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**STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD**

**ORDER WR 2010-0002**

**In the Matter of Cease and Desist Order WR 2006-0006 against the  
Department of Water Resources and the United States Bureau of Reclamation  
in Connection with Water Right Permits and License  
for the State Water Project and Central Valley Project1**

**SOURCES: Sacramento and San Joaquin Rivers and their tributaries, and the Sacramento-San Joaquin Delta Estuary**

**COUNTY: San Joaquin**

**ORDER MODIFYING ORDER WR 2006-0006**



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ORDER MODIFYING ORDER WR 2006-0006

BY THE BOARD:

**1.0 INTRODUCTION**

By this order, the State Water Resources Control Board (State Water Board or Board) modifies State Water Board Order WR 2006-0006, which is a cease and desist order issued against the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) in response to the threatened violation of DWR's water right permits for the State Water Project (SWP) and USBR's water right license and permits for the Central Valley Project (CVP). In Part A of Order WR 2006-0006, the State Water Board required DWR and USBR to take corrective actions in accordance with a time schedule in order to obviate the threatened violation of the requirement to meet a water quality objective for salinity designed to protect agricultural beneficial uses in the southern Sacramento-San Joaquin Delta Estuary (Delta).<sup>2</sup>

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<sup>1</sup> Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A, respectively) of the Department of Water Resources and License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 19304, and 14858B, respectively) of the United States Bureau of Reclamation.

<sup>2</sup> In Part B of Order WR 2006-0006, the State Water Board amended the July 1, 2005 approval by the Chief of the Division of Water Rights of a Water Quality Response Plan submitted by DWR and USBR for their use of each other's points of diversion in the Delta. This order does not modify Part B of Order WR 2006-0006.

At the outset, it bears emphasis that the purpose of this proceeding is not to determine the responsibility of DWR and USBR to meet the salinity objective, an issue that was addressed in Order WR 2006-0006, or to revisit the issue of whether a threat of violation exists. Instead, the purpose of this proceeding is to determine whether to modify the compliance schedule contained in Order WR 2006-0006, and whether to impose any interim protective measures.

As more fully explained below, we have determined that the July 1, 2009 deadline to obviate the threat of violation should be extended in recognition of the fact that, in a biological opinion issued in June of 2009, the National Marine Fisheries Service (NOAA Fisheries) prohibited DWR from constructing permanent, operable gates in the southern Delta as part of the South Delta Improvements Program (SDIP). Construction of the gates was a central component of DWR and USBR's plan to achieve compliance with the salinity objective as required by Order WR 2006-0006. 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 (2006 Bay-Delta Plan) and any subsequent water right proceeding so that, in developing a revised compliance plan, DWR and USBR can take into account any changes to their responsibility for meeting the objective that may occur as a result of our review. To avoid undue delay in the preparation and implementation of a revised compliance plan, we will require DWR and USBR to provide any technical assistance necessary to support our efforts to complete our review of the 2006 Bay-Delta Plan and any subsequent water right proceeding expeditiously.

In the interim, we will require DWR, with any necessary assistance from USBR, to continue to implement and improve upon the temporary barriers program. The temporary barriers improve salinity in the southern Delta, but they are not sufficient by themselves to ensure compliance with the salinity objective. More information is needed, however, concerning the effectiveness and feasibility of other salinity control measures. Accordingly, we will require DWR and USBR to study the feasibility of alternative salinity control measures, and we will delegate to the Executive Director the authority to require DWR and USBR to implement on an interim basis any additional salinity control measures that the Executive Director determines are reasonable and feasible.

Act of 2004 (Pub.L. No. 108-361, §103 (Oct. 25, 2004) 118 Stat. 1681). In addition, USBR and DWR are preparing a joint EIS/EIR for the recirculation project pursuant to NEPA and CEQA.<sup>13</sup>

The feasibility of increasing San Joaquin River flows also requires further analysis. In particular, the administrative record does not contain substantial evidence concerning the extent to which the interior southern Delta salinity objectives could be met by increasing flows in the San Joaquin River, the availability of water for purchase or exchange in order to increase San Joaquin River flows, the cost of any such water, or the potential impact of increasing such flows on water supplies, including water supplies needed to protect fishery resources.

To remedy the lack of information concerning the effectiveness and feasibility of alternative salinity control measures, we will require DWR and USBR to conduct a feasibility study and submit a report to the State Water Board. At a minimum, the study should address the effectiveness and feasibility of installing low lift pumps and increasing flows in the San Joaquin River. We will also require DWR and USBR to submit copies of the feasibility study and EIS/EIR for the Delta-Mendota Canal Recirculation Project, once those documents have been completed. Finally, we will delegate to the Executive Director the authority to require DWR and USBR to implement on an interim basis any alternative salinity control measures that the Executive Director determines are reasonable and feasible, based on the feasibility study and any other available information.

#### **4.0 CONCLUSION**

We find 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. That plan is no longer viable, however, in light of NOAA Fisheries' recent biological opinion, and the associated delay and uncertainty regarding the feasibility of constructing the permanent gates. In recognition of the fact that it will take time to develop and implement a revised compliance plan, we will extend the

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<sup>13</sup> We take official notice of the fact that USBR is conducting the feasibility study and USBR and DWR are preparing an EIS/EIR, as evidenced by the documents and other information posted on USBR's website. We take official notice of these facts pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the State Water Board to take official notice of matters that may be judicially noticed), and pursuant to Evidence Code section 452, subdivisions (c) (authorizing judicial notice of the official acts of administrative agencies) and (h) (authorizing judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

compliance deadline set forth in Order WR 2006-0006. Moreover, we will extend the deadline until after we complete our review of the 2006 Bay-Delta Plan and any subsequent water right proceeding, so that DWR and USBR's revised compliance plan can take into account any changes to DWR's or USBR's responsibility for meeting the interior southern Delta salinity objectives that may occur as a result of our review of the 2006 Bay-Delta Plan. We will also require DWR and USBR to provide any technical assistance necessary to support our efforts to complete our review of the 2006 Bay-Delta Plan and any subsequent water right proceeding expeditiously.

In the interim, we will require DWR to continue to implement and improve upon the temporary barriers program, in consultation with SDWA, and with any necessary assistance from USBR. In addition, we will require DWR and USBR to study the effectiveness and feasibility of alternative salinity control measures, and implement any additional measures that the Executive Director determines are both reasonable and feasible.

#### **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 by July 1, 2009. 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)<sup>14</sup>

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 ensure compliance with the Board's order or decision.

2. Within 60 days from the date of this order 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 mentioned set forth in paragraph one, above, including 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 by July 1, 2009. If the plan provides for implementation of equivalent measures, DWR and USBR shall submit information establishing that those measures will provide salinity control at the three compliance stations equivalent to the salinity control that would be achieved by permanent barriers. 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 submit a revised, detailed plan and schedule to the Executive Director for compliance with the Board's order or decision. The plan shall include planned completion dates for actions that will ensure compliance with the Board's order or decision and shall specify the date by which compliance will be achieved. For purposes of this paragraph, the pending proceeding

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<sup>14</sup> Hereinafter referred to as the interior southern Delta salinity objective.

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 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 (or any Board order or decision modifying DWR's or USBR's responsibility for meeting the objective), and shall include significant project milestones. DWR and USBR shall submit any additional information or revisions to the schedule and plan that the 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. Once approved, the revised compliance plan shall supersede any inconsistent requirements established pursuant to Order WR 2006-0006 or this order.

~~3. Within 60 days from the date of this order, if DWR and USBR decide to implement the permanent barriers project or equivalent measures, DWR and USBR shall submit a schedule to the Chief of the Division of Water Rights (Division) for developing an operations plan that will reasonably protect southern Delta agriculture. DWR and USBR shall submit the final plan to the Executive Director for approval no later than January 1, 2009. To ensure that the plan is adequate prior to the required compliance date, DWR and USBR shall submit a draft of the operations plan by January 1, 2008, to the Division Chief for review and comment.~~

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 and SWP 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. Any decision of the Executive Director under authority delegated pursuant to this paragraph is subject to reconsideration pursuant to sections 768 through 771 of title 23 of the California Code of Regulations.

49. 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, and/or P-12, prior to July 1, 2009 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 Central Valley Project (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).

510. If there is an exceedance of the 0.7 EC objective for Interagency Stations C-6, C-8, and/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.

611. Every three months, commencing on the last day of the month following the date of this order Order WR 2006-0006, DWR and USBR shall submit to the State Water Board a status report on progress towards compliance with the referenced permit/license conditions and an updated projection of the final compliance date ~~(including completion of construction and commencement of operations if DWR and USBR determine that permanent barriers or equivalently protective measures are the preferred method of compliance)~~. 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.

712. 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.

813. 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