

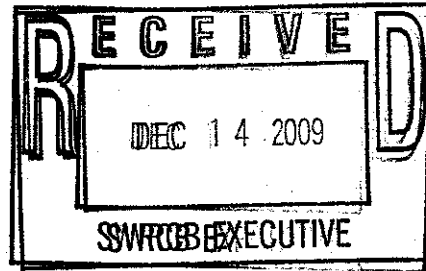
**DEPARTMENT OF WATER RESOURCES**

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(916) 653-5791



December 14, 2009

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



Re: Comments On The Draft Order Modifying State Water Resources Control Board Order WR 2006-0006 (to be considered for adoption by SWRCB on January 5, 2010)

Dear Ms. Townsend,

The Department of Water Resources (Department) has reviewed the Draft Order modifying State Water Resources Control Board (State Water Board or Board) Order WR 2006-0006 (Draft Order) by, among other things, extending the July 1, 2009 deadline to obviate the threat of non-compliance.

The Department generally supports adoption of the Draft Order and a requirement to prepare a revised compliance plan and schedule, if needed, subsequent to the current Board proceedings reviewing the southern delta salinity objectives. The Draft Order, if adopted, properly acknowledges that despite the Department's and the U.S. Bureau of Reclamation's (Reclamation) diligence, the current compliance plan and schedule is no longer viable, and the development of a revised compliance plan should be delayed pending completion of the current proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation. The Department believes the Draft Order, for the most part, has incorporated appropriate interim protective measures that will help control salinity in the southern Delta and further our knowledge of feasible and reasonable salinity control measures.

Notwithstanding the above, the Department does have comments on the Draft Order relating to terms and conditions we believe should be clarified or are unnecessary. The Department's comments and basis for requesting a modification to the Draft Order are provided below. The Department also requests that the Introduction and Background sections of the Draft Order also be revised to reflect the revisions.

1. Conditions A.1 And A.2 Of The Draft Order Should be Clarified to Recognize that the CDO May be Unnecessary Subsequent to Completion of The Current Proceeding To Consider Changes To The Interior Delta Salinity Objectives And The Associated Implementation.

The Department believes that the current proceedings to consider modifications to the interior southern Delta salinity objectives and a water rights hearing to implement the

objectives could establish future terms and conditions for compliance of these water quality objectives and would, thus, supersede the CDO. DWR believes that the Condition A.1 in the Draft Order requiring the Department and Reclamation to implement measures in this order subsequent to the current proceedings should be clarified to reflect the possible changes in the 2006 Bay-Delta Water Quality Control Plan (2006 Bay-Delta Plan) and the related water rights implementation order.

While the Department recognizes the broad authority the State Water Board has to enforce water rights, the Department does not believe Water Code section 1831 provides the Board with the authority to modify a 2006 cease and desist order to address the potential for a threatened violation of an undefined future Board order or decision. After completing the review of the 2006 Bay-Delta Plan and the State Water Board issues a decision regarding implementation of the southern Delta salinity objectives, the Department's and Reclamation's obligations to meet the objectives will be defined by the new decision. At that time, Order WR 2006-0006 and the Draft Order would be inapplicable. The ability of the Projects to comply with their future responsibilities should be the subject of the future proceedings and the Board should not prejudge the need for compliance conditions in this Draft Order. However, if the current proceedings on southern Delta objectives do not result in modifying the water quality control plan or D-1641, then the Department and Reclamation would be required to revise the compliance plan and schedule in the CDO.

Therefore, the Department requests the following changes to Conditions A.1 and A.2 to clarify the conditions but do not change the intent of Order WR 2006-0006 or the Draft Order.

A. To clarify that Order WR 2006-0006 and the Draft Order could be superseded subsequent to the current Board proceedings on the interior southern Delta salinity objectives, Condition A.1, pages 20-21, second paragraph should be revised as follows:

*"Notwithstanding the foregoing, if as a result of the State Water Board's review of the 2006 Bay-Delta Plan, the Board adopts an order or decision modifying DWR's or USBR's responsibility for meeting the interior southern Delta salinity objective, then ~~DWR and USBR shall implement measures to obviate the threat of non-compliance with the Board's order or decision~~ Order WR 2006-0006 and this order will be superseded by the requirements of such subsequent order or decision.*

B. To clarify that the compliance plan and schedule should only apply to the Department's and Reclamation's current responsibilities under the CDO and D-1641, Condition A.2, pages 21-22 should be revised as follows:

*"If the State Water Board's pending proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation included in the 2006 Bay-Delta Plan, and or any*

**subsequent water right proceeding ~~to consider whether to change DWR's or USBR's responsibility for meeting the objectives as a result of any changes to the 2006 Bay-Delta Plan do not revise DWR and USBR's responsibilities in D-1641 for the objectives, then within 180 days from the completion of the pending proceeding~~ 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. . . ."**

2. Condition A.3 Is Unnecessary And Inappropriate

The intent of Condition A.3 is to obtain the Department's assistance in the State Water Board's current efforts to review the south Delta salinity objectives in the Bay-Delta Plan. The Department believes that requiring the Department's technical assistance for this review through a cease and desist order is inappropriate and would more properly addressed through other means, such as a memorandum of understanding (MOU). The Department has publically expressed its desire to see the current review of the objectives completed as expeditiously as possible. In numerous written comments to the State Water Board, the Department has stated that the time is ripe for the Board to review and potentially modify the southern Delta salinity objectives and that the Department will provide resources to help move the process forward. For example, the Department provided the initial funding for Dr. Hoffman's salt tolerance report, which has been extremely valuable in furthering the understanding of what is needed to protect the southern Delta's most salt-sensitive crops. The Department has also provided technical assistance, including modeling, to the State Water Board in past water quality and water rights proceedings, such as during D-1641. The Department's commitment submitted in past and current comments to the Board to willingly provide staff and resources to assist the State Water Board in its effort to review the 2006 Bay-Delta Plan supports deleting Condition A.3 as unnecessary.

In addition Condition A.2 effectively puts the Department on notice that if the current review of the southern Delta salinity objectives is not complete by a certain date, the Department, along with Reclamation, must develop a plan and schedule to comply with its current obligations. The Department has expressed concern over the current objectives and its responsibility to meet those objectives. As such, it is already in the Department's best interest to ensure that the current review process is well-supported and completed before the date identified in Condition A.2.

Finally, the Department believes that a water rights enforcement action is not the appropriate forum to negotiate the scope of work to assist the State Water Board in its basin planning role. This condition as part of a cease and desist order creates unnecessary liability for the Department. As the Board knows, staffing and funding for state agencies are limited and the Department should have flexibility in how to best allocate these resources. The work required by Condition A.3 is not the only demand being placed on the Department's staff and resources to analyze information regarding Delta beneficial uses, which the Board has expressed interest in obtaining. The Department finds it inappropriate to be exposed to enforcement liability under a cease

and desist order related to allocating its staff and resources when the Department has committed to already making these resources available to the Board.

As an alternative to Condition A.3, and to better define the Department's commitment to provide staff and resources during the current review proceeding, the Department proposes that the Department and Reclamation enter into a MOU with the Board to describe the scope of work and identify the time schedule by which the work needs to be completed. The Department believes this approach is more appropriate in that it provides the Board assurance that the Department and Reclamation will perform the needed work without exposing them to unwarranted liabilities.

3. The Temporary Barriers Program Should Not Be Mandated Program As Part Of A Cease And Desist Order

The Department has represented, and remains committed, to implementing the temporary barriers program (Program). However, it is improper to mandate the Department to implement the Program through this order because it would be inconsistent with D-1641, in which the State Water Board endorsed the temporary barriers program. In D-1641, the Board found that barriers were integral to its decision regarding salinity control, but did not make them a mandatory obligation.

At the CDO modification hearing, the Department provided testimony and evidence to demonstrate that the temporary barriers could be modified in ways that could improve water flow in certain southern Delta channels that, in turn, could improve water quality. The Department also demonstrated that the modifications to the temporary barriers were the only salinity control measures that could be feasibly implemented during the interim period, and that the Department would continue to pursue and implement those modifications.

However, offering to implement the temporary barriers program responsibly should not result in a mandatory obligation in which the Department bears the sole responsibility. Since the temporary barriers program has never been a mandatory obligation, the issue of who should be responsible for its implementation was not included in this, or prior, proceedings before the State Water Board. As such, the Board has no evidence before it to support the conclusion that it is reasonable and proper to make the Department solely responsible for implementing the temporary barriers program. While the Department has been willing to voluntarily implement the Program in the past, making the Program a mandatory obligation for the Department has broad implications that need to be thoroughly considered before the Department should be held solely responsible for implementing the Program. Condition A.5 essentially changes the Program from a voluntary effort to mitigate water level effects of the State Water Project and Central Valley Project to a mandatory obligation to help meet water quality control objectives.

4. The Studies Required In Condition A.7 Are Likely To Be Helpful In The Current Proceeding To Review The Southern Delta Salinity Objectives And, As Such, Could Be Incorporated Into The Scope Of Work Identified In Condition A.3

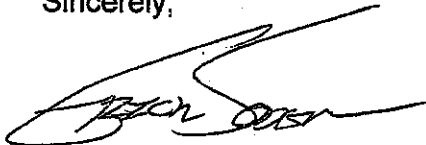
The Department believes that the studies required in Condition A.7 will likely produce valuable information that the State Water Board can rely on when reviewing and potentially modifying the southern Delta salinity objectives and the associated program of implementation. Given the potential value these studies could provide to the Board's planning process, the Department suggests that it would be appropriate to incorporate these studies into the scope of work proposed in an MOU that will carry out the activities identified in Condition A.3. The Department believes it is likely that Condition A.7's studies will be informed by or build from activities described in Condition A.3. If this is the case, then an MOU providing for a scope of work to conduct activities described in Condition A.3 could be developed with Condition A.7's studies in mind.

Even if this comment has merit, however, it does not necessarily require any changes to the language of the Draft Order. Instead, the Department's intent in making this comment is that, in practice, the information developed by and through this order is done so in an integrated and efficient manner.

In addition to the above specific comments, the Department would like the Board to include a general provision for an administrative appeal process to the Board of any decision made by the Executive Director which has been delegated by the Board. Also, by submitting these comments on the CDO modification of the compliance plan and schedule, the Department does not waive any prior position regarding its obligations under Order WR 2006-0006 and implementation of the interior southern Delta objectives.

The Department appreciates your consideration of these comments. If the State Water Board or its staff have questions on these comments please contact me at (916) 653-8826 or [esoderlu@water.ca.gov](mailto:esoderlu@water.ca.gov).

Sincerely,



Erick Soderlund  
Staff Counsel

**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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