

Memorandum

Date: January 31, 2006

To: Victoria Whitney
Division Chief
Division of Water Rights
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

From: Department of Water Resources

Subject: Comments on Amended Draft Cease and Desist Order to be Considered at SWRCB 2/1/06 Board Meeting, Item Number 8

Please find attached comments from the Department of Water Resources (DWR) in response to the State Water Resources Control Board Amended Proposed Draft Order Adopting Cease and Desist Order and Granting Petitions for Reconsideration (January 27, 2006) (Amended Draft CDO). Although the SWRCB has not requested comments on the Amended Draft CDO, DWR is submitting these comments for the record to correct errors resulting from changes introduced in the amended order.

This Comment Letter has been served to parties of the cease and desist hearing via email and U.S. Postal Service as described in the enclosed Proof of Service.

If you have any questions, please contact me at (916) 653-5613 or crothers@water.ca.gov.

Sincerely,



Cathy Crothers
Senior Staff Counsel

Attachments

California Department of Water Resources Comments
In Response to SWRCB Amended Proposed Order
Adopting Cease and Desist Order and Granting Petitions for Reconsideration
January 31, 2006

The Department of Water Resources (DWR) submits these comments to correct errors and faulty conclusions resulting from the changes introduced in the recent Amended Proposed Order Adopting Cease and Desist Order and Granting Petitions for Reconsideration of State Water Resources Control Board Approval of Water Quality Response Plan (Amended Draft CDO (January 27, 2006)). DWR requests that the State Water Resources Control Board (SWRCB) not adopt the Amended Draft CDO as it includes errors, is premature, and is unwarranted at this time for the reasons below and as explained in DWR's prior comments submitted to the SWRCB on January 10 and January 24, 2006.

A. The Amended Draft CDO Modifies DWR's Water Right Permits Without Proper Due Process by Requiring DWR to Fully Meet the South Delta Objectives.

The SWRCB amendments to the Draft CDO delete reference to DWR and U.S. Bureau of Reclamation (USBR) joint and several responsibility for meeting the south delta salinity objective and inserts that they are each fully responsible for meeting the objective (Amended Draft CDO, p. 7, 25, and 31 (January 27, 2006)). This amendment is inconsistent and not in accordance with DWR's D-1641 permit Condition 6, which implements the objective. D-1641 does not make DWR and USBR jointly or fully responsible for the southern delta objectives. Condition 6 sets forth a process expressly recognizing that during circumstances in the Delta that DWR does not have control of actions that cause an exceedance of the southern delta objectives, the SWRCB may choose to find that DWR does not have full responsibility for the objectives and therefore not enforce compliance.

The SWRCB in D-1641 found that DWR is only partially responsible for the salinity problems in southern Delta because of hydrologic changes that are caused by export pumping (Revised D-1641, p. 86-88 (March 15, 2000)). This issue was much discussed during the hearings for D-1641. After reconsideration of D-1641, the SWRCB adopted Condition 6 of DWR water right permits with an additional provision not originally part of the December 29, 1999 Decision. The added provision, as shown by the underlining below, recognizes that DWR's responsibility to implement the southern delta salinity objectives should be limited to actions within the control of DWR.

Condition 6, in its entirety provides:

"This permit [DWR 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 [DWR] has latitude in its method for implementing 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."¹

(Revised D-1641, Condition 6, p159, for DWR Delta permits; underlined sentences were added to Revised D-1641 after the SWRCB reviewed comments submitted during the hearing on petitions requesting reconsideration of the December 29, 1999, D-1641.)

During the hearing on the CDO, DWR presented new evidence regarding the source of water and affects of DWR Delta pumping on salinity in the south Delta. This evidence was not available to the SWRCB when D-1641 was adopted. This new evidence, based on modeling of historic conditions, shows that even reducing SWP exports to zero does not reliably or effectively improve water quality in the interior south delta, and some times makes it worse. DWR did not present this evidence during the CDO hearing for purposes of changing D-1641 but DWR submitted it as relevant to how the SWRCB must implement Condition 6. During typical water right hearings information is submitted to help show how responsibility should be allocated to water right permittees. However, information may not be sufficient to know absolutely how much responsibility a water right permittee should be allocated, especially in areas such as the south delta where many factors affect water quality conditions. This was the case during D-1641 for the southern Delta salinity objective. As a result, the SWRCB left open the question of how much responsibility would be allocated to DWR for controlling the south delta salinity. Under Condition 6, such responsibility is to be determined during the circumstances when salinity problems arise. In the case of a threatened exceedance, the SWRCB should consider the circumstances during increasing salinity and immediately preceding an anticipated problem.

¹ Table 2 lists four compliance locations where the objectives are measured as 0.7 mmhos/cm EC from April through August and 1.0 EC from September through March. Compliance applies in all year types and is measured by a maximum 30-day running average of mean daily EC.

If the SWRCB adopts the amended CDO, it will not be meeting its obligation under Condition 6 to allow DWR to explain whether increased salinity is the result of actions beyond its control. The SWRCB must not modify DWR's water right permit without noticing a hearing on this change. The CDO hearing was limited to whether the SWRCB should find that DWR is threatening to not comply with Condition 6. It was not about changing Condition 6. A SWRCB decision adopting the proposed Amended Draft CDO would be an abuse of SWRCB discretion and not in accordance with law.

B. DWR Did Not Agree to Backstop the Southern Delta Salinity Objective and the Amended Draft CDO Statement Is Incorrect.

The Amended Draft CDO inaccurately states that DWR agreed to backstop the interior south Delta salinity objectives in lieu of the SWRCB assigning responsibility to other parties to meet the objectives (Amended Draft CDO, p. 9 and 22 (January 27, 2006)). DWR agreed in the San Joaquin River Agreement to assume responsibility, as appropriate, for the San Joaquin River basin share of 'Delta Outflow' objectives of the 1995 Water Quality Control Plan" (San Joaquin River Agreement, Section 10.1.2, p. 13 (March 1, 1999) emphasis added). Delta Outflow is a specific water quality objective in the 1995 WQCP and it is not synonymous with south Delta salinity objectives. DWR agreed to assume the San Joaquin River share of Delta Outflow only for purposes of the Agreement and only as would be appropriate. The San Joaquin River flow accounts for about 10 to 20 percent of Delta Outflow. An agreement to backstop this requirement does not require DWR to backstop the south Delta salinity objectives for agriculture. The Agreement did not create any new water right obligation for DWR, and should not be a basis for a cease and desist order.

In addition the historical summary added to the Amended Draft CDO misrepresents the backstop agreements that were presented to the SWRCB during the water right hearings of 1998 to 1999 (Amended Draft CDO, p. 9). As noted above, the backstop provisions of such agreements have specific language defining responsibilities of parties to the agreement. The general statement in the summary incorrectly states that DWR and USBR agreed to backstop agreements guaranteeing implementation of the objectives (Id.). This statement implies the San Joaquin River Agreement provision requires DWR and USBR to backstop south delta salinity objectives, which is incorrect.

C. DWR's Permit Condition in an Enforcement Action Is the Same Whether the Claim is a Threatened Violation or an Actual Violation.

The SWRCB argues that the provision of Condition 6 allowing DWR to submit a report on the actions causing the exceedance applies to only an actual exceedance of the objective, not a threatened violation (Amended Draft CDO, p. 20 (January 27, 2006) emphasis added). The Draft Order explains that the CDO is not alleging an actual violation and the provision is not applicable to the

proceeding on a “threatened” violation (Id.). This has the appearance of ad hoc reasoning to suit a preferred outcome. There is no reason the SWRCB cannot analyze a threatened violation of Condition 6 in the same manner it would analyze an actual violation of Condition 6. Just as for an alleged actual violation, the SWRCB must make a decision of an alleged threatened violation based on facts showing whether an exceedance of 0.7 EC will occur and whether the exceedance will result from actions that will be beyond or within DWR’s control. DWR believes the SWRCB could do this analysis as part of this CDO proceeding, but fails to do so because it fails to recognize the entire Condition 6.

If the SWRCB is allowed to exert its authority to prevent threatened violations by applying analysis of the permit condition differently than would be applied under an actual claimed violation, the SWRCB is in essence changing the terms of a water right permit without the due process required to protect the permittee. The SWRCB appears to forget that issuance of a CDO is an enforcement action and that such action, whether it is for a threat of violation or an actual violation, should follow the process for enforcement that the SWRCB prescribes for the south Delta objectives in D-1641 Condition 6.

D. DWR is Diligently Pursuing the Proposed Permanent Gates and a CDO Must not be Based on Failure to Have Constructed Gates or Equivalent Measures.

DWR objects to the SWRCB finding that the purpose and effect of the CDO is to “require DWR and USBR to implement measures to obviate the threat of violation that is caused by their failure to carry out measures that would improve salinity levels in the southern Delta.” (Amended Draft CDO, p. 18, 32, 33, 34 (January 27, 2006)). Under provisions of Condition 6, DWR has latitude in methods of implementing the south delta objectives. The SWRCB conclusion and stated purpose of the CDO ignores this latitude and the other provisions of Condition 6 as discussed above. Failure of DWR to have installed the permanent gates should not be a basis for a threat of violation.

DWR has been diligently moving forward towards implementing the permanent gates, despite some changes required when the CALFED Bay-Delta Program included the gates within its process. The SWRCB purposely did not make construction of permanent gates or equivalent measures a requirement in D-1641 because it did not have the capability to comply with the extensive environmental analysis required under CEQA. Instead, the SWRCB recognized the benefits of the permanent gates and included the more stringent 0.7 objective as a hammer to force DWR to construct the gates. DWR is moving forward with this program as fast as it can within the constraints of needed permitting and environmental review. The proposed CDO does nothing to speed this process and may delay it. Parties opposed to SDIP will seize on any enforcement action against DWR as a reason not to allow DWR to proceed with any project in the Delta. Some may try to link the water quality issue of the proposed CDO with the

issues of the Delta pelagic fish decline despite the fact that the implementation in April 2005 of the more stringent southern delta salinity objective is a recent institutional change and not related to this fish concern. Issuance of a cease and desist order will not further the Board's or DWR's goal to assure that the permanent gates are soon operating to benefit the south delta.

E. SWRCB Could Approve Condition for Implementing JPOD Operations based on the SWRCB EIR on JPOD.

The SWRCB claims that it could not approve the Water Quality Response Plan (WQRP) with similar conditions as recommended by its Division Chief because it does not have an environmental analysis of the proposed change under CEQA. The proposed approval by the Division Chief would have allowed JPOD operations during water quality conditions that do not exceed 1.0 EC instead of conditions that do not exceed 0.7 EC, during April through August. Since 2000, JPOD operations have occurred during conditions when water quality was not to exceed 1.0 EC. Only since April 2005 has the operations been subject to the more stringent 0.7 EC objective. DWR believes that the SWRCB EIR for JPOD covers the operations proposed in the Division Chief's conditional approval of the WQRP (See SWRCB Final EIR for Implementation of the 1995 Bay/Delta Water Quality Control Plan, Chapter XIII (Dec. 1999)). The SWRCB could refer to this EIR to satisfy its CEQA compliance requirements when approving conditions on the WQRP.

In addition, the SWRCB incorrectly reasons that because DWR's ability to export water by JPOD and water transfers could be adversely impacted when salinity exceeds 0.7 from April through August under current water right constraints, that the converse meaning of this evidence suggests that increasing exports for JPOD or water transfers will adversely affect salinity in the south delta (Amended Draft CDO, p. 28 (January 27, 2006)). This reasoning is faulty. During the CDO hearing DWR provided evidence that changes in SWP pumping in the Delta does not effectively or reliably change salinity at the interior southern Delta salinity stations (DWR Exhibit 20). DWR's evidence included analysis of conditions during drier years (DWR-20, p. 22-28). This evidence shows that any changes in pumping for JPOD or water transfers would not significantly affect southern Delta water quality. Therefore this reasoning should not be a basis for not approving a condition for the WQRP that would permit Stage 1 of JPOD.

Conclusion

Current water quality conditions are good in the south delta and salinity may not increase to 0.7 EC for many months. DWR does not believe there is an issue of threatened violation of its water right permit before the SWRCB at this time. DWR urges the SWRCB to not adopt the proposed CDO and to adopt a condition that approves the Water Quality Response Plan to allow the SWP to transfer water during JPOD Stage 1 operations as discussed above.

PROOF OF SERVICE BY U.S. MAIL AND ELECTRONIC MAIL

I, Surinder Tumber, certify and declare as follows:

I am over the age of 18 years and not a party to this action. My business address is 1416 Ninth Street, Room 1118, Sacramento, California 95814, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On January 10, 2006, at my place of business, a copy of **COMMENTS ON AMENDED DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND GRANTING PETITIONS FOR RECONSIDERATION** was placed for deposit following the ordinary course of business as follows:

[XX] BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelope(s) were addressed as follows:

Patrick Porgans
Patrick Porgans & Assoc., Inc.
Post Office Box 60940
Sacramento, California 95860

Gary Bobker, Program Director
The Bay Institute
500 Palm Drive, Suite 200
Novato, California 94949

[XX] BY ELECTRONIC MAIL. Based on an agreement of the parties to accept service by e-mail or electronic transmission, on January 10, 2006, at approximately 5:00 p.m., I caused a copy of **COMMENTS ON AMENDED DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND GRANTING PETITIONS FOR RECONSIDERATION** to be sent to the persons at the e-mail addresses listed below.

SEE ATTACHED SERVICE LIST.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 31, 2006


Surinder Tumber
Surinder Tumber

SERVICE LIST

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

Amy L. Aufdemberge
Assistant Regional Solicitor
Room E-1712
2800 Cottage Way
Sacramento, California 95825
Jstruebing@mp.usbr.gov

Erin K.L. Mahaney
State Water Resources Control Board
1001 I Street
Sacramento, California 95814
emahaney@waterboards.ca.gov

Dante John Nomellini, Esq.
Nomellini, Grilli & McDaniel
Post Office Box 1461
235 East Weber Avenue
Stockton, California 95201
ngmplcs@pacbell.net

Carl P.A. Nelson
Bold, Polisner, Maddow, Nelson & Judson
500 Ygnacio Valley Road, Suite 325
Walnut Creek, California 94596-3840
cpanelson@prodigy.net

Clifford W. Schulz
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, Suite 2700
Sacramento, California 95814
cschulz@kmtg.com

Paul R. Minasian
Post Office Box 1679
Oroville, California 95965
pminasian@minasianlaw.com
msexton@minasianlaw.com
dforde@minasianlaw.com

Tim O'Laughlin
O'Laughlin & Paris LLP
2571 California Park Drive, Suite 210
Chico, California 95928
klanouette@olaughlinparis.com

Thomas J. Shephard, Sr.
Neumiller & Beardslee
Post Office Box 20
Stockton, California 95201
tshephard@neumiller.com

Jon D. Rubin
400 Capitol Mall, 27th Floor
Sacramento, California 95814
jrubin@kmtg.com

John Herrick, Esq.
South Delta Water Agency
4255 Pacific Avenue, Suite 2
Stockton, California 95207
jherrlaw@aol.com

Michael Jackson
Post Office Box 207
429 W. Main Street
Quincy, California 95971
mjatty@sbcglobal.net

Arthur F. Godwin
700 Loughborough Drive, Suite D
Merced, California 95348
agodwin@mrgeb.org

David J. Guy, Executive Director
Northern California Water Association
455 Capitol Mall, Suite 335
Sacramento, California 95814
dguy@norcalwater.org

Tina R. Cannon
700 Loughborough Drive, Suite D
Merced, California 95348
tcannon@dfg.ca.gov