Department of Water Resources
Testimony for SWRCB Hearing on Cease and Desist Order

Decision 1641 Permit Conditions and Implementation of Southern Delta Water Quality Objectives[1]

Introduction

The Department of Water Resources (DWR) and the U.S. Bureau of Reclamation are committed to complying with the conditions of their water right permits that authorize operations of their State and Federal water projects. DWR and Reclamation operate their projects subject to several water right permits issued by the State Water Resources Control Board (SWRCB) for the State Water Project (SWP) and Central Valley Project (CVP). The dynamics of Project operations and the various permit conditions create a highly technical and complex area of regulation that should be recognized by the SWRCB when considering enforcement issues.

Compliance with the myriad terms in D-1641, given the dynamic nature of the Delta Estuary and project reservoirs that are one to five days away from the Delta, is one of the most complex of requirements faced by any permittees regulated by the SWRCB. Operating the SWP and CVP in a coordinated manner in the Sacramento Valley and Delta to meet specific numerical criteria at specific locations in the Delta is a daunting task; but one that DWR and USBR knowingly accept. What we seek from the SWRCB, however, is an understanding and recognition of this complexity as we undertake compliance with the water right permit terms.

For instance, the SWRCB has recognized that enforcement of Delta permits must consider the ability of the permittee to control conditions required to achieve compliance. Some factors affecting water quality in the Delta are, at times, outside the control of DWR or Reclamation. For example, levee breaks, unexpected high discharges of salts, rapid changes in hydrologic or consumptive use conditions in the Sacramento Valley, limited circulation in some parts of the Delta, and other factors can effect water quality and make compliance difficult or impossible. As will be seen in our testimony today, DWR has limited methods, to control water quality in the southern Delta. However, DWR and Reclamation are taking all reasonable steps to comply with the conditions of their permits and the proposed cease and desist order is simply unwarranted and inappropriate.

[1] Presented by Jerry Johns, Deputy Director, Department of Water Resources.

Background and Overview of DWR Testimony

On May 3, 2005, the SWRCB sent notices to DWR and Reclamation (Permittees) initiating an enforcement action against them through Draft Cease and Desist Orders[2] (CDOs) for the threatened violation of the 0.7 mmhos/cm Electrical Conductivity (EC) southern Delta agricultural objective in their water right permits.

DWR recognizes that a recent statutory change provides the SWRCB authority to bring enforcement actions for "threats" of permit violations. Nevertheless, DWR objects to this proposed CDO because: (1) the action would thwart DWR's right to implement the process provided in its permit for implementing the objective, and (2) the proposed action is inappropriately based on historical and modeling data DWR submitted to the SWRCB to request changes in their water rights and the 1995 Water Quality Control Plan (WQCP) and which precludes the process for implementing its permit. If, however, the SWRCB should find it necessary to issue a CDO, the SWRCB needs to revise the Draft CDO to correct an error and to include a meaningful time schedule for implementing the objective. Furthermore, DWR believes that the SWRCB should defer considering a CDO until other SWRCB hearings on revising the WQCP and on DWR's change petition are concluded.

At this hearing, DWR will present testimony to support its objections and recommendations. This testimony will cover the following topics:

1. DWR relies upon its permit condition found on page 159 of Decision 1641 for implementing the southern Delta agricultural objectives. This condition provides the opportunity to show, in a report to the SWRCB, that an enforcement action is not appropriate after a non-compliance has occurred. The report called for by this term would discuss:

    a. Actions taken by DWR to achieve the objective;
    b. Actions taken by others that may cause exceedence and are beyond the control of DWR; and
    c. Consideration of harm to the beneficial use intended to be protected if there is an exceedence.

2. The finding of a "threat of violation" is inappropriate because it is based on historical and estimated data and does not allow DWR to exercise

[2] The SWRCB notice to DWR initiated enforcement regarding the Draft Cease and Desist Order 262.31-17 against SWP Delta Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512, respectively). The SWRCB notice to Reclamation initiated the Draft Cease and Desist Order 262.31-16 against CVP Delta and New Melones permits: License 1986, Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, and 15735.

its right to show that non-compliance is beyond its control nor allow latitude to the Permittees to implement the objective.

3. The finding of a "threat of violation" is expressly counter to the latitude provided to DWR by the SWRCB in D-1641 in implementing the southern Delta agricultural objectives and the recognition in D-1641 that factors affecting compliance may be outside the control of the operation of DWR water right permits

4. If a CDO were to be issued, the CDO must be revised to delete reference to Vernalis in DWR's permits and to provide a meaningful time schedule to implement the objective consistent with construction of permanent operable gates.

5. The SWRCB should not issue a CDO until after it has completed other SWRCB hearings on the southern Delta agricultural objectives.

1. D-1641 Permit Condition Requires SWRCB To Consider Information Submitted after Exceedence of the Objective To Determine If Causes are Beyond DWR's Control.

a. DWR Reliance on the Southern Delta Permit Condition.

This enforcement action is inconsistent with DWR's water right permit condition for implementation of the Southern Delta objective. SWRCB Decision 1641 (D-1641) provides:

> "This permit [DWR permit] is conditioned upon implementation of the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, at the following locations in the southern Delta:
> a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
> b. Old River near Middle River (Interagency Station No. C-8; and
> c. Old River at Tracy Road Bridge (Interagency Station No. P-12).
>
> Permittee [DWR] has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action

is appropriate or the noncompliance is the result of actions beyond the control of the Permittee." [3]
(D-1641, Condition 6, p159, for DWR Delta permits) [4] (Emphasis added)

The above condition gives DWR the right to submit a report to the SWRCB Executive Director if there is an exceedence of the southern delta objective. Based on the report and the Executive Director's recommendations, the SWRCB then will determine if enforcement action is appropriate. The SWRCB could decide that the exceedence is the result of actions beyond DWR's control and therefore no enforcement action should be taken. In addition, the permit condition allows DWR latitude in the method of implementing the objective and an enforcement action at this time precludes this possibility. DWR is justified in relying on this process for the following reasons.

After the SWRCB adopted Decision-1641, many parties filed petitions for reconsideration of the decision. DWR noted in its petition for reconsideration that it did not "formally" challenge the southern delta permit condition although it did object to the imposition of the condition. DWR objected to implementing the objective because DWR testimony showed that it had limited ability to influence the southern Delta objectives, that the southern Delta objectives are influenced by numerous factors beyond the control of DWR, and the objectives may not be achieved at all times despite DWR's best efforts (DWR Petition to Reconsider D-1641, Jan. 28, 2000, p. 5, footnote 2). DWR believes it is unreasonable to be found in violation of an objective where events are beyond its control. Therefore, DWR indicated in its Petition that it "intends to use the Board process established in D-1641 where appropriate to explain to the Board when the standards [objectives] are not met due to factors beyond DWR's control." (Id.) (Emphasis added).

DWR's reliance on the permit condition is supported by the SWRCB discussion in D-1641 and the Final Environmental Impact Report for Implementation of the 1995 Bay/Delta Water Quality Control Plan. The SWRCB recognizes that with the temporary rock barriers, and even with permanent operable gates, DWR may not always be able to control water quality in the southern Delta (D-1641, p. 8-12, 79, and 86-87. Therefore, the obligation to meet the objective was conditioned on a showing the exceedence was within the control of DWR. In D-1641, the SWRCB noted that the "permanent barriers

[3] Table 2 lists four compliance locations (the fourth is C-10 at Vernalis) where the 0.7 EC and the 1.0 EC objectives are measured as 0.7 mmhos/cm EC (EC) from April through August and 1.0 EC from September through March. Compliance applies in all year types and is measured by a maximum 30-day running average of mean daily EC.

[4] This water right condition also applies to Reclamation in D-1641 as condition 1 at pages 159, 160, and 162, for USBR CVP Delta and New Melones permits. DWR is not providing any specific interpretation as to Reclamation's permits.

would be operated to meet the water quality objectives at three stations in the southern Delta to the extent possible." (D-1641 p. 9. (Emphasis added)). Also noted is that "construction of the permanent barriers alone is not expected to result in attainment of the water quality objectives. . . . and that operation of the temporary barriers should achieve water quality of 1.0 mmhos/cm at the interior stations under most hydrologic conditions" (Id. p. 88). The SWRCB references DWR's D-1641 testimony regarding the permanent barrier operations, where DWR explained: "that the barriers (or flow control structures) only improve water quality to the extent that they improve water circulation in the southern Delta channels. . . . [and] water quality in the area is affected by many other factors. Because of this, the attainment of specific water quality objectives cannot be guaranteed by operation of the barriers or flow control structures. For instance, it is also necessary to control and dilute the salt load in the San Joaquin River at Vernalis." (D-1641 Exhibit DWR-37 Phase 5, p. 15, referenced in D-1641, p. 88).

Because of the testimony presented during D-1641 water right hearings, the SWRCB included in the southern Delta permit condition a process to withhold decisions to enforce compliance at the three southern delta locations (C-6, C-8 and P12) until it had considered whether the exceedence was due to factors beyond DWR's control. This discretion is in keeping with legal principles to only allocate implementation of an objective through reasonable means and in proportion to the impact a permittee has on the beneficial uses that the objective is intended to protect.

b. Factors the SWRCB Should Consider If there is an Exceedence of the Objective.

i. Temporary Barrier Project and its Effect on Southern Delta Water Quality.

In Testimony presented by Mark Holderman, DWR will describe the Temporary Barriers Project (TBP) and its effects on southern Delta water levels, circulation and water quality. DWR administers the TBP to provide improved water levels and circulation for southern Delta farmers and to provide flow and water quality benefits to migrating salmon. DWR presents this information to demonstrate the extent of control DWR now has in the southern Delta by implementing the TBP. If an exceedence in the southern Delta objective occurred, DWR would include information about the TBP in its report to the SWRCB to show what efforts DWR had been taking to achieve the southern Delta objective.

ii. DWR Studies of Source Water, Circulation Patterns, and Effects of SWP and CVP Export Pumping on Southern Delta Water Quality.

In Testimony presented by Tara Smith, DWR will explain analysis of historical data and modeling studies to demonstrate factors effecting salinity in

the southern Delta. In general, the studies show that when the Temporary Barriers Project is in place, SWP exports do not significantly degrade water quality at Brandt Bridge or in Middle River, and curtailing the exports does not improve water quality at these locations. At the compliance location on Old River at Tracy Road Bridge, results of modeling show a more complicated process. The water quality at the three locations is principally related to San Joaquin river water quality and local discharges. An Exhibit showing an animated result of DWR's Particle Tracking Model will dynamically demonstrate the general lack of mixing of Sacramento River water in the southern Delta. This information is pertinent to this hearing to demonstrate that DWR could show that an exceedence of the objective was beyond its control.

iii. Local Discharges Cause Increases in Channel Salinity.

Local discharges in the southern Delta from agricultural and municipal activities influence salinity conditions in the area. When considering this enforcement action, the SWRCB must consider the effect of such discharges downstream of Vernalis. Municipal activities include operations related to the City of Tracy Wastewater Treatment ponds upstream of the Old River at Tracy Road Bridge compliance location, and the City of Manteca's Wastewater Treatment Plant discharges into the San Joaquin River upstream of the confluence of the San Joaquin River and Old River.

The City of Manteca's wastewater treatment plant provides an example of the issues raised by such discharges. In 2004, the Central Valley Regional Water Quality Control Board issued a Waste Discharge Requirement (WDR) to the City of Manteca requiring that the City not discharge greater than 1.0 EC to the San Joaquin River, at Highway 120 near Mossdale (CVRWQCB WDR Order R5-2004-0028). Subsequent to issuing the WDR, the Regional Board issued a cease and desist order to require the City meet a schedule of compliance and interim standards, until it met the schedule. The interim standards, among other changes, relaxed the 1.0 EC requirement to allow a discharge 1.3 EC to the San Joaquin River. In March 2005, the SWRCB issued Order WQ 2005-0005 in response to the City of Manteca's Petition to Review its WDR. The "non-precedential" order revised the EC effluent limitations from its wastewater treatment plant to a maximum discharge of 1.0 EC. The SWRCB found that compliance with the irrigation season effluent limitation of 0.7 EC would require costly construction and operation of a reverse osmosis treatment plant. So, in view of the history of the southern Delta EC objectives and the fact that the objectives may be revised through the periodic review of the Delta WQCP, the SWRCB concluded in would be unreasonable to require the 0.7 EC in the City's permit. The limit is 1.0 EC year round (See Summary of Water Quality Order, WQ 2005-0005, March 16, 2005, Central Valley Regional Water Quality Control Board).

DWR agrees that other SWRCB activities and the ability to reasonably implement a requirement are important considerations when determining appropriate waste discharge requirements and enforcement of standards (objectives). However, this recent SWRCB order that allows a higher value of salinity to be discharged than required downstream at Brandt Bridge will not be within DWR's control. The Manteca discharge is downstream of Vernalis and will require other water users upstream of Vernalis, such as Reclamation, to release sufficient flows to dilute the discharge if the required water quality is to be met at Brandt Bridge. DWR's SWP Delta export activities and operation under these water right permits do not affect water quality in the San Joaquin River and these permits do not have control over these conditions.

iv. DWR Participation in Programs to Manage San Joaquin River Drainage.

Attached to this Testimony is a report prepared by Jose Faria of DWR's San Joaquin District summarizing the many programs and funding that have reduced saline drainages on the San Joaquin River (Attachment 1). DWR believes this information is relevant to this hearing to demonstrate actions that DWR, Reclamation, and others have taken to help improve water quality in the San Joaquin River and downstream in the Delta. These actions by DWR have been taken by the Water Management and Planning Programs of DWR to help improve water quality in the State. These actions were not taken because of any obligation of DWR as a water right permit holder. The SWRCB should consider this information when determining if DWR and Reclamation have taken actions to improve water quality in the San Joaquin River that benefit users of water from the Delta and assist in the ability to meet Delta Objectives.

D-1641 does not allocate responsibility to DWR for meeting flows and salinity on the San Joaquin River at Vernalis.[5] In D-1641, the SWRCB allocates responsibility for the Vernalis flow and salinity requirements to Reclamation because it is one of the largest diverters of water from the San Joaquin River and the CVP exports Delta water to farmers on the west side of the San Joaquin

[5] DWR does not export any significant amount of Delta water to farmers to the San Joaquin Valley with drainage to the Delta and has not been allocated responsibility for meeting salinity or flows at Vernalis. D-1641 does not include SWP exports of water as a basis for increased salinity in the San Joaquin River (See D-1641 p. 80-83). However, in the 1995 WQCP Program of Implementation, the SWRCB incorrectly describes a reason for elevated salinity in the southern Delta is due to salts imported in irrigation water by the SWP (WQCP p. 29). DWR exports SWP water to agricultural users south of the Delta but these uses are in Bakersfield and the Tulare Basin and do not result in drainage to the San Joaquin River and the Delta. In D-1641, the SWRCB did not include this incorrect analysis regarding the SWP but attributes the elevated salinity in the SJR to Reclamations' CVP and New Melones operations.

Valley. The reduction in San Joaquin River flow and saline irrigation return flows increases salt loads entering the Delta (D-1641, p. 80 - 83). Although DWR is not responsible for meeting Vernalis objectives, it has been allocated responsibility for meeting salinity at Brandt Bridge and the interior Delta stations. Improvements in San Joaquin water quality will help achieve water quality at these locations.[6]

Many agencies with interests in the Delta recognize the value of improving the San Joaquin River water quality. The CALFED Bay-Delta Program includes actions to address drainage problems in the San Joaquin Valley to improve downstream water quality (CALFED ROD, p. 66 -67 (August 28, 2000)). In December 1991, Reclamation, U.S. Fish and Wildlife Service, U.S. Natural Resources Conservation Service, U.S. Geological Survey, DWR, Department of Fish and Game, Department of Food and Agriculture, and SWRCB signed a Memorandum of Understanding (MOU) to implement a 1991 multi-agency management plan for agricultural subsurface drainage on the westside San Joaquin Valley (SWRCB 1995 WQCP, p. 30 (noting MOU provides agreements to implement the San Joaquin Valley Drainage Program)). Many actions have been funded subsequent to the MOU. These actions are described in the attached DWR report.

c. SWRCB Discretion to Enforce the Objective Should Consider If Exceedence Harms Agricultural Beneficial Use.

i. Background on Developing Southern Delta Salinity Objectives.

During hearings on the 1978 Water Quality Control Plan and Decision 1485, parties presented information on irrigation needs of agricultural lands in the southern Delta. As a result of these hearings, the SWRCB adopted salinity objectives based on the University of California "Guidelines for the Interpretation of Water Quality for Agriculture" (Guidelines)(1978 WQCP, p. VI-19). These Guidelines were developed from studies done by Ayers and Westcot and reported in a 1976 Report by the Food and Agriculture Organization (FAO "Irrigation and Drainage Paper 29, 1976 (updated in 1985). In the 1978 WQCP, the SWRCB noted that "ongoing research by the U.C. Cooperative Extension in the southern Delta may produce information which will show a need for future revision of these water quality criteria." (Id.).

[6] DWR's testimony during this hearing will demonstrate that DWR actions have no significant effect on water quality at Brandt Bridge and DWR believes it is inappropriate to allocate responsibility of the Brandt Bridge objective to DWR's permits. Also, the testimony indicates that even if Reclamation meets the salinity objective at Vernalis, local discharges below Vernalis can degrade water quality downstream at Brandt Bridge.

In the 1980s, the SWRCB held workshops and hearings to prepare a new water quality control plan and water right decision. A Southern Delta Agriculture Work Group (or Committee) was formed to evaluate the irrigation water quality requirements for agriculture in the South Delta (See SDWA presentation at March 2005 Workshop, "SDWA Exhibit No.103" (prepared for 1987 SWRCB water right hearings)). The Committee submitted a final report to the SWRCB that reviewed southern Delta soil types, soil permeability, and water quality requirements for various crops grown in the area (Hoffman, Prichard, and Meyer, "Water Quality Considerations for the South Delta Water Agency," Jan. 4, 1982). The Committee concluded that the "biggest uncertainty in this information is the leaching fractions which can reasonably be achieved for the various combinations of soils, crops, and management options suitable for the South Delta" (Id. at 10). The Committee specifically noted that it made no recommendation as to an appropriate water quality value for the South Delta (Id.). After more workshops and hearings, the SWRCB adopted in its 1991 WQCP the same southern Delta agricultural objectives based on the Guidelines because members of the Agricultural Workgroup did not reach consensus on a recommendation for objectives (1991 WQCP, p. 5-12; 1991 WQCP Table 6-3 at 4). In the 1995 WQCP, the SWRCB did not revisit issues related to the southern Delta agricultural objectives and included the same values (1995 WQCP at 2; 1995 WQCP Table 2 at 17).

ii. Recent Information on Irrigation Water Quality.

For the last 27 years, the issue of what should be the appropriate water quality objective to protect agricultural uses in the southern Delta has been discussed but never updated. DWR believes this issue is important at this time because reports presented during the SWRCB 2005 workshops for revising the 1995 WQCP suggest salinity values of 1.0 EC or 1.1 EC will reasonably protect agricultural uses in the southern Delta (See "Presentation of James R. Brownell," PhD, consultant to San Joaquin River Group Authority (SJRGA) for 2005 Workshop; and Presentation of William R. Johnston, "Concerning Southern Delta Electrical Conductivity," SWRCB March 2005).

In response to the proposed values suggested during the SWRCB Workshops, DWR hired an expert, John Letey, PhD, to evaluate agricultural irrigation needs in the southern Delta. Dr. Letey evaluated the Ayres and Westcot analysis, which is the basis for the Guidelines that established the WQCP salinity objectives. His evaluation is presented in his report to DWR, "Establishing Salinity Water Standards that are Protective for Agricultural Crop Production" (October 7, 2005) and is submitted as written testimony for this hearing. Dr. Letey's report is still undergoing peer review. It is not yet the final answer but one the SWRCB needs to take into consideration. Dr. Letey will testify as to his evaluation and findings that indicate 1.0 EC is protective of the most salt sensitive crops in the Southern Delta. This finding is consistent with conclusions by others reported at the SWRCB Workshops. DWR submits Dr.

Letey's report as necessary information for the SWRCB's decision regarding the appropriateness of an enforcement action. If no harm results from an exceedence of an objective, the SWRCB needs to take this into consideration in its discretionary enforcement of the objective. The SWRCB enforcement resources are limited and need to be used wisely.

As background on consideration of irrigation water quality needs in the southern Delta, DWR also will provide testimony and exhibits describing soils, crops, water table, and drainage within the South Delta Water Agency (SDWA), a specifically defined region of the southern Delta. This testimony provides specific information on acreage of beans grown in the SDWA area because it is the crop used to establish the salinity objective. The testimony compares the acreage of beans grown in the south Delta as reported in the SWRCB 1978 Water Quality Control Plan with 1980 and 1990 surveys of beans grown in the south Delta. This comparison suggests that the acreage of beans in the south Delta is greater than in 1978, when the 0.7 EC was first proposed. The SWRCB did not assign the responsibility to achieve the 0.7 EC in the southern Delta until 2005. Until that year, water quality in these channels was controlled by San Joaquin River water quality, hydrology and other Delta requirements. DWR believes that the apparent increase in bean production since 1978 when channel EC has historically been greater than 0.7 EC supports the findings from the recent reports discussed above that 1.0 EC is adequate to protect the most sensitive crop production in the southern Delta. DWR's Testimony presented by Tara Smith supports this conclusion with graphs of salinity in the southern Delta during the 1990s.

2. The SWRCB Inappropriately Claims that DWR has Threatened to Violate Its Delta Permit Condition.

The SWRCB has inappropriately used DWR's modeling data to claim that there is a threatened violation of the southern delta objectives because DWR's permit condition allows consideration of whether water quality conditions are within its control before taking enforcement action. The SWRCB finds that the threat to violate the objective is based on information DWR and Reclamation submitted to the SWRCB for purposes of a petition to change the time schedule for implementing the objective and on their comments at SWRCB workshops to consider revising the southern delta objective in the 1995 WQCP. In addition, the D-1641 permit condition implementing the objective allows permittees latitude in the method for implementation and this method may not be determined until actual conditions are known. DWR intends to comply with their permit conditions to the extent possible and this enforcement action and the draft CDO is unnecessary and inappropriate.

In the Draft CDO, the SWRCB cites the basis for the threatened violation is information presented by the Permittees in their February 18, 2005 letter and

change petitions submitted to the SWRCB (See Attachment 2, "Petition for Change Under Water Code section 1700" and "Petition for Temporary Urgency Change under Water Code section 1435" [7] (Change Petitions)). Also, the SWRCB referred to information presented at the March 2005 SWRCB workshops regarding possible changes to the 1995 WQCP (Draft CDO, p. 2 and 3). The information provided at the March 2005 workshop was to remind the SWRCB that permanent operable gates in the southern Delta must be part of the implementation of the three southern Delta salinity objectives and that the SWRCB should change the Program of Implementation to be consistent with this fact and with findings in D-1641 (See Attachment 3 and Attachment 4, DWR comments Regarding Southern Delta Salinity Objectives on Amending the 1995 WQCP (March 14, 2005, and June 3, 2005, respectively)).

DWR submitted information in its Change Petitions and at the SWRCB Workshops that was based on historical data and modeling of such data. Although modeling information may be generally predictive of water quality conditions, these predictions are based on modeling assumptions that may change. As new information becomes available, such as new information on San Joaquin River flows and reductions in agricultural drainage into the San Joaquin River, the predicted results change. In addition, the historical and modeling data does not represent actual conditions. DWR believes it is inappropriate for the SWRCB to commence enforcement against DWR based on this information as it precludes DWR's right to show that water quality conditions are beyond its control, as discussed above.

In addition, the predictions made by models may change based on the underlying assumptions and actual conditions. For example, in February 2005, DWR and Reclamation were concerned about water quality in the southern Delta and submitted a petition for Temporary Urgency Change. The SWRCB denied this request, partly because it found no basis to claim an urgent need for the change (SWRCB Order WRO 2005-0009, p. 6 (Feb. 24, 2005). DWR did not contest this denial because conditions changed such that the year's wet hydrology provided adequate water quality in the Delta. DWR and Reclamation no longer had an urgent need to request a change in the schedule for implementing the southern Delta objective (See Attachment 5, DWR Letter to Arthur Baggett, Jr., regarding petition for reconsideration, March 25, 2005). This

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[7] On February 18, 2005, DWR and Reclamation submitted two change petitions to the SWRCB for the same purpose, to change the time schedule for implementing the 0.7 EC objective at the three southern delta compliance locations (See Attachment 2), letter regarding "Petition to Temporarily Change Effective Date of Condition Imposed in Water Right Decision 1641"). The reason to change the time schedule for implementing the objective was to make it consistent with the schedule for constructing the permanent operable gates, a key underpinning for establishing the schedule of April 2005 (See Change Petition, p. 1).

example demonstrates that the basis for the threatened violation should not be from comments made in DWR's Petition or at a workshop, but should be based on actual, present, hydrologic conditions.

Furthermore, it was reasonable for DWR to request consideration of a change in the implementation schedule of the 0.7 EC objective and the SWRCB should have understood that information supporting this change was not intended as evidence of DWR's intent to not comply with its permit conditions. For about 20 years the SWRCB, DWR, Reclamation, and SDWA have been relying on a physical solution of temporary barriers or operable gates to improve circulation, water levels, and water quality for agricultural uses in the southern Delta. The SWRCB has not prepared any new environmental or water right analysis regarding full compliance with the 0.7 EC objective without the gates to justify not conforming the time schedules of implementation with installation of the gates. In its evaluation of the environmental effects of implementing the southern Delta salinity objectives, the SWRCB stated "Alternative 3 [permanent operable gates] meets salinity objectives in the southern Delta during the non-irrigation season, and reduces the frequency of exceedance compared to both Alternative 1 [D-1485 existing conditions] and Alternative 2 [temporary barriers] during the irrigation season" (SWRCB Final Environmental Impact Report for Implementing the 1995 Bay-Delta WQCP). Although, DWR and Reclamation did not submit their Change Petitions until 2005, the SWRCB knew in 2000, from the CALFED Bay-Delta Program Record of Decision (ROD), (signed by the Secretary for CALEPA upon the advice from the SWRCB staff) that the permanent operable gates would not be constructed until at least 2007 (CALFED ROD, p. 50 (August 2000)). In addition, past SWRCB documents support changing the time schedule for implementing the southern delta objective to be consistent with constructing the gates. The SWRCB environmental analysis for the 1995 WQCP recognizes that implementing the southern Delta salinity objectives has, since 1978, been deferred until DWR, Reclamation, and SDWA could resolve implementation responsibility among themselves (1995 SWRCB Environmental Report for the WQCP, p. VIII-61). In 1978 when the southern delta salinity objectives were first included in a WQCP, the SWRCB indicated that the values were to become effective "only upon the completion of suitable circulation and water supply facilities" (1978 WQCP at VI-29). The 1991 WQCP set a schedule for implementation by 1996 and indicated that the SWRCB may revise the objectives after DWR, USBR, and SDWA implement a contract resolving responsibilities among them (1991 WQCP at 5-12; 1991 WQCP Table 6-3 at 4). The 1995 WQCP had the same objectives but revised the implementation schedule to December 31, 1997 (1995 WQCP, p. 2; 1995 WQCP Table 2, p.17).

DWR's request in the Change Petition and during the WQCP Workshop to change the effective date of 0.7 EC was consistent with the SWRCB's past plans and analysis that always linked implementation to physical facilities. The time schedule in D-1641, footnote 5 of Table 2, does not appear to be based on any

analysis that would be inconsistent with the request to change the implementation date consistent with the schedule for constructing the permanent gates. The SWRCB required that DWR and Reclamation be responsible for meeting the 1995 WQCP salinity objectives in the southern Delta under the assumption that they would have the permanent operable gates in place to meet the objectives by April 1, 2005 (D-1641, p. 88). Because the schedule for constructing the gates was delayed, it would be consistent with past SWRCB documents to request a change in the schedule for implementation. DWR believes it is unreasonable and inappropriate for the SWRCB to suggest that the information used to support the change in schedule also indicates that DWR and Reclamation will not comply with their permit conditions.

The SWRCB's issuance of a Draft CDO and commencement of an enforcement action for a threat of violation based on arguments used in a Petition to change a water right permit will create a chilling affect among the regulated community. Permittees will fear an enforcement action may ensue when they submit change petitions. The SWRCB notes in the Draft CDO that DWR and Reclamation stated "if the 0.7 EC objective is imposed, then DWR and Reclamation could be forced to release large quantities of water to meet the objective and that it is unlikely that the releases alone would result in compliance" (CDO, p. 2-3). Also noted in the Draft CDO was DWR and Reclamation's assertion that if their Petitions were not approved they could be "subject to the SWRCB's enforcement action" (CDO p. 3). DWR and Reclamation made these assertions to support the need for the permit change. The SWRCB should expect a permittee who requests a change in its permit to argue that it may be difficult to comply with the existing permit terms because it is unlikely the permittee would request a change in its permit terms if the change did not relate to the reasonableness of compliance. However, this must not be misconstrued as a threat to not comply with permit conditions. It is only a request to make the permit terms more reasonable given the existing facts.

3. If SWRCB Decides to Issue a CDO, the Draft CDO Should be Revised To Delete Reference to Vernalis as an Obligation of DWR's Permits and Should Provide a Meaningful Time Schedule for Implementing the Objective that is Consistent with Construction of Permanent Operable Gates.

a. The SWRCB must revise the Draft CDO to Delete Reference to Vernalis as a DWR permit obligation.

Although DWR objects to issuance of a CDO against it for a threatened violation of the 0.7 EC objective on Table 2, if the SWRCB should decide to issue a CDO, the CDO must be revised to delete Vernalis as a compliance location in DWR's permits.

Table 2 lists the following four compliance locations where the 0.7 EC and the 1.0 EC objectives are measured in the southern Delta:

San Joaquin River at Airport Way Bridge, Vernalis (C-10);
San Joaquin River at Brandt Bridge (C-6);
Old River near Middle River (C-8); and
Old River at Tracy Road Bridge (P-12).

The Draft CDO against DWR incorrectly identifies the Vernalis compliance location as a responsibility of DWR under its water rights. The Vernalis compliance location is implemented by Reclamation's CVP permits for the Delta and its New Melones permits, but not by DWR's permits. Water Right Decision 1641 on page 159 identifies only three locations, not including Vernalis, as compliance points in the DWR permits.

b. The SWRCB Should Provide a Meaningful Time Schedule in the CDO that is Consistent with Past SWRCB Documents by Being Consistent with the Schedule for Constructing the Permanent Operable Gates.

The southern Delta compliance stations at C-6, C-8, and P-12 (but not C-10 at Vernalis) are implemented according to a time schedule described by Footnote 5 of Table 2. Footnote 5 provides:

> "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. The 0.7 EC objective is replaced by the 1.0 EC objective from April through August after April 1, 2005 if permanent barriers are constructed, or equivalent measures are implemented, in the southern Delta and an operation plan that reasonably protects southern Delta agriculture is prepared by the DWR and the USBR and approved by the Executive Director of the SWRCB. The SWRCB will review the salinity objectives for the southern Delta in the next review of the Bay-Delta objectives following construction of the barriers."
> (D-1641, Table 2, footnote 5, p. 182)

Footnote 5 sets the schedule for implementing the 1.0 and 0.7 EC objectives. The 1.0 EC became effective upon adoption of D-1641 in December 1999. Footnote 5 anticipated that the 0.7 EC objective would only become effective if the permanent gates were not constructed, or equivalent measures implemented, by 2005 and if the SWRCB Executive Director does not approve an operation plan prepared by DWR and Reclamation for protection of southern Delta agriculture.

In 1999, during the D-1641 water right hearings, DWR provided testimony that indicated that the permanent gates would be constructed by 2005. Although the SWRCB did not explain in its environmental documents or in the text of D-1641 the basis for imposing the more stringent 0.7 EC salinity objective as an interim requirement between 2005 and construction of the permanent gates,

DWR and Reclamation assume it was intended as a “hammer clause” to force DWR to construct the gates on the schedule identified during its testimony.

The imposition of the more stringent 0.7 EC objective, however, does not appear to be necessary for protection of agricultural uses because the objective returns to 1.0 EC after the gates are constructed and DWR and USBR have an approved plan to protect the southern Delta agriculture. DWR and USBR assume that they could develop such a plan and this requirement would not prevent returning to the 1.0 EC. In addition, if the gates had been constructed by 2005, the 0.7 EC would never have been in effect which supports the view that 1.0 EC provides adequate protection of agricultural uses. Therefore, DWR believes that the SWRCB could determine that a change in the time schedule of implementing the 0.7 EC consistent with construction of the gates would not harm agricultural uses. However, as some parties have noted, such a change in the time schedule would eliminate the 0.7 EC from ever being implemented because after the gates are constructed, the 1.0 EC would be in effect. Despite this outcome, DWR believes that associating the effective date of 0.7 EC with construction of the permanent gates would be consistent with past SWRCB plans and decisions as discussed above in Section 2.

DWR will provide testimony during this hearing showing the proposed operations of the permanent operable gates, as described in the Draft EIR/EIS for the SDIP, and the schedule for constructing the gates. The purpose of this testimony will be to provide a basis for the SWRCB to determine an appropriate time schedule for constructing the gates, if it is needed as part of a CDO that could be issued. The testimony on the permanent gates will also show the effects that operating the gates can have on southern delta water levels, circulation, and water quality to demonstrate what will be the expected benefits of the gates. This information will be useful for purposes of developing the operation plan to protect southern Delta agriculture, as required by Table 2, footnote 5 of D-1641.

4. A CDO Should Not Be Issued Now Because SWRCB Should First Conclude Hearings on Possibly Revising the Southern Delta Objectives and DWR’s Petition to Change the Time Schedule Implementing Objective.

The SWRCB should not issue a CDO against DWR for the reasons given above. However, if the SWRCB should not agree with these reasons, the SWRCB should not issue the CDO at this time because the basis for the CDO, compliance with the 0.7 EC southern Delta objective, may be eliminated if the SWRCB revises the WQCP and agrees to DWR’s change petition. The above sections discuss the SWRCB hearings for revising the 1995 WQCP. If the WQCP is revised to change the southern Delta agricultural objectives or to provide a different time schedule for implementing the objectives, the basis for the CDO would be changed. In addition, if the DWR change petition is granted and the time schedule to implement the agricultural objectives is changed to be

consistent with construction of the gates, the CDO would be unnecessary. Therefore, because the other actions may change the need for a CDO and existing conditions do not support a threat of violation at this time, the SWRCB should wait to consider issuing a CDO after the related hearings are concluded.

This concludes DWR's introductory testimony and discussion of implementation of its permit conditions pursuant to SWRCB D-1641.