

January 10, 2006

Sent via U.S. Mail and Email: commentletters@waterboards.ca.gov

Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
P.O. Box 100
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RE: COMMENT LETTER - 01/13/06 Board Meeting Item Number 4

Dear Ms. Potter:

These comments relate to the document titled "Draft - December 30, 2005- Order WR 2006 - In the Matter of Draft Cease and Desist Order Nos. 262.31-16 and 262.31-17 Against the Department of Water Resources and the United States Bureau of Reclamation Under their Water Right permits and License and In the Matter of Petitions for Reconsideration of the Approval of a Water Quality Response Plan Submitted by the Department of Water Resources and the United States Bureau of Reclamation for their Use of Joint Points of Diversion in the Sacramento-San Joaquin Delta" (hereinafter referred to as the "Draft Order").

Background Regarding Cross Valley Contractors

The undersigned are hereby presenting comments regarding the above-noted matter on behalf of Pixley Irrigation District, Lower Tule River Irrigation District, Tri-Valley Water District, Hills Valley Irrigation District, Kern Tulare Water District and Rag Gulch Water District. These districts receive CVP water under various exchange contracts from the Export Division of the Central Valley Project (water that originates in the Sacramento River watershed and is exported south of the Delta via the California Aqueduct). Because they receive CVP water from the Aqueduct via the Cross Valley Canal in the southern San Joaquin Valley, these districts are referred to as the Cross Valley Contractors.

Specifically, the Cross Valley Contractors have comments regarding both the process and the substance of those portions of the Draft Order that pertain to the Petition for Reconsideration of the Division Chief's July 1,

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2005, decision approving the Water Quality Response Plan ("WQRP") that supports the Bureau of Reclamation's Joint Points of Diversion (JPOD). The Cross Valley Contractors have three areas of comment:

I. Failure to Provide Notice and Opportunity to Be Heard

Although the Cross Valley Contractors are not direct parties to the matters that are the subject of the Draft Order, they are directly affected by Section B of the Draft Order (commencing on page 32), which addresses, and appears to be a final decision on, the Petition for Reconsideration (the "Petition"). The Cross Valley Contractors also actively participated in Phase 6 of the Bay-Delta proceedings leading up to the JPOD references in D-1641. In fact, deliveries to Cross Valley Contractors are specifically addressed in Section B of the Draft Order at page 33 (Condition 1.a.i.). Despite this direct impact and past involvement, no notice of this proposed action was given at any time to any of the Cross Valley Contractors.

Further, Section B of the Draft Order in general appears to be an afterthought to the chief subject of the Draft Order, namely the decision on the CDOs. It is our understanding that little to no time was spent at the hearings on discussions regarding the Petition and that most if not all of the attention was on the CDOs. Although the issues involved in the CDOs are related to the issues involved in the Petition, the issues are nevertheless separate and distinct, and deserved to have separate hearings and sufficient time devoted to each decision. Because this was not provided, it is our opinion that the Board has incomplete information from which to make the decision on the Petition as proposed by the Draft Order.

Because the proposed decision on the petition for reconsideration directly impacts the Cross Valley Contractors' ability to conduct diversions through JPOD, the Cross Valley Contractors should have received notice of the petition and should have been given an opportunity to be heard at the hearing on this matter. Because they were not, section B of the Draft Order should be removed, and further proceedings should instead be scheduled, if necessary.

II. Draft Order on Petition Not Supported By Factual Evidence

Section B of the Draft Order imposes an action that is not supported by any factual evidence, and in fact is not consistent with either the facts that are recited in the body of the Draft Order or the facts as our clients understand them.

Specifically, Section B of the Draft Order amends Condition 1 of the Division Chief's July 1, 2005, decision by limiting the "Stage 1" use of the

JPOD to deliveries that are actually received by Cross Valley Contractors, and further limits exchanges to those exchanges that are balanced within the same irrigation season. This limitation is not consistent with general statements in the body of the Draft Order that state that it is the intent of the Draft Order to continue to allow the historic use of JPOD. (See for example page 28 of the Draft Order, which states that the order "authorizes DWR and USBR to conduct the minimal, historic, uses of the JPOD under Stage 1, without requiring that DWR and USBR meet the 0.7 EC objective, until July 1, 2009".)

On page 26, the Draft Order draws the conclusion that the historic uses of JPOD are limited to deliveries that are actually received by Cross Valley Contractors and does not include transfers to other water users. However, nowhere in the body of the Draft Order are any facts recited that support the conclusion that historic uses do not include transfers to other water users. Further, there is no recitation of any fact or conclusion, other than in the order itself, that indicates that historic use includes exchanges only if the exchange is fully completed within one irrigation season. Nor, we understand, was any evidence presented during these proceeding concerning Cross Valley Contractor deliveries.

If our clients had been given advance notice of this issue, they would have provided evidence that the historic use of JPOD includes multi-season exchanges and outright transfers of water to other entities, all of which are accomplished with the consent and assistance of the primary license/permit holder, the Bureau of Reclamation. Details of these activities could easily be provided.

III. Cease and Desist Orders In General Are Inconsistent With D1641

As noted above, the Cross Valley Contractors are directly affected only by Section B of the Draft Order (commencing on page 32). However, to the extent that this portion of the order is affected by or informed by the Board's proposed orders on the Cease and Desist Orders ("CDOs"), the Cross Valley Contractors object to the entire Draft Order. In particular, the application of the .7 EC level as a specific condition of the Bureau of Reclamation permit is not, in our opinion, consistent with D-1641.

Because the .7 EC level standard should not be applied across the board to the diversion points at issue through the CDOs, no specific treatment of the JPOD in the decision on the Petition is necessary. Therefore, the July 1, 2005, decision of the Division Chief should be allowed to stand unamended.

Conclusion

In general, the Cross Valley Contractors support the Division Chief's initial decision as well as the Board's proposed order sustaining this decision.

However, if the Board intends its decision on the Petition for Reconsideration to result in historic uses of JPOD being allowed to continue, then all historic uses should be included. The decision should be stated in general terms (i.e., no specification as to what the historic uses are and no restrictions on transfers or exchanges). If necessary, the Board could conduct additional hearings to determine the historic uses that should be allowed to continue under the Division Chief's decision, as amended by the Board's decision on the Petition. If additional hearings are held, the Cross Valley Contractors would like notice and the opportunity to put on the record the actual facts regarding these historic uses.

Thank you for your consideration of these comments.

Respectfully Submitted,

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Note: The participants have been served via their email addresses and have only been served by mail if an email address has not been provided.

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