

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JON D. RUBIN, State Bar No. 196944  
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation  
400 Capitol Mall, 27th Floor  
Sacramento, CA 95814-4416  
Telephone: (916) 321-4500  
Facsimile: (916) 321-4555

Attorneys for San Luis & Delta-Mendota Water  
Authority and Westlands Water District

STATE WATER RESOURCES  
CONTROL BOARD  
2005 DEC 12 PM 3:08  
DIVISION OF RIGHTS  
SACRAMENTO

BEFORE THE  
STATE WATER RESOURCES CONTROL BOARD

In Re Draft Cease and Desist Orders against  
the United States Bureau of Reclamation  
and the California Department of Water  
Resources and Reconsider the Conditional  
Approval of the April 25, 2005 Water  
Quality Response Plan  
for use of Joint Points of Diversion by the  
United States Bureau of Reclamation  
and the California Department of Water  
Resources

**CLOSING MEMORANDUM**

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
I. INTRODUCTION.....	1
II. LEGAL STANDARD.....	3
III. BACKGROUND.....	3
A. 1995 Water Quality Control Plan.....	3
B. Water Rights Decision 1641 .....	4
IV. ARGUMENT .....	6
A. The Water Board Cannot Order The United States To Cease And Desist.....	6
B. No Evidence Exists In The Record To Support A Finding That The United States Or The Department Of Water Resources Will Violate Their License And/Or Permit Conditions .....	6
1. The Enforcement Unit Based Its Determination Of A "Threatened Violation" On An Improper Interpretation Of The Water Code.....	7
2. Enforcement Unit Based Its Determination Of A "Threatened" Violation On An Improper Interpretation Of The Conditions Imposed On The License And/Or Permits Held By United States And The Department Of Water Resources.....	8
a. A Review Of D-1641 Clearly Demonstrates That The Conditions Imposed On The License And/Or Permits Do Not Impose An Absolute Requirement To Achieve The Objectives Set Forth In Table 2 .....	8
b. The Environmental Document Supporting D-1641 Supports The Limited Obligation Imposed On The United States And Department Of Water Resources Regarding The Water Quality Objectives For Agricultural Beneficial Uses In The Southern Delta.....	12
3. The Evidence Before The Water Board Does Not Support A Finding That The United States And The Department Of Water Resources Threaten A Violation Of Permit And/Or License Conditions.....	14
a. WR-06 and WR-07 – Letters To The Water Board .....	14
b. WR-08, WR-11 to WR-15, WR-18, WR-19 – Data .....	16
c. The Critical Inquiry Into Prospective Circumstances Was Not Made To Assess If Violations Were Threatened .....	17
C. Parties To The Hearing Proposed Measures For A Cease And Desist Order That Are Outside The Scope Of What The Water Board Could Include In Such An Order.....	18

**TABLE OF CONTENTS**  
**(continued)**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

1.	The Water Board Cannot Require The United States Or The Department Of Water Resources To Implement The Seven Measures Proposed By South Delta Water Agency.....	18
2.	The Measure Proposed By The Central Delta Water Agency Is Simply Ridiculous.....	20
D.	The Evidence Shows That Salinity Is A Region-Wide Problem, That Local Aggressive Actions Are Key To Reducing Inputs, and that State and Federal Funding Is Essential.....	23
E.	Even If The Water Board Determines That Threatened Violations Exist, Because The Record Fails To Show That An Exceedance Of 0.7 EC Will Harm Beneficial Uses, The Water Board Should Not Issue A Cease And Desist Order.....	25
F.	Unless New Action Is Taken To Comply With The California Environmental Quality Act, The Measures Of A Cease And Desist Order Must Be Narrow.....	26
V.	CONCLUSION.....	29

1       **I. INTRODUCTION**

2           In its revised Notice of Public Hearing, issued on September 23, 2005, the California State  
3       Water Resources Control Board (Water Board) requested evidence on "whether to adopt Draft  
4       Cease and Desist Orders (CDO) No. 262.31-16 and 262.31-17 against the USBR and the DWR,  
5       respectively, with the statements of facts and information set forth in the draft orders."  
6       September 23, 2005, Revised Notice of Public Hearing at 1. In response to that notice, the Water  
7       Board held a hearing and accepted an extensive amount of evidence. As demonstrated herein, the  
8       evidence now before the Water Board precludes it from issuing the draft CDO. Legal and  
9       evidentiary obstacles are insurmountable.

10           At issue is whether there are threatened violations of conditions in the license and/or  
11       permits held by the United States and Department of Water Resources. The subject conditions  
12       relate to implementation of the water quality objectives intended to protect agricultural uses in the  
13       southern Sacramento/San Joaquin River Delta (Delta). The enforcement unit of the Water Board  
14       and other interested parties that support the issuance of the draft CDO believe that the subject  
15       conditions require the United States and the Department of Water Resources to take any and all  
16       actions to ensure that, from April to August, water quality in the southern Delta does not exceed  
17       0.7 electric conductivity (EC), the water quality objectives established in the Water Quality  
18       Control Plan for the San Francisco Bay/Sacramento San Joaquin Delta Estuary, (1995 WQCP).<sup>1</sup>  
19       A review of all documents related to implementation of the 1995 WQCP, including the license  
20       and permits with the subject conditions, reflects something very different.

21           Documents related to implementation of the 1995 WQCP show the obligations of the  
22       United States and the Department of Water Resources are limited. The license and/or permit  
23       conditions at issue do not contemplate violations of the conditions any time 0.7 EC is exceeded,

---

24       <sup>1</sup> The Authority and Westlands respectfully request that the Water Board take official notice of  
25       the 1995 WQCP. Section 648.2 to title 23 of the California Code of Regulations authorizes the  
26       Water Board to take official notice of such facts as may be judicially noticed by the courts. The  
27       1995 WQCP is such a document. See Cal. Code of Evidence §§ 451, 452. Rather than provide  
28       copies to the Water Board and the parties, the Authority and Westlands also request that the  
      Water Board accept that document by reference, pursuant to section 648.3 to title 23 of the  
      California Code of Regulations. The 1995 WQCP is a public document, the original of which is  
      within the possession of the Water Board.

1 during the April to August period. Violations of the conditions may only occur after the United  
2 States and the Department of Water Resources prepare a report for the Executive Director and  
3 that the Executive Director then evaluate the report and make a recommendation to the SWRCB  
4 to take an enforcement action because the noncompliance would be due to operations or actions  
5 of the United States or Department of Water Resources. When viewed in that light, it is clear  
6 there is no basis for a finding that a threatened violation exists.

7 South Delta Water Agency and Central Delta Water Agency propose measures to be  
8 added to the draft CDO. South Delta Water Agency proposes measures to "improve" water  
9 quality above Vernalis, beyond that required, to allow degradation below Vernalis without  
10 causing an exceedance of the water quality objectives for agricultural beneficial uses in the  
11 southern Delta. Central Delta Water Agency proposes that the Water Board include in the draft  
12 CDO a measure that would preclude deliveries to the San Joaquin Valley, if an exceedance  
13 occurs. Those additions should not and, at this time, cannot be made.

14 The proposal by South Delta Water Agency asks the Water Board to cause the United  
15 States and the Department of Water Resources to take actions to mitigate for impacts caused by  
16 others. That is simply not appropriate. The proposal by Central Delta Water Agency takes  
17 inappropriateness to a different level. It asks the Water Board to impose a measure that would  
18 not improve beneficial uses of water, but that would result in punitive action being taken on those  
19 entities that are committed to improving drainage management within their service areas and  
20 water quality in the San Joaquin River.

21 Further, in each case, as well as in the case of the draft CDO, the proposed measures are  
22 outside the actions the Water Board contemplated to implement the water quality objectives for  
23 agricultural beneficial uses in the southern Delta, and thus the environmental impacts of the  
24 measures have never been analyzed. The California Environmental Quality Act demands such  
25 analyses be conducted before issuance of an order requiring their implementation.

26 For those reasons, and others discussed herein, all of the proposed measures should be  
27 dismissed and the Water Board should refuse to issue the CDO.

28 ///

1       **II.    LEGAL STANDARD**

2           Inherent in California Water Code section 1831 is the standard to which the Water Board  
3 must act when deciding if a cease and desist order should issue. Section 1831 provides:

4           When the board determines that any person is violating, or threatening to violate,  
5 any requirement described in subdivision (d), the board may issue an order to that  
6 person to cease and desist from that violation.

6       Water Code § 1831(a). Subdivision (d) to section 1831 states:

7           The board may issue a cease and desist order in response to a violation or  
8 threatened violation of . . . any term or condition of a permit, license, certification,  
9 or registration issued under this division.

10       Water Code § 1831(d)(2). "The cease and desist order shall require that person to comply  
11 forthwith or in accordance with a time schedule set by the board." Water Code § 1831(b). As a  
12 result of the provisions of Water Code section 1831, the Water Board is authorized to issue a  
13 cease and desist order only upon a finding that the person is (a) violating, or threatening to violate  
14 (b) any term or condition of a permit or license. And, if such findings can be made, the order  
15 must be directed at causing the violation or threatened violation to cease and desist forthwith or in  
16 accordance with a time schedule set by the Water Board. Water Code § 1831(b).

17       **III.   BACKGROUND**

18           The draft CDO at issue in this proceeding relates to an asserted, threatened violation of  
19 conditions in the license and/or permits held by the United States and California Department of  
20 Water Resources. In evidence submitted in writing and orally during the hearing, there has been  
21 much confusion as to what are those conditions. Accordingly, the following provides a summary  
22 of the 1995 WQCP, Water Rights Decision 1641 (D-1641), WR-5a and the environmental  
23 document supporting D-1641.

24           **A.    1995 Water Quality Control Plan**

25           The 1995 WQCP "establish[es] water quality control measures which contribute to the  
26 protection of beneficial uses in the Bay-Delta Estuary." 1995 WQCP at 3. The Water Board set  
27 objectives in the 1995 WQCP "to attain the goal of the highest water quality which is reasonable,  
28 considering all demands being made and to be made on those waters and the total values

1 involved, beneficial and detrimental, economic and social, tangible and intangible.” *Id.* at 3-4.  
2 The Water Board made plain that nothing in the 1995 WQCP should “be construed as  
3 establishing the responsibilities of water rights holders.” *Id.* at 4.

4 Specific to this proceeding, the 1995 WQCP establishes water quality objectives for  
5 agricultural beneficial uses in the southern Delta. For the April to August period, the Water  
6 Board set a 0.7 EC objective in the San Joaquin River at Brandt Bridge, Old River near Middle  
7 River and Old River at Tracy Road Bridge. *Id.* at 17. The Water Board set a 1.0 EC objective at  
8 those same locations for the September to March period. *Id.* With regard to those objectives, the  
9 Water Board recognizes:

10 If a three-party contract has been implemented among the DWR, USBR, and  
11 SDWA, that contract will be reviewed prior to implementation of the above and,  
12 after also considering the needs of other beneficial uses, revisions will be made to  
the objectives and compliance/monitoring locations noted, as appropriate.

13 *Id.*

14 In the 1995 WQCP, the Water Board further recognizes that the United States and  
15 Department of Water Resources had an ongoing responsibility to implement the salinity standard  
16 under Water Rights Decision 1485. *Id.* at 27. However, the Water Board clearly contemplated  
17 responsibility being reallocated in the water rights proceeding to implement the 1995 WQCP, and  
18 that implementation of the salinity objective for agricultural uses in the South Delta may require  
19 complementary actions by other agencies. *Id.*

20 **B. Water Rights Decision 1641**

21 D-1641 is the primary means to implement the 1995 WQCP. D-1641 provides:

22 Many of the objectives in the 1995 Bay-Delta Plan are best implemented by  
23 making changes in the flow of water or in the operation of facilities that move  
24 water. Accordingly, this decision amends certain water rights by assigning  
responsibilities to the persons or entities holding those rights to help meet the  
objectives.

25 WR-5a (D-1641 at 5) (emphasis added).

26 Among other issues, D-1641 addressed salinity in the southern Delta, downstream of  
27 Vernalis. The Water Board concluded:

1 Water quality in the southern Delta downstream of Vernalis is influenced by San  
2 Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local  
water users; agricultural return flows; and channel capacity.

3 WR-5a (D-1641 at 86). Although the Water Board did recognize that “[t]he salinity objectives  
4 for the interior southern Delta can be implemented by providing dilution flows, controlling in-  
5 Delta discharges of salts, or by using measures that affect circulation in the Delta,” WR-5a (D-  
6 1641 at 86-87), the Water Board decided to implement the water quality objectives for  
7 agricultural beneficial uses in the southern Delta by imposing conditions exclusively on the  
8 license and/or permits held by the United States and Department of Water Resources.

9 The manner of implementation, however, has three critical parts. First, the license and/or  
10 permits are conditioned upon implementation of the water quality objectives for agricultural  
11 beneficial uses in the southern Delta, as specified in Table 2 of D-1641. Table 2 reflects the  
12 provision of the 1995 WQCP and provides the water quality objectives for agricultural beneficial  
13 uses in the southern Delta, which are stated as follows: in the San Joaquin River at Brandt Bridge,  
14 Old River near Middle River and Old River at Tracy Road Bridge at 0.7 EC and 1.0 EC from  
15 April to August and September to March, respectively. WR-5a (D-1641 at 182).

16 Second, implementation was further conditioned on the following:

17 The 0.7 EC objective becomes effective on April 1, 2005. The DWR and the  
18 USBR shall meet 1.0 EC at these stations year round until April 1, 2005. The 0.7  
19 EC objective is replaced by the 1.0 EC objective from April through August after  
20 April 1, 2005 if permanent barriers are constructed, or equivalent measures are  
21 implemented, in the southern Delta and an operations plan that reasonably protects  
22 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.

23 WR-5a (D-1641 at 182).

24 Finally, while responsibility for implementing those objectives was placed on the United  
25 States and Department of Water Resources, that responsibility was not absolute. The Water  
26 Board explained that if there is an exceedance of those objectives, a violation of the license and/or  
27 permits held by the United States and the Department of Water Resources does not immediately  
28 result. Rather, in that event, the United States and the Department of Water Resources:



1 Shall prepare a report for the Executive Director. The Executive Director will  
2 evaluate the report and make a recommendation to the SWRCB as to whether  
3 enforcement action is appropriate or the noncompliance is the result of actions  
4 beyond the control of the [the United States and the Department of Water  
5 Resources].

6 WR-5a (D-1641 at 159-161).

7 **IV. ARGUMENT**

8 **A. The Water Board Cannot Order The United States To Cease And Desist**

9 The California Legislature, through Water Code section 1831, provided the Water Board  
10 with the authority to issue a cease and desist order only against "persons." As used in section  
11 1831, person includes the United States, but only "to the extent authorized by law." Water Code  
12 § 1835. The law does not allow the definition of person to extend to the United States.

13 When a cease and desist order issues and there is a failure to comply with such order, the  
14 resulting actions that may be taken are limited. Water Code section 1845 (1) authorizes the Water  
15 Board to request that the Attorney General petition the California Superior Court for issuance of  
16 injunction relief, and (2) authorizes the California Superior Court or the Water Board to impose  
17 civil penalties on the person or entity that has failed to comply. Water Code § 1485(a), (b).  
18 Because the United States has not expressed a clear waiver of sovereign immunity, it cannot be  
19 subject to a suit in the California Superior Court that seeks injunction relief or civil penalties, nor  
20 can it be subject to civil penalties imposed by the Water Board. A cease and desist order thus  
21 cannot be issued against the United States.

22 **B. No Evidence Exists In The Record To Support A Finding That The United  
23 States Or The Department Of Water Resources Will Violate Their License  
24 And/Or Permit Conditions**

25 Water Code section 1831 allows the Water Board to issue a cease and desist order only  
26 upon a finding that there has been a violation or there is a threatened violation of any term or  
27 condition of a license or permit. In this matter, the enforcement unit of the Water Board asserts  
28 that the action or inaction of the United States and the Department of Water Resources presents a  
threatened violation of conditions imposed through Decision 1641. That assertion has no basis.

1                   1.     The Enforcement Unit Based Its Determination Of A "Threatened  
2                                   Violation" On An Improper Interpretation Of The Water Code

3                   The enforcement unit based its determination of a "threatened" violation on an improper  
4 interpretation of the Water Code. The following exchange occurred during the cross-examination  
5 of Mr. Charles Lindsay, for the enforcement unit, by Mr. Dante John Nomellini:

6                   Q     What is your purpose that you seek to achieve with the cease and desist  
7                                   order?

8                   A     To bring the parties into compliance with Decision 1641.

9                   Q     And that would be the .7 standards at Brandt Bridge, Old River, Middle  
10                                  River and Old River at Tracy Road Bridge?

11                   A     The Table 2, footnote 5.

12                   October 24, 2005 Transcript at 56:19 to 57:1. That same exchange continued:

13                   Q     All right. And you had proposed your cease and desist order based on an  
14                                  anticipatory breach of the .7 requirements; is that correct?

15                   A     That's correct.

16                   October 24, 2005 Transcript at 57:16 to 57:19. However, as stated in the absolute, neither Table  
17 2 nor the 0.7 EC requirements are the conditions imposed on the license and/or permits held by  
18 United States and the Department of Water Resources. *Cf.* D-1641 at 159-161. Table 2 reflects  
19 the 0.7 EC requirements are the water quality objectives established in the 1995 WQCP. *See* D-  
20 1641 at 182 (title to Table 2 provides "Water Quality Objectives for Agricultural Beneficial  
21 Uses"). Instead, the permit language indicates that a water quality exceedance triggers a required  
22 report and gives the Executive Director the authority to examine the report and to determine  
23 whether or not noncompliance is the result of actions beyond the control of the permit holder.

24                   Furthermore, the Water Code is explicit. The Water Board has the authority to issue a  
25 cease and desist order only if it first finds that the United States and Department of Water  
26 Resources is threatening to violate conditions of their license and/or permits. Water Code §  
27 1831(a), (d)(2). The enforcement unit has improperly interpreted the permit as absolute, short-  
28 circuiting the required process to deal with an actual or threatened water quality exceedance.  
This shortcoming precludes the Water Board from finding a threatened violation by the United

1 States and the Department of Water Resources of the license and/or permit conditions.

2 2. Enforcement Unit Based Its Determination Of A "Threatened" Violation  
3 On An Improper Interpretation Of The Conditions Imposed On The  
4 License And/Or Permits Held By United States And The Department Of  
5 Water Resources

6 In lieu of the error discussed above, the enforcement unit may have based its  
7 determination of a threatened violation on an interpretation of the conditions imposed on the  
8 license and/or permits held by the United States and the Department of Water Resources. To  
9 make that determination, the enforcement unit would have had to presume that the water quality  
10 objectives reflected in Table 2 or the 0.7 EC requirements are absolute conditions on the license  
11 and/or permits held by United States and the Department of Water Resources. *See e.g.*,  
12 October 24, 2005 Transcript at 102:20 to 102:23 (Mr. Lindsay testified that if the United States  
13 "violates" the 0.7 EC objective, they have violated D-1641); 168:10 to 169:12 (Mr. Lindsay  
14 testified that Table 2, footnote 5 and thus the 0.7 requirements "stand on [their] own). That  
15 presumption would be wrong. Nothing in any license or permit held by the United States or the  
16 Department of Water Resources imposes such an absolute requirement.

17 a. A Review Of D-1641 Clearly Demonstrates That The Conditions  
18 Imposed On The License And/Or Permits Do Not Impose An  
19 Absolute Requirement To Achieve The Objectives Set Forth In  
20 Table 2

21 Nothing in the license and/or permits held by the United States and the Department of  
22 Water Resources require them to ensure 0.7 EC is achieved at all southern Delta compliance  
23 locations under all circumstances. The Order imposing the conditions in the license and permits  
24 held by the United States provides:

25 IT IS FURTHER ORDERED that License 1986 (Application 23) and Permits  
26 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972,  
27 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, and 15735  
28 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767,  
16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, and 22316,  
respectively) of the USBR (CVP except New Melones) are amended by adding the  
following permit condition:

1. This permit is conditioned upon implementation of the water quality

1 objectives for agricultural beneficial uses in the southern Delta, as specified  
2 in Table 2, attached, at the following locations in the southern Delta:

- 3 a. San Joaquin River at Airport Way Bridge, Vernalis (Interagency  
4 Station No. C- 10);  
5 b. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);  
6 c. Old River near Middle River (Interagency Station No. C-8); and  
7 d. Old River at Tracy Road Bridge (Interagency Station No. P-12).

8 Licensee/Permittee has latitude in its method for implementing the water  
9 quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier  
10 program in the southern Delta may help to ensure that the objectives are  
11 met at these locations. If Licensee/Permittee exceeds the objectives at  
12 stations C-6, C-8, or P-12, Licensee/Permittee shall prepare a report for the  
13 Executive Director. The Executive Director will evaluate the report and  
14 make a recommendation to the SWRCB as to whether enforcement action  
15 is appropriate or the noncompliance is the result of actions beyond the  
16 control of the Licensee/Permittee.

17 \* \* \*

18 IT IS FURTHER ORDERED that Permits 16597 and 16600 (Applications 14858A  
19 and 19304, respectively) of the USBR (New Melones storage) are amended as  
20 follows

21 \* \* \*

22 In addition, Permittee shall ensure that the water quality objectives for  
23 agricultural beneficial uses in the southern Delta, as specified in Table 2,  
24 attached, are met at the following locations:

- 25 a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);  
26 b. Old River near Middle River (Interagency Station No. C-8); and  
27 c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

28 Permittee has latitude in its method for implementing the water quality  
objectives at Stations C-6, C-8, and P-12, above; however, a barrier  
program in the southern Delta may help to ensure that the objectives are  
met at these locations. If Permittee exceeds the objectives at stations C-6,  
C-8, or P-12, Permittee shall prepare a report for the Executive Director.  
The Executive Director will evaluate the report and make a  
recommendation to the SWRCB as to whether enforcement action is  
appropriate or the noncompliance is the result of actions beyond the control  
of the Permittee.

1 WR-5a (D-1641 at 159-161).

2 Similarly, the Order imposing the conditions in the permits held by the Department of  
3 Water Resources states:

4 IT IS FURTHER ORDERED that Permits 16478, 16479, 16481, and 16482  
5 (Applications 5630, 14443, 14445A, and 17512, respectively) of the DWR (SWP  
6 permits) are amended by adding the following terms and conditions:

7 \* \* \*

8 6. This permit is conditioned upon implementation of the water quality  
9 objectives for agricultural beneficial uses in the southern Delta, as specified  
10 in Table 2, attached, at the following locations in the southern Delta:

- 11 a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
- 12 b. Old River near Middle River (Interagency Station No. C-8; and
- 13 c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

14 Permittee has latitude in its method for implementing the water quality  
15 objectives at Stations C-6, C-8, and P-12, above; however, a barrier  
16 program in the southern Delta may help to ensure that the objectives are  
17 met at these locations. If Permittee exceeds the objectives at stations C-6,  
18 C-8, or P-12, Permittee shall prepare a report for the Executive Director.  
19 The Executive Director will evaluate the report and make a  
20 recommendation to the SWRCB as to whether enforcement action is  
21 appropriate or the noncompliance is the result of actions beyond the control  
22 of the Permittee.

23 WR-5a (D-1641 at 159).

24 Although it is beyond reasonable dispute that the Water Board conditioned the license and  
25 permits of the United States and Department of Water Resources "upon implementation of the  
26 water quality objectives for agricultural beneficial uses in the southern Delta," WR-5a (D-1641 at  
27 159-161), it is equally beyond reasonable dispute that if there were a potential exceedance of  
28 those objectives, a threatened violation of the license and/or permits held by the United States and  
the Department of Water Resources does not immediately result. Rather, in that event, a  
determination must be made as to whether enforcement action is appropriate or the  
noncompliance is the result of actions beyond the control of the United States and the Department  
of Water Resources. WR-5a (D-1641 at 159-161).

1 The text of D-1641 provides insight into why the Water Board decided not to have a  
2 potential exceedance of the water quality objectives for agricultural beneficial uses in the  
3 southern Delta results, per se, in a threatened violation of a license or permit condition. In D-  
4 1641, the Water Board concluded:

5 Water quality in the southern Delta downstream of Vernalis is influenced by San  
6 Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local  
water users; agricultural return flows; and channel capacity.

7 WR-5a (D-1641 at 86). Consistent with that statement, the Water Board found that "DWR and  
8 the USBR are partially responsible for salinity problems in the southern Delta." *Id.* at 88  
9 (emphasis added).

10 Indeed, because of the complicated factors affecting water quality in the southern Delta,  
11 the Water Board amended:

12 [T]he export permits of the DWR and of the USBR to require the projects to take  
13 actions that will achieve the benefits of the permanent barriers in the southern  
14 Delta to help meet the 1995 Bay-Delta Plan's interior Delta salinity objectives by  
April 1, 2005.

15 *Id.* at 88. That statement reflects the fact that the Water Board in D-1641 required the United  
16 States and the Department of Water Resources to take actions to achieve "the benefits of the  
17 permanent barriers." It did not require the United States or the Department of Water Resources to  
18 achieve each and every month of every year the water quality objectives for agricultural  
19 beneficial uses in the southern Delta. *Id.* See also WR-5a (D-1641 at 88) (stating "The  
20 construction of permanent barriers alone is not expected to result in attainment of the water  
21 quality objectives).

22 Further, the Water Board recognized unambiguously that potential actions taken to  
23 achieve the benefits of barriers could result in a determination that it is not feasible to fully  
24 implement the objectives. For that reason, the Water Board provided:

25 If, after actions are taken to achieve the benefits of barriers, it is determined that it  
26 is not feasible to fully implement the objectives, the SWRCB will consider  
27 revising the interior Delta salinity objectives when it reviews the 1995 Bay-Delta  
Plan.

28 *Id.* at 88. For those reasons, the underlying assumption by the enforcement unit, that the

1 conditions of the license and/or permits held by the United States and the Department of Water  
2 Resources impose an absolute requirement, is wrong. Accordingly, the enforcement unit's  
3 finding of threatened violation has no basis.

4 b. The Environmental Document Supporting D-1641 Supports The  
5 Limited Obligation Imposed On The United States And Department  
6 Of Water Resources Regarding The Water Quality Objectives For  
7 Agricultural Beneficial Uses In The Southern Delta

7 A conclusion that the United States and Department of Water Resources threaten a  
8 violation of their license and/or permit conditions if there is a potential to exceed 0.7 EC is also  
9 inconsistent with the final environmental impact report for implementation of the 1995 Bay/Delta  
10 Water Quality Control Plan (1995 WQCP EIR).<sup>2</sup> Nothing in the 1995 WQCP EIR suggests that  
11 every exceedance of the water quality objectives for agricultural beneficial uses in the southern  
12 Delta would result in a violation of the license and/or permits of the United States or the  
13 Department of Water Resources. In fact, nothing in the 1995 WQCP EIR suggests that the  
14 alternatives for implementing the water quality objectives for agricultural beneficial uses in the  
15 southern Delta could result in achievement of those objectives each and every month of each and  
16 every year. The analyses contained in the 1995 WQCP EIR prove just the opposite.

17 Chapter IX to the 1995 WQCP EIR "describe[d] three alternatives for achieving the  
18 southern Delta salinity objectives and discusse[d] the environmental effects of implementing the  
19 alternatives." 1995 WQCP EIR at IX-1.

20 The three alternatives. . . considered to implement the southern Delta agricultural  
21 objectives in the 1995 Bay/Delta Plan are listed below.

22 1. Southern Delta Salinity Control Alternative 1 - Base Case

23 <sup>2</sup> The Authority and Westlands also respectfully request that the Water Board take official notice  
24 of the 1995 WQCP EIR. Section 648.2 to title 23 of the California Code of Regulations  
25 authorizes the Water Board to take official notice of such facts as may be judicially is noticed by  
26 the courts. The 1995 WQCP EIR is such a document. See Cal. Code of Evidence §§ 451, 452.  
27 Rather than provide copies to the Water Board and the parties, the Authority and Westlands  
28 respectfully request that the Water Board accept that document by reference, pursuant to section  
648.3 to title 23 of the California Code of Regulations. The Water Board prepared the 1995  
WQCP EIR as part of the proceeding that resulted in Decision 1641. It is thus a public document  
and part of the administrative record for D-1641, and the original of which is within the  
possession of the Water Board.

1 The SWP and the CVP are responsible for meeting D-1485 requirements. The  
2 CVP is responsible for meeting the D-1422 salinity objective at Vernalis. Existing  
3 temporary barriers in the southern Delta are installed and operated to improve  
4 salinity conditions in the southern Delta. No further action is taken to implement  
5 the southern Delta salinity objectives.

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

2. Southern Delta Salinity Control Alternative 2 - 1995 Bay/Delta Plan

The 1995 Bay/Delta Plan flow objectives are met by implementation of one of the  
flow objective alternatives. Existing temporary barriers in the southern Delta are  
installed and operated by the SWP and the CVP to improve salinity conditions in  
the southern Delta. No further action is taken to implement the southern Delta  
salinity objectives.

3. Southern Delta Salinity Control Alternative 3 - Permanent Barrier  
Construction

The 1995 Bay/Delta Plan flow objectives are met by implementation of one of the  
flow objective alternatives. The barriers proposed in the ISDP preferred  
alternative are constructed and operated by the SWP and CVP to achieve the  
southern Delta salinity objectives to the extent feasible. Other elements of the  
ISDP not necessary to support barrier operation are not constructed.

1995 WQCP EIR at IX-11. *See also* 1995 WQCP EIR at II-40.

The 1995 WQCP EIR explains: "Figures IX-21 through IX-26 show the effect of the  
alternatives on compliance locations downstream of Vernalis." 1995 WQCP EIR at IX-30.  
Those figures clearly demonstrate that the water quality objectives for agricultural beneficial uses  
in the southern Delta were not achieved all of the time. 1995 WQCP EIR at IX-30 to IX-37.  
Indeed, the 1995 WQCP EIR summarizes: "none of the alternatives eliminates exceedances  
during the irrigation season." 1995 WQCP EIR at IX-37. The 1995 WQCP EIR reiterates:

Alternative 1 meets water quality objectives at southern Delta stations in the  
winter months, but frequently exceeds objectives during the summer months.  
Alternative 2 also meets water quality objectives at southern Delta stations for the  
September through March period, and reduces the frequency of exceedance of  
salinity objectives during the summer months. Objectives are still exceeded,  
however, according to model runs. . . . Alternative 3 meets salinity objectives in  
the southern Delta during the non-irrigation season, and reduces the frequency of  
exceedance compared to both Alternatives 1 and 2 during the irrigation season.

1995 WQCP EIR at IX-48. Notwithstanding those summaries, the 1995 WQCP EIR concludes:  
"No significant water quality impacts from the operation of the barriers were identified.



1 Therefore, no mitigation is required.” 1995 WQCP EIR at IX-41.<sup>3</sup> That conclusion thus supports  
2 not only the position that a potential for an exceedence of the water quality objectives for  
3 agricultural beneficial uses in the southern Delta cannot translate per se into a threatened violation  
4 of any license or permit condition, but also that an exceedence of water quality objectives for  
5 agricultural beneficial uses in the southern Delta would not cause significant harm in-Delta  
6 beneficial uses of water.

7 3. The Evidence Before The Water Board Does Not Support A Finding That  
8 The United States And The Department Of Water Resources Threaten A  
9 Violation Of Permit And/Or License Conditions

10 The enforcement unit made it clear, through the testimony of Mr. Lindsay, that the bases  
11 for the conclusion of threatened violations are the exhibits to Mr. Lindsay’s testimony, WR-08,  
12 WR-11 to WR-15, WR-18, WR-19. See October 24, 2005 Transcript at 142:7 to 142:10, 144:23  
13 to 145:2, 168:10 to 168:13, 180:13 to 180:18. As shown below, those exhibits shed no light on  
14 the potential for the United States or the Department of Water Resources to violate license and/or  
15 permit conditions.

16 a. WR-06 and WR-07 – Letters To The Water Board

17 WR-06 and WR-07 are two letters. The first letter is dated February 14, 2005 and is from  
18 Carl A. Torgersen and Donna E. Tegelman to Victoria Whitney. The second letter is dated  
19 March 25, 2005 and is from Carl A. Torgersen to Arthur Baggett, Jr. Mr. Lindsay expressed his  
20 opinion that the letters acknowledge that the United States and the Department of Water  
21 Resources “are likely to violate the 0.7 EC objectives” and that “the violation could result in  
22 enforcement action [sic].” WR-1 at 3. To support those statements, Mr. Lindsay quotes two  
23 provisions of WR-06 and WR-07. Mr. Lindsay wrote:

24 DWR and USBR acknowledged that they were unlikely to meet the water quality

25 <sup>3</sup> Mr. Lindsay, on behalf of the enforcement unit, testified that he did not review the 1995 WQCP  
26 EIR when preparing the draft CDO, that he was not aware of the alternatives considered in the  
27 1995 WQCP EIR for implementation of the water quality objectives for agricultural beneficial  
28 uses in the southern Delta, and that the alternatives for implementation of the water quality  
objectives for agricultural beneficial uses in the southern Delta would not meet those objectives  
100 percent of the time. See October 24, 2005 Transcript at 156:21 to 157:16. These are  
significant omissions, which must reduce the weight given to Mr. Lindsay’s conclusions.

1 objective without installing the permanent barriers, stating,

2 “imposition of the more stringent 0.7 EC agriculture salinity objective  
3 could force DWR and [USBR] to release large quantities of water from  
4 upstream reservoirs in an attempt to meet the 0.7 EC objective in the  
5 southern Delta. It is unlikely that that increased flows alone will result in  
6 compliance with the objective.” (WR-6, p. 2 [italics added].)

7 The agencies knew that they would be subject to enforcement if they violated the  
8 objective, adding, “[w]ithout an extension in the effective date, DWR and [USBR]  
9 could be found in violation of [D-1641 if they exceed the 0.7 EC objective...”  
10 (WR-6, p. 8.)

11 In a letter to the State Water Board dated March 25, 2005, DWR continued to  
12 acknowledge the threat of a violation of the 0.7 EC objective. It stated that:  
13 “Water quality often exceeds 0.7 EC in July and August in average to dry years.”  
14 (WR-7, p. 1.)

15 *Id.* The writings of Mr. Lindsay demonstrate a fundamental misunderstanding of both the  
16 possible bases for a conclusion of threatened violations and the statements made by the United  
17 States and the Department of Water Resources in WR-06 and WR-07. When viewed in the  
18 proper light, nothing in either letter even suggests that the United States or the Department of  
19 Water Resources would violate the conditions of their license and/or permits.

20 As noted above, a finding of “threatened violation” cannot be based upon a possible  
21 exceedance of the water quality objectives for agricultural beneficial uses in the southern Delta.  
22 It must be based upon a possible violation of conditions to a license or permit. The conditions in  
23 the license and/or permits provide that the United States and the Department of Water Resources  
24 implement, as of April 1, 2005, a 0.7 EC objective in the San Joaquin River at Brandt Bridge, Old  
25 River near Middle River and Old River at Tracy Road Bridge; provided, however, that if there is  
26 an exceedance of the objectives the United States and Department of Water Resources shall  
27 prepare a report for the Executive Director and that the Executive Director would then evaluate  
28 the report and make a recommendation to the SWRCB as to whether enforcement action is  
appropriate or the noncompliance is the result of actions beyond the control of the United States  
or Department of Water Resources. WR-5a (D-1641 at 159-161). Nothing in WR-06 or WR-07  
suggests that such a condition will be violated.

The letters clearly reflect (1) the fact that the United States and the Department of Water

1 Resources could take action to improve water quality in the San Joaquin River, (2) that under  
2 some circumstances the water quality objectives for agricultural beneficial uses in the southern  
3 Delta may be exceeded and (3) an exceedance could (may or may not) result in a violation of  
4 their license and/or permit conditions and that the United States and Department of Water  
5 Resources could take action to improve water quality. Those reflections, however, do not answer  
6 the relevant question. They do not address whether it is likely that in the near future (2006-2009)  
7 the United States or the Department of Water Resources will violate conditions in their license  
8 and/or permits. For those reasons, nothing Mr. Lindsay points to in WR-06 or WR-07 supports  
9 this finding.

10 b. WR-08, WR-11 to WR-15, WR-18, WR-19 – Data

11 WR-08, WR-11 to WR-15, WR-18 and WR-19 contain data that Mr. Lindsay relied upon  
12 to conclude the United States and the Department of Water Resources threatened a violation of  
13 their license and/or permit conditions. See October 24, 2005 Transcript at 168:10 to 168:13,  
14 180:13 to 180:18. Nothing in the data presented in WR-08, WR-11 to WR-15, WR-18 and WR-  
15 19 provides insight into the likelihood that in the future an exceedance would occur, which would  
16 cause a violation of conditions in the license and/or permits held by the United States or the  
17 Department of Water Resources.

18 No matter how one describes the conditions, it is indisputable that the subject water  
19 quality objectives did not take effect until April 1, 2005. See WR-5a (D-1641 at 182). WR-8  
20 provides historic data. It is the raw data used for WR-11 to WR-15, WR-18 and WR-19. WR-11,  
21 WR-12 and WR-13 provide data from 1996 to 2005. WR-15 provides charts of number of days  
22 30-day running average EC exceeded 1.0 mmhos/cm in 2003 at Interagency Station Nos. C-6  
23 (Brandt Bridge) and P-12 (Old River at Tracy Road Bridge). WR-18 and WR-19 are revised  
24 tables of (1) number of days 30-day running average EC exceeded 0.7 mmhos/cm since 1996 and  
25 (2) number of days that EC data is missing between April 1 to August 31 since 1996. In all cases,  
26 none of the data suggests that the United States or the Department of Water Resources is likely to  
27 violate conditions of its license and/or permits.

28 The historical data were presented to make two principal points. Data were presented to

1 show that during the period from 1996 to 2005 the 1.0 EC objective was exceeded. Data for that  
2 same period were also presented to show that water quality in the southern Delta exceeded 0.7  
3 EC. Neither point is particularly relevant to the issues at hand.

4 The exceedances of 1.0 EC occurred during a period outside of the period of concern in  
5 this proceeding. It does not relate to the April to August period. It related to the September to  
6 March time frame. Further, although there was an exceedance, that exceedance does not result in  
7 violations of conditions in the license and/or permits held by the United States and Department of  
8 Water Resources.

9 As to the data related to 0.7 EC, they are extremely misleading. While the data show that  
10 0.7 EC was exceeded, that exceedance occurred at a time implementation was based on achieving  
11 1.0 EC. The data do not reflect how the United States and the Department of Water Resources  
12 would operate the Central Valley Project and State Water Project, with 0.7 EC in place. Also, as  
13 is the case with the 1.0 EC data, an exceedance of 0.7 EC does not per se translate to violations the  
14 United States and Department of Water Resources license and/or permit conditions.

15 Simply put, the only time the data has any implication for the license and/or permit  
16 conditions was in 2005, and the data show the objective was not exceeded in 2005. Data from  
17 1996 to 2004 does not reflect on the ability or likelihood of the United States or Department of  
18 Water Resources to meet existing conditions in their license and/or permits. The data do not shed  
19 any light on whether 0.7 EC will be exceeded in any month in 2006 or any subsequent year.

20 c. The Critical Inquiry Into Prospective Circumstances Was Not Made  
21 To Assess If Violations Were Threatened

22 Contrary to ones intuition as to what is the proper inquiry when considering the potential  
23 for violations, Mr. Lindsay did not contemplate any prospective circumstances when rendering  
24 his conclusion that there are threatened violations. His conclusions were not based on carry-over  
25 storage in New Melones. October 24, 2005 Transcript at 139:8 to 139:10. They were not based  
26 on carry-over storage in New Don Pedro. October 24, 2005 Transcript at 139:11 to 139:13.  
27 Mr. Lindsay did not know the quantity of water in Exchequer Reservoir or the in-stream flow  
28 requirements for any of those reservoirs. October 24, 2005 Transcript at 140:15 to 140:19.

1 Mr. Lindsay performed no modeling to predict possible hydrologic conditions in 2006. See  
2 October 24, 2005 Transcript at 140:20 to 140:25. Mr. Lindsay never asked the United States or  
3 the Department of Water Resources how they planned on operating the Central Valley Project  
4 and State Water Project, respectively, during 2006. In fact, Mr. Lindsay conceded that he has no  
5 knowledge of Central Valley Project and State Water Project operations or how those projects  
6 coordinate operations. October 24, 2005 Transcript at 178:17 to 179:2. As Mr. Lindsay put it: "I  
7 don't claim to be an expert in the Bay Delta." October 24, 2005 Transcript at 180:6. Without  
8 understanding reservoir conditions, operations of water projects, or the Bay-Delta, there is no  
9 reasonable basis to support Mr. Lindsay's conclusion that the United States and the Department  
10 of Water Resources threaten to violate conditions in the license and/or permits.

11 **C. Parties To The Hearing Proposed Measures For A Cease And Desist Order**  
12 **That Are Outside The Scope Of What The Water Board Could Include In**  
13 **Such An Order**

- 14 1. The Water Board Cannot Require The United States Or The Department Of  
15 Water Resources To Implement The Seven Measures Proposed By South  
16 Delta Water Agency

17 South Delta Water Agency, upon concluding that the CDO should issue, proposed seven  
18 measures, which the Water Board should obligate the United States and/or the Department of  
19 Water Resources to take to improve water quality in the southern Delta. November 7, 2005  
20 Transcript at 17:25 to 18:6, 20:8 to 20:12. See also SDWA-2 at 3-5. South Delta Water Agency  
21 explains that if the United States and/or the Department of Water Resources would implement  
22 one or more of those measures, there would be more dilution flow and "[w]ater [q]uality  
23 [o]bjectives can be met." SDWA-2 at 3. The ability of the United States or the Department of  
24 Water Resources to implement action to improve water quality in the southern Delta is not the  
25 appropriate question when considering the form of a cease and desist order. It is simply too  
26 broad.

27 After finding that there has been a violation or there is a threatened violation of a  
28 condition in a license or permit, the Water Board, when preparing a cease and desist order, must  
ask what terms should the Water Board include in the cease and desist order to ensure  
compliance. To answer that question, in this case, it is not as simple as imposing conditions that

1 are within the control of the United States and Department of Water Resources to improve water  
2 quality.

3 The license and/or permit conditions at issue do not contemplate a violation of the conditions  
4 any time during the April to August period 0.7 EC is exceeded in the San Joaquin River at Brandt  
5 Bridge, Old River near Middle River and Old River at Tracy Road Bridge. A violation of the  
6 conditions may only occur after the United States and Department of Water Resources prepare a  
7 report for the Executive Director and that the Executive Director then evaluate the report and  
8 make a recommendation to the SWRCB as to whether enforcement action is appropriate or the  
9 noncompliance is the result of actions beyond the control of the United States or Department of  
10 Water Resources. WR-5a (D-1641 at 159-161). Thus, if an exceedance occurs because of  
11 actions of others, violations of the license and/or permits held by the United States and the  
12 Department of Water Resources does not result.

13 The complicated nature of the conditions at issue causes the initial question that must be  
14 asked to be: if there is threatened exceedance of the 0.7 EC, is that threat caused by "actions  
15 beyond the control of the [United States and the Department of Water Resources]." WR-5a (D-  
16 1641 at 159-161). The question is not whether the solution to an exceedance is within their  
17 control. That must be the case because the cause for an exceedance is not necessarily the United  
18 States or the Department of Water Resources.

19 In a very candid manner, South Delta Water Agency explains why, in many  
20 circumstances, the exceedance or threatened exceedance is beyond the control of the United  
21 States and the Department of Water Resources. Mr. Hildebrand testified:

22 As water passes Vernalis, it slowly degrades due to evaporation, consumptive uses  
23 and urban discharges. This degradation is reflected in field data which DWR has  
24 collected and which is set forth in Attachment "F." The increase in salinity during  
25 low flows can be .1 EC or more from Vernalis to Brandt Bridge. The amount of  
26 dilution water needed to offset this rise in salinity at Brandt Bridge or elsewhere  
27 depends on the quality of the dilution water and the amount of the flow from  
28 Vernalis to Brandt Bridge. Dilution provided upstream of Vernalis can be used to  
lower salinity below 0.7 EC at Vernalis so that it will not rise above 0.7 EC at  
downstream locations.

1 SDWA-2 at 3.<sup>4</sup> For that reason, the measures proposed by South Delta Water Agency are too  
2 broad. If included in a cease and desist order, they would impose burdens on the United States  
3 and the Department of Water Resources that exceed the authority delegated to the Water Board.  
4 They would go far beyond that required to ensure compliance with license and/or permit  
5 conditions.<sup>5</sup>

6 2. The Measure Proposed By The Central Delta Water Agency Is Simply  
7 Ridiculous

8 Thomas Zuckerman, on behalf of the Central Delta Water Agency, testified:

9 The CDO's [sic] should add a prohibition of deliveries of water to those  
10 areas on the west side of the San Joaquin River which directly or indirectly  
11 contribute to the degradation of the quality of the San Joaquin River and all those  
12 areas on the west side of the San Joaquin Valley which are within the San Luis  
13 Unit of the CVP as follows:

14 1) Commencing December 31, 2005, if such plan of operation is not  
15 submitted or if such plan is found to be inadequate by the SWRCB Division of  
16 Water Rights.

17 2) Commencing upon any violation of such Southern Delta Standards  
18 and continuing for the duration of such violation or six (6) months thereafter,  
19 whichever is later, and

20 3) Commencing upon any other failure to comply with the CDO and  
21 continuing until thirty (30) days after compliance is attained.

22 CDWA-10 at 5. Mr. Zuckerman explained that he made the proposal because he thought the  
23 provision was significantly punitive and would thus propose such a great risk to the San Joaquin  
24 Valley that "the project operator might pay a lot more attention to making sure they didn't violate  
25 the edict of the Board." October 25, 2005 Transcript at 129:25 to 130:1. Such a proposal is

26 <sup>4</sup> In addition, as South Delta Water Agency recognizes, the result of the measures would be to  
27 require the United States and Department of Water Resources to operate in a manner that causes  
28 water quality at Vernalis to be better than that mandated in either the 1995 WQCP or D-1641.  
Such a result makes no sense. It would render the Vernalis water quality objective superfluous.

<sup>5</sup> The proposal by Mr. Hildebrand also contemplates action well beyond that considered in the  
environmental document that supported D-1641. If the Water Board were to impose such a  
provision, the Water Board would have to first meet its obligations under the California  
Environmental Quality Act by preparing an environmental impact report.

1 ridiculous.

2 In addition to overwhelming legal obstacles (i.e., Water Code section 1831 and CEQA),<sup>6</sup>  
3 it should not be included in the draft CDO because it would serve no useful purpose.  
4 Implementation of such a measure would likely degrade Delta water quality and devastate one of  
5 California's most agriculturally productive areas. Through the following exchange, Mr. Snow  
6 testified to that effect.

7 Q Do you have an opinion on the effect, if any, Mr. Zuckerman's  
8 recommendation would have on salinity conditions in the south Delta?

9 A Yes, I do. My testimony today pertains to his recommendation on page 5  
10 of his written testimony, in which he states that the cease and desist order should  
11 contain a prohibition of deliveries of water to those areas on the west side of the  
12 San Joaquin River, which directly or indirectly contribute to the degradation of the  
13 quality of the river when any southern Delta standard is exceeded.

14 And it's my opinion that this reduction in exports, if it had any effect at all, would  
15 most likely result in a worsening of the salinity conditions in the southern Delta  
16 area. And this is due to the fact that the CVP/SWP exports tend to bring fresher  
17 water from the Sacramento River and northern Delta into the southern Delta  
18 channels. And this quality is better than would exist if the projects were not  
19 operating.

20 Q And, Mr. Snow, is the basis for your opinion your more than 30 years of  
21 experience with State Water Project and Central Valley Project operations and  
22 your review of testimony provided by the Department of Water Resources?

23 A Yeah, particularly the hydrology and water quality modeling that DWR  
24 did.

25 Q Thank you. And just 2 more questions. Do you have an opinion on the  
26 effect, if any, Mr. Zuckerman's recommendation would have on those areas of the  
27 west side of the San Joaquin River, which would not receive water as a result of  
28 the prohibition?

---

<sup>6</sup> As discussed in this closing memorandum, Water Code section 1831 limits the action the Water Board can take in a cease and desist order to that which requires compliance "forthwith or in accordance with a time schedule set by the board." Mr. Zuckerman's proposal is focused on imposing punitive damage, not compliance. Mr. Zuckerman's proposal would thus cause the cease and desist order to be outside that authority. In addition, the proposal by Mr. Zuckerman, as is the case with the proposal by Mr. Hildebrand, contemplates action well beyond that considered in the environmental document that supported D-1641. If the Water Board were to impose such a provision, the Water Board would have to first meet its obligations under the California Environmental Quality Act by preparing an environmental impact report.



1 A Yes. If exports were halted for about 6 months as is recommended by Mr.  
2 Zuckerman, I can't tell you precisely the impact to our district, since the USBR  
3 reaction to the reduction is kind of uncertain. However, the loss of exported water  
4 would no doubt result in a significant impact to our 600 family farmers.

5 In addition, since there are significant acres of permanent crops grown, the  
6 damages would likely be multiplied beyond just the crop loss in that year when the  
7 water is not pumped.

8 Q And, Mr. Snow, the basis for your opinion on impacts to Westlands is  
9 based on your 6 or more years of employment at Westlands Water District?

10 A Yes.

11 November 21, 2005 Transcript at 62:11 to 64:4. Thus, as evidenced by Mr. Snow's testimony,  
12 the measure proposed by Mr. Zuckerman is irrational.

13 Further, if Mr. Zuckerman's logic is to have the Water Board issue orders simply to be  
14 punitive against those that "directly or indirectly contribute to the degradation of the quality of the  
15 San Joaquin River," the prohibition on deliveries would have to be much more broad. To be  
16 consistent, it would, for example, have to extend to the farmers in the South Delta Water Agency  
17 and Central Delta Water Agency. As Mr. Hildebrand explained through the following exchange:

18 Q And the factors that you have listed here that contribute to the degradation  
19 [in water quality below Vernalis] are evaporation, consumptive use and urban  
20 discharges; is that correct?

21 A That's correct.

22 Q Are ag discharges another factor that contributes to the degradation?

23 A The degradation caused by ag discharges is a result of the salinity that  
24 arrives at Vernalis. Pre CVP, when we didn't have a lot of salt coming down  
25 Vernalis, it didn't degrade much. If you were to illustrate with an extreme,  
26 suppose we were -- we had distilled water coming at Vernalis, so that the irrigators  
27 then downstream of Vernalis were irrigating with 0 EC water, then their discharge  
28 would also be practically 0.

As you decrease the flow and increase the salinity of that flow, those irrigators  
necessarily are pumping some of that nonindigenous salt onto their lands, their  
crops can take up the water and reject the salt which flows back into the river. In  
addition to that, we have sewage outflows from Manteca, and Lathrop and if they  
get a reverse flow that comes up from Stockton and also into Old River from  
Tracy.

1 So there are other things coming in that tend to degrade it. But I think we  
2 submitted some sheets that showed that typically the degradation or the increase in  
3 salinity from Vernalis to either the Head of Old River or Brandt Bridge was of the  
4 order of one-tenth EC, so that if you had .6 EC at Vernalis instead of .7, you'd still  
5 have .7 downstream.

6 Q So if I understand your response correctly, what the farmers in the south  
7 Delta are dealing with is a water supply that has, as you've characterized it,  
8 nonindigenous salts --

9 A That's right.

10 Q -- that are brought onto the farm. And as a result of the farming practices,  
11 the salts are concentrated and it is reflected in the quality of water that's  
12 discharged?

13 A That's correct. As I explained during cross examination, this is true of any  
14 farmer. And your farmers [farmers within the San Joaquin Valley] do the same  
15 thing . . . .

16 November 7, 2005 Transcript at 121:2 to 122:16. If one accepts Mr. Hildebrand's testimony, the  
17 effect of farming in certain areas of the San Joaquin Valley is no different from the effects of  
18 farming in the Central Delta and South Delta.

19 **D. The Evidence Shows That Salinity Is A Region-Wide Problem, That Local**  
20 **Aggressive Actions Are Key To Reducing Inputs, and that State and Federal**  
21 **Funding Is Essential**

22 The draconian measure proposed by Mr. Zuckerman is further ironic and offensive  
23 because it seeks to insulate Delta-area farmers from responsibility in managing saline discharges  
24 and to penalize the Authority and its member agencies by curtailing their water deliveries, despite  
25 the evidence cited above that there are downstream contributions that degrade water quality and  
26 there are significant efforts within the Authority to address drainage management and improve  
27 water quality in the San Joaquin River. *See* SLDMWA-1. *See also* DWR-18A – Attachment 1.

28 For example, Mr. Joseph McGahan testified, SLDMWA-1, that the Authority and the  
United States obtained Waste Discharge Requirements from the Regional Board and for the  
Grassland Bypass Project. Local participants in the Grassland Bypass Project have reduced salt  
loading from the area by 51% (2004 level compared to 1995) through aggressive implementation  
of drainage management practices, including improved irrigation methods, recirculation projects,  
projects to keep tailwater on-farm, and drainage reuse. State and Federal funding described in

1 Mr. McGahan's testimony have augmented local investments to make these enormous  
2 achievements. But the project is not complete— the Grassland Bypass Project participants and  
3 other water agencies have developed the Westside Regional Drainage Plan to further reduce,  
4 manage, and treat drainwater; to develop strategic groundwater pumping as part of drainage  
5 management planning; and to generate some additional water supplies. The Westside Regional  
6 Drainage Plan is geared to manage saline drainage and to dispose of salts from the project area so  
7 that they no longer reach the San Joaquin River while maintaining a salt balance so that  
8 agricultural lands remain productive. The United States, the Department of Water Resources and  
9 local water agencies have a responsible role to play however, this project cannot be completed  
10 without significant, additional federal and state funding.

11 In addition, the Authority and its members are involved in many other activities to  
12 aggressively address drainage management and water quality issues:

- 13 • Watershed Coalitions: Participation in the Westside San Joaquin River  
14 Watershed Coalition and the Westlands Stormwater Coalition. Both  
15 Coalitions are aggressively pursuing monitoring programs, the  
16 development of best management practices, and providing ongoing  
17 outreach and communications with farmers, pest control advisors, ag  
18 commissioners and the Regional Board, all to comply with the Regional  
19 Board's regulatory programs and to improve drainage conditions and water  
20 quality.
- 21 • Best Management Practices: Development through 39 different ongoing  
22 projects best management practices within the boundaries of the  
23 Authority's member agencies.
- 24 • San Joaquin River Water Quality Management Group: Participation in the  
25 San Joaquin River Water Quality Management Group, which has made  
26 significant progress toward the development of a management plan to  
27 achieve the Vernalis salinity objective and a plan to address dissolved  
28 oxygen water quality issues in the Stockton Deep Water Ship Channel.

24 SLDMWA-1. *See also* DWR-18A – Attachment 1. This evidence is important because it  
25 specifically rebuts assertions that the Authority, its members and other participants have done  
26 little if anything to improve San Joaquin River water quality. It is also important for three other  
27 reasons.

28 The evidence demonstrates first, that issuance of the draft CDO against the United States

1 and Department of Water Resources, issuance of upstream TMDL's, and other water quality  
2 actions all have cross-effects and environmental impacts that must be cohesively examined for  
3 informed decision-making that actually results in water quality improvements within the San  
4 Joaquin River and Delta; second, that application of local initiative and expertise by water  
5 purveyors, drainage districts and farmers are essential—in the Delta region as well as in the San  
6 Joaquin Valley—to resolving these complex, difficult issues; and third, that State and Federal  
7 financial support is of paramount importance to such programs and will provide broad benefits,  
8 including to the south Delta and central Delta.

9 **E. Even If The Water Board Determines That Threatened Violations Exist,**  
10 **Because The Record Fails To Show That An Exceedance Of 0.7 EC Will**  
11 **Harm Beneficial Uses, The Water Board Should Not Issue A Cease And**  
12 **Desist Order**

13 South Delta Water Agency, Central Delta Water Agency, and the Department of Water  
14 Resources presented a great deal of testimony on harm. The only evidence to which the Water  
15 Board should give any weight is that of Terry Prichard and John Letey – the two experts in  
16 Agronomy. All other testimony lacks the proper foundation to support conclusion of harm.

17 Terry Prichard, in SDWA-02, explains why he believes the Water Board adopted, in the  
18 1995 WQCP, the water quality objectives for agricultural beneficial uses in the southern Delta.  
19 *Id.* That has little if any relevance to the question of harm.

20 John Letey, in DWR-22 (revised), provided evidence to support his conclusion that:

21 The most salt-sensitive agricultural crops have a threshold salinity of 1.0 dS/m.  
22 Based on the dynamics of water flow, salt transport, and crop-soil water  
23 interactions, an irrigation water with an EC of 1.0 dS/m is sufficiently protective of  
24 salt-sensitive crops and can be used to irrigate these crops without yield reduction.  
25 The contribution of rainfall provides an added margin of safety to this conclusion.  
26 Finally, this conclusion is consistent with experience in the Imperial and Coachella  
27 Valleys of California, where the salt sensitive crops are being successfully  
28 irrigated with Colorado River water with an EC of approximately 1.25 dS/m.

29 *Id.* at 8. Those conclusions are the only conclusion on harm, rendered by an expert in the area of  
30 impacts of salt to crops.

31 South Delta Water Agency called Mr. Prichard again as a rebuttal witness. Through  
32 rebuttal, Prichard took issue with Letey's conclusion, principally, because Letey did not follow

1 guidelines on (1) the relationship between soil water and extract salinity, and (2) concentration  
2 ratios. See November 21, 2005 Transcript at 3:6 to 5:12. That rebuttal should be given little  
3 weight. Prichard conceded that at times it would be appropriate to stray from the guidelines. See  
4 November 21, 2005 Transcript at 40:3 to 40:14. Further, Prichard did not contest Letey's  
5 conclusions on the basis that he made assumptions that were inconsistent with the conditions in  
6 the south Delta or central Delta. His complaint was simply that Letey did not follow guidelines.  
7 See e.g., November 21, 2005 Transcript at 3:6 to 5:12, 33:23 to 34:21. Thus, Letey's conclusions,  
8 on a substantive basis, went un-rebutted.

9 Indeed, the conclusions of Letey are consistent with the determination of the Water Board  
10 in the 1995 WQCP EIR. There, as quoted above, analyses show that the alternatives considered  
11 for implementation of the water quality objectives for agricultural beneficial uses in the southern  
12 Delta would frequently lead to an exceedance of 0.7 EC. See 1995 WQCP EIR at IX-30 to IX-37.  
13 The 1995 WQCP EIR summarizes:

14 Alternative 1 meets water quality objectives at southern Delta stations in the  
15 winter months, but frequently exceeds objectives during the summer months.  
16 Alternative 2 also meets water quality objectives at southern Delta stations for the  
17 September through March period, and reduces the frequency of exceedance of  
18 salinity objectives during the summer months. Objectives are still exceeded,  
19 however, according to model runs. Alternative 2 consistently improves salinity  
20 levels at Vernalis and Union Island stations between April and August. There are  
21 also improvements, though to a lesser degree, at Brandt Bridge on the San Joaquin  
22 River and Tracy Road Bridge on Old River during the irrigation season. . . .  
23 Alternative 3 meets salinity objectives in the southern Delta during the non-  
24 irrigation season, and reduces the frequency of exceedance compared to both  
25 Alternatives 1 and 2 during the irrigation season.

26 1995 WQCP EIR at 48. Despite those analyses and conclusions, the Water Board in the 1995  
27 WQCP EIR found "[n]o significant water quality impacts . . . [and t]herefore, no mitigation [was]  
28 required." 1995 WQCP EIR at 41.

29 F. Unless New Action Is Taken To Comply With The California Environmental  
30 Quality Act, The Measures Of A Cease And Desist Order Must Be Narrow

31 The draft CDO and those measures proposed by other parties go well beyond that  
32 contemplated by the Water Board before issuing D-1641. As such, if the Water Board is inclined

1 to issue the draft CDO and/or those measures proposed by others, it first must comply with the  
2 California Environmental Quality Act.

3 As discussed in detail above, the 1995 WQCP EIR considered three alternatives. The  
4 alternatives were described as follows:

5 a. Southern Delta Salinity Alternative 1 (No Project). The SWP and the  
6 CVP are responsible for meeting D-1485 flow objectives. Existing temporary  
7 barriers in the southern Delta are installed and operated to improve salinity  
8 conditions in the south Delta. No further action is taken to implement the south  
9 Delta salinity objectives.

10 b. Southern Delta Salinity Alternative 2. The Bay/Delta Plan flow  
11 objectives are met by implementation of one of the flow objective alternatives.  
12 Existing temporary barriers in the southern Delta are installed and operated by the  
13 SWP and the CVP to improve salinity conditions in the southern Delta. No further  
14 action is taken to implement the southern Delta salinity objectives.

15 c. Southern Delta Salinity Alternative 3. The Bay/Delta Plan flow  
16 objectives are met by implementation of one of the flow objective alternatives.  
17 The barriers proposed in the ISDP are constructed and operated by the SWP and  
18 the CVP to achieve the southern Delta salinity objectives to the extent feasible.

19 1995 WQCP EIR at II-40.

20 The draft CDO would require the United States and Department of Water Resources to  
21 implement the water quality objectives for agricultural beneficial uses in the southern Delta, at  
22 least in part, through additional releases from CVP/SWP facilities, reduction in CVP/SWP  
23 exports, CVP recirculation of diverted water to the San Joaquin River, or CVP/SWP purchases of  
24 water under transfers from other entities. See WR-3; WR-4. However, nothing in the 1995  
25 WQCP EIR involves analysis of any such actions to meet the water quality objectives for  
26 agricultural beneficial uses in the southern Delta. The measures in the draft CDO and those  
27 proposed by the parties are outside that considered in the 1995 WQCP EIR. Accordingly, if the  
28 Water Board adopts a cease and desist order with measures beyond those contemplated in the  
1995 WQCP EIR or D-1641, it must first comply with CEQA.

///

///

///

1 ///

2 ///

3 ///

4 **V. CONCLUSION**

5 For the reasons stated above, the Water Board cannot and should not issue a cease and  
6 desist order against either the United States or the Department of Water Resources.

7 Dated: December 12, 2005

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD,  
A Professional Corporation

8

9

By  \_\_\_\_\_

Jon D. Rubin  
Attorneys for San Luis & Delta-Mendota Water  
Authority and Westlands Water District

10

11

813546.1

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JON D. RUBIN, State Bar No. 196944  
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation  
400 Capitol Mall, 27th Floor  
Sacramento, CA 95814-4416  
Telephone: (916) 321-4500  
Facsimile: (916) 321-4555

Attorneys for San Luis & Delta-Mendota Water  
Authority and Westlands Water District

STATE WATER RESOURCES  
CONTROL BOARD  
2005 DEC 12 PM 3:09  
DIVISION OF RIGHTS  
SACRAMENTO

BEFORE THE  
STATE WATER RESOURCES CONTROL BOARD

DELTA SALINITY DRAFT CEASE AND  
DESIST ORDER (CDO) AND WATER  
QUALITY RESPONSE PLAN (WQRP)  
HEARING, SACRAMENTO RIVER, SAN  
JOAQUIN RIVER, AND  
SACRAMENTO-SAN JOAQUIN DELTA  
CHANNELS, SAN JOAQUIN COUNTY

**PROOF OF SERVICE**



1 I, Kathy Blenn, declare:

2 I am a resident of the State of California and over the age of eighteen years, and not a  
3 party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA  
95814-4416. On December 12, 2005, I served the within documents:

4 Closing Memorandum

5  by transmitting via e-mail the above listed document(s) to the e-mail addresses as  
6 set forth below on this date before 5:00 p.m.

7 Cathy Crothers  
8 Senior Staff Counsel  
9 Department of Water Resources  
10 1416 Ninth Street, Room 1118  
11 Sacramento, CA 95814  
12 crothers@water.ca.gov

Amy L. Aufdemberge  
Assistant Regional Solicitor  
Room E-1712  
2800 Cottage Way  
Sacramento, CA 95825  
jstruebing@mp.usbr.gov  
Representing: U.S. Bureau of  
Reclamation

11 Erin K.L. Mahaney  
12 State Water Resources Control Board  
13 1001 I Street  
14 Sacramento, CA 95814  
15 emahaney@waterboards.ca.gov  
16 Representing: Division of Water  
17 Rights Enforcement Team

Dante John Nomellini  
Nomellini, Grilli & McDaniel  
P. O. Box 1461  
235 East Weber Avenue  
Stockton, CA 95201  
ngmplcs@pacbell.net  
Representing: Central Delta Water  
Agency, et al.

15 Carl P.A. Nelson  
16 Bold, Polisner, Maddow, Nelson &  
17 Judson  
18 500 Ygnacio Valley Road, Suite 325  
19 Walnut Creek, CA 94596-3840  
20 cpanelson@prodigy.net  
21 Representing: Contra Costa Water  
22 District

Tim O'Laughlin  
O'Laughlin & Paris LLP  
2571 California Park Drive, Suite 210  
Chico, CA 95928  
klanouette@olaughlinparis.com  
Representing: San Joaquin River  
Group Authority

20 Thomas J. Shephard, Sr.  
21 P. O. Box 20  
22 Stockton, CA 95201  
23 tshephard@neumiller.com  
24 Representing: County of San Joaquin

John Herrick  
South Delta Water Agency  
4255 Pacific Avenue, Suite 2  
Stockton, CA 95207  
jherrlaw@aol.com  
Representing: South Delta Water  
Authority and Lafayette Ranch

24 Michael Jackson  
25 P. O. Box 207  
26 429 W. Main Street  
27 Quincy, CA 95971  
28 mjatty@sbcglobal.net  
Representing: Calif. Sportfishing  
Protection Alliance

Arthur F. Godwin  
700 Loughborough Drive, Suite D  
Merced, CA 95348  
agodwin@mrgb.org  
Representing: Merced Irrigation  
District and San Luis Canal Company

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Tina R. Cannon  
CA Department of Fish and Game  
1416 9<sup>th</sup> Street, Suite 1341  
Sacramento, CA 95814  
tcannon@dfg.ca.gov

Paul R. Minasian  
P. O. Box 1679  
Oroville, CA 95965  
[pminasian@minasianlaw.com](mailto:pminasian@minasianlaw.com);  
[msexton@minasianlaw.com](mailto:msexton@minasianlaw.com);  
[dforde@minasianlaw.com](mailto:dforde@minasianlaw.com)  
Representing: San Joaquin River  
Exchange Contractors Water  
Authority

Karna E. Harrigfeld  
Herum Crabtree Brown  
2291 W. March Lane, Suite B100  
Stockton, CA 95207  
[kharrigfeld@herumcrabtree.com](mailto:kharrigfeld@herumcrabtree.com);  
[jzolezzi@herumcrabtree.com](mailto:jzolezzi@herumcrabtree.com)  
Representing: Stockton East Water  
District

David J. Guy  
Executive Director  
Northern California Water  
Association  
455 Capitol Mall, Suite 335  
Sacramento, CA 95814  
[dguy@norcalwater.org](mailto:dguy@norcalwater.org)



by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

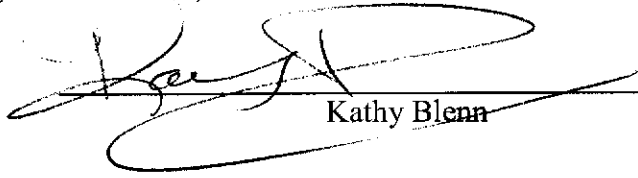
Gary Bobker  
Program Director  
The Bay Institute  
500 Palm Drive, Suite 200  
Novato, CA 94949

Patrick Porgans  
Patrick Porgans & Assoc., Inc.  
P. O. Box 60940  
Sacramento, CA 95860

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 12, 2005, at Sacramento, California.

  
Kathy Blenn