



State Water Resources Control Board



Linda S. Adams
Secretary for
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Arnold Schwarzenegger
Governor

FIRST CLASS MAIL AND ELECTRONIC MAIL

December 15, 2010

To: Enclosed Mailing List

DRAFT ORDER DENYING PETITIONS FOR RECONSIDERATION OF STATE WATER BOARD ORDER WR 2010-0002 – DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION, SACRAMENTO AND SAN JOAQUIN RIVERS AND THEIR TRIBUTARIES, AND THE SACRAMENTO SAN JOAQUIN DELTA ESTUARY, SAN JOAQUIN COUNTY

Enclosed is a draft order in which the State Water Resources Control Board (State Water Board or Board) denies two petitions for reconsideration of Order WR 2010-0002 that were submitted by South Delta Water Agency and Lafayette Ranch, Inc.; and California Water Impact Network and California Sportfishing Protection Alliance on February 4, 2010. This order is tentatively scheduled for consideration by the State Water Board at its Board meeting on **Tuesday, February 1, 2011**. The Board meeting is tentatively scheduled to begin at 9 a.m. in the Coastal Hearing Room on the second floor of the CalEPA Building at 1001 I Street, Sacramento. You will receive a copy of the Board meeting agenda approximately 10 days before the meeting.

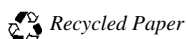
All interested persons and parties to the proceeding will have the opportunity to comment on the proposed order at the State Water Board meeting. All presentations should be limited to three (3) minutes. Time limits may be modified at the discretion of the Board Chairman. Comments should be limited to the general acceptability of the order or possible technical corrections. Parties may not introduce evidence at the State Water Board meeting.

Interested persons and parties are encouraged to submit their comments in writing. In order to be fully considered, written comments concerning the draft must be **received** by the State Water Board **by 12 Noon on Monday, January 17, 2011**.

Written comments are to be addressed and submitted to:

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

California Environmental Protection Agency



You may also submit your comments to Ms. Townsend by fax at (916) 341-5620, by email at commentletters@waterboards.ca.gov, or by hand delivery to the following address:

Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828

Couriers delivering comments must check in with lobby security and have them contact the Executive Office on the 24th floor at (916) 341-5600.

Please include the subject line, "**COMMENT LETTER – 02/01/11 BOARD MEETING: Draft Order Denying Order WR 2010-0002 Petitions.**" Any faxed or emailed items must be followed by a mailed or delivered hard copy with an original signature.

If you have any questions regarding this notice, please contact Dana Heinrich, Senior Staff Counsel, at dheinrich@waterboards.ca.gov or (916) 341-5188; Diane Riddle, Senior Environmental Scientist, at driddle@waterboards.ca.gov or (916) 341-5297, or me at jmccue@waterboards.ca.gov or (916) 341-5351.

Sincerely,



Jean McCue
Water Resource Control Engineer
Hearings Unit

Enclosures: Mailing List
Draft Order

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DRAFT ORDER DENYING PETITION FOR RECONSIDERATION OF ORDER WR 2010-0002
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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011 - XXXX

In the Matter of Cease and Desist Order WR 2010 - 0002
Against the Department of Water Resources and the United States Bureau
of Reclamation in Connection with the Water Right Permits and License
for the State Water Project and Central Valley Project¹

SOURCES: Sacramento and San Joaquin Rivers and their tributaries, and the
Sacramento-San Joaquin Delta Estuary

COUNTY: San Joaquin

ORDER DENYING PETITIONS FOR RECONSIDERATION OF ORDER WR 2010-0002

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (State Water Board or Board) denies two petitions for reconsideration of Order WR 2010-0002. South Delta Water Agency and Lafayette Ranch, Inc. (hereafter SDWA) filed the first petition (which is styled as a request for reconsideration). The California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) filed the second petition.

Order WR 2010-0002 modified Order WR 2006-0006, which is a cease and desist order (CDO) issued against the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) in response to the threatened violation of DWR's water right permits for the State Water Project (SWP) and USBR's water right license and permits for the Central

¹ Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A, respectively) of the Department of Water Resources and License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 19304, and 14858B, respectively) of the United States Bureau of Reclamation.

Valley Project (CVP). In Order WR 2006-0006, the State Water Board required DWR and USBR to take corrective actions in accordance with a time schedule in order to obviate the threatened violation of the requirement to meet a water quality objective for salinity designed to protect agricultural beneficial uses in the southern Sacramento-San Joaquin Delta Estuary (Delta).

In Order WR 2010-0002, the State Water Board extended the July 1, 2009 compliance deadline which had been established in Order WR 2006-0006 in recognition of the fact that, in a biological opinion issued in June of 2009, the National Marine Fisheries Service (NOAA Fisheries) prohibited DWR from constructing permanent, operable gates in the southern Delta as part of the South Delta Improvements Program (SDIP). Construction of the gates had been a central component of DWR and USBR's plan to achieve compliance with the salinity objective as required by Order WR 2006-0006. The Board extended the compliance deadline until after the Board has completed its current review of the salinity objectives and associated program of implementation contained in the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2006 Bay-Delta Plan) and any subsequent water right proceeding so that, in developing a revised compliance plan, DWR and USBR can take into account any changes to their responsibility for meeting the objective that may occur as a result of the Board's review.

For the reasons set forth below, we find that Order WR 2010-0002 was an appropriate and proper exercise of our enforcement discretion, and therefore the petitions for reconsideration are denied.

2.0 LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND

Order WR 2010-0002 contains a detailed description of the legal, factual, and procedural background in this proceeding, the pertinent parts of which are summarized below.

2.1 State Water Board Decision 1641

In Revised State Water Board Decision 1641, the Board determined the responsibility of certain water right holders, including DWR and USBR, to meet the water quality objectives set forth in the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta

Estuary (1995 Bay-Delta Plan). One of the requirements included in DWR's permits for the SWP and USBR's license and permits for the CVP is the requirement to meet salinity objectives designed to protect agricultural beneficial uses in the southern Delta. Specifically, the objectives are 0.7 millimhos per centimeter (mmhos/cm) electrical conductivity (EC) from April 1 through August 31 each year and 1.0 mmhos/cm EC from September 1 through March 31 each year in the interior southern Delta, with the following compliance locations: (1) Station C-6 (San Joaquin River at Brandt Bridge), (2) Station C-8 (Old River near Middle River), and (3) Station P-12 (Old River at Tracy Road Bridge). These objectives are referred to in this order as the southern Delta salinity objectives.

2.2 Cease and Desist Authority for Water Right Violations

The State Water Board may issue a (CDO) in response to a violation or threatened violation of a term or condition of a water right permit or license. (Wat. Code, § 1831, subds. (a) & (d)(2).) The Board may require compliance immediately or the Board may set a time schedule for compliance. (Wat. Code, § 1831, subd. (b).) The Board may, after notice and opportunity for hearing, modify, revoke, or stay a CDO, either on its own motion or upon application by any aggrieved person. (Wat. Code, § 1832.)

2.3 State Water Board Order WR 2006-0006

On February 15, 2006, the State Water Board issued a CDO against DWR and USBR for the threatened violation of the requirement to meet the 0.7 EC interior southern Delta salinity objective. (State Water Board Order WR 2006-0006.) The Board required DWR and USBR to develop and implement a compliance plan to obviate the threat of violation by July 1, 2009. The Board established the July 1, 2009, compliance deadline in order to accommodate DWR and USBR's plan to meet the salinity objective by constructing permanent, operable gates in the Delta. (*Id.* at pp. 17, 21-22.) At the time, DWR and USBR estimated that construction of the permanent gates would be completed by early 2009. (*Id.* at p. 27.)

2.4 DWR and USBR's Compliance Plan

As required by Order WR 2006-0006, DWR and USBR submitted a compliance plan dated April 14, 2006. The plan proposed to obviate the threat of violation at Station C-8 (Old River

near Middle River) and Station P-12 (Old River at Tracy Road Bridge) by constructing the permanent, operable gates component of the SDIP. The plan stated that additional actions to control local salinity discharges might be needed, but the gates were a necessary first step. The plan proposed to obviate the threat of violation at Station C-6 (San Joaquin River at Brandt Bridge) by continuing and expanding ongoing San Joaquin River salinity management activities. The State Water Board's Executive Director approved the compliance plan by letter dated May 12, 2006.

2.5 Application for Modification of Order WR 2006-0006

Due to delays in the regulatory approval process, DWR notified the State Water Board on several occasions, beginning in early 2007, that construction of the permanent gates had been delayed, and the gates would not be operable by July 1, 2009. In May of 2007, DWR requested the Board to modify Order WR 2006-0006 by extending the July 1, 2009, compliance deadline. The Board did not take action in response to this request. In May of 2009, DWR and USBR filed another application for a modification to Order WR 2006-0006 in light of the fact that the permanent gates would not be constructed by July 1, 2009.

2.6 NOAA Fisheries' 2009 Biological Opinion for CVP and SWP Operations

On June 4, 2009, NOAA Fisheries issued a biological opinion for the operation of the SWP and CVP pursuant to the Operations, Criteria, and Plan (OCAP). The biological opinion also addressed the SDIP. In the biological opinion, NOAA Fisheries found that the construction and operation of the permanent gates would adversely modify critical habitat for anadromous fish listed under the Endangered Species Act (16 U.S.C. § 1531 et seq.), and directed DWR not to implement the SDIP.

2.7 Water Quality Control Planning Process

The State Water Board is currently reviewing the 2006 Bay-Delta Plan to determine what, if any, changes should be made to the southern Delta salinity objectives or the associated program of implementation to ensure the reasonable protection of agricultural beneficial uses in the southern Delta. Following its review of the 2006 Bay-Delta Plan, the Board will undertake any necessary water rights or other proceeding to assign responsibility for meeting the southern

Delta salinity objectives, which could include changes to DWR's or USBR's responsibility for meeting the southern Delta salinity objectives.

2.8 Evidentiary Hearing

The State Water Board held an evidentiary hearing on DWR and USBR's application to modify Order WR 2006-0006 on June 25, 29, and 30, 2009. A number of parties participated in the hearing, including DWR, USBR, SDWA, C-WIN, and CSPA.

2.9 State Water Board Order WR 2010-0002

On January 5, 2010, the State Water Board adopted Order WR 2010-0002. As stated above, Order WR 2010-0002 modified Order WR 2006-0006 by extending the July 1, 2009, compliance deadline. The Board determined that the compliance deadline should be extended because the deadline had been based on DWR and USBR's original plan to construct the permanent gates by July 1, 2009, which was no longer feasible in light of NOAA Fisheries' biological opinion. (Order WR 2010-0002 at p. 11.) The Board also determined that DWR and USBR should begin to evaluate alternative salinity control measures in order to prepare a revised compliance plan. (*Ibid.*) The Board required DWR and USBR to specify a new compliance deadline in their revised compliance plan, based on the amount of time required to implement the measures necessary to obviate the threat of violation. (*Id.* at pp. 12, 21.) The revised compliance plan is subject to the review and approval of the Board's Executive Director. (*Id.* at p. 22.)

In Order WR 2010-0002, the State Water Board did not require DWR and USBR to submit a revised compliance plan until after the Board has completed its current review of the salinity objectives and associated program of implementation contained in the 2006 Bay-Delta Plan and any subsequent water right proceeding so that, in developing the plan, DWR and USBR can take into account any changes to their responsibility for meeting the objective that may occur as a result of the Board's review. (*Id.* at pp. 12-14, 21-22.) To avoid undue delay in the preparation and implementation of a revised compliance plan, the Board committed to completing its review as quickly as possible, and required DWR and USBR to assist the Board by providing any necessary technical assistance. (*Id.* at pp. 14, 22-23.) Order WR 2010-0002 also provides that the Board's review of the 2006 Bay-Delta Plan and any subsequent water right proceeding shall be deemed to be completed if the Board has not issued a final order in

the water right proceeding by January 1, 2013, unless the Deputy Director for Water Rights determines that the water right proceeding has been initiated, is proceeding expeditiously, and will be completed no later than October 1, 2014. (*Id.* at pp. 21-22.)

Pending the development and implementation of a revised compliance plan, the Board required DWR, with any necessary assistance from USBR, to continue to implement and improve upon DWR's temporary barriers program. (Order WR 2010-0002 at pp. 17, 23-24.) The temporary barriers improve salinity in the southern Delta, but they are not sufficient by themselves to ensure compliance with the salinity objective. The Board also required DWR and USBR to continue to implement the component of DWR and USBR's original compliance plan intended to achieve compliance at Station C-6 (San Joaquin River at Brandt Bridge). (*Id.* at pp. 17-18, 23.)

SDWA, C-WIN, and CSPA had argued that a number of other feasible salinity control measures existed, including installation of low lift pumps at one or more of the barriers, recirculation of water from the CVP's Delta-Mendota Canal through the San Joaquin River, reducing SWP and CVP exports, reducing highly saline drainage from upstream sources, and increasing flow in the San Joaquin River by releasing more water from CVP reservoirs or purchasing water from third parties. The Board found, however, that the record did not support the imposition of any other salinity control measures at that time. An expert witness for DWR had testified that CVP and SWP exports have minimal impact on or control over water quality in the interior southern Delta salinity locations. The Board found that the record was inconclusive as to the feasibility of the remaining measures, and that more information was needed concerning their effectiveness in controlling salinity, technical feasibility, cost, environmental impacts, and water supply impacts. (*Id.* at p. 18.) Accordingly, the Board required DWR and USBR to study the feasibility of alternative salinity control measures, but the Board did not require DWR or USBR to implement any of those measures on an interim basis. (*Id.* at pp. 24-25.)

SDWA filed an individual petition for reconsideration and C-WIN and CSPA filed a joint petition for reconsideration of Order WR 2010-0002.

3.0 GROUNDS FOR RECONSIDERATION

Within 30 days of adoption of a State Water Board order or decision, any interested person may file a petition for reconsideration of the order or decision pursuant to Water Code section 1122

and California Code of Regulations, title 23, sections 768-770. Section 768 of the Board's regulations provides that an interested person may petition for reconsideration upon any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

On reconsideration, the State Water Board may:

- (1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration;
- (2) Deny the petition upon a finding that the decision or order was appropriate and proper;
- (3) Set aside or modify the decision or order; or
- (4) Take other appropriate action.

(Cal. Code Regs., tit. 23, § 770, subd. (a).)

4.0 DISCUSSION

Petitioners contend that Order WR 2010-0002 is not supported by substantial evidence and is contrary to law. SDWA also contends that Order WR 2010-0002 was an abuse of discretion. SDWA requests the State Water Board to rescind Order WR 2010-0002 and take immediate enforcement action against DWR and USBR for failing to meet the July 1, 2009 compliance deadline. Similarly, C-WIN and CSPA request the Board to require DWR and USBR to comply immediately with the interior southern Delta salinity objectives.

We address petitioners' main arguments below and conclude that the petitions should be denied. To the extent that any issue raised in the petitions is not addressed in this order, we conclude that the issue is not a substantial issue that merits review. (See Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

4.1 SDWA's Petition

SDWA contends that Order WR 2010-0002 is contrary to law and is not supported by substantial evidence because DWR and USBR were not diligent in pursuing and implementing measures to obviate the threat of violation by July 1, 2009. The arguments SDWA makes in support of this contention are almost identical to the arguments that SDWA made in its closing brief in support of the contention that the July 1, 2009, compliance deadline should not be extended. The State Water Board addressed SDWA's arguments in Order WR 2010-0002, and it is unnecessary to address them again in detail here.

In summary, SDWA argues that the State Water Board should not have extended the compliance deadline because DWR and USBR could and should have implemented alternative salinity control measures in order to ensure compliance by the deadline, instead of relying on the construction of the permanent, operable gates as the only means to ensure compliance. SDWA argues that DWR and USBR were aware that alternative measures were necessary to achieve compliance, and that DWR and USBR knew as of May 2007 that the gates could not be constructed by the compliance deadline. Accordingly, SDWA argues that the issuance of NOAA Fisheries' biological opinion in June 2009 did not excuse DWR and USBR's failure to meet the deadline.

In Order WR 2010-0002, the State Water Board disagreed with SDWA's arguments against extending the compliance deadline. The Board did not take issue with SDWA's assertion that measures in addition to the permanent gates might be necessary to achieve compliance, and that DWR and USBR knew in 2007 that the gates would not be operable by the compliance deadline. (See Order WR 2010-0002 at pp. 5-6.) In addition, the Board acknowledged that it might have been possible for DWR and USBR to have achieved compliance by the deadline by pursuing multiple compliance strategies simultaneously. (*Id.* at p. 13.) Nonetheless, the Board concluded that it was reasonable for DWR and USBR to have pursued the compliance strategy set forth in their original compliance plan, which included construction of the permanent gates as a necessary first step, until NOAA Fisheries issued its biological opinion in June 2009, and it became clear that construction and operation of the permanent gates may not be feasible. (*Ibid.*) The Board also found that DWR and USBR had been diligent in their efforts to obtain the approvals necessary to construct the permanent gates. (*Ibid.*)

The State Water Board's decision to extend the compliance deadline was supported by the administrative record, and was well within the State Water Board's enforcement discretion. (See *Heckler v. Chaney* (1985) 470 U.S. 821, 831 ["[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."]; *Citizens for a Better Environment – California v. Union Oil of California* (9th Cir. 1996) 83 F.3d 1111, 1118-1120 [including a compliance schedule in a cease and desist order is an exercise of enforcement discretion]; *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 596-598 [California Department of Insurance Commissioner's decision whether to take enforcement action against insurers discretionary].) SDWA has not presented any new arguments that would compel a different decision, nor has SDWA shown that cause for reconsideration exists. Although the Board might have exercised its enforcement discretion differently based on the issues raised by SDWA, it does not follow that the Board's decision to extend the compliance deadline was an abuse of discretion. Nor does it follow that Order WR 2010-0002 is contrary to law or is not supported by substantial evidence.

SDWA also contends that Order WR 2010-0002 constitutes an abuse of discretion because the State Water Board did not set a date certain for compliance. A CDO may require compliance "in accordance with a time schedule" set by the State Water Board. (Wat. Code, § 1831, subd. (b).) The Water Code does not require a time schedule to include, at the time a cease and desist order is issued, a date certain for completion of all steps necessary for compliance. Instead, a CDO may set a schedule for intermediate steps leading to preparation of plans for compliance, with provision for further action to set times for full compliance. Order WR 2010-0002 follows that approach.

As stated above, the State Water Board required DWR and USBR to propose a new compliance deadline in their revised compliance plan. When it is established, the new compliance deadline should be based on the amount of time reasonably required to implement the salinity control measures identified in the revised plan. Because the amount of time necessary to achieve compliance was unknown when the Board adopted Order WR 2010-0002 (and remains unknown) specifying a date certain as a new compliance deadline would have been arbitrary. Similarly, specifying a deadline to submit a revised compliance plan would have been imprudent because it was uncertain when the pending proceeding to review the 2006 Bay-Delta Plan and any subsequent water right proceeding will be completed. The provision in Order WR 2010-0002 that those proceedings shall be deemed to be completed if the Board has not

issued a final order in the water right proceeding by a date certain, subject to a limited exception, will serve to ensure that the deadline to submit the revised compliance plan is not delayed indefinitely.

For the foregoing reasons, the time schedule established in Order WR 2010-0002 was reasonable, and the failure to establish a date certain for compliance was not an abuse of discretion.

4.2 C-WIN and CSPA's Petition

C-WIN and CSPA allege that the State Water Board failed to consider whether a delay in enforcement of the southern Delta salinity objective would adversely affect fish and wildlife. Therefore, C-WIN and CSPA contend that the Board violated the public trust doctrine, and Order WR 2010-0002 is contrary to law. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) C-WIN and CSPA also argue that the Board violated article X, section 2 of the California Constitution and Water Code section 275 because the Board failed to consider whether DWR's and USBR's use of water in violation of the salinity objectives is reasonable, taking into consideration the deterioration of the Delta fisheries during the period when the objectives have not been met.

In deciding whether and under what conditions to issue a cease and desist order in response to a water right violation, the State Water Board may consider the impacts of the violation on public trust uses, including fish and wildlife habitat. (See Revised Order WR 2009-0060 at p. 16, fn. 15.) The impacts of the violation may be relevant to determining how long any compliance schedule should be, or whether to impose any interim measures to avoid or mitigate harm to public trust uses during the period before full compliance is achieved. (*Ibid.*) Similarly, the Board may consider the reasonableness of a violator's diversion and use of water, taking into consideration the impacts of the violation, in determining the appropriate length of any compliance schedule, and whether to impose any interim mitigation measures. In this case, however, the record does not support the conclusion that a delay in enforcement of the southern Delta salinity objective will have any impact on fish and wildlife, and therefore C-WIN and CSPA's assertion that the Board failed to consider impacts to fish and wildlife lacks merit.

C-WIN and CSPA assume incorrectly that enforcement of the southern Delta salinity objective at issue in Order WR 2010-0002 is necessary to protect fish and wildlife habitat. (See C-WIN Exhibit C-WIN-2, p. 12 [“the southern Delta salinity standards . . . also simultaneously establish habitat criteria conditions for fisheries . . .”].) As explained in Order WR 2010-0002, the southern Delta salinity objectives are designed to protect agricultural beneficial uses, not fish and wildlife beneficial uses. (Order WR 2010-0002 at p. 13, fn. 9; see also Staff Exhibit 8, p. 19, table 2 [list of water quality objectives for agricultural beneficial uses]; see also *id.* at pp. 64-65 [describing the technical information regarding crop requirements used to establish the southern Delta salinity objectives].) Although elevated salinity levels can adversely affect freshwater fish and wildlife beneficial uses, that does not mean that salinity objectives established to protect agricultural uses should be treated as surrogates for fish and wildlife objectives.

The Board has established salinity objectives to protect fish and wildlife uses in the Bay-Delta, and they are not the same as the salinity objectives established to protect agricultural uses. (See Staff Exhibit 8, pp. 20-23, table 3 [list of water quality objectives for fish and wildlife beneficial uses].) Specifically, the fish and wildlife salinity objectives are: (1) 0.44 EC from April through May in the San Joaquin River between Jersey Point and Prisoners Point (compliance stations D-15 and D-29), and (2) specified EC values ranging from 8.0 EC to 19.0 EC, depending on the month, from October through May at specified locations in the Eastern and Western Suisun Marsh (compliance stations C-2, S-64, S-49, S-21, S-42, S-97, and S-35). (*Ibid.*) These objectives were established to protect striped bass spawning habitat in the lower San Joaquin River, and the channel and soil water salinities that affect the vegetative composition of managed portions of Suisun Marsh, respectively. (1995 Bay-Delta Plan, p. 15.)² The compliance stations for the fish and wildlife salinity objectives are not located in the southern Delta (*id.* at p. 45, fig. 2), and the Board has never determined that salinity objectives are necessary to protect fish and wildlife beneficial uses in the southern Delta. Accordingly, it is not fair to assume that a delay in enforcement of the 0.7 EC southern Delta salinity objective will necessarily adversely affect fish and wildlife.³

² The 1995 Bay-Delta Plan was not a hearing exhibit. We take official notice of the 1995 Bay-Delta Plan pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the State Water Board to take official notice of matters that may be judicially noticed), and pursuant to Evidence Code section 452, subdivision (c) (authorizing judicial notice of the official acts of administrative agencies).

³ C-WIN and CSPA argue that the Board’s treatment of salinity objectives as solely for the benefit of agricultural uses contradicts language in Decision 1641, in which the Board stated that drainage problems in the San Joaquin Valley threaten water quality, agriculture, fish and wildlife, and public health. (Decision 1641, at p. 85.) Based on this general statement in Decision 1641, C-WIN and CSPA jump to the conclusion that the southern Delta salinity
[footnote continues on next page]

Moreover, the administrative record contains no credible evidence that a delay in enforcement of the salinity objective will in fact adversely affect fish and wildlife. In their petition for reconsideration, C-WIN and CSPA assert that the State Water Board disallowed or rejected evidence and testimony regarding the potential harm to fish and wildlife if the salinity objective is not enforced immediately. (C-WIN and CSPA's Joint Petition for Reconsideration of Order WR 2010-0002, p. 4; Memorandum of Points and Authorities in Support of C-WIN and CSPA's Joint Petition for Reconsideration of Order WR 2010-0002, p. 3.) They also assert that they presented testimony during the hearing in this proceeding "that a failure to enforce the 0.7 EC standard would likely result in a deterioration of Delta fisheries and other beneficial uses." (C-WIN and CSPA's Joint Petition for Reconsideration of Order WR 2010-0002, p. 3.) As explained below, both of these assertions are false.

First, the Board did not exclude any evidence concerning potential impacts to fish and wildlife. All of C-WIN's testimony and exhibits were accepted into evidence, notwithstanding objections concerning the qualifications of C-WIN's witness and the relevance of his testimony. (R.T. of 6/30/2009, at pp. 20-25, 85.) Similarly, all of CSPA's testimony and evidence were accepted into evidence, notwithstanding an objection to several of CSPA's exhibits that contained hearsay. (R.T. of 6/30/2009, at pp. 11-13, 84; see Cal. Code of Regs., tit. 23, § 648.5.1 [authorizing the State Water Board to accept hearsay evidence, subject to certain limitations].)

Second, contrary to their assertion, neither C-WIN nor CSPA has demonstrated that a failure to enforce the 0.7 EC salinity objective would likely result in a deterioration of Delta fisheries. C-WIN provided testimony from only one witness, who was not a fish or wildlife biologist, and who was not designated as an expert. (C-WIN's Notice of Intent to Appear; C-WIN Exhibit C-WIN-1; C-WIN Exhibit C-WIN-2.) C-WIN's witness testified at length about the history of salinity problems in the San Joaquin River and in the Delta, and about the decline in fish populations in the Delta. (C-WIN Exhibit C-WIN-2; R.T. of 6/30/2009, at pp. 26-36.) But his testimony fell far short of demonstrating that past exceedances of the southern Delta salinity objectives have caused or contributed to a decline in fish populations, or that a delay in enforcement of the

objectives are necessary to protect fish and wildlife. But the general statement that agricultural discharges in the San Joaquin Valley, which include high levels of selenium as well as salt, pose a threat to fish and wildlife does not necessarily support the conclusion that salinity levels in the southern Delta pose a threat to fish and wildlife, or that the southern Delta salinity objectives in particular are necessary to protect fish and wildlife.

0.7 EC salinity objective will adversely affect fishery resources in the future. On cross-examination, C-WIN's witness admitted that he had not provided a scientific or evidentiary basis to support the conclusion that the salinity objective is necessary to protect anadromous fish. (R.T. of 6/30/2009, at p. 81.) C-WIN's witness went on to state that it was his understanding that providing appropriate salinity gradients would improve fish migration and survival, but he did not specify what salinity gradients were appropriate, or assert that enforcement of the 0.7 EC objective in particular was necessary to maintain appropriate salinity gradients. (*Id.* at pp. 82-83.)

Like C-WIN, CSPA presented only one witness, and he did not testify or provide any grounds for concluding that a delay in enforcement of the 0.7 EC salinity objective would adversely affect fishery resources. The written testimony of CSPA's witness contains the general statement that scientific literature exists concerning the harmful effects of salinity on freshwater fish. (CSPA Exhibit CSPA-2, p. 9.) But CSPA's witness did not testify that enforcement of the 0.7 EC salinity objective in particular is necessary to protect fishery resources. (See CSPA Exhibit CSPA-2; R.T. of 6/30/2009, at pp. 8-11.)

Although C-WIN and CSPA did not present any convincing testimony that immediate enforcement of the salinity objective is necessary to protect fish and wildlife from harm, it is possible that enforcement of the objective could indirectly affect fish and wildlife, depending on which salinity control measures are implemented in order to achieve compliance. As the State Water Board explained in Order WR 2010-0002, some salinity control measures, such as reducing highly saline drainage, could result in incidental benefits to fish and wildlife, while other measures, such as recirculation, could result in incidental adverse effects to fish and wildlife. (Order WR 2010-0002 at p. 13, fn. 9; see also Decision 1641 at pp. 16-17 [describing the potential adverse impacts of recirculation].) But it is speculative whether enforcement of the salinity objective would indirectly benefit fish and wildlife because DWR and USBR have not yet evaluated the feasibility of alternative salinity control measures, or developed a revised compliance plan specifying how compliance with the salinity objective will be achieved.

C-WIN and CSPA support meeting the salinity objective by increasing flows in the San Joaquin River, which could result in incidental benefits to fish and wildlife. (R.T. of 6/30/2009, at pp. 26, 31.) But as the State Water Board found in Order WR 2010-0002, the feasibility of increasing San Joaquin River flows in order to meet the salinity objective requires further

evaluation, including an evaluation of the potential impact of increasing such flows on the water supplies needed to protect fishery resources. (Order WR 2010-0002 at pp. 13, fn. 9, 19.) Accordingly, it is uncertain the extent to which the salinity objective could be met by increasing San Joaquin River flows, or whether increasing flows in the San Joaquin River to meet the objective would result in a net benefit to fishery resources. (*Ibid.*)

In summary, the State Water Board considered the potential benefits to fish and wildlife of enforcing the southern Delta salinity objective, and any adverse impacts on fish and wildlife from violation of the objective. The Board concluded that any benefits are speculative. In addition, the administrative record does not contain any credible evidence that past exceedances of the objective have caused or contributed to a deterioration of Delta fisheries, or that a delay in enforcement of the objective will adversely affect fish and wildlife. Consequently, no basis exists for C-WIN and CSPA's argument that the Board violated the public trust doctrine because the Board failed to consider whether a delay in enforcement would adversely affect fish and wildlife. Similarly, no basis exists for C-WIN and CSPA's argument that the Board violated article X, section 2 of the California Constitution and Water Code section 275 because the Board failed to consider whether the impacts of the violation on fish and wildlife make DWR's and USBR's water use in violation of the objective unreasonable.

5.0 CONCLUSION

For the foregoing reasons, we find that Order WR 2010-0002 was appropriate and proper. Therefore, SDWA's individual petition for reconsideration and C-WIN and CSPA's joint petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that Order WR 2010-0002 is affirmed, and the petitions for reconsideration submitted by SDWA, C-WIN, and CSPA are denied.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Board held on _____.

AYE:

NAY:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board

DRAFT