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February 26, 2004

**Via Fax (916) 341-5400**

Ms. Diane Riddle, Environmental Scientist  
 Division of Water Rights  
 State Water Resources Control Board  
 P. O. Box 2000  
 Sacramento, CA 95812-2000

Re: Comments to Proposed Order re Petition for Long Term  
 Transfer by Merced I.D., Modesto I.D., and Turlock I.D.

Dear Ms. Riddle:

I apologize for submitting these comments one day late. I mistakenly assumed that the continuance of the hearing on the Draft Order also included an extension of the comment period. I hope the Board will consider these comments.

1. The only non-substantive correction we suggest is to clarify what is meant by "the Vernalis fish and wildlife flow objective" (emphasis added) in Condition No. 4 of the Draft Order. D-1641 sets flow objectives for fish and wildlife at Vernalis from February through June. A portion of the flow is commonly referred to as the pulse flow, a time during which the Bureau is releasing water from New Melones to also meet the objective. The Order should clarify that the refill condition applies to February through April 14 and May 16 through June with regard to the flow objective.

Regarding the substantive issues, we refer the Board to the Closing Brief and Rebuttal Brief submitted by CDWA and SDWA in this matter. Those briefs set forth the Agency's arguments and citations to the Record supporting a denial of the petition. We request the Board re-evaluate the Draft Order and deny the Petition.

2. Briefly, we would like to reference a number of the substantive issues. The Draft Order fails to accurately address the issue of whether or not the Petition would result in a change in the amount of water the Petitioners are entitled to use (Section 4.3 therein). The Draft Order

examines the amounts of water "used" by the Petitioners under the limitations set forth in their licenses, and then goes no further. The Board should have examined the historic diversions and uses under the licenses to first determine if the upper limits of the licenses have been further limited by non-use. Notwithstanding license limitations, all water rights are further-limited by what has actually been put to beneficial use (see Closing Briefs). The Petitioners should not be allowed to increase their use over the amount they have used for over 50 years. This is the situation provided for in Section 1707. Granting the Petitioners the right to store more water than they have historically used is per se increasing the amount of water they are entitled to use.

3. The Board should stop making references to the effect that CDWA and SDWA "claim" to represent legal users in the Delta. At the hearing, the Agencies presented four legal users in the Delta who confirmed that the Agencies indeed represent them. The continued use of the word "claim" suggests a cynicism inappropriate for a Board Order.

4. The Draft Order incorrectly concludes that granting the petition will not affect summer flows. The Petitioners' operators admitted that under some circumstances, they do and will make such shifts in flow (see RT 214:5-215:13).

5. The most glaring mistake in the Draft Order is its references to the Bureau meeting the Vernalis Salinity Objective. The Board "assumes" the Bureau will meet its obligation (see Section 4.4.1.2 on page 14) and even states that in those times when more New Melones water is needed due to the Petition, the reservoir has "adequate water" to meet the objective (see Section 4.4.3 on page 19). These statements ignore the modeling for D-1641 and for the Petition. There is no doubt that the Bureau does not allocate sufficient supplies from New Melones to meet the Vernalis Salinity Objective. Increasing that burden simply makes the problem worse. The Board should not pretend that the Bureau will somehow magically find enough water or a commitment to meet the Objective it plans on violating.

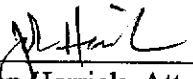
6. Section 4.4.4 of the Order cannot withstand scrutiny. The Draft Order first attempts to conclude that additional pulse flow water will not result in increased export pumping at other times of the year. This is incorrect. Additional pulse flows result in additional lost exports. D-1641's "no net loss" to export provisions therefore mean there will be additional exports at some other time to recoup these losses. Protections under the Response Plan for JPOD have been shown to be inadequate in each year of its operation and in fact the prior Response Plan has expired.

7. The Draft Order inadequately deals with the issue of effects of shifting flows in Section 4.5.2. The times when the Petitioners will make up lost storage are the same times when the Bureau is obligated to meet the non-pulse fishery flow objective. Since the Bureau has repeatedly informed the Board that it cannot and will not meet this Objective, the Petition will necessarily result in an exacerbation of the violation of the Water Quality Objective.

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8. Finally, with regard to the refill condition, the Draft Order makes no mention of the Petitioners' current failure to abide by the refill obligation in D-1641 (see RT 25:6-27:2). Such failure should be noted in the Draft Order as a basis for denying the Petition.

We respectfully request that the Board review the arguments and evidence in this matter and deny the Petition.

  
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John Herrick, Attorney for South Delta Water  
Agency and Central Delta Water Agency

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