

SOUTH DELTA WATER AGENCY

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February 7, 2006

Ms. Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
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Re: SOUTH DELTA WATER AGENCY COMMENTS TO THE
JANUARY 27, 2006, DRAFT CEASE AND DESIST ORDER

The revised Cease and Desist Order should be adopted by the Board based on staff comments and recommendations made at the February 1, 2006, meeting regarding the Order's effect on DWR and USBR's existing obligations contained in their various permits. Those comments and representations were that notwithstanding the time frame for actions to obviate the threat of water quality violations, the 0.7/1.0 EC standards continue to be in effect and that violations of such standards can subject the projects to enforcement action by the Board or complaints brought by interested parties.

Opposition to the CDO is based upon a misreading of the clear language of D-1641, the water right decision which made the 0.7/1.0 EC standards an obligation of DWR and USBR.

First, DWR, USBR and others argue that the obligations for compliance with these standards are contingent upon a showing that an exceedance is directly related to specific ongoing DWR and/or USBR operations. This position is based upon the language of D-1641 which provides for DWR and USBR to assert that a violation may be "beyond the control" of the projects (pages 161 and 163 of D-1641). This position cannot be correct. First, it is clear that measures "beyond" the projects' control would include such things as drought, levee failures, and other natural or unavoidable events. The methods by which the standards are met (releases for dilution or withholding drainage from the river) are always within the control of the projects.

In addition, D-1641 recognized that other factors affect water quality downstream of Vernalis. Some of those factors were listed in D-1641 and include river inflow, tidal action, project diversions, local water use, return flows, and channel capacity (page 86 of D-1641; see also pages 79 - 89). If D-1641 only placed the responsibility for the standards on the projects to the degree they caused it, the Decision not only would have clearly said so (rather than giving oblique clues), but the Board would have then assigned the remaining obligations to other parties ***because such assignment of responsibility was the purpose of D-1641.***

The assertion by DWR and USBR that meeting Vernalis relieves them from responsibility for the other three downstream standards is certainly unsupportable. The projects cause the San Joaquin River to have salinities sometimes above 5,000 EC, dilute it to 700 EC and then claim that further users of the river are responsible for concentrating the salts. Simply put, the projects remain the cause of the 700 EC concentrations.

The second reason the opposition to the Order is incorrect responds to the State Water Contractor's assertion that stored water is unavailable to meet the water quality standards. SWC asserts that D-1641's treatment of a Petition by SJRGA for changes in place and purpose of use for their permits precludes such releases. This argument must fail.

The Petition considered and granted in D-1641 dealt with parties ***who were not responsible for downstream standards.*** In granting that Petition, the Board concluded a number of things including that SDWA and others could not require upstream releases to help maintain water quality or flow needs because the changes either did not harm any legal user, or that no harm resulted from the change. [SDWA disagrees with those conclusions which are currently before the Appellate Court.]

Arguing that this precludes the release by DWR and USBR of water stored in New Melones, Friant, San Luis, or other reservoirs is a non sequitor. The permits to those facilities require compliance with the standards, regardless of how any particular operation of a facility may be affecting the water quality in the river at any particular time. By SWC's reasoning, Shasta cannot be forced to make releases for X-2 unless it is causing the standard to move upstream; export pumping cannot be decreased if a loss of gravel beds caused a particular year's salmon population to drop, and New Melones cannot be forced to release water to meet Vernalis or Brandt Bridge standards because that dam does not supply the CVP San Joaquin Valley service area. Of course, those actions are required and are appropriate, or should be challenged at the time they are adopted.

Lastly, the opposition is incorrect because of FN 26 on page 19 of D-1641. That footnote clearly states that "backup" responsibilities were made by DWR and USBR for the San Joaquin River flow objectives of D-1641. The flow objectives are those standards that can be met with flows. The footnote clarifies these back ups are for meeting those objectives "other than the pulse flow objectives." To argue this does not mean meeting the water quality standards in the South Delta is to assert that words do not mean what they say. As staff succinctly stated, if parties

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thought this footnote did not mean what it said, they should have challenged it five years ago. They did not.

With regard to the motion to disqualify the prosecution and throw out their evidence, SDWA notes that the record contains other evidence either presented by SDWA or elicited through cross-examination of DWR witnesses that neither the Bureau nor DWR has undertaken any efforts to meet the Brandt Bridge standard other than those undertaken to meet the Vernalis standard. In light of this, it is not only likely, but almost a certainty that the Brandt Bridge standard (as well as the Old River at Middle River and Old River at Tracy Road Bridge standards) will be violated sometime in the next few years.

Finally, with regard to the proposed changes to the Water Quality Response Plan for JPOD, the Board's decision to maintain D-1641's restriction on such operations at times when water quality violations are occurring is appropriate.

SDWA strongly supports the SWRCB's Draft Cease and Desist Order as a method of requiring compliance with the existing and necessary water quality objectives. The CDWA joins in these comments.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd