



IN REPLY
REFER TO:
MP-100

United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

JAN 06 2006

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

Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95823-0100

SUBJECT: COMMENT LETTER – 01/13/06 BOARD MEETING ITEM NUMBER 4

Dear Ms. Potter:

The United States Bureau of Reclamation (Reclamation) hereby submits comments to the State Water Resources Control Board (SWRCB or the Board) on the draft cease and desist order (CDO) against Reclamation and the California Department of Water Resources (DWR) for salinity standards in the south Delta. These comments are for consideration by the SWRCB at its meeting on January 13, 2006. Reclamation is not now, nor has it in the past been, in violation of the salinity standard term and condition set forth in its water rights through D-1641. The Board now proposes to arbitrarily alter the process it set forth in D-1641, and find Reclamation is threatening to violate the salinity standards without any determination of whether the alleged threatened violation, which is not real but merely hypothetical, is within the control of Reclamation. This is contrary to the Board's own process it set forth for salinity standard compliance in D-1641. Reclamation could not have prevented the issuance of a draft CDO, because the Board now attempts to enforce the salinity standard in a manner never anticipated by Reclamation, and outside of the terms and conditions Reclamation has heretofore operated.

In addition, Reclamation regrets that the SWRCB is proposing to find that Reclamation is threatening to violate south Delta water quality salinity standards through Central Valley Project (CVP) operations, when the SWRCB has specifically found that CVP operations are not the sole cause for degradation of salinity conditions in the south Delta (below the measuring station at Vernalis). In short, the SWRCB has recognized that Reclamation does not fully cause, and therefore, cannot fully control salinity degradation in the south Delta. Yet, the SWRCB now proposes to take the extraordinary step of making Reclamation fully responsible for salinity conditions in the south Delta, contrary to the terms and conditions of Reclamation's water rights and the law governing those water rights. **Reclamation hereby formally requests that this matter be submitted to nonbinding arbitration or mediation, pursuant to 23 CCR 648.6, prior to the SWRCB taking the extraordinary step of issuing an order against Reclamation for allegedly threatening to violate a water quality standard that is degraded by actions and circumstances beyond Reclamation's control.**

At issue is a footnoted provision in Reclamation's and DWR's water rights for certain facilities of the CVP and the State Water Project (SWP), which states:

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

It is Reclamation's position that the 0.7 salinity provision is a "hammer clause" intended to be an incentive to install permanent operable barriers at certain locations within the south Delta, as a condition on Reclamation's water right. The 0.7 EC salinity provision, as imposed on Reclamation in its water right, is not a substantive, protective term and condition. This is evident from the fact that the standard originally imposed on certain facilities of the CVP prior to April 1, 2005, was 1.0 year round. Nothing in Reclamation's water right (D-1641), or the environmental documents supporting D-1641, would support a position that after April 1, 2005, conditions in the interior south Delta suddenly require a new, more restrictive, standard to be more protective over the one imposed for the last five years. It is also Reclamation's position that this provision cannot be read in a vacuum. Reclamation's water rights also state:

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

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

Permittee has latitude in its method for implementation 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.** (Emphases added).

The Board's draft CDO completely ignores the last provision requiring analysis of an exceedance to determine the responsibility of Reclamation, if any. If the Board continues to ignore this provision in this enforcement action, Reclamation has no assurance that the Board will begin to honor this provision in the future. It is Reclamation's position that because of the way this provision is written, Reclamation can never be the subject of an enforcement action based upon "threatened violations" for salinity standards. Violations can only be determined following an exceedance and a determination as to whether the exceedance was beyond control of Reclamation. If the Board chooses to ignore this provision for enforcement of a hypothetical, threatened violation, Reclamation believes it will ignore this provision in the future.

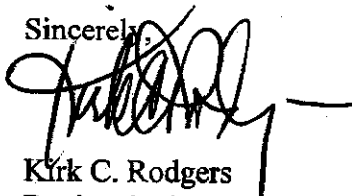
The importance of this provision in Reclamation's permit cannot be understated: before any enforcement attempt by the Board can be taken a determination has to be made that the cause is attributable to Reclamation. Previous statements by the Board have recognized this causation requirement in Reclamation's permits. For example, the Board states in D-1641, that, "Water quality in the southern Delta downstream of Vernalis is influenced by San Joaquin river inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity." In addition, the Board states that, "Even when salinity objectives are met at Vernalis, the interior Delta objectives are sometimes exceeded. ... Exceedance of the objectives in the interior Delta is in part due to water quality impacts within the Delta from in-Delta irrigation activities." (Citations omitted).

A hearing on this matter was held on October 24 and 25, and on November 7, 17, 18, and 21, 2005. Prior to the hearing, Reclamation sought, and put its efforts into, a potential settlement with SWRCB staff, or the "Prosecution Team." The hearing continued against Reclamation despite Reclamation's understanding that a settlement had been reached. When, during the hearing, Reclamation learned that the SWRCB Prosecution Team staff would not accept a settlement agreement that made Reclamation responsible only for actions within its control, Reclamation withdrew from settlement discussions. Therefore, Reclamation did not put on a defensive case during the hearing but instead submitted a closing brief setting forth the factual and legal insufficiencies with the draft CDO. Unfortunately, the SWRCB has wholly ignored all arguments set forth by Reclamation in its closing brief, does not address them, and proposes to adopt findings and an order not sufficiently supported by the evidence, or by the law.

The evidence relied on by the SWRCB Prosecution Team, and proposed in draft findings and order are two letters to the Board, one submitted jointly by Reclamation and DWR, the other sent by DWR only. These letters accompanied joint petitions filed by Reclamation and DWR to change the effective date of the 0.7 EC standard. The statements relied upon by the SWRCB are merely statements acknowledging that the 0.7 EC standard is exceeded at the three interior south Delta measuring stations below Vernalis by circumstances beyond the control of either Reclamation and DWR. They do not amount to the legal admissions of threatened future violations resulting from CVP or SWP operations as contended by the SWRCB.

Reclamation believes that the SWRCB is on the verge of imposing an unreasonable enforcement action against Reclamation based upon an untenable, insupportable, and heretofore, unknown, interpretation of the Board's own water right terms and conditions. Essentially, if the Board adopts the draft findings and CDO, it will be deciding to modify the existing Reclamation permits to predetermine a result without providing the fundamental due process authorized by the permit. Adversarial and protracted litigation over this issue would not be in the best interest of the public or the water quality conditions in the Delta. Therefore, Reclamation urges the Board to take seriously Reclamation's request for nonbonding arbitration or mediation, as allowed by 23 CCR 648.6, and work together for a reasonable solution to prevent salinity standard degradation in the south Delta.

Sincerely,



Kirk C. Rodgers
Regional Director



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(Comments: COMMENTS FROM U.S. BOR ON
Draft CDO.