STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000-02

In the Matter of
Implementation of Water Quality Objectives for the
San Francisco Bay/Sacramento-San Joaquin Delta Estuary;
A Petition to Change Points of Diversion of the
Central Valley Project and the State Water Project in the Southern Delta; and
A Petition to Change Places of Use and Purposes of Use of the Central Valley Project,

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ORDER DENYING PETITIONS FOR RECONSIDERATION AND AMENDING SWRCB DECISION 1641

1.0 INTRODUCTION

In this Order, the State Water Resources Control Board (SWRCB) denies reconsideration of SWRCB Decision 1641 (D-1641) and amends D-1641 as provided below. The SWRCB will publish an amended version of D-1641, for the convenience of parties operating under its requirements, that incorporates the changes made in this Order.

On December 29, 1999, the SWRCB adopted SWRCB D 1641. D-1641 includes several actions. First, it implements the numeric flow objectives in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Bay-Delta Plan). This is accomplished through temporary and longer-term changes in the water rights of the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR), a long-term change in the rights of certain water right holders on tributaries of the San Joaquin River, and establishment of the rights of some parties who had reached agreements with other parties as to their responsibilities to meet the objectives in the 1995 Bay-Delta Plan. Because some parties have temporary responsibilities, continued full implementation of the 1995 Bay-Delta Plan numeric flow objectives will require future action. The temporary changes in the water rights of

the DWR and the USBR, requiring them to meet the objectives set forth in Tables 1, 2, and 3 of D-1641, will expire on November 30, 2001 unless the SWRCB adopts a further decision before that date assigning responsibility for meeting the objectives.

Second, D-1641 conditionally approves a joint petition of the DWR and the USBR to change their points of diversion in the southern Delta by adding points of diversion at one another's water diversion facilities. Third, it conditionally approves a water right change petition of the USBR by adding specified places of use and purposes of use. D-1641 also approves several proposals for establishing the responsibilities of specified parties with respect to meeting the objectives in the 1995 Bay-Delta Plan. Finally, D-1641 modifies the responsibilities of the DWR and the USBR to protect Suisun Marsh beneficial uses, making their responsibilities consistent with superior protections for the beneficial uses.

Petitions for reconsideration of D-1641 were due 30 days after adoption of D-1641, on January 28, 2000. The SWRCB received twenty-one timely petitions for reconsideration. The following parties filed petitions for reconsideration. 1. Stockton East Water District. 2. The Natural Heritage Institute and The Bay Institute of San Francisco. 3. California Farm Bureau Federation. 4. Central Delta Water Agency, Reclamation Districts Nos. 2039 and 2072, R.C. Farms, Inc., Zuckerman-Mandeville, Inc., and South Delta Water Agency (Central and Southern Delta parties). 5. North San Joaquin Water Conservation District. 6. Glenn-Colusa Irrigation District and forty other entities in the Sacramento basin, all collectively known as the Sacramento Valley Water Users. 7. Department of Water Resources. 8. San Luis and Delta-Mendota Water Authority and Westlands Water District. 9. San Luis Water District. 10. Department of Fish and Game. 11. State Water Contractors. 12. San Joaquin County and San Joaquin County Flood Control (San Joaquin County) and Water Conservation District. 13. Central San Joaquin Water Conservation District. 14. City of Stockton. 15. Merced Irrigation District and Turlock Irrigation District. 16. Regional Council of Rural Counties. 17. Environmental Defense and Save San Francisco Bay Association. 18. Santa Clara Valley Water District. 19. United States Department of the Interior. 20. Golden Gate Audubon Society, Marin Audubon Society, San Joaquin Audubon Society, Santa Clara Valley

Audubon Society, California Sportfishing Protection Alliance, and Committee to Save the Mokelumne. 21. Contra Costa Water District.

2.0 PETITIONS FOR RECONSIDERATION

The SWRCB may order reconsideration on all or a part of a decision adopted by the SWRCB upon petition by any interested person. (Wat. Code § 1122.) The SWRCB's regulation lists the following causes upon which a petition for reconsideration may be filed:

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

(23 Cal. Code Regs. § 768)

The causes for reconsideration set forth in the petitions fall primarily within subdivisions (a) and (d) listed above.

2.1 Interpretation of Area of Origin Statutes and Delta Protection Act

With reference to the approvals of the Joint Point of Diversion (JPOD), the San Joaquin River Agreement (SJRA), and the Mokelumne Agreement, some parties argue that D-1641 violates Water Code sections 11460-11463 and the Delta Protection Act (Wat. Code §§ 12202-12204). The issues concerning sections 11460 and 11463 are whether these sections protect contractors buying New Melones water against uses of the water by the CVP for fish and wildlife; whether these sections require the Central Valley Project (CVP) and State Water Project (SWP) to sell water to users in the areas of origin; and whether these sections protect North San Joaquin Water Conservation District against upstream diversions by East Bay Municipal Utilities District (EBMUD). An additional issue is whether sections 11460-11463 or the Delta Protection Act requires the CVP to deliver stored water to water users in the Delta. With respect to

section 11462, the petitions raise issues concerning what this section means and whether it applies to the CVP.

The parties addressing this topic include: Stockton East Water District, Central and Southern Delta parties, Department of Water Resources, San Joaquin County and San Joaquin County Flood Control and Water Conservation District, Central San Joaquin Water Conservation District, City of Stockton, Regional Council of Rural Counties, and Contra Costa Water District.

2.2 Interpretations of Water Code section 1702

With reference to approval of the change petitions under the SJRA , the approval of the JPOD changes, and the approval of the CVP's change of purpose of use of water, certain parties argue that as CVP contractors they are injured within the meaning of Water Code section 1702. The issue is whether the "no injury" rule codified in section 1702 prohibits a change proposed by a water right holder, notwithstanding the absence of any injury to any other water right holder, if the change could have the effect of reducing deliveries to a person who receives water under contract with the water right holder.[1] Other parties claiming riparian rights argue under section 1702 that they are injured if stored water from upstream reservoirs does not reach them at the same time as it did in the past, and that the water users in the southern Delta have a right to water from the Sacramento River and from tributaries reaching the Delta from the east side.

The parties addressing this topic include: Stockton East Water District, California Farm Bureau Federation (not a participant in the proceedings leading to adoption of D-1641), Central and Southern Delta parties, Westlands Water District, State Water Contractors, Central San Joaquin Water Conservation District, and City of Stockton.

[1] D-1641 finds that water supply contractors cannot claim injury within the meaning of section 1702's prohibition against injury to any legal user of water where the claimed injury is based on contractual rights, not on any water rights held by the water supply contractors, and the change is proposed by the water right holder with whom they hold contracts. D-1641 further specifies, however, that water supply contractors can protect their interests in their water supply on other grounds.

2.3 Interim Imposition of Condition 2 on the DWR and the USBR

Some parties argue that the SWRCB should delete Condition 2 on the water rights of the DWR and the USBR, set forth in the first part of the Order in D-1641. They argue that they did not have adequate notice that the SWRCB might adopt this interim condition. Condition 2 extends until November 30, 2001 the interim requirements in Orders 95-6 and 98-09 to meet some of the fish and wildlife objectives and adds a requirement that DWR and USBR meet the outflow objective, while removing the striped bass objective and other flow-related objectives that were required in SWRCB Decision 1485 (D-1485).

The parties addressing this topic include: Department of Water Resources, San Luis and Delta-Mendota Water Authority and Westlands Water District, State Water Contractors, and U.S. Department of the Interior.

2.4 The Manner of Approving the SJRA

In D-1641, the SWRCB enabled the SJRA to go forward by authorizing petitioned changes in the water rights of some of the parties to the agreement. Some parties argue that the SJRA is not a valid agreement among all of its parties unless the SWRCB incorporates it in its entirety into D-1641 and makes all of the findings the SJRA directs that the SWRCB must make. In particular, these parties want the SWRCB to impose the export goals in the SJRA as mandatory limits in the permits of the DWR and the USBR. Some of the parties objecting to the SWRCB's action argue that the SJRA is not enforceable among the parties unless D-1641 contains the findings specified in the SJRA. Some of the parties making these arguments have not signed the SJRA. These parties argue that the SWRCB must adopt the entire SJRA as its own in order to properly implement the water quality objectives. Alternatively, one petitioner requests that the SWRCB adopt additional measures to ensure that the Vernalis Adaptive Management Plan (VAMP) experiment achieves a level of protection equivalent to the 1995 Bay-Delta Plan objectives. Another petitioner argues that under the water quality laws the SWRCB cannot authorize the VAMP experiment in lieu of meeting the objectives. Two of the water suppliers for the SJRA requested a change in the reservoir refill condition established in D-1641 as a condition of approval of their change petitions. Some parties argue that the SWRCB must

rescind all approvals of settlement agreements until it has determined the obligations of the DWR and the USBR.

The parties addressing this topic include: The Natural Heritage Institute and The Bay Institute, Central and Southern Delta Parties, Department of Fish and Game, Merced Irrigation District and Turlock Irrigation District, and Environmental Defense and Save San Francisco Bay Association.

2.5 Use of Water from New Melones for Meeting Objectives

D-1641 places an interim condition on New Melones storage rights, during the term of the SJRA and until the SWRCB establishes alternative implementation thereafter, to ensure that the USBR meets water quality objectives at Vernalis. Some parties claim this is an unreasonable use of water.

The parties addressing this topic include: Stockton East Water District, San Joaquin County and San Joaquin County Flood Control and Water Conservation District, and Central San Joaquin Water Conservation District, City of Stockton.

2.6 Action Adding CVP Encroachment Lands to the CVP Place of Use with Mitigation

Some water contractors object to the requirement in D-1641 that the CVP mitigate the effects of its encroachment into areas outside the authorized places of use of water where the encroached area was not previously farmed. These contractors are concerned that the CVP will impose the mitigation responsibility on the water contractors as a condition of renewing their water delivery contracts.

The parties addressing this topic include: California Farm Bureau Federation (not a participant in the proceedings leading to adoption of D-1641), San Luis and Delta-Mendota Water Authority and Westlands Water District, and San Luis Water District.

2.7 No Addition of Expansion Lands to the CVP Place of Use

The Environmental Impact Report (EIR) for the USBR's petition for a change in place of use and purpose of use of water did not analyze the effect of expanding the CVP place of use into areas

not currently served, and the SWRCB found that it could not approve an expansion into these areas without the necessary environmental documentation. Santa Clara Valley Water District argues that expansion lands within the boundaries of its district but outside of the authorized CVP place of use and never served by the CVP should nevertheless be construed as being within the authorized CVP place of use.

2.8 Salinity Control Requirements and Discussion of San Luis Drain

D-1641 requires the USBR to meet salinity objectives at Vernalis and the USBR and the DWR to meet salinity objectives in the Delta. The USBR and the DWR must fully achieve the Delta salinity objectives within five years. The method of compliance is not prescribed. Some parties argued that the salinity control measures in D-1641 are inadequate, and the SWRCB must forbid deliveries of water to the San Luis Unit of the CVP unless it requires the USBR to construct the San Luis Drain. Some parties asked the SWRCB to order the regional board to adopt and implement salinity objectives for the San Joaquin River upstream of Vernalis and to impose a time schedule. One request is that the SWRCB require the DWR and the USBR to meet immediately the salinity objectives in the southern Delta, including the Vernalis objective. On the other side, some parties oppose the measures required in D-1641, arguing that the interior southern Delta objectives can not be reliably met or arguing that any discussion of the drain is improper. To control the salinity of its diversions from the Delta, Contra Costa Water District requests a change in the time periods when export pumping under the JPOD is restricted to protect Contra Costa's water diversions, from September to July, and also seeks protection against increases in salinity that do not exceed the objective.

The parties addressing this topic include: Central and Southern Delta Parties, Stockton East Water District, San Joaquin County and San Joaquin County Flood Control and Water Conservation District, Central San Joaquin Water Conservation District, City of Stockton, Environmental Defense and Save San Francisco Bay Association, and Contra Costa Water District.

2.9 Opposition to Approval of the Mokelumne Agreement

Some parties request reconsideration of D-1641 based on alleged injury to North San Joaquin Water Conservation District. Additionally, some parties argue that the SWRCB should not act on the Mokelumne Agreement until it has acted on the hearing it conducted in 1993 on the Mokelumne River issues, and that the SWRCB should require EBMUD to bear responsibility for any water supply shortage to North San Joaquin Water Conservation District.

The parties addressing this topic include: Central and Southern Delta parties, North San Joaquin Water Conservation District, San Joaquin County and San Joaquin County Flood Control and Water Conservation District, and Golden Gate Audubon Society, et al.

2.10 Absence of Implementation of the Narrative Salmon Doubling Objective

Some parties argue that the SWRCB is obligated to implement the narrative objective in the current proceeding.

The parties addressing this topic include: The Natural Heritage Institute and The Bay Institute, Department of Fish and Game, and Environmental Defense and Save San Francisco Bay Association.

2.11 Adequacy of the Bay-Delta EIR for a Future Decision Implementing the 1995 Bay-Delta Plan

The Sacramento Valley Water Users seek additional clarification that they will not be precluded, after a future water right decision to implement the 1995 Bay-Delta Plan, from challenging the SWRCB's use of the Bay-Delta EIR, as well as making any other challenges legally available to them.

2.12 Adequacy of Suisun Marsh Protections

Golden Gate Audubon Society, et al., asserts that D-1641 should be vacated because it fails to implement the water quality objectives for the western Suisun Marsh.

2.13 Delegation of Authority to Board Staff

San Joaquin County and San Joaquin County Flood Control and Water Conservation District, objected to the SWRCB delegating authority to its staff to administer terms and conditions in D-1641.

3.0 BACKGROUND

The SWRCB adopted D-1641 after completing seven phases of a projected eight-phase adjudicative hearing, plus added Phases 2A and 2B. The SWRCB issued a Notice of Public Hearing for the Bay-Delta Water Rights Hearing on December 2, 1997, and subsequently issued a Revised Notice of Public Hearing on May 6, 1998. The hearing commenced on July 1, 1998. Thus far, the SWRCB has completed eighty-two days of hearing, including two days of hearing in December, 1999, to consider receiving in evidence the two final EIRs that address the implementation of the 1995 Bay-Delta Plan and the USBR's petition for a change in place of use and purpose of use of water appropriated under its CVP water rights.

D-1641 is part of the SWRCB's implementation of the flow objectives in the 1995 Bay-Delta Plan. The flow objectives include the Delta outflow objectives, salinity objectives in the Delta that occasionally control Delta outflow, the flow objectives on the Sacramento River at Rio Vista, the flow objectives on the San Joaquin River at Vernalis, and the salinity objectives on the San Joaquin River at Vernalis. The flow objectives in the 1995 Bay-Delta Plan can best be implemented by changes in the flow of water or in the operation of facilities that move water. To make such changes, D-1641 amends water rights by assigning responsibilities to the water right holders to help meet the flow objectives.

4.0 APPLICATION OF AREA OF ORIGIN PROTECTIONS

D-1641 addresses Water Code sections 11460-11463 (Watershed Protection Act) in two findings, on pages 34-35 and on pages 101-102. Several of the parties petition for reconsideration of these findings, arguing that these findings misinterpret the Watershed Protection Act or the Delta Protection Act. In addition, some parties argue that the SWRCB violates Water Code sections 11460-11463 by approving the Mokelumne Agreement, discussed in Part 8.1 of D-1641 at pages 57-65, and by placing conditions on the USBR's New Melones

water rights. One party argues that D-1641 violates the San Joaquin River Protection Act (Wat. Code § 12230, et seq.). The following sections address these arguments.

4.1 Effect on Rights of In-Delta Water Users Under the Delta Protection Act

Several parties requested reconsideration of the finding on pages 34-35 of D-1641 (Part 6.3.4.2.3). This finding is in the analysis in Part 6.3.4 of whether the SWRCB should approve the petitioned long-term water right changes needed to carry out the Vernalis Adaptive Management Plan (VAMP) experiment under the San Joaquin River Agreement (SJRA). It addresses the question whether the South Delta Water Agency (SDWA) has water rights pursuant to the Delta Protection Act. SDWA objected to the changes on the basis that its members would be deprived of water or water quality that they would have in the absence of the long-term changes. The standards for approving the petitions are set forth in Water Code sections 1707 and 1735, et seq. Under Water Code section 1707 a change cannot be approved if it will unreasonably affect any legal user of water. Under Water Code section 1735, et seq., a change cannot be approved if it will result in substantial injury to any legal user of water. Therefore, the findings in Part 6.3.4.2 address the alleged effects on water users claiming to be legal users of water. The finding in Part 6.3.4.2.3 is one of several findings meant to determine whether SDWA's members are legal users of water who will be deprived of water because of approval of the long-term change petitions. It is unnecessary to make a finding as to whether the SDWA's members have a right to water under the Delta Protection Act, however. The change in timing of flows under the long-term changes requested by the members of the San Joaquin River Group Authority (SJRGA) has no effect on the availability of any water that either the DWR or the USBR may arguably be required to provide under the Delta Protection Act. Such water, if provided, would come from sources other than the SJRGA members whose change petitions are approved. Accordingly, the text in 6.3.4.2.3 is stricken, and is replaced with the following paragraph:

> "SDWA claims to represent legal users of water who would be injured as a result of the long-term water right changes. SDWA argues that in-Delta water users have a right to have water provided to them by the DWR and the USBR pursuant to the Delta Protection Act, even if they have no water available to them under riparian or appropriative water rights at a given time. Whether or not the DWR and the USBR have an obligation to provide water to in-Delta

water users, however, is irrelevant to the question of whether the long-term changes will cause injury to a legal user of water."

4.2 EFFECTS OF THE JPOD ON SACRAMENTO RIVER WATER USERS

Several parties requested reconsideration of the findings regarding the Watershed Protection Act on pages 101-102. The findings on pages 101-102 are in Part 11.6.1. They address the question whether a water purchaser, Tehama-Colusa Canal Authority (TCCA), that buys water from the USBR will be injured by the SWRCB's approval of a change in point of diversion in the USBR's permits. The change in point of diversion is referred to as the JPOD because it would allow the DWR and the USBR to use each other's diversion facilities in the Delta. Use of the JPOD effectively increases the physical capacity of the facilities used by the USBR to divert water from the southern Delta under its water rights to areas south and west of the Delta.

The concern expressed by Tehama-Colusa Canal Authority (TCCA) is not that approval of the JPOD will result in immediate injury to any appropriative water rights currently held by TCCA, but that approval of the JPOD could result in a refusal by the USBR to execute a water supply contract in the future that increases the amount of water supplied to TCCA. As noted in D-1641, operation of the JPOD will not change the amount of water that Sacramento Valley Water Users otherwise would receive under their existing water supply contracts. (R.T. pp. 11069, 11073, 11075.) The potential lack of an increase in TCCA's water supply does not deprive TCCA of its existing water supply, and does not harm an existing water use. Additionally, as discussed below, to the extent that any claim of harm is based solely on a contract with the USBR or the potential to enter into a contract with the USBR, TCCA cannot invoke Water Code section 1702[2] to prevent the USBR from making the change.

TCCA argued in the Bay-Delta Water Rights Hearing that it prospectively could be deprived of water due to the JPOD change. TCCA argued that additional water supplies might become unavailable to its members from the USBR due to the USBR's commitment of its supplies to areas south and west of the Delta. TCCA argued that because it is located in the watershed of

[2] The interpretation of Water Code section 1702 is discussed in Part 5 of this Order. Also see D-1641 at footnote 58 on page 100.

origin it is entitled to obtain an additional contractual water supply from the USBR, and that the SWRCB should not approve the change of point of diversion and rediversion in the Delta without requiring the USBR to execute additional contracts north of the Delta under the Watershed Protection Act.[3] TCCA's argument that the change petition should not be approved because TCCA might in the future obtain an additional contract with seniority over exports does not, however, amount to a present harm to its existing uses. If TCCA is correct that it can require the USBR to preferentially deliver additional water to it in the future, then it would obtain water whether or not the SWRCB approves the use of the JPOD. Likewise, if TCCA obtains a senior water right in the future under an area of origin theory, it would obtain water in preference to the delivery of CVP water to export areas. It bears emphasis that the watershed of origin law does not prevent water use outside the watershed in the period before it is needed in the watershed. (25 Ops.Cal.Atty.Gen. 8, 20-22, 26-27 [1955].)

D-1641 contains a finding, on page 101, that section 11462 applies to the DWR. This finding points out, by comparison with DWR, that not all of the Watershed Protection Act applies to the USBR. The DWR and its contractors, however, take exception to the finding regarding the meaning of Water Code section 11462, that, conditioned upon the payment of adequate compensation, it requires the DWR to execute water service contracts with water users in the watershed of origin. In the context of the discussion on page 101 in Part 11.6.1, this construction of section 11462 is dicta. The requirements embodied in section 11462 need not be decided in D-1641. The important point is that TCCA cannot, under Water Code section 1702, prevent the JPOD changes.

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[3] The Watershed Protection Act places limitations on the construction and operation of a project entitled the "Central Valley Project" in Part 3 of Division 6 of the Water Code. The CVP originally was to be constructed and operated by a state entity that was a predecessor of the DWR. (Stats. 1933, c. 1042.) The Central Valley Project Act, of which the Watershed Protection Act is a part, describes a number of units which eventually were constructed and are now operated by the USBR, not the DWR. All four sections of what is now called the Watershed Protection Act were originally set forth in section 11 of the Central Valley Project Act as limitations on the powers of DWR's predecessor. In 1943, the Water Code was created and section 11 was split into four sections, sections 11460, 11461, 11462, and 11463. Each of these sections is specifically applicable to the DWR. In 1951, realizing that entities other than the DWR would construct and operate some of the projects, the Legislature adopted Water Code section 11128. Section 11128 applies the limitations in sections 11460 and 11463 to any agency of the state or federal government that constructs or operates the CVP, as described in the Water Code, or any unit thereof.

Because the discussion of section 11462 is unnecessary to the conclusion that the JPOD should be approved, the following changes are made in D-1641. On page 101 of D-1641, the two paragraphs following the partial paragraph at the top of page 101, and the quotation of section 11128 of the Water Code, are deleted.

As pointed out on pages 101-102, the SWRCB in D-990 included Term 23 in the USBR's permits for Shasta Reservoir. Term 23 set a time schedule, which has since expired, for the USBR to enter into contracts with water users in the Sacramento basin and in the Delta. The basis of Term 23 likely was protection of the public interest. The SWRCB does not at this time find that the USBR will unreasonably refuse in the future to consider providing water, for adequate compensation, in the Sacramento Valley or in other watersheds of origin from which the USBR exports water. This discussion should not, however, be construed as stating that the SWRCB cannot require the USBR, under appropriate circumstances, to provide water for adequate compensation to water users within areas of origin under the SWRCB's authority to condition water rights in the public interest or under its authority to protect the public welfare in accordance with California Constitution, article X, section 2. Nor should this discussion be construed as preventing water supply contractors of either the DWR or the USBR from seeking to enforce their water supply contracts through the courts.

4.3 Application of Water Code sections 11460-11463 to New Melones Conditions

Decision 1641 contains requirements, based on the permits for New Melones, that the USBR meet water quality objectives in the southern Delta. These include requirements ensuring that specified objectives for flow at Vernalis are met. The San Joaquin County parties (County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, Stockton East Water District, the Central and South Delta parties, Central San Joaquin Water Conservation District, and City of Stockton) raise arguments based on effects on users of water that is stored in or is passed through New Melones Reservoir. These parties seek reconsideration of the requirements to meet the objectives because D-1641 does not require the USBR to provide New Melones water for consumptive uses within San Joaquin County in preference to meeting the objectives. Among other bases for seeking reconsideration of D-1641, these parties argue that Water Code section 11460 requires the USBR to provide New Melones water to them

because they are within the area of origin. The argument based on section 11460 is discussed here. The other bases cited by these parties for changing the New Melones obligation are discussed in Part 8, below.

The argument based on section 11460 ignores an important factor regarding section 11460, et seq. Section 11460, et seq., protects the areas of origin from exports of water to other areas, by providing priority to the areas of origin. Section 11460 does not establish a preference for any particular type of use within the area of origin, such as irrigation or municipal use, over other uses within the area of origin, such as protection and enhancement of water quality. The New Melones permits do not authorize use of water appropriated by the New Melones Project outside of the counties of San Joaquin, Stanislaus, Tuolumne, Calaveras and Contra Costa. These counties are within the area of origin or immediately adjacent thereto. To the extent that the USBR is supplying water appropriated at New Melones to contractors, it is required to supply all of that water within the area. If the USBR were exporting water appropriated under the New Melones permits from the area of origin for use in other parts of the state, Water Code sections 11460 and 11463 would be applicable. The New Melones water right permits, however, do not authorize use of water appropriated under these permits outside the area of origin of the water. In the absence of any export of water appropriated under the New Melones permits, Water Code sections 11460-11463 do not apply to the New Melones Project.

4.4 Application of San Joaquin Protection Act

San Joaquin County argues that D-1641 violates the San Joaquin River Protection Act (Wat. Code § 12230, et seq.) by making changes in water right permits that affect the reach of the San Joaquin River between its junctions with the Merced River and Middle River. As San Joaquin County observes, the SWRCB previously has found that because all of the relevant permitted water right applications were filed before June 17, 1961 (See Wat. Code § 12233), the provisions of the Act do not apply to the SWRCB's actions. San Joaquin County now argues that if the SWRCB subsequently authorizes a change in the permits, the Act is applicable to the change.

San Joaquin County's argument fails. Section 12233[4] refers to the date of application for a water right, not to the permit date, which necessarily must be subsequent to the application. As a result, the permits issued after June 17, 1961 on applications filed before June 17, 1961 were not affected by the Act. It follows that if the original permits could be issued before or after June 17, 1961 without being constrained under the Act, changes in those permits also should not be affected by the Act.

4.5 Application of Water Code sections 11460-11463 to the Mokelumne Agreement

North San Joaquin Water Conservation District (NSJWCD) and County of San Joaquin argued in their petitions for reconsideration that the SWRCB should apply the Watershed Protection Act to the water rights of the EBMUD on the Mokelumne River, in order to protect NSJWCD from reductions in water supplies resulting from implementation of the Mokelumne Agreement. EBMUD exports water from the Mokelumne River to its place of use. The Watershed Protection Act, however, does not apply to EBMUD's water rights because EBMUD's project is not part of the Central Valley Project described in Part 3 of Division 6 of the Water Code. The Watershed Protection Act establishes limitations on the Central Valley Project described in the Water Code. In effect, the parties raising this point as a watershed protection issue are seeking a change in the priority of NSJWCD's and EBMUD's water right permits, based on a public interest theory.

NSJWCD argues that because it uses water in the watershed of the Mokelumne River and EBMUD uses water outside the watershed of the Mokelumne River, NSJWCD should have priority over EBMUD. The relative priority of these two parties is an issue that the SWRCB ruled on when it considered EBMUD's and NSJWCD's water right permits in Decisions 858 and 893. In those decisions, the SWRCB ruled against NSJWCD on the priority issue. In effect, NSJWCD is seeking a reversal of that ruling. NSJWCD points out that in some watersheds, the SWRCB has, under its public interest authority, subordinated the priority of out-of-watershed appropriators to the priority of subsequent appropriators seeking to use water in the watershed.

[4] "Nothing in this part shall be construed as affecting the quality of water diverted into the Sacramento-San Joaquin Delta from the Sacramento River, nor as affecting any vested right to the use of water, regardless of origin, or any water project for which an application to appropriate water was filed with the State Water Resources Control Board prior to June 17, 1961." (Wat. Code § 12233.)

NSJWCD argues that the SWRCB would have done this when it originally considered NSJWCD's and EBMUD's water right applications, had it known that NSJWCD would not receive water from the American River through the Folsom South Canal. NSJWCD has a junior water right with an interim water supply, and it is likely to suffer reductions in supply because of its junior priority. For the Bay-Delta Water Rights Hearing, however, there was no notice that the SWRCB would consider changes in water right priority between EBMUD and NSJWCD. Accordingly, D-1641 is not the proper proceeding for the SWRCB to make the kind of change NSJWCD is requesting. The SWRCB does not, herein, change the priority of these rights.

5.0 PROTECTIONS PROVIDED AGAINST EFFECTS OF WATER RIGHT CHANGES UNDER SECTION 1702

Several parties petitioning for reconsideration of D-1641 argue that it violates Water Code section 1702 or that D-1641 misinterprets section 1702. Three issues are raised. These are (1) whether water supply contractors of the CVP are protected by the "no injury" rule in section 1702, (2) whether the approval of the change petitions needed to conduct the Vernalis Adaptive Management Plan under the San Joaquin River Agreement injures downstream legal users of water, and (3) whether the approval of the Mokelumne Agreement violates section 1702.

Water Code section 1702 is set forth in Chapter 10 of Part 2 of Division 2 of the Water Code. Chapter 10 governs changes of the point of diversion, place of use, or purpose of use of water from that specified in a water right application, permit, or license. Section 1702 provides, with reference to a petitioned change, that:

> "Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved."

This provision is frequently referred to as the "no injury" rule. Section 1702 is derived from section 16 of the 1913 Water Commission Act. (Stats. 1913, c. 586, p. 1021, § 16.) Section 16 was a long section addressing several subjects, including applications, permits, and changes. It was divided into chapters, articles, and smaller sections in 1943 when the Water Code was enacted. (Stats. 1943, c.368, p.1628, § 1702.) Because of its origin, the text of sections 1700 and 1701, following, help establish a context for section 1702.

> "Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use of such water may be changed as provided in this code." (Wat. Code § 1700.)
>
> "At any time after notice of an application is given, an applicant, permittee, or licensee may change the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license; but such change may be made only upon permission of the board." (Wat. Code § 1701.)

5.1 Can Buyers of Water from an Appropriator Prevent the Appropriator from Changing its Water Rights?

In D-1641, the SWRCB concluded that section 1702 does not prevent the USBR from petitioning for and obtaining approval of changes in its CVP water rights that could have the effect of reducing deliveries to a CVP contractor. This is a narrow ruling, and does not preclude water supply contractors from protesting a change in their water suppliers' water right based on other provisions of law. As is explained in footnote 75 on page 130, water service contractors can file protests based on public interest grounds or on environmental and public trust grounds. They also may file protests to changes proposed by other water right holders based on injury to the water right holder from whom they buy water.

The discussion of section 1702 in D-1641 responded to the claim by Westlands Water District (WWD) that the SWRCB could not approve the USBR's change in its purposes of use of water under its CVP water right permits. WWD argued that it is the actual water right holder and consequently is the legal user of water delivered by the CVP, and that approval of the change would cause injury to WWD. The injury claim was based on the fact that the USBR has been supplying, and likely will continue to supply, less water to WWD than the full contractual allotment of 1,150,000 acre-feet per annum. The USBR has reduced the amount of water it supplies to WWD primarily because it is using more water for fish and wildlife purposes, purposes that are authorized as a result of D-1641 but were not previously authorized in most of the USBR's water right permits.[5]

[5] The SWRCB notes that while WWD makes its argument in the context of a protest to the addition of a new purpose of use, the argument would apply with equal force to any additions to the authorized place of use. If the "no injury" rule bars addition of a fish and wildlife purpose of use because a limited supply would be divided among *[footnote continues on next page]*

The shortage to WWD varies with the year type, but substantial shortages have occurred even in wet years since 1992. The SWRCB examined two main factors in making its findings regarding WWD's protest of the change. First, the SWRCB examined whether approving the change would be the cause of any harm to WWD. The SWRCB concluded that approving the change would not be the cause of harm to WWD, because the USBR already has reduced the amount of water it supplies to WWD in order to comply with requirements under the federal Endangered Species Act by increasing the amount of water it provides for endangered fish.

To satisfy its obligations under the federal Endangered Species Act, the USBR must use some of its water for fish and wildlife protection, and the USBR representatives argue that the USBR is bound by federal law to operate in this manner. The USBR witness made it clear that the USBR has been using water to meet fish and wildlife protection obligations in the past few years while reducing the amount of water it makes available to its water supply contractors. In this circumstance, approving the change does not, in fact, cause any harm to WWD because the USBR already has obligations regardless of the SWRCB's action.

Second, the SWRCB considered whether, as a matter of law, a CVP water supply contractor such as WWD can be "injured" within the meaning of Water Code section 1702 if the SWRCB approves a change in the CVP water right permits that allows the USBR to use CVP water for additional purposes that compete with the purposes for which WWD receives and uses water from the CVP. Because WWD based its argument on a claim that it, and not the USBR, is the water right holder, D-1641 analyzes the state and federal legal authorities applicable to WWD's argument. D-1641 concludes that the USBR, not WWD, is the water right holder of the CVP water rights involved. Accordingly, the SWRCB concluded that water service contractors are not injured legal users of water within the meaning of Water Code section 1702. As explained in footnote 75, this does not mean that a water service contractor cannot maintain a protest against a change in water rights or an application for new water rights based on other legal theories, such

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more uses than before, then the "no injury" rule would also bar any additions to the USBR's place of use, including any changes to add "encroachment " and "expansion" lands in WWD's service area to the USBR's place of use, because approval of the change in place of use would add to the acreage sharing a limited supply, to the detriment of irrigation districts or individual farmers whose lands are already entirely within the authorized place of use.

as public interest or public trust. Under a protest based on a public interest theory, a contractor can raise issues concerning potential impacts on water deliveries. A contractor also can protest a change proposed by another water right holder that would cause injury to the water right holder from whom the contractor buys water. Nor does this conclusion mean that a water service contractor does not use water legally, or that it cannot pursue against the water right holder any claims that it has based on its contract with the water right holder. This conclusion means, simply, that section 1702 does not prohibit shortages that may be suffered by a water service contractor because the water right holder expands its purposes or place of use.

The SWRCB previously has interpreted the term "legal user of water" as meaning a legally protectible right to use the water in question. (See SWRCB Order WR 95-6, pp. 12-13.) As the SWRCB pointed out in Order WR 99-02, the "no injury" rule in section 1702 is a codification of a common law rule designed to protect the rights of third party water right holders when a water right is changed. (See Code Commission Notes after Wat. Code § 1700, in West's Annotated Code; *San Bernardino* v. *Riverside* (1921) 186 Cal. 7, 28 [198 P. 784], cited therein; *Ramelli* v. *Irish* (1892) 96 Cal. 214 [31 P. 41]; *Scott* v. *Fruit Growers Supply Co.* (1927) 202 Cal. 47 [258 P. 1095, 1098].) The "no injury" rule includes protection of a junior water right holder who would take the water if the senior right holder does not take it or returns a portion of the water to the watercourse. The "no injury" rule codified in section 1702, barring any change that will "operate to the injury of any legal user of the water involved", is a term of art. It does not prevent all changes that would result in harm to a person who is using water and whose use is not illegal. For example, it is well established under the law of return flows that a person who is importing water from another watershed may change the purpose or place of use of those imported waters, even though the change reduces or completely eliminates the supplies available to another water right holder who is legally appropriating the return flows from those imported waters. (*Stevens* v. *Oakdale Irrigation District* (1939) 13 Cal.2d 343, 90 P.2d 58; *Haun* v. *De Vaurs* (1950) 97 Cal.App.2d 841, 218 P.2d 996.) The law of return flows illustrates the principle that, to prevent a water right holder from making a change under the "no injury" rule, the party seeking to prevent the change must have a legal interest that can exist independently of the rights of the water right holder seeking to make the change. WWD's contractual right to use water

appropriated by the USBR is dependent on the contract and on the rights of the USBR, and therefore does not provide a basis for finding a violation of the "no injury" rule in section 1702.

Like persons who appropriate return flows and who may be affected by a change proposed by the water right holder who imports the water in question, a water supply contract does not give the water supply contractor a legal interest in the water independent of the rights of the water right holder. Indeed, unlike persons who appropriate return flows from imported water, water supply contractors do not themselves hold any water rights. Water supply contractors have a right to use water only by virtue of their contracts with their water suppliers. In the absence of the contract, a water supply contractor would not have a right to use the water involved. (See *United States* v. *State Water Resources Control Board, et al*. (1986) 182 Cal.App.3d 145 [227 Cal.Rptr. 167, 198].) The existence and content of the contract is outside the control of SWRCB, and the SWRCB is not in a position to amend its terms or to settle disputes between the water right holder and its customer. The contract does not create a right to divert or use water, except in accordance with the rights of the water right holder, and does not define or alter those water rights. Consequently, the SWRCB concludes that an "injury of any legal user of the water involved" within the meaning of Water Code section 1702 does not include any harm to a contractor whose entitlement to the use of water is dependent on the rights of the water right holder with whom it contracts, unless impacts on the water right holder would bar the transfer under the "no injury" rule. If a water right holder proposes or agrees to the change, neither the water right holder nor any contractor whose entitlement to water deliveries is dependent on the water right holder has suffered injury within the meaning of Water Code section 1702.

Of course, a contractor may protect its interests when a proposed appropriation or a proposed change would impact the contractor's receipt of water from the water right holder, and the proposed appropriation or change would deprive the water right holder of water to which it is entitled. D-1641 recognizes this right. The State Water Contractors argued, however, that the first sentence in the last paragraph of text on page 130 of D-1641 could be read as denying that contractors have standing to protect their interests during a water right hearing, notwithstanding the explanation in footnote 75. Accordingly, the State Water Contractors request that the SWRCB clarify the sentence. The State Water Contractors suggest clarifying language that

includes moving the statement in footnote 75 to the text. The SWRCB will replace the sentence with the requested language. Footnote 75 will be deleted because it would be repetitive. The last paragraph starting on page 130, is amended to read:

> "~~In view of the foregoing discussion, the SWRCB finds that the water service contractors are not injured legal users of water within the meaning of Water Code section 1702, and consequently are not entitled to the protection of Water Code section 1702.~~In view of the foregoing discussion, the SWRCB finds that section 1702 is not an appropriate basis for WWD to raise this issue, which essentially is a dispute between a contractor and its water supplier. This decision does not preclude water service contractors from protesting changes in existing water rights or applications for new water rights. Such contractors can file protests based on public interest grounds or on environmental and public trust grounds. Water service contractors may also file protests based on injury to the water right holder on whom they rely for deliveries under their water service contracts. Application of the "no injury" rule is not the proper basis for determining contractual or other claims between a water service contractor and the water right holder who supplies water under contract where those claims are not based on the proprietary water rights of the water service contractor. Where a water right holder proposes or agrees to a change, there can be no injury to that water right holder. Therefore, where a change is proposed by a water right holder, any protest based on the potential for reduced deliveries to water service contractors, whose contractual entitlements are dependent on the water rights of the water right holder, must be based on other legal grounds. The petitioned change of purpose of use will allow the USBR to operate efficiently without violating its water right permits. Accordingly, the petitioned change of purpose of use is approved."

Finally, any shortage that may be suffered by WWD is not the result of D-1641. Where the USBR, as a water supplier, has legal obligations that conflict with its contractual obligations, and it chooses to satisfy its legal obligations by actions that lead to a reduction in the amount of water available to its contractors, it is the USBR that makes the decision to reduce the amount of water supplied to the contractors, not the SWRCB. By authorizing additional purposes of use under the USBR's water rights the SWRCB does not mandate that the USBR use water for the additional purposes. Accordingly, WWD is misguided in its attempt to treat the SWRCB's action as the cause of any shortages it is suffering or will suffer due to the USBR's decision to shift water supplies from WWD to fish protection.

5.2 Effects on Other Legal Users of the Changes Approved to Implement the SJRA

Some parties in San Joaquin County downstream from the parties whose petitions for changes in place of use and purpose of use of water rights were approved in D-1641 assert that they are injured by the approval of the change petitions needed to conduct the Vernalis Adaptive Management Plan under the San Joaquin River Agreement. They raise two issues: whether the refill conditions on approval of the change petitions adequately avoid harm to the USBR's contractors for water from the New Melones Project, and whether the SWRCB should find that riparian right holders in the Delta can be injured by changes in storage releases from upstream reservoirs. The first of these issues is discussed below, in Part 7.0 of this Order. The discussion of the second issue follows.

The Central and Southern Delta parties argue that riparian right holders in the Delta have a right to stored water from upstream reservoirs during seasons when natural flow is unavailable or inadequate to serve the uses of all riparian right holders taking water from the source. This argument is based in part on an argument that there might be natural flow in the stream later in the year if everybody upstream from the riparian right holder used less groundwater and less surface water. Riparian right holders, however, are required to share water with other riparian right holders correlatively. Thus, as development occurs, less and less water is available to each riparian right holder.

These parties also argue that riparian right holders can take advantage of a "physical solution" by simply taking any water that appears in the stream during dry periods. This water, if it is present, usually is present only because it has been released from storage in an upstream reservoir. This water is not part of the natural flow that is subject to riparian rights. In effect, these parties are saying that their habitual taking of non-natural flow is an informal "physical solution" to numerous long-standing upstream water diversions, and that they have a right to have it continue even though there is no evidence that they and the upstream parties whose change petitions were approved have ever entered into a formal arrangement. There also is no proof that these parties would have water significantly later in the season under riparian rights if other existing correlative riparian rights are considered, and there is no proven nexus between the unavailability of natural flow and the upstream water storage during other seasons by the parties whose change

petitions were approved. Accordingly, there is no basis for requiring the parties whose changes were approved to release water from storage during the dry season for these parties, without compensation. This petitioned cause for reconsideration is dismissed.

These parties also challenge a statement on page 33 of D-1641 that Order WR 89-8 finds that southern Delta riparian right holders have no claim to the waters of the Sacramento River. Since this statement appears in a part of D-1641 that addresses change petitions filed by appropriators on the San Joaquin River, it is unnecessary to the determination therein that the change petitions are approved. Therefore, the last sentence in the third paragraph on page 33, which reads, "SWRCB Order WR 89-8 concludes that southern Delta riparian right holders have no right to water from the Sacramento River." is deleted.

5.3 Allegations of Injury to Other Legal Users of Water Due to the Mokelumne Agreement

The NSJWCD, the Central and Southern Delta parties, and the County of San Joaquin argued that the SWRCB should change or rescind its approval of the Mokelumne Agreement. Based on the Mokelumne Agreement, the SWRCB established responsibilities for the EBMUD, the Woodbridge Irrigation District, the USBR, and the DWR, to contribute water for the Mokelumne River's share of objectives in the 1995 Bay-Delta Plan.

The parties argue that because the SWRCB has another ongoing proceeding on the Mokelumne River, the SWRCB should issue a decision on that proceeding first. The two proceedings address different issues, however. The Mokelumne River proceeding does not address the contribution of water from the Mokelumne River for water quality objectives in the Delta, which are addressed in the Bay-Delta Water Right Hearing. Accordingly, a delay to wait for the other proceeding would only serve to delay final action.

The parties claim that likely reductions in water supply to NSJWCD will violate several laws. The parties argue that the action regarding EBMUD's water rights violates Water Code section 1702, based on a claim of reduction of water supply to NSJWCD from EBMUD. Section 1702 is not applicable, however, because the new conditions imposed on EBMUD's and Woodbridge Water District's water rights are not the result of approving any petitioned change

under Water Code section 1700 requested by EBMUD in its water rights, but rather constitute a determination, by the SWRCB, of the extent of the contribution to be provided from the Mokelumne River.

Further, this action is not the cause of any reduction in water supply for NSJWCD. NSJWCD has rights junior to those of EBMUD, and is subject to reductions in its supply from EBMUD when EBMUD has less water available. Before the SWRCB acted, the Federal Energy Regulatory Commission (FERC) already had required changes in EBMUD's FERC license. The FERC action requires the instream flow releases from EBMUD's facilities that are set in D-1641 as the limit of EBMUD's responsibility. The SWRCB's action limits the EBMUD contribution to Delta objectives to the amount of water already required of EBMUD by the FERC, thereby minimizing the amount of water supply reduction to be sustained by NSJWCD. The SWRCB is not in a position, however, to reduce the amount of instream flows required by the FERC.

6.0 DUE PROCESS CONSIDERATIONS REGARDING CONDITION 2

Several parties argued that the SWRCB should delete Condition 2, set forth in the first part of the Order in D-1641 on page 147. Condition 2 extends for one year and eleven months the interim requirements in Orders 95-6 and 98-09 to meet the fish and wildlife objectives for flow at Rio Vista, and adds the 1995 Bay-Delta Plan outflow objective instead of the outflow objective in D-1485. This addition is part of a temporary assignment to the DWR and the USBR of responsibility to implement the 1995 Bay-Delta Plan objectives, pending a decision after Phase 8 of the Bay-Delta Water Rights Hearing on the responsibilities of the parties in the watersheds of the Sacramento, Cosumnes, and Calaveras rivers. This addition substitutes implementation of the fish and wildlife objectives in the 1995 Bay-Delta Plan for those in the1978 Water Quality Control Plan, eliminating a continuing requirement to meet some of the D-1485 objectives that are not in the 1995 Bay-Delta Plan.[6]

[6] Condition 1 on page 147 of accomplishes the same type of switch from the 1978 plan to the 1995 plan for the agricultural, municipal and industrial objectives.

The parties arguing that Condition 2 should be deleted contend that the SWRCB did not give them notice that this condition might be added to the water right permits of the DWR and the USBR. In particular, they contend they did not expect that the Delta outflow objective might be imposed. The parties argue that the Delta outflow objective is a Phase 8 responsibility that has not been assigned before. It is partially true that responsibility for the objective was not assigned before, since the amount of water required under the Delta outflow objective was increased in the 1995 Bay-Delta Plan. A Delta outflow object has been assigned to the DWR and the USBR under D-1485, however, since 1978.

When the SWRCB released the draft of D-1641 on December 2, 1999, the draft contained a Condition 2 that was similar to Condition 2 on page 147 of D-1641. The draft of Condition 2, however, was inadvertently and unfortunately phrased as being a permanent condition. The SWRCB intended it to be a temporary condition that would continue only until the SWRCB completes Phase 8 and adopts a further decision, and the SWRCB amended this condition to make it temporary before it adopted D-1641. Before the SWRCB acted on D-1641, several parties commented on Condition 2 because of its permanent phraseology, stating that it is a matter for decision after Phase 8. The SWRCB agrees that if the condition were to assign responsibility for the 1995 outflow objective for an indefinite period of time, it would be a Phase 8 issue, but as adopted, Condition 2 is an interim condition appropriate for adoption based on the record of Phase 1.

The parties had notice that the SWRCB might require additional temporary compliance with the 1995 Bay-Delta Plan as a result of Phase 1 of the hearing. Regarding Phase 1, the Revised Notice of Public Hearing dated May 6, 1998, provides that the subject of Phase 1 was "extension of Order WR 95-6 or equivalent temporary compliance with the 1995 Bay-Delta Plan". (Emphasis added.) Key Hearing Issue number 1, which pertains to Phase 1, provides: "**Should the SWRCB extend the effective period of Order WR 95-6? If yes, how long should it be extended, and what terms and conditions should it contain?"** This question is followed in the notice by an explanation of the contents of Order 95-6 and a statement that it would expire on December 31, 1998. Petitioners for reconsideration overlook these provisions of the notice in arguing that they had no notice that a condition such as Condition 2 might be adopted.

In December 1998, the SWRCB adopted Order WR 98-09, ordering a one-year extension of the terms and conditions in Order WR 95-6 with some modifications. Some parties express surprise that the SWRCB has ordered a further extension of the temporary compliance in Orders 95-6 and 98-09. The parties should not be surprised that the SWRCB would adopt a further extension of the temporary compliance requirement, in light of the expiration of Order WR 98-09 and the need for further proceedings before adopting requirements that will not expire in the short term. Order WR 98-09 itself indicates that it may be extended.

Some parties express further surprise that the extension requires DWR and USBR to meet the 1995 outflow objective, which DWR and the USBR have previously met pursuant to their commitment to operate under the December 1994 Principles Agreement. The May 6, 1998 notice, however, clearly asked what terms and conditions should be included in an extension. This question would have been unnecessary if the issue were whether the exact content of Order WR 95-6 should be repeated in an extension.

The argument some parties make, that the use of the Bay-Delta EIR somehow changes the nature of the temporary compliance requirement into a new type of requirement, is confounding. Having completed the CEQA process, the SWRCB now has an environmental document that analyzes, among other things, the effects of requiring compliance with the 1995 outflow objective. In Orders WR 95-6 and 98-09, the SWRCB relied on the Environmental Report for the 1995 Bay-Delta Plan as the environmental documentation and constrained its action to prevent any possibility of adverse effects on the environment. The recently certified EIR uses that 1995 Report as a programmatic document and expands upon the analysis in it for the implementation of the 1995 Bay-Delta Plan. It is, in effect, an extension of the same document.

The SWRCB does not intend, by adopting Condition 2, to imply that the DWR and the USBR have the permanent responsibility to mitigate any and all adverse consequences suffered by fish and wildlife that can be remedied through increased flows. Instead, the purpose of Condition 2 is to ensure that the flow objectives are met while the SWRCB completes the Bay-Delta Water Rights Hearing or November 30, 2001, whichever is sooner. Meeting these objectives is in the

public interest. (See Wat. Code §§ 1253, 1256, 1257; 1258.) Accordingly, Condition 2 is retained in D-1641.

7.0 REQUESTS FOR RECONSIDERATION OF THE APPROVAL OF THE SAN JOAQUIN RIVER AGREEMENT

The SWRCB received several petitions requesting reconsideration of the approval of the SJRA. Merced Irrigation District and Turlock Irrigation District requested reconsideration of the reservoir refill criteria included in the terms and conditions on the approval of their petitions for change. The Natural Heritage Institute and The Bay Institute, and the Department of Fish and Game argue that the SWRCB must adopt the SJRA as its own and make all the findings specified in the SJRA in order to make the SJRA enforceable among its parties. Environmental Defense (ED) and Save San Francisco Bay Association (SSFBA) argue that that the SWRCB must rescind its approval of the SJRA and the associated change petitions because the record does not support the SJRA and because the SWRCB cannot allow implementation of the objectives to be achieved in stages. Alternatively, ED and SSFBA argue that the SWRCB must require full implementation of the VAMP. Central and Southern Delta Parties argue that the SWRCB must rescind all approvals of settlement agreements until it has determined the obligations of the DWR and the USBR.

7.1 The Reservoir Refill Criteria

The conditions in D-1641 that regulate reservoir refill operations require that Merced Irrigation District and Modesto and Turlock Irrigation Districts refrain, at times when the USBR is releasing water from New Melones Reservoir to meet objectives at Vernalis, from refilling[7] their reservoirs to replenish water that they have released for purposes of the SJRA. D-1641 does not fully explain this condition. The purpose of this condition is to protect the junior water rights of the USBR from the effects of the approved long-term changes in the water rights of Merced, Modesto, and Turlock irrigation districts, pursuant to the requirements in Water Code sections 1707 and 1736 that the change will not unreasonably affect any legal user of water and

[7] It should be noted that the last water diverted into a reservoir is accounted as the first water to leave the reservoir. This means that the USBR foregoes storage when there is no excess flow available because any water that otherwise would be stored is instead bypassed.

will not result in substantial injury to any legal user of water, respectively. Modeling indicates that, in the absence of the condition, in a few years of record the approved changes could significantly reduce the amount of water the USBR would make available to its water supply contractors from the New Melones Project.

D-1641 includes bypass of inflow in the refill constraint because when the USBR bypasses inflow to meet the Vernalis objectives it is foregoing water storage. When it foregoes water storage, its ability to deliver water to its water supply contractors is reduced. As discussed in Part 5.1 of this order, a water supply contractor can be protected from the effects of injury to the water right holder from whom it obtains water only when the water right holder does not agree to the effects of the change. Stockton East Water District and Central San Joaquin Water Conservation District, which are water supply contractors, and the City of Stockton, which is in the service area of the contractors, have raised the issue of whether they would suffer reductions in deliveries under some year types due to the change in operations under the SJRA. There is no clear evidence in the record that the USBR agreed to provide water to make up for instream flows that are missing from the river due to increased storage operations late in the diversion season. In the absence of such an agreement, it would be injured within the meaning of sections 1707 and 1736 if the refill condition were changed as requested by Merced and Turlock.

Merced and Turlock irrigation districts seek to limit the refill constraint to times when the USBR is releasing stored water from New Melones Reservoir, but not when the USBR is bypassing inflow to meet water quality objectives. A refill constraint that applies only when the USBR is making releases of stored water from New Melones would be similar to the provisions in SWRCB Standard Permit Term 93, which requires upstream water right holders to cease diversions when the USBR has to release stored water to supplement uncontrolled river flows to meet the Vernalis objectives. Merced and Turlock irrigation districts seek reconsideration because they mistakenly believe that the condition would constitute a reversal of their senior water right priorities by requiring them to contribute to the existing permit responsibilities of the USBR. This is not the purpose of the condition; its function is to avoid shifting the water cost of the flow releases under the SJRA to the USBR's New Melones Project, where the SWRCB has found that the USBR did not agree to provide additional dilution flows to make up for refill

operations. If the USBR had in fact agreed to provide this water, then the refill condition would be amended to insert the word "stored" after "releasing" in the first line of the condition.

Merced and Turlock irrigation districts point out that CVP operations in the San Joaquin basin could increase the dilution requirements at Vernalis independently of any operation under the SJRA, necessitating releases from New Melones Reservoir in excess of those required to make up for reductions to the USBR due to the changes under the SJRA. The refill condition is not intended to require more bypass than is needed to offset the effects of the changes. D-1641 reserves jurisdiction over the long-term changes to make changes consistent with D-1641 and with this order. Accordingly, if the USBR causes an increase in dilution requirements, the Executive Director of the SWRCB can act to ensure that the refill condition is not misused.

7.2 Requests to Adopt the SJRA and Make the Findings Specified Therein

As noted above, petitions for reconsideration filed by the Department of Fish and Game and by Natural Heritage Institute (NHI) and the Bay Institute request that the SWRCB adopt or enter into the SJRA and make all of the findings specified in it. These parties argue that the SJRA is currently unenforceable and provides no assurance that the flows will be provided unless the SWRCB takes the requested steps. Their requests are denied. As is extensively explained in D-1641, the record does not support making all of the suggested findings. Further, the SWRCB's role in this matter is that of a regulator of water rights, not that of a party to a contract.[8] With respect to the SJRA, the SWRCB's role is to decide whether to establish the responsibilities of the parties consistent with the agreement and approve the change petitions brought before it, which it approved. As the adjudicator of the issue whether to approve the change petitions, the SWRCB believes it would be unwise to become a party to the SJRA instead of a regulator. The SJRA is used in D-1641 as evidentiary support for the change petitions and represents a commitment on the part of the affected water right holders to accept certain responsibilities under their water rights. These responsibilities are incorporated into the parties'

[8] The SWRCB encourages parties with diverse interests to reach agreements as to their responsibilities to meet the Bay-Delta objectives, and to submit the agreements to the SWRCB for consideration. The SWRCB has the responsibility to decide, however, what parts of an agreement will be incorporated into a water right decision or order. The parties submitting an agreement should not expect the SWRCB to incorporate an entire agreement into a decision or order.

water rights to the extent appropriate to allow them to operate under the approved changes during the term of the changes. It recognizes that the term could end early, and includes conditions to ensure that the water quality objectives are met until the SWRCB takes further action.

7.3 Requests to Rescind Approval of the SJRA

ED, SSFBA, and the Central and Southern Delta Parties argue that the SWRCB should rescind its approval of the SJRA. This request is denied. Approval of the change petitions and establishment of the parties' responsibilities consistent with the SJRA is justified for the reasons stated in D-1641.

8.0 ISSUES REGARDING USE OF WATER FROM NEW MELONES FOR MEETING OBJECTIVES

The SWRCB in D-1641, at pages 161 and 162, places interim Conditions 2 and 3 on New Melones storage rights, during the term of the SJRA and until the SWRCB establishes alternative implementation thereafter, to ensure that the USBR meets the Vernalis flow objectives if they are not otherwise met. Condition 2 requires the USBR to ensure that the Vernalis flow objectives in the 1995 Bay-Delta Plan are met during the term of the SJRA, except that in the April-May period when experimental flows are required, the USBR is required to meet the experimental flows under the SJRA. Condition 3 requires the USBR to meet the flow objective at Vernalis if the SJRA is terminated, until the SWRCB establishes alternative implementation. Neither of these conditions directs the USBR to release water from New Melones to meet the objectives. Further, footnote 87, applicable to Condition 2, specifies that this condition does not mandate that the USBR use water under these permits to meet this condition if it uses other sources of water or other means to meet the condition. This footnote was added at the request of parties who now argue that Conditions 2 and 3 mandate the release of water from New Melones Reservoir. To ensure that Condition 3 is not construed differently from Condition 2 with respect to the release of water from New Melones Reservoir, Condition 3 will be added to footnote 87.

Stockton East Water District, San Joaquin County, and Central San Joaquin Water Conservation District object to the assignment, under Conditions 2 and 3, of responsibility to the New Melones permits. They argue that requiring the USBR, as a condition of its New Melones permits, to meet the objectives requires an unreasonable use of water or that it unreasonably treats New Melones differently from other CVP projects. These arguments fail, however, because the USBR is not required to release the water from New Melones; it is simply required to make sure water gets to Vernalis in the amounts and at the times specified. This is consistent with the USBR's commitment to backstop the flow requirements for the VAMP experiment under the SJRA. The USBR does not object to this requirement. Further, any objection to the objectives themselves is an objection to the 1995 Bay-Delta Plan, which established the objectives, not D-1641. Finally, it should be noted that the New Melones project, unlike the other CVP facilities, is in a location close to Vernalis where it can conveniently meet the objectives at Vernalis by water releases, and has historically been required to meet Vernalis objectives, whereas other CVP facilities have less influence on Vernalis flows.

9.0 MITIGATION FOR ADDITION OF CVP ENCROACHMENT LANDS

San Luis and Delta-Mendota Water Authority and WWD, and San Luis Water District object to the requirement in D-1641 that the CVP mitigate the effects of its encroachment into areas outside the authorized places of use of water, where the encroached area was not previously farmed. The California Farm Bureau Federation (not a participant) supports their position. Despite the fact that the mitigation requirements in D-1641 are imposed solely on the USBR, these water supply contractors are concerned that the USBR may force them to meet its mitigation responsibility as a condition of renewing their water supply contracts. Further, they are concerned that the USBR may exact from them an unreasonably large mitigation requirement based on D-1641. Finally, they express confusion as to the location of encroached areas that require or do not require mitigation, and suggest that the determination of which lands require mitigation will be left to post-decision determinations. San Luis Water District argues that the SWRCB should have used its 1974 EIR for the lands within its boundaries, and as a result should not require mitigation in its district. WWD argues that Water Code section 37856 authorizes delivery of CVP water to lands that were in WWD at the time when this section was enacted, in 1965. Since Section 37856 was enacted before CEQA was enacted, WWD argues that delivery

of CVP water to the encroachment lands is categorically exempt from CEQA under Section 15261 of Title 14 of the California Code of Regulations. WWD also argues that the delivery of CVP water to WWD did not result in the conversion of native vegetation to agriculture because only previously-irrigated lands were allowed to receive allocations from the CVP. These arguments are addressed below.

First, D-1641 imposes the mitigation conditions for the change of place of use only on the permits of the USBR. Accordingly, these conditions would be enforced only against the USBR. The SWRCB does not control the contractual arrangements the USBR makes with its water supply contractors. Thus, any requirement by the USBR that its contractors provide the mitigation imposed on the USBR is the result of negotiations between the USBR and the contractors and is not due to D-1641. D-1641, however, does not require more mitigation than is necessary to provide a one-to-one compensation for the encroached lands that were converted to irrigated agriculture due to deliveries of CVP water. This will be clarified in D-1641, as set forth below.

Second, the acreage and habitat types encroached in each district by receiving CVP water are shown in the final EIR, in Table 2-36. Accordingly, this is not a post-decision determination. Table 2-36 shows that 10,668 acres of encroached lands in the San Luis Water District were converted from native habitat by the delivery of CVP water supplies. It also shows that 30,607 acres of encroached lands in wwd were converted from native habitat by the delivery of CVP water supplies. Recognizing that the water supply contractors may not have come forward with evidence that certain areas were converted to irrigated agriculture without CVP water deliveries, the SWRCB will give the USBR an opportunity to demonstrate that some of the lands shown in Table 2-36 were in fact converted to irrigated agriculture before they received CVP water.

Regarding the third point, San Luis's argument regarding the use of its 1974 EIR instead of the CPOU EIR is adequately addressed in D-1641. Because of the factors discussed in D-1641, it is not applicable to the project approved in D-1641, and cannot be used as a basis for avoiding mitigation.

Fourth, the Merger Statute, at Water Code section 37856, does not change the place of use boundary of the USBR's water right permits. Accordingly, it does not support WWD's claim of a categorical exemption from the California Environmental Quality Act. The Merger Act merged the West Plains Water Storage District into the WWD, effective June 29, 1965. Water Code section 37856 is included in the Merger Act. This section establishes an order of priority among the various lands within the merged district for their receipt of water under any water service contract with the United States. It provides:

> "Lands which were within the Westlands Water District immediately prior to the merger shall, so long as said lands remain in the said district, have a prior right with respect to water to which said district was entitled under any contract with the United States in effect on the date of said merger over (1) lands added to the Westlands Water District as a result of the merger and (2) lands annexed to the said district subsequent to the merger."

Fifth, WWD argues, based on testimony it presented, that the delivery of CVP water to WWD could not have resulted in the conversion of native vegetation to agriculture because only previously-irrigated lands were allowed to receive allocations from the CVP. This testimony described the general practice of the USBR during certain periods when the individuals testifying were involved in the management of WWD. WWD does not, however, point to any written policies or correspondence from the USBR in the hearing record stating that only previously-irrigated lands could receive CVP water. Thus, it is not clear whether it was always the case that the USBR would not approve deliveries to previously unirrigated lands. Accordingly, the evidence is not adequate to change the acreage listed in the final EIR as the acreage of encroachment lands in WWD that were converted from native habitat due to deliveries of CVP water. Nevertheless, it is the intention of the SWRCB in D-1641 that the only encroached lands requiring mitigation as a result of their addition to the CVP place of use are those that were converted from native habitat due to deliveries of CVP water.

To clarify that the amount of mitigation required by D-1641 does not exceed a one-to-one compensation for acreage converted, and that the USBR can obtain reductions in the mitigation required under D-1641 by proving that fewer encroached lands were converted due to deliveries

of CVP water than are specified in D-1641, Condition 3 on pages 164 and 165 is amended. The changes are in three places.

1. The two paragraphs of Condition 3 on page 164 of D-1641, addressing mitigation for the addition of lands to the place of use of the CVP, are amended to read:

> "Except as provided below, Permittee shall provide compensation and habitat values equivalent to those that were associated with the lands (encroachment lands) that were receiving CVP water prior to being added to a CVP place of use on December 29, 1999, provided that such lands were converted from native habitat as a result of application of CVP water. The maximum total habitat compensation required by this term is the equivalent of the 45,390 acres of habitat identified in the final EIR for the Consolidated and Conformed Place of Use as having been converted from native habitat as a result of the delivery of CVP water. The habitat compensation shall consist substantially of the following mix of habitats:
>
> - 3 acres of valley-foothill hardwood-conifer
> - 1 acre of mixed chaparral
> - 4,278 acres of valley-foothill riparian/fresh emergent wetland
> - 17,944 acres of annual grassland
> - 23,165 acres of alkali scrub
>
> In any event, the acreage set aside for habitat compensation pursuant to this condition shall not exceed 45,390 acres, less any reductions approved by the Executive Director in accordance with the following guidelines. If approved by the Executive Director of the SWRCB, the maximum amount of habitat compensation and acreage set forth above may be reduced at the rate of one acre for one acre if the Permittee demonstrates that one or more of the following circumstances exist with respect to a specified encroached area within the 45,390 acres: (1) the encroachment is not subject to CEQA because it occurred prior to the effective date of CEQA; (2) the encroachment has been previously mitigated through measures equivalent to the habitat compensation that would satisfy this permit term; (3) the encroachment occurred after the land involved was converted to agriculture from native habitat.
>
> For the purpose of providing habitat values that compensate for those associated with the converted lands subject to this term, Permittee shall identify, define and delineate existing habitats of

special status plant and animal species within the habitat types listed above in consultation with DFG and the USFWS. Upon delineation of these habitats, Permittee shall develop, in consultation with DFG and the USFWS, an upland species Habitat Management Plan (HMP) with specific mitigation measures, funding methods and schedules. Suitable mitigation for the impacts to the habitat converted, up to mitigation for 45,390 acres of habitat, could consist of several different programs to acquire, maintain, and restore the habitat values needed to support the listed species that were previously found on these lands. Measures to obtain these habitat values could include, but are not limited to:"

2. A sentence is added after the first sentence of the second paragraph on page 165 (which ends "18 months after the date of this order.") to read:

"If the Permittee elects to provide compensation through habitat acquisition, the acreage acquired shall be deemed to provide, for each habitat type acquired, equivalent habitat values to those lost through conversion of an equal acreage of that habitat type to irrigated agriculture, except where the Permittee demonstrates that a lesser acreage of replacement habitat will provide habitat of equivalent value to the acreage that has been converted."

3. The second sentence of the fourth paragraph ("Any reductions in the habitat compensation ….") on page 165 of D-1641 is amended to read:

"Any reductions in the habitat compensation due to the encroachment preceding CEQA, or due to previous mitigation equivalent to the habitat compensation required herein, or due to the encroachment having occurred after the land involved was converted to irrigated agriculture from native habitat, shall be subject to notice to interested parties."

10.0 TREATMENT OF CVP EXPANSION AREAS

In D-1641, the SWRCB partially approved the USBR's petitions for change of place of use, consolidating the authorized places of use and authorizing use of water in areas where CVP water service already had encroached. The EIR did not analyze the environmental effects of

expanding the CVP place of use into areas not currently served.[9] Accordingly, the hearing notice did not include consideration of the expansion areas. The notice states, on page 3, "Approval of the change petition would consolidate the places of use of many of the CVP water right permits, expand the places of use to include areas where CVP water is being used outside and authorized place of use, and conform all of the purposes of use under the group of CVP permits that are subject to the petition." This states the limit of the actions that the SWRCB contemplated taking as a result of the noticed hearing. In D-1641, the SWRCB additionally found that it cannot approve an expansion into these areas in the absence of environmental documentation. Accordingly, the SWRCB approved only the parts of the changes of place of use that encompass the encroached areas.

In its petition for reconsideration, Santa Clara Valley Water District (SCVWD) argues that in D-1641 the SWRCB should have expanded the CVP place of use to the boundaries of its district. SCVWD makes three arguments: that the entire district is currently within the CVP place of use, that the environmental effects of delivering CVP water to the entire county have been addressed, and that if the place of use is not the entire county, the state and federal government will get involved in local land use planning.

Because the SWRCB in D-1641 did not take any action with respect to the expansion areas, there is no action to reconsider. The expansion areas could not be considered in D-1641 because the environmental documentation prepared for the Bay-Delta Water Rights Hearing by the USBR did not include a project-level analysis of the expansion areas. Thus, the SWRCB has not denied the petitions with respect to expansion; it has simply not acted in this regard.

Regarding SCVWD's first argument, the place of use maps that were on file with the SWRCB prior to D-1641 did not include the expansion areas. The place of use was the areas shown on the maps. The expansion areas are not, under any reasonable interpretation of the maps, within the boundaries on the maps. The USBR argued at the hearing that the maps do not represent the place of use. The permits of the USBR, however, refer to the maps to describe the place of use.

[9] The expansion area exceeds 700,000 acres statewide.

This is consistent with the Water Code, which requires that the place of use of water be specified, and that any changes in the place of use be requested from the SWRCB. (Wat. Code §§ 1260-1262; 1701 et seq.) The SWRCB consistently uses either a specific delineation on a map or a metes and bounds description to specify the place of use of water in a permit or license. In the absence of such a description, the requirement to specify the place of use would be meaningless, and would fail to protect other interests that could be affected by changes in the places where water is used. In the case of the CVP places of use, which cover vast areas, maps describe the places of use. In the SCVWD service area, the place of use map delineates an area that primarily covers the low-lying lands in the Santa Clara Valley, and does not include the mountainous areas.

SCVWD's second argument is that the environmental effects of delivering water to the entire county have been addressed, and therefore the expansion can be approved. The SWRCB does not have evidence in the hearing record that an environmental document analyzes the effects of expansion into areas of SCVWD outside the approved place of use. SCVWD entered in evidence, during Phase 7 of the hearing, a summary of a final EIR for the San Felipe Water Distribution System dated March 1976. The summary indicates that the EIR analyzes the effects of building a water distribution system in the district. The SWRCB is not listed as a responsible agency for the project in the summary; nor is there any other indication that the EIR contains an analysis of the effects of using water in areas where it has not previously been applied. Even if the document described in the summary addresses the change of place of use, the EIR itself has not been entered in the hearing record, and therefore cannot be used by the SWRCB in D-1641.

SCVWD's third argument is that if the SWRCB does not expand the place of use in its service area, the SWRCB and the USBR will interfere with local land use matters. This argument misrepresents the roles of the SWRCB and the USBR. The state has a regulatory and ownership interest in the water and the USBR has a proprietary interest in the use of the water it has appropriated. All water in California is the property of the people of the state. (Wat. Code § 102.) The SWRCB is required to regulate the diversion, purpose of use, and place of use of water. In effect, SCVWD is arguing that it should not be subjected to the same regulatory requirements that affect other water supply contractors who buy water from water right holders.

In D-1641, the SWRCB approved a limited change in place of use that includes the areas within SCVWD where there was evidence that CVP water service already has encroached. Accordingly, it can be assumed that SCVWD's current water use is within the CVP place of use approved in D-1641. Further, SCVWD has a course of action to increase the CVP place of use within its service area if it does not wish to limit the places where it delivers CVP water in the future. SCVWD can prepare, for the USBR, a petition for change of place of use of the CVP permits to add specified lands. The petition would be submitted to the USBR for filing with the SWRCB, and would require adequate environmental documentation under CEQA. SCVWD, as a local agency, could be the lead agency for the environmental documentation. The SWRCB would process the petition for change in accordance with its regulations. In the absence of protests, the SWRCB can process a petitioned change within a few months.

11.0 SALINITY CONTROL IN THE SOUTHERN DELTA

D-1641 requires the USBR to meet the Vernalis salinity objective in the southern Delta, and requires the USBR and the DWR to meet immediately a salinity requirement of 1.0 mmhos/cm at the interior southern Delta stations all year. Commencing on April 1, 2005, D-1641 requires the DWR and the USBR to meet a salinity objective of 0.7 mmhos/cm during the months of April through August, unless other measures, such as permanent barriers in the southern Delta channels, are implemented that reasonably protect southern Delta agriculture. D-1641 discusses drainage measures that could be used in the San Joaquin Valley to remove salts, and urges the USBR to resolve the drainage problems promptly. D-1641 adds a term to the USBR's water right permits, requiring a report in five years if the drainage problems have not been resolved in a way that causes the salinity objectives to be consistently achieved, but D-1641 does not mandate specific measures to resolve the drainage problems.

The Stockton East Water District, Central San Joaquin Water Conservation District, City of Stockton, and San Joaquin County and San Joaquin County Flood Control and Water Conservation District, seek reconsideration of the requirement that the USBR control salinity at Vernalis using water releases from New Melones if necessary. These parties obtain water from the New Melones Project, and they seek to reduce the amount of water dedicated to meeting flow

and salinity objectives using water from the New Melones Project. These parties are asking the SWRCB to require other means, such as control of discharges of saline water to the San Joaquin River, to meet the objectives. Some of these parties specifically request that the SWRCB require the USBR to construct a San Joaquin Valley drain. Some of these parties asked the SWRCB to order the regional board to adopt and implement salinity objectives for the San Joaquin River upstream of Vernalis. Environmental Defense and Save San Francisco Bay Association, on the other hand, argue that any discussion of the San Luis Drain is improper.

The Central and Southern Delta Parties ask the SWRCB to require the DWR and the USBR to meet immediately the salinity objectives in the southern Delta, including the Vernalis objective.

Contra Costa Water District requests a change in the time periods when export pumping under the JPOD is restricted to protect Contra Costa's water diversions, from September to July, and also seeks protection against increases in salinity that do not exceed the objective.

11.1 The Use of Flow to Control Salinity at Vernalis

The parties who use water from the New Melones Project under water supply contracts argue that water should be used to dilute salts in the San Joaquin River only if other means do not succeed in meeting the objectives. These parties recommend several measures, including curtailing export of water into the San Joaquin basin, drainage measures, and requiring the regional water quality control board to adopt and implement water quality objectives for salinity upstream of Vernalis. These parties object to the D-1641 conditions that impose specific requirements upon New Melones Reservoir while imposing more general requirements on the other water rights of the USBR.

The requirement that the New Melones project provide salinity control at Vernalis in the southern Delta is not new. It has existed in the New Melones water right permits since the permits were first issued. D-1641 amends the previous salinity control condition in the New Melones permits. D-1641, for the first time, explicitly allows the USBR to meet the salinity objective at Vernalis through means other than flow releases from New Melones. Thus, the complaining parties are actually objecting to the continuation of a requirement that has been

amended in D-1641 to ease the burden on New Melones compared with the past Vernalis salinity control requirement. One of the functions of New Melones is to provide salinity control in the southern Delta. Although other means of controlling salinity in the San Joaquin River would conserve fresh water for other uses, those means, some of which are described below, are not yet implemented.

D-1641 directs the regional board promptly to develop and adopt salinity objectives and a program of implementation for the San Joaquin River upstream of Vernalis. The SWRCB intends that this directive will be carried out, but the regional board is not a party in the hearing, is not a water right holder whose permits or licenses may be amended, and has its own responsibility to exercise its discretion in water quality matters. Accordingly, the directive is in the findings, not in the order of D-1641.

D-1641 discusses drainage control as a means of reducing the salt loads reaching the southern Delta. Drainage control is an appropriate measure to help meet the objectives. D-1641 does not, however, mandate that the USBR construct the San Luis Drain. D-1641 calls upon the USBR to investigate all alternatives including, but not limited to, the feasibility of out of valley alternatives, as soon as possible. Recently, a court reviewing the USBR's drainage obligation agreed that the USBR has discretion in selecting the drainage measures. The findings in D-1641 will be amended to reflect the court's recent opinion. At the end of the first sentence of the last paragraph on page 86 of D-1641, a footnote is added, to read:

> "In *Firebaugh Canal Co., et al*. v. *United States of America, et al*., United States Court of Appeals, Ninth Circuit, Nos. 95-15300 and 95-16641 (opinion filed February 4, 2000), the federal Court of Appeals construed this statute in light of subsequent legislation, holding that the USBR still has an obligation under the San Luis Act to provide drainage service, but has discretion as to how it satisfies this requirement."

These parties also suggest that the SWRCB require the USBR to curtail exports to the west side of the San Joaquin Valley from the southern Delta in an effort to control salinity. The SWRCB prefers to have this issue addressed through drainage control and other measures set forth in the 1995 Bay-Delta Plan at pages 30-33.

11.2 Current and Continuing Implementation of the Vernalis Salinity Objective

The Central and Southern Delta Parties read a condition in the Order in D-1641 as suspending the Vernalis salinity requirement for five years. The referenced condition is not a time extension. The condition requires the USBR to report to the Executive Director of the SWRCB in five years if the USBR is not able to consistently meet the Vernalis objectives. This condition recognizes that the USBR has not met the objective consistently, and sets a deadline for taking further action. The condition, however, can be stated more clearly. Accordingly, the condition, which is set forth in D-1641 at page 160, third paragraph, page 161, fourth paragraph, and page 163, second paragraph, is amended to read as follows:

> "Licensee/Permittee shall, at all times, meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis. Licensee/Permittee may meet these objectives through flows or other measures. Licensee/Permittee shall develop a program under which it will meet these objectives consistently. Licensee/Permittee shall conduct modeling and planning studies to evaluate the effectiveness of its program to meet the Vernalis water quality objectives. If, within five years, Licensee/Permittee has not developed a program under which it will consistently achieve the Vernalis objectives, Licensee/Permittee shall report to the Executive Director of the SWRCB all actions it has taken in attempting to meet the objectives, including drainage and management alternatives. The Executive Director of the SWRCB will evaluate the report and will decide whether further action should be taken by the SWRCB to ensure that the objectives are met."

11.3 Effects of D-1641 on Contra Costa Water District

CCWD requests three changes in D-1641 that are relevant to southern Delta salinity. First, CCWD expressed concern that if the DWR and the USBR use the joint points of diversion, the salinity at CCWD's intakes on the Contra Costa Canal or at Old River could increase significantly. CCWD requests that the DWR and the USBR be required to develop a response plan to protect salinity levels at CCWD's diversions. The SWRCB will add consultation with CCWD and the preparation of a response plan to the conditions on the JPOD in D-1641, to ensure that the salinity levels at CCWD's intakes are protected from the effects of the JPOD. This order adds condition 1.a.(5) at page 151 and condition 2.a.(5) to D-1641 at page 156, to read as follows:

> "(5) Permittee shall develop a response plan to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of the Joint Points of Diversion to the injury of water users in the southern and central Delta. Such a plan shall be prepared with input from the designated representative of the Contra Costa Water District and approved by the Chief, Division of Water Rights."

Second, CCWD requests a correction in the months when restrictions in export pumping are imposed on the use of the Joint Point of Diversion, to substitute July for September in condition 1.a.(1)(b) on page 151 and condition 2.a.(1)(b) on page 156. D-1641 is corrected to read as follows:

> "(b) It is east of Collinsville (81 kilometers upstream of the Golden Gate bridge) during the months of January, June, July and August, or"

Third, CCWD requests that the SWRCB require the DWR and the USBR to mitigate the effects of the construction and operation of the southern Delta barriers on water quality. CCWD also requests that the SWRCB find that construction and implementation of the barriers will require additional terms and conditions on the permits of the DWR and the USBR. CCWD's comments indicate a need for clarification of the discussion regarding the barriers. D-1641 does not require construction of the barriers. D-1641 does, however, state that the SWRCB encourages the DWR and the USBR to find ways to attain the benefits of the barriers while avoiding or mitigating the adverse effects of the barriers. (Emphasis added; see page 12, D-1641.) The SWRCB agrees with CCWD that if the DWR and the USBR decide to construct the barriers, they should mitigate any resulting adverse effects on water quality. The SWRCB, however, clarifies that it is not the agency that will decide whether to build the barriers and operate them. Further, it would be premature for the SWRCB to find, on the current hearing record, that construction of the barriers will necessarily require additional terms and conditions on the permits of the DWR and the USBR.

12.0 IMPLEMENTATION OF THE NARRATIVE SALMON DOUBLING OBJECTIVE

Several parties argued that the SWRCB is obligated to implement the narrative salmon doubling objective in the southern Delta in the current proceeding. The narrative salmon doubling objective may not be fully implemented as a result of this proceeding. The current proceeding addresses implementation of the objectives in the 1995 Bay-Delta Plan that can be implemented through flows. If the requirements in D-1641 and any future decision in this proceeding do not incidentally result in the objective being met, measures in addition to flow will be needed. Such measures are outside the scope of the current proceeding. Other agencies are working toward meeting the objective. Water Code section 13242, subdivision (a), provides that entities in addition to the SWRCB may need to take actions to achieve water quality objectives. Pursuant to section 13242, the program of implementation in the 1995 Bay-Delta Plan states that actions of other agencies will be needed to implement this objective.

13.0 USE OF THE BAY-DELTA EIR IN FUTURE BAY-DELTA DECISION MAKING

Before the SWRCB adopted D-1641 and certified the Bay-Delta EIR, the SWRCB clarified the use of the Bay-Delta EIR in future proceedings. In response to comments from the Sacramento Valley Water Users (SVWU), D-1641, at page 134, points out that a series of decisions may be made on different parts of a project, with all of the decisions relying on a single EIR. After each decision that relies on the Bay-Delta EIR, the SWRCB will file a notice of determination under CEQA, and a new limitation period will commence for causes of action under CEQA. D-1641 is the first in what may be a series of decisions that will rely on the Bay-Delta EIR or on the Bay-Delta EIR with supplemental environmental documentation. The water rights of members of the SVWU are not affected by D-1641, but they may be assigned responsibility to meet the objectives in a future decision that relies on the Bay-Delta EIR.

In D-1641, the SWRCB assured the SVWU that its members would have the opportunity to litigate CEQA issues regarding the use of the Bay-Delta EIR in connection with a future water right decision that relies on the EIR. In other words, to maintain their legal position regarding the adequacy of the EIR, they do not need to file their CEQA lawsuit before the SWRCB makes a decision affecting them that may rely on the Bay-Delta EIR. The SVWU seeks additional

assurance that its members will not be precluded, after a future water right decision to implement the 1995 Bay-Delta Plan, from challenging the adequacy of the Bay-Delta EIR to support the future decision. The SVWU argues that the applicable law is ambiguous. Accordingly, it requests that the SWRCB state unambiguously that if it relies on the Bay-Delta EIR to support any future decision to implement the 1995 Bay-Delta Plan, the SWRCB will file a new notice of determination after each such decision. The SVWU seeks changes on pages 6 and 134.

The SWRCB does not intend to preclude any parties affected by future decisions resulting from the Bay-Delta Water Rights Hearing from having the opportunity to challenge the use of the environmental documentation relied upon in the future decision. Further, CEQA requires that the adoption of each new decision that relies on a given EIR will trigger a new limitation period for filing petitions for writ of mandate under CEQA. Nevertheless, the SVWU seeks further assurance. Accordingly, D-1641 is amended to provide further clarification.

The language on page 6 does not refer to CEQA. Consequently, it is amended to avoid confusion. On page 6, Part 3.0, the title is amended as follows: ~~PROJECT DESCRIPTION~~ PURPOSE OF THIS PROCEEDING. The first sentence is amended as follows: "The ~~project in this matter~~ purpose of the proceeding in which this decision is made is to adopt ~~a~~ water right ~~decision or~~ decisions that will accomplish three goals." In the same paragraph on page 6, add two sentences at the end of the paragraph, reading: "This decision partially accomplishes the first goal, and accomplishes the second and third goals. Future decisions in this proceeding will address completion of the first goal."

The language on page 134 addresses CEQA compliance. The fifth and sixth sentences in the first paragraph are amended as follows:

> "With respect to actions taken in any future SWRCB decision ~~using~~ that relies upon the Bay-Delta EIR certified on December 29, 1999, or upon the December 29, 1999 EIR and a supplement, a new limitation~~s~~ period~~s~~ will commence at the time of ~~the~~ each future decision for parties to request reconsideration of the decision by the SWRCB and to seek judicial review of

the decision based on any causes of action under either CEQA[10] or under provisions governing petitions for writ of mandate. At that time When the SWRCB adopts a new decision that is subject to CEQA, the SWRCB intends to will file a new notice of determination under CEQA. Any new notice of determination for a decision that relies on the Bay-Delta EIR certified on December 29, 1999, or on that EIR as supplemented, will state that the Bay-Delta EIR is relied upon by the SWRCB in adopting the decision."

In addition to seeking assurance that it could file any CEQA litigation after a decision is made that addresses its members' water rights, SVWU filed a petition for writ of mandate under CEQA, concurrently with its petition for reconsideration. Having filed a petition for reconsideration, SVWU did not have to file the petition for writ of mandate at the same time. Under Water Code section 1126(b), the time for filing a petition for writ of mandate is extended for any person who seeks reconsideration of a decision made by the SWRCB. The SWRCB interprets this section to extend the time for filing all causes of action that may be the basis of a petition for writ of mandate challenging a decision or order of the SWRCB, including CEQA causes of action.

14.0 ADEQUACY OF SUISUN MARSH PROTECTIONS

Golden Gate Audubon Society, et al., (GGAS) seeks reconsideration of the SWRCB's determination in D-1641 to remove the compliance requirement at the two westernmost monitoring stations in the Suisun Marsh, stations S-35 and S-97. GGAS did not appear in the hearing or present evidence. GGAS argues that in D-1641 the SWRCB abuses its discretion and ignores applicable law by not requiring compliance with the Suisun Marsh objectives at these two stations. GGAS argues that a compliance requirement is necessary in order to protect the beneficial uses in the marsh.

The SWRCB removed the requirement to meet the objectives at S-35 and S-97 based on the recommendation of the parties, including the US Fish and Wildlife Service, that these stations not be implemented. Evidence received in the hearing, which is newer and more reliable than the information that GGAS cites, shows that the environment of the western Suisun Marsh

[10] A cause of action under CEQA filed by a party seeking judicial review may include, but is not limited to, any challenge regarding the adequacy of the Bay-Delta EIR, as it may be supplemented, to support the decision.

requires variability in salinity levels in order to protect the beneficial uses of water in that area. In other words, the steady-state salinity levels advocated by GGAS could harm, rather than help, the beneficial uses in the western Suisun Marsh. The changes in the Suisun Marsh protections GGAS seeks are therefore denied.

15.0 DELEGATION OF AUTHORITY TO BOARD STAFF

San Joaquin County objected to the SWRCB delegating authority to its staff to administer terms and conditions in D-1641. The County characterizes the authorities delegated as being quasi-judicial in nature, and claims that the delegations lack provisions for further review or guidance from the SWRCB.

The County's characterization of the delegations of authority in D-1641 is sweeping, and does not address with specificity any particular delegation of authority. These delegations are not quasi-judicial in nature or lacking in requirements to give notice to the parties and an opportunity for response where such is necessary to provide due process. Nor do the delegations lack guidance to the Executive Director or provisions for further review where appropriate. The delegations of authority in D-1641 are administrative in nature, and do not delegate authority to make changes in the water rights of the parties without notice and an opportunity for a hearing. If a hearing is needed, a member of the SWRCB will conduct it. The delegations ensure the prompt and efficient administration of the provisions in the order. Accordingly, the County's request for reconsideration of the delegations of authority is denied.

16.0 CORRECTIONS TO D-1641

Separately from its petition for reconsideration, the Department of Water Resources requested correction of two clerical errors in D-1641. In both cases, the changes requested should be made. The first change was adopted with the decision, as part of the addendum to the errata, but did not appear in the published final version of D-1641. It is a part of D-1641, and is added at the end of condition 6 on page 159, as follows:

> "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."

The second change is on page 162, in the first sentence under the first table, and on page 167, in the first sentence of the second paragraph under the first table. In both places the sentence is amended to read: During years when the sum of the current year's 60-20-20 indicator and the previous ~~years'~~year's 60-20-20 indicator is seven (7) or greater...."

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied, and that SWRCB Decision 1641 is amended as follows:

1. On page 6, Part 3.0, the title is amended as follows:

~~PROJECT DESCRIPTION~~PURPOSE OF THIS PROCEEDING.

The first sentence is amended as follows: "The ~~project in this matter~~ purpose of the proceeding in which this decision is made is to adopt ~~a~~ water right ~~decision or~~ decisions that will accomplish three goals." In the same paragraph on page 6, two sentences are added at the end of the paragraph, reading: "This decision partially accomplishes the first goal, and accomplishes the second and third goals. Future decisions in this proceeding will address completion of the first goal."

2. The last sentence in the third paragraph on page 33, which reads, "SWRCB Order WR 89-8 concludes that southern Delta riparian right holders have no right to water from the Sacramento River." is deleted.

3. The text in 6.3.4.2.3 on pages 34 and 35 is stricken, and is replaced with the following paragraph:

SDWA claims to represent legal users of water who would be injured as a result of the long-term water right changes. SDWA argues that in-Delta water users have a right to have water provided to them by the DWR and the USBR pursuant to the Delta Protection Act, even if they have no water available to

them under riparian or appropriative water rights at a given time. Whether or not the DWR and the USBR have an obligation to provide water to in-Delta water users, however, is irrelevant to the question of whether the long-term changes will cause injury to a legal user of water.

4. At the end of the first sentence of the last paragraph on page 86 of D-1641, a footnote is added, to read:

> "In *Firebaugh Canal Co., et al*. v. *United States of America, et al*., United States Court of Appeals, Ninth Circuit, Nos. 95-15300 and 95-16641 (opinion filed February 4, 2000), the federal Court of Appeals construed this statute in light of subsequent legislation, holding that the USBR still has an obligation under the San Luis Act to provide drainage service, but has discretion as to how it satisfies this requirement."

5. On page 101 of D-1641, the two paragraphs following the partial paragraph at the top of page 101, and the quotation of section 11128 of the Water Code, are deleted.

6. The last paragraph starting on page 130 is amended as follows. Footnote 75 is deleted.

> "~~In view of the foregoing discussion, the SWRCB finds that the water service contractors are not injured legal users of water within the meaning of Water Code section 1702, and consequently are not entitled to the protection of Water Code section 1702.~~In view of the foregoing discussion, the SWRCB finds that section 1702 is not an appropriate basis for WWD to raise this issue, which essentially is a dispute between a contractor and its water supplier. This decision does not preclude water service contractors from protesting changes in existing water rights or applications for new water rights. Such contractors can file protests based on public interest grounds or on environmental and public trust grounds. Water service contractors may also file protests based on injury to the water right holder on whom they rely for deliveries under their water service contracts. Application of the "no injury" rule is not the proper basis for determining contractual or other claims between a water service contractor and the water right holder who supplies water under contract where those claims are not based on the proprietary water rights of the water service contractor. Where a water right holder proposes or agrees to a change, there can be no injury to that water right holder. Therefore, where a change is proposed by a water right holder, any protest based on the potential for reduced deliveries to water service contractors, whose contractual entitlements are dependent on the water rights of the water right holder, must be based on other legal grounds. The petitioned change of purpose of use will allow the USBR to operate efficiently

without violating its water right permits. Accordingly, the petitioned change of purpose of use is approved."

7. On page 134, the fifth and sixth sentences in the first paragraph are amended as follows:

"With respect to actions taken in any future SWRCB decision ~~using~~ that relies upon the Bay-Delta EIR certified on December 29, 1999, or upon the December 29, 1999 EIR and a supplement, a new limitation~~s~~ period~~s~~ will commence at the time of ~~the~~ each future decision for parties to request reconsideration of the decision by the SWRCB and to seek judicial review of the decision based on any cause~~s~~ of action under either CEQA[11] or under provisions governing petitions for writ of mandate. ~~At that time~~ When the SWRCB adopts a new decision that is subject to CEQA, the SWRCB ~~intends to~~ will file a new notice of determination under CEQA. Any new notice of determination for a decision that relies on the Bay-Delta EIR certified on December 29, 1999, or on that EIR as supplemented, will state that the Bay-Delta EIR is relied upon by the SWRCB in adopting the decision."

8. Condition 1.a.(1)(b) on page 151 and condition 2.a.(1)(b) on page 156 are corrected to read as follows:

"(b) It is east of Collinsville (81 kilometers upstream of the Golden Gate bridge) during the months of January, June, July and August, or"

9. Condition 1.a.(5) at page 151 and condition 2.a.(5) to D-1641 at page 156, are added to read as follows:

"(5) Permittee shall develop a response plan to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of the Joint Points of Diversion to the injury of water users in the southern and central Delta. Such a plan shall be prepared with input from the designated representative of the Contra Costa Water District and approved by the Chief, Division of Water Rights."

10. On page 159, at the end of Condition 6, insert:

[11] A cause of action under CEQA filed by a party seeking judicial review may include, but is not limited to, any challenge regarding the adequacy of the Bay-Delta EIR, as it may be supplemented, to support the decision.

"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."

11. Footnote 87, on page 160, is amended to read:

"Conditions 1, 2, and 3 below do not mandate that the Permittee use water under these permits to meet these conditions if it uses other sources of water or other means to meet these conditions."

12. The conditions at page 160, third paragraph; page 161, fourth paragraph; and page 163, second paragraph, are amended to read as follows:

"Licensee/Permittee shall, at all times, meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis. Licensee/Permittee may meet these objectives through flows or other measures. Licensee/Permittee shall develop a program under which it will meet these objectives consistently. Licensee/Permittee shall conduct modeling and planning studies to evaluate the effectiveness of its program to meet the Vernalis water quality objectives. If, within five years, Licensee/Permittee has not developed a program under which it will consistently achieve the Vernalis objectives, Licensee/Permittee shall report to the Executive Director of the SWRCB all actions it has taken in attempting to meet the objectives, including drainage and management alternatives. The Executive Director of the SWRCB will evaluate the report and will decide whether further action should be taken by the SWRCB to ensure that the objectives are met."

13. On page 162, in the first sentence under the first table, and on page 167, in the first sentence of the second paragraph under the first table, the sentence is amended to read:

During years when the sum of the current year's 60-20-20 indicator and the previous ~~years'~~year's 60-20-20 indicator is seven (7) or greater...."

14. Condition 3 on pages 164 and 165 is amended. The changes are in three places, as follows.

a. The two paragraphs of Condition 3 on page 164 of D-1641, addressing mitigation for the addition of lands to the place of use of the CVP, are amended to read:

"Except as provided below, Permittee shall provide compensation and habitat values equivalent to those that were associated with the lands (encroachment lands) that were receiving CVP water prior to being added to a CVP place of use on December 29, 1999, provided that such lands were converted from native habitat as a result of application of CVP water. The maximum total habitat compensation required by this term is the equivalent of the 45,390 acres of habitat identified in the final EIR for the Consolidated and Conformed Place of Use as having been converted from native habitat as a result of the delivery of CVP water. The habitat compensation shall consist substantially of the following mix of habitats:

- 3 acres of valley-foothill hardwood-conifer
- 1 acre of mixed chaparral
- 4,278 acres of valley-foothill riparian/fresh emergent wetland
- 17,944 acres of annual grassland
- 23,165 acres of alkali scrub

In any event, the acreage set aside for habitat compensation pursuant to this condition shall not exceed 45,390 acres, less any reductions approved by the Executive Director in accordance with the following guidelines. If approved by the Executive Director of the SWRCB, the maximum amount of habitat compensation and acreage set forth above may be reduced at the rate of one acre for one acre if the Permittee demonstrates that one or more of the following circumstances exist with respect to a specified encroached area within the 45,390 acres: (1) the encroachment is not subject to CEQA because it occurred prior to the effective date of CEQA; (2) the encroachment has been previously mitigated through measures equivalent to the habitat compensation that would satisfy this permit term; and (3) the encroachment occurred after the land involved was converted to agriculture from native habitat.

For the purpose of providing habitat values that compensate for those associated with the converted lands subject to this term, Permittee shall identify, define and delineate existing habitats of special status plant and animal species within the habitat types listed above in consultation with DFG and the USFWS. Upon delineation of these habitats, Permittee shall develop, in consultation with DFG and the USFWS, an upland species Habitat Management Plan (HMP) with specific mitigation measures, funding methods and schedules. Suitable mitigation for the impacts to the habitat converted, up to mitigation for 45,390 acres of habitat, could consist of several different programs to acquire, maintain, and restore the habitat values needed to support the listed species that were previously found on these lands.

Measures to obtain these habitat values could include, but are not limited to:"

b. A sentence is added after the first sentence of the second paragraph on page 165 (which ends "18 months after the date of this order.") to read:

"If the Permittee elects to provide compensation through habitat acquisition, the acreage acquired shall be deemed to provide, for each habitat type acquired, equivalent habitat values to those lost through conversion of an equal acreage of that habitat type to irrigated agriculture, except where the Permittee demonstrates that a lesser acreage of replacement habitat will provide habitat of equivalent value to the acreage that has been converted."

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c. The second sentence of the fourth paragraph ("Any reductions in the habitat compensation ….") on page 165 of D-1641 is amended to read:

> "Any reductions in the habitat compensation due to the encroachment preceding CEQA, or due to previous mitigation equivalent to the habitat compensation required herein, or due to the encroachment having occurred after the land involved was converted to irrigated agriculture from native habitat, shall be subject to notice to interested parties."

15. On pages 169 and 170, Condition 3 on the licenses of Merced Irrigation District and the condition on the licenses of Modesto and Turlock Irrigation District are amended by adding the following text at the end of the conditions:

> "The Executive Director of the SWRCB is delegated authority to ensure that this condition is not used by the USBR to increase the obligation of Licensee."

CERTIFICATION

The undersigned, Administrative Assistant 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 Resources Control Board held on March 15, 1999.

AYE:

NO:

ABSENT:

ABSTAIN:

/ s /
Maureen Marché
Administrative Assistant to the Board