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Selica Potter
Acting Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

FROM MODESTO:
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Re: COMMENT LETTER - 01/13/06 BOARD MEETING ITEM NUMBER 4

Dear Ms. Potter:

On behalf of the County of San Joaquin, we submit to the State Water Resources Control Board (State Board) the following comments to the Proposed Order Adopting Cease and Desist Order and Granting Petitions for Reconsideration (Order) which is to be considered by the State Board on Friday, January 13, 2006 as agenda item 4.

We object to the proposed Order due to its ambiguity and to the extent that it extends DWR and USBR's obligation to comply with the 0.7 EC objective until July 1, 2009. The proposed Order as drafted does not enforce the terms and conditions of Decision 1641 (D 1641) but rather modifies those terms and relaxes the conditions and standards imposed on the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) by D 1641.

1. Proposed Order is ambiguous and contains conflicting conditions.

The proposed Order is ambiguous and contains conflicting conditions that will likely lead to future confusion regarding the implementation and enforcement of D 1641 in the future. We submit that the Order is confusing due to the following various ambiguities.

(a) Item A.1 on page 9 of the Order requires the interior salinity objectives of 0.7 EC be met beginning April 1, 2005, unless permanent barriers or equivalent measures are implemented. The Order correctly indicates that permanent barriers or equivalent measures have not been implemented. Thus, the 0.7 EC objective is applicable. This requirement is consistent with the terms of D 1641.

However, item A.2. of the Order contradicts the requirements of item A.1. by providing as follows:

“2. Within 60 days from the date of this order, DWR and USBR shall submit a detailed plan and schedule to the Executive Director for compliance with the conditions mentioned above, including planned completion dated for key events leading to full compliance with the 0.7 EC objective at stations c-6,c-8, and P-12 by July 1, 2009.”

It is unclear to the County of San Joaquin how item A.1., which requires compliance with the salinity objective of 0.7 EC, can be reconciled with item A.2., which requires submission of a plan and schedule leading to "full compliance with the 0.7 EC objective" by July 1, 2009. It appears that item A.2. provides that the 0.7 objective is not applicable until July 1, 2009. If this interpretation is correct, item A.2 contradicts item A.1 which requires compliance by April 2005. This ambiguity in the Order should be clarified.

(b) Although it can be argued that the provisions of Part A of the proposed Order relating to the applicable salinity objective are unclear, it is quite clear that Part B of the proposed Order amends the salinity objective for Joint Points of Division purposes (JPOD). Item B. 1.1.a.i. of the proposed Order provides that the EC objective prior to July 1, 2009 for the interior Delta is 1.0 EC. D 1641 clearly requires these salinity objectives to be 0.7 EC after April 2005 if the permanent barriers or equivalent measures are not implemented. Due to the language in Part B of the proposed Order regarding JPOD, it is clear that the proposed Order intends to modify the interior salinity standards which were established in D1641.

2. A modification of D 1641 is not permissible in this proceeding.

In the event that the Order intends to extend the date for compliance with the 0.7 EC objective from April 1, 2005 until July 1, 2009, San Joaquin County objects to such proposed Order. Such a modification of the salinity objectives are objectionable for a variety of reasons.

First, this hearing was noticed as a hearing regarding the draft cease and desist orders against DWR and USBR and reconsideration of the approval of the Water Quality Response Plan (WQRP). The cease and desist hearing was intended to enforce the existing obligations imposed by D 1641 on DWR and USBR. However, the proposed Order amends the terms of D 1641 by extending the date to comply with the 0.7 EC objective from April 1, 2005 until July 1, 2009. Such an amendment was not properly noticed nor before the State Board in the pending hearings.

In addition, the Hearing Officer specifically ruled at the beginning of the hearing and throughout the hearing that she would not consider any evidence regarding amending the requirements of D 1641. Hearing Transcript page 3, lines 7-9. The salinity objectives were set in D 1641 and thus changing or amending the standard was not a subject of the hearing. Despite the Hearing Officers rulings and exclusion of evidence, the proposed Order essentially modifies the salinity objective by extending the objective compliance deadline from 2005 until 2009.

In addition, the modification of a term of the salinity objective is an amendment to the terms of D1641. The State Board staff do not have the authority and were delegated the authority

in D 1641 to amend this standard when it was authorized in D 1641 to review and approve the WQRP.

3. Reporting requirements are illusionary if salinity objective is modified.

The proposed Order provides in item A.4 that if a violation of the 0.7 EC objective is threatened then reports must be filed with the State Board describing the threatened violation and the corrective actions that are initiated to avoid the violation. However, this provision is illusionary as item A.2. discussed above does not require “full compliance” with the 0.7 EC objective until July 1, 2009. Therefore, due to the terms of the Order it can be argued that the 0.7 EC objective is not applicable prior to 2009 and thus no reporting of threatened violations is necessary.

Furthermore, the proposed Order provides in item A.5 that if a violation of the 0.7 EC objective occurs then DWR and USBR must submit a report to the Executive Director of the State Board. This proposed Order condition does not specify when the reporting requirements commence. Due to the provisions of item A.2. it can be argued that this reporting requirement is not effective until after July 1, 2009 when DWR and USBR must be in “full compliance” with the 0.7 salinity objective.

4. An amendment to D 1641 was not properly noticed and does not comply with CEQA.

The proposed Order ambiguously changes the existing interior salinity standards originally set in the 1978 Water Quality Control Plan, which has never been implemented, and finally imposed on permittees by D 1641 in 2000. Now, rather than require compliance with the salinity objective set by the State Board almost 28 years ago and imposed on DWR and USBR almost six years ago, the State Board is granting the parties another four year extension until 2009. This is unacceptable and legally indefensible.

As indicated above, the hearing Officer specifically excluded evidence regarding changing the applicable salinity objectives and specifically stated that an amendment of the salinity objective was not properly before the State Board in this proceeding. An amendment to D 1641, the Water Right Decision implementing the 1995 Water Quality Control Plan, was specifically excluded as an issue from the pending proceeding (See Hearing Transcript page 3. lines 7-9) and must be properly noticed to all interested parties. This pending matter was not, but was merely noticed as a hearing on the draft cease and desist orders and reconsideration of the approval of the WQRP. This is inconsistent with California Water Law and the State Board’s own regulations. Any change to D 1641 must follow the formal amendment process for a water rights permit. This includes a noticed, public hearing, with the opportunity to present protests, evidence, and cross examination, similar to the process followed when D 1641 was issued. See Wat. Code §§1394, 1611, 1703. The pending hearing did not include notice of or testimony regarding changing the existing salinity objectives. Such evidence was specifically excluded from the hearing proceedings. Thus, the proposed Order cannot stand.

In addition, the California Environmental Quality Act requires compliance on any action by the State Board that may have a "potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." CEQA Guidelines §15378. The application of CEQA to a proposal to amend the interior salinity objective is consistent with the prior requirements of the State Board staff. As the proposed Order indicates, DWR and USBR have submitted a long-term petition to the State Board requesting to change the effective date of the 0.7 EC objective for the interior southern Delta stations from April 1, 2005 to December 31, 2008. Proposed Order p.9. According to the proposed Order, "The State Board cannot continue processing the petition until DWR completes its California Environmental Quality Act compliance." The State Board is correct. The CEQA compliance is required to amend the salinity objective compliance date, but in its proposed Order, the State Board in fact amends the salinity objective without compliance with CEQA.

In addition, the long-term petition by DWR and USBR was noticed by the State Board and three protests were received from SDWA, CDWA and CCWD. Proposed Order p. 9. The proposed Order again violates due process and the State Board's regulations as it did not properly notice this hearing as a change to the effective date of the 0.7 EC objective nor provide the three objecting parties to the long-term petition; an opportunity during these proceedings to provide arguments or evidence regarding changing the salinity objective.

Very truly yours,



DEEANNE M. GILLICK
Attorney at Law

DMG:dmg

cc: Dr. Mel Lytle
Thomas J. Shephard
Delta Salinity Draft CDO and WQRP Hearing Service List