



San Joaquin River Group

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May 12, 2008

Tam Doduc, Chair
State Water Resources Control Board
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Dear Madam Chair:

Unfortunately, what was conveyed to you at the Board Workshop of March 19, 2008, is coming true this year in the San Joaquin River Basin. Rainfall in the San Joaquin River Basin for March and April 2008 was the lowest it has been in decades. The Basin is hovering between a Dry and Critical year classification on the heels of the fifth driest year on record in 2007, which means that San Joaquin River flows this summer will be low. As a result, to protect existing water right holders and beneficial uses, the SWRCB should and must enforce water rights in the South Delta to prevent illegal diversions from the San Joaquin River, Old River, Middle River, Paradise Cut and Tom Paine Slough.

Enforcement is necessary because it is well known that individuals and entities in the South Delta take water they are not entitled to divert. This has and will have an impact on river flow, river stage, fishery resources, interior South Delta salinity standards and compliance with Judge Wagner's order in *NRDC v. Norton*.

After VAMP, San Joaquin River flows at Vernalis are projected to be approximately 1,000 cubic feet per second ("cfs"). Immediately downstream of Vernalis, the Banta Carbona Irrigation District diverts up to 220 cfs, even in late July, which would leave only 800 cfs for all other uses downstream of its diversion. Alex Hildebrand has previously testified that daily diversions in the South Delta Water Agency ("SDWA") range from 1,400-1,800 cfs. Since diversions on the mainstem San Joaquin River, Middle River, Old River, Tom Paine Slough and Paradise Cut are all from the San Joaquin River under riparian or appropriative rights, then who or what is making up the 600-1,000 cfs deficit which will result from expected diversions within the South Delta?

This is not a new problem, but given the present day circumstances it does have significant ramifications. In D-1641 the SWRCB clearly recognized that in a Critical year in the San Joaquin River Basin there would be insufficient water for riparian water users since their net diversions exceeded the unimpaired flow. Even assuming that some amount of natural flow was available for riparian diversion, the total amount would have to be shared equally by all riparian right holders, and none would likely get the amount needed. Regardless, in most critical years riparian diversions cannot account for the diversion of 1,400 – 1,800 cfs by diverters within the South Delta. Likewise, appropriative rights cannot account for the amount of water diverted from the South Delta in Critical years, as Term 91 will likely be in effect and prohibit diversions by appropriative right holders. The only explanation for the large amount of pumping in the South Delta, particularly in Dry and Critical years, is that diverters are taking water to which they are not entitled.

The Honorable Tam Doduc, Chair
May 12, 2008
Page 2

These illegal diversions have a significant impact on compliance with the interior South Delta salinity standards. If a diverter takes water to which it is not entitled, then two things happen to the salt balance. First, the assimilative capacity of the water source is diminished, resulting in higher salt concentrations. Second, before the diverted water is returned to the source after being used, it collects additional salt which is added to the already salty water. The Department of Water Resources has sampled drains from the Pescadero Irrigation District and found that discharged water contained in excess of 4,000 $\mu\text{S}/\text{cm}$ electrical conductivity. This combination of less assimilative capacity and additional salty discharges within the South Delta make it nearly impossible for the interior South Delta salinity standards to be met.

Similarly, illegal diversions exacerbate the dissolved oxygen problem in the Stockton Deep Water Ship Channel ("DWSC"). The CVRWQCB, in its TMDL for Dissolved Oxygen for the DWSC, identified low flow through the Stockton DWSC as a factor causing or contributing to the dissolved oxygen problem. If flow from the San Joaquin River is diverted in Dry and Critical years without right, then less flow will enter the Stockton DWSC, further intensifying the existing dissolved oxygen deficit.

The illegal diversions in the South Delta also negate the assumed benefits of the February-June and VAMP flow releases. In March and early April of this year, the USBR released stored water from New Melones to meet the San Joaquin River flow objective at Vernalis for X2. Stored water released for this purpose is not considered abandoned while within the South Delta, and therefore it is not subject to diversion and use by either riparian or appropriative right holders. Total flow at Vernalis was approximately 2,200 cfs. Since the USBR released approximately 700 cfs to meet X2, only about 1,500 cfs was available for diversion. If the Banta Carbona Irrigation District diverted 220 cfs, then only 1,280 cfs was available for diversion within the South Delta. If South Delta diverters took 1400-1800 cfs, they could only have done so by illegally diverting water released from the USBR to meet X2. In that event, the purpose for which the stored water was released was thwarted, and the intended benefits to X2 were not realized.

Finally, illegal diversions directly take water from the CVP and SWP. Under Judge Wagner's order, certain flows must be maintained in Old and Middle Rivers. When diverters within the South Delta take water to which they are not entitled it directly impacts the CVP and SWP. If 700 cfs is being illegally diverted from March through June, then the total amount taken would be nearly 125,000 acre-feet.

There is no factual or legal basis for these diversions. As the SWRCB noted in its briefing before the 3rd District Court of Appeal in the *SWRCB Cases*, the Central and South Delta Water Agencies have failed to articulate any legal basis for their diversions. At the administrative hearing leading up to D-1641, Mr. Hildebrand, testifying on behalf of SDWA, was asked under oath to explain the basis for his Dry year diversions from Walthall Slough, a slough that empties into the San Joaquin River. After conceding that he lacked a riparian right for such diversions, Mr. Hildebrand explained that:

MR. O'LAUGHLIN: Okay. So under what right did you go into Walthall Slough and begin diverting water to your property?

MR. HILDEBRAND: I guess it was a right of desperation...

The Honorable Tam Doduc, Chair
May 12, 2008
Page 3

There is no "right of desperation" in California. Only those with riparian or appropriative rights can divert water in California, and when there is insufficient water to meet the needs of legitimate water right holders, the water right priority system is used to address the shortage. The SWRCB is the entity responsible for enforcing water rights and applying the water right priority system. Given what we know about this year's hydrologic conditions and the past propensity for illegal diversions in the South Delta, the SWRCB must move aggressively to enforce water rights in the South Delta.

The legal issues allegedly justifying diversions within the South Delta in the absence of individual water rights historically and repeatedly raised by SDWA have been adjudicated and defeated. In D-1641, *The SWRCB Cases, El Dorado Irrigation District v. State Water Resources Control Board*, and *Phelps et al. v. State Water Resources Control Board* (the "Term 91" hearings), the Appellate Court soundly rejected SDWA's assertions regarding the applicability, scope and meaning of the Delta Protection Act, Area of Origin, Watershed Protection Act, and their novel theory of riparian rights (the Delta is a Bathtub). In *Phelps*, the court affirmed what the SWRCB had repeatedly stated – a diverter can only divert in accordance with its permit, license or riparian right. Such rights do not give diverters within SDWA the right to divert when they want, how much they want, or what water they want.

The legality of diversions within the South Delta has been a problem that has been known to, but never resolved by, the SWRCB since 1961:

Throughout these proceedings, the Bureau's representatives have consistently affirmed their policy to recognize and protect all water rights on the Sacramento River and in the Delta existing under State law at the time these applications were filed, including riparian, appropriative and others. Unfortunately, these rights have never been comprehensively defined. It is imperative, therefore, that the holders of existing rights and the United States reach agreement concerning these rights and the supplemental water required to provide the holders with a firm and adequate water supply, if a lengthy and extremely costly adjudication of the waters of the Sacramento River and its tributaries is to be avoided. (D-990, p. 75.)

No agreement with SDWA was ever reached. By 1978, the SWRCB gave the parties an ultimatum:

The current negotiations between the project operators and the South Delta Water Agency concerning the construction of physical facilities to provide adequate circulation in the southern Delta to meet these standards are discussed in Chapter I of the Delta Plan. These negotiations appear to be directed toward the most practical solution for long-term protection of southern Delta agriculture and should be concluded as soon as practicable, at least by January 1980. If an agreement is not executed by January 1, 1980, the Board will examine in detail southern Delta water rights, determine the causes and sources of any encroachment, and take appropriate action to the extent of the Board's authority. (D-1485, p. 12.)

Again, no resolution was reached.

The Honorable Tam Doduc, Chair
May 12, 2008
Page 4

After 47 years, it is time for the SWRCB to step forward in this critical year when the Delta is in decline and ensure that (1) diverters in the South Delta follow the same rules as do all other diverters in the Sacramento-San Joaquin-Bay-Delta, and (2) all legitimate beneficial uses are protected.

Sincerely,



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