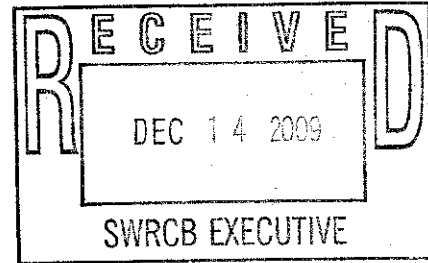




United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room E-1712
Sacramento, California 95825-1890

December 14, 2009



IN REPLY
REFER TO:

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

Subject: COMMENT LETTER – 1/05/10 BOARD MEETING: DRAFT ORDER
MODIFYING ORDER WR 2006-0006

Dear Mr. Townsend:

We are in receipt of the State Water Resources Control Board's (Board's) Draft Order Modifying Order WR 2006-0006, dated November 17, 2009 (Draft Order). We are generally pleased with the Draft Order, and while we believe we are making progress toward a better understanding of the south Delta agricultural objectives, we remain in disagreement with the Draft Order on several key facts and circumstances. Therefore, we appreciate this opportunity to comment to the Board in writing.

On page 3, under paragraph 2.1, the Draft Order states that D-1641 determined the responsibility of the United States Bureau of Reclamation (USBR) and the California Division of Water Rights (DWR) for the south Delta agricultural salinity objectives. Paragraph 2.1 then infers that the permits for the Central Valley Project (CVP) and the State Water Project (SWP) (the Projects) were conditioned on implementation of the 0.7 millimhos per centimeter (mmhos/cm) electrical conductivity (EC) from April 1 through August 31 each year at the three interior south Delta measuring stations in questions, C-6 (Brandt Bridge), C-8 (Old River near Middle River, and P-12 (Old River at Tracy Road Bridge). This is incorrect. D-1641 found that the Projects were "partially" responsible for salinity degradation in the south Delta, and assigned to them the responsibility of meeting a 1.0 mmhos/cm EC from April 1 through August 31 each year at the three interior south Delta stations. It was only after a "hammer clause" located in a footnote to a table of D-1641 became effective in 2005 that said if the Projects had not achieved the benefits of the barriers by that date, the Projects would somehow have to achieve 0.7 mmhos/cm EC from April 1 through August 31 at the three interior south Delta stations. The "hammer clause" was an attempt to provide incentive to DWR and USBR to achieve a federal/state construction project as a condition of the Projects' water rights. We now know that the barrier project is not currently feasible, due to potential adverse impacts to fish.

The "hammer clause" is critical to the Board's understanding of the south Delta salinity objectives. This is because the Board has never found the Projects to be fully factually responsible for salinity degradation in the south Delta. Rather, the Board has asserted a legal responsibility on the part of the Projects that does not comport with its factual findings. In addition, since D-1641, DWR has shown, and the Board has accepted evidence, that export pumping does not increase salinity concentrations in the south Delta.

The CVP consistently meets the salinity objective at Vernalis. The USBR has no facilities below Vernalis on the San Joaquin or in the south Delta, yet, the south Delta salinity objectives are exceeded. The Board has acknowledged local sources of degradation, yet persists in its contention that "responsibility" is simply a legal tag, rather than a factual inquiry. The tag theory is also apparently keeping the Board from regulating non-point sources and other point sources of salinity in the area which contribute to salinity degradation below Vernalis.

On page 2 of the Draft Order, it states that this proceeding is not to determine the responsibility of DWR and USBR to meet the salinity objectives, "an issue that was addressed in Order WR 2006-0006" (the Cease and Desist Order or CDO). Please note that the CDO inappropriately changed the Board's finding regarding the Project's responsibility from "partially" responsible to "fully" responsible without holding a hearing on responsibility (the Board held a hearing on whether to issue the CDO, but did not notice a hearing on, nor did it take evidence on, what entities are responsible for degradation of salinity concentrations below Vernalis). The United States sought judicial review of the CDO. This was the first time the United States sought judicial review of a Board order in over 25 years. This was due to, among others, its strong belief that the Board unlawfully changed findings of fact in D-1641 without a hearing, and that this action was arbitrary, capricious, unsupported by facts in evidence, and prejudicial to the United States. This lawsuit is subject to a tolling agreement but can be reinstated under the terms of that agreement.

At page 18 of the Draft Order, under footnote 11, USBR is listed as being among CSPA and C-WIN in arguing that California Water Code section 13360 prohibits the State Water Board from specifying the manner of compliance with the southern Delta salinity objectives. This is far from correct. While USBR made reference to CSPA's and C-WIN's argument about section 13360 in its closing brief, USBR does not join them in their argument. To the contrary, USBR agrees with the Draft Order that section 13360 "has no bearing" on this order. In fact, the USBR believes it is incumbent upon the Board to adopt reasonable and achievable objectives, and when conditioning water rights on meeting water quality objectives, the Board has an obligation to determine the factual responsibility of the water right holder and be clear on how the water right conditions can be met by the water right holder. This is not a discharge issue.

It is in the above context that we view the Draft Order. We believe the Draft Order appropriately grants the Projects until completion of the Board's pending proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation included in the 2006 Bay-Delta Plan, and any subsequent water right proceeding, to comply with the south Delta salinity objectives. However, we have a few concerns regarding process the studies required under paragraphs 3 and 7 of the Draft Order.

Under paragraph 3, the Draft Order requires DWR and USBR to provide technical assistance, including modeling, to help the Board with its review of the objectives. USBR is currently considering a Memorandum of Understanding (MOU) with the Board to do just that. The MOU will ensure that any technical assistance provided will be according to law, including how such assistance is funded.

We are also in favor of any additional language that makes clear that the CDO, including this modification, is dissolved if the south Delta salinity objectives and/or the plans of implementation are altered in the future in such a way as to make the CDO obsolete.

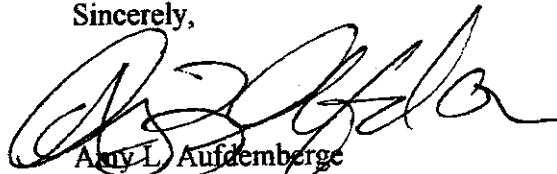
Under paragraph 7, the Draft Order requires DWR and USBR to study ways in which the southern Delta salinity objectives could be met, including by installing low lift pumps and increasing flows on the San Joaquin. USBR will make its best efforts to determine the legal authority to undertake such a study, but can only make resources available for the study subject to appropriations. USBR will make its best efforts to determine whether existing appropriated dollars can be used for such an effort, and inform the Board about the resources it can make available. In that regard, USBR will also work with DWR to determine the appropriate scope of such an effort.

Under paragraph 8, we believe that the Projects should be afforded an appeal to the Board for relief of any decision the Executive Director may make that may be unsupported by the weight of the evidence. Expressly granting an appeal process under paragraph 8 would officially allow the Board to consider objections of interested parties prior to those parties seeking judicial review of an Executive Director decision.

We join with DWR in support of its suggested edits to paragraphs 1 and 2 of the Draft Order.

We appreciate this opportunity to comment on the Draft Order. We hope the future finds DWR, USBR, the South Delta Water Agency, and the Board, working together constructively to resolve the myriad of issues surrounding southern Delta agricultural objectives. Should you have any questions or concerns, please do not hesitate to contact me at (916) 978-5688.

Sincerely,



Amy L. Aufdenberge
Assistant Regional Solicitor
Attorney for Bureau of Reclamation