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Secretary for  
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# State Water Resources Control Board


## Executive Office

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Arnold Schwarzenegger  
Governor

**TO:** Lester Snow, Director  
Department of Water Resources

**FROM:** Celeste Cantú  
Executive Director  
**EXECUTIVE OFFICE** 

**DATE:** OCT 13 2006

**SUBJECT:** DELTA SALINITY CEASE AND DESIST ORDER IN STATE WATER BOARD  
ORDER WR 2006-0006

I am responding to concerns raised by your staff regarding the State Water Board's adoption of a cease and desist order in Order WR 2006-0006. Apparently the Board and the Department of Water Resources (DWR) have not had a common understanding of the order.<sup>1</sup>

I wish to assure you that in adopting Order WR 2006-0006, the State Water Board did not change the water right conditions in State Water Board Decision 1641 (D-1641) implementing the southern Delta agricultural salinity objectives. I also wish to assure you that the process described in D-1641, condition 6, on page 159 is unchanged.

Further, on behalf of the State Water Board, I am providing the following assurances with regard to the water right conditions contained in D-1641:

- As contemplated in D-1641, the Board's Executive Director will not recommend that the State Water Board, and the Executive Director anticipates that the State Water Board would not, take an enforcement action (the term "enforcement action" as used herein includes an action to enforce Order WR 2006-0006) against the DWR for an actual exceedance or a potential exceedance of the southern Delta salinity objectives that is or would be caused by actions beyond DWR's reasonable control.
- Consistent with D-1641, the State Water Board recognizes that exceedances or potential exceedances of the southern Delta salinity objectives may be caused by actions that are beyond DWR's reasonable control. Therefore, as provided in condition 6 on page 159 in D-1641, DWR can demonstrate that an exceedance or potential exceedance of the

<sup>1</sup> Given the pending litigation involving Order WR 2006-0006, and the threat of similar litigation in the future, I must note that nothing in this letter shall constitute an admission or waiver of any arguments the State Water Board may make in defense of Order WR 2006-0006.

southern Delta salinity objective is or would be caused by actions that are beyond DWR's reasonable control by submitting a report to the Board's Executive Director. The Executive Director will evaluate the report and make a recommendation to the State Water Board as described in D-1641.

- If the Executive Director should recommend an enforcement action against DWR because the Executive Director believes DWR caused an exceedance or potential exceedance, the Executive Director will recommend that any remedy be based on the relative responsibility of the DWR actions that the Executive Director believes caused the exceedance or potential exceedance.
- The foregoing does not preclude the Executive Director, however, from recommending an enforcement action to ensure that DWR reduces threat of its causing a violation of terms and conditions of its water rights permits regarding southern Delta salinity objectives due to its failure to implement reasonable measures within its control that will help avoid the violation.
- In Order WR 2006-0006, the State Water Board took two actions<sup>2</sup>: it adopted the cease and desist order, and it also granted reconsideration of the approval of the Water Quality Response Plan for the use by DWR and the U.S. Bureau of Reclamation (USBR) of each other's points of diversion in the southern Delta. The portion of the order granting reconsideration of the approval of the Water Quality Response Plan reinforces that, consistent with D-1641, DWR and USBR may only use each other's points of diversion if they are meeting the terms and conditions of their water rights, including those terms and conditions related to the southern Delta salinity objectives. Therefore, DWR and USBR are authorized to use each other's points of diversion, provided that DWR and USBR operate pursuant to the water right conditions in their permits and license, including the applicable response plan(s) required by D-1641.
- I note that the USBR is subject to requirements under other conditions of D-1641 that are similar to the permit terms and conditions imposed on DWR. The State Water Board and the Executive Director will observe the same principles with respect to USBR as I have described above if the Executive Director has occasion to address an exceedance or potential exceedance of the southern Delta objectives.

The State Water Board's regulation of water rights and water quality to resolve salinity issues in the Delta is, by law and in practical effect, a work in progress, with many opportunities for the DWR to have input and to help the Board resolve these important issues. The State Water Board has several upcoming proceedings starting this fall that will address issues relating to southern Delta salinity. These proceedings are separate from the cease and desist order, but they have the potential to result in future amendments to the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, (Bay-Delta Plan), further changes in water rights, or changes in both the Bay-Delta Plan and water rights.

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<sup>2</sup> The two actions are based on separate authorities and differ in their procedural stages.

OCT 13 2006

To the extent that the DWR can produce evidence and analysis that will inform the State Water Board as to the causes, remedies, and dynamics of elevated salinity in the southern Delta, it may be possible to resolve the current quandary regarding salinity issues. The cease and desist order issued pursuant to Order WR 2006-0006 is only a limited-term order that provides additional time to complete certain beneficial actions. The proceedings that can help the State move forward include the following matters:

- The State Water Board will conduct a public workshop to discuss the need for more information about southern Delta salinity issues. The State Water Board anticipates that the workshop will be an opportunity to obtain additional information regarding the southern Delta salinity objectives from all stakeholders. At the salinity workshop, the State Water Board will invite DWR to present its current information on southern Delta salinity objectives. The State Water Board will also ask DWR to commit to participating in studies to determine sources of salinity in the southern Delta and other studies that the State Water Board may request to obtain information needed to consider possible changes in the southern Delta salinity objectives or implementation of the objectives.

The State Water Board intends to use the salinity workshop as a starting point for the State Water Board to develop and manage a thorough study or studies of salinity in the southern Delta. At the salinity workshop, the State Water Board will ask DWR and other participants to recommend the scope of work for studies they believe are needed regarding salinity in the southern Delta. As part of this effort, the State Water Board will request that DWR and other stakeholders make commitments of resources for the preparation of any required environmental documentation for any proposed action by the State Water Board, and that DWR and other interested participants contribute resources to the study or studies. The State Water Board will commit financial and staff resources to conducting or overseeing studies arising from the workshop as well.

The State Water Board will request that participants who recommend studies provide a reasonably detailed study plan for consideration, including completion dates for studies and other actions. The study plans, completion dates, and potential actions would be discussed at the workshop. The State Water Board expects that the study and other efforts will lead to a water right and/or water quality proceeding. This process may require two or more years to complete.<sup>3</sup>

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<sup>3</sup> The State Water Board will consider changing the agricultural salinity objectives for the southern Delta or the program of implementation for these objectives upon the submission of adequate information, including data and modeling studies, to support a change.

OCT 13 2006

- When DWR completes its application for water quality certification of the South Delta Improvement Project under Clean Water Act section 401 in connection with an application by DWR for a permit from the U.S. Army Corps of Engineers under Clean Water Act section 404, and timely adopts a final EIR, the State Water Board will act as expeditiously as possible on the application, but in no event later than 60 days after the application is completed.
- The State Water Board will consider at a Board meeting whether to amend D-1641 to comply with the requirement in the writ of mandate in *Central Delta Water Agency, et al. v. SWRCB, et al.* (San Francisco County Superior Court, Case No. 311502.) regarding implementation of the southern Delta salinity 0.7 EC objectives.
- This fall, the State Water Board will issue a hearing notice and will release a draft of a revised Bay-Delta Plan for review. The State Water Board will hold a hearing on whether to adopt the draft. The draft will be based on all information received by the State Water Board related to the water quality objectives, including the information obtained at the State Water Board workshops that were conducted in 2004-2005 pursuant to State Water Board Resolution No. 2004-0062, dated September 30, 2004, adopting the Staff Report on the Periodic Review of the 1995 Bay-Delta Plan. Commencing this proceeding will satisfy the requirement in the writ of mandate in *Central Delta Water Agency, et al. v. SWRCB, et al.* (San Francisco County Superior Court, Case No. 311502.) regarding implementation of the April-May (Vernalis) pulse flow objectives in the 1995 Bay-Delta Plan and implementation of the southern Delta salinity 0.7 EC objectives.<sup>4</sup>

If desired, I am willing to provide assurance similar to the above to the USBR and to the other plaintiffs or petitioners in litigation that is currently on file in any court.

If you have any questions, I can be reached at (916) 341-5615.

BJLeidigh/rjdickerson  
August 24, 2006 / October 3, 2006  
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<sup>4</sup> The State Water Board must timely respond to the writs issued in the *State Water Resources Control Board Cases*.