

**Department of Water Resources  
Additional Comments on the  
State Water Resources Control Board  
Draft Cease and Desist Order  
Against DWR and U.S. Bureau of Reclamation  
January 24, 2006**

On January 10, 2006, the Department of Water Resources (DWR) submitted comments on the Draft Cease and Desist Order (CDO) that the State Water Resources Control Board (SWRCB) is considering to issue against DWR and the U.S. Bureau of Reclamation. Consistent with those comments and DWR's additional comments below, DWR requests that the SWRCB not issue the Draft CDO as it is not supported by substantial evidence and is premature at best. DWR believes that the record developed during the hearing on the proposed Draft CDO does not provide substantial evidence that DWR will not comply with its permit conditions set forth in Water Right Decision 1641 for implementing the southern Delta water quality requirements.

The SWRCB should find that since the time of the first notice of the proposed Draft CDO on May 3, 2005, information available to the SWRCB has changed. This new information made available during the hearing warrants the Board finding that a CDO against DWR should not be issued. Compared with information available in May 2005, the SWRCB today has better knowledge of hydrology affecting the southern Delta, and specifically the hydrology and water quality conditions that occurred in 2005 and that will likely occur in 2006. In addition, the SWRCB now has available for review the draft South Delta Improvement Program Environmental Impact Statement / Environmental Impact Report (SDIP EIS/EIR) that describes the proposed construction and operation of the permanent operable gates in the southern Delta. The proposed gates offer a reasonable solution to improving southern Delta water quality. The schedule for review and proposed construction of the gates is now available to the SWRCB and a CDO for this purpose is not warranted.

With respect to a decision on whether a threat of violation in 2006 is likely, the SWRCB should be cognizant of the current water year conditions. This year's hydrology is again appearing wet, creating a water-year classification of possibly above-normal or wet. In such case, as was last year, salinity in the southern Delta and on the San Joaquin River will most likely be quite good. Last year salinity in the southern delta during the irrigation season April through August, as measured by electrical conductivity (EC), never exceeded the objective of 0.7 EC. This supports a finding and decision by the SWRCB that there is no immediate threat of violation of the DWR permit conditions implementing southern Delta water quality objectives.

In addition, DWR restates its position that the terms of D1641 specifically prescribe a process for dealing with compliance issues related to southern Delta standards which the SWRCB should follow rather than the more general "threaten violation" provisions of the recently modified Water Code section 1831. The D-1641 water right term was added to the March 2000 Revised D1641 subsequent to the SWRCB reconsideration of petitions and comments by DWR and DWR expects the SWRCB to comply with its commitment on the process to address the complex facts and DWR's ability to control conditions in this area of the Delta.

As shown by the evidence provided during the hearings on the CDO, the water quality requirements at Vernalis have been met during the last 10 years and will continue to be met. DWR believes that the good water quality conditions this year on the San Joaquin River will likely result in flows which will result in water quality requirements being met at Brandt Bridge, similar to last year. The findings by the SWRCB in D1641 and the evidence submitted during the CDO hearings show that water quality degrades downstream from Vernalis to Brandt Bridge because of local agricultural return flows and discharges permitted by the Regional Water Quality Control Board. These discharges are not, at this time, constrained to meeting the receiving water standards. As discussed during the CDO hearing, the only mechanism available to reasonably meet the receiving water standards are excess flows to dilute the salts added by other water users downstream of Vernalis. DWR has no facilities in the San Joaquin River System that affect flows at Vernalis nor salt loads to the southern Delta. With the better understanding of the factors affecting water quality downstream of Vernalis, demonstrated by DWR during the CDO hearing, the SWRCB must find that a CDO on a threatened violation by DWR at Brandt Bridge is not warranted.

The two remaining water quality compliance stations in the southern Delta on Middle River and Old River are most affected by San Joaquin River water quality, local agriculture drainage, and circulation. The water right permits of the State Water Project (SWP) have no reliable effect on these conditions, as shown by DWR's testimony at the CDO hearing. DWR and Reclamation are taking all diligent steps to implement the most reasonable solution to water quality concerns in this area, namely implementation of the proposed operable gates described as Stage 1 in the Draft SDIP EIS/EIR. DWR, Reclamation, and South Delta Water Agency have been cooperating for years on developing the operable gates program to improve circulation and water quality at the interior southern Delta stations. Now that DWR and Reclamation have released the public Draft EIS/EIR on the proposed gates, as well as other improvements in the south Delta channels, the SWRCB can now evaluate the proposed improvements to water quality and the schedule for such implementation. A CDO on a threatened violation will not change this commitment and is not necessary for the parties to implement actions to improve water quality in south Delta at these stations. The issuance of the CDO will not result in any productive corrective actions that will change the currently proposed solution for the southern Delta. A reasonable

solution will be the result of the environmental analysis process that is underway. If requested, DWR is willing to commit to provide the SWRCB, as well as other interested agencies, periodic status reports in writing or at SWRCB workshops or Board meetings on the progress towards completing the environmental reports and permits required for constructing the proposed gates.

The remaining issue to address in the draft CDO is the approval of the conditions for the Water Quality Response Plan required for implementing the Joint Point of Diversion (JPOD) at the SWP Delta Pumping Plant. DWR recommends that the SWRCB reinstate the conditions approved by the Division of Water Rights this past summer. At a minimum, the SWRCB needs to clarify that water transfers by the SWP will be considered under the same criteria as that for Stage One JPOD being proposed by the SWRCB. There is some confusion about this because of the way the water quality response plan is written that links water transfers by the SWP to the water quality response plan.

If the SWRCB decides to not adopt the Draft CDO and to approve the conditions for the water quality response plan with clarifying language as recommended above by DWR, DWR would withdraw its change petition that is before the SWRCB to modify DWR's water rights and change the time schedule for implementing the 0.7 EC standard in the southern Delta. For the same reasons DWR believes that the SWRCB need not issue a CDO to assure compliance of DWR water right permits, DWR believes it need not pursue its change petition to modify its permits during the interim period until the operable gates are constructed. These reasons have been discussed above and include that the SWRCB and parties interested in the change petition have more information and a better understanding of how the SWP and CVP Delta water right permit conditions are met. Also, DWR's modeling prepared for the CDO hearing provides new tools to demonstrate the factors affecting southern Delta water quality that DWR can use in any future reports to the SWRCB. If for some reason the more stringent numeric standards that became effective in April 2005 are not met in the future, DWR will rely on the SWRCB to follow the condition set forth in its water right permits that provides DWR the opportunity to demonstrate whether it has control over the conditions that caused the noncompliance before enforcement action is considered by the SWRCB.

State water policy developed specifically to better manage the difficult issues of competing resources in the Delta necessitates that State agencies enlist cooperative efforts to achieve reasonable solutions for improving water quality conditions. The issues related to water quality conditions in the southern Delta are not simple, which explains why these issues have been discussed and studied for the last 30 years. The CDO hearings began a process of again evaluating the water quality needs for the southern Delta and the factors affecting the area. DWR recommends that the SWRCB continue discussions on this topic, such as during the periodic review of the 1995 Water Quality Control Plan (WQCP). The recent modeling and information submitted to the SWRCB during

the CDO hearing could be used during the review of the WQCP to help evaluate whether revisions should be considered regarding implementation of the water quality objectives, as suggested in D-1641. The State policy for the Delta clearly directs our agencies to work together on solutions and not follow an adversarial path that will impair our abilities to achieve our common goal to improve water quality conditions in the southern Delta.