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CLIFFORD W. SCHULZ

February 8, 2006

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

Re: State Water Contractors Suggestions for Process In Lieu of South Delta
CDO and/or For Modification of Proposed CDO

Dear Ms. Whitney:

The State Water Contractors organization ("SWC") has participated in all aspects of the current Cease and Desist Order ("CDO") proceedings, including presentation of written and oral comments. At the State Board's February 1, 2006, meeting, the Board members asked the parties to provide further suggestions on how best to achieve full implementation of the salinity objectives for the three southern Delta compliance stations. The SWC has been working with the Department of Water Resources on their proposal that is being submitted today. This letter supports DWR's proposal and will explain why the SWC continues to oppose issuance of the proposed CDO.

The 1995 Bay-Delta Water Quality Control Plan properly recognized that its program of implementation should balance the responsibilities of water project operators and other means of fully implementing the various objectives. At page 4, the 1995 Plan stated:

Most of the objectives in this plan will be implemented by assigning responsibilities to water rights holders because the factors to be controlled are primarily related to flows and diversions. This plan, however, is not to be construed as establishing the responsibilities of water rights holders. Nor is this plan to be construed as establishing the quantities of water that any particular water rights holder or group of water rights holders may be required to release or forego to meet objectives in this plan. The SWRCB will consider, in a future water rights proceeding or proceedings, the nature and extent of water rights holders' responsibilities to meet these objectives. Water Code section 1258 charges the SWRCB, when it acts on water appropriations, to consider water quality control plans, and it authorizes the SWRCB to subject the appropriations to terms and conditions that are

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necessary to carry out the plans. It does not, however, impair the SWRCB's discretion to decide whether to impose such conditions or the conditions to be imposed. If necessary after the water rights proceeding, this plan could be amended to reflect any changes that may be needed to ensure consistency between the plan and the water right decision.

This statement turned out to be quite accurate, as the Plan's objectives that were related to flow or diversions were assigned to water rights holders through Decision 1641. However, this quoted paragraph did not address salinity objectives that might not be related flow or diversions. The drafters of the 1995 Plan felt that certain South Delta objectives were so different from other Plan objectives that they required a separate, lengthy discussion in a discrete section of the Plan. (See pages 29-33 of the 1995 Plan.) In the introduction to this discussion (at page 28), the Plan states:

Implementation of four water quality objectives in this plan will require measures by the SWRCB, *under both its water quality and water rights authorities, in concert with actions taken by other agencies*. These objectives are: (1) the dissolved oxygen objective for the San Joaquin River; (2) the narrative objective for salmon protection; (3) the narrative objective for the tidal brackish marshes of Suisun Bay; and (4) the salinity objectives for southern Delta agriculture. A summary of implementation measures for these objectives is provided below. (Italics added.)

This recognition that the Plan objectives for southern Delta agriculture would require *both* exercise of the State Board's water quality and water rights authority is key to understanding Decision 1641's treatment of the south Delta salinity objectives.

Decision 1641 mimics the 1995 Plan by continuing to recognize that full implementation of the southern Delta salinity objectives is likely infeasible without both flow adjustments and water discharge controls. At pages 83-84, the Decision found:

If the SWRCB were to amend the CVP water right permits to require compliance with the southern Delta salinity objectives using only dilution water, there could be adverse effects on the water supply of CVP contractors south of the Delta, including WWD. Although releases of dilution water could help meet the southern Delta objectives, regional management of drainage water is the preferred method of meeting the objectives.

When addressing salinity issues in the southern Delta downstream of Vernalis, Decision 1641 states, at pages 86-87:

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. (R.T. p. 3668; DWR 37, p. 8.) The salinity objectives for the interior southern Delta can be implemented by providing dilution flows, controlling in-Delta discharges of salts, or by using measures that affect circulation in the Delta.

To this end, the State Board, through Decision 1641, imposed responsibilities on the SWP and CVP with respect to meeting the southern Delta salinity objectives, but appropriately provided an exception to requiring strict compliance if the "noncompliance is the result of actions beyond the control" of the two projects. (See, for example, Decision 1641, at page 159).

This caveat in the ordering paragraphs of Decision 1641 was consistent with the 1995 Plan and the quoted language from the Decision. Just as important, however, it was consistent with other State Board determinations in Decision 1641 and Order WR 2000-02 denying reconsideration of the Decision. Beginning at page 30 of Decision 1641, the State Board analyzed a claim by southern Delta water users that the San Joaquin River Agreement modified upstream storage releases and thereby caused injury to their riparian rights. In response the State Board ruled:

Assuming that any water right holders downstream of the parties supplying water under the SJRA have senior riparian water rights, such water right holders could require the SJRA suppliers of water to bypass water from natural flow. They could require this with, or in the absence of, the petitioned changes. *Riparian right holders cannot, however, require that water stored in another season be released for their benefit. Water stored in another season is not natural flow of the stream. Riparian rights attach only to the natural flow of a stream. Lux v. Haggin* (1884) 69 Cal. 255 [4 P. 919]; *Bloss v. Rahilly* (1940) 16 Cal.2d 70 [104 P.2d 1049].) Further, riparian rights do not attach to water that has been stored upstream during an earlier period. (*Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450 [173 P. 994, 997].) Thus, if water previously stored in another season is flowing in the stream, that water is not available to riparian right holders. It follows that if previously stored water is not available to a riparian right holder, the riparian right holder cannot be injured if the water does not

arrive at the riparian right holder's point of diversion due to a change in the use of the stored water. If an upstream diverter increases its use of natural flow or detains the water as a result of a change in its water right so that it does not reach the downstream riparian right holder at the natural time, however, and this change deprives the downstream riparian right holder of adequate water for beneficial uses, the downstream riparian right holder could be injured by the change. (*Scott v. Fruit Grower's Supply Co.* (1927) 202 Cal. 47 [258 P. 1095].) (Italics added.)

The southern Delta water users again tried to require stored water releases to benefit their riparian rights in their petition for reconsideration of Decision 1641. This time the board dismissed the petition as follows:

The Central and Southern Delta parties argue that riparian right holders in the Delta have a right to stored water from upstream reservoirs during seasons when natural flow is unavailable or inadequate to serve the uses of all riparian right holders taking water from the source....

These parties also argue that riparian right holders can take advantage of a "physical solution" by simply taking any water that appears in the stream during dry periods. This water, if it is present, usually is present only because it has been released from storage in an upstream reservoir. This water is not part of the natural flow that is subject to riparian rights.... Accordingly, there is no basis for requiring the parties whose changes were approved to release water from storage during the dry season for these parties, without compensation. The petitioned cause for reconsideration is dismissed.

(Order WR 2000-02, at section 5.2)

The amount of water available to the southern Delta area is dominated by the tides. Thus, the Delta parties' rejected claims were not designed to physically obtain more water molecules (as would be the case in a non-tidal upstream area), but were designed to obtain better water quality by requiring releases of high-quality, previously stored water from upstream San Joaquin River tributaries in the summer months when in-Delta water quality problems tend to occur. That is what the State Board rejected.

In an estuarine system, there is a fine line between meeting a water quality objective and ordering releases of previously stored water, without compensation, to enhance a

riparian right. The SWC recognizes that the SWP may need to provide stored water or otherwise modify its operations if necessary to mitigate salinity degradation caused by its operations. But going beyond mitigation, as proposed by the CDO, constitutes providing free water to a riparian that has no legal right to previously stored water.

In summary, the two main reasons the SWC has so strenuously objected to the proposed CDO center on (a) its interpretation of Decision 1641 as requiring the SWP to cure exceedances of the southern Delta water quality objectives even when the exceedances are caused, for example, by municipal waste discharges to the Delta channels and (b) its impact on the State Board's long held rule that riparian rights do not attach to releases of stored water.

In addition, the proposed CDO sets a dangerous precedent. If Decision 1641 is interpreted to require the SWP and CVP to cure any exceedances of Delta water quality objectives, no matter what the cause, the motivation to manage Delta water quality through waste discharge controls, in-Delta management, and other non-flow programs is seriously compromised. "Don't worry, the SWP and CVP will just release more water to dilute the pollution." The State Board should think long and hard before it rules that a water project operator, in situations where it is not the cause of a water quality problem, has the duty to cure it at no cost to the perpetrator.

For the reasons set forth above, the SWC supports the alternate process described in today's DWR submittal. Its submittal is consistent with the multi-pronged approach laid out in the 1995 Plan and Decision 1641 and attacks the problem at its source – urban and agricultural discharges in the Delta downstream of Vernalis. Therefore, the SWC urges the Board to give the milestones proposed by DWR a chance to work before it acts to consider issuance of the proposed CDO.

Very truly yours,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
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