



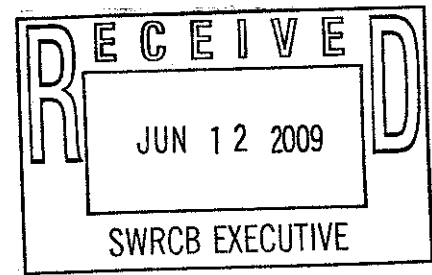
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VIA US MAIL AND ELECTRONIC MAIL ([commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov))

June 12, 2009

Jeanine Townsend, Clerk of the Board  
State Water Resources Control Board  
PO Box 100  
Sacramento, CA 95814



**Re: 2009 Periodic Review Staff Report Comments**

Dear Members of the Board:

The San Joaquin River Group Authority offers the following comments on the Draft Staff Report for the Periodic Review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Draft Periodic Review Staff Report") with respect to which issues the State Water Resources Control Board ("SWRCB") should and should not consider and what the issue should and should not encompass.

The recently released NMFS Biological Opinion ("BIOP") will significantly dictate baseline conditions for the Delta. It will dictate flow regimes for the San Joaquin River, thereby affecting water quality, storage, available supply for competing demands, and which implementation actions may be prohibited due to issues related to the Federal Endangered Species Act. However, flows required by the NMFS BIOP should not be perceived as objectives, as they are also established for the State Water Project ("SWP") and Central Valley Project ("CVP") to mitigate for their activities. Moreover, flows and other activities required by the NMFS BIOP may change given the likelihood of further litigation. If the SWRCB begins its Periodic Review now, by the time it finishes the project baseline and existing conditions will change. The SJRGA therefore recommends that the SWRCB wait until the NMFS BIOP litigation reaches finality and existing conditions are relatively stable and predictable.

South Delta Salinity and San Joaquin River Flows

The SWRCB has already initiated the process to review the Water Quality Objective for Agricultural Beneficial Uses for the Southern Delta ("South Delta Salinity Objectives") and for San Joaquin River Flow Objectives. These processes should be completed.

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With the Vernalis Adaptive Management Plan ("VAMP") due to expire in 2011, the SWRCB needs to establish scientifically-based objectives adopted in an open process, as opposed to the current objectives, which were based on the 1994 *Principles for Agreement on Bay-Delta standards between the State of California and the Federal Government* and a "subjective determination of the reasonable needs of all the consumptive and non-consumptive demands on the waters of the Estuary."<sup>1</sup> *Principles for Agreement* were not intended to establish water quality objectives with regulatory effect. Additional water needs would be provided by the Federal government on a willing seller basis financed by federal funds; not regulatory re-allocations. (*Principals for Agreement*, p. 5.)

However, when the SWRCB adopted the same flows called for in the *Principals for Agreement* as objectives, it was required to fully implement them. (*St. Water Resources Control Bd. Cases* (2006) 136 Cal.App.4<sup>th</sup> 674, 729-734.) Consequently, if parties who had agreed to provide water under the *Principals for Agreement* lacked sufficient did not have enough water, the SWRCB would have been required to amend other water rights so there would be enough water. The SWRCB therefore effected a regulatory reallocation that was not on a willing seller basis. The SWRCB should nonetheless consider the results of the VAMP study and adopt the previous recommendations of the SJRGA to:

- Better align the X2 flow requirement and water availability with a San Joaquin River Basin type of Index;
- Eliminate the X2 flow requirement for the San Joaquin River for February through June, because the San Joaquin River does not contribute to Delta outflow; and
- Subject current and proposed San Joaquin River flow objectives to a fact-finding hearing to ensure that the SWRCB not only obtains information, but information that is more reliable that would be obtained through less formal processes.

For South Delta Salinity, the SWRCB should revise its review schedule to permit time for completion and public review of the report currently being drafted by Dr. Glenn Hoffman and survey the water rights in the South Delta. Although, the Third District Court of Appeal held in *United States v. State Water Resources Control Board*, (1986) 182 Cal.App.3d 82, that a water quality control plan must protect water quality rather than water rights, the degree to which irrigators may legally divert and use water for irrigated agriculture defines the nature, scope, and extent of agricultural beneficial uses in the South Delta. In some months of some years few persons, if any, may have rights to legally divert and use water. If nobody can legally divert and use water, then irrigated agriculture, although a beneficial use, would not be a reasonable use of water and should not be protected. Even if a small number of diverters still have rights to divert and use water, competing beneficial uses may be more critical and "trump" South Delta agricultural beneficial uses.

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<sup>1</sup> The *Principals of Agreement* were exhibit number SWRCB 134 in the D-1641 proceeding, accepted into evidence on July 1, 1998.

### Reverse Flow Objectives in Old River and Middle River

Reverse flows in Old River and Middle River are primarily caused by the SWP and CVP operations. The issue is closely tied to the NMFS BIOP. However, the SWRCB should also consider the impact of illegal diversions, because such activities would impact compliance with such objectives. Every cubic foot per second illegally diverted deprives the beneficial use protected by reverse flow objectives of that much flow.

### Dissolved Oxygen in the Stockton Deep Water Ship Channel

The SWRCB should review the Dissolved Oxygen ("DO") Objective for the Stockton Deep Water Ship Channel ("Ship Channel"). The DO Objective for the Ship Channel is 5.0 mg/l all year, except from September through November when the objective is 6.0 mg/l. (2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("2006 Bay-Delta Plan") (SWRCB Resolution 2006-0098), p. 14 table 3.) The criteria for 5.0 mg/l was based on the work of Richard J. Hallock, who observed that "after four years of investigation, II... no salmon moved past Stockton until the dissolved oxygen had risen to about 4.5 ppm, and the run did not become steady until oxygen levels were above 5 ppm." (1991 Water Quality Control Plan for Salinity in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("1991 Salinity Plan") (SWRCB Resolution 91-24), p. 5-23.) However:

To address the problem of low dissolved oxygen levels in the San Joaquin River, an agreement was reached in 1969 between the USFWS, USBR., DWR, and DFG, in part, to take specific actions... to maintain the dissolved oxygen content in the Stockton Ship Channel generally above 6 ppm when necessary....

(Id.)

As a result, if DO levels dropped below 6 mg/l, DWR began installing a temporary rock barrier across the head of Old River to increase San Joaquin River flows past Stockton, thus improving DO levels. (Id.) Considering the lack of biological basis for the 6.0 mg/l criteria, it appears to have been a "trigger" for implementation rather than an objective. DWR installed the barrier when DO dropped below 6.0 mg/l to complete installation before DO could drop below 5 mg/l. The implementation measure, however, became part of the objective. The SJRGA therefore recommends reviewing the 6.0 mg/l objective to determine whether it has a scientific and biological basis or if it was an implementation action inadvertently incorporated into the objective.

### Program of Implementation

The program of implementation will be substantially affected by the recently released NMFS Biological Opinion ("NMFS BIOP") for the Central Valley Project ("CVP") and State Water Project ("SWP") will have significant impacts that must be considered. The NMFS BIOP applies to the CVP and SWP and may or may not permit certain actions. For example, the NMFS BIOP lacks a reasonable and prudent alternative

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for the South Delta Improvement Project ("SDIP"). Consequently, the SDIP, as currently contemplated, may not be a feasible alternative for implementing the South Delta Salinity Objectives. Since the SWRCB must fully implement its water quality control plans it must revise the objectives if there are no realistic alternative implementation actions capable of fully implementing them.

Conclusion

The SWRCB has established an ambitious schedule for Periodic Review. Given its time and staffing restriction, the SJRGA recommends that the SWRCB limit the issues to refining and reviewing current aspects of the Bay-Delta Plan, rather than addressing wholly new issues.

Very truly yours,  
O'LAUGHLIN & PARIS LLP

By:

  
KENNETH PETRUZZELLI

Cc: SJRG (e-mail only)