

SOUTH DELTA WATER AGENCY

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July 19, 2017

Via E-mail michael.lauffer@waterboards.ca.gov

Mr. Michael Lauffer
Acting Executive Director
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Re: Revised Compliance Plan regarding Order WR 2010-0002

Dear Mr. Lauffer:

The South Delta Water Agency is in receipt of the DWR and USBR ("Projects") letter of June 19, 2017 (Letter") which includes what is purported to be the Revised Compliance Plan ("Plan") mandated under Order WR 2010-0002 ("CDO"). It is important to note that, according to SDWA's reading of the CDO, the Plan was due 180 days after January 1, 2013. However, the Delta Watermaster graciously gave the projects the benefit of the doubt regarding their confusion over the language in the CDO and in December of 2016 (nearly 3 ½ years after the CDO deadline) further extended the deadline until June of 2017.

For some perspective, SDWA also notes that since April, 2005 (the date the current water quality standards in the southern Delta became fully effective) hundreds of violations of southern Delta salinity standards have occurred. During that time, SDWA has not filed any complaint with the SWRCB against DWR or USBR, while DWR, USBR, various export contractors, upstream interests and SWRCB staff have initialed legal and regulatory proceeding to challenge local water rights and to avoid the Projects' obligations to protect Delta water quality. SDWA's goals remain the same: to stop other parties from adversely affecting local diverters, to see that current laws and regulations are enforced and to require mitigation of adverse impacts visited upon the southern Delta. SDWA has not sought to prevent exports at any time while pointing out that exports harm local diverters each and every year.

As will be discussed in more detail later, the Plan outlined in the Letter is little more than a list of ongoing processes and efforts, some of which are only tangentially relevant to the mandates of the CDO and the southern Delta salinity problem. The Letter fails at any level to satisfy the CDO. Unless and until the SWRCB enforces the relevant permit terms and the requirements of the CDO the Projects will expend little or no effort to address the salinity problem and will continue to ignore their own permit conditions. The time has come for action. It has been 22 years since the 1995 Water Quality Control Plan was adopted and 17 years since D-1641 assigned DWR and USBR responsibility for meeting southern Delta salinity objectives. It is now the SWRCB's choice: enforce permit conditions or continue to ignore their ongoing violation to the detriment of southern Delta agricultural beneficial users.¹

The Letter suffers from a number of faults. The first is a false premise misinterpreting the mandates in D-1641. The Letter states that the SWRCB "has never made ... a finding" that the Projects are a "cause" of the water quality violations in the southern Delta.² DWR and USBR assert that their permit conditions are *not really* conditions unless the SWRCB first finds that any violation of the objectives was their fault. This odd position turns the actual language of D-1641 upside down.

D-1641 states that "If Permittee exceeds the objectives [in the southern Delta] 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 is appropriate or the non-compliance is the result of actions beyond the control of the Permittee" (D-1641 at page 159, 161 and 163). Thus the Decision provides for a *possible* reason to not enforce any particular violation.

When DWR and USBR notify the SWRCB that a violation of the interior salinity standards has occurred or when they expect such violations will occur (per the CDO) they always include language asserting that the violations are "beyond their control." A reasonable reading of the D-1641 language suggests that *some* violations might be beyond Project control. It does not seem reasonable to read D-1641 to mean that any and all violations can be beyond the control of the Projects, otherwise the responsibility to meet the standards would never have been assigned to the Projects.

¹ See for example the testimony of various southern Delta farmers in the Bay-Delta process and in the WaterFix Petition hearings showing harm due to salinity.

² Of course the operations of the Projects are the main cause of elevated salinity in the San Joaquin River, reverse flows in Delta channels and the creation of null zones where salt collect and are not flushed out. See 1980 Report on the Effects of the CVP on The Southern Delta Water Supply Sacramento-San Joaquin Delta.

That language in D-1641 certainly does not mean that the failure of the Executive Director to make such a recommendation (for 12 years) or the Board's failure to even consider the enforcement of the many permit violations is somehow an indication that these permit conditions need not be met. Unless and until the SWRCB takes a position on the violations, there is no basis for the Division of Water Rights, the Executive Director, or the Watermaster to turn a blind eye to the violations. The opposite of Projects' position is the correct one. The Projects are responsible to meet their permit conditions and the mandates in the CDO.

The second fault with the Letter is that the D-1641 language became moot once the parties went through two CDO hearings and two CDO's were issued. DWR and USBR did not challenge either CDO in court, and the time for such challenges has lapsed. The second CDO (Order 2010-0002) was issued after numerous days of hearing preceding each CDO. In those hearings, DWR and USBR provided hours of testimony wherein they asserted they were not responsible for elevated salinity in the southern Delta and they were incapable of improving water quality in that area.

In those CDO hearings, SDWA provided testimony showing how and why the Projects affect southern Delta water quality (increased salt inputs, altered flow patterns, null zones due to export pumping, etc), which testimony contradicted that of the Projects. SDWA also explained how and with what actions water quality could be improved, if not full compliance with the objectives. Since the CDO ordered the Projects to develop a plan to obviate future water quality violations, the SWRCB Hearing Officers apparently believed at least most of the SDWA testimony and evidence and discounted that of the Projects.

The results of the hearings were the two CDO's the second of which states: "DWR and USBR shall submit a revised, *detailed* plan and *schedule* to the Executive Director for compliance with the conditions set forth in paragraph one, above. The plan shall include *planned completion dates for actions* that will obviate the threat of non-compliance with the 0.7 EC objectives at stations C-6, C-8, P-12 and shall *specify the date by which the threat of non-compliance will be eliminated*" (emphases added).

Thus the Projects' position is untenable. D-1641 provides a means by which the Executive Director *might* recommend no enforcement of the southern Delta salinity objectives be undertaken after certain violations, but that ultimate decision was left to the Board itself. *Thereafter*, the SWRCB held hearings on the issue of compliance and by way of the CDO ordered DWR and USBR to develop a plan to obviate the threats to compliance, to include a schedule and a date by which the threat of non-compliance "will be eliminated." It is not reasonable for the Projects to assert that the potential escape language of D-1641 remains in effect and was not superseded by the direct mandates of the later CDO. Those mandates require elimination of the threats of violations.

Although the CDO references the provisions in D-1641 that include the possibility that no enforcement would occur for certain violations, the CDO contains no such qualification. One cannot interpret a mandate to specify how and when threatened violations will be eliminated while at the same time assuming all violations are excused and nothing must be done about those violations.

As we can see from the Letter, DWR and USBR have not specified how threatened violations will be obviated, have not specified what actions they will undertake to accomplish this and have not specified when those actions will occur or the threats will be obviated. The Letter asserts that “no current threat of non-compliance” exists. The CDO mandates are not conditioned upon any pending threat of violation. Having extraordinary high flows this water year in no way affects the likely future violations of the interior southern Delta salinity standards or the Projects’ permit and CDO obligations.

Instead of complying with the very simple and clear mandates of the CDO, DWR and USBR conclude the Letter by anticipating that the ongoing Bay-Delta process to develop a new Water Quality Control Plan will eventually relax the southern Delta salinity standards and that they somehow will either not be fully responsible for meeting them or that their current operations will suffice to meet those relaxed standards. Thus it appears the regulated are informing the regulator that they need not abide by current regulations but will wait and see if future, relaxed regulations are adopted or assigned to them. This approach by the Projects would be remarkable in any other situation than the Bay-Delta regulatory morass. It appears the Projects are refusing to abide by the CDO.

We should all note that after having ignored the CDO mandates for four-plus years, DWR and USBR are now informing the SWRCB that they will operate as if the CDO has been amended; an amendment that does not require them to undertake any additional measures until the current burden on them is lifted. Of course the Projects should have challenged the CDO long ago if they were not happy with its terms and conditions, but they did not. Similarly, they could have petitioned to “reopen” the CDO process and sought changes to the CDO mandates, but they did not. Instead, they are simply ignoring the requirements placed upon them in 2000 under D-1641 and in 2010 under the CDO. The SWRCB should not abide such regulatory indifference. The rule of law is the foundation of our society.

SDWA now turns to the specifics listed in the Letter which constitute the “Plan” by the Projects. Recall, the Plan requires specific actions and time lines for obviating the threat violations.

1. They submitted a report on flow and salinity patterns in the southern Delta entitled *Evaluation of Salinity Patterns and Effects of Tidal Flows and Temporary Barriers in South Delta Channels*. No actions or deadlines are provided. This

report was produced by ICF, the principal author being Dr. Russ Brown. The Report provides valuable information but does not commit DWR or USBR to undertake any actions to improve southern Delta water quality. The report also makes no conclusions regarding the control of water quality being beyond Project control.

2. They promise to continue the temporary barrier program, already mandated by the CDO. This program is necessary to mitigate lowered water levels caused by export pumping and might be configured or changed to improve water quality. It however is not being used to improve southern Delta water quality to any significant degree. No actions or deadlines are provided.
3. They will continue work on the fish study (re: how the barriers affect fisheries) mandated by the BiOps. No actions or deadlines are provided.
4. They will work on updating consumptive use studies in the Delta. Though this process will provide useful information for a number of efforts it cannot reasonably be described as something which will address CVP salts being trapped and concentrating in the southern Delta. No actions or deadlines are provided.
5. They will continue the San Joaquin Valley Drainage Program. SDWA is not aware of this program having improved salinity levels in southern Delta channels. No actions or deadlines are provided.
6. They will continue to operate the monitoring program in the southern Delta. Though valuable data is gathered therein, the collection of data is not a means by which improvements to water quality will occur. No actions or deadlines are provided.
7. They will continue to participate in the Central Valley Salinity Alternatives initiative which we assume means the CV-SALTS program. CV-SALTS anticipates a 30 year time frame and has morphed into more of a nitrates program. No actions or deadlines are provided.
8. They will “continue” to implement the Real Time Management Plan for the San Joaquin River. To date, the coordination of drainage and dilution flows has not yet occurred. By definition, this effort will worsen the quality of water entering the southern Delta at certain times. No actions or deadlines are provided.
9. They will continue to operate the Grasslands Bypass Project. That program has purportedly decreased salt loads in the River while at the same time decreasing flows. Even discounting recent drought years, many violations of southern Delta

Mr. Michael Lauffer
July 19, 2017
Page - 6 -

salinity standards have occurred during this project's life. It is important to note that project is designed to decrease selenium discharges, not to address the salt problems. No actions or deadlines are provided.

Clearly DWR and USBR did not comply with the specific mandates of the CDO. The Plan does not in any way constitute compliance with the CDO and the SWRCB should initiate legal action against the Projects for their continued violations of their permits, D-1641 and the CDO. As the CDO states:

Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of Part 2 of Division 2 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).) Any person or entity who violates a CDO may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b)(1).)

The time has come. The regulators must now choose. Do the permit conditions and mandates of a Cease and Desist Order mean something or can DWR and USBR operate as they choose regardless of regulatory mandates. SDWA recommends no more talk, no more hearings and no more extensions of deadlines. If the SWRCB choose not to enforce its own regulations it will have finally and completely abandoned its duties.

Very truly yours.



JOHN HERRICK

cc: Mr. Michael George, Watermaster
Ms. Felicia Marcus, Chair
Mr. Steven Moore, Vice Chair
Ms. Tam M. Doduc, Board Member
Ms. Dorene D'Adamo, Board Member
Mr. E. Joaquin Esquivel, Board Member
CDO Service List