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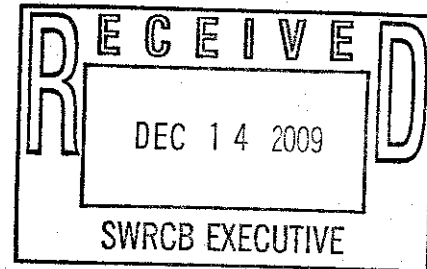
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December 14, 2009

Via e-mail: commentletters@waterboards.ca.gov
And U.S. Mail

State Water Resources Control Board
Attn: Jeanine Townsend
Clerk to the Board
Post Office Box 100
Sacramento, CA 95812-0100



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

Members of the Board:

The San Luis & Delta-Mendota Water Authority ("Authority") reviewed the State Water Resources Control Board's ("State Water Board") November 17, 2009, draft order modifying State Water Board Order WR 2006-0006 ("CDO"). The Authority commends the State Water Board for composing a judicious draft order on subject matter that is exceedingly complicated and contentious.

The Authority supports the draft order's extension of the CDO compliance timeline until the State Water Board completes its review of the southern Delta salinity objectives and any accompanying water rights proceedings related to assigning responsibility therefor ("southern Delta salinity review period"). For the reasons explained in the draft order, the extension is necessary and prudent.¹

¹ Notwithstanding the Authority's support for manner in which the State Water Board proposes to modify Order WR 2006-0060, the Authority does not waive, but hereby preserves the objections it previously raised to Order WR 2006-0060. The Authority hereby incorporates the comments it submitted during the State Water Board's administrative proceeding leading to the issuance of Order WR 2006-0060. Those comments are available at www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/delta_salinity/.

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Although the Authority supports the draft order, the draft order contains an ambiguity that should be clarified. Specifically, the draft order does not properly distinguish between the "pre" and "post" southern Delta salinity review period. Early in the draft order, the State Water Board recognizes that the authority of the CDO is limited to the interim period until review of south Delta salinity objectives and resulting water rights proceedings are complete. (Draft Order, p. 2 ("We will extend the compliance deadline until after we have completed our current review of the salinity objectives and associated program of implementation contained in the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and any subsequent water right proceeding").) However, the ordering section includes language that could be interpreted as the State Water Board exercising authority after the southern Delta salinity review period is complete. (Draft Order, p. 21-22 ("Within 180 days from the completion of the State Water Board's pending proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation . . . DWR and USBR shall submit a revised, detailed plan . . . includ[ing] planned completion dates for actions that will obviate the threat of non-compliance with the 0.7 EC objective").)

The CDO is based upon a finding that DWR and USBR threatened to violate the existing southern Delta salinity objectives. If the pending review process results in new objectives and/or a reallocation of responsibility to achieve objectives, the existing objectives and/or water right conditions related to implementation will be superseded and the State Water Board's CDO will thus be rendered moot. For that reason, it would be inappropriate and unlawful for the State Water Board, at this time, to extend the authority of the CDO beyond the southern Delta salinity review period. Accordingly, any language in the draft order which does that should be modified to avoid reaching beyond the southern Delta salinity review period. (See attached proposed revisions.)

In addition to the above clarification, the Authority is concerned that the draft order delegates too much authority to the Executive Director. For example, the draft order would provide the Executive Director with the power to require implementation of "any additional salinity control measures." (Draft Order, p. 25.) The Authority questions whether the State Water Board has the authority to make such a delegation. Even if the delegation is lawful, the draft order provides no mechanism to appeal a decision of the Executive Director. If the State Water Board adopts the draft order with the current level of delegated authority, the Authority respectfully requests that the State Water Board include a clear process to appeal any action taken by the Executive Director thereunder.

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Attached to these comments, the Authority provides proposed revisions to the draft order that, if incorporated into the final draft order, would adequately address the Authority's above-noted concerns.

The Authority appreciates the opportunity to comment on the draft order and hopes its concerns will be taken into consideration in drafting the final order.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation



Valerie C. Kincaid
Attorneys for the
San Luis & Delta-Mendota Water Authority

VCK/jvo

Attachment

cc: Mailing List (attached)

{00207081; 5}

Proposed Revisions to Nov. 17, 2009 Draft Order Modifying the CDO

ORDER

IT IS HEREBY ORDERED that Part A. of the ordering section of Order WR 2006-0006, beginning on page 28, is modified as follows:

A. The State Water Resources Control Board (State Water Board) ORDERS that, pursuant to Water Code sections 1831 through 1836, the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) shall take the following corrective actions and satisfy the following time schedules:

1. DWR and USBR shall implement measures to obviate the threat of non-compliance with Condition 56 on page 159, Condition 1 on pages 159 and 160, and Condition 1 on pages 160 and 161 of Revised Decision 1641 (D-1641) regarding the 0.7 mmhos/cm electrical conductivity (EC) objective. Beginning April 1, 2005, these conditions require DWR and USBR to meet the 0.7 EC Water Quality Objective for Agricultural Beneficial Uses at the following locations specified in Table 2 of D-1641 at page 182:

- 1) San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
- 2) Old River near Middle River (Interagency Station No. C-8); and
- 3) Old River at Tracy Road Bridge (Interagency Station No. P-12)¹³

Notwithstanding the foregoing, if as a result of the State Water Board's review of the 2006 Bay-Delta Plan, the Board adopts an order or decision modifying DWR's or USBR's responsibility for meeting the interior southern Delta salinity objective, then ~~DWR and USBR shall implement measures to obviate the threat of non-compliance~~ comply with the Board's order or decision.

2. If, as a result of the State Water Board's review of the 2006 Bay-Delta Plan, the Board adopts an order or decision modifying DWR's or USBR's responsibility for meeting the interior southern Delta salinity objective, and such order or decision requires a compliance plan, then within 180 days from the completion of the State Water 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 consider whether to change DWR's or USBR's responsibility for meeting the objectives as a result of any changes to the 2006 Bay-Delta Plan, DWR and USBR shall submit a revised, detailed plan and schedule to the Executive Director for compliance with the conditions set forth in paragraph one, above by the Board's order or decision. The plan shall include planned completion dates for actions that will obviate the current threat of non-compliance with the 0.7 EC objective at stations C-6, C-8, and P-12 and shall specify the date by which the threat of non-compliance will be eliminated comply with responsibilities in place at that time. For purposes of this paragraph, the pending proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation and any subsequent water right proceeding shall be deemed to have been completed and an order or decision issued, which includes a requirement to prepare a compliance plan, if the State Water Board has not issued a final order in the water right proceeding by January 1, 2013, unless the Deputy Director for Water Rights determines that the water right proceeding has been initiated, is proceeding as expeditiously as reasonably possible, and will be completed no later than October 1, 2014. To assist DWR and

USBR in determining when the revised compliance plan is due, the Deputy Director will notify DWR and USBR when the proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation and any subsequent water right proceeding have been completed. The plan and schedule submitted by DWR and USBR are subject to approval by the Executive Director of the State Water Board, shall be comprehensive, shall provide for full compliance with DWR's and USBR's responsibility to meet the interior southern Delta salinity objective, and shall include significant project milestones. DWR and USBR shall submit any additional information or revisions to the schedule and plan that the

¹³ Hereinafter referred to as the interior southern Delta salinity objective.

Executive Director requests within the period that the Executive Director specifies. DWR and USBR shall implement the plan and schedule as approved by the Executive Director. ~~If required and Once approved, the revised compliance plan shall supersede any inconsistent requirements established pursuant to Order WR 2006-0006 and or this order shall be superseded if, as a result of the State Water Board's review of the 2006 Bay-Delta Plan, the Board adopts an order or decision modifying the southern Delta salinity objectives and/or DWR's or USBR's responsibility therefore.~~

3. DWR and USBR shall comply without delay with any reasonable requests for technical assistance, including modeling, necessary to assist the State Water Board in its current efforts to review and implement the 2006 Bay-Delta Plan expeditiously. Specifically, within two weeks of adoption of this order, the Deputy Director for Water Rights will submit to DWR and USBR a scope of work and time schedule for DWR and USBR to provide modeling assistance to the State Water Board in its current efforts to review and implement the 2006 Bay-Delta Plan. DWR and USBR shall execute the scope of work pursuant to the time schedule specified in the scope of work. At the discretion of the Deputy Director for Water Rights, modifications or additions to the scope of work may be made to ensure the expeditious review of the 2006 Bay-Delta Plan, including the addition of technical assistance unrelated to modeling. If DWR or USBR object to any provisions of the scope of work, within two weeks of receipt of the scope of work, or any modifications to that scope of work, DWR and USBR may request reconsideration of the scope of work by the Executive Director of the State Water Board. DWR and USBR shall implement any scope of work approved by the Deputy Director for Water Rights, or by the Executive Director in cases where reconsideration has been requested.

4. In order to obviate the threat of violation at Station C-6 (San Joaquin River at Brandt Bridge), within 60 days from the date of this order DWR and USBR shall submit for approval by the Executive Director any necessary revisions to DWR and USBR's April 14, 2006 Compliance Plan for Monitoring Station C-6. DWR and USBR shall implement this element of the April 14, 2006 compliance plan and any revisions to this element of the plan required by the Executive Director.

5. DWR, with any needed cooperation from USBR, including funding and technical assistance, shall continue to implement the temporary barriers project. In addition, DWR, with assistance from USBR, shall pursue and implement, if feasible, any improvements to the temporary barriers project, including, but not limited to, the proposed increase in the height of the barrier located in Middle River near Victoria Canal. DWR and USBR shall consult with South Delta Water Agency (SDWA) regarding potential improvements to the temporary barriers project on a yearly basis and as

needed throughout the irrigation season. DWR and USBR shall expeditiously complete any necessary analyses to determine the feasibility of any proposed improvements and shall diligently pursue any permitting or funding needed to implement improvements. If DWR or USBR disagrees with SDWA regarding the feasibility of a proposed improvement or the analyses necessary to determine the feasibility of a proposed improvement, DWR and USBR shall immediately advise the Executive Director who will make a determination regarding necessary actions. By February 1 of each year, DWR and USBR shall submit a plan for approval by the Executive Director outlining the proposed construction and operation of the temporary barriers during the upcoming irrigation season. DWR and USBR shall implement the plan as approved by the Executive Director.

6. USBR shall diligently pursue completion of the Delta-Mendota Canal Recirculation Project Feasibility Study. DWR and USBR shall submit to the State Water Board copies of the Final Feasibility Study and the Environmental Impact Statement/Environmental Impact Report for the project within 10 days of the completion of those documents.

7. DWR and USBR shall study the feasibility of controlling salinity by implementing measures other than the temporary barriers project, recirculation of water through the San Joaquin River, and construction and operation of the permanent, operable gates. For each measure studied, DWR and USBR shall evaluate the extent to which the measure could control salinity at each of the interior southern Delta compliance locations, whether implementation of the measure would result in compliance with the interior southern Delta salinity objective at each of the locations, the technical and regulatory feasibility of the measure, the costs of the measure, and any potential impacts of the measure, including potential impacts to water quality, fishery resources, or water supplies. The study shall include, but is not limited to, an evaluation of the installation of low lift pumps at one or more of the temporary barriers. In addition, DWR and USBR shall evaluate, through modeling, whether compliance with the interior southern Delta salinity objective could be achieved by increasing flows in the San Joaquin River. In evaluating the feasibility of increasing flows in the San Joaquin River, DWR and USBR shall (1) evaluate the feasibility of both increased releases from CVP facilities and purchases or exchanges of water from third parties, and (2) evaluate the potential impacts of increasing flows on water supplies, including water supplies needed to protect fishery resources. Within 60 days from the date of this order, DWR and USBR shall submit a study plan to the Deputy Director for Water Rights for the Deputy Director's review and approval. The Deputy Director may direct DWR and USBR to make any changes to the study plan necessary to ensure a meaningful evaluation of alternative salinity control measures. In addition, the Deputy Director may require DWR and USBR to conduct the study in phases, to refine or augment the study based on the results of an earlier phase, or to evaluate a combination of alternative salinity control measures designed to improve or achieve compliance with the interior southern Delta salinity objective. DWR and USBR shall make any changes to the study plan that the Deputy Director requires within the period that the Deputy Director specifies, and shall conduct the study in accordance with the approved study plan. Within 180 days from the Deputy Director's approval of the study plan, DWR and USBR shall submit a report to the Executive Director that describes the study and its results.

8. During the interim period before the revised compliance plan described in paragraph 2, above, is developed and approved, the authority is delegated to the Executive Director to require DWR or USBR to implement any additional salinity control measures

that the Executive Director determines are feasible and reasonable based on the Executive Director's review of the studies described in paragraphs 5 and 6, above, or any other available information.

9. In the event that DWR and/or USBR projects a potential exceedance of the 0.7 EC objective at Interagency Stations C-6, C-8, or P-12, prior to the compliance deadline specified in the plan approved pursuant to paragraph 2, above, DWR and/or USBR shall immediately inform the State Water Board of the potential exceedance and shall describe the corrective actions they are initiating to avoid or reduce the exceedance. Corrective actions may include but are not limited to additional releases from upstream CVP facilities or south of the Delta State Water Project (SWP) or CVP facilities, modification in the timing of releases from Project facilities, reduction in exports, recirculation of water through the San Joaquin River, purchases or exchanges of water under transfers from other entities, modified operations of temporary barriers, reductions in highly saline drainage from upstream sources, or alternative supplies to Delta farmers (including overland supplies).

10. If there is an exceedance of the 0.7 EC objective for Interagency Stations C-6, C-8, or P-12, within 30 days from the date of the exceedance, DWR and USBR shall report to the Executive Director (1) the length of time over which the exceedance occurred and (2) the corrective actions taken to curtail the exceedance, including the amount of water bypassed or released from upstream CVP supplies and south of Delta SWP and CVP supplies, the net reduction in exports, and the measured quantity of other actions, if any, taken specifically to correct the exceedance. DWR and USBR also shall identify the amount of their Project supplies remaining for beneficial uses following corrective actions. Upon receipt of the above report, the Executive Director will make a recommendation to the State Water Board regarding whether to take enforcement action. In deciding whether to initiate enforcement action, the Executive Director shall consider the extent to which the noncompliance was beyond DWR's and USBR's control and the actions taken to correct the exceedance.

11. During the interim period, before the State Water 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 consider whether to change DWR's or USBR's responsibility for meeting the objectives as a result of any changes to the 2006 Bay-Delta Plan Every three months, commencing on the last day of the month following the date of Order WR 2006-0006, DWR and USBR shall submit to the State Water Board a status report to the State Water Board every three months on progress towards compliance with the referenced permit/license conditions and an updated projection of the final compliance date. During the interim period before the revised compliance plan described in paragraph 2, above, is developed and approved, the status report shall describe the activities undertaken to comply with paragraphs 4, 5, 6, 7, and 8, above.

12. If DWR or USBR is unable to collect EC data at Interagency Station Nos. C-6, C-8, or P-12 for more than seven (7) consecutive days for any reason, DWR and USBR shall report the outage in writing to the Executive Director. The report shall include the reason for the loss of data, a plan to restore data collection, and the anticipated date that data collection will resume.

13. DWR and USBR shall submit to the Executive Director by December 1 of each year the annual monitoring report required by Condition 11, paragraph c, on page 149 of D-1641, beginning with the report required by December 1, 2005. DWR and USBR shall make historical results of the monitoring required under paragraph c available to the State Water Board and other interested parties by posting the data on the internet. The posted data shall include a computation of the 30-day running average.

14. DWR and USBR shall serve copies of all reports, plans, and other communications required by the above paragraphs of this order on the Central Delta Water Agency; SDWA; San Joaquin County; California Sportfishing Protection Alliance; California Water Impact Network; and Contra Costa Water District, and shall submit a proof of service to the Executive Director or to the Deputy Director for Water Rights showing that the copies were served concurrently with their submittal to the Executive Director or the Deputy Director. Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of Part 2 of Division 2 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).) Any person or entity who violates a CDO may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b)(1).)

15. Any decision made or action taken by the Executive Director pursuant to this Order may be reviewed by the State Water Board, upon a petition for reconsideration. The petition for reconsideration shall be filed within 14 days of the decision or action. The effect of the decision or action shall be stayed while the State Water Board reviews the decision or action.

**Mailing List To Receive Draft Order Regarding
WATER RIGHT HEARING TO CONSIDER MODIFICATION OF
ORDER WR 2006-0006, JUNE 25, 29, AND 30, 2009
DEPARTMENT OF WATER RESOURCES AND
THE UNITED STATES BUREAU OF RECLAMATION**

Via: E-Mail

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