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8 BEFORE THE
9 STATE WATER RESOURCES CONTROL BOARD
10 STATE OF CALIFORNIA

11 In the matter of)
12 HEARING ON DRAFT CEASE AND DESIST)
13 ORDER REGARDING DELTA SALINITY) **SAN JOAQUIN COUNTY CLOSING**
14 AND WATER QUALITY RESPONSE PLAN) **BRIEF**
15)
16)
17)

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19 San Joaquin County (“County”) submits this closing brief in support of the testimony and
20 exhibits submitted on behalf of the County in the State Water Resources Control Board (“State
21 Board”) hearing regarding the Delta Salinity Cease and Desist Orders (“CDOs”) and the Water
22 Quality Response Plan (“WQRP”).

23 The County supports the issuance of the CDOs by the State Board against the Bureau of
24 Reclamation (“Bureau” or “Reclamation”) and the Department of Water Resources (“DWR”) to
25 ensure and require compliance with the interior delta salinity objectives of 0.7 EC during the months
26 of April through August. In addition, the County requests an amendment to condition 1 of the
27 Division Chief’s approval of the WQRP to also require the 0.7 EC salinity objectives be met during
28 these periods.

1
2 **Threatened violation of salinity objectives exists.**

3 California Water Code section 1831 authorizes the State Board to issue a cease and desist
4 order if the Board determines that a licensee or permittee is violating or “threatening to violate” any
5 term or condition of a permit or license. Water Right Decision 1641 (“D 1641”) requires
6 Reclamation and DWR, pursuant to their water right permits and licenses, to meet the salinity
7 objective at the three southern interior Delta compliance locations (located on (1) the San Joaquin
8 River at Brandt Bridge, (2) Old River near Middle River, and (2) the San Joaquin River at Tracy
9 Road Bridge) between April 1 and August 31. D 1641 provides that if the permanent barriers are
10 not constructed, or equivalent measures are implemented, the 0.7 EC interior delta salinity objective
11 must be met by Reclamation and DWR. (D 1641 p. 182, Table 2, Enforcement Team Exhibit WR
12 5b.)

13 Reclamation and DWR indicated by letter to the State Board that they anticipated violating
14 the 0.7 EC objective for the interior Delta. (Enforcement Team Exhibit WR 6.) Evidence presented
15 during the hearing by the Enforcement Team indicates that the then existing salinity objective of 1.0
16 EC was violated in 2003. (Enforcement Team Exhibit WR 15.) In addition, the Enforcement
17 Team demonstrated that based on past practices during the recent water years the 0.7 objective
18 would have been violated, even during wet years. (Enforcement Team Exhibit WR 11-13, and WR
19 1, p.6.) During the hearing, no evidence was presented by any party as to any anticipated or possible
20 measures that would or could be implemented by Reclamation and/or DWR to ensure that potential
21 violations do not occur in the future. Additionally, no evidence was submitted that “equivalent
22 measures” would be implemented. It is reasonable to assume that if additional measures are not
23 implemented by Reclamation and DWR, future violations of the 0.7 EC objective will occur. The
24 State Board has the clear authority pursuant to Water Code section 1831 to issue a cease and desist
25 order regarding these threatened and likely violations.

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1 **The CDOs should be modified to clearly require compliance with the 0.7 EC objective.**

2 One of the purposes of issuing the CDOs is to provide the ability for the State Board to take
3 further enforcement action in the event the salinity objectives are exceeded. California Water Code
4 section 1845 provides enforcement provisions for failure to comply with a cease and desist order. In
5 order to implement these enforcement measures, which includes filing an action for injunctive relief
6 and imposing civil penalties of up to \$1,000 for each day of the violation, a cease and desist order
7 must be violated. Wat. Code §1845. Issuance of the CDOs is the first step of this statutory
8 enforcement scheme. Once a violation of the CDO occurs, the enforcement measures may be
9 pursued.

10 In order to ultimately enforce the CDOs it is necessary that the CDOs clearly require the
11 Bureau and the DWR to meet the salinity objectives. The draft CDOs imply that the salinity
12 objectives must be met, but do not clearly require that the objectives be met. Rather, the draft CDOs
13 set forth various reporting and monitoring provisions that must be met by Reclamation and DWR if a
14 violation occurs or will potentially occur. The CDOs must clearly require that the salinity objectives
15 be met by DWR and Reclamation.

16 As testimony and legal arguments made during the hearing indicate, DWR's interpretation of
17 D 1641 is that despite an exceedence of the salinity objectives occurring DWR is not in violation of
18 its permit if non-compliance is "beyond its control" and until a report has been submitted to the State
19 Board regarding the violation and the Executive Director makes a recommendation to the State
20 Board on the report. (DWR Exhibit 18, p. 2-3.) This is absurd. D 1641 set the salinity objective
21 and made the Bureau and DWR responsible for meeting those objectives. Although D 1641
22 provides that following the evaluation of a report, the Executive Director can make a
23 "recommendation to the SWRCB as to whether enforcement action is appropriate or the
24 noncompliance is the result of actions beyond the control of the Permittee." (D 1641 p. 159.
25 Enforcement Team Exhibit WR 5.) This language does not make the exceedence of the salinity
26 standard not a violation of the permits, but merely discusses the State Board's discretion to take
27 enforcement action against the permit term violation and to consider such items as whether meeting
28 the salinity objective violation was beyond the control of DWR.

1 Due to DWR's and the Bureau's total lack of appreciation of their obligation to meet the
2 existing salinity objectives and due to the statutory language allowing enforcement "upon failure to
3 comply with a cease and desist order", it is essential that the CDOs clearly specify that the Bureau
4 and DWR must meet the existing salinity objectives. The County proposes amending the CDOs to
5 insert a new item 1 as follows:

6
7 Reclamation and DWR shall meet the 0.7 objective for Interagency Stations C-6, C-8, and P-
8 12 from April 1 through August 31 each year until such time as the permanent barriers are
9 operational, or approved equivalent measures are implemented.

10 The above language will eliminate any future confusion or potential arguments by DWR and
11 Reclamation that the CDO did not require compliance with the established salinity objectives.

12
13 **Reclamation and DWR must utilize all reasonable resources to meet objectives.**

14 During the hearing, Reclamation and DWR failed to present, discuss or comment on the
15 actions that may be utilized by them to ensure that the salinity objectives will be met. There was no
16 indication during the hearing that the parties will take any new action to meet the tougher salinity
17 objectives. The evidence presented by the State Board enforcement team indicates that if past
18 practices are followed and past water year types occur, the salinity objectives will be violated in
19 even wet years. (Enforcement Team Exhibit WR 1 p. 6, WR 11-13.) The CDOs should direct the
20 manner of compliance by DWR and Reclamation.

21 Reclamation's past practice of meeting the salinity objectives by predominately making
22 releases of fresh water from New Melones Reservoir to dilute the saline water within the San
23 Joaquin River is an unreasonable use of water in violation of Section 2 of Article X of the California
24 Constitution. Reclamation and DWR must meet these objectives and utilize the many tools available
25 to Reclamation and DWR to manage the federal and state systems to meet these objectives, without
26 depriving San Joaquin County of its contract water from New Melones Reservoir or depriving Delta
27 users of the quality and quantity of water necessary to sustain their agricultural beneficial uses. D
28 1641 discusses the various tools available to meet the objectives by DWR and Reclamation.

1 D1641 directs Reclamation to “consider dilution water other than New Melones Reservoir.”
2 (D1641 p. 86). D1641 indicates that, “Although releases of dilution water could help meet the
3 southern Delta objectives, regional management of drainage water is the preferred method of
4 meeting the objectives.” (D 1641 p. 84.) D1641 also recognizes that “a valley-wide drain will be
5 the only feasible long-term solution to drainage problem.” (D1641 p. 85.)

6 The CDOs identify some of the possible tools available to Reclamation and DWR to meet
7 the objectives, including additional releases from state and federal facilities, reduction of exports,
8 recirculation of diverted water to the San Joaquin River or purchases of water. (Draft Orders
9 262.31-16 and 262.31-17 at page 3.) The CDOs should require more. The CDO for Reclamation
10 should specifically limit the unreasonable use of additional New Melones Reservoir water releases to
11 meet the objectives. Instead of such unreasonable releases, the CDO should direct the parties to use
12 non-flow alternatives before water quality releases are made from New Melones, a non-export
13 facility. In addition, the CDOs should include, as a non-flow alternative, that the regional
14 management of drainage water be utilized by the parties to help met their salinity objective
15 obligations. Finally, the CDOs should require quarterly reports by Reclamation to the State Board
16 regarding its progress on the valley-wide drain, in order to require meaningful progress on the
17 valley-wide drain.

18
19 **D1641 Salinity Standard cannot be amended by the WQRP or in this Hearing.**

20 The effect of the Division Chief’s approval of the WQRP was to amend the provisions of
21 D1641 by amending the requirement that the 0.7 EC objectives are met in the southern Delta
22 locations. Instead of meeting the required 0.7 EC objectives, condition 1 of the approval of the
23 WQRP allowed joint points of diversion to occur if Reclamation and DWR met the 1.0 EC. The
24 Division Chief is entirely without the authority to alter the terms and conditions of water rights
25 permits issued by the Board. Any change to D 1641 must follow the formal amendment process for
26 a water rights permit. This includes a noticed, public hearing, with the opportunity to present
27 protests, evidence, and cross examination, similar to the process followed when D 1641 was issued.
28 See Wat. Code §§1394, 1611, 1703. The pending hearing did not include notice of or testimony

1 regarding changing the existing salinity objectives. Such evidence was specifically excluded from
2 the hearing proceedings. Thus, the Division Chief's approval of the WQRP cannot stand.

3
4 **Conclusion.**

5 Due to Reclamation and DWR's past practices and threatened violation of the interior Delta
6 salinity objectives, the State Board should issue final CDOs. This will provide the State Board with
7 more meaningful enforcement options pursuant to Water Code section 1845 in the event that the
8 salinity objectives are violated in the future. Reclamation and DWR must be required to take all
9 reasonable actions to meet the salinity objectives and up to this time they have demonstrated a lack
10 of willingness or intent to take reasonable actions to meet these objectives. It must be noted that the
11 continued reliance on New Melones to meet the objectives is an unreasonable use of water contrary
12 to law. Reclamation and DWR must be required to meet the established salinity objectives to protect
13 agricultural beneficial uses within the Delta. Issuance of the CDOs will encourage compliance, and
14 enable the State Board to utilize additional enforcement tools if compliance does not occur.

15 The Division Chief's approval of the WQRP allowing a relaxation of the salinity objectives
16 within the Delta is improper and cannot stand. The State Board must require compliance with the
17 salinity objectives established in D 1641. Any discussion of diminished water quality, whether it is
18 in the Delta or some other area of the State, in an era when all federal, state and local regulatory
19 attention is focused on its sustainable improvement, is at the very least ludicrous.

20 Dated: December 9, 2005

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23 By: 
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