

**COMMENTS BY THE
CALIFORNIA DEPARTMENT OF WATER RESOURCES
ON THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
DRAFT ORDER ADOPTING CEASE AND DESIST ORDER AND
DENYING PETITIONS FOR RECONSIDERATION
January 10, 2006**

The Department of Water Resources opposes adoption by the State Water Resources Control Board (State Water Board) the proposed Draft Cease and Desist Order (CDO) issued on December 30, 2005. The State Water Board's issuance of the proposed CDO against DWR would be an abuse of discretion and not in accordance with law because the State Board fails to analyze the whole of the Department's water right permit condition and creates new permit requirements outside of Decision 1641 when finding there is a threatened violation of DWR's permit and that DWR and U.S. Bureau of Reclamation are jointly and severally responsible for meeting the southern Delta water quality objectives.

Water Code Section 1831 applies to the violation or the threatened violation of a permit *term or condition*. The permit term or condition at issue is *Condition 6* in D-1641 (Revised Decision 1641, page 159, March 2000). Condition 6 has two requirements: (1) that the D-1641 Table 2 objectives be met; and (2), if they are not met, DWR is allowed to provide a satisfactory explanation for the exceedance before enforcement action will be taken. "Exceedance" is used here to refer to non-compliance with the objective. There are really *two* compliance issues involved and they have been confused. There is compliance with the salinity *objective*; and compliance with the *condition*. Only the latter can be the subject of a CDO under Section 1831.

Below are DWR's general comments and specific comments on the draft CDO, followed by policy issues the State Water Board should consider in this matter.

I. DWR'S GENERAL COMMENTS OPPOSING THE DRAFT CDO

1. THE WHOLE CONDITION MUST BE CONSIDERED

Permit Condition 6 must be read in its entirety. It has two parts. To violate *Condition 6* (not the water quality *objective*), there must be alleged both (1) an exceedance of the standard and (2) a failure to adequately explain.

The CDO, however, only alleges and concerns itself with the exceedance of the objective, i.e., only with the first element of the condition. The failure to allege non-compliance with the second part two, i.e., the failure

to provide an adequate explanation, therefore fails to constitute the allegation of a violation (or threatened violation) of a permit term or condition. The CDO is therefore not authorized under Section 8361.

2. SWRCB HAS A DUTY TO CONSIDER DWR'S EXPLANATION BEFORE TAKING ENFORCEMENT ACTION

Even if the view is taken that non-compliance with the objective were sufficient by itself to establish a violation of the whole condition, the SWRCB has a duty—set forth in Condition 6—to consider DWR's explanation for the exceedance before it takes enforcement action. In other words, even if the parts of Condition 6 are to be read separately, the Board has assumed a duty, and provided DWR with a right, to justify the exceedance. The taking of the C&D action violated this duty, deprived DWR of a substantial right under its permit, and is unlawful.

The taking of C&D action for a threatened violation is, like most enforcement options, not mandatory but discretionary. The fact that the SWRCB was given discretionary authority in 2002 to issue CDO's for threatened as well as actual violations of permit terms and conditions does not affect the fact that it bound its discretion in 1999 as to enforcement options in Condition 6 of D-1641. The policy of vigorous enforcement of permit terms and conditions set forth in Section 1825 does not specify the use of CDO enforcement; and in fact, it is the SWRCB's own violation of Condition 6 that violates the Section 1825 policy.

3. THE CDO IMPROPERLY ENFORCES RESPONSIBILITY FOR WATER QUALITY DEGRADATION FOR SALINITY AGAINST DWR

The SWRCB explicitly indicated in Condition 6 that enforcement action would not be taken if DWR were able to explain that achieving the objective were beyond its control. That has been and continues to be the case. DWR neither causes nor has the power to control or correct, through the exercise of its water rights, the exceedance of the Brandt Bridge salinity objective. There is therefore no regulatory nor enforcement nexus between the alleged violation and DWR's water rights.

The SWRCB's assertion that DWR could purchase water or take some other action wholly unrelated to the exercise of its water rights is fatuous. It is as if the SWRCB had tried to place the responsibility for maintenance of a Delta objective on a permittee on the Russian River. Yes, that permittee could buy water, too, to try to meet the objective. But there is no nexus between the regulatory requirement and the entitlement conferred. The requirement would be arbitrary and capricious—as it is here. Such a requirement is well beyond the discretion and flexibility the Racanelli

decision suggested for the Board to fashion water quality responsibility for the Delta through its water rights processes.

It is precisely the opportunity to explain and show no control that makes Condition 6 legal. But the CDO abridges that opportunity to be heard. The CDO is unauthorized under the terms of the Board's own order, a violation of Condition 6 of D-1641, unlawful, and a violation of DWR's right to due process of law.

4. THE CDO FAILS TO ADEQUATELY ALLEGE OR SUBSTANTIATE A THREATENED EXCEEDANCE OF THE BRANDT BRIDGE STANDARD

This problem is difficult to formulate because cease and desist authority for *threatened* violations of a term or condition doesn't make a great deal of sense. What does a cease and desist even mean in the context of a future violation? A present violation can be "ceased" and "desisted in" by complying with the permit term or condition. But what is the activity to be desisted in? The act of "threatening"? What constitutes such an act?

It seems that the remedy should (and must) be interpreted to refer to a *course of conduct* that is threatened to be continued and that will lead to violation. But if so, what is that course of conduct involved in this case? Past hydrologic conditions? Letters indicating that meeting 0.7 EC may be beyond DWR's and USBR's control? At a minimum, it would seem logical that a "threatening" course of conduct must be alleged and supported by evidence. The future violation must be shown to proximately result from that course of conduct. The burden should be and is on the SWRCB as the enforcing agency to clearly articulate and prove up what that course of action is.

Has it? This problem circles back to DWR's lack of control over the objective. What course of conduct could be alleged on the part of DWR that threatens an exceedance when DWR has no power to effect compliance?

5. CDO VIOLATES DWR'S WATER RIGHT PERMIT

Condition 6 of D1641 (page 159) sets up conditions for DWR that are severable from USBR who has similar terms. Each permittee is given the opportunity to explain its ability to control salinity at these locations if the numeric standards are exceeded. The Conclusions and Condition 1 of the draft joint CDO attempts to make compliance with this term a joint responsibility and require DWR to make up for conditions caused by others or the lack of performance by USBR. This is a substantial change in DWR's water rights without due process.

Condition 6 of D-1641 states that enforcement action will only be considered after an exceedence and the permittee is given an opportunity to demonstrate whether the exceedence was outside the control of the permittee. A draft CDO is an enforcement action that is not following this due process set out in the water right permit. DWR presented extensive evidence that it has no ability to control salinity in the southern Delta. The SWP has no facilities on the San Joaquin that affect flow or salinity and modeling with exports cut to zero did not show improvement in water quality and sometimes made it worse.

Term 4 of the C&D appears to require the SWP to mitigate for the effects of others. This is not appropriate and not in the public interest and is arbitrary. The CDO inappropriately assumes that DWR can control the actions of the USBR at New Melones. DWR does not coordinate operations with USBR on this local project that does not provide water to the CVP export service area. DWR does not have joint responsibility with USBR for San Joaquin River inflow water quality and cannot control USBR operation.

II. DWR'S SPECIFIC COMMENTS OPPOSING THE CONCLUSIONS IN THE DRAFT ORDER

The State Water Board draft order misrepresents DWR's evidence and arguments presented at the hearing on the cease and desist order, as discussed below.

A. Misinterpretation of DWR Evidence.

Page 18 of Draft Order makes incorrect statements regarding DWR's evidence provided at the CDO hearing. The Board appeared to misinterpret DWR's evidence. Below are the Draft Order incorrect statements followed by DWR's explanation of the evidence.

- "DWR did not, however, provide evidence regarding the effects of CVP operations on meeting the interior southern Delta EC objectives"

Evidence of the effects of CVP operations were provided in DWR Testimony and Exhibits (DWR 20). DWR 20 pp 15-17 show the effects of both CVP and SWP operations on water quality. The fingerprinting plots show that over a wide variety of Sacramento Flows, San Joaquin Flows, and export levels, the predominate source of water at the three locations is the San Joaquin River. Even with the temporary barriers in place, there is a large number of periods where the source of water at the three locations is only the San Joaquin River and in Delta returns indicating that water quality at that location is controlled by the USBR who controls water quality and water flow in the San Joaquin

River. DWR 20 also shows the local impact of in Delta returns on water quality (DWR 20 pp 4-6). This demonstrated the approximate amount that water quality would have to be improved at Vernalis to meet water quality at the other stations. The plots were designed to show the importance of the SJR at those locations.

CVP exports were not modified in the simulations; however, it is well known (and I believe mentioned in Paul Marshal's exhibit) that if CVP and SWP exports were eliminated the natural flows in old River and Middle River and Grant line would be towards the ocean. The flow would be San Joaquin flows and in Delta returns. San Joaquin flows are controlled by the USBR.

- “[DWR] did not fully explain what impacts its operations have when San Joaquin River flows are below 1000 cfs or the temporary barriers are installed.”

The Graphs shown in DWR 20 show the impacts over a wide range of flow and export rates, including below 1000 cfs which would occur during dry conditions on the San Joaquin River.

- “DWR did not provide estimates regarding water costs to meet the objectives.”

For the vast majority if not all of the cases, it would be impossible for DWR to meet the objectives regardless of how it modified SWP exports or how much water it released into the Sacramento River. DWR 20 was designed to show, by using a long historical period, that DWR cannot control the water quality at all three locations with any action within its control.

- “DWR has some control over operations by USBR, particularly when USBR wishes to use JPOD.”

DWR 20 demonstrated that eliminating SWP exports, regardless of who the water was pumped for, had very little effect on water quality standards at the three locations. JPOD was indirectly addressed by the reduction and total elimination of SWP exports shown in DWR 20 pp 8-11. JPOD occurred in 1998 and in 2000 when temporary barriers were not in place. This period was covered in the simulations of reduced SWP exports. The results of reduced exports were shown to have an insignificant effect on south Delta water quality. Regardless who the water is pumped for at the State facilities the simulations where SWP exports are eliminated demonstrate a large decrease in SWP exports, approximately 8,000 cfs at times, and this reduction in pumping had very little water quality effect on the South Delta Stations. (The only station showing some affect was Old River at Tracy).

B. Mischaracterization of DWR Arguments.

On pages 17-20, the Draft Order the SWRCB mischaracterizes DWR's arguments, claiming that DWR is "attacking the requirement in its permits that it meet the salinity objectives at the interior southern Delta compliance stations." DWR was not at the hearing to change its water right permit conditions, but was defending itself from an inappropriate interpretation by the SWRCB prosecution team of this permit condition (DWR 18, p. 1-5, Recorded Transcript Nov. 17, p. 152-153, 154;161; 162; 226.). Below are some clarifications of the incorrect interpretations the Draft Order makes of DWR's arguments:

- "DWR is in effect arguing that the SWB cannot initiate an enforcement action until SWR and USBR submit a report to the Executive Director. Under this reasoning, if they routinely violate the requirements to meet the objectives at the three stations and never file a report, the State Board can never take enforcement action against them."

DWR has asked the State Board to apply the entire permit condition when analyzing if enforcement action is appropriate (see above references). If an exceedance occurs and DWR has not filed a report, the State Board can begin enforcement proceedings to require an explanation of the exceedance and issue enforcement actions as appropriate.

- "DWR's arguments generally are more relevant to a consideration of whether the State Board should amend DWR's permits to relieve it of the responsibility for meeting the objectives or reduce its responsibility, or to an argument that the water quality objectives themselves are unnecessarily protective of southern Delta agriculture and should be amended."

DWR's arguments and evidence were presented to show that a future exceedance may be caused by actions that are beyond the control of DWR, as the permittee. DWR's evidence was presented to follow the process provided by its permit condition for implementing the south delta objectives and not to argue that changes are necessary in the permit condition.

- "DWR did not, however, provide any evidence regarding the effects of CVP operations on meeting the interior southern Delta EC objectives. . ."

DWR did not believe it was appropriate to put evidence on regarding the CVP since the USBR was a party to the hearing. The SWRCB issued separate draft CDOs to the DWR and USBR and the notice on the hearing separated the issues as to each permittee. Minutes before the CDO hearing began, the USBR and SWRCB prosecution team entered into a draft settlement. The USBR did not enter evidence into the record.

Toward the end of hearing, the USBR and prosecution team announced there would be no settlement. It is disingenuous of the SWRCB to at the end of the day expect DWR to provide evidence for USBR.

- "While DWR may not have complete control over compliance with the interior southern Delta salinity objectives, DWR and USBR are jointly and severally responsible for meeting the objective" (citing D-1641, p 159 and 163).

D-1641 does not state that DWR and USBR are joint and severally liable for the southern delta objectives. In fact, the process provided by the condition implementing the southern delta objectives allows each permittee (USBR and DWR separately) to show why actions affecting salinity are not within the permittee's control and therefore no enforcement should be taken. This condition can not be interpreted to require joint and several liability for DWR and USBR if each agency has an opportunity to show why it is not responsible for conditions causing increased salinity.

- "DWR did not refute that the permanent barriers are the only alternative currently under consideration for meeting DWR's and USBR's permit obligation."

DWR explained that the permanent barriers are being proposed to help address south delta water quality needs. DWR also explained it has no ability to control conditions in the south delta through its water right permits, therefore it is taken no other actions in the south delta to control salinity. DWR is helping to decrease saline drainage in the SJR, but this is also unrelated to its SWP operations. (DWR-18)

III. POLICY CONSIDERATIONS

DWR believes the State Water Board must consider issuance of the draft CDO in light of the unprecedented policy directions being taken by such action. The SWRCB has never before taken enforcement action against DWR. DWR does not expect nor has it ever gotten unfair or special treatment from the SWRCB as a water right permittee under the SWRCB's water rights jurisdiction. What DWR does expect—and what the people of the State deserve—is that DWR, as a sister agency with considerable public interest authority and responsibility of its own, will be accorded the appropriate respect and deference in areas where the Board has lawful discretion to take or refrain from taking action, or where matters of expertise or credibility are concerned. And the SWRCB is entitled and may expect precisely the same from DWR.

DWR is not just another water right holder. DWR is the State' chief water policy

agency, the State's chief water planner, and the chief water investigation and technical and professional water expert. DWR operates a project that has been approved by the people of the state. DWR shares coequal authority with the SWRCB for enforcing the most fundamental policy governing water in the state, i.e., the reasonable, beneficial, non-wasteful use of water under Water Code section 275. DWR has special, statutorily conferred interest and standing in all Board proceedings (Water Code section 184).

The Board issuance of the draft CDO would set poor precedent because the conclusion for finding the "threatened violation" are unsupported given that:

- No violation of 0.7 EC last year and likely natural conditions this year will achieve the objectives.
- DWR is taking all diligent steps to improve water quality in the South Delta consistent with the CALFED ROD and subsequent CALFED actions. The Draft CDO does not recognize this. The signal being sent with the CDO is the SWRCB does not support the CALFED Process.
- SWRCB' premature enforcement action against DWR makes DWR's efforts to improve conditions in the Southern Delta appear "hollow" and threatens to undermine the confidence needed to make DWR's efforts to improve water quality a success.
- The CDO does nothing to improve water quality and creates conflicts that will make solutions much more difficult or impossible.
- The CDO sets up a likely State/Federal conflict over issues that have not happened and may never happen.
- At a time when the Governor is moving forward with a water initiative to address this concern and others, we don't need the SWRCB and DWR fighting over something that has not happened

V. WATER QUALITY RESPONSE PLAN

In addition to the above comments on the draft CDO, DWR believes that the order regarding the approval of the Water Quality Response Plan (WQRP) appears to disallow water transfers by DWR at the State Water Project if San Joaquin River water quality is not maintained by others. The export of transferred water at the SWP does not adversely affect water quality in the Southern Delta. The times when this might occur are in the summer of dry years when allowing a robust water transfer market that does not injure others is critical to California. DWR believes the Board should not limit the approval of the Joint Point of Diversion to only stage 1 of JPOD.

V. CONCLUSION

For the reasons above, DWR the State Water Board should not approve the proposed Draft Order on the CDO. DWR will provide further comments at the State Water Board meeting on Friday, January 13, 2006 and respond to any questions the State Water Board may have regarding these written comments.

Sincerely,

A handwritten signature in black ink that reads "Cathy L. Crothers". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Cathy L. Crothers
Senior Staff Counsel