



Alan C. Lloyd, Ph.D.
Agency Secretary

State Water Resources Control Board



Arnold Schwarzenegger
Governor

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

September 8, 2005

HAND DELIVERED

Mr. Arthur G. Baggett
Hearing Officer
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, CA 95814

Ms. Tam M. Doduc
Hearing Officer
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Dear Chairman Baggett and Board Member Doduc:

OPPOSITION TO JOINT MOTION BY THE DEPARTMENT OF WATER RESOURCES AND THE UNITED STATES BUREAU OF RECLAMATION TO CONSOLIDATE AND CONTINUE THE HEARING ON THE DRAFT CEASE AND DESIST ORDERS WITH OTHER PROCEEDINGS

The Division of Water Rights Enforcement Team (Enforcement Team) opposes the joint motion of the Department of Water Resources (Department) and the United States Bureau of Reclamation (Bureau) to consolidate and continue proceedings related to the Delta salinity objective. The State Water Resources Control Board's (State Water Board) commitment to enforcement and compliance is best served by holding a hearing on the draft Cease and Desist Orders (CDO) as scheduled on October 24, 2005. Continuing the hearing will only serve to further delay the Bureau's and the Department's compliance with the terms of their permits and license.

Background

In May 2005 the State Water Board's Division of Water Rights (Division) issued draft CDO Nos. 262.31-16 and 262.31-17 to the Bureau and Department, respectively, for the threatened violation of the term requiring the agencies to meet a maximum 30-day running average of mean daily Electrical Conductivity (EC) (measured in mmhos/cm) of 0.7 from April through August at three Delta locations. After April 1, 2005, the 0.7 EC objective is replaced by an EC objective of 1.0 from April through August if permanent barriers are constructed or equivalent measures are implemented. The agencies have neither constructed the permanent barriers nor implemented equivalent measures. The draft CDOs impose a compliance schedule that, in part, requires the agencies to install the permanent barriers or implement equivalent measures by January 1, 2009.

After the Bureau and the Department requested a hearing, the State Water Board scheduled the matter for hearing on October 24, 2005. The Enforcement Team has filed a Notice of Intent to Appear in that hearing. Additionally, the State Water Board currently is considering adopting an order granting reconsideration of the July 1, 2005, approval by the Chief, Division of Water Rights, of the Water Quality Response Plan that will allow the Department and the Bureau to use certain diversions in the Delta. The proposed order schedules the reconsideration matter for hearing concurrent with the October 24 hearing on the draft CDOs. The Enforcement Team does not object to the proposed consolidation as long as the hearing is not delayed.

On September 1, 2005, the Department and the Bureau submitted a joint motion proposing to consolidate the three proceedings pending before the State Water Board in one hearing:

- (1) consideration of the draft CDOs issued against the Bureau and the Department;
- (2) reconsideration of the Division Chief's recent approval of the Water Quality Response Plan, and
- (3) consideration of their change petitions seeking a change in the effective date of the salinity objective. The Department and the Bureau request that the consolidated hearing be postponed until at least January 2006.

Opposition to Motion to Consolidate and Continue the Hearing

The Enforcement Team opposes the joint motion of the Department and the Bureau. The Division issued the draft CDOs based on the agencies' threatened violation of their permit and license terms requiring them to meet the 0.7 mmhos/cm EC objective. In part, the draft CDOs establish a schedule of compliance for the agencies and require them to notify the State Water Board of any potential or actual violation of those permit and license terms. The purpose of the CDOs is to compel compliance with the terms of the agencies' permits and license as soon as reasonably possible.

Such compliance, however, is undermined by any delays in the current October hearing schedule. At a minimum, the Bureau and the Department propose to delay the consolidated hearing until January. It is entirely possible, however, that the hearing will be delayed even further by factors beyond the State Water Board's control. For example, the environmental documentation for the change petitions may be challenged. Moreover, the addition of numerous other parties once the change petition is set for hearing likely will result in delay. To ensure compliance with the terms of the agencies' permits and license, and to ensure that the permanent barriers are constructed expeditiously, the enforcement hearing should be held in October as planned.

The Bureau and the Department state that the three proceedings involve the same main issue, namely, whether implementation of the salinity objective of 0.7 EC should be replaced with the 1.0 EC objective. This is incorrect. Although the proceedings all involve the same subject—the salinity objective—they do not involve the same issue. From the Enforcement Team's perspective, the sole issue is whether the agencies have threatened to violate the existing term

imposing the 0.7 EC objective and whether the State Water Board consequently should issue a schedule of compliance under the CDOs. It is neither necessary nor desirable to hold a consolidated hearing on changing the salinity objective.

The Bureau and the Department further assert that holding the enforcement hearing before the hearing on the change petitions will result in the hearings being scheduled out of order. To the contrary, delaying an enforcement hearing in the hopes that a permit and license term will be changed, thus obviating the need for enforcement, controverts the logical order of the proceedings. The purpose of the enforcement proceeding is to ensure compliance with *current* permit and license conditions. To assume that those conditions will be changed, and that further enforcement will be unnecessary, is speculative at best and irrelevant to the issue of whether a permittee or licensee has threatened to violate an *existing* requirement. The agencies' concern that any final CDOs may need to be revised if the salinity objective is subsequently changed is easily addressed. The State Water Board has the authority to modify or revoke a CDO at any time if the permit requirement enforced by the CDO is later revised or eliminated. (Wat. Code, § 1832).

Moreover, the Enforcement Team has grave concerns about the practicality of combining an enforcement proceeding—a proceeding to determine whether a violation is threatened and whether a compliance schedule should be imposed—with a proceeding to change the very term that is the subject of the enforcement proceeding. Indeed, the Bureau and the Department acknowledge in their motion that “discussing the three matters in one hearing may make the arguments more complicated,” which is one of the reasons they request a continuance. Because the issue of whether to issue a CDO is distinct from the issue of whether the salinity objective should be revised, the Enforcement Team suggests that if the State Water Board is inclined to consolidate any proceedings, it should consolidate the reconsideration and change proceedings in one hearing and continue to hold the October hearing on the draft CDOs.

Combining enforcement proceedings, where a separation of functions is required, with consideration of a change petition, which does not require a separation of functions, is also an inefficient allocation of the State Water Board's resources. If the proceedings are combined, staff will need to observe a separation of functions throughout the proceedings, requiring a greater commitment of staff time than would be required if the matters were heard separately.

Finally, the Water Code directs the State Water Board to take vigorous action to enforce the terms and conditions of water right permits and licenses. (Wat. Code, § 1825.) This requires that enforcement proceedings be completed promptly and efficiently. Combining the hearing on the CDOs with the proceedings on water right change petitions would have the opposite effect.

Mr. Arthur G. Baggett &
Ms. Tam M. Doduc

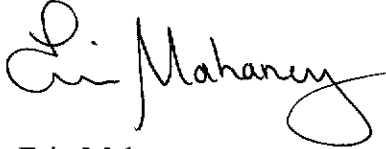
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September 8, 2005

Conclusion

The Enforcement Team respectfully requests that the Department's and the Bureau's joint motion to consolidate and continue the three proceedings be denied.

Sincerely,



Erin Mahaney
Staff Counsel, Division of Water Rights Enforcement Team

cc: Mr. John O'Hagan [**via email only**]
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Ms. Jean McCue
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Mr. Larry Lindsay [**via email only**]
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Barbara Leidigh, Esq.
Office of Chief Counsel
State Water Resources
Control Board
1001 I Street, 22nd Floor
Sacramento, CA 5814

Service List

Service List

Amy Aufdemberge, Esq.
Assistant Regional Solicitor
U.S. Department of Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

Cathy Crothers, Esq.
Office of the Chief Counsel
State Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

Jeanne M. Zolezzi, Esq.
Herum Crabtree Brown, Inc.
2291 West March Lane, Suite B100
Stockton, CA 95207

Robert B. Maddow, Esq.
Carl P.A. Nelson, Esq.
Bold, Polisner, Maddow, Nelson & Judson
500 Ygnacio Valley Road, Suite 325
Walnut Creek, CA 94596-3840

John Herick, Esq.
Attorney at Law
4255 Pacific Avenue, Suite 2
Stockton, CA 95207

Dante John Nomellini, Esq.
Dante John Nomelline, Jr., Esq.
Nomellini, Grilli & McDaniel
Professional Law Corporation
235 East Weber Avenue
P.O. Box 1461
Stockton, CA 95201

PROOF OF SERVICE

I, Dolores M. White, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within documents:

OPPOSITION TO MOTION OF DEPARTMENT OF WATER RESOURCES AND BUREAU OF RECLAMATION


	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
X	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

By placing a true copy thereof in separate, sealed envelopes addressed to:

Amy Aufdemberge, Esq. Assistant Regional Solicitor U.S. Department of Interior 2800 Cottage Way, Room E-1712 Sacramento, CA 95825	Cathy Crothers, Esq. Office of the Chief Counsel State Department of Water Resources 1416 Ninth Street Sacramento, CA 95814	Jeanne M. Zolezzi, Esq. Herum Crabtree Brown, Inc. 2291 West March Lane Suite B100 Stockton, CA 95207
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<p>Robert B. Maddow, Esq. Carl P.A. Nelson, Esq. Bold, Polisner, Maddow, Nelson & Judson 500 Ygnacio Valley Road, Suite 325 Walnut Creek, CA 94596-3840</p>	<p>John Herick, Esq. Attorney at Law 4255 Pacific Avenue, Suite 2 Stockton, CA 95207</p>	<p>Dante John Nomellini, Esq. Dante John Nomelline, Jr., Esq. Nomellini, Grilli & McDaniel Professional Law Corporation 235 East Weber Avenue P.O. Box 1461 Stockton, CA 95201</p>
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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on September 9, 2003, at Sacramento, California.



Dolores M. White