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Via E-Mail commentletters@waterboards.ca.gov

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Clerk to the Board
State Water Resources Control Board
P. O. Box 200
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Re: South Delta Water Agency/Lafayette Ranch Comments to Draft Order Modifying Order WR 2006-0006

Chair and Board Members:

The South Delta Water Agency and Lafayette Ranch ("SDWA") submit the following comments to the Draft Order ("Draft Order") Modifying Order WR 2006-0006 ("CDO"). Central Delta Water Agency joins in these comments. The Draft order continues the State Water Resources Control Board's effort to avoid enforcing the water quality objectives which protect southern Delta agriculture.

1. To understand the pervasive faults of the Draft Order, one need only recount the SWRCB's record regarding the water quality objectives for agricultural beneficial uses in the southern Delta ("salinity standards" or "standards").

A. The standards were first developed nearly 30 years ago.

B. They were incorporated into the 1995 Water Quality Control Plan for the Bay-Delta, which Plan directed that the Brandt Bridge standard be met "immediately" and the other two within two years.

C. D-1641 delayed full implementation of all three standards until 2005, and included a mechanism by which the standards would regress to a level not found to be protective of the beneficial use.

D. D-1641 also contained a provision which, upon violation of the standards, would allow the Executive Director to recommend "whether enforcement action is appropriate;" a provision not tied to any other permit condition or Plan directive.

E. The SWRCB argued before the courts that it could indeed change the standards without the need of any publically involved process to review the standards.

F. After the courts ruled against the SWRCB, it chose to not undertake any enforcement action against DWR and USBR for violations of the standards after (and before) April 2005.

G. Rather than enforce the standards, SWRCB issued a CDO; not to require compliance with the standards, but to "obviate the threats" to violations; three years thence. During the three years, the SWRCB took no action on any of the numerous violations of the standards, or any action on illegal exports done during such violations. In fact after such illegal diversions, the SWRCB notified the DWR and USBR that they should seek relief from the permit term which made such exports illegal.

H. The SWRCB approved municipal discharges (which add salt to the channels) with salinity levels above the standards, yet cited local agriculture use of water (which concentrates salt added by other parties) as a "possible contributor" to the salinity problem.

I. The SWRCB approved in an expedited manner an urgency permit change (without public participation) to allow previously illegal exports during times when the standards were being violated, yet waited until the urgency order had expired to rule on challenges to that order.

J. The SWRCB directed all of its enforcement personnel to investigate southern Delta water rights, and *immediately* undertook to investigate three complaints filed against southern Delta diverters, yet has failed to act on a 2008 complaint filed against DWR and USBR for violating the standards and permit conditions. With this remarkable record of avoidance of responsibility, we now turn to the Draft Order.

2. The Draft Order fails to address the underlying fallacy of the CDO. The CDO hearing and order are/were directed at preventing violations of the salinity standards. Once the projects began to regularly violate the standards, the focus should have shifted to requiring compliance, not planning to prevent compliance. Violations of the standards are pre se adverse impacts to agriculture water users in the Delta. Encouraging a plan to prevent future "threats" of violations is suggesting the barn door be closed after the horse has already fled. It is not only

indefensible, but unjustifiable to go through this long, tortured process to develop yet another plan (someday) to address threats, when violations are now common place. The Draft Order should simply note that the time periods in the CDO were not met, violations (and thus harm) are occurring, and specify an enforcement action begin immediately.

3. To the contrary, the Draft Order goes through a gratingly illogical process to argue/justify why the DWR and USBR's failure to protect water quality should be continued for at least another six years. The SWRCB assigned the standards to DWR and USBR in D-1641. This was at a time when the projects were already installing and operating the temporary barriers. Since D-1641, the projects have undertaken (virtually) no actions to meet water quality other than the temporary barriers. D-1641 was adopted in March 2000. More than nine years have elapsed and the projects have not only failed to comply with their permit terms to meet the standards, the SWRCB has not once sought compliance or enforcement of the permit terms. Instead, the Draft Order not only extends any deadline for compliance, it recognizes that the future plan "can take into account any future changes to their responsibility" for meeting the standards. Thus, through a cease and desist proceeding, the SWRCB has provided a method by which DWR and USBR may never have to meet their permit terms or protect agricultural beneficial uses in the southern Delta. One might label such efforts as clever were they not so embarrassingly inappropriate. The tools of enforcement are being used to not only avoid, but prevent enforcement.

4. Amongst the most glaring of the numerous glaring disconnects of the Draft Order is its finding that it was "reasonable" for DWR and USBR to "focus their efforts" on their plan to meet the standards by installing the permanent barriers. This conclusion not only has no support in the record, but the evidence requires the opposite conclusion. The Draft Order admits that DWR knew at least two years before the July 1, 2009 deadline that it would not be able to install the permanent barriers before that date. The Draft Order "forgets" to mention the testimony on cross-examination wherein DWR personnel acknowledged this fact, the testimony that no one believed those permanent barriers would solve the problem, the testimony that SDWA had proposed actions which would solve the problem, and the testimony that the problem could be solved with temporary barriers and other actions.

Yet with it being clear that the projects knew for at least two years they could not meet their own plan to "obviate threats" to the standards, knew they would not meet the standards (and were actually violating them along the way, and did not offer to or undertake any other methods to improve water quality, the SWRCB ***finds*** "that DWR and USBR have been diligent in their efforts to obtain the approvals necessary to construct permanent, operable gates in the southern Delta in accordance with the compliance plan approved by the Executive Director in 2006." According to the SWRCB, it was "reasonable" for them to do nothing (for at least two years), or anything else as the deadline approached. But wait; there is more! The SWRCB in the Draft

Order notes that such reasonableness was okay "***until***" the NOAA Fisheries issued its Biological Opinion in June of 2009 (forgetting to note that the BO came out the day before the notice of the hearing to consider changes to the CDO). To clarify, the SWRCB ***finds*** that relying on something that is known will not occur (in time) is a reasonable approach to meeting permit conditions and water quality standards ***until*** one is within a month of a deadline.

If words have any meaning (which is brought into serious question by the Draft Order) and if reasoned thought and logic are not illusory, the only possible conclusion is that it is not reasonable for a party under a CDO to intentionally fail to meet the deadline of the CDO. It is ***un***reasonable for both the projects and the SWRCB to go along their merry way knowing the CDO deadline would not be met, that no other actions were being undertaken to meet the standards, and that no enforcement action was recommended or initiated to force compliance with the standards.

Adopting the Draft Order would be an act of irresponsibility as it would result in hundreds of thousands of dollars being spent in court (by all parties). It is a surety that the court will find that SWRCB's conclusions "are not supported by the record."

5. A second non sequitur of the Draft Order is its treatment of the Court's order in the D-1641 cases. In that case, the Appellate Court held that the SWRCB could not change a water quality standard without going through a water quality standard process (quasi-legislative), and that the standards must be fully implemented because the program of implementation in the 1995 WQCP required such.[1] To address this issue, and SDWA's argument that continued extensions of the CDO deadline are/were in fact a failure to implement the standards, the SWRCB reasons that "a compliance schedule as part of the CDO ***does not relieve*** USBR and DWR of the requirement to meet the objectives, which remains a condition of their permits." (Emphasis added, at page 15 of the Draft Order). A few sentences later, in the same paragraph, the Draft Order states "Essentially, the modification of the compliance schedule in this CDO reflects our determination that further action ***would not be warranted*** . . ." (Emphasis added).

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[1] The Draft Order references the often misquoted D-1641 Appellate Court holding. The Court did not order the SWRCB to review the standards, or to change the standards. Neither did the Court order any new proceeding to fully implement the standards. The Court held that a standard must either be changed in the proper manner, or fully implemented. It clarified that changing a standard required the proper *planning* process and could not be done in a water right hearing like D-1641. The Court did not speculate, debate or hold that the assignment of full responsibility for the standards was not done, just that the D-1641 footnote allowing the standards to regress was illegal. If the SWRCB believes the salinity standards are not fully assigned it should say so very clearly.

To put this in layman's terms, the SWRCB is stating that although it has not enforced the permit conditions, has extended the time frame for compliance under D-1641 and the CDO, has decided to extend compliance again for at least another six years, and has decided to not enforce the standard in the interim, it is indeed actually, fully implementing the standards. The conclusion simply cannot follow those facts.

By the SWRCB's reasoning, implementing a requirement can be accomplished by implementing something admit you will never enforce. This raises cynicism to a level not seen since the Fourth Crusade sacked Christian Constantinople. Clearly the law does not allow a regulatory agency to do something in order to pretend to comply with the law.

6. The Draft Order gives short shrift to its own language in the CDO that it "would not extend the deadline beyond July 1, 2009" by stating that was, but no longer is, reasonable to expect the permanent barriers by that date. The justification does not work. The SWRCB never ordered the permanent barriers, never believed they alone would result in full compliance, and actually encouraged DWR and USBR to look at other means and actions to meet the standards before the permanent barriers were installed. The key portion of the CDO statement about allowing no further extensions was that "there is evidence that salinity is a factor in limiting crop yields" in the SDWA. The SWRCB seems to forget the evidence and testimony in the CDO showing significant crop loss where the water quality exceeded the standard.

7. The Draft Order takes judicial notice of a recent draft report by Dr. Hoffman regarding the salt tolerance of crops in the southern Delta. This citation/notice is given as support for the SWRCB to speculate that DWR and USBR's obligations to meet the standards may change; not only because the standards may change, but because their share of the responsibility may change. From this, the SWRCB constructs an illogical and convoluted scheme whereby DWR and USBR never have to meet their current permit conditions. The plan now is to defer any compliance with the standards until the ongoing review of the standards ***and*** the water rights hearing implementing those standards are completed. Then, DWR and USBR will draft a new plan to "obviate" threats of violations, specifying when ***they*** think they can meet those new, as yet undetermined obligations. There are so many problems with this approach one wonders where to start.

First, speculating on changes to the standards, and using such speculation as a basis for not enforcing an existing standards is as illogical and illegal now as it was when the SWRCB noticed the hearing on this matter. Unless the SWRCB has already decided to change the standards, or has already decided to adjust DWR and USBR's obligations to meet any standards, there is no basis for considering one possibility over any other; unless, the SWRCB has already made a decision before the processes have even begun. Since the Board members have likely not

read Dr. Hoffman's draft report, ***or*** any of the comments suggesting flaws in his analysis, one cannot even speculate what changes could be made to the standards.

Second, the purpose of the standards and the ordering of certain parties to meet the standards ***is to protect beneficial uses***. It is inconceivable that the SWRCB's plan to protect beneficial uses is (i) to ignore the prior process' determination of the standards, (ii) to ignore the prior assignment of the obligation to meet standards, and (iii) defer meeting those standards until they are re-examined, reassigned, and some future plan of compliance (at some unimaginable future date) is developed by DWR and USBR. Recall that per D-1641, the CVP was found to be the cause of the salinity problem (with DWR's help). Not even the SWRCB can think that is the best way to protect agricultural beneficial uses in the southern Delta.

The law certainly does not allow for an indefinite time frame for a permit holder to comply with its permit conditions, or for a cease and desist order to have an indefinite deadline for complying with the order.

Third, the Draft Order reads like and un-funny version of the movie *Groundhog's Day*. The "new" plan set forth in the Draft Order contains the same old tired, ineffective language that was contained in the CDO, as well as in D-1641. The projects are to look into other things, report back, don't rely on just barriers, develop time lines for the Executive Director to review and adopt, report potential and actual exceedances, report on other measures undertaken to avoid or lessen exceedances, and on and on. The SWRCB apparently forgets that these things accomplished nothing under the CDO except an increase in violations. It is not difficult to predict such results. When there are no adverse consequences to an action (or lack of action), the behavior never changes. With all of the requirements and stern warnings of the CDO (and D-1641) the projects did nothing to meet their permit obligations and the standards are now commonly violated. It should be noted that never once did the DWR or USBR list any corrective actions they undertook when a standard was being violated (as required by the CDO), yet this condition still festers in the Draft Order. It is the definition of insanity to do the same thing over and over and expect a different result.

8. The Draft Order ignores the testimony of SDWA at the hearing. Contrary to the Order's assertion, the evidence does suggest that low lift pumping over the barriers could improve water quality. To state otherwise is to not understand the problem. The testimony clearly shows that stagnant zones result in higher concentrations of salt. Low lift pumps not only dilute that salt, but at the appropriate level create net flows which flush the salts out of the null zone. There is no "other side" to these facts. Physics is physics.

From this sort of ignorance of the situation, the SWRCB then tries to excuse DWR, USBR, and itself from requiring any actions other than the permanent barriers. It does this by

noting that other actions may require ESA review and permitting. ESA review and permitting are the requirements of nearly all actions; thus not a reason to avoid ordering compliance. The temporary barriers require periodic re-permitting, permanent barriers require permitting, recirculation requires re-permitting, low lift pumps require permitting. It is a non-issue; compliance is required, and the projects must do what is necessary to be able to conform to their permits to export, store and divert. The point missed by the SWRCB in the Draft Order is that it must begin enforcing compliance, leaving the necessary reviews and permitting to DWR and USBR. The Draft Order failed to mention that recirculation required permitting each time by the USBR. Even after waiting until the last minute each time, USBR was able to get permits from the Regional Board and proceeded to do the recirculation.

9. Tellingly, the Draft Order fails mostly ignores SDWA suggestion of a number of actions that could be undertaken to improve water quality, or even meet the standards. Sadly, DWR and USBR undertook none of the suggested actions even they were made at least four years ago, and even though the projects knew for two years they would not have permanent barriers in time. The record shows that SDWA recommended adding one foot to the Middle River barrier to induce net flows. That recommendation was made more than a year before the hearing. DWR acknowledged it could have sought permitting for such changes earlier but did not. A DWR witness also stated he had now started to seek such permitting, and expected approval during the summer of 2009. Given this, there is no basis for the Draft Order concluding "the record does not support South Delta's contention that alternative salinity control measures exist that would achieve compliance with the objectives and that could be implemented in 2010 ..." That statement is demonstratively false. In fact DWR anticipates such approval before the 2010 season. With this sort of a track record, there is no basis for the SWRCB to excuse compliance because some actions might require ESA review and permitting.

10. The Draft Order listed recent violations of the standards, which oddly do not include any violations beyond July 13 of any year. Coincidentally, the violations seem to immediately precede JPOD operations which begin in early July, and which are generally prohibited during such violations. We suggest the Board make sure that the record is accurate. We do not recall, and it seems incredible that the standard at Tracy Old River Bridge was met in July and August of 2008 and 2007, as it was violated every day in the same time period in 2009.

11. The Draft Order's stated concerns about water supply impacts to export interests and fish are unpersuasive. Meeting salinity standard requirements is not a trade-off with meeting fisher standards. Both are obligations that are necessary and should be enforced. For some reason, the SWRCB has concluded that enforcement of either is subservient to exports (see for example the Feb 2009 violations of outflow standards and related hearing). Impacts to exports may indeed occur when permit obligations are met, but such impacts do not affect the obligations. Exports are subject to meeting all permit obligations; not the other way around.

12. The Draft Order fails to note that the standards are to be met throughout the channels, not just at the three compliance locations per the 2006 WQCP. Hence, all reporting of anticipated and actual violations must include all areas of the channels, not just three. Currently, the quarterly an annual reporting mask the extent of the violations by just concentrating on those three locations. As per the uncontroverted testimony of SDWA, the compliance locations are known to not correspond to the stagnant zones where water quality is the worst.

SDWA recommends the Draft Order be discarded, and a new draft order be released. That new draft should reiterate the history of DWR and USBR's failure to meet permit conditions and violations of water quality standards, their failure to take any reasonable actions to meet such requirements, their failure to comply with the CDO, and notice an enforcement hearing to determine the amount they should be fined and the injunctive relief sought to create the incentive for compliance. As written, the Draft Order is indefensible, internally inconsistent, illogical, and contrary to the law. The time has come to enforce the standards. Delay, excuse, and justification yield only contempt and violation.

Very truly yours,

JOHN HERRICK