

SOUTH DELTA WATER AGENCY

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February 7, 2006

Via E-Mail and U. S. Mail

Chair Tam Doduc
c/o Ms. Selica Potter
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Chairperson Dudoc, Board members and all interested parties:

I am now in receipt of DWR's *Milestones To Implement Southern Delta Standards* dated February 8, 2006 which was included with the San Luis and Delta-Mendota Water Authority and Westlands Water District comments to the draft Cease and Desist Order. Surprisingly, the *Milestones* document presents the same problem of which SLDMWA complains regarding bias and the blurring of the quasi-legislative and quasi-judicial functions of the Board.

In the CDO process, the SWRCB is acting as the judge. As such, the judge has certain limitations and obligations so that it can fairly decide issues brought before it based on the evidence and argument made in public, and before it and the other parties to the action. This is why the Administration's efforts to contact the Chairperson to affect the decision were so egregious and why the contact was (rightfully) disclosed. [One hopes the Administration does not make similar calls to Superior and Appellate Court judges/justices regarding pending litigation.] This is also the reason why SLDMWA seeks to negate the proceeding; because of an alleged conflict/bias which appears when an advisor to the Board also acts as an advocate.

The Milestones document seeks to have the Board suddenly put aside its judicial function in the middle of a quasi-judicial proceeding and act as a participant and/or regulator under its quasi-legislative function. It is hard to imagine any other proceeding or situation where a party before a judge, who is about to be sanctioned, would suggest the judge step down for a short period of time, and help the "accused" party to work out a resolution of the actions it is accused of doing (or not doing). Here it is even worse as the party did not work out a potential resolution with the prosecution team (and then jointly submit it) or with the other participating parties who have all invested significant time, effort and money to participate in the CDO hearing.

Further, the *Milestones* document does not address the issues before the judge of whether a water quality

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violation is threatened and under what terms a CDO should issue. To the contrary, it continues the collateral attack on the clear terms and conditions of D-1641.

The *Milestones* document certainly presents an interesting and potentially valuable approach to addressing the some San Joaquin River salinity issues. However, it is more appropriately submitted as part of the schedule for attaining compliance anticipated in the CDO. Similarly, it would appear to be appropriately part of the various ongoing efforts on the River or submitted in the Periodic Review process or its eventual implementation. It *should* have been submitted and undertaken five years ago when the obligation to maintain the standards was imposed.

Lastly, it appears that in their efforts to avoid the CDO certain parties to the proceeding have had non-public contact with Board staff and/or members in an effort to convince the Board to make the radical, inappropriate and illegal change from judge to participant. Just as the Chairperson disclosed the inappropriate contact made to her, I hope the other Board members and staff disclose all contacts made to them wherein parties to the CDO or their counsel sought to suspend the quasi-judicial process once it appeared their position might not prevail.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd

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