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January 29, 2009

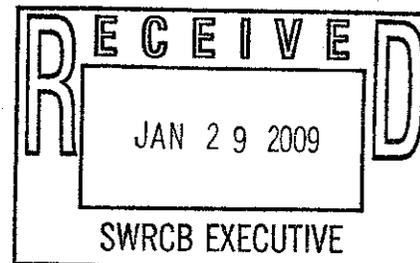
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*Via E-Mail to [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov) and  
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Chair Tam Doduc and Members of the State Water Board  
c/o Jeanine Townsend, Clerk of the Board  
Executive Office  
State Water Resources Control Board  
Cal/EPA Headquarters  
1001 "T" Street, 24th Floor  
Sacramento, CA 95814-2828



**Re: COMMENT LETTER - 02/03/09 BOARD MEETING:  
JPOD PETITIONS FOR RECONSIDERATION DRAFT ORDER**

Dear Chair Doduc and Members of the State Water Board:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively hereinafter the "County"), we submit the following comments the Draft Order Denying South Delta Water Agency et al's JPOD Petition for Reconsideration scheduled as item 13 on the February 3, 2009 State Water Board Meeting Agenda.

The County is disappointed in the State Water Board's failure to enforce the permit conditions of the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR). In addition, Order WR 2008-0029-EXEC improperly excused DWR and USBR from meeting their permit conditions regarding southern Delta salinity during 2008. The State Water Board must meaningfully review these actions so that additional violations do not occur in 2009. Given DWR and USBR's past actions combined with the current lack of precipitation, it is more than likely that the salinity violations will continue in 2009 unless the State Water Board takes action. As a result, it appears that the State Water Board's Draft Order denying the Petitions for Reconsideration is merely a response to political pressure to support the export projects, rather than a meaningful exercise of the State Water Board's duty to enforce California water law and its prior water right decisions and orders, including D 1641 and Cease and Desist Order WR 2006-0006 (CDO).

The San Joaquin County Board of Supervisors provided a letter dated August 19, 2008 to the State Water Board explaining the importance of this matter to the County, which encompasses almost half of the legal Delta. In this letter the County indicated that the Urgency Petition is precluded due to DWR and USBR's failure to exercise due diligence in petitioning for the change. *Wat. Code* § 1435(c). The County continues to assert that the Urgency Petition was granted in error, and should be reconsidered.

DWR and USBR did not pursue due diligence in petitioning for the urgency change to modify the terms of their water right permits. According to D 1641 and the CDO, it is clear that JPOD cannot be utilized when permit terms and conditions are being violated by DWR and USBR. This fact was clearly set forth in the CDO as well as in a letter to DWR and USBR by State Water Board Executive Director Dorothy Rice, dated November 28, 2007, in which Director Rice stated:

“... DWR and USBR may petition the State Water Resources Control Board to change the permit and license requirements applicable to their use of the JPOD. If DWR or USBR are considering submitting such a change petition, *I suggest that they submit it as soon as possible to assure that the matter can be considered prior to any need for JPOD diversions next year.*” (emphasis added)

The direction to DWR and USBR to petition for a temporary change in their permit if they anticipated that salinity standards would not be met, and to do so well ahead of time, is abundantly clear. Rather than heed this advice, DWR and USBR neglected to undertake the appropriate process to change their permits in a timely manner, a process that calls for more detailed review by the State Water Board as well as a public notice and comment period, and instead elected to wait until the last minute, thereby causing the alleged “emergency” situation that purportedly justified the Urgency Petition.

A determination of urgency need is precluded where the Board, in its judgment, concludes that the petitioner has not exercised due diligence either (1) in petitioning for a [permit] change; or (2) in pursuing that petition for change. *Wat. Code* §1435(c). Given the myriad circumstances that created the strong likelihood that DWR and USBR would violate the salinity standards in 2008 (low precipitation, the Wanger decision, and violations in 2007), and given that DWR and USBR were cautioned to begin the petition process a full seven months prior to the filing of the Urgency Petition, it cannot be reasonably asserted that DWR and USBR made a showing of “due diligence” justifying this situation as an actual “urgency need.” As a result, DWR and USBR’s attempt to circumvent the system by alleging an urgency need that they themselves created is contrary to law and does not support the issuance of a Temporary Urgency Change for the water rights permits at issue.

DWR and USBR have endlessly delayed, through both wet and dry periods, dealing with the very real problem of salinity in the San Joaquin River and south Delta. The USBR and DWR have been repeatedly advised and ordered to address the problem, but have continued to ignore all advice and have failed to follow orders. The time has come to tackle the salinity problem, and that time is now. Both DWR and USBR have the obligation and the ability to do so, but apparently fail to take their responsibilities and permit conditions seriously. If this is not addressed by the State Water Board now, violations and salinity problems will continue in 2009 and beyond.

The County asserts that DWR and USBR have failed to take actions which are available to, and within the control of, both parties which would allow them to meet the interior Delta salinity standards, which would then allow them to operate the JPOD legally, as opposed to continuing to operate the JPOD in blatant disregard of the law. As is pointed out in SDWA's Request for Reconsideration, there are actions the DWR and USBR could take, including but not limited to recirculation, which would allow the USBR and DWR to meet their requirements for water quality at the interior points and allow the utilization of the JPOD.

This matter was considered at length during the Bay Delta evidentiary hearings that resulted in D 1641. The State Water Board's decision in D 1641 is the controlling decision regarding the salinity issues in the Bay Delta. D 1641 is clear --- the responsibility for meeting the salinity objective belongs to DWR and USBR. D 1641 is also clear that the root cause of the salinity problems is not due to in-Delta users (although it is recognized that in-Delta users add some salt to the waterways) but rather the export projects.

Regarding the responsibility to meet the Delta salinity objectives the State Water Board in WR Decision 1641 summarizes as follows:

"Salinity problems in the southern Delta result from low flows in the San Joaquin River and discharges of saline drainage water to the river. The actions of the CVP are the principal causes of the salinity concentrations exceeding the objectives at Vernalis. Downstream of Vernalis, salinity is influenced by San Joaquin River inflow, tidal action, diversions of water by the SWP, CVP, and local water users, agricultural return flows, and channel capacity. Measures that affect circulation in the Delta, such as barriers, can help improve the salinity concentrations." D 1641 p. 89.

D 1641 continues stating that the circulation problems in the Delta are caused by "... export pumping by the SWP and CVP and in-Delta diversions in the southern Delta [which] cause null zones, areas with little or no circulation." D 1641 p. 87.

In D 1641 the State Water Board found that the circulation issues that contribute to the salinity violations are due to the export pumping of the CVP and the SWP, not just the in-Delta diversions. Although the State Water Board found that in-Delta users contribute in part to the southern Delta salinity, based on substantial evidence it was reasonable to place the entire burden and obligation to meet the southern Delta salinity objectives on DWR and USBR. Now, DWR and USBR repeatedly point to the in-Delta diversions and claim that there is nothing that the CVP and SWP do to influence these objectives. This is simply not accurate.

D 1641 continues that the "... construction of permanent barriers alone is not expected to result in attainment of the water quality objectives." D 1641 p. 88. Thus, since 2000, it was made quite clear by the State Water Board that more needs to be done by DWR and USBR to address the salinity problems in the South Delta as D 1641 imposes the responsibility of meeting the salinity objectives on DWR and USBR.

The need to implement additional mitigation measures should not be a surprise to DWR or USBR now. The periodic reports by DWR and USBR and the reasoning relied upon by DWR and USBR to support the need for the urgency petition was that "no additional reasonable control measures exist." To the contrary, D 1641 indicates that measures that affect circulation in the Delta can be used to implement the southern Delta salinity objectives. DWR and USBR are just choosing not to implement them. The State Water Board needs to make them do so.

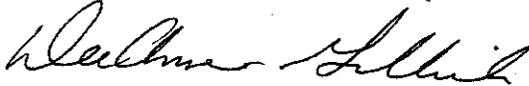
It is disingenuous to repeatedly receive reports and letter updates from DWR and the USBR that assert that the southern Delta salinity problem is "beyond their control." Their operations are the cause of the problem. Since they are in control of their operations, they are likewise in control of the impacts on salinity caused by those operations. The State Water Board identified the measures that needed to be implemented in order to address salinity in the southern Delta stating that salinity objectives for the interior southern Delta "... can be implemented by providing dilution flows, controlling in-Delta discharges of salts, or by using measures that affect circulation in the Delta." D 1641 p. 87. Additionally, the declaration and letters submitted by South Delta Water Agency et al. indicate that there are meaningful measures that are available and that can be undertaken to immediately improve water quality. Thus, there are measures within the control of DWR and USBR that could be immediately implemented to address the salinity violations in the South Delta.

The State Water Board must enforce the existing water right permit terms and require DWR and USBR to meaningfully implement these and other measures. Alternatively, consistent with State water law, DWR and USBR should not be receiving water pursuant to their water right permits while these salinity objective terms are being violated.

The County desires a solution, not the blatant disregard of the law and the State Water Board decisions and orders. San Joaquin County is not opposed to the use of the JPOD but maintains that such use governed by, and limited by, the rules for the use of the JPOD established by D-1641.

For the reasons stated above, the County disagrees with the draft order and requests that South Delta Water Agency's Petition For Reconsideration in the matter of Order WR 2008-0029-EXEC should be granted. It is too late for the State Water Board to take meaningful action to affect the 2008 season but it is not too late to affect 2009. The State Water Board needs to meaningfully consider this issue and take action following a noticed proceeding which allows all interested parties to participate. It is improper to allow DWR and USBR to file another urgency petition in 2009 and to continue to allow DWR and USBR to operate the JPOD in direct violation of the terms and conditions of the underlying permits, as well as D-1641 and the Cease and Desist Order (WR 2006-0006).

Very truly yours,



DeeAnne Gillick  
Attorney at Law

DMG/cmp

cc: Each Member of the Board of Supervisors  
David Wooten, County Counsel  
T.R. Flinn, Director of Public Works  
Thomas M. Gau, Chief Deputy Director  
C. Mel Lytle, Ph.D., Water Resources Coordinator  
Thomas J. Shephard, Sr.