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9 RANCH, INC.

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

12 In the matter of
13 WR 2008-0029-EXEC

14 **REQUEST FOR RECONSIDERATION**

15 The South Delta Water Agency and Lafayette Ranch, Inc., herein request the State Water
16 Resources Control Board reconsider its Order WR 2008-0029-EXEC ("Order"), and pray for the
17 relief set forth below. This request for reconsideration is based upon the following, including the
18 points and authorities and the attached declaration of Alex Hildebrand.

19 1. **The Name and Address of the Petitioner.**

20 The Petitioners (or "SDWA") are the South Delta Water Agency; its address is 4255
21 Pacific Avenue, Suite 2, Stockton, California 95207 and Lafayette Ranch, Inc., which may be
22 contacted at the same address.
23

24 2. **The Specific Board Action of Which Petitioner Request Reconsideration.**

25 Petitioners request the SWRCB's reconsideration of its ORDER WR 2008-0029-EXEC
26 which granted a Temporary Urgency Change Petition to the California Department of Water
27 Resources ("DWR") and the U.S. Bureau of Reclamation ("USBRR" or "Bureau") (sometimes
28

1 jointly "projects").

2 **3. The Date on Which the Order was Made by the Board.**
3 WR 2008-0029-EXEC was signed by Board member Arthur G. Baggett, Jr. on July 1,
4 2008.
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6 **4. The Reason the Action Was Inappropriate or Improper.**
7 Issuance of the Order was contrary to law because the Petitioners therein, DWR and
8 USBR did not exercise due diligence in seeking the changes; having known for approximately
9 seven months that the changes would be necessary, and yet took no action until the last possible
10 time, thus creating the conditions which purport to justify the urgent need. In addition, the Order
11 is not supported by substantial evidence in that numerous actions have been, and continue to be
12 available to DWR and USBR which, if undertaken, would enabled them to better water quality in
13 the southern Delta and/or meet the salinity standards. This would have allowed them to comply
14 with their permit terms and conditions, and thus allow JPOD operations without the need for the
15 Urgency Petition. Further, the actions herein alleged also constitute an abuse of discretion, and
16 that relevant information was available to the Board, but not reviewed or submitted due to the
17 expedited process which resulted in the Order.
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19 **5. The Specific Action Which SDWA Requests.**
20 SDWA requests that the SWRCB rescind WR 2008-0029-EXEC and affirm that JPOD
21 not be allowed unless the conditions set forth in D-1641 and WR 2006-0006 are met.
22

23 **6. A Statement That Copies of the Petition and Accompanying Materials Have**
24 **been Sent to All Interested Parties.**
25

26 The Urgency Petition contained no mailing list, and it is unknown if either DWR/USBR
27 or the SWRCB provided copies of it to any party other than SDWA. Notwithstanding this,
28

1 SDWA is providing this Petition to all those parties contained on the enclosed mailing list and
2 will request the SWRCB distribute it to its Bay-Delta contact list.

3 POINTS AND AUTHORITIES

4 I. STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION

5 An interested party may petition the State Board for reconsideration of a decision or order
6 based on the following grounds: (1) irregularity in the proceedings, or any ruling, or abuse of
7 discretion, by which the person was prevented from having a fair hearing; (2) the decision or
8 order is not supported by substantial evidence; (3) there is relevant evidence, which in exercise of
9 reasonable diligence, could not have been produced; and (4) error in law. Cal. Code Regs., Title
10 23, § 768.
11

12 SDWA asserts that the SWRCB Order granting the DWR/USBR Urgency Change
13 Petition constitutes an error in law, and is not supported by substantial evidence. Further, the
14 actions herein alleged also constitute an abuse of discretion, and that relevant information was
15 available to the Board, but not reviewed or submitted due to the expedited process which resulted
16 in the Order.
17

18 II. STATEMENT OF FACTS

19 In March of 2000, the SWRCB adopted Revised Water Rights Decision 1641 (“D-1641”)
20 wherein, among other things, it implemented its 1995 Bay Delta Water Quality Control Plan. In
21 that Decision, the SWRCB granted the DWR and USBR the authority to use each other’s Delta
22 export facilities under certain conditions. This authority was described as Joint Points of
23 Diversion, or “JPOD.” JPOD authorization was conditioned by a number of limitations, one of
24 which precluded its use if the projects were not in compliance with all of their permit terms and
25 conditions. Some of those terms and conditions included responsibility for water quality
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1 objectives in the southern Delta. [For responsibility to meet the objectives see D-1641 at pages
2 159; for limitations of JPOD see D-1641 at pages 150 and 156.]

3 The southern Delta water quality objectives are for the protection of agricultural
4 beneficial uses and are set forth in Table 2 of D-1641 on page 182 (and the 1995 Plan). The
5 USBR is responsible for the objective or standard at Vernalis (compliance location designated as
6 “C-10”) and USBR and DWR are jointly responsible for the standards at San Joaquin River at
7 Brandt Bridge, Old River near Middle River, and Old River at Tracy Road (sic.) Bridge (C-6, C-
8 8, and P-12, respectively commonly referred to as the “interior salinity standards”).

9 In 2006, the interior salinity standards became fully effective¹ meaning that from April
10 through August, water quality in the southern Delta Channels was to be maintained on a 30 day
11 running average of 0.7 mmhos/cm EC.²

12 In 2005, DWR and USBR forecasted that the Bureau’s releases on the Stanislaus River
13 would meet the Vernalis standard, but that the interior salinity standards would be exceeded.
14 Rather than take any additional actions or measures to address the forecasted exceedances, DWR
15 and USBR petitioned the SWRCB for an urgency change, and concurrently filed a petition for
16 long term permit changes. DWR and USBR sought therein to escape the requirements that JPOD
17 could only occur when the interior salinity standards were being met. The projects asserted they
18 were not responsible for exceedances based on the language in D-1641 which states: “If
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24 ¹ D-1641 originally contained footnote [5] which allowed these standards to relax (or
25 never become fully implemented), but in the legal challenges to the Decision, the Appellate Court
26 disallowed this footnote as an unlawful change of a water quality standard.]

27 ² Although the standards have compliance locations at which quality is measured, the
28 SWRCB’s adoption of the 2006 Bay-Delta Water Quality Control Plan clarified its position that
although measuring locations are specified, the standard applies throughout the channels. See
2006 WQCP at page 10.]

1 Permittee exceeds the objectives . . . , the Permittee shall prepare a report for the Executive
2 Director. The Executive Director will evaluate the report and make a recommendation to the
3 SWRCB as to whether (sic) enforcement action is appropriate or the noncompliance is the result
4 of actions beyond the control of the Permittee.” (See D-1641 at pages 159 and 160). 2005
5 turned out to be a wet year and runoff/upstream releases on the San Joaquin River system
6 resulted in so much flow entering the Delta from that system that water quality standards were
7 fully met even without any actions being taken by the projects and JPOD proceed as desired.
8

9
10 However, the DWR and USBR statements in the urgency petition resulted in the Division
11 of Water Rights instituting a proceeding as to whether or not a cease and desist order should
12 issue due to the threat of violations of water quality/permit terms and conditions. An evidentiary
13 hearing was conducted on October 24, 25, November 7, 17, 18, and 21, 2005 and the SWRCB
14 adopted Cease and Desist Order WR 2006-0006 (“CDO”) on February 15, 2006. The CDO
15 hearing included both the issue of the threatened violations of the standards, and also the issue
16 (relating to the approval of a Water Quality Response Plan) of whether or not JPOD could occur
17 even if there were violations of DWR and USBR permit terms and conditions, especially the
18 interior salinity standards.
19

20 In the Cease and Desist order, the SWRCB stated:

21 “DWR and USBR are each fully responsible to meet the objectives in the interior
22 southern Delta . . .” (CDO at page 26.)
23

24 “Accordingly, D-1641 does not authorize JPOD operations when DWR and USBR are
25 not meeting the 0.7 EC objective during April through August.” (CDO at page 26.)
26

27 “This order does not relieve DWR and USBR of the requirements to meet the 0.7 EC
28 interior southern Delta objectives that apply at stations C-6, C-8, and P-12. . . .” (CDO at page

1 27.)
2
3 “Considering that the objectives were first adopted in the water quality control plan in
4 1978, and there is evidence that salinity is a factor in limiting crop yields for southern Delta
5 agriculture, the State Water Board will not extend the date for removing the threat on non-
6 compliance beyond July 1, 2009.” (CDO at page 27.)

7 “DWR shall serve copies of all reports, plans, and other communications required by the
8 above paragraphs of this order on (SDWA and others) . . . concurrently with their submittal to the
9 Executive Director and Division Chief.” (CDO at page 31.)

10 “DWR and USBR may conduct JPOD diversions if DWR and USBR are . . . in
11 compliance with all of the conditions of their water rights permits and licenses including . . . the
12 0.7 EC objective(s) (in the southern Delta).” (CDO at page 32.)

13 “It should be emphasized that DWR’s and USBR’s permit/license conditions do not
14 require construction of permanent barriers as the exclusive method of compliance. . . . [T]hey
15 should consider all potential means of compliance.” (CDO at page 23.)

16 In the CDO hearing it was discovered that USBR and DWR had violated the Brandt
17 Bridge and Old River at Tracy Blvd. Bridge standards in 2003 during a time when the standards
18 were 1.0 EC but had failed to report the violation. Inexplicably, during the CDO hearing, the
19 Division of Water Rights staff “prosecuting” the alleged threatened violations declined to
20 prosecute this actual permit violation and the SWRCB took no action on it, apparently deciding
21 that action on a threatened violation was more important than action on an actual violation.
22

23 In spring of 2007, SDWA, anticipating low flows into the southern Delta and probable
24 violations of the standards, asked DWR and USBR to take actions to prevent such violations.
25 DWR and USBR eventually notified SWRCB that it anticipated violations would occur, as per
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1 the CDO. USBR maintained that the hydrology prevented it from using any potential additional
2 supply, and argued that any such additional San Joaquin River flow would be a waste of water as
3 too much would be needed to affect compliance locations other than Vernalis. DWR maintained
4 that it had no facilities which would, and no ability to, affect southern Delta flows and quality.
5 Therefore, DWR and USBR concluded that meeting the interior Delta standards were beyond
6 their control.
7

8 In a May 22, 2007 memorandum, DWR notified the SWRCB that the Old River near
9 Tracy Road Bridge standard had been violated from April 30 through May 22, and was
10 continuing to be violated. In fact, the EC remained above the standard until it switched from 0.7
11 EC to 1.0 EC on September 1, 2007. USBR made a similar disclosure by way of letter dated
12 May 25, 2007. DWR's only references as to what could be done to address the violations was to
13 give an update on delayed review of SDIP (the permanent barrier program) by the fishery
14 agencies. In "discussing" what could be done to address the violations, USBR stated that
15 "Recirculation has not been determined to be feasible by Reclamation, and has known adverse
16 impacts to fish." Recirculation had already been done by USBR for a short period of time in the
17 summer of 2004.
18

19 Notwithstanding their positions stated above and without notifying the SWRCB, at the
20 instigation of SDWA, DWR agreed to change operations of the flap gates on the Old River near
21 Tracy barrier for the sole purpose of increasing the net flow of the channel and improving water
22 quality. In addition, DWR and USBR agreed to undertake a recirculation project to increase San
23 Joaquin River flow entering the Delta. The recirculation occurred from August 7 through
24 September 12, 2007.
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During the violations of the standards in 2007 (measured at Tracy Blvd. Bridge), DWR

1 and USBR operated JPOD in violation of their permit terms and conditions and the CDO. On
2 November 28, 2007, the Executive Director of the SWRCB sent a memo to DWR and a letter to
3 USBR. In those correspondence, she clarified that JPOD could not occur during times when the
4 standards were being violated. Ms. Rice stated:
5

6 [Y]ou indicate that you believe that the State Water Board
7 Decision 1641 (D-1641) authorizes DWR and USBR to utilize
8 JPOD when the interior southern Delta salinity objectives are being
9 exceeded if the exceedances are beyond the reasonable control of
10 DWR or USBR. You cite State Water Board Director Celeste
11 Cantu's letter of October 13, 2006, to support your conclusions.
12 However, as stated in Ms. Whitney's August 21, 2007 letter, D-
13 1641 and Order WR 2006-0006 only allow USBR and DWR to
14 conduct JPOD diversions if they are, at the time of the diversion, in
15 compliance with all of the conditions of their water right permits
16 and licenses, including meeting the salinity objectives at the
17 interior southern Delta stations. . . .

18 *Of course, DWR and USBR may petition the State Water
19 Board to change the permit and license requirements applicable to
20 their use of JPOD. If DWR or USBR are considering submitting
21 such a change petition, I suggest that they submit it as soon as
22 possible to assure that the matter can be considered prior to any
23 need for JPOD diversions next year.*

18 (Emphasis added.)

19 In the spring of 2008, SDWA again requested DWR and USBR undertake certain actions
20 to insure water quality standards in the southern Delta would meet, especially during the summer.
21 DWR agreed verbally to again operate the flap gates of the Old River barrier to increase net flow
22 in that channel to improve water quality. USBR at first did not respond to SDWA requests to
23 consider recirculation, but eventually met with representatives of SDWA and agreed to "look
24 into the possibilities." One of the purposes of the recirculation is to provide sufficient inflow
25 into the south Delta to maximize temporary barrier efficiency to control salinity. USBR
26 representatives seemed hopeful that recirculation would again go forward. SDWA encouraged
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1 USBR to implement recirculation as soon as possible in order to address anticipated water
2 quality problems resulting from insufficient inflow from the upstream side of the barriers. At
3 this time, USBR is assumed to be seeking recirculation.

4
5 On June 11, 2008, DWR notified the SWRCB that it anticipated violations of the interior
6 salinity standards. In violation of the CDO, the notice was not sent concurrently to SDWA and
7 the other interested parties. On June 16, DWR and USBR jointly petitioned for an urgency
8 change to its permits to allow JPOD when the interior standards were being violated. The
9 petition, sought to add “clarifying language” which was directly contrary to the language of D-
10 1641, the CDO, Ms. Whiney’s letter of August 27, 2007 and Ms. Rice’s letter of November 28,
11 2008. On June 1, 2008 SWRCB Board member Arthur Baggett granted the Urgency Petition
12 with certain conditions.
13

14 III. ARGUMENT

15 1. Petitioners Did Not Exercise due Diligence as Required by Water Code 16 Section 1435. 17

18 Urgency Petitions are governed under Water Code Sections 1435 et. seq. An “Urgency
19 Need” is defined under Section 1435 (c). The subsection precludes a determination of an
20 urgency need in certain circumstances by stating “. . . except that the Board shall not find a
21 petitioner’s need to be urgent if the board in its judgment concludes, if applicable that the
22 petitioner has not exercised due diligence either (1) in petitioning for a change pursuant to
23 provisions of this division other than this chapter, or (2) in pursuing that petition for change. The
24 Order makes no analysis of this issue even though SDWA comments to the Petition raised this
25 due diligence issue.
26
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28 Section 1435(c) requires that a petitioner has been diligent in seeking the proposed

1 permit changes under provisions of the division other than those which provide for an urgency
2 changes. This means of course that they have sought a more “normal” method of petitioning for
3 the changes, not the expedited method for urgency changes which have little or no public
4 participation. Those other methods are the various statutes under Division 2 of the Water Code
5 which includes Sections 1000 through 5976, inclusive. For purposes of this review, the relevant
6 methods by which one could have sought such changes other than through an urgency petition,
7 are by applying for a new or different permit, by requesting a temporary change to an existing
8 permit, or by requesting a permanent change to an existing permit. A temporary change would
9 seem to be the appropriate method in this case, and is governed by Sections 1725 et. seq.
10

11
12 Neither DWR or USBR made a petition to for a temporary change to their permits between
13 November 28, 2007 (the date of Ms. Rice’s letter) and the date the urgency petition was filed.³

14 “Due diligence” is defined as “the doing things in proper time” or “such diligence as a
15 reasonable person under the same circumstances would use.” (Merriam-Webster’s Dictionary of
16 Law) The term implies, if not requires that the party acts promptly in seeking something or
17 protecting something. It is the opposite of non-action.
18

19 The facts here are indisputable. As stated above, the issue of increased export rates under
20 JPOD during times when the interior salinity standards were being violated arose at the very
21 latest in 2007.⁴ In the summer of 2007, DWR and USBR cooperated in JPOD for approximately
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24 ³ The petition for a long term change is assumed to be on hold pending the SWRCB’s
25 review of the interior salinity standards.]

26 ⁴ The issue actually arose first in 2000 when D-1641 was adopted, again when the
27 standards were fully implemented in 2005, again when the CDO directly addressed the issue in
28 2006, and again in Ms. Whitney’s letter of August 2007. Of course if DWR and USBR had
exercised *any* diligence, the issue would have arisen *before* each of these events, not just
afterwards.

1 62 days (July through August) while the Tracy Blvd. Bridge standard was being violated. After a
2 number of communications between the parties, the Executive Director of the SWRCB wrote to
3 DWR and USBR in a letter dated November 28, 2007. After clarifying in the letter that JPOD
4 was not allowed when the standards were being violated the Executive Director stated:

5
6 *[Of course, DWR and USBR may petition the State Water Board*
7 *to change the permit and license requirements applicable to their*
8 *use of JPOD. If DWR or USBR are considering submitting such a*
9 *change petition, I suggest that they submit it as soon as possible to*
10 *assure that the matter can be considered prior to any need for*
11 *JPOD diversions next year.*

12 (Emphasis added)

13 Without doubt, the projects were warned that if they wished to change their permits to
14 allow JPOD during times when interior salinity standards were being violated, they should file
15 such a petition “as soon as possible” so that the issue could be addressed “prior to any need for
16 JPOD” which might occur in the summer of 2008. It is undisputable that the projects did not
17 attempt to file any such petition until June 16, 2008; nearly seven months after they were
18 cautioned to not wait until the last minute. Since DWR and USBR use JPOD each summer for
19 EWA water and/or other transfers, there is no doubt that they knew in 2007 that they would be
20 seeking JPOD in 2008. Similarly, the projects undertook no actions which would result in
21 anything but the Vernalis standards being met prior to the summer of 2008. Hence, there is no
22 basis on which to conclude the projects were diligent in seeking the requested permit changes.
23 To the contrary, the actions of the DWR and USBR are the exact opposite. Since one should not
24 assume DWR and USBR are ignorant of the law, the SWRCB’s position on this issue, or their
25 permit terms, the only reasonable conclusion is that the projects intentionally delayed taking
26 action to avoid the normal procedure for seeking temporary permit changes.
27

28 It cannot be argued that the current year’s low precipitation or the *Wanger* decision

1 somehow “snuck up” on the projects and precluded them from acting earlier. Since they
2 experienced this very same problem in 2007, took no actions to meet interior Delta salinity
3 standards, and seek to use JPOD each and every year, there were no conditions which “mislead”
4 them into thinking there would be no problem this year. The “emergency” the projects complain
5 of existed at the very latest as of November 28, 2007, when Ms. Rice notified them they had
6 violated their permits and should seek a changes well ahead of any JPOD need in 2008.
7
8 The Petitioners’ description of the emergency as well as the Order’s recounting of the 2008
9 hydrology and the Petition show that DWR and USBR knew for many months that they
10 wanted/desired JPOD during the summer of 2008, that it was likely that the salinity standards
11 would be violated, and that JPOD was not allowed under those conditions. The actions of DWR
12 and USBR indicate an intent to avoid the more detailed review process under change petitions
13 (Water Code Sections 1725 et. seq.). Further, DWR and USBR made no effort to file an
14 Urgency Petition under Sections 1435 et. seq. sufficiently prior to July 1 which would have
15 allowed the SWRCB to conduct a more detailed investigation of the proposal, and perhaps allow
16 interested parties to work out acceptable conditions or comment on the proposal.
17
18 Regardless, there can be no doubt that the Order must be revoked as the Petitioners did not
19 exercise due diligence in seeking the sought after changes to their permits.

20
21 **2. The Order Illegally Alters the Required Analysis Contained in Water Code**
22 **Section 1435.**
23

24 The Order itself contains an additional contradiction with law. It changes DWR and
25 USBR permit terms to allow JPOD when the salinity standards are being violated *if* the
26 Executive Director finds (1) no additional reasonable control measures exist that the SWP or
27 CVP could take *this summer or fall* in order to meet the objectives. . . .” (Emphasis added).
28

1 Hence, it allows the Petitioners to wait until the last minute (when they assert there is nothing
2 that can be done) and if nothing can be done at the last minute, they can proceed with JPOD.
3 The Order thus turns upside down the Board's obligation under Section 1435 to make sure the
4 petitioner exercised due diligence by *not* waiting until the last minute. Under the Order, if the
5 Executive Director finds there *are* actions to be taken to meet the standards, then there could
6 have been no basis for granting the Petition, i.e. the projects don't need the changes because they
7 can meet the standards and thus can operate JPOD. In an apparent attempt to "throw a bone" to
8 those dependant on the standards, the Board tossed a grenade. Its inconceivable the Executive
9 Director would make a ruling that contrary to the Order, the projects can meet the standards.
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12 The Order contains one more poison pill, when it limits the Executive Director's finding
13 to actions available this summer or fall which will "meet the objectives." This of course means
14 that any efforts which might improve water quality and protect those dependant on it *are not*
15 *required* unless the efforts will absolutely meet the standards. A curious approach by the
16 regulator of water quality in the Delta; improving water quality is not required unless it fully
17 meets the standard.
18

19 **3. Petitioners Failed to Appeal the Limitations on The Ability to use JPOD for**
20 **Over Eight Years.**
21

22 The subject terms and conditions to DWR and USBR permits were first adopted on
23 December 29, 1999, and revised in the final D-1641 dated March 15, 2000. Neither DWR or
24 USBR petitioned the courts to change the conditions on JPOD within the statutory time
25 limitations, although DWR participated in the long legal proceeding which ensued. The final
26 ruling on the actions challenging D-1641 was made in 2007.
27

28 The CDO was adopted February 15, 2006, and again, neither DWR or USBR sought any

1 judicial review of that order which again specified that JPOD could not occur when southern
2 Delta salinity standards were being violated. After DWR and USBR's illegal use of JPOD in
3 2007, neither party requested the SWRCB reconsider the Executive Director's "ruling" or
4 clarification in her letter of November 28, 2007.
5

6 Clearly, the time for challenging the permit conditions limiting JPOD have long past
7 given that they were adopted eight years ago, reaffirmed two years ago, and clarified seven
8 months ago. At some point the issue becomes final.
9

10 **IV. NOT SUPPORTED BY THE EVIDENCE**

11 **1. The Evidence Shows Petitioners are Able to Reasonably Comply with the** 12 **Existing Limitations on JPOD.**

13 Since April 2005, neither DWR or USBR has suggested, attempted or sought authority to
14 do any action which might improve water quality in the southern Delta. As per the attached
15 Declaration of Alex Hildebrand, water quality problems in the southern Delta result from a
16 combination of circumstances, but generally exist due to a lack of sufficient net flow through and
17 out of the local channels. Such net flow is affected by export rates, barrier operations, and inflow
18 from the San Joaquin River.
19

20 Export rates determine the direction of net flow in local channels, the amount of water
21 trapped by the tidal barriers, and how much San Joaquin River water enters the southern Delta
22 through the Head of Old River. Barrier operations determine the amount of water trapped behind
23 them and thus the ability to cause a net flow in either direction, and how much water enters the
24 southern Delta from the San Joaquin River. San Joaquin River flows determine the amount and
25 concentration of salts entering the southern Delta, how much water fills behind the barriers, and
26 whether there is a net downstream flow on the main stem or in the other channels. Any action
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1 which can alter or affect these three things can therefore affect water quality. (Declaration of
2 Alex Hildebrand 3:16-4:28.)

3 As discussed in Mr. Hildebrand's Declaration, a number of actions can be attempted and
4 coordinated which will improve water quality and determine what specifics actions will allow the
5 standards to be met. Additional San Joaquin River flow can dilute the salts entering the area, and
6 establish a net downstream flow at Brandt Bridge or in other channels. Additional flow can come
7 from recirculation, purchases, transfers or any number of sources. Barriers flap gates can be
8 manipulated to encourage net flows in any channel and to allow additional incoming tide to be
9 trapped. Temporary pumps can be installed on barriers to increase the supply behind the barriers
10 in order push flow in specific directions (and flush the channels). Barrier heights can be altered
11 to allow additional water to be trapped. All of these options have been discussed with DWR and
12 USBR in every year since and including 2005. In addition, all of these possibilities were
13 discussed during the hearings leading to the CDO, and are thus in the record before the Board.
14 (Declaration of Alex Hildebrand 3:24-4:28.)

15 Since April of 2005 (and of course before that time) DWR and USBR have not once
16 sought a method by which to increase San Joaquin River flows.⁵ They have never proposed or
17 investigated or inquired about purchasing water, transferring water or exchanging water.
18 (Declaration of Alex Hildebrand 6:4-10.)

19 Since April of 2005, DWR and USBR have never once sought to alter flap gate
20 operations⁶ to experiment as to how flows might be manipulated to improve quality. They have
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23 ⁵ Not including the recirculation test projects done at SDWA's request and which the
24 Bureau now asserts doesn't help water quality.

25
26
27 ⁶ Not including the 2007 flap gate changes done at the request of SDWA and which
28 DWR asserts are not methods to improve water quality.

1 never sought authority to install and operate temporary pumps, and have never sought authority
2 to change barrier heights even though the barrier permits periodically need to be renewed.

3 What DWR and USBR have done is succinctly outlined in their June 11, 2008 letter to
4 the SWRCB notifying it of anticipated water quality exceedances. They briefly mention that as
5 in 2007, they will operate the Old River barrier flap gates “to provide a potential improvement to
6 water quality in the zone (the area near the Old River at Tracy Blvd. Bridge compliance
7 location).” Hence, they are telling the Board that they are going to take actions which will
8 improve water quality. They also state they are “pursuing a re-circulation pilot project for later
9 this summer.” Hence they are telling the Board they are (belatedly) attempting one other thing
10 which will improve water quality.

11 In their minimal disclosures, the projects actually inform the Board there are things to do
12 to improve water quality, but try to downplay the effectiveness. At the same time, the projects
13 assert they do not have to meet the standards by wrongly stating that their obligation to meet
14 water quality standards only exists if either of them “causes exceedances.” We see from the
15 earlier quotes of the CDO that this interpretation is simply wrong. They are obligated to meet the
16 standards regardless, but *may* not be prosecuted if the Executive Director finds the exceedances
17 are “beyond their control.”

18 It is clear from the Petitioners’ own documents that actions are available to them to
19 improve water quality; actions which are not beyond their control, some of which they have
20 done, most of which they have not. It is also clear from the CDO record and declaration of Alex
21 Hildebrand that a number of actions are available which would allow them to meet the standards.
22 Therefore, there is no substantial evidence supporting the request to remove the limitation on
23 JPOD which requires compliance with the interior salinity standards. There have been, and are
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1 actions available to, and within the control of DWR and USBR which would allow them to meet
2 the interior salinity standards. When met, JPOD could proceed as authorized by D-1641, and the
3 CDO.
4

5 **2. Petitioners' Modeling Does Not Support the Order.**

6 Both the Order and the Petition refer to modeling runs which indicate that the models
7 predict compliance with all three interior standards throughout the summer, but that the model
8 "underestimates the salinity discharges from local agricultural and municipal drainages into the
9 south Delta Channels." In it June 11, 2008 letter to the Board notifying it of anticipated
10 exceedances, DWR identifies that its modeling projects violations of the Tracy Blvd. Bridge
11 standard "very shortly," and expects exceedances at Brandt Bridge and Middle River "later in
12 the summer."
13

14 Hence the Petitioners are relying on evidence which tell them and the SWRCB two
15 opposite things; that the standards will not be violated and that they will be violated "shortly."
16 When the same evidence presents two conflicting things, it cannot be said to be reliable or
17 substantial. DWR attempts to address this by alleging that the model may not be accurate in
18 predicting water quality, but it is accurate in showing changes in water quality. No evidence has
19 been submitted to support this claim. Hence, when the Order quotes the Petitioners' modeling
20 that water quality may actually improve under the JPOD, there is no basis for evaluating the
21 claim or for relying on it.
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24 **3. Petitioners' Modeling Does Not Examine Water Quality Throughout the**
25 **Channels.**

26 As referenced above, the 2006 WQCP clarifies that although the interior Delta standards
27 are measured at three compliance locations, the standards apply throughout the channels. The
28

1 DWR modeling of the impacts of their proposed JPOD makes no attempt to evaluate the changes
2 to water quality in places other than the compliance locations. Per the declaration of Alex
3 Hildebrand, even if the JPOD improves water quality at some locations, it will most likely
4 worsen quality at other places. Therefore, DWR and USBR have not yet given the SWRCB any
5 analysis on what the water quality will be in the southern Delta channels, or adequately evaluated
6 the impacts of the JPOD on the water quality in those channels. Hence, there the evidence
7 supporting the Order is insufficient.

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10 **4. The Order Wrongfully Concludes the Petition Does Not Require CEQA**
11 **Review.**

12 JPOD was analyzed as part of D-1641 which was subject to a extensive environmental
13 review resulting in a CEQA equivalent document rather than an EIR. The Order makes a
14 significant change to D-1641 and to permits which implement it without any CEQA analysis.
15 Petitioners and the Order conclude that the action is CEQA exempt by reasoning that (i) the
16 projects have previously pumped more export water than the Order now authorizes so there can
17 be no additional impacts, (ii) there may be improvements in water quality resulting from the
18 action, and (iii) and the action is exempt under California Code of Regulations, Title 14, Section
19 15301 (exemptions which involve negligible or no expansion of existing use). None of these are
20 correct.
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22

23 With regard to previous pumping rates and amounts, the comparison made by Petitioners
24 and the Order is that if one pumped large amounts legally and in compliance with one's permits,
25 then pumping a smaller amount when permit conditions are not being met is not an expansion of
26 an existing project. Of course this cannot be true; previous pumping amounts were authorized
27 and CEQA (equivalency) reviewed when all other permit conditions were being met. In our case
28

1 that means that the review assumed meeting the interior salinity standards. The Order now
2 allows the pumping, including the delivery of additional salt to the San Joaquin valley when the
3 standards are not being met.

4
5 With regard to possible improvements, we have already seen from the Declaration of
6 Alex Hildebrand that an improvement in water quality at a compliance location can likely result
7 in a worsening at some other location. Since the standards must be met in all locations in the
8 channels, the “modeled” improvement is only part of the story, and cannot be assumed to result
9 in an actual or net benefit,

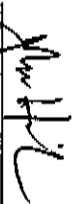
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11 With regard to Section 15301, that regulation involves repairs, maintenance, etc. to
12 already approved actions and conditions. Here we have the exact opposite. Additional export
13 pumping (above and beyond that which is allowed under any conditions pursuant to the permits)
14 is a new action, never before allowed or authorized. As stated above, JPOD analyses were
15 always during times of compliance with interior salinity standards. Adding such a new benefit
16 under an existing permit cannot be construed as the same thing as previously performed, legal
17 pumping. As the SWRCB stated in the CDO: “[I]n effect, DWR and USBR are privileged to be
18 able to use the JPOD at all. In the absence of the conditions (meeting the interior salinity
19 standards), the State Water Board was not satisfied that the use of JPOD would not injure other
20 legal users of water or have other adverse impacts.” (CDO at page 25.)
21
22 Obviously, if the substantial evidentiary proceedings of D-1641 and the CDO found that
23 JPOD could only occur if the standards were met, one cannot reasonably argue that allowing it in
24 the absence of meeting those standards is somehow within the purview of Section 15301's
25 exemptions.
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SDWA incorporates the record and subsequent communications from the CDO herein.

1 This Request for Reconsideration should also be considered an objection to the Urgency Permit
2 being granted.

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4 Dated: July 18, 2008

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John Herrick, Esq., Attorney for South Delta
Water Agency and Lafayette Ranch, Inc.