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# State Water Resources Control Board



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January 10, 2006

### SENT VIA EMAIL AND HAND DELIVERY

Chair Tam Doduc  
c/o Ms. Selica Potter  
Acting Clerk to the Board  
State Water Resources Control Board  
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Dear Chair Doduc:

### COMMENT LETTER—JANUARY 13, 2006 BOARD MEETING ITEM NUMBER 5 (DELTA SALINITY DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND GRANTING PETITIONS FOR RECONSIDERATION)

The Division of Water Rights Enforcement Team (Enforcement Team) supports the State Water Resources Control Board's (State Water Board or Board) adoption of the draft order released December 30, 2005, issuing a joint cease and desist order to the Department of Water Resources (Department) and United States Bureau of Reclamation (Bureau). Imposing a joint cease and desist order on these agencies will demonstrate the State Water Board's commitment to enforcement in accordance with Water Code section 1825, which directs the Board to take vigorous action to enforce the terms and conditions of water right permits and licenses. Moreover, taking enforcement action against government entities comports with the Governor's Action Plan for the Environment, which states:

Government should be held accountable for environmental protection to the same extent as private parties and should be held to the same enforcement standards.

(<http://www.calepa.ca.gov/Enforcement/Initiative/GovActionPlan.htm>). The draft order is supported by substantial evidence and provides a reasonable method of ensuring the Department's and the Bureau's compliance with their existing water right requirements. The Enforcement Team urges the State Water Board to adopt the proposed order.

On January 6, 2006, the Department and the Bureau submitted comments on this agenda item to the State Water Board. The Department requests the State Water Board to withdraw this item from its January 13, 2006, meeting agenda and to postpone consideration of the matter for four weeks. The Enforcement Team opposes the postponement of this matter. In keeping with the

*California Environmental Protection Agency*

vigorous enforcement contemplated by Water Code section 1825, enforcement proceedings should be completed promptly and efficiently. Any unwarranted delay serves to frustrate the Legislature's intent and the administration's enforcement policies. If, however, the State Water Board decides to continue this proceeding, the Enforcement Team urges the Board to set the matter for its next meeting on February 1, 2006. This timeline will give the hearing participants four weeks from the release of the draft order on December 30, 2006, to review and comment on the draft order. Four weeks is an ample amount of time for the hearing participants' review.

In the Bureau's comment letter, the Bureau requests the State Water Board to submit the matter to nonbinding arbitration or mediation, pursuant to California Code of Regulations, title 23, section 648.6. The State Water Board should deny the request. Alternative dispute resolution requires the consent of all the parties. (Gov. Code, § 11420.10, subd. (a).) The Enforcement Team opposes the Bureau's request. It is inappropriate for a party to seek arbitration or mediation at this point in the proceeding. The Bureau requested a hearing on the draft cease and desist order. It did not request arbitration or mediation at any point before or during the hearing. The State Water Board held six days of hearing on the enforcement proceeding and on the petitions for reconsideration of the Division Chief's approval of the Water Quality Response Plan, and it gave the participants an opportunity to brief the issues. Only now, after seeing a draft decision that is not to its liking, the Bureau seeks arbitration or mediation. A party should not be allowed to seek arbitration or mediation for purposes of negotiating a different result, after having every opportunity to participate in the adjudicative hearing, merely because it does not like the result.

Moreover, the primary issue raised by the Bureau is a legal one that is not conducive to mediation or arbitration. The Bureau contends that the State Water Board never can take an enforcement action against the Bureau for a threatened violation of a salinity standard. The Bureau's position is untenable. In Decision 1641 (revised), the Board did not, and legally could not, exempt the Bureau from subsequent amendments to the Water Code allowing cease and desist orders to be issued for threatened violations of permit and license terms. As explained in the Enforcement Team's closing brief, Decision 1641 simply cannot be interpreted to limit the State Water Board's enforcement discretion under a subsequently amended statute.

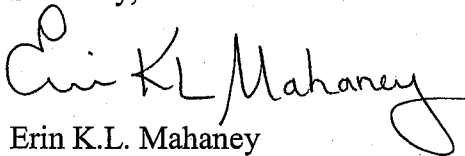
The Bureau implies that it did not fully participate in the hearing because it instead chose to focus its efforts on settlement with the Enforcement Team. The Hearing Officer expressly excluded any discussion of the settlement negotiations between the Enforcement Team and the Bureau from the hearing and the State Water Board should not entertain any such discussion now. How the Bureau chose to expend its resources—whether on negotiation or hearing preparation (or both, as the Enforcement Team did)—is irrelevant to the outcome of this proceeding. Although the Enforcement Team notified the hearing participants of a proposed settlement at the start of the hearing, neither the Enforcement Team nor the Bureau requested a continuance, either at that time or when it became clear that the proposed settlement would not

be executed. Having failed to make any request for a continuance based on the settlement negotiations, the Bureau cannot complain now that the hearing went ahead as scheduled.

The State Water Board should also be aware that the Enforcement Team disagrees strongly with some of the representations that the Bureau makes concerning the settlement negotiations. Consistent with professional courtesy and ethical and legal requirements, the Enforcement Team has kept its settlement discussions with the Bureau confidential. Apparently the Bureau does not feel similarly constrained. Because the Enforcement Team does not believe that the settlement negotiations have any bearing on how the State Water Board should proceed, the Enforcement Team will not respond to the Bureau's allegations in these comments. If the State Water Board believes the settlement negotiations are somehow relevant to what should be included in its proposed order, or provides a basis for arbitration, mediation, or any other actions that would delay adoption of its proposed order, and if the Bureau will waive confidentiality, the Enforcement Team would be happy to explain in detail where we disagree with the Bureau's representations.

The Department's and the Bureau's comments should not influence the State Water Board's decision in this proceeding. The Enforcement Team respectfully requests the State Water Board to adopt the proposed order without delay.

Sincerely,



Erin K.L. Mahaney  
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cc: Delta Salinity Draft CDO and  
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