

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING – DIVISION OF WATER RIGHTS
SEPTEMBER 21, 2006**

ITEM 7

SUBJECT

CONSIDERATION OF A PROPOSED ORDER AMENDING STATE WATER BOARD DECISION 1641 TO COMPLY WITH WRIT OF MANDATE

DISCUSSION

On December 29, 1999, the State Water Resources Control Board (State Water Board) adopted Water Right Decision 1641 (D-1641), which among other matters amended the permits and licenses of the California Department of Water Resources (DWR), the United States Bureau of Reclamation (USBR) and other parties to implement certain flow-related water quality objectives adopted by the State Water Board for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. On March 15, 2000, in response to petitions for reconsideration, the State Water Board revised D-1641 in accordance with Order WR 2000-02.

D-1641 resulted in lengthy and complex litigation addressing numerous issues. The litigation concluded after an opinion issued on February 9, 2006, by the Court of Appeal, Third District of California. The State Water Board lost on only two of over twenty issues. With regard to the salinity objectives at three compliance stations in the southern Delta, the Court of Appeal held that the State Water Board acted without authorization when it included footnote 5 of Table 3 on page 182 of D-1641. Footnote 5 would replace the 0.7 mmhos/cm Electrical Conductivity (EC) with the 1.0 EC objective under certain conditions *after* April 1, 2005, thereby allowing the objective to be unmet in the future. The court held that the State Water Board must either fully implement the southern Delta salinity objectives as set forth in the 1995 Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) or must duly amend the Plan. As discussed in the recommended order, the course of action available at this time is to amend D-1641 to provide for implementation of the 0.7 EC objective.

Under the writ of mandamus issued by the trial court in response to the Court of Appeal opinion, the State Water Board shall file a return by no later than 100 days after entry of the writ, setting forth what the State Water Board and its members have done to comply with the writ. Because the writ of mandamus applying to the southern Delta salinity objectives was entered on July 5, 2006, the return on the writ must be filed on or before October 13, 2006.

POLICY ISSUE

Should the State Water Board adopt the proposed order, deleting footnote 5 in Table 2 on page 182 of D-1641 to comply with the writ of mandate regarding implementation of the southern Delta salinity objectives?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

Adopt the proposed order.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**ORDER WR 2006 -**

In the Matter of Implementation of Water Quality Objectives for the
San Francisco Bay/Sacramento-San Joaquin Delta Estuary

in

revised Water Right Decision 1641.

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

ORDER AMENDING DECISION 1641**BY THE BOARD:**

On December 29, 1999, the State Water Resources Control Board (State Water Board or SWRCB) adopted Water Right Decision 1641 (D-1641), which among other matters amended the permits and licenses of the California Department of Water Resources (DWR), the United States Bureau of Reclamation (USBR) and other parties to implement certain flow-related water quality objectives adopted by the State Water Board for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. On March 15, 2000, in response to petitions for reconsideration, the State Water Board revised D-1641 in accordance with Order WR 2000-02.

Numerous parties, including the Central Delta Water Agency, et al., timely filed litigation against D-1641 in several superior courts in California. The Judicial Council coordinated the various cases in Case No. JC 4118 and assigned them to the Sacramento County Superior Court. The Honorable Roland L. Candee served as the Coordination Trial Judge. In May 2003, Judge Candee issued his statement of decision, upholding D-1641 with two exceptions. With respect to the assignment of responsibility for meeting the salinity objectives in the southern Delta, Judge Candee dismissed the Central Delta claim. Central Delta Water Agency appealed this ruling as well as other rulings sustaining the State Water Board's decision.

On February 9, 2006, the Court of Appeal, Third District of California, issued its opinion in the appeals of the trial court decision. The Court of Appeal generally upheld D-1641, but with regard to the salinity objectives at three compliance stations in the southern Delta, the Court of Appeal held that the State Water Board acted without authorization when it included footnote 5 of Table 3 on page 182 of D-1641. Footnote 5 would replace the 0.7 mmhos/cm Electrical Conductivity (EC) with the 1.0 EC objective under certain conditions *after* April 1, 2005.¹ The court held that the Board must either fully implement the southern Delta salinity objectives as set forth in the 1995 Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) or must duly amend the Plan.²

On July 5, 2006, in accordance with the direction of the Court of Appeal, the Superior Court of the State of California, County of Sacramento, issued to the State Water Board a Peremptory Writ of Mandamus in *Central Delta Water Agency, et al. v. SWRCB, et al.* (San Francisco County Superior Court, Case No. 311502). The peremptory writ of mandamus orders the State Water Board “to commence proceedings either to assign responsibility for meeting the southern Delta salinity 0.7 EC objective on the San Joaquin River at Brandt Bridge, on Old River near Middle River and on Old River at Tracy Road Bridge in the 1995 Bay-Delta Water Quality Control Plan or to amend the plan.” The writ of mandamus further commands the State Water Board to file a return by no later than 100 days after entry of the writ, setting forth what the State Water Board and its members have done to comply with the writ. Because the writ of mandamus was entered on July 5, 2006, the return on the writ must be filed on or before October 13, 2006.

As noted above, the Court of Appeal held that the State Water Board could not take the action it took in D-1641 to allow the 0.7 EC objective to be exceeded without amending the plan.

¹ Footnote 5 as adopted in D-1641 provides: “The 0.7 EC objective becomes effective on April 1, 2005. The DWR and the USBR shall meet 1.0 EC at these stations year round until April 1, 2005. The 0.7 EC objective is replaced by the 1.0 EC objective from April through August after April 1, 2005 if permanent barriers are constructed, or equivalent measures are implemented, in the southern Delta and an operations plan that reasonably protects southern Delta agriculture is prepared by the DWR and the USBR and approved by the Executive Director of the SWRCB. The SWRCB will review the salinity objectives for the southern Delta in the next review of the Bay-Delta objectives following construction of the barriers.”

² The Court of Appeal also held that the State Water Board must conduct further proceedings to fully implement the Vernalis flow objectives in the 1995 Bay-Delta Plan or to amend the Plan. The State Water Board will address this issue in a separate proceeding to amend the Plan’s program of implementation.

Without additional information, however, the State Water Board has no adequate scientific basis to amend the 0.7 EC objective. Accordingly, the State Water Board finds that at this time its best course is to amend D-1641 by revising the provision that would allow exceedance of the 0.7 EC objective. In addition to this action, the State Water Board will, in a proceeding commencing this fall to amend the Bay-Delta Plan, summarize and clarify the flow control and salt load reduction implementation measures, and their timeline for implementation, that have already been adopted by the State Water Board and Central Valley Regional Water Quality Control Board (Central Valley Water Board), respectively. A mix of low flows and elevated salinity causes the salinity impairment in the southern Delta. The time schedule for implementation of salt load reductions contained in the Central Valley Water Board's Control Program for Salt and Boron Discharges into the Lower San Joaquin River ³, requires compliance with salt load allocations in the San Joaquin River in eight to 20 years, depending on source and water year type.

In addition to the immediate action taken in this order and the commencement of a proceeding this fall to amend the Bay-Delta Plan, the State Water Board intends to conduct a workshop and to conduct further proceedings, as necessary, to review: 1) the salinity requirements of the beneficial uses of water in the southern Delta; 2) the causes of salt loading in the southern Delta; 3) practices that could reduce the salt loading from Delta sources; 4) flow and salt load reduction measures to implement the salinity objectives; and 5) the timeline for implementation of these measures. The State Water Board intends to develop and manage a study of salinity in the southern Delta as part of this effort. This process could result in amendments to the Bay-Delta Plan, further changes in water rights, or changes in both the Plan and water rights. The State Water Board expects that the study and other efforts leading to a water right or water quality proceeding under this process will, however, require two or more years to complete, and therefore will not satisfy the writ of mandamus which requires the commencement of a proceeding by October 13, 2006.

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³ The program is set forth in the amendment to the Water Quality Control Plan for the Sacramento and San Joaquin River Basins that can be found at <http://www.waterboards.ca.gov/centralvalley/programs/tmdl/vernal-salt-boron/index.html#approvals>. The amendment was approved by the Office of Administrative Law on July 21, 2006.

ORDER

IT IS HEREBY ORDERED THAT:

1. Revised State Water Resources Control Board Decision 1641 is amended by revising footnote 5 of Table 3 on page 182, to read: "The DWR and the USBR shall meet these objectives. The SWRCB will conduct a workshop to review the salinity objectives for the southern Delta commencing in 2006 and may consider amending the objectives and/or the program of implementation of the objectives in the Bay-Delta Plan if it receives adequate evidence supporting an amendment. If the SWRCB amends the Bay-Delta Plan as a result of the review, it will subsequently amend the permits of the DWR and the USBR as appropriate to make them consistent with the Bay-Delta Plan."

In all other respects, D-1641 is unchanged and remains in full force and effect.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 21, 2006.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Song Her
Clerk to the Board