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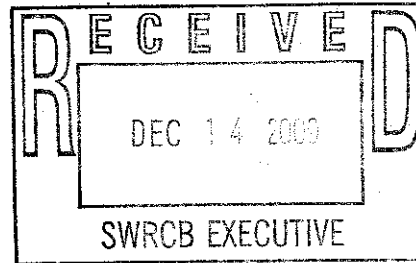
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December 14, 2009



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*Via E-Mail to commentletters@waterboards.ca.gov and
Overnight Mail to Jeanine Townsend, Clerk of the Board*

Chair Charlie Hoppin and Members of the State Water Board
c/o Jeanine Townsend, Clerk of the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "P" Street, 24th Floor
Sacramento, CA 95814-2828

**Re: COMMENT LETTER - 01/05/10 BOARD MEETING:
DRAFT ORDER MODIFYING ORDER WR 2006-0006**

Dear Chair Hoppin and Members of the State Water Board:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively hereinafter the "County"), we submit the following comments to the Draft Order Modifying Order WR 2006-0006 ("Draft Order"). The County does not support the current Draft Order and requests several amendments to the Draft Order.

The County contends it is improper to extend the July 1, 2009 deadline of Order WR 2006-0006 ("CDO") and enforcement action should be taken against DWR and USBR due to the continuing salinity objective violations in the south Delta. It is improper to delay any further compliance schedule or enforcement until the completion of the pending review of the southern Delta salinity objective. In addition, a specific time schedule should be imposed to require DWR and USBR to complete alternative salinity control measures identified in paragraphs 4, 5, 6, and 7 of the Draft Order.

The record is clear. Violations of the southern Delta salinity objectives have occurred on numerous occasions. See Draft Order p. 8. The only action taken by DWR and USBR to avoid or curtail exceedances of the interior southern Delta salinity objective "was the implementation of the temporary barriers program." Draft Order p. 8, referencing DWR Exhibits DWR-31 and DWR-32. The Draft Order correctly indicates that "the temporary barriers improve salinity levels, but

they are not sufficient by themselves to ensure that the objective will be met." Draft Order p. 8, referring to DWR Exhibit DWR-5 at p. 5. However, that is all DWR and USBR did to address salinity in the south Delta. That is not substantial evidence to support an attempt by DWR and USBR to comply with the CDO order nor to support or justify a modification of the CDO now. DWR and USBR must be required to do more in a timely fashion. Any modification to the CDO must require immediate corrective action so that the status quo of not doing enough does not continue in 2010.

It is not appropriate to delay enforcement of D 1641 standards and the CDO until after the current review of the southern Delta salinity objectives.

It is not appropriate to extend the CDO July 1, 2009 compliance deadline until the water quality control planning process regarding the southern Delta salinity objective has been completed. The Draft Order indicates that Dr. Glen Hoffman's Draft Report entitled *Salt Tolerance of Crops in the Southern Sacramento-San Joaquin Delta* ("Draft Report") "suggests that higher salinity water than the current objectives may be fully protective of agricultural beneficial uses in the southern Delta and recommends additional analyses to further review this issue." Draft Order at p. 9. Reliance at this time by the State Water Board on the Draft Report to delay a schedule for compliance with the current objective is legally erroneous and would lead to an arbitrary and capricious decision in this proceeding.

First, the Draft Report is not final and it is unknown how the Draft Report may be modified by the author prior to the final report. Second, the record in this proceeding does not contain or benefit from the numerous and substantive comments regarding the Draft Report and the pending modifications of the Draft Report. It is not clear from the record before the Board in this proceeding the outcome of the final report by Dr. Hoffman. Furthermore, substantial comments have been submitted regarding salinity and crop tolerance in the lowlands of the south Delta which are not known to the Board at this time and it is not known how the Draft Report may be modified. State Board staff has indicated to South Delta Water Agency that this additional information will affect Dr. Hoffman's Draft Report. At this time, the result is unknown and reliance on the Draft Report will lead to an arbitrary and capricious decision in this proceeding. It is quite possible that a higher salinity objective will not be found to support agricultural beneficial uses in the southern Delta. It is entirely improper to allow further delay for meaningful compliance with the existing salinity objective because a draft report may indicate relaxed standards are possible, but further study is needed. Until there is substantial evidence to support modifying the existing objective then the prior objective must remain. There is certainly not substantial evidence before the Board in this proceeding to support delaying compliance with the

existing salinity objective or modifying the existing objective.

In addition, even if there is support to change the objectives, the objectives have not yet been changed and it is improper and not legally supportable for the current objectives to be ignored until such time as the objectives are actually, properly modified by the State Water Board. The 2006 Appellate Court Decision regarding D 1641 indicated that the principle mechanism of the State Water Board to enforce compliance with water quality control plans is "its regulation of water rights." *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674, 732. citing the *Racanelli* Court at *United States v. State Water Resources Control Bd.*, (1986) 182 Cal. App. 3d 82, 125 (*Robie* Court). The State Water Board has a legal duty to comply with water quality control plans approved or adopted by the State Water Board. *Id.* at p. 730. The *Robie* Court indicates as follows:

"It would be strange if the Board, having determined in a water quality control plan that a water rights proceeding was necessary to achieve the water quality objectives in that plan, could simply decide *not* to take action in that proceeding and thereby refuse to enforce its own plan. Fortunately, the Legislature has not authorized the Board to do any such thing. Thus, the Board cannot – as it attempted to do here- make a de facto amendment to a water quality objective in a water quality control plan by simply refusing to take action that it has identified as necessary to achieve that objective." *Id.* at p. 732.

This is exactly what the State Water Board is attempting to do again by considering modifying the CDO and not requiring a compliance schedule when the evidence clearly indicates that violations of the objective are occurring and the only corrective action taken, the temporary barriers, are insufficient to meet the required salinity objectives. The Draft Order argues that the State Water Board's cease and desist order authority at Water Code section 1831 provides the State Water Board the authority to establish a compliance schedule and thus the provisions of the Draft Order are "otherwise authorized by statute." However, a compliance schedule would be acceptable if the schedule was consistent with the water quality control plan. Currently DWR and USBR are operating in violation of D 1641 as salinity objectives are being violated. The State Water Board has no authority to change those objectives in this proceeding and has a legal duty to enforce those objectives. Thus, a compliance schedule that allows for violations to continue, or does not enforce violations, pending the compliance schedule completion is improper.

The *Robie* Court indicated that approving the San Joaquin River Agreement in lieu of the water quality control plan's Vernalis pulse flow objective, even on a temporary basis, was a "de facto amendment of that plan without complying with the procedural requirements for amending a water quality control plan." *Id.* at p. 734. The same applies to the CDO proceeding. By amending the CDO and indicating that enforcement of the CDO, and



thus D1641, will not occur the State Water Board would be undertaking a de facto amendment of the water quality plan without following the proper procedure. The contemplated enforcement is necessary and required by law. The evidence at the hearing is clear that violations of the salinity objectives are occurring. Failing to enforce these violations is a failure to implement the Water Quality Control Plan. By failing to enforce the salinity objective violations of the Water Quality Control Plan, as identified in the CDO, the State Water Board is providing a "de facto amendment to a water quality objective in a water quality control plan by simply refusing to take action that it has identified as necessary to achieve the objective." *Id.* at p. 732.

The Draft Order claims that modification of the compliance schedule of the CDO reflects the Board's determination that "further enforcement action would not be warranted, provided that DWR and USBR take steps to obviate the threat of violation in accordance with the modified compliance schedule." Draft Order p. 15. This conclusion is erroneous. First, the hearing record does not support the determination that further enforcement action is not warranted and second the modified compliance schedule is delayed until the objective is otherwise modified; thus no compliance with the existing objective is required. It is illusory to discuss requirements of a revised compliance deadline and plan which the Draft Order delays until D 1641 is modified. This circular argument is not legally defensible.

A revised compliance plan should be required immediately. This should not be a new idea. DWR and USBR should already be evaluating the feasibility of alternative salinity control measures. The Draft Order at page 13 indicates that "It is possible that DWR and USBR could have obviated the threat of violation by July 1, 2009, or earlier, by pursuing multiple compliance strategies simultaneously." This is correct. However the Draft Order errs in the next conclusion stating: "In our judgment, however it was reasonable for DWR and USBR to focus their efforts on implementation of the strategy set forth in the compliance plan approved by the Executive Director in 2006, which included construction of the permanent gates as a necessary first step, until NOAA Fisheries issued its biological opinion in June 2009, and it became clear that operation of the permanent gates may not be feasible." This conclusion is not supported by substantial evidence in the record.

The record reflects lack of due diligence by DWR and USBR. DWR anticipated in its first quarterly status report dated May 31, 2006 that the permanent operable barriers would not be installed and operating by the CDO required July 1, 2009 deadline. DWR Exhibit DWR-13. The November 2006 quarterly report clearly indicated that "completion of the permanent operable gates will be correspondingly delayed." DWR Exhibit DWR-15. However, DWR and USBR have only implemented the temporary barriers despite the inability to comply with

the salinity compliance schedule and despite ongoing violations of the salinity objective. This does not demonstrate reasonable compliance with the CDO to obviate the threat of violations or compliance with the D 1641 salinity objective requirements.

A completion schedule to implement additional salinity control measures must be required in a public forum.

The County is pleased that the Draft Order requires DWR and USBR to take various actions to address salinity in the south Delta. However, given DWR's and USBR's past practice of repeated delay to take meaningful actions more needs to be required by the State Water Board including requiring actual completion of various salinity control measures. A specific time schedule should be imposed to require DWR and USBR to complete the alternative salinity control measures identified in paragraphs 4, 5, 6, and 7 of the Draft Order. Submitting plans and reports to the Executive Director or the Deputy Director is a step in the right direction; however, more needs to be required. Action must be required within specified time periods which will be reviewed by the State Water Board. Public review of the proposed action and progress by DWR and USBR is warranted and necessary given the importance of these issues and the past practices of delay by DWR and USBR.

Draft Order contains erroneous conclusion.

On page 18 the Draft Order indicates that South Delta did not refute DWR's expert witness testimony "that salinity in the southern Delta cannot be controlled by restricting exports or increasing releases from reservoirs in the Sacramento River watershed." To the contrary, South Delta's attorney cross examined DWR's rebuttal witness on these issues and the cross examination questioning reflected that DWR's models submitted in this proceeding did not adequately consider such changes and the possible affect on salinity in the south Delta. Therefore, there is inconclusive evidence to support DWR's conclusions regarding export limits and reservoir releases in the Sacramento River watershed. The Draft Order should be modified to reflect South Delta's challenge during cross examination of DWR's conclusions.

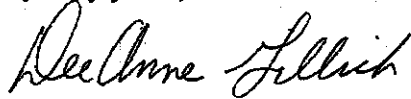
Conclusion

The County is disappointed in the State Water Board's failure to enforce the permit conditions of DWR and USBR given continuing ongoing violations. The State Water Board must enforce the existing water right permit terms and require DWR and USBR to meaningfully implement salinity control measures. The State Water Board should not delay enforcement as provided in the Draft Order until the pending review of the salinity objective is complete by the State Water Board. In addition,



any amendment to the CDO Order should require a compliance schedule to complete and implement meaningful salinity control measures.

Very truly yours,



DeeAnne Gillick
Attorney at Law

DMG/

cc: David Wooten, County Counsel
C. Mel Lytle, Ph.D., Water Resources Coordinator
Thomas J. Shephard, Sr.
Hearing Service List

WATER RIGHT HEARING TO CONSIDER MODIFICATION OF ORDER WR 2006-0006
DEPARTMENT OF WATER RESOURCES AND
THE UNITED STATES BUREAU OF RECLAMATION
SCHEDULED TO COMMENCE JUNE 25, 2009
REVISED SERVICE LIST
(June 19, 2009)

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the Notice.)

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