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January 10, 2006

Via Fax (916) 341-5620

Ms. Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Re: Comment Letter – 01/13/06 Board Meeting Item Number 4
Draft Order Regarding Cease and Desist Orders Nos. 262.31-16 &
262.31-17 and Reconsideration of Approval of Water Quality Response Plan
These Comments are Submitted on Behalf of Central Delta Water
Agency, R. C. Farms, Inc., Curt Sharp, and Rudy Mussi, South Delta
Water Agency, and Lafayette Ranch

Dear Ms. Potter:

The Draft Order (“DO”) for the above matters draws lines through the participating party’s positions in an apparent effort to give everyone something. The result however is legally deficient, contrary to the evidence, and frustrates the protections of water quality in the Delta.

Both with regard to the Cease and Desist Orders and the Water Quality Response Plan, the Draft Order clearly and unequivocally changes D-1641. This is not only illegal under the California Environmental Quality Act but constitutes a poor policy choice by the Board. These comments will address the legal flaws of the DO and also suggest changes to other portions of the text.

1. The DO changes D-1641's implementation of the 1995 Water Quality Control Plan Water Quality Objectives for Agricultural Beneficial Uses in the Southern Delta.

The 1995 Water Quality Control Plan provides that the Southern Delta Water Quality Objectives at Old River near Middle River, Old River at Tracy Road Bridge, and San Joaquin River at Brandt Bridge shall be 0.7 EC from April through August and 1.0 EC from September to March. These objectives were implemented over time through D-1641. As stated in footnote

5 to Table 2 of D-1641: “The 0.7 EC objective becomes effective on April 1, 2005. The DWR and the USBR shall meet 1.0 EC at these stations year round until April 1, 2005.” D-1641 was supported by an extensive Environmental Impact Report. As stated in that EIR,

[A]s required by the California Environmental Quality Act, the SWRCB prepared environmental documents on the impact of adopting the (1995 Water Quality Control) Plan. . . This Draft Environmental Impact Report (“EIR”) analyzes the impacts of implementing the 1995 Plan. Many of the actions to implement one group of objectives are independent of actions to implement other groups of objectives. As a result, there are many combinations of actions that could be taken to implement the Plan.

The staged implementation of the Southern Delta objectives was examined through the EIR process which identified potential negative impacts and set forth mitigation measures.

In the DO, the Board states on page 30:

2. Within 60 days from the date of this Order, DWR and USBR shall submit a detailed plan and schedule to the Executive Director for compliance with the conditions mentioned above, including plan completion dates for key events leading to full compliance with the 0.7 EC objective at station C-6, C-8, and P-12 **by July 1, 2009**. (Emphasis added.)

The situation could not be more clear. Through this CDO process, the SWRCB proposes to change the staged implementation schedule set forth in D-1641. This proposed change to the implementation date is accompanied by no environmental review for such changes. The DO itself recognizes that such changes would require accompanying environmental review on page 9 of the DO. In discussing the DWR and USBR’s Petition for Long-Term Change to their Water Permits submitted on February 18, 2005, the Board notes that those projects requested “to change the effective date of the 0.7 EC objective for the interior Southern Delta stations from April 1, 2005, to December 31, 2008.” The Board goes on to state, “The State Water Board cannot continue processing the Petition until DWR completes its California Environmental Quality Act compliance.” If changing the implementation of the 0.7 EC objective at the three interior southern Delta stations pursuant to a Petition by DWR and USBR requires accompanying environmental documents, then so too does a change of the implementation date of the 0.7 EC objective for the three interior southern Delta stations through a CDO process also require such environmental documentation. The Board should note that its own comments to DWR’s initial study and proposed Negative Declaration supporting the Petition pointed out shortcomings indicating that the Negative Declaration was insufficient to support the proposed changes.

2. The DO changes D-1641's approval of JPOD without the appropriate environmental review.

In D-1641, the Board approved JPOD with certain conditions and limitations. In addition to deferring JPOD's water level and water quality effects to further review through response plans approved by the Executive Director, D-1641 required that JPOD was to be conditioned upon compliance with all other permit/licenses of the projects. As stated above, the EIR supporting D-1641 and thus JPOD was an environmental analysis of the effects of such additional pumping and included necessary findings and mitigation.

In the DO, the SWRCB changes D-1641's requirement of compliance with existing permit/licenses and allows Stage 1 JPOD if the three South Delta salinity objectives are violated. Such a change to a government action that can have a significant effect on the environment requires environmental review. Such review is absent in this case, and therefore the DO is legally deficient.

It must be pointed out that the DO recognizes "minimal, historic uses of JPOD under Stage 1." These uses include supplying the Cross-Valley Contractors (et al.) with water. The Board should take note of its own records and see that this historic use was historically illegal as DWR was delivering water to the CVP service area in violation of its permits until D-1641 made it legal.

The other "historic" use cited by the DO deals with makeup pumping. In support of the DO, the Board refers to previous makeup pumping to recover losses due to actions taken to protect stripped bass. Stripped bass populations are now at all time lows. Current makeup pumping is taken to protect (generally) salmon and smelt and includes makeup pumping for exports lost during the pulse flow time frame. During that time frame, D-1641 allows exports to equal 100 percent of the San Joaquin River flow notwithstanding the Biological Opinions which require that exports be much lower than those flows. Hence, this "historic" use is a method by which the Board tries to make sure that if the projects must protect fish, it does not cost them any water.

To use these two "beneficial uses" as justification for water quality violations is not just bizarre, it is the Board obligating its violations to protect the waters of the State.

3. Other proposed changes to the Draft Order.

A. In paragraph 1, page 29 of the DO, DWR and USBR are ordered to insure compliance with the 0.7 EC objective (from April through August) at the three South Delta compliance locations as of April 1, 2005. As stated above, paragraph 2 on page 30 does not require "full compliance" until "July 1, 2009."

The DO is therefore inconsistent in that on the one hand it requires compliance with the 0.7 standard by April 1, 2005, and on the other hand requires full compliance with that same standard by July 1, 2009.

B. Paragraph 2 of the Draft Order provides for a “plan” by which the 0.7 EC objective shall be met, but that the plan may include means which are equivalent to that of barriers. The Draft Order requires that “if DWR and USBR decide to implement the permanent barrier project or equivalent measures, DWR and USBR shall submit a schedule to the Chief of the Division of Water Rights for developing an operations plan that will reasonably protect southern Delta agriculture.” This too is confusing and contradictory as it suggests that “equivalent measures” must be geared to meet the 0.7 EC objective as that is the purpose of the plan required in paragraphs 2 and 3. However, as per footnote 5 of Table 2 of D-1641, “equivalent measures” to barriers “with an acceptable operations plan” is one method of avoiding the 0.7 objective as the footnote allows the objective to revert back to 1.0 once barriers or equivalent measures are in place. The DO however seems to indicate “equivalent measures” may be one way of eventually attaining full compliance.

C. Paragraph 4 of the DO lists various other measures DWR and USBR can take as “corrective actions” if they anticipate violations of the South Delta objectives. The DO lists releases, export reductions, recirculation, purchases, exchanges, transfers, modifications to temporary barrier operations, and drainage reductions. Since these are the methods by which a projected violation can be avoided, and the Board thinks they should be undertaken to avoid such violation, the DO should simply require compliance with the standards. There is no logical reason to give DWR and USBR until 2009 to reach “full compliance” with the standard while at the same time expecting they can undertake any of the large number of options available to avoid a violation in any particular instance. By confusing the issue, the Board is insuring that DWR and USBR will not plan ahead and secure the appropriate approvals or expenditures in order that they may undertake some of these items and avoid water quality violations.

D. Paragraph 5 of the DO requests DWR and USBR provide certain information in the event of a violation. The information includes the “amount of water bypassed or released from project supplies, the net reduction in exports, and the measured quantity of other actions. . .” It also seeks the “supplies remaining for beneficial uses following corrective actions.” There would appear to be no valid reason to request such information. The request/requirement appears to be a method by which DWR and USBR can justify a violation by arguing the corrective action taken results in an unreasonable use of water. Since DWR gave no evidence or testimony to suggest such an argument, the Board should not give its implicit support for one. If DWR and USBR believe that releasing 50,000 acre-feet of water to meet water quality obligations is an unreasonable use of water while they are exporting 5 million or more acre-feet, they can make that argument if they so choose. It is not the SWRCB’s function to conserve and protect any specific export levels.

E. Page 5 of the Do lists conditions and actions which affect water conditions in the southern Delta. Instead of such a list, the DO should reference the Board's findings set forth in D-1641 which led it to assign responsibility for the water quality objectives to DWR and the Bureau.

F. Page 7 of the Do describes the development of the water quality standards as being to protect two salt sensitive crops in the South Delta, beans and alfalfa. This incorrectly describes the previous analysis and decisions of the Board. The Board is directed to pages VI - 18 to VI - 19 of the 1978 Water Quality Control Plan which used beans and alfalfa as indicators to protect various crops. The current language of the DO appears to be setting the groundwork for an argument that a decrease in bean farming would justify a lessening of the standard. The Board should not be party to actions that will preclude southern Delta farmers from being able to grow any crop they choose if it is otherwise economically feasible.

G.. Page 7 of the DO incorrectly attributes delays in the implementation of the standards to previous negotiations between SDWA and DWR and USBR. The Board is directed to pages VI - 22 and VI - 23 of the 1978 Plan, and the relevant portions in the 1991 and 1995 plans and D-1641. To the contrary, the standards were proposed for early implementation in case those negotiations were not successful.

H. Page 18 of the DO refers to DWR's assertion that changes in the SWP exports do not effectively control water quality in the South Delta, and the Board's analysis and refutation of that position. The text should include references to SDWA testimony showing numerous ways in which SWP operations do affect salinity in the South Delta and how the DWR presented no evidence as to how it would jointly operate with the USBR to meet the objectives.

I. Pages 19 - 20 of the DO deal with DWR's assertion that 1.0 EC is protective of agricultural beneficial uses and the Board's analysis and refutation of that position. The text should include references to the rebuttal testimony of SDWA's witness Terry Prichard who pointed out a number of unreasonable/incorrect assumptions in Dr. Letey's analysis, which incorrect assumptions were not contested by DWR or any other party. In addition, the text should not refer to other evidence for "potential" harm when the evidence showed actual harm and how increasing salt concentrations in irrigation water will result in further harm.

J. Page 20 confuses the issue of a water quality objective for agricultural beneficial uses by making reference to irrigation water salinity being one factor in crop production. The existence of other factors that affect crop production is irrelevant to what water quality is needed. The fact that a farmer may lose crop production due to other causes does not mean that water quality is unimportant or can be adjusted depending on what the eventual crop production in the year actually will be. For example, the amount of flow to protect fisheries on the San Joaquin River does not become less if in any particular year offshore fishing radically increases the mortality of that fishery.

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4. Conclusion.

The Draft Order incorrectly changes provisions of D-1641 without adequate environmental review. The Board should amend the Draft Order to simply require compliance with existing standards and not make any extensions of implementation dates for water quality standards. The parties hereto also request their previous recommendations for provisions to be included in the final Order.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd

PROOF OF SERVICE BY E-MAIL AND MAIL

I declare as follows:

I am over eighteen years of age and not a party to the within entitled action. My business address is the Law Office of John Herrick, 4255 Pacific Avenue, Suite 2, Stockton, California, 95207. I am employed in San Joaquin County, California. Based on an agreement of the parties to accept service by e-mail or electronic transmission, on January 10, 2006, at approximately _____ p.m., I caused the Comment Letter – 01/13/06 Board Meeting Item Number 4 Draft Order Regarding Cease and Desist Orders Nos. 262.31-16 & 262.31-17 and Reconsideration of Approval of Water Quality Response Plan These Comments are Submitted on Behalf of Central Delta Water Agency, R. C. Farms, Inc., Curt Sharp, and Rudy Mussi, South Delta Water Agency, and Lafayette Ranch to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I am readily familiar with the practice of the Law Office of John Herrick for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business of the Law Office of John Herrick, correspondence is deposited with the United States Postal Service the same day as it is collected and processed. On January 10, 2006, I served Comment Letter – 01/13/06 Board Meeting Item Number 4 Draft Order Regarding Cease and Desist Orders Nos. 262.31-16 & 262.31-17 and Reconsideration of Approval of Water Quality Response Plan. These Comments are Submitted on Behalf of Central Delta Water Agency, R. C. Farms, Inc., Curt Sharp, and Rudy Mussi, South Delta Water Agency, and Lafayette Ranch on the following individuals by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, and placed for collection and mailing on said date to be deposited with the United States Postal Service following ordinary business practices at Stockton, California, addressed as follows:

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Patrick Porgans
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on January 10, 2006, at Stockton, California.

Ms. Selica Potter
January 10, 2006
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Dayle Daniels