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8

9 BEFORE THE
10 STATE WATER RESOURCES CONTROL BOARD
11

12
13 In the matter of the

14
15 DELTA SALINITY DRAFT CEASE AND
16 DESIST ORDERS AND WATER QUALITY
RESPONSE PLAN HEARING

ENFORCEMENT TEAM'S
CLOSING BRIEF

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1 “It is the intent of the Legislature that the state should take
2 *vigorous action to enforce the terms and conditions of permits[,]*
3 *licenses, certifications, and registrations to appropriate water, to*
4 *enforce state board orders and decisions, and to prevent the*
5 *unlawful diversion of water.” (Wat. Code, § 1825 [italics added].)*

6 “[I]n my opinion, issuing the [Cease and Desist Order]
7 demonstrates compliance with this policy.” (Testimony of Mr.
8 Lindsay, Enforcement Team, Reporter’s Transcript (R.T.) (Oct. 24,
9 2005) 52:9-11 [referring to Water Code § 1825].)

10 I. INTRODUCTION

11 Water Code section 1825 expresses the Legislature’s intent that the state “take vigorous
12 action” to enforce the terms and conditions of water right permits and licenses and to enforce State
13 Water Resources Control Board (State Water Board or Board) decisions and orders. (*County of*
14 *Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973-974 [84 Cal.Rptr.2d 179].) The
15 Department of Water Resources’s (Department) and the United States Bureau of Reclamation’s
16 (Bureau) threatened violation of water quality objectives imposed in their water rights by Revised
17 Water Right Decision 1641 (dated March 15, 2000) (D-1641), and their disregard of the associated
18 monitoring and reporting requirements, compels the vigorous enforcement action mandated by
19 section 1825.

20 This adjudicative proceeding involves consideration of draft Cease and Desist Order (CDO)
21 Nos. 262.31-16 and 262.31-17 issued to the Bureau and Department, respectively, by the State
22 Water Board’s Division of Water Rights (Division). The CDOs are intended to prevent the
23 threatened violation of the term requiring the agencies to meet a maximum 30-day running average
24 of mean daily Electrical Conductivity (EC) (measured in mmhos/cm) of 0.7 from April through
25 August at three Delta locations. The first two hearing issues identified in the revised hearing notice
26 dated September 23, 2005, ask whether the State Water Board should issue a CDO to the Bureau
27 and to the Department in response to the draft CDOs, and if so, what modifications should be made
28 to the CDOs. The answer to these hearing issues unequivocally is “yes.”¹ The evidence in the

¹ The Enforcement Team did not submit evidence regarding the water quality response plan or any use of the joint
[Footnote continued on next page.]

1 record demonstrates that the State Water Board should issue the CDOs against both the Bureau and
2 the Department. In addition, the Enforcement Team recommends that modifications be included in
3 the final orders to incorporate monitoring and reporting requirements imposed in D-1641.

4 The basic issue in this proceeding is whether a violation or threatened violation has been
5 demonstrated by a preponderance of the evidence, and if so, what should be the terms of a CDO
6 issued in response to the violation or threatened violation. As discussed in section III of this brief,
7 the evidence clearly supports the issuance of the proposed CDOs. Section IV of this brief
8 addresses legal issues raised by the hearing participants and by the presiding hearing officer,
9 including issues concerning the effect of a CDO on the requirements of the underlying water rights
10 and the relationship of enforcement to the public trust. In particular, the Department argues that a
11 CDO should not be issued unless and until a violation has occurred and that violation has been
12 reported, and that the State Water Board should forego enforcement and pursue other approaches
13 for violations committed by the Department. The Department's arguments are without merit.

14 II. LEGAL AND PROCEDURAL BACKGROUND

15 Pursuant to Water Code section 1831, the State Water Board may issue a CDO to any
16 person who is violating, or threatening to violate, any term or condition of a permit or license. The
17 CDO "shall require that person to comply forthwith or in accordance with a time schedule set by
18 the [State Water Board]." (Wat. Code, § 1831, subd. (b).)

19 The Bureau and the Department hold the water rights that are the subject of this
20 proceeding.² As a condition of these water rights, D-1641 requires each agency to meet water
21 quality objectives for agricultural beneficial uses, as specified in Table 2 of the decision, at certain
22 locations in the southern Delta. (WR-5a, pp. 159-160.) Effective April 1, 2005, Table 2 of D-1641

23
24 point of diversion that may be made possible as a result of approval of the plan, and does not address those issues in
this brief.

25 ² The Department holds Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512,
26 and 17514A, respectively). USBR holds License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886,
27 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860,
15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767,
16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 19304, and 14858B, respectively).
(WR-5a, pp. 155-163.)

1 requires the Bureau and the Department to meet a maximum 30-day running average of mean daily
2 EC of 0.7 millimhos per centimeter from April through August of each year, in all water year
3 types, at three compliance locations: (1) the San Joaquin River at Brandt Bridge (Interagency
4 Station No. C-6); (2) Old River near Middle River (Interagency Station No. C-8); and (3) Old
5 River at Tracy Road Bridge (Interagency Station No. P-12). (WR-5b, p. 182, Table 2.)

6 Table 2 further specifies that after April 1, 2005, the 0.7 EC objective for Interagency
7 Stations number C-6, C-8, and P-12 may be replaced by a 1.0 EC objective from April through
8 August if permanent barriers are constructed, or equivalent measures are implemented, in the
9 southern Delta and an operations plan that reasonably protects southern Delta agriculture is
10 prepared by the Department and the Bureau and approved by the Executive Director of the State
11 Water Board. (WR-5b, p. 182, Table 2, note 5.)

12 The Department and the Bureau have neither constructed the permanent barriers nor
13 implemented equivalent measures. Accordingly, the 0.7 EC objective is in effect at Interagency
14 Station Nos. C-6, C-8, and P-12 from April through August. (WR-1, p.3.)

15 On investigation, the Division's Compliance and Enforcement Unit staff concluded that
16 there was a threat of violation of the permit and license terms requiring the Department and the
17 Bureau to meet the 0.7 EC objective from April through August. On May 3, 2005, the Division
18 issued notices of draft CDO Nos. 262.31-16 and 262.31-17 to the Bureau and the Department,
19 respectively, to enforce those permit and license terms and to establish an enforceable schedule of
20 compliance. (WR-1, p. 4; WR-3; WR- 4.) At the request of the Department and the Bureau, a
21 hearing was held on October 24-25, and on November 7, 17-18, and 21, 2005.³

22 **III. THE EVIDENCE SUPPORTS THE ISSUANCE OF THE CDOs WITH**
23 **RECOMMENDED MODIFICATIONS**

24 This proceeding involves CDOs proposed to be issued in response to the threatened
25 violation of terms in the water rights held by the Department and Bureau. No matter which hat the
26 Department's Deputy Director, Mr. Jerry Johns, wears (R.T. (Nov. 17, 2005) 156:21-158:19), the

27 _____
28 ³ The Bureau did not present evidence at the hearing.

1 bottom line is that the Department is a water right permittee and, as such, it must comply with the
2 terms and conditions of its permits. Even the Department admits this much.⁴ The same is true for
3 the Bureau.

4 **A. The Evidence Demonstrates that there is a Threat of Violation of the 0.7 EC Objective**

5 The Enforcement Team's evidence supports the State Water Board's finding that there is a
6 threatened violation of the 0.7 EC objective in effect from April through August at the southern
7 Delta stations. A threat of violation is more probable than not based on several factors, including
8 (1) the agencies' own statements that there is a threat of violation of the 0.7 EC objective; (2) the
9 agencies' own statements that the 0.7 EC objective is likely to be exceeded until the permanent
10 barriers are operating; and (3) a review of historical EC data, which indicates that a threat of
11 violation continues even in years following wet years.

12 *1. The Department and the Bureau have acknowledged that there is a threat of violation*

13 In correspondence and presentations to the State Water Board, the Department and the
14 Bureau have acknowledged that they are likely to violate the 0.7 EC objective and they have
15 acknowledged that the violation could result in enforcement action. These statements are discussed
16 in detail in the Enforcement Team's written testimony and will not be repeated here. (See WR-1,
17 pp. 3-4; WR-6; WR-7; R.T. (Oct. 24, 2005) 44:13-45:10, 164:3-166:14.) While the Department
18 has argued that statements made in a change petition should not be used as a basis for an
19 enforcement action, it admits that its statements are reliable. (R.T. (Nov. 17, 2005) 234:24-235:1
20 [Q: "Is there any reason that those statements would be unreliable?" A: "No."].) Thus, the
21 agencies' own admissions support a finding of a threatened violation.⁵

22
23
24 ⁴ "And we're a permittee and we have obligations as a permittee. We have to meet our water quality permit terms or
25 water right permit terms." (Department testimony by Mr. Johns, R.T. (Nov. 17, 2005) 157:7-9.) Curiously, however,
26 Mr. Johns also appears to suggest that the Department will not comply with the water quality objectives in D-1641
27 without a court order. (*Id.* at 259:21-260:4.)

28 ⁵ No objection was raised to the admission of this evidence at the hearing. Moreover, the Department does not cite
any evidentiary privilege that would provide a basis for excluding these admissions. Nor is there any public policy
basis for excluding this evidence. If anything, the possibility that information submitted in support of an application or
petition might be used in other proceedings, thereby holding parties accountable for the accuracy of the information
they submit, helps promote the integrity of the proceedings on those applications and petitions.

1 2. *A threat of violation will continue until the permanent barriers are constructed or*
2 *equivalent measures are implemented*

3 Although the Department and the Bureau met the 0.7 EC objective at all three
4 southern Delta locations this year, the threat of a violation at these locations will continue at
5 least until the permanent barriers are constructed or equivalent measures are implemented.

6 The barriers are the primary means by which the agencies can meet the water quality
7 objectives in the long term. (WR-1, pp. 4-5.) As the agencies themselves have explained,
8 the State Water Board linked the effective date of the 0.7 EC objective to the expected
9 completion date of the barriers “in recognition that . . . operations without the barriers could
10 not, in many years, achieve the more stringent [0.7 EC] objective.” (WR-6, p. 3.)

11 Similarly, the Department has explained that “[a]t this time, the proposed [permanent
12 barrier] appears to be the only feasible water management tool available that will affect the
13 interior channel water quality to achieve the Southern Delta objectives.” (WR-7, p. 2.)

14 During the hearing, the Department admitted that, “*it is likely that the .7 EC objective will*
15 *be exceeded under certain conditions until the installation of the permanent gates.*”

16 (Testimony of Mr. Leahigh, R.T. (Nov. 17, 2005) 244:14-16 [italics added].)

17 Moreover, Mr. Lindsay testified, “[e]ach year that the permanent barriers are not installed is
18 a year in which the agencies will threaten to violate the 0.7 EC objective at Interagency Station
19 Nos. C-6, C-8, and P-12.” (WR-1, p. 5.) There is no dispute that the permanent barriers are not in
20 place. There is little dispute that the permanent barriers are essential to the agencies’ ability to
21 meet the objective.⁶

22 3. *A review of the historic EC data demonstrates a threat of violation*

23 Based on the Enforcement Team’s review of the available historical EC data, it is very
24 likely that the Department and the Bureau will fail to meet the objective before the permanent
25 barriers are completed. The benefits of one wet year do not necessarily carry over into other water

26 _____
27 ⁶ The draft CDOs do not direct construction of the barriers, but instead, reiterate the language of D-1641, which allows
28 the agencies to construct the permanent barriers or implement equivalent measures. (WR-3; WR-4; see also R.T.
(Oct. 24, 2005) 192:19-21, 194:10-15 [the decision is up to the Department and the Bureau].)

1 years. (WR-1, pp. 5-6.) An analysis of water quality data for the three southern Delta locations
2 (Interagency Stations C-8, C-6, and P-12) since 1996, between April through August, demonstrates
3 that the Department and the Bureau historically have exceeded 0.7 EC at those locations even in
4 wet years. (WR-1, p. 6; WR-11 to WR-13; WR-18; R.T. (Oct. 24, 2005) 45:11-46:21.)

5 Additionally, the agencies' past violation of the less restrictive 1.0 EC objective supports a
6 conclusion that they are likely to violate the more restrictive 0.7 EC objective in the future. In
7 2003 the Department and the Bureau were required to meet 1.0 EC at the three southern Delta
8 locations, but they exceeded the objective at two stations from January to April. (WR-1, p. 6;
9 WR-15; R.T. (Oct. 24, 2005) 47:25-48:15.) These violations of the 1.0 standard in close proximity
10 to April 1, when the 0.7 EC standard now becomes effective, indicates that the agencies may have
11 difficulty in attaining the 0.7 standard at those locations.⁷ (WR-1, p. 6.)

12 Thus, the evidence in this proceeding supports a finding that a threat of violation exists.
13 The Department and Bureau threaten to violate the requirement to implement the 0.7 EC objective
14 in effect from April through August. A threatened violation exists at least until the Department and
15 the Bureau construct and operate the permanent barriers or implement equivalent measures.

16 **B. The CDOs Should Be Issued with Modifications Recommended by the Enforcement**
17 **Team**

18 In light of the threatened violation of the Department's and the Bureau's water right terms,
19 the State Water Board should issue the CDOs to establish a schedule of compliance with these
20 terms and to impose reporting and monitoring requirements so that the Board will be informed of
21 the agencies' compliance with the terms. In addition, because the agencies have failed to comply
22 with certain monitoring and reporting requirements already imposed by D-1641 in their permits
23 and license, the CDOs should include those requirements to ensure the agencies' future
24 compliance.

25
26 ⁷ As a point of clarification, the Division was not aware of the actual violations at the time it issued the notices of the
27 draft CDOs in May 2005. The Enforcement Team does not make any recommendation regarding enforcement against
28 the actual violations during this proceeding on the threatened violations; any such enforcement action would be
initiated in a separate proceeding. (R.T. (Oct. 24, 2005) 59:10-22.)

1 The Enforcement Team first recommends that CDOs include a time schedule to avoid
2 future delays in the construction of the permanent barriers or implementation of equivalent
3 measures. Based on the agencies' own statements in February 2005 (WR-1, p. 7; WR-6), the
4 Enforcement Team recommended that the State Water Board require the Department and the
5 Bureau to install and to operate the permanent barriers or to implement equivalent measures by
6 January 1, 2009. (WR-1, p. 7.) The agencies' own estimate has already slipped from the one they
7 gave less than a year ago, and at the hearing, the Department's witnesses testified that they
8 anticipate that the permanent barriers will be completed by April-June 2009. (DWR-23,
9 Figure 18.) Regardless of the final date, the Enforcement Team strongly urges the Board to impose
10 a compliance schedule on the agencies to ensure that they implement the necessary measures in a
11 timely manner. Additional delays in the installation and operation of the permanent barriers, or
12 implementation of equivalent measures, means that the threat of violation will continue to exist for
13 a longer period of time. (WR-1, p. 6.)

14 Second, the CDOs should also include the reporting requirements recommended by the
15 Enforcement Team to ensure that the agencies inform the State Water Board of their progress in
16 constructing the permanent barriers or implementing equivalent measures. Those
17 recommendations, which will not be repeated here, are discussed on p. 7 of WR-1 and are
18 contained in the draft CDOs (WR-3; WR-4).

19 Third, the evidence also shows that the agencies failed to comply with basic monitoring and
20 reporting requirements imposed by D-1641, and that those requirements must be included within a
21 CDO to ensure future compliance. Specifically, in the past, the agencies have failed to comply
22 with various provisions of Term 11 on p. 149 of D-1641 requiring water quality and baseline
23 monitoring, making monitoring results publicly available (e.g., through posting on the internet),
24 submission of annual reports, and notification to the State Water Board of anticipated or actual
25 violations. (WR-5a, p. 149, Term 11; WR-1, pp. 7-8; R.T. (Oct. 24, 2005) 49:2-50:19; WR-19.)
26 Noncompliance with these terms hinders the State Water Board's ability to properly administer the
27 agencies' water rights.

28 Accordingly, the CDOs should contain the following modifications recommended by the

1 Enforcement Team: (1) require the Department and the Bureau to report losses of EC data for
2 periods of 7 days or more: (2) require the Department and the Bureau to file the annual report
3 required by paragraph c of Term 11; and (3) require the Department to make its data available to
4 the public on the internet. (WR-1, pp. 8-9; see WR-16 and WR-17 [identifying recommended
5 modifications in underline].)⁸

6 In making its recommendations to include Term 11's monitoring and reporting
7 requirements in the CDOs, the Enforcement Team explained the difficulties it had in obtaining
8 accurate data from the Department, and that the EC data received from the Department on three
9 different occasions had gaps in it. (WR-1, pp. 5-6; R.T. (Oct. 24, 2005) 119:1-24.) On rebuttal,
10 the Department responded that the Enforcement Team had asked the wrong person for the data and
11 that the evidence showed that there were no data gaps greater than five days. (R.T. (Nov. 18,
12 2005) 242:3-13.)

13 A dispute over whether the Department has experienced data gaps of five days or seven
14 days or even twenty-eight days misses the point.⁹ More importantly, the evidence demonstrates
15 that the Department itself does not even know who is responsible for data collection and whether
16 those data are accurate.¹⁰ Mr. Lindsay testified that he contacted Ms. Tracy Hinojosa, Chief of the
17 Operations Compliance and Study Section, Division of Operations and Maintenance, for the data
18 and that she independently contacted him with new data right before the hearing. (R.T. (Oct. 24,
19 2005) 119:13-24.) One would assume that Ms. Hinojosa believed that she had the right data when
20 she contacted Mr. Lindsay. But on rebuttal, Mr. Rich Breuer, Chief of the Environmental Water
21 Quality Estuarine Studies Branch, testified that he had the data and that Mr. Lindsay did not
22 contact him. (R.T. (Nov. 18, 2005) 242:14-243:11; DWR-6.) Presumably, when the State Water
23

24 ⁸ In addition, draft CDO No. 262.31-17, issued to the Department, should be revised to delete the reference to
Interagency Station C-10 at Vernalis as a compliance location. (WR-1, p. 9.)

25 ⁹ To the extent the Department experiences data losses, however, it should report them.

26 ¹⁰ Moreover, the Department's own testimony regarding its data collection and analysis is internally inconsistent.
27 (Compare R.T. (Nov. 18, 2005) 236:11-24 [Mr. Leahigh's testimony that the Department did not track the 0.7 EC data
before 2005 and that data was not readily available at certain stations] with *id.* at 239:7-9 [Mr. Breuer's testimony that
the Department had "excellent compliance" at all stations].) The Department even admitted that its own data used in
28 the hearing may be inaccurate. (R.T. (Nov. 17, 2005) 245:3-11.)

1 Board required the Department and the Bureau to make their monitoring results available,
2 including by timely posting on the internet, it meant to avoid problems such as this. (See R.T.
3 (Nov. 18, 2005) 243:12-14 [agreement by Mr. Breuer that posting on the internet would avoid such
4 problems in the future].) This evidence demonstrates the necessity of requiring the Department to
5 comply with its permit requirements through issuance of a CDO.

6 In some instances, the agencies' failure to comply with Term 11 is not simply a matter of
7 regrettable oversight. For example, the agencies have failed to submit the annual reports required
8 by paragraph c of Term 11. (R.T. (Oct. 24, 2005) 50:10-19.) The Department testified that it was
9 working on the annual reports, that it sent the 2001 and 2002 reports to the State Water Board in
10 2005, and that it expected to be caught up in 2006. (R.T. (Nov. 18, 2005) 238:7-18.) The
11 Department apparently willfully and consciously decided not to submit these annual reports, stating
12 that it has other priorities. (*Id.* at 244:5-15.) The Department's practice of picking and choosing
13 which permit terms and conditions to comply with illustrates the vital importance of enforcement.
14 Without the deterrent effect of enforcement, the Board's imposition of permit terms and conditions
15 is meaningless.

16 The Enforcement Team recommends modifications to the CDOs to compel compliance
17 with these existing terms. (WR-16; WR-17; R.T. (Oct. 24, 2005) 51:13-52:25.) It is within the
18 Department's control to meet these requirements. (R.T. (Nov. 17, 2005) 242:4-244:4.) The
19 Department's promises in this proceeding that it will comply in the future are insufficient to
20 remedy the past five years of inaction and noncompliance. To ensure the agencies' future
21 compliance with existing requirements, the State Water Board should issue the CDOs with the
22 recommended modifications.

23 IV. LEGAL AND POLICY ISSUES RAISED IN THE HEARING

24 During the hearing, certain legal issues arose that are addressed in this brief: (1) whether
25 the draft CDOs modify, or excuse compliance with, the water quality objectives or D-1641;
26 (2) whether the hearing can be used to challenge the Division's exercise of prosecutorial discretion;
27 (3) whether the Water Code requires a showing of irreparable harm before a CDO may be issued;
28 and (4) whether D-1641 limits the process by which the State Water Board may take enforcement

1 action against the Department or the Bureau. In addition, Hearing Officer Doduc requested the
2 hearing participants to explain how their recommendations would further protection of water
3 resources and the public trust.

4 **A. The CDOs Do Not Modify the Water Quality Objectives, and any CDO Issued in this**
5 **Proceeding Cannot Suspend or Excuse a Violation of any Requirement of D-1641**

6 During the hearing, it became clear that certain hearing participants misunderstood the
7 nature and effect of the draft CDOs, suggesting that the orders postpone the effective date of
8 D-1641's requirement to implement the 0.7 EC objective or otherwise have the effect of amending
9 D-1641. This is incorrect. The draft CDOs neither excuse nor suspend compliance with the water
10 quality objectives imposed in D-1641, nor otherwise modify those objectives or the requirements
11 of the Bureau's and Department's permits and license. (See WR-1, p. 6 [noting that the CDOs "do
12 not impose any new or more stringent water quality standards . . . and they do not alter any permit
13 or license terms."]; R.T. (Oct. 24, 2005) 51:5-12, 80:14-23.) In fact, the only means of changing a
14 permit term is through the State Water Board's statutory and regulatory change petition procedures.

15 A CDO is an enforcement technique that provides a first step by which the State Water
16 Board may seek to enforce a permit or license term previously promulgated by the Board. (See
17 *Pacific Water Conditioning Assn., Inc. v. City Council* (1977) 73 Cal.App.3d 546, 555 [140
18 Cal.Rptr. 812] [discussing water quality CDOs].) The sole purpose of the draft CDOs is to
19 establish a schedule of compliance for the Bureau and the Department and to set measures to
20 ensure such compliance. (See Wat. Code, § 1831, subd. (b) [providing that a CDO shall require a
21 "person to comply forthwith or in accordance with a time schedule"].)

22 The Water Code establishes substantive and procedural requirements for changing a permit
23 or license term. (See Wat. Code, § 1701 et seq.) Absent compliance with these statutory
24 requirements, the issuance of a CDO cannot serve to modify the terms of a permit or license. (See
25 *Citizens for a Better Environment-California v. Union Oil Co.* (9th Cir. 1996) 83 F.3d 1111, 1119-
26 1120 and *Citizens for a Better Environment-California v. Union Oil Co.* 861 (N.D. Cal. 1994)
27 F.Supp. 889, 902-903 [both holding that a CDO cannot modify a National Pollutant Discharge
28 Elimination System permit].) Instead, including a time schedule in a CDO reflects an exercise of

1 prosecutorial discretion and does not amount to an amendment of any permit or license term.
2 (*Ibid.*) Simply put, the State Water Board cannot legally alter the requirements in the agencies'
3 permits and license through this enforcement action; any alterations can only be accomplished
4 through the change petition process.

5 In granting reconsideration of the approval of the Water Quality Response Plan (WQRP),
6 the State Water Board observed that the condition of D-1641 governing use of the joint points of
7 diversion remains "in effect and controls" the use of the joint points of diversion regardless of the
8 approval of the WQRP. (Board Order WR 2005-0024 at p. 3.) This is because the approval of the
9 WQRP was not noticed as a proposed change in the applicable permits and licenses and the request
10 for approval of the WQRP was not processed in accordance with the procedures for water right
11 changes. (See Cal. Code Regs., tit. 23, § 791, subd. (e) [the procedures for petitions to change the
12 point of diversion, place of use or purpose of use shall be followed as nearly as possible when
13 processing petitions for other types of changes].) By the same logic, a CDO, which is noticed as an
14 enforcement action and is not processed in accordance with procedures to amend the applicable
15 permits and licenses, cannot effect a change in the applicable permits and licenses.¹¹

16 Accordingly, the requirement to implement the 0.7 EC objective, which became effective in
17 2005, remains in effect until the specific conditions in D-1641 providing for a reversion to the
18 1.0 EC objective are met. The draft CDOs neither excuse nor delay the requirement to implement
19 the 0.7 EC objective. They merely impose a schedule of compliance to ensure that the Bureau and
20 the Department meet their responsibilities.

21 **B. A Hearing on a CDO Should Not Be Used to Challenge the Exercise of Prosecutorial**
22 **Discretion**

23 Some of the hearing participants have sought to broaden the hearing issues to include
24

25 ¹¹ In addition to adopting changes by processing a change petition submitted by the permit or license holder, the State
26 Water Board may modify the terms and conditions of water right permits and licenses based on its continuing authority
27 under Water Code section 275 and the public trust doctrine. (See 23 Cal. Code Regs., § 781, subd. (a).) But this
28 proceeding has been noticed as proposed enforcement action, not as an exercise of the Board's continuing authority,
and modification of the permits or license pursuant to the Board's continuing authority is beyond the scope of this
proceeding.

1 review of the Division's decision to issue a notice of proposed CDO. Some people suggest that
2 these actions should not have been prosecuted because other violations merit a higher priority.
3 Others contend that the notice of proposed CDO should have been framed more broadly to include
4 other violations by the Bureau and the Department.¹² Mr. Johns argued on behalf of the
5 Department that the State Water Board should not prosecute the Department for water right
6 violations, but instead should seek a means of cooperatively resolving the problem. (R.T.
7 (Nov. 17, 2005) 153:13-154:8.) These efforts to expand the scope of the hearing should be
8 rejected, and the Board order in this matter should clearly state that a hearing on a notice of
9 proposed CDO, administrative civil liability order, or revocation should not be used to challenge
10 the exercise of prosecutorial discretion in initiating the proceedings.

11 *1. An exercise of prosecutorial discretion should not be considered during an adjudicative*
12 *proceeding*

13 The State Water Board has broad authority over enforcement. As part of the budget
14 process, the Board determines how much of a commitment it can make to enforcement. The Board
15 may also set enforcement priorities. The Board may even identify cases that the Division of Water
16 Rights should investigate to determine if enforcement is appropriate. (See Gov. Code, § 11425.30,
17 subd. (b)(2) [a person who has participated in a determination of probable cause or other equivalent
18 preliminary determination is not disqualified from serving as presiding officer in the proceeding].)
19 Once an adjudicative proceeding has been initiated through the issuance of a notice of proposed
20 violation, administrative civil liability complaint, or other initial pleading, however, the Board
21 should avoid any inquiry into the exercise of prosecutorial discretion by the prosecution team.

22 Sound public policy supports such a limitation. First, consistent with the legislative policy
23 that the State Water Board should take vigorous action to enforce the terms and conditions of
24 permits and licenses, and to prevent the unauthorized diversion of water, the Board should take

25
26 ¹² Some hearing participants suggest that the Division should have imposed a monetary penalty on the Department and
27 the Bureau as part of the draft CDOs. The State Water Board may issue an administrative civil liability complaint only
28 if there has been a trespass under Water Code section 1052 or a violation of a CDO under Water Code section 1845,
neither of which is at issue in this proceeding. To the extent that these arguments question the Division's exercise of
prosecutorial discretion, those arguments should be rejected as explained in this section.

1 care to avoid making enforcement hearings unnecessarily complicated. (See Wat. Code, § 1825.)
2 An adjudicative proceeding, which must be decided based on evidence in the record, is ill suited to
3 review an exercise of prosecutorial discretion. Allowing an inquiry into prosecutorial discretion
4 could expand even the simplest of enforcement proceedings into an open-ended inquiry. For
5 example, evidence concerning the extent and severity of any other violation by any other person
6 diverting or using water in any part of the state is arguably relevant to whether, in the exercise of
7 its enforcement discretion, the Division should have initiated the prosecution in this case.

8 Second, a review of the exercise of prosecutorial discretion in a pending proceeding where
9 the State Water Board will decide the merits of the case involves an inappropriate mixing of
10 prosecutorial and adjudicative functions. (See generally Gov. Code § 11425.10, subd. (a)(4)
11 [separation of adjudicative function from the prosecutorial function].) In reviewing the exercise of
12 prosecutorial discretion, the Board would necessarily be either directing the actions of the
13 prosecution team, or taking over a key prosecutorial function. Depending on the circumstances,
14 this failure to separate prosecutorial and adjudicative functions may either undermine the
15 effectiveness of the prosecution or create an appearance of bias in favor of the prosecution.
16 Consistent with the separation of functions established for this proceeding, the Board should not
17 consider arguments or evidence directed towards challenging the prosecutorial decision to initiate
18 enforcement proceedings.

19 Finally, there is no need to accept evidence or hear arguments concerning the exercise of
20 prosecutorial discretion in order to make a proper record for review by the courts. An
21 administrative agency's exercise of its enforcement discretion is not subject to judicial review.
22 (*Sierra Club v. Whitman* (9th Cir. 2001) 268 F.3d 898, 902.)

23 2. *The State Water Board should treat the Department the same as any other water right*
24 *holder*

25 Similarly, the State Water Board should reject the Department's suggestion that the
26 Department, as a sister agency, enjoys a special relationship with the Board that makes
27 enforcement inappropriate. The Department's suggestion is a thinly veiled attempt to have the
28 Board review the Division's exercise of enforcement discretion and to avoid responsibility for

1 complying with its permits. Moreover, as a matter of law and policy, the Board should not give the
2 Department special treatment in enforcement matters.

3 The State Water Board's predecessor, the State Water Rights Board, was created based on
4 the need for an independent regulatory agency that would be evenhanded in water rights matters
5 involving the Department. The statutory provisions establishing an independent State Water
6 Rights Board were based on the recommendations of a legislative committee, headed by
7 Assemblyman Casper Weinberger, that proposed the creation of the Department of Water
8 Resources. (A Department of Water Resources for California, Report of the Assembly Interim
9 Committee on Government Organization (1956).)¹³ The report concluded that there was an
10 "inherent conflict" between the role of the proposed department as the planner and builder of water
11 supply projects, and the role of water right administration. (*Id.*, at p. 18.) Therefore the committee
12 concluded:

13 The water rights of all interests, both public and private, within the
14 State can best be protected by placing the determination of these
15 rights in a quasi-judicial, independent body separate from the
proposed Department of Water Resources.

16 (*Ibid.*) The committee specifically recommended that State Water Rights Board members be
17 appointed to staggered, four-year terms and, in contrast to the Director of the Department of Water
18 Resources, Board members would not serve at the pleasure of the Governor. (*Id.*, at pp. 21-22.)
19 The committee also recommended that the State Water Rights Board have its own legal counsel.
20 (*Id.*, at p. 90.) The 1956 legislation establishing the Department of Water Resources and the State
21 Water Resources Control Board followed all of these recommendations. (Stats. 1956, 1st Ex.Sess.,
22 ch. 52.)

23 Consistent with the Legislature's decision to establish the State Water Board as an

24
25 ¹³ Pursuant to California Code of Regulations, title 23, section 648.2 and Evidence Code section 452, the Enforcement
26 Team requests that official notice be taken of the following documents cited in this brief: A Department of Water
27 Resources for California, Report of the Assembly Interim Committee on Government Organization (1956); Governor's
28 Commission to Review California Water Rights Law, Final Report (1978); Recommended Changes in Water Quality
Control, Final Report of the Study Panel to the State Water Resources Control Board, Study Project, Water Quality
Control Program (1969); and Report of the Conservation Commission (1912), transmitted to the Governor and the
Legislature on Jan. 1, 1913.

1 independent agency with adjudicative powers, the State Water Board should not give the
2 Department any special treatment. It is important to other water right holders to know that the
3 State Water Board will be evenhanded as between the Department and other water right holders. If
4 the Department is in violation, or threatened violation, the State Water Board should take
5 enforcement action comparable to what it would take with any other violator. This point is
6 underscored by section 1835 of the Water Code, which defines those persons and entities subject to
7 water right cease and desist orders. (See Wat. Code, §§ 1831, subd. (a) [authorizing a cease and
8 desist order against “any person” in violation or threatened violation of specified requirements],
9 1835 (defining “person” for purposes of the chapter that includes section 1831].) Section 1835
10 specifically includes any department of the state.

11 **C. The Water Code Does Not Require a Finding of Harm before Issuing a CDO**

12 Some hearing participants suggest that enforcement is not appropriate unless the threatened
13 exceedance of the water quality objective results in harm. The issue of harm, however, is not
14 germane to whether the CDOs should be issued. The Water Code does not require the State Water
15 Board, before issuing a CDO, to demonstrate harm, or to demonstrate that a violation threatens
16 harm to the environment or water right holders that outweighs the burden of compliance with a
17 water right permit or license.¹⁴ The statute only requires that a violation or threatened violation be
18 proven. (Wat. Code, § 1831, subd. (a).) Practical difficulties in obtaining immediate compliance,
19 including factors such as reliance on an unauthorized diversion for domestic supply, or the time
20 needed to plan and construct facilities needed to come into compliance, may be taken into account
21 by including a schedule of compliance in the CDO, instead of requiring compliance forthwith. (*Id.*,
22 subd. (c).)

23 The State Water Board’s water right CDO authority was originally adopted based on the
24 recommendations of the Governor’s Commission to Review California Water Rights Law, Final
25

26 _____
27 ¹⁴ Some hearing participants suggest that the question of harm should be considered as a basis for questioning the
28 exercise of the Division’s prosecutorial discretion. As explained above, this proceeding should not be used to review
the Division’s exercise of prosecutorial discretion.

1 Report (1978). The draft legislation was patterned after the water quality CDO authority provided
2 in the Porter-Cologne Water Quality Control Act. (Compare, *id.*, at pp. 74-78 with Wat. Code,
3 § 13301.) The Board's water right CDO authority was expanded in 2002, providing authority to
4 take action against unauthorized diversions and to take action against threatened violations, among
5 other changes. (Stats. 2002, ch. 657, §§ 5-13.)

6 Neither the statutory authority under the Porter-Cologne Act for water quality CDOs nor
7 the statutory authority for water right CDOs sets any requirement for a showing that harm will
8 occur if the CDO is not issued. Nor do the statutes require any showing of the balance of the
9 hardships. Moreover, the legislative history clearly shows that it was not the intent of the
10 Legislature to establish any requirement to show harm or a balance of the hardships.

11 As discussed above, the code sections establishing the State Water Board's water right
12 CDO authority are patterned after the Porter-Cologne Act. The statute enacting the Porter-Cologne
13 Act provides that it is intended to implement the legislative recommendations in a report submitted
14 to the Legislature by the State Water Board. (Stats. 1969, ch. 482, § 36.) That report includes
15 proposed language, which was enacted as part of the Porter-Cologne Act, specifying that in a civil
16 action brought under the Porter-Cologne Act for injunctive relief "it shall not be necessary to allege
17 or prove at any stage of the proceeding that irreparable damage will occur" (Recommended
18 Changes in Water Quality Control, Final Report of the Study Panel to the State Water Resources
19 Control Board, Study Project, Water Quality Control Program (1969), Appendix A at p. 75
20 [proposing language later codified as subdivision (c) of Water Code section 13361].) In a
21 comment on this proposal, the report noted: "Note. Subdivision (c) merely confirms the rule of law
22 that would be applicable in its absence." (*Id.*, at p. 76.)

23 As this language indicates, it was the understanding of the Legislature that there was no
24 requirement for proof of irreparable harm in an enforcement proceeding, even in an action in court
25 seeking injunctive relief. If this showing was not required for a court proceeding in equity, then
26 certainly there is no requirement for this showing in an administrative proceeding under a statute
27 that does not require any such showing.

28 In fact, the Water Code does not require any consideration of harm unless and until the

1 State Water Board seeks to impose civil liability on a person who violates a CDO. If such
2 violation occurs, the State Water Board may impose, or request the Attorney General to petition a
3 court to impose, civil liability for the violation. (Wat. Code, § 1845, subd. (b).) A person may be
4 liable for up to one thousand dollars a day for each day of violation. (*Id.*, subd. (b)(1).) In
5 determining the appropriate amount of civil liability, the State Water Board (or the court) must
6 consider all relevant circumstances, including “the extent of harm caused by the violation.” (*Id.*,
7 subd. (c).) As used in that context, the word “violation” refers to a violation of the cease and desist
8 and not to a violation of a permit or license term or condition. In sum, the issue of harm arises only
9 *after* the State Water Board has already issued a CDO and when it is considering the amount of
10 civil liability to impose for a violation of that CDO.

11 **D. The State Water Board’s Enforcement Authority is not Limited by D-1641**

12 The Department defends against the proposed CDO by claiming that D-1641 establishes a
13 different and more limited enforcement process than the one that has taken place in this
14 proceeding.¹⁵ Specifically, the Department characterizes language in Term 6 on p. 159 of D-1641
15 as establishing the sole process by which the State Water Board may enforce any violation of the
16 requirement to implement water quality objectives,¹⁶ and argues that issuance of the draft CDOs
17 for a threatened violation is inconsistent with this process.¹⁷ The Department’s argument is flawed
18 for the following reasons.

19 First, the State Water Board cannot and should not interpret D-1641 as limiting its ability,
20 procedures, or discretion to take vigorous action to enforce water right permit and license terms;
21 such an interpretation would be contrary to the express language of the Water Code and to the
22

23 ¹⁵ To the extent that the Department relies on this claim to challenge the Division’s exercise of prosecution discretion,
as discussed above, such challenge is improper.

24 ¹⁶ The portion of Term 6 relied on by the Department states: “If Permittee [referring to the Department and the
25 Bureau] 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 recommend to the [State Water Board] whether
26 enforcement action is appropriate or the noncompliance is the result of actions the control of the Permittee.” (WR-5A,
p. 159, Term 6.)

27 ¹⁷ Mr. Johns, who took this position on behalf of the Department, admitted that he was not familiar with the Board’s
CDO authority. (R.T. (Nov. 17, 2005) 221:22-23 [Q: “Are you familiar with Water Code Section 1831?” A: “Not very
28 much.”].)

1 Legislature's intent. Water Code section 1825 requires the Board to take vigorous action to
2 enforce the terms of its water rights. The statute contains no exceptions. Although the Board
3 certainly has the discretion to decide when and which enforcement actions to take, it cannot
4 abdicate its enforcement responsibility under section 1825.

5 Second, the express language of the portion of Term 6 relied on by the Department does not
6 apply to a threatened violation of the water quality objectives and should not be construed to apply
7 to such violations. (See R.T. (Nov. 17, 2005) 224:17-225:4 [Department's testimony that Term 6
8 does not say anything about threatened or anticipated violations].) When the State Water Board
9 adopted D-1641 it did not have the statutory authority to enforce against threatened violations of
10 permit and license terms. Water Code section 1831 subsequently was amended in 2002, two years
11 after D-1641 was adopted, to allow the Board to issue a cease and desist order for a threatened
12 violation. Accordingly, Term 6 cannot be construed as limiting the Board's ability to take action
13 concerning a threatened violation because the Board did not, and could not, contemplate such
14 enforcement actions at that time.¹⁸ D-1641 simply cannot be interpreted to limit the Board's
15 enforcement discretion under a subsequently adopted statute.

16 Third, while the portion of Term 6 relied on by the Department establishes a particular
17 process under which the Department and the Bureau are required to report actual exceedances of
18 the salinity objectives, it does not logically follow that the term limits the State Water Board's
19 enforcement options. The Department apparently views the term as a *limitation* on the Board's
20 authority. A more reasonable interpretation, however, is that the term gives the Department an
21 *opportunity*, that it might not otherwise have had, to explain its actual noncompliance with the
22 salinity objectives. Term 6 gives the Department and the Bureau an opportunity to provide the
23 Board with information supporting a decision not to take an enforcement action.

24 The Department's interpretation of Term 6 would lead to absurd results. Term 6 requires

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27 ¹⁸ The Board did, however, require the Department and the Bureau to report anticipated violations of the water quality
28 objectives. (WR-5A, p. 149, Term 11, ¶ d.) The Department cannot argue that one reporting requirement in D-1641
supersedes another.

1 the Department and the Bureau to report an exceedance of the water quality objectives to the
2 Executive Director, who will then recommend whether the State Water Board should take an
3 enforcement action. The Department suggests that if the agencies fail to report a violation then the
4 Board may not take enforcement action at all. (R.T. (Nov. 17, 2005) 224:4-7.) Under this
5 interpretation, the Board could not take an enforcement action for the actual violation that occurred
6 in 2003 until the Department reported it in 2005. Such a limitation on the Board's enforcement
7 discretion is untenable.

8 Fourth, when Term 6 is read as a whole, the specific language relied on by the Department
9 cannot fairly be read to limit or condition the Department's obligation to implement water quality
10 objectives. The Department argues that D-1641 conditioned the requirement that the permittees
11 comply with the 0.7 EC objective on their ability to meet that objective. (R.T. (Nov. 17, 2005)
12 226:16-22, 228:5-11.) To the contrary, however, if the State Water Board had intended to craft a
13 permit term in D-1641 that conditioned compliance with the salinity objectives on the agencies'
14 ability to meet those requirements, it was fully capable of expressly doing so. For example, in
15 Water Right Order 90-5 the Board imposed a term requiring the Bureau to maintain a certain
16 temperature when it was "within the Bureau's reasonable control" and went on to identify factors
17 considered to be beyond the Bureau's reasonable control. (WR 90-5, at pp. 20, 54-55.) Term 6
18 establishes no such conditional compliance. The agencies' water rights are conditioned on meeting
19 the salinity objectives—there is no "reasonable control" exception here. The purpose of Term 6 is
20 to allow the agencies to explain to the Board that a violation is due to circumstances beyond their
21 control, not to excuse making an effort to comply in the first instance.

22 Moreover, the Department has not shown that compliance with the requirements of D-1641,
23 in accordance with the schedule of compliance in the proposed CDOs, is beyond the Department's
24 reasonable control. While the Department has attempted to explain why it is difficult to meet the
25 0.7 EC objective, it has not demonstrated that steps intended to facilitate meeting the salinity
26 objectives—i.e, constructing the barriers or implementing equivalent measures—are beyond its
27 control. To the contrary, the Department has testified that the permanent barriers are the most
28 effective means of meeting the water quality objective and that it intends to construct the barriers,

1 thus indicating that those steps are within its control. (See R.T. (Nov. 17, 2005) 232:6-9, 237:23-
2 238:5).¹⁹

3 In sum, when the language relied on by the Department is read in context, and in
4 accordance with the policies of the Water Code, it should be clear that it is intended to explain the
5 State Water Board's enforcement authority.²⁰ It does not limit the Department's nor the Bureau's
6 responsibility to comply with water quality objectives, and does not limit the Board's authority to
7 take enforcement action if a violation occurs.

8 **E. Enforcement of Water Right Terms and Conditions Furthers the Protection of Water**
9 **Resources and the Public Trust**

10 Although not included as a key hearing issue, at the hearing's conclusion, Hearing Officer
11 Doduc asked the participants to explain how the participants' recommendations would further "the
12 protection of water resources and the public trust." (R.T. (Nov. 21, 2005) 84:18-20.) As explained
13 herein, the Enforcement Team specifically recommends that the State Water Board issue the
14 CDOs, with the proposed modifications, to the Department and the Bureau. For the purposes of
15 Hearing Officer Doduc's request, the Enforcement Team's recommendation is simple—the Board
16 should enforce the terms and conditions of the water right permits and licenses, and water right
17 decisions, that it issues. (Wat. Code, § 1825.)

18 *1. Enforcement of water right terms is an essential component of the state's water right*
19 *program*

20 Meaningful enforcement is an integral component, perhaps even the very essence, of the
21

22 ¹⁹ Mr. Johns argued, on behalf of the Department, that constructing the barriers would be accomplished by a different
23 unit within the Department than the unit that handles State Water Project operations, and that therefore compliance was
24 beyond the control of the State Water Project. (Testimony of Mr. Johns, R.T. (Nov. 17, 2005) 161:1-10 [Mr. Johns's
25 efforts to distinguish the Department from the permittee identified in D-1641].) The State Water Board should reject
26 this artificial distinction. The relevant permits are issued to the Department, not to any smaller unit within the
27 Department, and nothing in the those permits or in D-1641 suggests that the Department's obligation to implement
28 water quality objectives is limited to what can be achieved through operation of facilities already incorporated into the
State-Water-Project.

²⁰ In addition, the focus of the language on violations that have already occurred, and whether they were within the
permittee's control, appears to be directed to the issues governing whether civil penalties should be imposed, and in
what amount. (See generally Wat. Code, §§ 1052, subd. (e), 1055.3). Different factors should be considered in
determining whether a CDO, which seeks to avoid or reduce the extent of threatened or continuing violations, should
be issued.

1 state's regulatory water right program. The Conservation Commission of the State of California
2 (Conservation Commission), which was established in 1911 to study and recommend measures
3 regarding the allocation of the state's natural resources, recognized that "[o]f all the natural
4 resources, there is none more valuable, more necessary to present and future generations of
5 California than water." (Report of the Conservation Commission (1912), transmitted to the
6 Governor and the Legislature on Jan. 1, 1913 [hereinafter Commission Report], at p. 18.) In
7 making its recommendations for a state agency to administer the appropriation of this valuable
8 resource, the Conservation Commission noted that the state should see that water is, "from the very
9 beginning of its use, properly used, and that its use is permitted only to those who can and will use
10 it with a due regard for the rights of its owners, the public." (*Id.*, at p. 21.) The scope of the state's
11 regulatory program has considerably expanded beyond that originally contemplated by the
12 Conservation Commission. Nonetheless, the guiding principle that the use of water should only be
13 permitted to those who use it with due regard for the public interests and policies that inhere within
14 the regulatory program, remains valid today.

15 The principle that enforcement fosters the efficient allocation of water resources similarly
16 underlies the recommendation of the Governor's Commission to Review California Water Rights
17 Law to enact legislation broadening the State Water Board's enforcement authority to include
18 authority to issue cease and desist orders. (Governor's Commission to Review California Water
19 Rights Law, Final Report (1978), at pp. 58-59.) This principle also underlies the 2002 legislation
20 broadening the Board's water right CDO authority. (Stats. 2002, ch. 652.)

21 Thus, a strong enforcement policy is critical to fulfill the State Water Board's mission to
22 "preserve, enhance and restore the quality of California's water resources, and ensure their proper
23 allocation and efficient use for the benefit of present and future generations." (R.T. (Nov. 18, 2005)
24 99:24-100:2.) The Board's enforcement powers and its willingness to use them deters people who
25 ~~would otherwise put water to an unauthorized use. As the Enforcement Team's witness, Mr.~~
26 Lindsay noted, "water right terms may become meaningless without active enforcement." (R.T.
27 (Oct. 24, 2005) 52:12-13.) Failure to take appropriate enforcement action weakens the Board's
28 ability to fulfill its mission and to protect the water right holders and the public trust by lessening

1 that deterrent effect.

2 Further, as it was at the turn of the century, it is not “sound public policy for the State to
3 permit anybody to break and continue to break the law” (Commission Report, at p. 39.) The State
4 Water Board’s regulatory requirements imposed in the permits and licenses that it issues have the
5 effect of law and no one should be able to violate those requirements with impunity. Claims of
6 hardship, a special “sister agency” status, or a lack of control should not negate the imposition of a
7 particular requirement. As the Conservation Commission noted in response to claims that
8 requiring compliance with the law would impose a hardship, it is not “good public policy to
9 suspend the law because its enforcement may work supposititious [sic] hardship upon him who is
10 knowingly or even unknowingly breaking the law.” (*Id.*, at p. 40.)

11 2. *This enforcement proceeding illustrates how enforcement leads to improved compliance*
12 *with water right terms*

13 This very proceeding illustrates the beneficial effect of enforcement. When Mr. Johns of
14 the Department testified, he suggested that an enforcement action for a threatened violation should
15 serve as a wake-up call. Giving his thoughts on how the State Water Board should act under its
16 enforcement authority, he stated,

17 I’d use it in the areas where the Board was having real problems
18 getting folks to comply with permits and they couldn’t quite catch
19 them at it. I would use the [] threatened violation as a tool to get
20 their attention.

21 (R.T. (Nov. 18, 2005) 98:23-99:1.) The Enforcement Team agrees. Although, Mr. Johns was not
22 referring to this proceeding involving the Department, it certainly served that purpose here.

23 For example, and most egregiously, due to its failure to comply with the monitoring and
24 reporting requirements, the Department failed to identify and report an exceedance of the 1.0 EC
25 objective that occurred in early 2003 until *two years* later, in late 2005. (DWR-26.) In fact, the
26 Department admitted that it only became aware of the exceedances while preparing for this
27 proceeding. (*Id.*, at p. 1.) Otherwise, it is questionable whether the Department ever would have
28 discovered and reported those exceedances. At a minimum, this proceeding has served as a wake-
up call to the Department and the Bureau that the Board expects them to comply with their water
right requirements.

1 3. *Effective enforcement helps protect public trust resources*

2 Moreover, the protection and management of the state's water resources necessarily entails
3 consideration of the public trust. The public trust doctrine requires the State Water Board to
4 consider the effect of the diversion or use of water on streams, lakes, or other bodies of water, and
5 "preserve, so far as consistent with the public interest, the uses protected by the trust." (*National*
6 *Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447 [189 Cal.Rptr. 346, 365] cert. denied
7 464 U.S. 977.) The uses protected by the public trust include navigation, commerce, fisheries,
8 recreation and ecological values. (*Id.*, at pp. 435-36.) Even after an appropriation has been
9 approved, the public trust imposes a duty of continuing supervision. The public trust provides
10 authority to reopen earlier water allocation decisions based on their impact on public trust uses.
11 (*Id.*, at p. 447.)

12 D-1641 implements the public trust. (See WR-5 (D-1641), pp. 7-8.) The proposed CDOs
13 implement D-1641.²¹ The State Water Board's continuing authority under the public trust doctrine
14 provides authority to reopen D-1641 and to modify its requirements as appropriate to protect the
15 public trust, but as the Hearing Officer Doduc specified in her opening statement, a reopening of
16 D-1641 is beyond the scope of this proceeding. But, as noted above, the public trust does not
17 merely provide authority to reopen prior water right decisions, it establishes a duty of continuing
18 supervision. Effective enforcement is an essential element of the Board's duty of continuing
19 supervision under the public trust doctrine.

20 Effective enforcement of water right permit and license requirements helps protect the
21 public trust, even where the requirements involved are not specifically addressed to public trust
22 issues. The State Water Board implements the public trust doctrine primarily through its
23 administration of water right permits and licenses. Enforcement of the statutory prohibition against
24

25 ²¹ The CDOs merely implement requirements imposed under D-1641. They do not amend the Department's or the
26 Bureau's water rights and do not authorize any activity that would not be authorized if the CDOs were not issued.
27 Thus, issuance of the CDOs does not pose any threat of harm to public trust resources. In fact, to the extent that
28 issuance of the CDOs prevents future violations of the salinity objectives, harm to public trust resources may also be
prevented. (See R.T. (Nov. 17, 2005) 5: 2-8 [California Sportfishing Protection Alliance testimony that violation of
the 0.7 EC objective could adversely affect fish].)

1 unauthorized diversion and use established in Water Code section 1052 helps protect the public
2 trust because it requires appropriators to comply with the application and permit process through
3 which the Board sets terms to protect the public trust. Similarly, although the permit terms being
4 enforced by the proposed CDOs are directed towards protecting water quality for agricultural use,
5 vigorous enforcement helps to ensure compliance with all permit terms, including those set to
6 protect public trust uses. In this regard, it is particularly important for the Board to demonstrate its
7 willingness to use its recently enacted authority to issue CDOs in response to threatened violations.
8 (See Wat. Code § 1831, subd. (a), as amended by Stats. 2002, ch. 652, § 6.) Public trust uses, in
9 particular, may be irreparably harmed if the State Water Board follows a policy, like that
10 recommended by the Department in this proceeding, of waiting until after the water right holder
11 has reported a violation before considering any enforcement action.

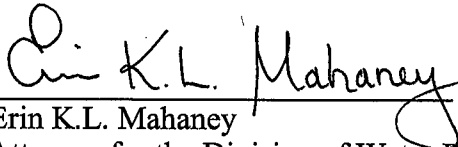
12 In sum, it is immaterial whether the salinity objectives were imposed to protect agricultural
13 beneficial uses instead of public trust resources. The State Water Board's vigorous enforcement of
14 the permit and license terms and conditions that it issues, regardless of the purposes of those terms,
15 ensures compliance and thus furthers the management of water resources in California.

16 V. CONCLUSION

17 The Water Code requires the State Water Board to vigorously enforce its decisions and the
18 terms of the water rights permit and licenses that it issues. The evidence clearly demonstrates a
19 threatened violation of terms imposed on the Department and the Bureau in D-1641. Accordingly,
20 a CDO with a compliance schedule is necessary to ensure the Department and the Bureau meet the
21 terms and conditions of their water rights and to unequivocally establish their responsibilities under
22 those water rights. Issuance of the CDOs, with the modifications recommended by the
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1 Enforcement Team, will demonstrate the Board's commitment to taking the vigorous enforcement
2 action that the Legislature intended when it enacted Water Code section 1825.

3 Date: December 12, 2005.
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6 
7 Erin K.L. Mahaney
8 Attorney for the Division of Water Rights
9 Enforcement Team
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