You've characterized that as one letter.

16 Q Okay. Several letters, several phone calls.

17 Have you ever gone back to the United States
18 Bureau of Reclamation and asked them how they're planning
19 to operate in 2006?

20 A No, I have not.

21 Q Okay. Have you asked DWR how they're planning to
22 operate in 2006?

23 A No, I have not.

24 Q Now, what ability -- do you understand -- do you know
25 what the San Joaquin River Agreement is?

1 A I'm not familiar with it.

2 Q Okay. Do you know if there are any transfers that
3 take place on the San Joaquin River which allow water to
4 move downstream on the main stem to meet water quality
5 requirements in the lower San Joaquin River?

6 A I understand that takes place. I'm not familiar with
7 any specific ones.

8 Q So you don't know how much or when or how?

9 A No.

10 Q What is the sole basis of your knowledge of the amount
11 of water or the quality of water entering the southern
12 Delta at any time period of the year?

13 A Let me hear that one more time please.

14 Q Yeah. What is the basis for your knowledge of
15 understanding the amount of water or the quality of water
16 entering the southern Delta at any time of the year?

17 A I don't even see where that's necessary to trust this.

18 Q No, you don't have to see whether it's necessary or
19 not. You just have to answer the question.

20 What is the basis of your knowledge?

21 A I don't know how to answer that.

22 Q Okay. Well, we can go through a whole laundry list of
23 things to understand that.

24 If you -- well, here's my question to you. I
25 mean you've said that there's a potential violation next

1 year -- is there a potential violation next year to exceed
2 the EC requirement of .7 at Brandt bridge, at any time
3 next year?

4 A Yes, I believe there is.

5 Q Okay. Now, other than your belief, which it's nice to
6 have beliefs, but other than this one piece of paper
7 looking at past practices, do you have any independent
8 knowledge to support that belief?

9 A Independent knowledge?

10 Q Yeah.

11 A No.

12 Q So the sole sum of your testimony is you -- you
13 wouldn't know how they were going to operate any other
14 projects next year upstream in releasing water or what
15 that water would look like when it reached the southern
16 Delta?

17 STAFF COUNSEL MAHANEY: Asked an answered.

18 Q Correct?

19 Mr. O'LAUGHLIN: No, that has not been asked.
20 That was a summation question.

21 CHAIRPERSON DODUC: Let me ask you then a
22 different question.

23 On what information in the record do you base
24 your finding that there is a potential for violation of
25 the .7 EC standard?

1 THE WITNESS: I base it on the exhibits in my
2 testimony.

3 CHAIRPERSON DODUC: The exhibits from?

4 THE WITNESS: DWR and USBR.

5 MR. O'LAUGHLIN: Well, no, wait. You're -- sorry
6 to disagree.

7 CHAIRPERSON DODUC: Okay. He's answered the
8 question.

9 MR. O'LAUGHLIN: Well, no. He answered your
10 question. He answered my question differently. Because I
11 asked specifically if other than this document, which is
12 the 30-day running average EC, "did you rely on any other
13 fact for a potential violation of the .7 at Brandt Bridge
14 next year?"

15 STAFF COUNSEL MAHANEY: Objection. I believe my
16 witness has made it clear that he has relied on statements
17 made by the Bureau and by the Department and by the
18 historic EC data.

19 CHAIRPERSON DODUC: He has made that clear.

20 Let's move on.

21 MR. O'LAUGHLIN: Okay.

22 I have no further questions.

23 CHAIRPERSON DODUC: Thank you.

24 The Bay Institute?

25 I don't see you.

1 California Department of Fish and Game?

2 MS. CANNON: No questions.

3 CHAIRPERSON DODUC: Contra Costa Water District?

4 DR. DENTON: No questions.

5 CHAIRPERSON DODUC: Merced Irrigation District,

6 San Luis Canal Company?

7 Northern California Water Association?

8 San Joaquin River Exchange Contractors Water

9 Authority.

10 CROSS-EXAMINATION

11 by MR. MINASIAN:

12 Q Mr. Lindsay, I'd like to take you back -- my name is
13 Paul Minasian. I'd like to take you back to your thinking
14 process in terms of devising the contents of the CDO.

15 Are you aware that Decision 1641 included a
16 requirement that the Bureau of Reclamation provide for a
17 report to the State Board within five years of the
18 adoption of Decision 1641 in regard to its drainage plan?

19 A No, I really don't. I don't remember that.

20 Q Do you have WR-5 in front of you, 5A?

21 A Yes.

22 Q Okay. Look on page 86 -- actually let's go to page
23 160, which actually contains the terms of the order.

24 A One six zero?

25 Q One six oh.

1 Second paragraph down from the top of the page.

2 Madam Chairman, may I read it for those that can
3 not find it quickly?

4 CHAIRPERSON DUDOC: Uh-huh.

5 MR. MINASIAN: "If within five years
6 licensee/permittee has not developed a program under which
7 it will consistently achieve Vernalis objectives,
8 licensee/permittee shall report to the Executive Director
9 of SWRCB all actions it has taken in attempting to meet
10 the objectives, including drainage and management
11 alternatives."

12 Q You see that language?

13 A Yes.

14 Q Do you agree that you didn't include in the CDO
15 compliance with this requirement that within five years a
16 report be presented?

17 A I agree.

18 Q Do you agree that if such a report were presented and
19 meaningful, that it would help alleviate the problem at
20 the three stations we're talking about?

21 A I don't know.

22 Sorry.

23 STAFF COUNSEL MAHANEY: Never mind. He answered.

24 MR. MINASIAN:

25 Q I'm sorry. I didn't get your answer.

1 STAFF COUNSEL MAHANEY: I was going to object.
2 Assuming facts not in evidence. I believe you said it was
3 not meaningful or something -- I probably would have to
4 hear the question again. But I believe that was the gist
5 of it.

6 CHAIRPERSON DODUC: You mean -- please rephrase
7 your question -- restate your question.

8 MR. MINASIAN: I'd be glad to rephrase it.

9 Q Now that your recollection's refreshed about the
10 language of the permit, can you tell us why you didn't
11 include in the CDO a reference to filing that report,
12 which by my calculations six months overdue?

13 STAFF COUNSEL MAHANEY: Objection. This goes to
14 prosecutorial discretion as to what it decided to take
15 action on -- as to what the prosecution team decided to
16 take enforcement action on.

17 MR. JACKSON: Yes, I'd like to --

18 CHAIRPERSON DODUC: Would you please step up to
19 the microphone for the court reporter.

20 MR. JACKSON: Prosecutorial discretion, as I
21 understand it, is something that the prosecuting team is
22 doing. But the question of the adequacy of the CDO is for
23 the hearing officers to decide. And the fact that the
24 prosecutor has decided not to enforce D-1641 certainly
25 goes to the adequacy of the CDO.

1 CHAIRPERSON DODUC: All right. Please answer the
2 question.

3 THE WITNESS: Okay. And, again, I'm sorry, I'm
4 going to have to hear it one more time.

5 MR. MINASIAN:

6 Q I'll try. It will vary slightly.

7 A All right.

8 Q You know that the Bureau was required as a condition
9 of its permits to file a report within -- last April
10 basically, relating to the drainage measures that were
11 going to reduce the amount of salt and boron going down
12 the river, do you not?

13 A The extent of my knowledge is what you just read to me
14 right here.

15 Q Okay. Did you exclude reference to enforcing that
16 requirement from the language of the CDO for any
17 particular reason?

18 A No.

19 Q Would it be helpful to the Board if it ordered
20 compliance with that requirement in terms of meeting the
21 requirements and avoiding the threat of a violation as
22 it's --

23 CHAIRPERSON DODUC: Yes, I can hear the objection
24 being formed right now. You're asking for speculation in
25 terms of what would be meaningful to the Board.

1 Please rephrase.

2 MR. MINASIAN: Good. Let me rephrase it.

3 Q Salt does go down the river, doesn't it?

4 A Yes.

5 Q And that's what we're reading when we get .7 or 1.0

6 some figure, isn't it?

7 A Yes.

8 Q And the less salt that goes down the river the better,

9 right?

10 A That's the way I understand it.

11 Q Okay. Why did you decide not to include as a subject

12 of the CDO compliance with the permit term that was added

13 in 1641 regarding a drainage plan?

14 STAFF COUNSEL MAHANEY: I'll object again. I

15 understand that part of the hearing issues involve

16 proposed modifications to the cease and desist order.

17 Parties are free to propose such modifications. But

18 questioning my witness as to his conclusions whether or

19 not to exercise enforcement discretion is not part of this

20 proceeding.

21 CHAIRPERSON DODUC: I'll sustain that.

22 You're welcome to bring it up in your direct

23 testimony, suggestions on how the cease and desist order

24 can be modified.

25 MR. MINASIAN: Madam Chairman, let me just

1 register for the record. We have the prosecution here who
2 has studied and is proposing a CDO to you. I think the
3 Board is entitled to its thinking in terms of things that
4 are included and things that are not. So if you're
5 object -- if you're ruling on the objection on the basis
6 it's not relevant, I think that would be an error.

7 CHAIRPERSON DODUC: We'd like to hear more about
8 this. But please save it for your rebuttal.

9 MR. MINASIAN: Okay. Thank you.

10 We're not going to talk about the Bureau
11 settlement, right?

12 Q Mr. Lindsay, did you think about putting in the CDO a
13 provision that said that the Department of Water Resources
14 would not be bound to the CDO unless they had an
15 appropriation of money?

16 (Laughter.)

17 A No.

18 CHAIRPERSON DODUC: Okay. Let's not answer that
19 question.

20 Please move on.

21 MR. MINASIAN: On what basis?

22 CHAIRPERSON DODUC: The question has been asked
23 before from someone else. And it's linked to the
24 settlement agreement, which we're not discussing.

25 MR. MINASIAN: Okay. But we're talking about the

1 CDO that's going to be issued to DWR. If it's helpful for
2 the Bureau to have such a provision, then it must be
3 helpful to --

4 CHAIRPERSON DODUC: You're making a presumption
5 that that settlement agreement will be signed and
6 approved. And that is not the fact that we have right
7 now.

8 MR. MINASIAN: Okay. But how else would the
9 Board get evidence in regard to whether it's a good thing
10 or a bad thing to include other than to ask the
11 prosecution's witness? I'm sorry to seem to be arguing
12 with the Chair.

13 CHAIRPERSON DODUC: No, no, no. It's been
14 pointed out. But at least I'll -- but the settlement
15 agreement again is not the subject of this hearing. We
16 are not taking testimony or cross-examination or rebuttal
17 on the settlement agreement or any aspect of that
18 agreement.

19 MR. MINASIAN: Okay.

20 Q Mr. Lindsay, were there any other alternatives which
21 you thought about including in the CDO which would be
22 helpful to accomplishing the purposes of enforcing the
23 provisions of Decision 1641 at these three monitoring
24 stations?

25 A My focus was on the 0.7 EC objective in regards to

1 footnote 5, Table 2. That was my focus.

2 Q And you concluded from your focus that there was a
3 threat, did you not, of violation?

4 A From my focus?

5 CHAIRPERSON DODUC: That's been made very clear
6 through other questions and answers.

7 MR. MINASIAN:

8 Q So my question to you is: What did you consider as
9 possible conditions and portions of the order that would
10 help the basic problem of there being no drain for the
11 area served by the Bureau, other than the San Joaquin
12 River?

13 STAFF COUNSEL MAHANEY: Objection on several
14 grounds. Relevance, prosecutorial discretion. Again,
15 we're looking at the proposed cease and desist order.
16 That order, my witness has testified, comprises his
17 thoughts and recommendations as to enforcement.

18 CHAIRPERSON DODUC: And it's obvious that you
19 have other recommendations which would be best served by
20 including in your rebuttal.

21 MR. MINASIAN: Good. And I would just reserve --
22 if I might, just make my objection very clear, and the
23 reservation, is I think the only way the Board is going to
24 get evidence as to the adequacy of this order in terms of
25 doing anything except walking in a circle is by looking at

1 what the witness -- technical witness's thoughts were in
2 crafting it.

3 Thank you.

4 CHAIRPERSON DODUC: Thank you.

5 San Luis and Delta Mendota Water Authority and
6 Westlands Water District.

7 MR. RUBIN: Good afternoon. Jon Rubin for San
8 Luis and Delta Mendota Water Authority.

9 CROSS-EXAMINATION

10 by MR. RUBIN:

11 Q I have some brief foundational questions for you.

12 As part of your effort to develop the draft cease
13 and desist order, did you review Water Code Section 1831?

14 A I'll have to refresh my mind as to which code that is.
15 I think I know, but I want to be sure.

16 Yes.

17 Q Isn't it correct that Section 1831 of the Water Code
18 under Subsection D provides the State Water Resources
19 Control Board with the discretion to issue a cease and
20 desist order?

21 CHAIRPERSON DODUC: Are you asking for a legal
22 opinion?

23 MR. RUBIN: As this person interpreted the
24 statute in his efforts to develop the draft cease and
25 desist order.

1 THE WITNESS: Yes.

2 MR. RUBIN:

3 Q And the conditions upon which the State Board may
4 exercise its discretion to issue a cease and desist order
5 are listed in Section 1831(d)(1), (2) and (3); is that
6 correct?

7 A Yes.

8 Q Is there a particular subsection upon which you
9 decided to prepare the draft cease and desist order?

10 A D2.

11 Q And under Water Code Section of 1831(d)(2), it
12 authorizes the Board to exercise discretion to issue a
13 cease and desist order if there is a violation or a
14 threatened violation of any term or condition of a permit;
15 is that correct?

16 A That's how I understand it.

17 Q And how do you define the term "threatened violation"?

18 A Where there is some likelihood of a term or condition
19 of a water right being violated.

20 Q And is there any constraints upon which you place the
21 ability to issue a cease and desist order because of a
22 threatened violation?

23 A Well, again, in my opinion, are there -- let me hear
24 it one more time please.

25 MR. RUBIN: If you could read that back for him.

1 (Thereupon the record was read as requested.)

2 THE WITNESS: Yes.

3 MR. RUBIN:

4 Q And what are those conditions?

5 A How valid the threat is, I guess.

6 Q Do you place --

7 A That's my opinion.

8 Q Do you place any temporal constraints? Is it if a
9 threat could occur today, tomorrow, five years from now,
10 ten years from now?

11 A In general?

12 Q I ask in the context of preparing the draft cease and
13 desist order that's at issue -- or the draft cease and
14 desist orders? Excuse me.

15 A I was looking at the possibility between now and 2009.

16 Q Thank you.

17 As part of your preparation for today or for the
18 draft cease and desist orders, did you review the 1995
19 Water Quality Control Plan?

20 A No.

21 Q As part of your effort to prepare for today and the
22 draft cease and desist order did you review the
23 Environmental Impact Report that was prepared for the
24 Decision -- or that justified Decision 1641?

25 A No.

1 Q Are you aware of the alternatives that were considered
2 in the draft and final Environmental Impact Report that
3 justified Decision 1641 for implementation of the South
4 Delta interior standards?

5 A No.

6 Q Are you aware that the Environmental Impact Report
7 that was prepared to justify Decision 1641 evaluated the
8 potential for meeting the objectives in the 1995 Water
9 Quality Control Plan for the South Delta interior
10 standards?

11 A No.

12 Q Are you aware that the Environmental Impact Report
13 showed that the objectives for the South Delta interior
14 standards would not be met consistently or a hundred
15 percent of the time?

16 A No.

17 Q As part of your review for preparation for this
18 hearing and the draft cease and desist orders, did you
19 review Decision 1641?

20 A Yes.

21 Q As part of your preparation for today and the draft
22 cease and desist orders did you review the specific permit
23 terms and conditions that impose on Reclamation an DWR an
24 obligation to implement or -- excuse me -- that condition
25 the water rights held by those entities?

1 Let me rephrase that. I apologize.

2 As part of your preparation for today's hearing
3 and the draft cease and desist orders, did you review the
4 conditions that are imposed on the permits held by
5 Reclamation and DWR specifically for the conditions that
6 affect their operations and their ability to meet South
7 Delta interior standards?

8 A I reviewed the requirements of those particular
9 permits. I read them. I concentrated on the Table 2,
10 footnote 5.

11 Q I believe Decision 1641 is marked for identification
12 purposes as Exhibit WR-5. Do you have a copy of that in
13 front of you?

14 A Yes.

15 Q I ask that you turn to page 159.

16 A Okay.

17 Q On page 159, about halfway down the page, there is a
18 section of the order that imposes a condition on a number
19 of permits.

20 Is that one of the conditions that you reviewed
21 for preparation for today?

22 A I'm sorry. I see several conditions on page 159.

23 Q I'm sorry. I'm speaking of the one that's about
24 halfway down, it begins "It is further ordered that
25 license 1986" and continues on.

1 A Okay. You're asking me if I reviewed everything from
2 this on down through -- is that what I'm hearing?

3 Q Yes.

4 A Yes, I've read that.

5 Q Isn't it correct that the permit condition that is
6 imposed on the United States Bureau of Reclamation through
7 that provision of the order requires the United States
8 Bureau of Reclamation to take certain actions regarding
9 the South Delta objective?

10 A Yes.

11 Q And isn't it correct that that condition requires the
12 United States Bureau of Reclamation -- or conditions --
13 excuse me -- the permit that United States Bureau of
14 Reclamation holds upon implementation of water quality
15 objectives for agricultural beneficial use in the South
16 Delta as specified in Table 2?

17 A Yes, yes. There's Table 2. It's there.

18 Q And isn't it correct that that condition continues on
19 page 160 and provides the United States Bureau of
20 Reclamation with latitude in its method for implementing
21 the water quality objectives?

22 A Yes.

23 Q And doesn't it also continue to say that if -- excuse
24 me -- however a barrier program in the South Delta may
25 help to ensure that the objectives are met at these

1 locations?

2 A Yes, it says that.

3 Q Doesn't it also say that if the United States Bureau
4 of Reclamation exceeds the objectives at the South Delta
5 stations the United States Bureau of Reclamation shall
6 prepare a report to the Executive Director?

7 A Yes, it does.

8 Q And doesn't it also continue that the Executive
9 Director will evaluate that report and make a
10 recommendation to the State Board as to whether
11 enforcement action is appropriate or the noncompliance is
12 the result of actions beyond the control of the United
13 States Bureau of Reclamation?

14 A Yes, it says that.

15 Q And, again, you've taken this into consideration when
16 you prepared for today and when you prepared the draft
17 cease and desist orders?

18 A Absolutely.

19 Q Thank you.

20 And, again, there has been a number of questions
21 on this, but I still am not a hundred percent clear on the
22 issue.

23 The testimony that you prepared spoke of proposed
24 violations. And is it correct that the proposed
25 violations that you were concerned with were violations of

1 the permit term similar to the one that we just went
2 through that appears in D-1641 on page 159 and 160?

3 A The Table 2 violation? Yes, that's correct.

4 Q But, again, when you considered a violation, you
5 considered the full elements of the condition on the
6 permit?

7 A You mean the full elements of what we just went
8 through? Yes.

9 Q Yes. And that includes the ability of the licensee or
10 permittee, in this case the United States Bureau of
11 Reclamation, to prepare a report if there is an exceedance
12 in the objective, and that there would be an evaluation at
13 that time by the Executive Director as to whether the
14 violation -- whether there should be a recommendation to
15 the State Water Resources Control Board as to whether an
16 enforcement action is appropriate or whether the
17 noncompliance is the result of actions beyond the control
18 of the permittee or the license?

19 A Yes, I was aware of what we've just read when I
20 drafted the cease and desist order. Again, the cease and
21 desist order goes after the threat of violating this.

22 Q And so there is two elements, if I understand this
23 correctly, that you based the cease and desist order on:
24 One is the ability to meet the standards as set forth in
25 Table 2 and the second is the reporting and evaluation

1 requirement that is reflected on page 160 of the Decision
2 1641?

3 A I didn't -- I did not consider their ability to meet
4 the requirement in Table 2.

5 Q If you did not consider the ability of the United
6 States to meet the requirement in Table 2, which is the
7 objective for the South Delta to protect beneficial use
8 for agriculture, what did you consider in order to make a
9 determination that those objectives would be violated?

10 CHAIRPERSON DODUC: I think that question has
11 been asked before and it has been answered before several
12 times.

13 MR. RUBIN:

14 Q I ask you to turn to page 3 of your written testimony.
15 It reflects a statement that you've made here today.

16 I apologize. For the record, that's WR-1 page 3,
17 under Subsection B. The first sentence you indicate that
18 DWR and USBR acknowledged that they are likely to violate
19 the 0.7 EC objective; is that correct?

20 A Yes.

21 Q I have two follow-up questions. My first is, we
22 discussed previously Water Code Section 1831; is that
23 correct?

24 A Yes, we did.

25 Q And that was a statute that you reviewed prior to

1 preparing the draft cease and desist orders?

2 A Yes.

3 Q And isn't it correct that under Water Code Section

4 1831 the Board may issue a cease and desist order in

5 response to a threatened violation of a permit term or

6 condition?

7 A Yes.

8 Q And isn't it correct that the permit terms and

9 conditions include a requirement to meet the objectives in

10 Table 2 as well as other actions if there are a potential

11 exceedance of the objectives set forth in Table 2?

12 A I had you till the last part there.

13 The cease and desist orders require compliance

14 with the .7 EC objective. I think the answer to your

15 question's yes. It's that last little bit that through me

16 off.

17 Q Isn't it correct that a cease and desist order is

18 intended to implement or ensure implementation of a permit

19 term or condition?

20 A Yes.

21 Q And if the permit term and condition required the

22 permittee or the licensee to take an action, and if that

23 action were not taken, that they would have to report and

24 there would have to be an evaluation?

25 A Yes.

1 Q Let me turn to a second question.

2 A Okay.

3 Q Again, you have stated in WR-1 page 3 that DWR and
4 USBR have acknowledged that they are likely to violate the
5 0.7 EC objective. I believe in earlier testimony you said
6 that has -- that that acknowledgement came in the context
7 of letters that were written to either the State Board or
8 State Board staff?

9 A Yes.

10 Q Are those letters exhibits to your testimony?

11 A Yes. Yes, they are.

12 Q And can you provide me with the exhibit number for one
13 of those letters?

14 A WR-6.

15 Q And can you direct me specifically to the section of
16 that Exhibit WR-6 in which you based your conclusion that
17 there was an acknowledgement that they would violate the
18 0.7?

19 A Give me a moment.

20 I'm looking for it on the page. And I'm sorry,
21 I'm just getting tired. I need some help finding it.
22 It's here.

23 I mean I can quote from my testimony here where
24 it says -- in this cover letter that's WR-6 they say, and
25 I quote, "Imposition of the more stringent .7 EC

1 agricultural salinity objective would force DWR and USBR
2 to release large quantities of water from upstream
3 reservoirs in an attempt to meet the .7 EC Objective in
4 the southern Delta. It is unlikely that the increased
5 flows alone will result in compliance with the objective."

6 And that's in about the middle of page 2 in that second
7 paragraph of WR-6.

8 Q Thank you.

9 And as I understand it, those letters as well as
10 some data that you evaluated were the basis for your
11 conclusion that there was a threatened violation?

12 A Yes. And, you know, the data. They have told us that
13 they would violate -- that there was a threat -- I'm
14 sorry -- there was a threat of violation. And the data
15 was simply meant to just take a look at the past.

16 Q I'm sorry. You said that "They told us that there was
17 a threat of violation." Again, where is that? Is that
18 the quote that you just provided?

19 A I'm saying that what I get from reading these letters
20 that they submitted is that there is a threat of
21 violation.

22 Q And is that because of Reclamation's and DWR's
23 statement in their letters that reflect what you read to
24 me from WR-6, that without the barriers installed they
25 would require a large release of water from upstream

1 reservoirs?

2 A Yes. Also Water Right 7, page 1, where it says,
3 "Water quality often exceeds .7 EC in July and August in
4 average to dry years. Even in a wet year like 2000" --
5 well, that's the quote. I'm through with the quote. The
6 quote is: "Water quality often exceeds .7 EC in July and
7 August in average to dry years." That's Water Right 7,
8 page 1.

9 Q And from those statements -- we'll focus on those
10 statements right now rather than the data in other
11 exhibits. But from those statements you've concluded that
12 there's a threatened violation of the permit terms and
13 conditions; is that correct?

14 A Yes.

15 Q What do you believe was intended by the State Board
16 when they drafted the order -- the permit term and
17 condition which contemplated the permittee and the
18 licensee, which in this case is DWR and Reclamation, to
19 prepare a report for the Executive Director and that the
20 Executive Director will evaluate the report and make a
21 recommendation as to whether enforcement action is
22 appropriate or the noncompliance is the result of actions
23 beyond the control of the licensee and permittee, again in
24 this case Reclamation and DWR?

25 STAFF COUNSEL MAHANEY: Objection. It calls for

1 speculation on the part of the witness.

2 CHAIRPERSON DODUC: Sustained.

3 Would you like to rephrase?

4 MR. RUBIN: Well, I believe I could -- I will
5 rephrase. But I believe that goes directly to the
6 witness's interpretation of a permit term and condition
7 which he was required to interpret to draft the draft
8 cease and desist orders.

9 CHAIRPERSON DODUC: And he has already answered
10 that he's considered, reviewed and examined all those --

11 MR. RUBIN: Well, my question -- I could -- I
12 will rephrase.

13 Q The exhibits that you quoted, letters from the
14 Department of Water Resources and the Bureau of
15 Reclamation, contemplate a circumstance in which either
16 action will require a significant release of water from
17 upstream reservoirs; or if that does not occur, that the
18 objective may be violated; is that correct?

19 A I believe that's what the letters say.

20 Q And you've interpreted that to mean that Reclamation
21 and DWR believe that they will violate their permit terms
22 and conditions, specifically for United States Bureau of
23 Reclamation the permit term that we've gone through that
24 appears on page 159 and 160; is that correct?

25 A Yes.

1 Q Thank you.

2 Turning to the data -- this is another piece of
3 information that you used to support your conclusion that
4 there's a threatened violation. And, again, the data that
5 I'm referring to appears as WR-9, and I believe it's now
6 through dash 19; is that correct?

7 STAFF COUNSEL MAHANEY: Are you asking about the
8 exhibit numbers? Yes, they go up to 19 now.

9 MR. RUBIN:

10 Q And Exhibits WR-9 through WR-19 provide data which was
11 used by you to support your conclusion that there's a
12 threatened violation?

13 A Yes.

14 Q And, again, when I speak of threatened violation, I
15 speak of not the Water Quality Control Plan objective but
16 the permit term and condition that applies to the United
17 States Bureau of reclamation and the Department of Water
18 Resources; is that correct?

19 A The one in Table 2, yes.

20 Q In Table 2?

21 A Yes.

22 Q I'm sorry. And maybe we're going in circles here.
23 But the permit term and condition is imposed through
24 Decision 1641. One of those permit terms and conditions,
25 the one that's applicable to the United States Bureau of

1 Reclamation appears on 159 and 160 of Decision 1641?

2 A Yes, that's where that Table 2 requirement is.

3 Q But in addition to that Table 2 requirement, there are
4 other provisions that affect how you interpret the permit
5 term or permit condition; is that correct?

6 CHAIRPERSON DODUC: And I think you've -- and
7 you've gone through them already with this witness.

8 MR. RUBIN: I just want to clarify it, because
9 his last statement seemed to contradict testimony they
10 provided previously.

11 THE WITNESS: In my mind that table stands on its
12 own.

13 MR. RUBIN:

14 Q And in your mind then do you believe that the
15 provisions that appear on page 160 of Decision 1641 have
16 no effect on the permit terms and conditions that we're
17 speaking of?

18 A Let me look at 160.

19 MR. JACKSON: While the witness is looking at
20 160, basically 160 -- there's sort of a problem -- 160 is
21 a statement that talks also about something you ruled out
22 of order for cross-examination, which is the report that's
23 due on the drainage on the San Joaquin River within five
24 years and we're now six months past that. So it's not a
25 threatened violation. It's an actual violation. And yet

1 you wouldn't let us go into that, but we're able to go
2 into that in this line of questioning.

3 MR. RUBIN: Madam Chair, these questions that I'm
4 asking are extremely relevant to the issue that's before
5 the Board. The question is whether the United States
6 Bureau of Reclamation and/or DWR demonstrated a threatened
7 violation of a permit term and condition. In order to
8 fully understand whether there's a threatened violation,
9 you need to understand the permit term and condition. And
10 my questions go to language that is actually -- is
11 directly in the permit term and condition. And if lays a
12 foundation for what the Board had expected at the time
13 they imposed that permit term and condition.

14 MR. JACKSON: And my point is that the relevance
15 ought to cover the whole section. If it's relevant for
16 one purpose, it's relevant for another. Again, the
17 section being quoted talks about not a threatened
18 allegation but an actual violation that has taken place,
19 and is the drainage that causes the salt problem hasn't
20 been dealt with and it was due six months ago. So it
21 should be in the cease and desist order.

22 CHAIRPERSON DODUC: And you will make that part
23 of your rebuttal. And I encourage you to do the same as
24 well. Let's focus now just on the .7 on the cease and
25 desist order as it is currently drafted.

1 STAFF COUNSEL MAHANEY: Chair Doduc, my witness
2 has been testifying for almost -- well, over three hours
3 now and may need a break soon. I don't know how much
4 further things are going.

5 MR. RUBIN: I have about five more minutes. But
6 I know that there's at least one other party that does
7 want to cross examine and --

8 CHAIRPERSON DODUC: Let's do five more. And
9 then, if necessary, we'll take a break.

10 STAFF COUNSEL MAHANEY: Okay. Thank you.

11 MR. RUBIN: Madam Chair, based on your statement
12 does that mean the witness is not going to be answering my
13 last question?

14 CHAIRPERSON DODUC: What is your last question?

15 MR. RUBIN: I'm going to ask the reporter to read
16 it back. I apologize.

17 (Thereupon the record was read as requested.)

18 CHAIRPERSON DODUC: You don't need to answer
19 that.

20 MR. RUBIN:

21 Q When you prepared for today's hearing and you prepared
22 the draft cease and desist order, did you try to
23 understand the alternatives that were evaluated as part of
24 the proceeding that led to Decision 1641, the alternatives
25 that were considered for implementing the South Delta

1 objectives?

2 CHAIRPERSON DODUC: That question has already
3 been asked and answered as well.

4 MR. RUBIN:

5 Q Would you be surprised to learn that the alternatives
6 that were considered by the State Board in the proceedings
7 that led up to Decision 1641 contemplated exceedances of
8 the South Delta objectives?

9 CHAIRPERSON DODUC: You don't need to answer
10 that.

11 I think that again goes to various objections
12 that have already been raised.

13 MR. RUBIN:

14 Q Getting back to the second issue that I would like to
15 address with you and, that is, the data that you relied
16 upon in order to conclude that there is a threatened
17 violation of the permit terms and conditions that apply to
18 the United States Bureau of Reclamation and Department of
19 Water Resources for the South Delta standards. Again,
20 those are Water Right -- or WR-9 to WR-18; is that
21 correct?

22 A Yes.

23 Q And for ease of reference I'm going to be looking at
24 WR-9 rather than the revised.

25 A Okay.

1 Q These data were made available to you and they reflect
2 historic EC at the stations indicated; is that correct?

3 A Yes.

4 Q And, again, you did not consider whether there was an
5 ability to reoperate as if the .7 objective was a permit
6 term and condition of the United States Bureau of
7 Reclamation and DWR at the time?

8 A No.

9 Q And, therefore -- and do you believe that these
10 data -- excuse me. Strike that.

11 Isn't it correct that the data that appears on
12 WR-9 may not reflect how the projects DWR and Reclamation
13 would operate and if the -- and now that the 0.7 EC
14 applied for the South Delta objectives?

15 A Yes, I agree with that.

16 Q Just a few more questions.

17 I believe that you were asked several questions
18 regarding WR-15, which deals with Station P-12; is that
19 correct?

20 A Yes.

21 Q And turn specifically to the second page of that
22 exhibit, WR-15. It's Station C-6, San Joaquin River at
23 Brandt bridge.

24 A I've got it.

25 Q Is it correct that this slide shows that EC at Brandt

1 bridge exceeded 1.0 for a period of time roughly late
2 January to mid-April?

3 A Yes.

4 Q And as part of your evaluation did you consider what
5 the EC was at Vernalis?

6 A In presenting this slide?

7 Q Yes.

8 CHAIRPERSON DODUC: That question has already
9 been asked before and answered before.

10 MR. RUBIN:

11 Q I don't recall what the answer to that was. I guess
12 we can go back and try to find that answer, or you could
13 answer yes or no. But it would be helpful for me for my
14 next question.

15 CHAIRPERSON DODUC: If your next question is
16 related to the Vernalis issue, then it's not relevant.

17 MR. RUBIN: I'm going to ask my next question and
18 then be able to argue my point, if you don't mind.

19 (Laughter.)

20 MR. RUBIN: I do believe it is relevant. But let
21 me ask my next question and we could avoid this, I guess.

22 Q As part of your preparation of the WR-15, would it be
23 a surprise to you to know that the EC at Vernalis was
24 either at 1.0 or less for the period of time in which
25 you've indicated a violation at the San Joaquin River

1 Brandt Bridge Station?

2 A Would it be a surprise? No, it would not be a
3 surprise.

4 Q If I as a hypothetical say that the EC at Vernalis was
5 below or at 1.0 and therefore met the requirement under
6 the permit term and condition for reclamation, what
7 factors could lead to a violation at Brandt Bridge?

8 STAFF COUNSEL MAHANEY: Objection. Calls for
9 speculation or conjecture.

10 MR. RUBIN: I asked the question because we're
11 before the Board on a draft cease and desist order which
12 says it's likely that the United States Bureau of
13 Reclamation and DWR will violate their permits. And if
14 there's conditions that are outside the control of DWR and
15 Reclamation, I think those are relevant to the
16 determination by the enforcement team that a cease and
17 desist order against those two agencies is appropriate.

18 STAFF COUNSEL MAHANEY: Actually I disagree. And
19 this is a legal issue relating to the basis for the
20 proposed cease and desist order which looks at the
21 threatened violation of the permit or license term. Where
22 circumstances beyond their control or where harm comes in
23 is if the Board in its discretion decides to pursue an
24 action based on violation of the cease and desist order.

25 MR. RUBIN: This issue goes directly to the issue

1 of threatened violation. The permit terms and conditions
2 subject Reclamation and DWR to meeting the objectives in
3 Table 2. But there's an additional element to that permit
4 term and condition, and those appear on 160. And it
5 becomes extremely relevant for a determination of a
6 violation or a threatened violation if there are actions
7 outside of the control that were considered or not
8 considered by the enforcement team on drafting the draft
9 cease and desist order.

10 STAFF COUNSEL MAHANEY: Actually, if I may
11 respond to that, that is an issue identified in my opening
12 statement where I said that the issue of the Board's
13 enforcement authority is a legal issue, not an evidentiary
14 issue. And I also requested if there's any question in
15 the Hearing Officer's mind, that the Board accept closing
16 briefs on this issue.

17 CHAIRPERSON DODUC: I agree.

18 Let's move on please.

19 Mr. Jackson, did you --

20 MR. JACKSON: Yes. I just wanted to object to
21 that question as calling for speculation and a lack of
22 foundation. There is no indication whatsoever in the --
23 in D-1641 that the State Board did not take into effect
24 other issues when it set the standard where it did and set
25 the responsibility with DWR --

1 CHAIRPERSON DODUC: We're not going to open this
2 door.

3 MR. O'LAUGHLIN: Unfortunately I had the pleasure
4 to be here for the 1995 Water Quality Control Plan in
5 D-1641. And I think it's very important as this
6 proceeding goes forward -- I realize the prosecution team
7 would like to limit what we're going to look at. But if
8 the permit --

9 CHAIRPERSON DODUC: And so would the Board.

10 MR. O'LAUGHLIN: Oh, okay. But when you're
11 looking at the permit term and condition that is
12 applicable to the United States Bureau of Reclamation and
13 DWR, you can't paraphrase -- take out certain phrases or
14 conditions and isolate them in and of themselves without
15 the modifying clauses on them.

16 And so what's really important here is -- we can
17 all probably agree that the United States Bureau of
18 Reclamation and DWR have to meet .7 at Brandt Bridge. But
19 that in and of itself is not the entire permit term and
20 condition that's set forth in D-1641 or is within their
21 permit terms and conditions. So while that's part of it,
22 it's kind of like the old thing, the rest of the story.
23 And the rest of the story is, is part of the prosecution,
24 did they look at factors that were outside the control of
25 DWR and the United States Bureau of Reclamation? And

1 that's a key point. Did they allow a report to be
2 submitted to the Executive Officer for the Executive
3 Officer to review and make a report and findings to the
4 State Board? Those are all permit terms and conditions.

5 And what my client is extremely interested about
6 is that we make sure that the permit terms and conditions
7 are followed to the their full extent. So while we're
8 very much interested in that the standards and objectives
9 are met, they have to be met through the permit terms and
10 conditions specifically. So we have to look at the permit
11 terms and conditions specifically applicable in this case;
12 and that includes language that just doesn't say .7.

13 CHAIRPERSON DODUC: I appreciate that, and we've
14 had this discussion today. And we are going to move
15 forward from this point.

16 MR. RUBIN:

17 Q I just have one more question. It follows up on some
18 questions that were asked by Mr. O'Laughlin. He was
19 asking you some questions regarding factors that you
20 considered in terms of operation of reservoirs, questions
21 in that line. I question you, whether you are familiar
22 with the Central Valley Project operations criteria and
23 plan?

24 A No.

25 Q Are you familiar with the coordinated operations

1 agreement?

2 A No.

3 Q Are you familiar with the manner in which the United
4 States Bureau of Reclamation and Department of Water
5 Resources operate to meet their obligations?

6 CHAIRPERSON DODUC: These questions are intended
7 to connect back to those modifying conditions. And we
8 again have been through this.

9 MR. RUBIN: No, I think these questions go
10 directly to the basis for the witness's conclusion that
11 there's a threatened violation.

12 CHAIRPERSON DODUC: And he's already answered
13 that it's based on exhibits in the record from DWR and
14 USBR.

15 MR. RUBIN: And my questions now go to any kind
16 of -- any level of underlying understanding of operations,
17 particularly with regard to the manner in which the
18 Department of Water Resources and United States Bureau of
19 Reclamation operate to meet their obligations and their
20 permits' terms and conditions that were imposed to
21 implement the 1995 Water Quality Control Plan.

22 CHAIRPERSON DODUC: And I believe he's answered
23 those questions.

24 MR. RUBIN:

25 Q Can you provide to me any information that you have

1 available that developed your expertise for today to
2 testify as an expert related to the manner in which
3 California water systems operate to meet Water Quality
4 Control Plan requirements within the San Francisco/San
5 Joaquin/Bay Delta system?

6 A I don't claim to be an expert in the Bay Delta. I
7 claim to be a member of the enforcement unit with
8 experience enforcing water rights, issuing cease and
9 desist orders and administrative civil liabilities.

10 Q And based on that --

11 CHAIRPERSON DODUC: And I believe he's answered
12 your question.

13 MR. RUBIN: Based on that statement, the sole
14 basis for concluding that there is a threatened violation
15 are the letters that are attached to your testimony as
16 exhibits and the data that's attached to your testimony as
17 exhibits?

18 A Yes.

19 MR. RUBIN: Thank you.

20 No further questions.

21 CHAIRPERSON DODUC: Let me ask the State Water
22 Contractors -- are you still here?

23 MR. SCHULZ: Oh, yeah.

24 CHAIRPERSON DODUC: How much time do you think
25 you'll need?

1 MR. SCHULZ: I have no idea. It depends on how
2 I'm constrained.

3 CHAIRPERSON DODUC: Okay. Well, in that case why
4 don't we go ahead and take a break then. Ten-minute
5 break, resume at 5:50.

6 (Thereupon a recess was taken.)

7 CHAIRPERSON DODUC: We're ready to resume.

8 Cross-examination by the State Water Contractors.

9 MR. SCHULZ: Madam Chairman, Board Member
10 Baggett. I can possibly make this very short by sort of
11 making a statement of where I'm trying to go, so that I
12 can find out maybe in advance as to whether I'm going to
13 be allowed to ask these questions or not.

14 There is a clear, that I guess I've seen,
15 disagreement today perhaps on a legal point that involves
16 the interrelationship between Table 2, or whatever it is,
17 and the provisions on pages 159 and 161 of the ordering
18 paragraphs of D-1641 that are parts of Exhibit 5A in this
19 proceeding.

20 And specifically so you understand where we've
21 all been coming from, it's been our -- it's our legal
22 position that -- the words on page 159 as to DWR on
23 paragraph 6 states, "If permittee exceeds" -- and that the
24 word "exceeds" is extremely important to us -- "the
25 objective at Station C6, C8 and P12, permittee shall

1 prepare a report," et cetera, "and the Executive Director
2 will evaluate the report and make a recommendation to the
3 SWRCB as to whether enforcement action is appropriate or
4 the noncompliance is a result of actions beyond the
5 control of the permittee."

6 It's our view of the law that this -- that you
7 have to read this provision and the table in conjunction
8 with one another and that the word "exceeds" and the word
9 "violation" mean two different things. It's our position
10 that you only have a violation if the Executive Director
11 finds that the noncompliance is as a result of an action
12 that is within the control of the permittee. And if it's
13 beyond the control of the permittee, it doesn't constitute
14 a violation even though there's been an exceedance of the
15 numeric number. That's --

16 CHAIRPERSON DODUC: And I --

17 MR. SCHULZ: That's our legal position.

18 CHAIRPERSON DODUC: Yes, and I appreciate that
19 position. We've obviously heard from other speakers
20 regarding that as well. And we've heard from the
21 prosecution team. And I've been advised by my own counsel
22 that that legal difference is not what we're discussing
23 today.

24 MR. SCHULZ: Well, that legal difference will be
25 briefed.

1 But the point is is that what we need to find out
2 and what we've been trying to find out from this
3 witness -- and we still haven't gotten a clear answer --
4 is whether when he uses the term "violation" he means
5 exceeding the standard at a time when it's within the
6 control of the Department or the Bureau to prevent it or
7 whether he's using the term "violation" irrespective of
8 whether the Bureau and the Department have the ability to
9 control it. That's what we're trying to find out, what
10 did he use -- and that's a factual question, as to the
11 assumption that he used with respect to what constitutes a
12 violation. And that's all -- if he can answer that one
13 question, I suspect I can speed up as to how he used the
14 term "violation" in the work that he did in deciding that
15 there was a threat of violation.

16 CHAIRPERSON DODUC: We'll give you one more
17 chance at asking him that question. I believe it's been
18 asked and he's tried his best to answer. Obviously
19 there's still a lot of question in various folks' minds.
20 But I need to caution you to be very careful that we're
21 not stepping into the legal concern that has been
22 expressed here with respect to what the prosecution
23 counsel has raised.

24 MR. SCHULZ: No, I agree with that. And I never
25 ask an expert witness what his legal opinion is. But I do

1 ask them what assumption that he made when he uses the
2 term "violation". That's all I want to ask him.

3 CHAIRPERSON DODUC: Yes. But he has also already
4 answered to previous parties that there were things that
5 he read and considered all those factors. And there were
6 obviously, you know, data that he did not have. But there
7 was also data and things in the record that he did have.

8 MR. SCHULZ: The one thing that I'm aiming at
9 only is what is his definition of the word "violation" --
10 "What is it that you use?" So my question --

11 CHAIRPERSON DODUC: Proceeding carefully.

12 MR. SCHULZ: All right. I'm going to try to ask
13 this very carefully.

14 CROSS-EXAMINATION

15 by MR. SCHULZ:

16 Q In determining whether there was a threat of
17 violation, did you assume that a violation occurred every
18 time there was an exceedance of the numeric objective or
19 only when you found that that exceedance was within the
20 control of the Bureau or the Department? Which of those
21 did you use?

22 A I haven't found any violations of the .7 EC. What I
23 showed on my table was historic exceedances of .7.

24 Q Right.

25 My question was: In determining that there was a

1 threat of violation, which of those definitions of
2 violation did you use?

3 A A true violation beyond their control is what I would
4 consider a threat of violation.

5 Q A true violation that --

6 A A violation beyond their control.

7 Q That is beyond their control?

8 A Well, you know --

9 Q Well, if noncompliance --

10 A Let me back up here.

11 Q Okay.

12 A There's -- my focus on this was they have reported to
13 us the possibility of a violation. I think that that's
14 the term they use in their letters.

15 Q Actually I looked at their letters, and I didn't find
16 the word "violation" once. I found the word "exceed". I
17 found the word "noncompliance". And I found that the
18 term -- that there would be a threat that the Board would
19 find them in violation. But I could not find the phrase
20 that they would violate their permit terms. I just -- I
21 didn't find it.

22 So if you can help me as to where they used the
23 word "violation," I would appreciate that.

24 A Give me a few minutes.

25 Q And it is late. So I agree, I could have missed it

1 too.

2 STAFF COUNSEL MAHANEY: Could you rephrase the
3 question please.

4 MR. SCHULZ: Rephrase it?

5 STAFF COUNSEL MAHANEY: Or restate it.

6 MR. SCHULZ: Well, what we're looking for now
7 is -- he just stated that he thought that the Department
8 or the Bureau used the word "violation" in their letters.
9 And I was saying I found the word "exceed," I found the
10 word "noncompliance" and I found that there could be a
11 threat that the Board would find them in violation. But I
12 never ever saw a direct statement that they would violate
13 the permits and terms of their -- because I know that the
14 Department and the Bureau believe they only violate if it
15 is within their control.

16 Q So the question was: Where in the letters does the
17 word "violation" appear?

18 A Well, that wasn't the original question. Let me see
19 if I can find it for you.

20 Q Then we'll come back to the -- I mean I think you
21 answered the original question as to whether you
22 considered a violation to be a situation where the
23 exceedance was beyond their control or within their
24 control. That was the simple question that I started out
25 with.

1 A You know, without looking for the exact point, I
2 recall in one of those letters -- and I could spend time
3 looking for it now. But there was a point where they
4 acknowledge that without the petitions that they
5 requested, that they may be subject to enforcement action
6 by the Board.

7 Q I agree with that.

8 Okay. Now, let me get -- I can really end this
9 pretty quickly.

10 A I'm trying. I'm really trying.

11 Q I know you are, and it is late.

12 But my question is this: Your use of the word
13 "violation," did you limit it to circumstances that were
14 within the control of the Bureau or the Department as
15 shown on 159 and 161, or did you assume that any
16 exceedance of the standard irrespective of control was a
17 violation?

18 A To the first question, did -- can you break that into
19 two for me?

20 Q Sure. Did you treat as a violation any exceedance
21 even if that exceedance was beyond the control of the
22 Bureau or the Department?

23 A In my mind that's what a violation is in the sense of
24 the cease and desist.

25 Q Okay. So the answer is that you did treat any

1 exceedance, irrespective of control over that exceedance,
2 as a violation?

3 STAFF COUNSEL MAHANEY: Asked and answered.

4 CHAIRPERSON DODUC: As a potential violation,
5 yes.

6 MR. SCHULZ: As a potential --

7 CHAIRPERSON DODUC: Okay.

8 MR. SCHULZ: All right. That's what we needed to
9 know. Because to me now that sets up the legal issue that
10 we will now have to brief as to whether that's the
11 appropriate interpretation of D-1641's permit terms and
12 conditions.

13 And it also means that I do not have to ask a
14 whole bunch of questions about the graphs that are in 11,
15 12 and 13, because I was going to ask questions about
16 whether he considered whether any of those violations were
17 within the control of the Department or the Bureau. And I
18 just assume that his answer would be now that, no, he
19 didn't because he didn't believe that was necessary. So
20 I'm just going to pass on those.

21 So the last thing that I'm going to touch on is
22 on the cease and desist order itself, and specifically
23 the -- let's see, those are exhibits what, 3 and 4? I
24 believe. Yeah.

25 Q And I want to just briefly ask you a couple of

1 questions about the barriers portion of the document. And
2 that deals with the language that talks about the date for
3 getting the barriers in place and the language about other
4 acceptable -- I must have marked it on Exhibit 3 of the
5 Bureau's.

6 Can somebody -- it is real late. Can somebody
7 point me to the language that lists the alternatives to
8 the barriers. Is it in the facts or is it in the ordering
9 paragraph?

10 MR. HERRICK: It says here number 2 to the last
11 part of the sentence.

12 MR. SCHULZ: Last part of the sentence in --

13 MR. HERRICK: Last part of two.

14 MR. SCHULZ: Okay. All right.

15 This is going to be real quick.

16 Q Reductions in exports is one of the alternatives.

17 Did you make any study of whether reductions in
18 exports from the state water project facilities in any way
19 either help or hinder the ability to meet the interior
20 Delta standards?

21 A No.

22 Q Okay. Same thing with respect to storage releases
23 from Shasta or Oroville.

24 A I didn't make any studies of those, no.

25 Q So you do not know whether those in fact are possible

1 alternatives to the barriers; is that correct -- feasible
2 alternatives?

3 A Not specifically.

4 Q Okay. Do you have any information that you could
5 provide us today as to -- actually let me ask the question
6 this way -- because I want to take you back to a question
7 that you answered earlier today that I think you answered
8 incorrectly.

9 And, that is, on page 3 of your testimony at the
10 very top of the page, there is a statement that reads,
11 "Accordingly, the .7 EC objective is in effect" -- excuse
12 me. That's not -- that's page 3.

13 Page 5. I'm sorry.

14 Top of page 5, there's a sentence that starts,
15 "Accordingly, construction and operation of the permanent
16 barriers is the only practical and effective method of
17 achieving the water quality objective." And then you go
18 on and say, "Each year the permanent barriers are not
19 installed is the year when the agencies will threaten to
20 violate the .7 objective at Interagency Station C6, C8 and
21 P12." And I believe you testified earlier that you were
22 just quoting WR-7 at page 2 in that statement. And I
23 think if you take a close look at that, that's not so.
24 That the prior sentence that starts on the bottom of page
25 4 is the quote that DWR has explained and then you quote.

1 But then I read the next sentence as being your conclusion
2 based on that quote that the permanent barriers is the
3 only practical and effective method of achieving the water
4 quality objective. Is that correct?

5 A You're correct in that, yes, I was referring to the
6 Water Right 7 as that quoted part.

7 Yeah, I guess I draw that conclusion there.

8 MR. SCHULZ: Okay. Thank you.

9 That's all I have.

10 MR. JACKSON: That change in testimony was a
11 direct response to a question that I had asked. And now
12 I've got a different response from him, and I'd like to
13 ask him about that.

14 CHAIRPERSON DODUC: All right.

15 CROSS-EXAMINATION (Continued)

16 by MR. JACKSON:

17 Q Mr. Lindsay, you indicated that you came to the
18 conclusion that the permanent barriers were the only way
19 to avoid the exceedances; is that correct?

20 STAFF COUNSEL MAHANEY: Objection. That
21 mischaracterizes the -- never mind. Strike that.

22 MR. JACKSON:

23 Q Is that what I just heard you say?

24 A That's what this testimony says, right here.

25 Q And you indicate that you had not -- you did not study

1 any of the alternative methods that the Board suggested in
2 D-1641, releases of water from Friant, for instance?

3 CHAIRPERSON DODUC: He's already said so. He's
4 already answered that.

5 MR. JACKSON:

6 Q Well, then what conclusion -- on the basis of what
7 study did you determine that the only possible way to
8 solve the problems in the Delta is the barriers?

9 A You know, I guess what I'm getting at here is that the
10 decision talks about permanent barriers and other means,
11 you know. And this late I remember -- there's a term for
12 it.

13 Equivalent measures. Thank you.

14 Barriers, equivalent measures. Everything I've
15 seen so far coming out of DWR is we're headed towards the
16 permanent barriers. I guess I'm making a jump there that
17 that's what that is. The permanent barriers are the way
18 to go as opposed to some equivalent measures.

19 However, it's still up to DWR. We haven't
20 limited that in any way. If they would like to take on
21 the equivalent measures, they're welcome to do it.

22 Q And it's your understanding that if DWR installs the
23 permanent barriers, that solves the problem no matter what
24 the actual results are?

25 A No.

1 Q So --

2 A Solves the problem?

3 Q I mean that -- is it your position that if DWR builds
4 the barriers, it really doesn't matter whether they work
5 or not in terms of your ability to operate the cease and
6 desist order?

7 MR. RUBIN: Madam Chair, I object to the line of
8 questioning.

9 CHAIRPERSON DODUC: All right. I think you've
10 had the opportunity to clarify on what was said before by
11 the witness.

12 So let us move on to Stockton East Water
13 District.

14 MS. ZOLEZZI: Good afternoon. Thank you. Jeanne
15 Zolezzi for Stockton East Water District.

16 Good evening by ten minutes.

17 CROSS-EXAMINATION

18 BY MS. ZOLEZZI:

19 Q Mr. Lindsay, I will try to be brief so we can get you
20 out of here. But I do have a couple of questions.

21 The draft CDO requires permanent barriers or what
22 we've just been talking about, equivalent measures. Can
23 you explain in your understanding what those equivalent
24 measures might be?

25 A I have no idea what those equivalent measures might

1 be.

2 Q So who would be able to determine whether or not --

3 A I'm trying not to be trite. But really I -- let me
4 rephrase that. I don't know what DWR might propose as
5 equivalent measures. I don't know.

6 Q Who would decide then whether or not they were in
7 compliance with the CDO by proposing equivalent measures?

8 A If they proposed equivalent measures? Executive
9 Director.

10 Q Okay. And the CDO does not include any direction to
11 DWR or the Bureau as to how to come into compliance with
12 their permit requirements, as you just mentioned; it's up
13 to DWR, it's up to the Bureau how they would come into
14 compliance; is that correct?

15 A That's correct.

16 Q But you're familiar with, because you've stated it in
17 the draft CDO, that both DWR and Reclamation have
18 represented that flow alone is unlikely to meet the
19 standards without the barriers and you yourself have
20 concluded that the barriers may be the only effective way
21 to meet the standards.

22 Are you --

23 A Yes, to the first part of that question. I'm sorry.
24 Let me hear that one more time. There was two questions
25 there.

1 Q Yes. I'm sorry. I apologize. I'll break them up.

2 DWR and Reclamation have represented that flow
3 alone is unlikely to meet the standard without the
4 barriers; is that correct?

5 A That's what I understand from things I've -- the
6 letters I've read, yes.

7 Q And I believe it's been asked and answered that your
8 conclusion in the CDO was that the barriers may be the
9 only effective way to meet the standards?

10 A That's what I believe I've been hearing through this
11 whole process, yes.

12 Q Okay. Given that, are you concerned -- well, I take
13 that back. One more foundational question.

14 We know that you're familiar with D-1641. And
15 one of the sections of that decision that you include in
16 the DWR was that -- in your CDO, I apologize -- is that
17 while the .7 standard could be met without permanent
18 barriers, it may take an amount of flow to meet them that
19 may constitute an unreasonable use of water, correct?

20 A Do I believe it may constitute an unreasonable use of
21 water?

22 Q No, that wasn't my question.

23 My question was: You have read D-1641, it made
24 that conclusion, and you referenced that conclusion in the
25 draft CDO?

1 A Yes, I think I did.

2 Q My question as to your concern is whether or not you
3 are concerned that requiring them to meet the standard
4 without direction as to how to meet the standard, they may
5 implement a method of meeting the standard that would
6 constitute an unreasonable use of water?

7 CHAIRPERSON DODUC: You don't need to answer
8 that.

9 Obviously he's already answered the question that
10 equivalent measures would need to be submitted to the
11 Executive Officer for approval. And assuming that there
12 is disagreement with the Executive Officer, there is a
13 petition process that would be involved as well.

14 MS. ZOLEZZI: Well, I had a question then --

15 CHAIRPERSON DODUC: So I don't believe it is up
16 to Mr. Lindsay to determine what is or is not an
17 appropriate use of water.

18 MS. ZOLEZZI: That wasn't my question. But if I
19 can go back.

20 My understanding is that equivalent measures
21 would have to be proposed. However, Mr. Lindsay has
22 testified earlier that until the permanent barriers or
23 equivalent measures are implemented, DWR and Reclamation
24 will have to meet the standards. I am asking him if he
25 has a concern as to how they might meet the .7 standard

1 before the barriers or equivalent measures are in place
2 and no report is required for how they would meet the
3 standards. As the expert for putting together the CDO,
4 who is familiar with the Board's concern as expressed in
5 D-1641, I am asking him as the expert if he has concern
6 that they may comply with the standards in a manner that
7 constitutes an unreasonable use of water.

8 STAFF COUNSEL MAHANEY: Could you repeat the
9 question please?

10 MS. ZOLEZZI: Would you like me to repeat the
11 foundational questions or just the question that results
12 from them?

13 STAFF COUNSEL MAHANEY: The final question.

14 MS. ZOLEZZI: My question to Mr. Lindsay is:
15 Does he have a concern with the way the CDO is phrased
16 that Reclamation and/or DWR may attempt to meet the .7
17 standards in a manner that constitutes an unreasonable use
18 of water?

19 THE WITNESS: I do not have a concern with the
20 way the CDO is phrased.

21 MS. ZOLEZZI: Thank you.

22 And then one question that I'm sure I'll get lots
23 of objections to -- and I will prephrase as to why I'm
24 asking this question. The key issues for today, as have
25 been mentioned before, include what modifications of the

1 draft order may be appropriate. While I understand that
2 we can suggest changes and modifications to the draft
3 order ourselves, I think it makes the most sense to ask
4 the expert who drafted the CDO whether or not changes to
5 it would make sense from his experience of putting it
6 together, whether he thinks it would be a good idea to add
7 modifications. I would like to ask him whether he thinks
8 several issues might be a good idea to add to the CDO.

9 CHAIRPERSON DODUC: Thoughts, counsel?

10 STAFF COUNSEL MAHANEY: I feel like we've been
11 through this before. Again, as to the issue of relevance,
12 the hearing issue deals with the issuance of the proposed
13 cease and desist orders and Mr. Lindsay's proposed
14 modifications to those orders. When the line of
15 questioning goes into why he did or did not exercise
16 certain discretion in developing those recommendations, I
17 think that is irrelevant to this proceeding.

18 MS. ZOLEZZI: If I may respond.

19 I am not asking Mr. Lindsay whether or not he --
20 why he decided something should be included and something
21 shouldn't. That is absolutely within his discretion. He
22 made that decision.

23 CHAIRPERSON DODUC: I appreciate that. But I
24 also want to stay consistent with previous rulings.

25 MS. ZOLEZZI: Well, if those rulings were

1 incorrect --

2 CHAIRPERSON DODUC: You are welcome to bring up
3 suggestions during your rebuttal, during you're direct.
4 And obviously the prosecution team is welcome to provide
5 their thoughts if they wanted to at that time as well.

6 MS. ZOLEZZI: Thank you.

7 CHAIRPERSON DODUC: Yes.

8 MR. RUBIN: Can I ask just one or two additional
9 questions? Very brief.

10 CHAIRPERSON DODUC: Let me go through the final
11 party first.

12 The U.S. Bureau of Reclamation.

13 MS. ZOLEZZI: Excuse me, Madam Chair. I would
14 object. Are we going to allow other parties to come up
15 and ask additional questions now that we've heard what
16 everyone has said?

17 MR. RUBIN: If I --

18 CHAIRPERSON DODUC: I was told I don't have to
19 let you ask again.

20 MR. RUBIN: I could ask my question. And if
21 there's an objection to the question, I will --

22 MR. JACKSON: I Object.

23 CHAIRPERSON DODUC: No, let's -- why don't we
24 stick to the rules here, because I can see others jumping
25 up to ask more questions.

1 So let's just go ahead and conclude this
2 cross-examination for the day.

3 Actually do you need to make some motion
4 regarding --

5 STAFF COUNSEL MAHANEY: Right. At the -- I would
6 actually like to -- yes, I'd like to offer into evidence
7 Water Right Exhibits -- and let me pull up my -- well,
8 that's something I actually could clarify.

9 We still have redirect. And I'm not sure at what
10 point in this process you'd like to see that. I could
11 offer my exhibits into evidence at that point or now.
12 Whenever you want.

13 CHAIRPERSON DODUC: Okay. Let's wait then.

14 STAFF COUNSEL MAHANEY: Okay.

15 CHAIRPERSON DODUC: It's been a very long day.
16 So we're going to adjourn and resume tomorrow with the
17 redirection from the prosecution team.

18 And you may enter your exhibits in to evidence
19 afterwards.

20 MR. SCHULZ: This is just a question on how late
21 we're going tomorrow, because I know a number of us have
22 got some problems going this late tomorrow.

23 Do we have a schedule for the ending date
24 tomorrow?

25 CHAIRPERSON DODUC: We have a list of parties to

1 go through. Let's shoot for 5 o'clock.

2 MR. SCHULZ: Okay. That would work.

3 CHAIRPERSON DODUC: All right.

4 (Thereupon the State Water Resources
5 Control Board public hearing adjourned
6 at 6:15 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing California State Water Resources Control Board,
7 Division of Water Rights public hearing was reported in
8 shorthand by me, James F. Peters, a Certified Shorthand
9 Reporter of the State of California, and thereafter
10 transcribed into typewriting.

11 I further certify that I am not of counsel or
12 attorney for any of the parties to said hearing nor in any
13 way interested in the outcome of said hearing.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 5th day of November, 2005.

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23 JAMES F. PETERS, CSR, RPR

24 Certified Shorthand Reporter

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