STATE WATER BOARD
BOARD MEETING MINUTES
February 1, 2006

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CALL TO ORDER

Tam M. Doduc, Chair called the meeting to order on February 1, 2006 at 10:12 a.m. in the Coastal Hearing Room, 1001 I Street, Sacramento, California.

BOARD MEMBERS PRESENT

Tam M. Doduc, Arthur G. Baggett, Jr., Richard Katz, and Gerald D. Secundy

BOARD MEMBERS ABSENT

None

STAFF PRESENT

Celeste Cantú, Executive Director
Tom Howard, Deputy Director
Bill Rukeyser, Office of Public Affairs
Liz Kanter, Office of Public Affairs

Chris Davis, Office of Public Affairs
Betsy Jennings, Office of Chief Counsel
Anne Hartridge, Office of Chief Counsel

Barbara Leidigh, Office of Chief Counsel

Steven Blume, Office of Chief Counsel
Erin Mahaney, Office of Chief Counsel

Shakoora Azimi-Gaylon, Division of Water Quality
Wayne Verrill, Division of Water Quality
Rik Rasmussen, Division of Water Quality
Bruce Fujimoto, Division of Water Quality
Dominic Gregorio, Division of Water Quality

Beth Jines, Acting Deputy Director
Michael Lauffer, Chief Counsel
Selica Potter, Acting Clerk to the Board
Carmencita Sannebeck, Asst. Clerk to the Board

Ken Coulter, Division of Financial Assistance
Allan Patton, Division of Financial Assistance
Erin Ragazzi, Division of Financial Assistance

Leslie Laudon, Division of Financial Assistance

Ken Coulter, Division of Financial Assistance
Darrin Polhemus, Division of Financial Assistance

Ken Harris, Division of Water Quality

Danny Merkley, Division of Water Quality
Walt Shannon, Division of Water Quality
Jim Maughan, Division of Water Quality

PUBLIC FORUM

None

MINUTES

Motion: Vice Chair Secundy moved to adopt the December 9, 2005 and January 4, 2006 minutes

For additional detail, an electronic recording of the meeting is available by upon request. Please contact commentletters@waterboards.ca.gov.

Seconded by: Member Katz

MOTION CARRIED

Aye: Board Chair Doduc
Vice Chair Secundy
Member Katz

No: None

Absent: Member Baggett

INFORMATIONAL ITEM

Catherine Kuhlman, North Coast Regional Board, with Assistant Executive Officer, Luis Riveria showed a slideshow presentation about the regional boards' issues and/or priorities, accomplishments, challenges, and the New Year's Flood.

WATER QUALITY

2. Public Hearing to consider a resolution approving an exception to the California Ocean Plan for the University of Southern California Wrigley Marine Science Center discharge into the northwest Santa Catalina Island Area of Special Biological Significance, including special protections to protect beneficial uses

Vice Chair Secundy was the hearing officer for this public hearing. The purpose of this hearing is to receive comments on the proposed special ASBS protections and exceptions to the California Ocean Plan for the discharge by the University of Southern California's Wrigley Marine Science Center in the Northwest Santa Catalina Island area of special biological significance. The comment letter deadline for written comment was January 13, 2006. Written comments that were timely received are being entered into the hearing record and will be considered by the Board before adopting the Negative Declaration in the proposed exception. Mr. Secundy continued to say that staff will give a presentation first and then interested parties will be able to speak. Anyone who wished to speak had to take an oath.

Dominic Gregorio, Division of Water Quality (DWQ): Mr. Gregorio presented the item along with a slideshow presentation.

According to the Public Resources Code, ASBS are Areas of Special Biological Significance. In an ASBS, waste discharges shall be prohibited or limited by the imposition of special conditions. Furthermore, ASBS are a subset of State Water Quality Protection Areas and require special protection as determined by the State Board.

Section III (I)(1) of the 2001 Ocean Plan states: "The State Board may, in compliance with the California Environmental Quality Act, subsequent to a public hearing, and with the concurrence of the Environmental Protection Agency, grant exceptions where the Board determines: a. The exception will not compromise protection of ocean waters for beneficial uses, and, b. The public interest will be served." If the exception includes the

20 conditions, as revised, then the discharge will not compromise the protection of ocean waters for beneficial uses, and the public interest will be served."

The special conditions in the Mitigated Negative Declaration before the board are designed to strictly limit waste discharges and offer special protections to the ASBS, meeting the requirements of the Public Resources Code and the Ocean Plan.

The USC Wrigley Marine Science Center operates a marine laboratory that provides important research and educational services. The designation of the ASBS was in part due to the presence of this marine laboratory. The Wrigley Marine Science Center relies on the use of the open seawater system in carrying out its mission. Since informed that the Ocean Plan prohibits their waste discharges, the Wrigley Marine Science Center has been extremely cooperative in addressing this problem.

If the exception is not granted, the Wrigley Marine Science Center may be forced to shut down its seawater system. Being on a remote island location, there are no reasonable alternative disposal options. Diverting flows would involve their discharge into another, more pristine portion of the Marine Life Refuge. In short, it is in the public interest to allow the Wrigley Marine Science Center to continue the drainage of its seawater and storm drain systems into Big Fisherman Cove under the proposed mitigating conditions.

To put the Wrigley Marine Science Center discharge into perspective, Mr. Gregorio referred to a map of the applicable portion of the ASBS. He pointed out that the drainages and potential sources associated with the Wrigley. The sea water system discharges 180,000 gallons per day into Big Fisherman Cove. During rain events storm water is also discharged to the Cove. Originally at least part of the runoff and waste seawater were co-mingled, however, since becoming aware of the ASBS discharge issues, USC has segregated its waste streams. Most of the runoff from the laboratory area proper is now treated and infiltrated in vegetated swales. The remaining storm water flows drain from the canyon area upstream of the laboratory and dormitory buildings. He also noted, that direct discharges from the dive locker area have been eliminated. The laboratory has a sewage treatment plant that discharges treated, chlorinated wastewater to land; the wash down water from the dive locker area is now diverted to that treatment plant.

The Wrigley Marine Science Center is not the only source of pollutants into this area. In 2003, the SCCWRP/State Board Discharge Survey identified 38 drainages into the ASBS, most of which were not associated with USC/Wrigley.

On July 19, 2005, staff held a meeting with USC, the Regional Board, and representatives of the California CoastKeeper Alliance and the Ocean Conservancy to discuss mitigation and collaborate on the special protections before you today. On December 7, 2005, the State Board circulated an Initial Study and draft Mitigated Negative Declaration for the proposed exception in accordance with the California Environmental Quality Act and the California Code of Regulations (Title 14, section 15070). The draft Negative

Declaration, and the draft Resolution included 20 special conditions designed: 1) To protect beneficial uses in the ASBS, and 2) To specify minimum monitoring requirements necessary to determine if beneficial uses are being protected. These twenty special conditions represent a strict but reasonable approach to protecting beneficial uses. The Initial Study and draft Negative Declaration found no significant effect on the environment because of these mitigating conditions.

The written comment period closed on January 13, 2006. Staff received comments from only one organization, USC. After considering their comments, staff prepared minor recommended revisions to the Negative Declaration and the draft State Board Resolution. These revisions have been provided to the Board (in underline/strikeout mode). The revisions fall into two categories: 1) changing the location of the reference site for determining natural water quality, and 2) clarifying that, for example, modifications or minor construction, above the water line, at the pier and dock, would not be considered a cause for notification to the Regional Board under Section III(E)(2) of the Ocean Plan.

Another concern raised by USC revolved around the applicability of Condition 2(e), which eliminates non-storm flows from storm drain conveyances. USC was concerned that this section may be interpreted to apply to certain waterfront and marine activities. Activities such as the washing of the floating dock structure and boats are not associated with any storm water conveyance, but instead constitute a nonpoint source. Release of pollutants into the receiving waters from marine nonpoint sources will instead be addressed by Condition 2(r), regarding the implementation of the waterfront management plan. Implementation of that plan must ensure that natural water quality in the ASBS is maintained. For example, using only fresh water (no soap) to remove salt from a vessel's windows is not expected to result in an alteration of natural water quality.

CEQA requires that changes to the conditions in a Negative Declaration can only be made after the Lead Agency holds a public hearing on the issue. Today's hearing fulfills this requirement as well as the hearing requirement for considering an Exception.

Staff recommends, the Board adopt the Initial Study and Mitigated Negative Declaration as revised, and approve those Special Protections in the Exception at the February 15 Board Meeting. With these Special Protections, the quality of the discharges will improve, and the ASBS will be protected. The Wrigley Marine Science Center would not compromise the protection of ocean waters of the ASBS for beneficial uses, and the public interest will be served. Furthermore, if the exception is granted, then the Los Angeles Regional Board will be able to proceed with the re-issuance of the NPDES permit, incorporating those special conditions.

Commenters

David Hung, Los Angeles Regional Board
Tony Michaels, University of Southern California
Ruber Phillips, Monterey Bay Aquarium
Kristina Raspe, of Roberts, Raspe & Blanton LLP

The public hearing on Item 2 was then closed.

(A brief break was taken and the board meeting resumed at 11:20 a.m.)

3. Consideration of a resolution approving the final report of the Colorado River Basin Salinity Control Forum titled, "2005 Review – Water Quality Standards for Salinity-Colorado River System" (2005 Triennial Review)

Walt Shannon, Division of Water Quality (DWQ): Mr. Shannon has been the staff resource on the Colorado River Basin Salinity Control Forum and Advisory Council issues for several years and occasionally substituted for Executive Director Celeste Cantú at Forum meetings.

Staff is seeking public input on the 2005 triennial review of salinity standards for the Colorado River. The 2005 Review is a product of the Colorado River Basin Salinity Control Forum that adopted it in October last year. The Forum was formed in 1973 by the seven states in the Colorado River Basin to cooperate on salinity control activities and to provide the states with the information necessary to comply with the requirements to adopt water quality standards under Section 303 of the Clean Water Act.

The Clean Water Act requires that standards be reviewed by the Basin states at least every three years and submitted to USEPA.

This is the tenth triennial review of the standards. The numeric standards have not changed since first adopted in 1975, and no changes are proposed in the 2005 Review.

The plan of implementation is intended to maintain salinity at or below the numeric criteria at each of the compliance points through the year 2025. The implementation plan includes completion of federal agencies' salinity control projects, implementation by the states of the Forum's adopted policies for effluent limitations (principally under the NPDES permit program), and implementation by the states of their nonpoint source management plans.

Staff has reviewed the 2005 Triennial Review and recommends approval by the Board and transmittal to USEPA as required.

Staff has received one letter from the Colorado River Board of California supporting the staff recommendation. No other written comments have been received.

Motion: Member Katz moved to adopt the proposed resolution.

Seconded by: Vice Chair Secundy

MOTION CARRIED (Resolution 2006-0007)

Aye: Board Chair Doduc

Vice Chair Secundy

Member Katz

Absent: Member Baggett

Commenters

None

4. Consideration of a resolution approving a site-specific exception to the Sources of Drinking Water Policy for Old Alamo Creek

Glenda Marsh, Division of Water Quality (DWQ): Ms. Marsh presented two items, #4 and #5. The first is a proposed site-specific exception to the State Water Resources Control Board's Sources of Drinking Water Policy, and the second is a proposed amendment to the Central Valley Water Board's Basin Plan.

Motion: Member Secundy moved to adopt the proposed resolution.

Seconded by: Vice Chair Katz

MOTION CARRIED (Resolution 2006-0008)

Aye: Board Chair Doduc

Vice Chair Secundy

Member Katz

Absent: Member Baggett

Commenters

David Tompkins, City of Vacaville

5. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Central Valley Region to remove four beneficial uses from surface waters of Old Alamo Creek

Motion: Member Katz moved to adopt the proposed resolution.

Seconded by: Vice Chair Secundy

MOTION CARRIED (Resolution 2006-0009)

Aye: Board Chair Doduc

Vice Chair Secundy

Member Katz

Absent: Member Baggett

Commenters

David Tompkins, City of Vacaville

FINANCIAL ASSISTANCE

6. Consideration of a resolution authorizing funding from the State Water Pollution Cleanup and Abatement Account (CAA) for investigation and cleanup at former Sunrise Handy Market/Mr. C's, Porterville, Tulare County

Motion: Member Katz moved to adopt the proposed resolution.

Seconded by: Vice Chair Secundy

MOTION CARRIED (Resolution 2006-0010)

Aye: Board Chair Doduc
Vice Chair Secundy
Member Katz

Absent: Member Baggett

Commenters

None

7. Consideration of a resolution adopting the waiver of litigation rights language for the 2005-06 Consolidated Grants Program Guidelines

Michael Lauffer, Chief Counsel presented the item to the Board with a slideshow presentation. On page 7, the following language was added: *Regardless of the outcome of any such litigation, and notwithstanding any conflicting language in this agreement, the grantee agrees to complete the project funded by this agreement or to repay all of the grant funds plus interest.*

Motion: Member Katz moved to adopt the proposed resolution.

Seconded by: Vice Chair Secundy

MOTION CARRIED (Resolution 2006-0011)

Aye: Board Chair Doduc
Member Katz
Vice-Chair Secundy

Absent: Member Baggett

Commenters

David Tompkins, City of Vacaville

Judith Fries, County of Los Angeles-Public Works

David McFadden, Sonoma Water County Agency

Daniel Laffery, Los Angeles County Department of Public Works and Los Angeles County Flood District

Peter McGaw, City of Yuba City

David Tompkins, City of Vacaville

WATER RIGHTS

8. Consideration of a proposed order following a hearing on draft cease and desist orders against the United States Bureau of Reclamation (USBR) and the California Department of Water Resources (DWR) and reconsideration of the Division Chief's approval of a water quality response plan for joint use of USBR's and DWR's points of diversion in the southern Sacramento-San Joaquin Delta

Chief Counsel Michael Lauffer recused himself from this matter. Staff Counsel Ted Counsel took the lead as the board's attorney for the matter.

Prior to staff's presentation, Chair Doduc read her ex-parte statement concerning a conversation that she had regarding this matter.

Victoria Whitney, Division of Water Rights: While presenting the item to the Board, Ms. Whitney said she would refer to the water rights as the "permits" and the two agencies as the "permittees" for ease.

Ms. Whitney said the proposed order is divided into two parts. One part addressed a proposed Cease and Desist Order that was issued last year after determining that there was enough evidence to go forward. The other part addresses petitions for reconsideration filed by Delta interests objecting to one of the conditions under which was approved in the water quality response plan that is required by State Water Board Decision 1641 under a conditional delegation. The proposed order before the Board is the result of previous actions by the State Water Board over the past 50 years to ensure that control of salinity in the Delta is adequate to protect Delta agriculture. Protection of agricultural uses also ensures incidental protection of other beneficial uses in the Delta.

With regard to the enforcement action, the proposed order finds that Reclamation and the Department have failed to take actions necessary to prevent a threat of violation of the conditions in their water right permits related to salinity control. Those permit conditions impose the numeric salinity objectives, measured as electrical conductivity, in the 1995 Bay-Delta Plan. Based on information contained in the record, the proposed order identifies a number of actions that the two agencies could take to assure compliance with their permit conditions. These are not the only potential means of achieving the salinity objectives set forth in the State Water Board's 1995 Bay-Delta Plan, but they are means that are consistent with the Board's implementation of the Plan's salinity objective through conditioning Reclamation's and the Department's water right permits.

During the hearing, testimony was presented that the construction of operable gates in the southern Delta is the preferred compliance method. This has been the case for at least 15 years. The proposed order requires that the permittees provide regular status reports to the State Water Board on progress towards constructing the facilities, while at the same time requiring the permittees to meet the conditions through the other means available to them.

In regard to the water quality response plan, the proposed order concludes that the use of joint points of diversion in the Delta by the two agencies should only be allowed to occur if the agencies meet all of the conditions of their water right permits, including the 0.7 millimhos/cm (aka 700 micromhos/cm) permit condition that is in effect at the four southern Delta compliance locations from April to August of each year. It goes without saying that the permittees must also meet the other conditions of the Water Quality Response Plan, which are not at issue today.

Ms. Whitney continued saying the State Water Board received, and the staff considered, many comments submitted by the parties to the hearing that led to this proposed order and by others interested in the outcome, including comments submitted late yesterday. For the purposes of the enforcement action, the parties are the Division's prosecution team, the Department and Reclamation. For the purposes of the water quality response plan, the parties are the Department and Reclamation, Contra Costa Water District, South Delta Water Agency, Central Delta Water Agency, and Westside Irrigation District. Other hearing participants, although they may be interested in the outcome, do not have party status and the associated rights that go with it. Although many people participated at the hearing, only parties have standing to raise certain issues.

In response to the comments received, the order before the Board has been amended from the December 30, 2005 version that was originally sent out. The amendments were provided to the Board and to those on the mailing list for this action late Friday afternoon. The amendments from the December 30 version were specified in the letter transmitting the order. Additional changes were made as a result of the comments received since Friday. Those changes are indicated on an errata sheet that has been provided to you and made available to other parties.

There have been a number of assertions made in closing briefs and in the comment letters. Ms. Whitney addressed a few of them for the record. First is the assertion by the Department of Water Resources that action by the State Water Board against the Department is an unprecedented policy action. Although Ms. Whitney is not aware of any actions that the State Water Board has taken against DWR specifically, she knows for certain that there is no policy prohibition against one state agency taking action against another. The Regional Water Quality Control Boards have issued enforcement actions against a number of other state agencies, such as CalTrans, the Department of Corrections, and the Department of Parks and Recreation. If it was the State's policy to exempt itself from enforcement, the Legislature could certainly exempt all State agencies

from State laws implemented by other state agencies. This is obviously not the State's intent.

Furthermore, although it is true that the Department of Water Resources has primary authority for water supply planning and shares authority with the State Water Board to prevent waste and unreasonable use of water, the State Water Board is the only State agency with authority to directly regulate water quality and the only agency to issue and condition water right permits. Nevertheless, we agree that it is certainly in DWR's interest to protect water quality so that it can meet its water supply responsibilities.

The second issue relates to approval of the water quality response plan and the Board's subsequent amendment of that approval. The conditions under which Ms. Whitney originally approved the water quality response plan would have given the State and federal water projects authorization to use joint points of diversion in the event that the Board ultimately changed the salinity requirements in the permittees' water right permits when it acts on a petition the two agencies filed which is being processed by the Division. The December 30th version of the proposed order changed that condition of approval, instead imposing a condition that would have allowed for some other exceptions to meeting the salinity requirements as a condition for joint point pumping. The January 27th version further amends that approval by requiring that the Department and the USBR comply with the conditions of D1641. The Department has asked you to approve the water quality response plan as proposed in the December 30th version of the proposed order.

Certain commenters alleged that the State Water Board did not evaluate the environmental impacts associated with making changes to D1641. That allegation is not true. When the State Water Board prepared its Environmental Impact Report supporting Decision 1641, it analyzed and considered a full range of alternatives regarding the use of joint points of diversion and the delivery of water to Reclamation's Cross Valley Canal contractors, who constructed the Cross Valley Canal in 1975 and received water delivered through it without the necessary authorization from this agency until the Board adopted D1641 in 2000. However, because that EIR is not in the record for this proceeding and because we agree with the commenters who pointed out that any change to D1641 requires compliance with the California Environmental Quality Act, staff has amended the proposed order. The January 27 version deletes the previously proposed exceptions and does not amend the salinity conditions currently in the permits. The Board can if it so desired amend these conditions, but only after entering the D1641 EIR into the record and providing an opportunity for a hearing on it. Some of the comments filed discuss the EIR and since the EIR is not in the record; the Board should not consider those comments. Many other comments on the water quality response plan are now moot as a result of the proposed amendments.

Similarly, the Department points the Board to the draft EIR issued on the Delta Improvement Project. That document is not a final document, and it is also not in the record. Therefore, the Board cannot and should not rely on it at this time. There is no

guarantee that the document will be finalized in the near future or ever. The Department has previously released two draft EIRs related to projects intended to bring permanent improvements to the area and resolve problems in the southern Delta—one draft EIR/EIS was released in 1990 and one in 1996. Those documents were never finalized, mainly due to controversies surrounding impacts on fisheries. Concerns over the fate of Delta fisheries have only increased since then.

Next, several commenters offered unique interpretations of the meaning of the conditions in Reclamation's and the Department's permits that impose the salinity requirements. The conditions contain language that provides the permittees an opportunity to explain specific circumstances that it might want the Board to consider in exercising its enforcement discretion. The extreme view offered is that the conditions prohibit the Board from taking action if the permittess fail to report a violation. Ms. Barbara Leidigh drafted that condition with the assistance of Chief Deputy Director Tom Howard and Ms. Whitney. Co-Hearing Officer Baggett was on the Board that adopted D1641. The proposed order before the Board clarifies the intent of that condition.

Reclamation has proposed that the Board enter into arbitration or mediation with Reclamation rather than adopt this order. The State Water Board does not have its own regulations regarding arbitration or mediation, so must rely on regulations adopted by the State Office of Administrative Hearings. Those regulations require that requests for arbitration be made at the beginning of a proceeding, not at the end.

Lastly, San Luis Delta Mendota Canal Authority raised a procedural issue regarding the State Water Board's separation of functions. Staff does not believe that the issue has merit for the reasons specified in footnote 9 on page 14 of the order.

In its actions to implement the 1995 Bay-Delta Plan, the State Water Board considered a full range of alternatives. It held 80 days of hearing prior to adopting D1641. The court held additional 15 or so days of hearing. The trial court concluded that the Board erred when it approved the San Joaquin River Agreement, because that agreement did not fully implement the San Joaquin River objectives. Despite the Board's arguments that it is not required to fully implement water quality objectives through its water rights authority, the Court disagreed. This is one of only two issues in which the Court did not uphold the Board out of all the issues that were raised. The Court of Appeals heard over four hours of oral argument on D1641 just last week. It remains to be seen how it will decide the issue. It is clear that the parties have had ample opportunity to object to the responsibilities that the Board imposed on them during those long and arduous proceedings. They did not. The time for doing so expired in April of 2000, almost six years ago. Ms. Whitney asks that the Board to disregard comments that one or both of the agencies are not responsible for solving the problem. Their water right permits are conditioned on meeting the objectives.

In closing, Ms. Whitney acknowledged a number of things:

1. Salinity objectives were met this past year. Wetter than normal hydrologic conditions in the winter of 2004 and in 2005 were the primary reason that the permit conditions were not violated.
2. Complexities of the issues were addressed in this order, as well as, the difficulties and expense involved in solving these problems. Although Staff recommends that you adopt the proposed order, staff does sincerely desire to work cooperatively with the Department, Reclamation, and the other entities involved in these broader issues.
3. Staff believes that it is preferable to bring threatened violations to the Board's attention before they occur in order to prevent them, rather than waiting until the violation has occurred.

Chair Doduc and the Board agreed to carry this matter over to the February 15 board meeting to allow ample time for parties to review the second revision to the draft order and make comments prior to the Board taking action.

Commenters

Alex Peltzer, Cross Valley Contractors

Bill Jennings

Clifford Schulz, Kern County Water Agency-State Water Contractor

Ron Milugan, U.S. Bureau of Reclamation

DeeAnne Gillick, San Joaquin County

Jon Rubin, San Luis and Delta Mendota Water Agency

Karna Haringfeld, Stockton East Water District

James Snow, Westlands Water District

John Herrick, South Delta Water Agency

Michael B. Jackson, California Sportfishing Protection Alliance

ADJOURNED
The Board meeting adjourned at 12:10 pm