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10

11 BEFORE THE
12 STATE WATER RESOURCES CONTROL BOARD
13

14 In Re Draft Cease and Desist Orders against
15 the United States Bureau of Reclamation
16 and the California Department of Water
17 Resources and Reconsider the Conditional
18 Approval of the April 25, 2005 Water
19 Quality Response Plan for use of Joint
20 Points of Diversion by the United States
21 Bureau of Reclamation and the California
22 Department of Water Resources

23 **COMMENTS ON DRAFT ORDER**
24 **ADOPTING CEASE AND DESIST**
25 **ORDER AND GRANTING PETITIONS**
26 **FOR RECONSIDERATION**

27 The San Luis & Delta-Mendota Water Authority (Water Authority) and Westlands Water
28 District (Westlands) participated in the hearing process, which lead to the California State Water
Resources Control Board (Water Board) releasing on December 30, 2005 its draft "Order
Adopting Cease and Desist Order and Granting Petitions for Reconsideration" (Draft Order).
During the hearing process, the Water Authority and Westlands presented evidence, cross-
examined witnesses and filed a closing brief. Through those actions, the Water Authority and
Westlands raised several concerns, including:

- The inability of the Water Board to issue a cease and desist order against the United States because it has not expressed a clear waiver of sovereign immunity;

- 1 ▪ The lack of evidence in the record to support a finding that there has been a
2 violation or there is a threatened violation of any term or condition of a license or
3 permit held by either the United States or the Department of Water Resources;
- 4 ▪ The failure to show harm even if the Water Board determines that
5 threatened violations exist; and
- 6 ▪ The possible need to comply with the California Environmental Quality
7 Act before the Water Board were to issue the Draft Order.

8 The Water Authority and Westlands are entitled to responses by the Water Board to those
9 concerns, if and when it issues a final order. Because the Draft Order does not provide such a
10 response, the Draft Order is not acceptable.

11 Also, to supplement the concerns raised previously, the Water Authority and Westlands
12 present the following comments, which are specific to the Draft Order. The Water Board, if it
13 were to issue the Draft Order, would (1) conclude that the United States and Department of Water
14 Resources threaten to violate conditions in their license and/or permits, and (2) potentially limit
15 the ability of the United States and California Department of Water Resources to use of each
16 other's points of diversion in the southern Sacramento-San Joaquin Delta, commonly referred to
17 as Joint Point of Diversion (JPOD). Both actions, based on the record before the Water Board,
18 would be arbitrary.

19 The Draft Order responds to perceived threats of violations by the United States and
20 Department of Water Resources of conditions in their license and/or permits. The Draft Order,
21 however, fails to provide an adequate basis for a determination of "threatened violations." It
22 ignores the history underlying the conditions imposed by the Water Board on the license and/or
23 permits. History shows that exceedances of objectives intended to protect agricultural uses of
24 water in the southern Delta, as established in the 1995 Water Quality Control Plan for the San
25 Francisco Bay/Sacramento San Joaquin Delta Estuary, (1995 WQCP), should not result, per se, in
26 violations of conditions of the license and/or permits held by the United States and California
27 Department of Water Resources. Or, in other words, possible, future exceedances of objectives
28 established in the 1995 WQCP do not mean there are threatened violations of conditions.
Because the Draft Order fails to draw such a distinction, the evidence does not support the Draft

1 Order's determination of "threatened violations," and the Water Board should thus not issue a
2 cease and desist order.

3 The Draft Order also addresses the petitions for reconsideration of the approval of a water
4 quality response plan (WQRP), a requirement for use of JPOD. The Draft Order arbitrarily limits
5 JPOD based on conditions or actions within the prior twelve months, and the ability of the Cross
6 Valley Canal contractors and Musco Olive to manage under JDOP water supplies available to
7 them through transfers. The Draft Order does not provide an adequate explanation for either
8 potential limitation. Indeed, the explanation provided offers no justification for the limitations.
9 Accordingly, if the Water Board were to issue the Draft Order it would include capricious
10 limitations on JPOD. The Water Board should not adopt the Draft Order as currently drafted.

11 **I. THE RECORD DOES NOT CONTAIN SUFFICIENT EVIDENCE TO SUPPORT**
12 **FINDINGS OF "THREATENED VIOLATIONS"**

13 The Draft Order is explicit in the information that forms the basis for the finding of a
14 threatened violation. It explains:

15 Statements by DWR and USBR, historic data, gaps in required data reporting, and
16 the unreported violations of the 1.0 EC objective in 2003 immediately before the
17 effective period of the more restrictive 0.7 EC effective period support a
18 conclusion that DWR and USBR are likely to violate the 0.7 EC objective in the
19 future.

20 Draft Order at 16. During the hearing, the enforcement unit presented that evidence. However,
21 the evidence fails to appreciate, as does the Draft Order itself, the delicate balance struck by the
22 Water Board in D-1641, a balance reflected in the subject conditions of the United States' and
23 Department of Water Resources' license and/or permits. Because of that omission, the evidence
24 does not support a determination that either the United States or the Department of Water
25 Resources threaten to violate the conditions of their license and/or permits.

26 In D-1641, the Water Board balanced the causes of the water quality concerns with the
27 available, reasonable actions that could be taken to improve water quality in the southern Delta.
28 The Water Board recognized in D-1641 that exceedances of the water quality objectives
established in the 1995 WQCP intended to protect agricultural uses in the southern Delta were

1 caused by numerous factors, including “San Joaquin River inflow; tidal action; diversions of
2 water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity.”
3 D-1641 at 86. The Water Board recognized further that those objectives could be implemented
4 through several actions, including “providing dilution flows, controlling in-Delta discharges of
5 salts, or by using measures that affect circulation in the Delta.” *Id.* at 86-87.

6 However, through D-1641, rather than seek to assign responsibility and require actions to
7 be taken by each person or entity based on each factor that influences water quality in the
8 southern Delta, the Water Board focused on then-contemplated actions; the barrier programs. *See*
9 *id.* at 87-89. It assigned to the United States and the Department of Water Resources
10 responsibility for water quality in the southern Delta, but that responsibility was limited to a level
11 of water quality that could be provided through the barrier programs; a temporary and
12 “permanent” barrier (now operable gates) program. Neither phase of action was ever thought to
13 achieve at all times the water quality objectives intended to protect agricultural uses in the
14 southern Delta.

15 The modeling performed for the programs, which is part of the record for D-1641,
16 demonstrated that neither program would preclude at all times exceedances of either a 1.0 EC or a
17 0.7 EC at any of the southern Delta compliance locations. The Water Board noted: “Modeling
18 shows that construction and operation of the temporary barriers should achieve water quality of
19 1.0 mmhos/cm at the interior stations under most hydrologic conditions.” *Id.* at 88 (emphasis
20 added). Similarly, the Water Board acknowledged that “construction of permanent barriers alone
21 is not expected to result in attainment of the water quality objectives.” *Id.* (Emphasis added.)

22 Those statements are supported by the analyses contained in the environmental impact
23 report prepared for implementation of the 1995 WQCP. In that document, three alternatives were
24 considered:

25 The three alternatives currently being considered to implement the southern Delta
26 agricultural objectives in the 1995 Bay/Delta Plan are listed below.

27 1. Southern Delta Salinity Control Alternative 1 - Base Case

28 The SWP and the CVP are responsible for meeting D-1485 requirements. The

1 CVP is responsible for meeting the D-1422 salinity objective at Vernalis. Existing
2 temporary barriers in the southern Delta are installed and operated to improve
3 salinity conditions in the southern Delta. No further action is taken to implement
4 the southern Delta salinity objectives.

2. Southern Delta Salinity Control Alternative 2 - 1995 Bay/Delta Plan

5 The 1995 Bay/Delta Plan flow objectives are met by implementation of one of the
6 flow objective alternatives. Existing temporary barriers in the southern Delta are
7 installed and operated by the SWP and the CVP to improve salinity conditions in
8 the southern Delta. No further action is taken to implement the southern Delta
9 salinity objectives.

3. Southern Delta Salinity Control Alternative 3 - Permanent Barrier Construction

10 The 1995 Bay/Delta Plan flow objectives are met by implementation of one of the
11 flow objective alternatives. The barriers proposed in the ISDP preferred alternative
12 are constructed and operated by the SWP and CVP to achieve the southern Delta
13 salinity objectives to the extent feasible. Other elements of the ISDP not necessary
14 to support barrier operation are not constructed.

15 FEIR for Implementation of the 1995 Bay/Delta Water Quality Control Board at IX-11 (emphasis
16 added). The analyses of those alternatives is summarized as follows:

17 Alternative 1 meets water quality objectives at southern Delta stations in the
18 winter months, but frequently exceeds objectives during the summer months.
19 Alternative 2 also meets water quality objectives at southern Delta stations for the
20 September through March period, and reduces the frequency of exceedance of
21 salinity objectives during the summer months. Objectives are still exceeded,
22 however, according to model runs. Alternative 2 consistently improves salinity
23 levels at Vernalis and Union Island stations between April and August. There are
24 also improvements, though to a lesser degree, at Brandt Bridge on the San Joaquin
25 River and Tracy Road Bridge on Old River during the irrigation season. There is
26 no marked improvement in water levels under Alternative 2 compared to
27 Alternative 1. Alternative 3 meets salinity objectives in the southern Delta during
28 the non-irrigation season, and reduces the frequency of exceedance compared to
both Alternatives 1 and 2 during the irrigation season.

Id. at IX-48 (emphasis added).

As presented above and previously in the hearing, the Water Board clearly contemplated that the United States and the Department of Water Resources would contribute to the improvement of water quality in the southern Delta through barrier-related actions. However, those actions at all times were considered to provide a level of protection less than that required under the 1995 WQCP. Those factors must be reflected in any interpretation of the conditions in

1 the license and/or permits held by the United States and Department of Water Resources. When
2 viewed in that light, a determination of threatened violation of license and/or permit conditions
3 cannot be based solely on evidence advanced to support a possible exceedance of objectives
4 established in the 1995 WQCP.¹ To make a finding of threatened violation based simply on
5 evidence advanced to support a possible exceedance of objectives would cause an absurd result.
6 It would result in the United States and the Department of Water Resources threatening violations
7 of their license and/or permit conditions simply by complying with D-1641.

8 In sum, the Draft Order has been prepared and the proposed findings of “threatened
9 violations” are made without regard for the history of D-1641. There, the Water Board struck a
10 balance between factors influencing water quality and responsibility for implementing solutions.
11 That balance did result in conditions being imposed on the license and/or permits held by the
12 United States and Department of Water Resources. The balance, however, did not cause the
13 Water Board to impose absolute obligations on the United States and Department of Water
14 Resources to achieve the water quality objectives intended to protect agricultural uses in the
15 southern Delta. The obligations imposed were something less. As a result, the conditions, as
16 imposed through D-1641, cause a distinction, which must be drawn, between exceedances of the
17 1995 WQCP objectives and violations of permit and license conditions. The Draft Order ignores
18 such a distinction. When that distinction is taken into account, it becomes clear that there is no
19 basis to find threatened violations and thus there is no basis to issue a cease and desist order.

20 **II. THE PROVISIONS RELATING TO JPOD MAKE LITTLE SENSE**

21 The Draft Order also addresses the petitions for reconsideration of the approval of the
22 WQRP. The Water Authority and Westlands take exception with two provisions of the Draft
23 Order related thereto. The first provision provides:

24 DWR and USBR may conduct JPOD diversions if DWR and USBR have, for the
25 previous twelve months, been in compliance with all of the conditions on their
26 water right permits and license.

27 ¹ A substantive concern with the evidence presented is that the enforcement unit witness, who
28 concluded that a “threatened violation” exists, has no expertise to conclude that a possibility of
future violation exists. *See* Water Authority and Westlands Closing Brief at pp. 17-18.

1 That provision does not serve the purpose of the WQRP. As the Draft Order properly recognizes,
2 the purpose of the WQRP "is to ensure that operation of JPOD does not significantly degrade
3 water quality in the southern and central Delta to the injury of water users in the southern and
4 central Delta." Draft Order at 22. A provision that potentially limits JPOD based on conditions
5 or actions within the prior twelve months has little, if any relationship to the effect of then-
6 proposed operations of JPOD on water quality in the southern and central Delta. It would
7 arbitrarily constrain use of JPOD.

8 The second provision would preclude, under certain circumstances, the Cross Valley
9 Canal contractors and Musco Olive from transferring water made available to them pursuant to
10 JPOD. The provisions states:

11 DWR and USBR may conduct Stage 1 JPOD diversions pursuant to Condition 1.b.
12 on page 151 and Condition 2.b. on page 156 of D-1641 if they meet an EC
13 objective of 1.0 mmhos/cm at Interagency Station Nos. C-6, C-8, and P-12 (San
14 Joaquin River at Brandt Bridge, Old River near Middle River, and Old River at
Tracy Road Bridge) and provided that water deliveries to serve the Cross Valley
Canal contractors and Musco Olive are not transferred to other parties for sale.

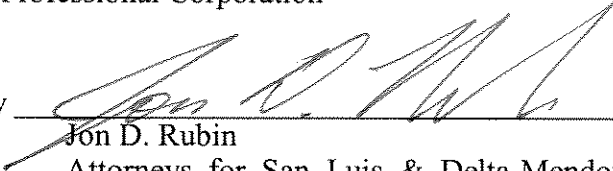
15 The justification for that provision is it is necessary to preserve "the long-standing historic uses of
16 JPOD." Draft Order at 26. It is unclear what evidence supports the discussion of historic uses of
17 JPOD. Nevertheless, substantively, the Draft Order again provides an arbitrary limit on those
18 historic uses: one of which is transfers. For a long period of time, the Cross Valley Canal
19 contractors and Musco Olive have employed transfers to manage their water supplies.

20 For these reasons, the State Water Board should remove the condition on JPOD that
21 requires compliance with all conditions in the previous twelve months and the limitation on the
22 ability to transfer water pumped under Stage 1 when an EC objective of 1.0 mmhos/cm is met.

23 Dated: January 10, 2006

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD,
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In Re Draft Cease and Desist Orders against
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Approval of the April 25, 2005 Water
Quality Response Plan for use of Joint
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Bureau of Reclamation and the California
Department of Water Resources

PROOF OF SERVICE

1 I, Kathy Blenn, declare:

2 I am a resident of the State of California and over the age of eighteen years, and not a
3 party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA
95814-4416. On January 10, 2006, I served the within documents:

4 COMMENTS ON DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND
GRANTING PETITIONS FOR RECONSIDERATION

5 by transmitting via e-mail the above listed document(s) to the e-mail addresses as
6 set forth below on this date before 5:00 p.m.

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14 by placing the document(s) listed above in a sealed envelope with postage thereon
15 fully prepaid, in the United States mail at Sacramento, California addressed as set
16 forth below.

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22 I am readily familiar with the firm's practice of collection and processing correspondence
23 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
24 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
25 motion of the party served, service is presumed invalid if postal cancellation date or postage
26 meter date is more than one day after date of deposit for mailing in affidavit.

27 I declare under penalty of perjury under the laws of the State of California that the above
28 is true and correct.

Executed on January 10, 2006, at Sacramento, California.

21 
Kathy Blenn