

Memorandum

Date: March 17, 2006

To: Lewis Moeller, Chief
Hearings Unit, Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-20

From: Department of Water Resources


Subject: PETITION FOR RECONSIDERATION OF ORDER WR 2006-0006:
Adopting Cease and Desist Order and Granting Petitions for Reconsideration -U.S.
Bureau of Reclamation and Department of Water Resources, Southern Sacramento-
San Joaquin Delta.

The Department of Water Resources petitions the State Water Resources Control Board to reconsider Order WR 2006-0006 pursuant to the California Code of Regulations, sections 768-770. Attached is DWR's Points and Authorities in support of the petition.

1. Names and address of petitioner:
Department of Water Resources
1416 Ninth Street, Room 1118
Sacramento, CA 95814
2. Specific SWRCB Action to be reconsidered:
Water Right Order WR 2006-0006 adopting Cease and Desist Order against DWR and U.S. Bureau of Reclamation for threatened violation of Southern Delta Agriculture salinity objective of 0.7 EC.
3. Date of SWRCB Order: February 15, 2006.
4. The reasons the SWRCB's action is inappropriate or improper:
 - a. The SWRCB adoption of the CDO is arbitrary and an abuse of discretion for failing to follow the process established by the SWRCB in D-1641 regarding enforcement of the standard.
 - b. The SWRCB adoption of the CDO is arbitrary and an abuse of discretion as it is inconsistent with SWRCB Decision 1641 (D-1641) and contrary to law as it fails to implement DWR's State Water Permit (SWP) permit condition for implementing the southern Delta objectives in a manner that allows for partial responsibility of the objective to the degree that the SWP causes an exceedance of the objective.

- c. The SWRCB action is arbitrary and an abuse of discretion for failing to apply D-1641 SWP permit condition for implementing the southern Delta objectives when determining a threatened violation in the same manner as is used in determining an actual violation.
 - d. The SWRCB action is arbitrary and an abuse of discretion as it changes the meaning of the SWP permit condition by asserting that an exceedance of the objectives is a violation of the SWP permit condition rather than analyzing an exceedance of the objective as the first step in the analysis of a threatened violation of the permit condition.
 - e. The SWRCB action is based on insufficient evidence to find that a concrete threat of violation of the southern Delta standard exists.
 - f. The SWRCB action is arbitrary and an abuse of discretion because it identifies corrective actions that are not supported by the evidence and has not been supported by required environmental and statutory analyses under CEQA and water law.
 - g. The SWRCB action is arbitrary and an abuse of discretion as it is inconsistent with D-1641 and CEQA for requiring DWR to implement the plan and schedule for constructing the permanent operable gates or equivalent measures.
5. The specific action which petitioner requests.
DWR requests that the SWRCB reconsider and withdraw its Order adopting the Cease and Desist Order against DWR for threatening to violate the southern Delta agricultural salinity objective at the three compliance stations: Old River at Tracy Road Bridge, Old River at Middle River and San Joaquin River at Brandt Bridge.
6. DWR has sent copies of this petition and the accompanying material to all interested parties, as shown on the attached Proof of Service and Mailing List provided by the SWRCB Order 2006-0006.

If you have any questions, please contact me at (916) 653-5613.



Cathy Crothers
Senior Staff Counsel

Attachments

Nancy Saracino (California Bar No. 179273)
David B. Anderson (California Bar No. 78711)
Cathy Crothers (California Bar No. 148923)
Attorneys for the Department of Water Resources

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

Order WR 2006-0006	/	Points and Authorities
Cease and Desist Order against	/	in Support of
California Department of Water Resources and	/	Petition for
United States Bureau of Reclamation	/	Reconsideration
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I. INTRODUCTION

The Department of Water Resources seeks reconsideration of Water Right Order 2006-0006, adopting a Cease and Desist Order against DWR and the U.S. Bureau of Reclamation for a threatened violation of the southern Delta salinity standard in Water Right Decision 1641. The State Water Resources Control Board misapplies the permit condition it imposed under D-1641 and fails to consider the enforcement process established for implementing the objective. This enforcement process is necessary to determine the partial responsibility of the State Water Project for implementing the objective as provided in D-1641 and the 1995 Bay-Delta Water Quality Control Plan. The WQCP program of implementation calls for the SWRCB to implement the southern Delta objectives through water rights, water quality, and in concert with actions by other agencies. The Cease and Desist Order ignores the WQCP implementation measures, the Constitution, and statutory provisions to prevent waste and unreasonable use of

water, and requires the SWP to be responsible for implementing obligations of others without following required water right proceedings. In determining the threat of violation, the SWRCB arbitrarily applies only a portion of the SWP permit condition. Such misapplication results in premature enforcement unsupported by concrete evidence and the adoption of corrective actions that could result in an unreasonable use of water. Finally, the SWRCB mandate to construct the permanent operable barriers or equivalent measures is inconsistent with D-1641 and the California Environmental Quality Act and is an abuse of discretion. For these reasons, and as more fully discussed below, DWR requests that the SWRCB reconsider its adoption of the CDO and ultimately withdraw it.

II. ARGUMENT

A. SWRCB has Abused its Discretion by Issuing a CDO Inconsistent with the Enforcement Process for Southern Delta Objectives in D-1641.

The SWRCB ignores its own enforcement process established in D-1641 in issuing the CDO. Under D-1641, the SWRCB specifically addressed the enforcement process that would apply to SWP and CVP permits if the southern delta agricultural salinity objectives are exceeded. This specially-tailored enforcement process requires the SWRCB to consider evidence regarding the actions causing an exceedance and the ability of the SWP to control these actions before deciding to initiate an enforcement action.¹ Issuing the CDO

¹ The complete SWP and CVP water right permit condition in D-1641 is: "This permit is conditioned upon implementation of the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, at the following locations in the southern Delta:
a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
b. Old River near Middle River (Interagency Station No. C-8); and
c. Old River at Tracy Road Bridge (Interagency Station No. P-12).
Permittee [DWR] has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in

without following the D-1641 enforcement process is inconsistent with the implementation measures identified in its 1995 WQCP for the southern Delta objectives. (*State Water Resources Control Board Cases (2006) 136 Cal.App.4th 674.*) In the CDO, the SWRCB fails to follow its own requirements which constitutes an abuse of discretion. (See CDO, p. 19-20, 28-31.)

The SWRCB understood in 2000 that DWR would not be held accountable for meeting the salinity objectives in the southern delta if an exceedance was not caused by DWR's own activities. DWR specifically noted that salinity levels in this part of the Delta are affected by numerous factors beyond DWR's control, and that if DWR was not the cause of the problem, DWR should not be held accountable by the SWRCB to solve it. (DWR 18, p. 3-5, citing DWR Petition to Reconsider D-1641, Jan. 28, 2000, p.5, footnote 2.)

The SWRCB recognized this limitation on DWR's obligation to take actions to meet the salinity standards by adopting a special enforcement process for implementing the southern delta agricultural objectives. In D-1641, the SWRCB found that there are multiple causes influencing water quality in the southern Delta, namely San Joaquin River inflow; tidal action; diversion of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity. (D-1641, p. 86, 89.)

In its 1995 WQCP, the SWRCB determined that the southern Delta water quality objectives would be implemented under the SWRCB authorities for water quality and water rights, and in concert with actions taken by other agencies. (1995 WQCP, p. 28; see also State Water Resources Control Board Cases (2006) 136 Cal.App.4th 674.) The WQCP program of implementation describes four general components of measures for implementing water quality objectives:

the southern Delta may help to ensure that the objectives are met at these locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of the Permittee." (D-1641, p. 159 – 163).

(1) measures within the SWRCB's authority over water diversion and use; (2) measures requiring a combination of SWRCB's water quality and water rights authorities and actions by other agencies; (3) recommendations to other agencies to improve fish and wildlife habitat; and (4) monitoring and special studies program. (*Id.*) The SWRCB has implemented the southern delta objectives under Component 2 and expressly excluded the southern Delta salinity objectives from Component 1 (i.e., measures that would implement the objectives solely through water rights). (*Id.*) Thus, the WQCP implementation of the southern delta objectives includes, among others, flow measures on the San Joaquin River, management of irrigation drain water to the San Joaquin River by actions of the multi-agency San Joaquin Valley Drainage Program, and the salt load reduction program of the Regional Water Quality Control Board. (WQCP, p. 29 -33.) It does not contemplate that the water Projects would be solely accountable for meeting these objectives through their water right permits.

Consistent with the WQCP measures implementing the southern delta objectives, the SWRCB found in D-1641 that water quality in the southern Delta can be protected by several measures, including dilution flows, controlling in-Delta discharges of salt, or by using measures to affect circulation in the southern delta channels, such as the barriers. (D-1641, p. 86-87.) The SWRCB noted that even if salinity and flow objectives are met at Vernalis, southern Delta agricultural objectives can still be exceeded because of in-Delta irrigation activities. (D-1641, p. 87.) The SWRCB found that the SWP and CVP are only partially responsible for salinity problems in the southern delta. (D-1641, p. 88.) The SWRCB also stated that irrigators within the Delta could implement water management measures to control salt impacts in the channels. (*Id.*) The SWRCB understood in D-1641 and from evidence submitted for the CDO that factors outside of the Project's control, such as irrigation activities and waste water treatment plant discharges in the Delta, increase salinity and affect compliance of the southern Delta objectives. (D-1641, p. 88; DWR-18, p. 6-7; DWR-18A, Attachment 1, p. 17.)

The SWRCB assigned the obligation to meet the southern delta agricultural objectives to DWR and USBR subject to a special enforcement process that imposes responsibility only to the extent the Projects cause the salinity problem. And, similarly, if an exceedance is caused by actions outside the control of the Projects, enforcement would not be appropriate. The D-1641 requirement for a special enforcement process is necessary in order for the SWRCB to implement the measures in the WQCP Program of Implementation. The SWRCB must give full effect to this process. The SWRCB's failure to do so is an abuse of discretion.

B. The SWRCB Abused its Discretion by Improperly Finding DWR Fully Responsible for Implementing the Southern Delta Objectives and Arbitrarily Changing its Water Rights.

The SWRCB concludes in the CDO that "DWR and USBR are each fully responsible to meet the objectives" in the southern Delta. (CDO, p. 26 (emphasis added).) This conclusion effectively eliminates the enforcement process for the objectives established by the SWRCB in D-1641. (D-1641, p. 159-163.) In contrast, the SWRCB found in D-1641 that "DWR and USBR are partially responsible for salinity problems in the southern Delta because of hydrologic changes that are caused by export pumping." (D-1641, p. 88 (emphasis added).) D-1641 amends the SWP and CVP export permits to partially implement the WQCP southern Delta objectives by means of the enforcement process where the SWRCB would determine the degree of responsibility for achieving the objectives at the time of the exceedance. In the case of a threatened violation analyzed for this CDO, the SWRCB should consider the circumstances affecting water quality prior to determining a violation of the standard. Consideration of such circumstances is necessary because the SWRCB found that to require the Projects to use means other than the barriers to achieve the southern Delta objective, such as increased flows through the southern Delta or export restrictions, could result in an unreasonable use of water. (D-1641, p. 10, 86-89.)

The SWRCB must determine whether an unreasonable use of water could result from implementing water quality objectives based upon the totality of the circumstances. (*US v. SWRCB*, 182 Cal.App.3d at 129-30; *Environmental Defense Fund, Inc., v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183, 194.) The determination of what is a beneficial or a reasonable use of water depends upon the facts and circumstances of each case. (*SWRCB Cases* (2006) 136 Cal.App.4th 674; *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139, 60 Cal.Rptr. 377, 429.) The SWRCB's independent basis of authority to prevent unreasonable use or methods of diversion "vests jurisdiction in the Board to compel compliance with the water quality standards *insofar as the projects' diversions and exports adversely affect water quality.*" (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 129, 142, 227 Cal. Rptr. 161 (emphasis added).)

Therefore, in D-1641, the SWRCB recognizes that a determination of what constitutes the partial responsibility of the SWP permits related to salinity impacts from Delta exports and the actions needed to avoid an exceedance of the water quality objectives must be based on the circumstances at the time of the exceedance. Given the multiple factors causing increases in salinity in the southern Delta, an enforcement action against the SWP to force compliance with the objectives, either through export reductions or increased storage releases, could be unreasonable and contrary to constitutional and statutory requirements, depending upon circumstances related to the exceedance. The special enforcement process established in the SWP southern Delta permit condition assures that these circumstances are considered prior to the SWRCB initiating enforcement against DWR. The issuance of the CDO without recognizing the partial responsibility of the SWP has arbitrarily changed the meaning of the southern Delta permit obligation without following the required water right hearing process and is an abuse of discretion.

C. SWRCB Erroneously Interprets the SWP Southern Delta Permit Condition Resulting in Arbitrary Enforcement.

In the CDO, the SWRCB finds that the enforcement process established in D-1641 is not applicable to a threatened violation of the permit condition. (CDO, p. 19-20.) The SWRCB's argument is not legally supported because: (1) it has arbitrarily chosen to analyze only a portion of the permit condition for purposes of determining a threatened violation when it could follow the same analysis used to determine an actual violation; and (2) it misinterprets the meaning of noncompliance of the objective to mean violation of the permit. (Id.)

1. SWRCB Abused its Discretion in Applying the Permit Condition Differently for a Threatened Violation than an Actual Violation.

In the CDO the SWRCB analyzes a threatened violation differently than an actual violation by not considering whether the threatened violation may result from actions beyond the control of the SWP. (CDO, p. 19 and 23.) The SWRCB determined it did not need to consider the special enforcement process because "no actual violation is alleged in the draft CDOs . . ." (Id.) In contrast, the CDO finds that if DWR and Reclamation actually violate the 0.7 EC objective, they can submit a report to the Executive Director and then the SWRCB will determine if prosecution should occur.² The SWRCB offers no basis for the difference in its approach. DWR submitted evidence during the hearing that constituted a report of potential actions that cause increased salinity in the southern Delta, all of

² DWR objects to the CDO language describing the process of an actual violation:

"[p]ursuant to D-1641, if DWR and USBR violate the 0.7 . . . objective", then the permittees can submit a report to the Executive Director, after which the Board will determine whether the violation should be prosecuted (Id.).

SWRCB incorrectly uses of the term "violation" of the 0.7 EC objective. The language found in the SWP permit condition is "noncompliance," which carries a different meaning in this context, as discussed in Part II.C.2.

which are beyond DWR's control.³ The SWRCB could use this information and make findings of the potential of DWR to exceed the southern delta objective due to actions within or beyond its control in the same manner that it used DWR's historical data to show that salinity in the southern Delta will exceed 0.7 EC in some water year types.

Procedurally, the SWRCB must follow the same two- step process for a threatened violation as for an actual violation, namely: (1) consider whether noncompliance of the objective will be, or was, due to actions within or beyond the permittee's control, and (2) determine if enforcement is appropriate based on the information from step 1. The SWRCB must not consider the requirement to review such evidence after taking an enforcement action. The SWRCB's arbitrary interpretation results in the Projects being prosecuted prior to a potential violation of the standard that may not in fact occur. In addition, the SWRCB must apply the second step in order to give meaning to the SWP's partial responsibility under the WQCP Program of Implementation for the southern Delta objective. (1995 WQCP, p. 28; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674.)

Furthermore, if the SWRDB arbitrarily decides to not apply a permit condition the same for a threat of violation as it uses for an actual violation, it could follow this approach to change the meaning of any of the SWP permit conditions. The statutory authority regarding threatened violations of permit

³ DWR submitted evidence during the CDO hearing that the SWRCB could use to analyze if an exceedance is due to actions within the control of the Projects, including evidence demonstrating the mix and sources of water in the southern delta that carry increased salt, such as agricultural drainages on the San Joaquin River and local discharges (DWR 18 and 20). DWR provided a quantified estimate of the affect of local discharges on the San Joaquin River in the reach between Vernalis and Brandt Bridge, where water quality degraded on the average about 8 percent, with the majority of the degradation between Vernalis and Mossdale (DWR-18A, Attachment 1, p. 17; DWR 20, p. 4-6). DWR submitted evidence that the City of Manteca has been permitted to discharge from its waste water treatment plant into the Delta at a maximum salinity of 1.0 EC year round (DWR-18, p. 6-7; DWR-18A, Attachment 1, p. 17;).

conditions does not provide any special provisions for analyzing a permittee's permit condition differently for actual or threatened violations. (See Water Code Sections 1830 *et seq.*) The SWRCB must give effect to DWR's entire permit conditions as adopted in D-1641 and relied upon by DWR (DWR 18, p. 3-5). The SWRCB failure to cite evidence or make appropriate findings of the SWP's ability to control actions causing increased salinity, based on its interpretation that threats of violations do not require such analysis, is arbitrary and an abuse of discretion.

2. SWRCB Arbitrarily Changes the SWP Permit Condition Finding that Noncompliance of the Objective Means Violation of the Permit.

The SWRCB incorrectly inserts of the term "violation" for "noncompliance" or "exceedance" when interpreting the SWP permit condition. The language found in the SWP permit condition is "noncompliance," which carries a different meaning in this context than "violation." The SWRCB argues that the special enforcement term in the SWP permit condition means:

that if DWR and USBR are in violation of the condition, one of the matters to be considered by the Executive Director in recommending whether to prosecute is the extent to which the noncompliance results from actions that are beyond the control of DWR and USBR. It does not mean there is no violation if other factors are affecting salinity levels; it means simply that the Executive Director may exercise prosecutorial discretion. (CDO, p. 19-20, emphasis added).

The SWRCB erroneously finds a violation of the condition before investigating if the allegation of noncompliance of the objective merits enforcement. Before determining whether to recommend enforcement, the Executive Director is bound to first consider information regarding the Projects' control over actions causing noncompliance of the objective. This approach is necessary to give effect to SWP's partial responsibility for the objectives. (D1641, p. 8-10, 86-97.) The noncompliance of the 0.7 EC objective alone does not mean DWR has violated its permit condition. (See Closing Statement of the State Water Contractors, p. 4-7 (Dec.12, 2005); DWR Closing Brief, p. 5-10 (Dec. 12,

2005; Closing Brief of United States Bureau of Reclamation, p. 12 (Dec. 12, 2005).)

The SWRCB interpretation in the CDO of the permit term deletes reference to the Executive Director's evaluation and recommendation of "whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of Permittee." The plain meaning of the term requires that the SWRCB consider that a "noncompliance" of the 0.7 EC objective is equivalent to evaluating an "allegation" that is investigated before a violation may be determined and prosecution action taken. The phrase is written in the disjunctive to connote that the SWRCB will either take enforcement action if noncompliance is within control of permittee or will not take enforcement action if noncompliance is beyond control of permittee. The Executive Director cannot recommend a violation based on only the noncompliance of the objective. She must first weigh the factors leading to the causes of the noncompliance (i.e., exceedance of the objective) and then determine whether to recommend prosecution. The SWRCB's interpretation results in the noncompliance of the objective as equivalent to a violation of the permit condition. This interpretation results in a premature prosecution action, such as has occurred by issuance of the CDO. DWR believes the SWRCB interpretation is in error resulting in an arbitrary change in DWR's permit condition and is tantamount to an error in law.

D. The CDO Finding of Threat is Speculative and Not Supported by Concrete Evidence

The CDO concludes that a threatened violation of the 0.7 EC objective exists. (CDO, p. 26.) The SWRCB's evidence, however, describes hypothetical possibilities of what may happen in the distant future to cause an exceedance of the objective, which is not sufficient to support a finding of an imminent future violation. (Cf. *Central Valley Water Agency v. U.S.* (2004) 327 F.Supp.2d 1180, 1212.) Although there is no published case law that construes the SWRCB's new authority to issue CDOs for "threatened violations," DWR has found no other

authority that supports issuance of a CDO where a future violation is speculative. An enforcement action for a threatened violation must be based on concrete facts that demonstrate a violation is real and imminent; it cannot be based on hypothetical facts or mere speculation about future events. The SWRCB's evidence establishes, at best, only that the permit requirements may not be met at some future time. That is not sufficient to establish that there is a "threatened violation" for purposes of an enforcement action. (*Id.*, 327 F.Supp.2d 1180, 1212 (speculative potential injury, which assumes Department of Interior will intentionally violate the law by not acting to meet its legal duties, does not prove that Defendants will violate the Vernalis Standard; there must be evidence of an actual or imminent future violation); *accord Consumer Cause, inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175,1186, 34 Cal. Rptr.3d 258 (injunction may not issue for threatened violation under Proposition 65 where there is no concrete evidence of threat, but only the abstract possibility of a violation); 61C Am Jur 2d section 2047 (to warrant relief against threatened injury from pollution, "the proofs must show that the apprehension of material and irreparable injury is well grounded on a state of facts that show the danger to be real and imminent").) Therefore, the SWRCB must reconsider its decision to adopt the CDO for a threatened permit violation because the alleged threat is not supported by the evidence.

E. The CDO Corrective Actions to Avoid a Threatened Exceedance Could Result in Unreasonable Use of Water and Have Not Been Analyzed Pursuant to CEQA.

The CDO lists several corrective actions which suggest that the actions are reasonable methods to protect the southern Delta agricultural water quality objective. However, these actions have not been analyzed by the SWRCB to determine if such uses of water would be reasonable. In addition, if DWR and Reclamation were to undertake the actions, they would first need to comply with requirements of CEQA. Finally, suggesting that DWR and USBR should

undertake the actions is inconsistent with the WQCP Program of Implementation and the findings in the recent appellate decision on D-1641. (*SWRCB Cases*, 136 Cal. App.4th 674.)

The CDO Correction Actions Numbers 1 and 4 require that DWR meet the 0.7 EC objective and in the event DWR projects a potential exceedance of the 0.7 EC objective, DWR shall immediately inform the SWRCB of the potential exceedance and describe corrective actions initiated to avoid the exceedance. (CDO, p. 29-30.) The SWRCB lists corrective actions that include, but are not limited to: additional releases from south of Delta SWP facilities (e.g., San Luis Reservoir), modification in the timing of releases from SWP facilities, reduction in exports, recirculation of water through the San Joaquin River, purchases of water from other entities, modified operations of temporary barriers, reductions in saline drainage from upstream sources, or alternative supplies to Delta farmers. Some of these actions are identified in the WQCP Program of Implementation to be taken by other agencies or groups, such as under the San Joaquin Valley Drainage Program or by the Regional Water Quality Control Board. (WQCP, p. 29-33.)

In addition, the CDO mandates installation of the barriers and implicitly requires use of equivalent measures related to increased flows and reduced exports in its corrective actions. (CDO, p. 30 (corrective action 4).) DWR disagrees with the SWRCB assertion that benefits of the barriers should be achieved by other means, such as increased flows and export restrictions. This assertion is inconsistent with D-1641. (D-1641, p. 10 (noting that use of increased flows or export restrictions could be unreasonable use of water).) The SWRCB provides no evidence to support the assertion. In contrast, DWR submitted evidence demonstrating that SWP export restrictions would not achieve the benefits of the barriers. (see DWR-20 (showing effects of changes in exports and source of water in the South Delta; DWR 23 (showing benefits of permanent barriers (gates).)

The SWRCB found that the construction of permanent barriers alone is not expected to result in attainment of the water quality objectives. (D-1641, p.

88.) The objective can be met consistently only by providing more dilution or by treatment. (*Id.*) The SWRCB did not indicate in D-1641, however, what water user would be responsible for providing dilution flows or treatment actions. In the WQCP Program of Implementation, the SWRCB identifies multiple actions by other agencies that could be taken to help implement the southern Delta objectives. (WQCP, p. 30-33.) The CDO should not be used as a method to implement the WQCP. The SWRCB must follow the proper procedures either through water right hearings, waste discharge permitting, or appropriate agreement with others.

During the CDO hearing, DWR testified that its SWP operations do not effectively or reliably influence southern Delta salinity. (DWR 18; DWR 20.) Therefore, the SWRCB's list of proposed corrective actions is not related to the expected impacts caused by the SWP in the southern Delta. The SWRCB indicated that a reduction in exports could be an unreasonable use of water (D-1641, p. 10.) Before DWR should implement any of the corrective actions that could unreasonably use water, the SWRCB should analyze whether the use of this water would be reasonable. (See California Constitution Article X, Section 2; Water Code section 100-101; (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 129, 144, 227 Cal. Rptr. 161 (noting all water rights are subject to limitation that water use must be reasonable and it may be proper to exempt water projects from certain standards that would require wasteful use of water for salinity control; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1270, 54 Cal.Rptr.2d 340 (use of upstream water to wash out salts downstream is unreasonable use of water).) The failure of the SWRCB to analyze the use of water needed to implement the objectives and determine if such use would be reasonable is an error in law.

F. Evidence Does Not Support the CDO Mandate to Install Permanent Gates or Equivalent Measures to Implement the Southern Delta Objectives.

The SWRCB issued the CDO based on findings that DWR and USBR failed to carry out measures, such as the permanent gates, to improve salinity levels in the southern Delta by April 2005 (CDO, p. 17, 23). The CDO orders DWR to provide a detailed plan and schedule for actions to prevent the threat of noncompliance with the objectives, in other words through construction of permanent barriers or implementing equivalent measures that will achieve the benefits of the permanent barriers. (CDO, p. 29, corrective action 2.) The CDO requires that the Projects implement this plan and schedule. (*Id.*)

The SWRCB did not order DWR and Reclamation in D-1641 to construct the permanent barriers, or implement equivalent measures. (D-1641, p. 10-12, 159-163 (noting the decision does not order the barriers to be constructed).) The SWRCB recognizes in D-1641 that DWR and USBR must first comply with CEQA and the National Environmental Policy Act (NEPA) before constructing the barriers or taking equivalent measures. (D-1641, p. 88.) The CEQA compliance for the proposed permanent gate project has not been completed and the CDO mandate to build the gates is not supported by the required environmental documentation.

The SWRCB inserted a hammer-clause in D-1641 to motivate DWR and Reclamation to construct the gates or implement equivalent measures by April 2005. (D-1641 Table 2, footnote 5, p. 182.) The SWRCB noted that construction of the gates by April 2005, along with approval of a plan to protect south delta agriculture, would allow the 1.0 EC objective to remain in effect. (Footnote 5 of Table 2, D-1641 p. 88.) If the permanent gates had been constructed by April 2005, DWR and USBR would have benefited by having a less stringent objective to meet. (*Id.*) However, it is inconsistent with D-1641 for the SWRCB to now determine that the CDO is necessary because DWR and USBR have failed to carry out such equivalent measures to improve southern delta salinity, such as through the permanent barriers. (CDO, p. 17, 23.)

In addition, DWR believes the CDO is unnecessary since DWR has provided the SWRCB with a schedule for constructing the permanent barriers (gates) and DWR will be moving forward with the project independent of the CDO. DWR provided evidence during the CDO hearings that DWR and USBR are diligently moving forward with CEQA and NEPA compliance to construct the gates. (DWR-23, p. 4 and Figure 18.) Although the schedule for such construction is later than initially estimated in the D-1641 water right hearings, DWR and USBR now have a proposed project that is under public review and the barrier project is expected to be approved, subject to CEQA, in August 2006.⁴ (DWR 23; DWR Comments to SWRCB (Feb. 15, 2006).)

DWR is proposing the permanent gates project under its water management authority. As a result, DWR believes it is unnecessary for the SWRCB to issue a CDO against the SWP to mandate installation of the gates. DWR and Reclamation have proposed the permanent gates to meet several objectives, including reducing the movement of San Joaquin River Chinook salmon into the south Delta on Old River and maintaining water levels in the south Delta (DWR-23, p. 1-3). DWR currently installs temporary rock barriers each year to help achieve these objectives (DWR-19). The proposed permanent gates will replace the four temporary barriers resulting in improvements in water levels, circulation, water quality, and fishery management (id.). DWR proposes the installation of the permanent gates to benefit California resources through improvements in existing water management tools.

⁴ During the CDO hearing and at the February 15, 2006, SWRCB meeting prior to adoption of the CDO, DWR provided a timeline for the necessary activities leading to operating the permanent gates based on the Physical/ Structural Component Schedule for SDIP, as follows:

August 2006	Adopt Final EIR/EIS pursuant to CEQA
December 2006	Secure Environmental Permits / Award Contract
Begin August 2007	Dredge gate sites and drive all piles
August-November 2007	Channel Dredging
August-November 2008	Channel Dredging
August 2008	Set first gate in place
November 2008	Set final gate in place
April 2009	All gates operational

The SWRCB has abused its discretion in adopting a CDO mandating construction of the permanent barriers (gates) or equivalent measures prior to completion of the required environmental documentation. In addition, DWR believes the SWRCB order to construct the barriers or equivalent measures is unnecessary and arbitrary because DWR is pursuing this proposed project independent of its water rights to achieve multiple state-wide benefits.

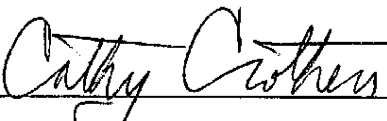
G. SWRCB Has Abused its Discretion and will Cause Prejudicial Harm to DWR If it Must Fully Implement the Southern Delta Objective Without Consideration of the SWP Ability to Control Causes Affecting Salinity.

If the CDO is not withdrawn, it will alter the SWP permit term and eliminate DWR's right to explain whether a potential future exceedance of the agricultural objectives will be beyond its control. This right is necessary to prevent the SWRCB from taking a premature, unwarranted enforcement action. As proposed, DWR is faced with full responsibility for all future potential conditions in the southern Delta and for showing how it will use its SWP resources, including reduction in exports, to implement the southern Delta objectives. Under the CDO, DWR is responsible for potential future southern Delta water quality conditions even when changes to SWP operations would not improve water quality and SWP operations would not be the cause of an exceedance of the objective. If the CDO conclusion stands wherein the SWP has full responsibility for implementing the southern Delta objectives under all circumstances, the SWP could be subject to enforcement actions that otherwise would not be appropriate. Such enforcement actions could make the SWP subject to penalties appropriate to the relative impacts caused by each of the DWR and Reclamation, as determined by the SWRCB. (CDO, p. 20; Water Code Section 1845.) Such penalties include fines of up to \$1000 per day of violation. (*Id.*) DWR believes such penalties are the result of a CDO that is not based on the evidence and is an abuse of discretion.

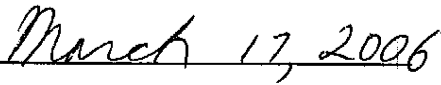
III. CONCLUSION

In adopting the CDO, the SWRCB inappropriately disregards the special enforcement process adopted in D-1641 as part of the SWP permit condition implementing the southern Delta objectives. This specially tailored process was established to recognize that others may cause increased salinity in the southern Delta and the Projects should only be responsible for complying with the objectives to the degree that their operations cause an exceedance. The SWRCB's misapplication of the permit condition is inconsistent with its Bay-Delta WQCP and D-1641. The SWRCB recognized in the WQCP and D-1641 that multiple factors affect southern Delta salinity requiring multi-agency actions to implement the agricultural objective. In addition, the SWRCB found that measures available to the SWP in the absence of the permanent operable barriers (gates), such as reduced exports, could result in an unreasonable use of water. The SWRCB is constitutionally and statutorily obligated to assure that water is used reasonably to protect beneficial uses. The special enforcement process implementing the objectives is important to fulfill this duty. The SWRCB's disregard of this process and changes to the plain meaning of the SWP condition is arbitrary and an abuse of discretion. In addition, the CDO is not based on sufficient evidence to show a threat of violation of the standard. Therefore, DWR requests that the SWRCB reconsider its decision and withdraw the CDO.

Respectfully submitted,



Cathy Crothers
Senior Staff Counsel



Date

PROOF OF SERVICE

I, the undersigned, hereby certify that I am over the age of eighteen (18) years of age and an employee of the State of California Department of Water Resources, 1416 Ninth Street, Sacramento, California 95814.

On March 17, 2006, I served true and correct copies of the attached Department of Water Resources "PETITION FOR RECONSIDERATION OF ORDER WR 2006-0006" by personal delivery to the office of Division of Water Rights of the State Water Resources Control Board on the 14th floor of the California Environmental Protection Agency Building at 1001 I Street in Sacramento. I also served true and correct copies of this document by electronically transmitting to those who accept service by electronic mail, or by placing said copies in postage paid envelopes in the U.S. Mail, to the parties listed on the attached "Mailing List for Transmittal of Final Order 2006-006 Re: Delta Salinity Hearing."

Date: March 17, 2006

By: *Surinder Tumber*
Surinder Tumber

MAILING LIST

Transmittal of Final Order 2006-0006 Re: Delta Salinity Hearing

Cathy Crothers, Senior Staff Counsel
Department of Water Resources
1416 Ninth Street, Room 1118
Sacramento, CA 95814
crothers@water.ca.gov

Amy L. Aufdemberge
Assistant Regional Solicitor
Room E-1712
2800 Cottage Way
Sacramento, CA 95825
jstruebing@mp.usbr.gov
Rep: U.S. Bureau of Reclamation

Erin K. L. Mahaney
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
emahaney@waterboards.ca.gov
*Rep: Division of Water Rights
Enforcement Team*

Dante John Nomellini, Esq.
Nomellini, Grilli & McDaniel
P.O. Box 1461
235 East Weber Avenue
Stockton, CA 95201
ngmplcs@pacbell.net
Rep: Central Delta Water Agency, et al.

Carl P. A. Nelson
Bold, Polisner, Maddow, Nelson & Judson
500 Ygnacio Valley Road, Suite 325
Walnut Creek, CA 94596-3840
cpanelson@prodigy.net
Rep: Contra Costa Water District

Tim O'Laughlin
O'Laughlin & Paris LLP
2580 Sierra Sunrise Terrace, Suite 210
Chico, CA 95928
klanouette@olaughlinparis.com
Rep: San Joaquin River Group Authority

Thomas J. Shephard, Sr.
P.O. Box 20
Stockton, CA 95201
tshephard@neumiller.com
Rep: County of San Joaquin

Jon D. Rubin
Kronick, Moskovitz, Tiedemann and Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
JRubin@KMTG.com
KBlenn@KMTG.com
*Rep: San Luis & Delta-Mendota Water
Authority and Westlands Water District*

John Herrick, Esq.
South Delta Water Agency
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Jherrlaw@aol.com
*Rep: South Delta Water Authority
and Lafayette Ranch*

Michael Jackson
P.O. Box 207
429 W. Main Street
Quincy, CA 95971
mjatty@sbcglobal.net
Rep: Calif. Sportfishing Protection Alliance

Clifford W. Schulz
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, Suite 2700
Sacramento, CA 95814
cschulz@kmtg.com
Rep: The State Water Contractors

Gary Bobker, Program Director
The Bay Institute
500 Palm Drive, Suite 200
Novato, CA 94949

Patrick Porgans
Patrick Porgans & Assoc., Inc.
P.O. Box 60940
Sacramento, CA 95860

Ernest A. Conant
Young Wooldridge, LLP
1800 30th Street, 4th Floor
Bakersfield, CA 93301

Paul R. Minasian
P.O. Box 1679
Oroville, CA 95965
pminasian@minasianlaw.com
msexton@minasianlaw.com
dforde@minasianlaw.com
*Rep: San Joaquin River Exchange
Contractors Water Authority*

Bob Baiocchi, Consultant
P.O. Box 1790
Graeagle, CA 96103
baiocchi@psln.com

Kirk C. Rodgers, Regional Director
Mid-Pacific Regional Office
Bureau of Reclamation
U.S. Department of the Interior
2800 Cottage Way
Sacramento, CA 95825-1898

Karna E. Harrigfeld
Herum Crabtree Brown
2291 W. March Lane, Suite B100
Stockton, CA 95207
kharrigfeld@herumcrabtree.com
jzolezzi@herumcrabtree.com
Rep: Stockton East Water District

U:\Herdrv\Jean McCue\Draft Order 2-10-06
Mailing List.doc

David J. Guy, Executive Director
Northern California Water Association
455 Capitol Mall, Suite 335
Sacramento, CA 95814
dguy@norcalwater.org

Arthur F. Godwin
700 Loughborough Drive, Suite D
Merced, CA 95348
agodwin@mrgb.org
*Rep: Merced Irrigation District
and San Luis Canal Company*

Tina R. Cannon
CA Department of Fish and Game
1416 9th Street, Suite 1341
Sacramento, CA 95814
tcannon@dfg.ca.gov

Alex Peltzer
Dooley Herr & Peltzer
100 Willow Plaza, Suite 300
Visalia, CA 93291