Item 5 1/13/06
Email: BD, CC, TH, ML, BJ, SP

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
A PROFESSIONAL CORPORATION

CLIFFORD W. SCHULZ

January 10, 2006

Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Re: State Water Contractors' comments on the State Board's December 30, 2005, Draft Cease and Desist Order

Dear Ms. Potter:

This letter sets forth the State Water Contractors' ("SWC") comments on the State Board's December 30, 2005, draft Cease and Desist Order against the Department of Water Resources ("DWR") and the United State Bureau of Reclamation ("USBR") for alleged threats of future violations of the South Delta salinity objectives.

Like DWR, the SWC is very disappointed that the State Board is only providing the affected parties about six working days to prepare and file comments on a proposed order of such significance. The SWC is equally disappointed that the State Board has not first scheduled a workshop on the draft order before it comes before the full Board for a final vote. In effect, the Board has provided itself and its staff only two days to review and consider the comments of the parties. Given that the order would not even become effective until April 1, we do not understand the Board's haste to adopt this highly controversial order with such limited opportunity to consider its policy and legal implications.

As these comments are being written, Delta inflows are nearly 200;000 cubic feet per second, a condition which makes any violation of the South Delta salinity objectives this year a remote likelihood. Thus, there is simply no reason to limit public review and comment, or internal deliberations by the Board and its staff, as is now being done. A final decision could be far more effectively developed for a State Board meeting in February or March, while still ensuring that the cease and desist order, if needed and issued, would be effective before a risk of violation arises. We believe that this truncated review period severely compromises the integrity of any order that the Board may issue and unreasonably limits public participation.

The SWC, therefore, urges the State Board to reconsider DWR's request that this matter be withdrawn from the Board's January 13, 2006 agenda, and that a new schedule be developed which would allow for more extensive written comments and a workshop for questions and discussion before the matters is placed on the agenda for final Board action.

Turning to the substance of the proposed order, the SWC has identified several legal and factual errors that go to the heart of the rationale for the cease and desist order. The SWC strongly believes that these errors are so fundamental that the draft cease and desist order should be withdrawn for further fact development and legal analysis. This process could include further evidentiary hearings to receive testimony from the USBR on its plans for future San Joaquin basin operations.

1. **Exceedance vs. Violation**

The most serious error in the draft cease and desist order is its failure to recognize that Decision 1641, for well thought out policy reasons, distinguished water quality control plan exceedances from water rights permit violations.

After lengthy hearings and review of an extensive EIR, the State Board found in Decision 1641 that the interior south-Delta salinity objectives would likely be exceeded from time to time, despite the best efforts of all involved, *even after permanent operable barriers had been installed.* Given that knowledge, it makes no sense to now interpret Decision 1641 as declaring that such exceedances will always be viewed as violations of the CVP and SWP water rights permits. To so argue is to contend that the State Board intentionally issued a set of orders that would automatically, absolutely, and without fault, result in permit term violations from time to time. It did not do that. Instead the State Board carefully used the term "exceed" to connote higher than desirable south-Delta water quality conditions that were caused by factors beyond the CVP's and SWP's control and the term "violation" to connote circumstances where the exceedance was within the control of the two projects.

In its closing brief, the SWP provided direct evidence that Decision 1641 intended to distinguish the terms "exceed" and "violate." With respect to Suisun Marsh salinity, the Decision states:

If any Suisun Marsh salinity objectives at the above locations are exceeded at a time when the Suisun Marsh Salinity Control Gates are being operated to the maximum extent, then such exceedances shall not be considered violations of this permit/license. A detailed operations report acceptable to the Executive Director of the SWRCB regarding Suisun Marsh Salinity Control Gate operation and a certification from the parties that the gates were operated to the extent possible must be submitted to receive the benefit of this exception.

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416
TEL: (916) 321-4500
FAX: (916) 321-4555

The SWC believes that there is no practical difference between the way Decision 1641 differentiates exceedances from violations for the Marsh salinity objectives and the way it treats exceedances at the south-Delta interior stations. Both provisions require reports and both treat exceedances as violations only if the CVP or SWP could reasonably do more to avoid the problem.

The SWC also rejects the assertion by the Board (at page 17 of the draft cease and desist order) that DWR argued it could avoid being in violation of its south-Delta obligations by never filing the required reports. We do not agree that DWR attempted to take such an irresponsible position, and the SWC would never support such an argument. Further, the Board's assertion appears to reflect a view of unwarranted distrust of a related state agency. In point of fact, DWR simply argued that it has the due process right, under Decision 1641, to have the State Board's executive director make a finding that an exceedance was within DWR's control before DWR is held culpable.

Further, contrary to what the State Board asserts at page 17, the failure to file a report when an exceedance has occurred is, in itself, a violation of Decision 1641. The Board may very well have had a legitimate basis for issuing a cease a desist order requiring DWR to file timely reports, given DWR's failure to do so in 2003. The Board may also have had a basis to treat such a failure as a waiver of DWR's right to argue that the exceedance was outside its control (similar to what happens if a "detailed operations report" is not filed for a Suisun Marsh exceedance). But, a past failure to file a report, or a distorted interpretation of DWR's arguments in these hearings, should not be used to deprive DWR (and the USBR) of their rights under Decision 1641 to show that a future exceedance of the south-Delta salinity objectives was beyond their control and, therefore, not a violation of their water rights terms and conditions. The draft cease and desist order constitutes a de facto amendment of Decision 1641 by eliminating the carefully crafted distinction between exceedances and violations; and it does so with following the required process for amending water rights permits.

By eliminating this distinction, the draft cease and desist order also establishes a new and very dangerous precedent. The same paragraph that wrongly accuses DWR of claiming it can avoid violations by not filing reports, contains the following statement:

> The meaning of the condition DWR references is that if DWR and USBR are in violation of the condition, one of the matters to be considered by the Executive Director in recommending whether to prosecute is the extent to which the noncompliance results from actions that are beyond the control of DWR and USBR. *It does not mean there is no violation if other factors are affecting salinity levels.* (p. 17)

This is the first time that the State Board has ever ruled that a water rights holder is in violation of the terms and conditions of its permit or license because water quality has

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416
TEL: (916) 321-4500
FAX: (916) 321-4555

been degraded by the discharge of municipal wastes into a water course, or by an act of nature such as a levee failure. In this instance, in particular for Brandt Bridge, the State Board has inferred, if not directly held, that it may, in the future, require the SWP and CVP to operate their projects or buy water from third parties for the purpose of eliminating the pollution caused, for example, by the City of Manteca's waste discharges into the San Joaquin River below Vernalis and upstream of Old River.

By characterizing an increase in salinity levels caused by municipal waste discharges as a violation of the SWP and CVP water rights permits, the State Board has taken a first step down a very slippery slope. The SWC urges the Board to retain Decision 1641's carefully reasoned and legally sound distinction between exceedances and violations. The Board's preference for enforcement does not require the Board to forfeit its professional discretion under Decision 1641 to determine whether or not an exceedance is also a permit violation.

2. **Joint and Several**

Based on the premise that all exceedances are violations, no matter what their cause, the draft order then holds in several places that DWR and the USBR are "jointly and severally responsible" for meeting the water quality objectives at the interior south-Delta stations. Page 18 of the draft order cites pages 159 and 163 of Decision 1641 as the authority for this characterization. Decision 1641, however, does not use, at those pages or any other place in the decision, the quoted phrase. In other words, the "joint and several" conclusion is an interpretation of Decision 1641, not a quotation from the Decision. The SWC can not find any indication in Decision 1641 that the legal concept of joint and several was ever considered by the Board in preparing Decision 1641, and it was not included in the decision.

The problem with the term "joint and several responsibility" is its apparent use in the draft cease and desist order as a synonym for "joint and several liability," which is the way the concept is expressed in most court decisions. The draft order can thus be interpreted as ruling that the SWC is "acting in concert"[1] with the USBR with respect to

[1] See American Motorcycle Association v. Superior Court (1978) 20 Cal.3d 578, 587: ..."The terminology originated with respect to tortfeasors who acted in concert to commit a tort, and in that context it reflected the principle, applied in both the criminal and civil realm, that all members of a "conspiracy" or partnership are equally responsible for the acts of each member in furtherance of such conspiracy. ..."Subsequently, the courts applied the "joint and several liability" terminology to other contexts in which a preexisting relationship between two individuals made it appropriate to hold one individual liable for the act of the other; common examples are instances of vicarious liability between employer and employee or principal and agent, or situations in which joint owners of property owe a common duty to some third party. In these situations, the joint and several liability concept reflects the legal conclusion that one individual may be held liable for the consequences of the negligent act of another."

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416
TEL: (916) 321-4500
FAX: (916) 321-4555

the USBR's San Joaquin River operations and thus be held fully liable for fines or injunctions --even if only the USBR, and not the SWP, is responsible for an exceedance. While SWC would dispute such an interpretation, it would be unwise for the order to lay open the possibility of such a legal battle.

For example, assume the following: (a) the USBR operates New Melones Reservoir in a manner that just meets the Vernalis 0.7 E.C. objective; (b) waste discharges from the City of Manteca and other sources downstream of Vernalis and upstream of Old River result in an exceedance of the 0.7 E.C. objective at Brandt Bridge; (c) the flows in the San Joaquin River are more than 1000 cfs, and hydraulically DWR's Delta operations in no way contribute to the exceedance of the Brandt Bridge objective; and (d) the State Board, due to sovereign immunity or similar reasons, can not fine or injunctively require the USBR to provide additional flows to keep the River fresh all the way to Brandt Bridge. Under those not unreasonable assumptions, the State Board's invocation of the joint and several doctrine would mean that DWR could be required to pay100 percent of any fine or provide 100 percent of the stored water from San Luis Reservoir to dilute the salts at Brandt Bridge simply because the executive director found that the exceedance was *not* beyond the USBR's reasonable control – *even if the executive director found that the exceedance was beyond the control of DWR!* If this is not what was intended, the term "joint and several" must be removed from the draft order. If this is what was intended, it represents extraordinarily bad policy and should also be removed from the draft order.

It appears that the State Board may have reached its "joint and several" conclusion based on the existence of the of the 1986 "Agreement Between the United State of America and the State of California for Coordinated Operation of the Central Valley Project and the State Water Project" (the COA"). At page 18 of the draft Order, the State Board opines:

> In addition, to the extent that DWR and USBR operate their projects in a coordinated fashion, DWR has some control over operations by USBR, particularly when USBR wishes to use JPOD.

For several reasons, the assumptions underlying this quote are significantly flawed. First, it fails to recognize that the COA is inapplicable to operations at New Melones or Friant or to any other aspect of USBR operations on the San Joaquin River system.[2] By an act of Congress, the COA is limited to operations on the Sacramento Valley side of the Delta where both projects have facilities. This is made clear in section 3 of the COA ("Definitions") where the term "United States Storage withdrawal" is limited to the Trinity River imports, Shasta Reservoir, and Folsom Reservoir, and the SWP storage

[2] The only COA reference to New Melones and Friant are in section 5, which lists all existing CVP and SWP facilities. The body of the document, however, only coordinates operations of "Sacramento Valley" facilities.

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416
TEL: (916) 321-4500
FAX: (916) 321-4555

includes only Oroville and the upper Feather River reservoirs. (See Articles 3(d) and (e).)[3] The COA does not grant DWR any authority, or even consultation or coordination rights, over USBR operations on the San Joaquin River and its tributaries.[4]

Second, even if the COA could be interpreted to cover the San Joaquin River, the statement that DWR has "some control over operations by the USBR" is fallacious. The COA makes clear that DWR does not have any authority to decide how CVP water will be managed or allocated among Shasta, Folsom, the Trinity system, or any other CVP facility. As long as the CVP provides its percentage shares of the water needed to meet in-basin needs, the source of that water is wholly controlled by the USBR. The United States did not relinquish to DWR its sovereignty with respect to operating CVP facilities to meet CVP needs.

Thus, the COA does not support an interpretation that the SWP and CVP "act in concert" on the San Joaquin River system, and neither does the structure of Decision 1641. Decision 1641's approach is consistent with the accepted view of the COA as described above. The ordering paragraphs for the SWP are clearly separated from the ordering paragraphs governing the CVP. Each of the ordering paragraphs are written in the singular and do not state the DWR and the USBR shall jointly meet the permit obligations. This singular approach is understandable given that the two projects have separate and distinct facilities in different locations. It is quite foreseeable that the State Board executive director could find that an exceedance was within the control of one of the parties and not the other. Joint and several liability should not be automatic, and the phrase must be removed from the order.

3. **Ordering Paragraph A(4)**

While we urge the Board to refrain from adopting the proposed order due to the legal and factual flaws described above, we must point out some additional serious problems with some of the ordering paragraphs in case the Board moves forward with the order. For example, the second sentence of paragaraph A(4) needs to be deleted. This sentence lists some of the corrective actions that the CVP and SWP might consider to

---

[3] See also, sections 3(c) and (d) that define balanced and excess water conditions with reference only to the needs of the Sacramento Valley in-basin users. It should also be remembered that the COA was, negotiated, in large part, to avoid litigation with respect to the priority of rights between the two projects in areas where they both had facilities (see the twelve paragraph of the "Explanatory Recitals" to the COA). The Sacramento River side of the system was where that conflict was centered.

[4] The lengthy "Technical Report on Determination of Annual Water Supplies for Central Valley Project and State Water Project," dated March 1984, and referenced in the COA, also demonstrates that New Melones and other San Joaquin operations were not within the scope of the COA.

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416
TEL: (916) 321-4500
FAX: (916) 321-4555

avoid or cure a "violation." The list includes actions that Decision 1641 states may be constitutionally unreasonable. (D-1641, p. 10) Listing these potential corrective actions in the cease and desist order gives them an imprimatur of reasonableness that is not appropriate in the abstract and is inconsistent with the Board's prior findings and decisions. The language is also unnecessary unless it is intended as an amendment to Decision 1641 finding that each of these actions may be deemed reasonably in all circumstances. The second sentence of paragraph A(4) must be deleted from the order.

4. **The Water Quality Response Plan**

At page 26, the draft order states that "it is not desirable to curtail long-standing historic uses of JPOD as a result of the recent change in salinity requirements, as these uses are within the operations that were assumed to exist when the Board approved JPOD." However, the following sentences on page 26 and the amendment to Condition 1 of the Division Chiefs conditional approval of the WQRP are, we believe inadvertently, inconsistent with policy of not impacting historic uses of Cross Valley Canal water.

The development, conveyance and use of water within the Tulare Lake Basin region (an area that does not drain into the San Joaquin River) is governed by highly complex contracts and similar arrangements that have historically involved exchanges and transfers that take maximum advantage of infrastructure and changing year to year water needs and supplies. Sometimes these involve same year exchanges and sometimes there are transfers or exchanges that are repaid in following years. These are the historic practices that existed when the State Board approved the JPOD.

While we recognize the Board's desire to avoid use of Cross Valley Canal water in areas that drain to the San Joaquin River at times when water quality objectives are not being met, a flat prohibition on transfers and multi-year exchanges is too blunt an instrument and will seriously harm historic CVC practices and uses. Therefore, the SWC, and in particular the Kern County Water Agency, request that the State Board eliminate the strict rule that there can not be any transfers or multi-year exchanges. Instead, the Board should work with the CVC contractors to develop alternate means of ensuring that the water is not managed in ways that are inconsistent with the Board's desire to protect San Joaquin River water quality at times when the south-Delta salinity objectives are not being achieved.

In conclusion, the State Water Contractors urge the Board to reject the current draft cease and desist order. It is flawed in many ways and is sure to engender unnecessary litigation if adopted as is. The SWC also suggests, as part of this further review, that the Board reopen the evidentiary record to receive testimony from the USBR on its proposed future operations on the San Joaquin River. Such testimony could be highly relevant to the issue of whether there is a threat of future violations.

KRONICK
MOSKOVITZ
TIEDEMANN
& GIRARD
400 CAPITOL MALL,
27TH FLOOR
SACRAMENTO, CA
95814-4416
TEL: (916) 321-4500
FAX: (916) 321-4555

It is not any parties' fault that evidence of that nature was not initially presented. The announced settlement with the USBR on the first day of the evidentiary hearings, well after direct testimony had been submitted, and the settlement's withdrawal very late in the hearing process, left all of the parties in a difficult, if not impossible, position. Given that DWR, as demonstrated above, is not involved in CVP San Joaquin operations, the draft orders' observation (at page 18) that DWR should have provided testimony on how the USBR proposes to operated in the future is simply not realistic or appropriate. For this reason alone, the State Board should consider soliciting supplemental testimony from the USBR.

The State Water Contractors will appear on Friday, January 13, 2006, to provide further suggestions and to answer questions concerning this written presentation.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By: Clifford W. Schulz
Clifford W. Schulz
Attorneys for State Water Contractors

CWS/ll
817503.1

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
400 Capitol Mall, 27th Floor
Sacramento, Ca 95814-4417
Tel: (916) 321-4500
Fax: (916) 321-4555

SERVICE LIST
Delta Salinity Draft CDO and WQRP Hearing, Sacramento River, San Joaquin River, and Sacramento-San Joaquin Delta Channels, San Joaquin County

(Note: the participants whose e-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the Revised Notice of Public Hearing.)

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

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

Erin K. L. Mahaney
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
emahaney@waterboards.ca.gov
Rep: Division of Water Rights Enforcement Team

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

Carl P. A. Nelson
Bold, Polisner, Maddow, Nelson & Judson
500 Ygnacio Valley Road, Suite 325
Walnut Creek, CA 94596-3840
cpanelson@prodigy.net
Rep: Contra Costa Water District

Tim O'Laughlin
O'Laughlin & Paris LLP
2580 Sierra Sunrise Terrace, Suite 210
Chico, CA 95928
klanouette@olaughlinparis.com
Rep: San Joaquin River Group Authority

Thomas J. Shephard, Sr.
P.O. Box 20
Stockton, CA 95201
tshephard@neumiller.com
Rep: County of San Joaquin

Jon D. Rubin
Kronick, Moskovitz, Tiedemann and Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
JRubin@KMTG.com
KBlenn@KMTG.com
Rep: San Luis & Delta-Mendota Water Authority and Westlands Water District

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

Michael Jackson
P.O. Box 207
429 W. Main Street
Quincy, CA 95971
mjatty@sbcglobal.net
Rep: Calif. Sportfishing Protection Alliance