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**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of:)
)
Order WR 2006-0006)
Application to Modify Part A of)
Cease and Desist Order against the)
United States Bureau of Reclamation and)
the California Department of Water Resources)

UNITED STATES BUREAU OF RECLAMATION’S CLOSING BRIEF

Pursuant to Cal. Wat. Code § 1832, the United States Bureau of Reclamation (Reclamation) and the California Department of Water Resources (DWR) have applied to the State Water Resources Control Board (Board) to modify Order WR 2006-0006 (the CDO). On June 4, 2009, NOAA Fisheries issued its final biological opinion (BO) finding construction of permanent operable gates in the south Delta would adversely modify critical habitat for endangered salmon. In addition, the Board is currently undertaking a review of the southern Delta salinity (agricultural) objectives. The Board’s review could result in new

southern Delta salinity objectives being adopted, and/or a new plan of implementation for those objectives being adopted by the Board as early as 2012.

Reclamation and DWR make this request to the Board under Cal. Wat. Code § 1832 which states, in relevant part, that, “The board may, after notice and opportunity for hearing, upon its own motion or upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part any cease and desist order issued pursuant to this chapter.” The Board has broad discretion under this provision to change a CDO, including time schedules. There are no factors for the Board to consider before it exercises this authority, it simply has the discretion to make such a modification.¹

On June 5, 2009, the Board issued a Notice of Public Hearing, noticing Reclamation and DWR’s application and setting a hearing date for June 25, 2009. The Board held a hearing on June 25, 2009, which was continued on June 29 and June 30. In its Notice, the Board set forth the following two key issues for the hearing:

1. What modifications, if any, should the State Water Board make to the compliance schedule set forth in Part A of Order WR 2006-0006, and how should any modifications be structured to take into account any potential changes to the southern Delta salinity objectives or the program of implementation that may occur as a result of the State Water Board’s current review of the Bay-Delta Plan?
2. If the compliance schedule contained in Part A of Order WR 2006-0006 is modified, what interim protective measures, if any, should be imposed?

At the hearing, Board member Baggett requested parties to brief the following two issues:

- 1) whether the date should be extended for submitting a plan to the executive officer and division

¹ In Order WR 2005-0006-EXEC, the Executive Director analyzed a petition under Cal. Wat. Code § 1832 using the same factors for reconsideration under Cal. Wat. Code § 1122. However, in that case, the petitioners requested reconsideration under § 1122 as an alternative to a modification under § 1832, and the petition was filed within 30 days of the original order, well within the timeframe to seek reconsideration of the original order. Here, we are several years away from the issuance of WR-2006-0006, or the CDO, and neither Reclamation nor DWR are requesting a reconsideration of WR-2006-0006. Therefore, it would not make sense in this case to consider this application the same as a motion for reconsideration.

chief to comply with the cease and desist order; and 2) if extended, what alternative measures or alternatives that any of the parties would like to see considered. (Hearing Tr., Tuesday, June 30, 2009, p. 244).

Reclamation did timely submit a plan in 2006 pursuant to the CDO, and consistent with D-1641. However, the NOAA Fisheries final BO now makes clear that permanent operable barriers are infeasible for the foreseeable future. The question now is: should the deadline in the CDO be extended to allow Reclamation and DWR more time to submit an amended plan to the executive officer and division chief? Given the findings in the NOAA BO that permanent operable barriers will adversely modify critical habitat for endangered salmon, together with the Board's current review of the southern Delta salinity objectives, it only makes sense to extend the time schedule in the CDO and allow Reclamation and DWR to file an amended plan. The time schedule should be extended until the Board's review of the objectives and/or the plan of implementation for the objectives is complete.

It makes sense to extend the date in Schedule A.2 of the CDO because the Board is undertaking a review of the south Delta salinity objectives, and, in the meantime, Reclamation, DWR, and the South Delta Water Agency (SDWA) continue to work together often and amicably to modify, adjust and improve the temporary barrier program. (See testimony of Paul Fujitani, Hearing DVD, June 25, 2009, Disc 1, Ch. 9; and of Mark Holderman, Hearing DVD, June 25, 2009, Disc 1, Chs. 12-14).

With respect to interim measures, Reclamation submits that the best and most reasonable interim alternative to be implemented by Reclamation and DWR is continuation of the temporary barrier program. The temporary barrier program is a weekly ongoing, cooperative, adaptive program that keeps staff of DWR, Reclamation and SDWA in touch with respect to conditions in

the southern Delta and provides a mechanism for the operators of the Central Valley Project and the State Project (the Projects) to do what they can to improve water level and water quality conditions for South Delta. Suffice it to say, today's temporary barrier program has improved since the adoption of D-1641 through these constant interactions, significantly improving the benefits of the temporary barriers on salinity concentrations. However, the Board can and should consider encouraging interim measures involving its other implementation alternatives, as set forth in the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the 2006 Plan) (See the 2006 Plan, p. 28).

Any interim measure ordered by the Board involving a flow requirement or dilution below Vernalis at this stage is likely wrought with conflict and controversy. Not only has the Board found in D-1641 that such a measure may result in an unreasonable use of water, (D-1641, p. 10), the impacts of such a measure, including the impacts to other water quality objectives and to water supply, have not been studied by the Board. (See testimony of Paul Fujitani, Hearing DVD, June 25, 2009, Disc 2, Chs. 15-16). Testimony by Paul Fujitani for Reclamation made clear that Reclamation consistently meets its dilution requirement at Vernalis and is actively taking measures to help reduce salt loading in the lower San Joaquin (for example, Reclamation has recently entered into an agreement with the Central Valley Regional Water Quality Board to take actions to reduce salt loading of the San Joaquin River) (written testimony of Paul Fujitani, BOR-01, p. 2). Reclamation is participating in solutions to the salinity issues in the south Delta. However, converting the south Delta salinity objectives into a dilution flow requirement is not supported by the record for D-1641, the CDO, or this hearing.

At the hearing, there was much testimony regarding a "toolbox," claiming that Reclamation and DWR have to do whatever it takes, to use any tool in the "toolbox," to meet

southern Delta salinity objectives. In addition, other parties assert that Reclamation and DWR are required to use their “toolbox” to meet southern Delta salinity objectives even when exceedances are not caused by the Projects. If these parties are correct, and the Board interprets D-1641 to impose liability on Reclamation and DWR for southern Delta salinity (agricultural) objectives even when exceedances are caused by others, then the terms of D-1641 are either an improper and discriminatory regulatory condition aimed specifically and only at governmental entities,² or they are terms that represent a claim of Board authority for which every water right holder in the State of California should be concerned: the ability to regulate water away from, or exact other actions from, a water right holder for water quality conditions that have no connection to the exercise of the water right.

At the hearing, Mr. Bill Jennings testified that Cal. Wat. Code 13360 prevented the Board from prescribing to Reclamation and DWR precisely how to meet the southern Delta salinity objectives. In other words, the Board should not specifically require dilution flows, but make clear that dilution flows are one option, a tool in the “toolbox,” for Reclamation and DWR to meet the objectives. Section 13360 states that, “No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.” This section prevents the Board from forcing certain technologies on dischargers. It should not be used as a round-about way to require flow from a

² Reclamation is unaware of an instance where the Board has required a private party, as a condition of a water right, to mitigate for pollution caused by others. It is worth noting that Congress, under the federal Clean Water Act has waived sovereign immunity and subjected federal facilities to state water quality requirements only so far as those requirements are the same manner and to the same extent as any nongovernmental agency would be subject to those requirements. 33 U.S.C. § 1323(a). At the hearing, Mr. Bill Jennings questioned the Board’s wisdom of “targeting” or “picking” on only the Projects. (Hearing Tr., June 30, 2009, p. 41).

water right holder. Flow requirements are not simply a design or type of construction-like compliance issue. Water quality flow requirements re-appropriate water from other beneficial uses to which the Board has previously appropriated water. Only the Board can allocate waters of the State.³ Permittees should not be expected, under a “toolbox” theory, to make water allocation decisions on behalf of the Board. Such re-allocations require the Board to determine whether a flow requirement is a reasonable use of water under the California Constitution (Cal. Const., art. X, § 2), and to analyze the environmental and water supply impacts of flow requirements. Under D-1641, the Board analyzed the environmental and water supply impacts of every other flow requirement imposed on Reclamation or DWR. However, it has performed no such analysis with respect to the southern Delta salinity objectives being implemented through flow requirements.

In any event, the temporary barrier program continues to be modified and improved through the cooperation of Reclamation, SDWA, and DWR. During this time that the Board is undertaking a review of the south Delta salinity (agricultural) objectives, including the plan of implementation, it only makes sense to allow Reclamation and DWR to submit an amended plan when the Board’s review is complete. Until then, Reclamation and DWR should continue the temporary barrier program, acknowledging that the effectiveness of the temporary barrier program has improved, and that exceedances will occur that are outside the control of the Projects.

³ “The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources.” United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 130 (Cal. App. 1st Dist. 1986).

Respectfully submitted this 11th day of August, 2009.



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