SOUTH DELTA WATER AGENCY

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September 16, 2014

Via E-Mail commentletters@waterboards.ca.gov

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comments on Proposed Order Taking Action on Petitions for Reconsideration of and Addressing Objections to the Executive Director's January 31, 2014 Order that Approved Temporary Urgency Changes in License and Permit Terms and Conditions for the State Water Project and Central Valley Project and Subsequent Modifications to That Order

Dear Ms. Townsend:

The South Delta Water Agency submits the following comments to the SWRCB's Draft Order on the various Petitions for Reconsideration and Objections to the numerous Temporary Urgency Change Orders issued at the request of DWR and USBR during 2014 ("TUCP").

1. Exporting Fishery Flows. The April 11 and April 18 modifications to the TUCP, when taken together allowed DWR and USBR to export water necessary for the protection of fishery beneficial uses. Earlier and subsequent modifications to the TUCP excused the projects from meeting Delta outflow and/or Western Delta agricultural objectives. Since those objectives were adopted as being necessary to protect those beneficial uses, failing to meet them constituted harm to those users. Whether or not the relaxation of the D-1641 fishery pulse flow on the San Joaquin River was appropriate, the failure to require those flows to flow past the export pumps and contribute to the D-1641 outflow requirements was inappropriate. The pulse flow waters are abandoned once they reach Vernalis, and thus could have added to the flows needed to meet outflow and Western Delta objectives. The SWRCB's approval of additional export pumping to take this abandoned fishery flow when downstream flow-dependent D-1641 objectives went unmet is ill-conceived, inappropriate and reversible error. When the projects cannot meet minimum permit obligations, there is no "balancing" of their consumptive use needs.

During the time of the TUCP it was clear that there was no natural flow available for export and insufficient storage to meet DWR and USBR permit terms. Thus there was no water available for export. When the April 18 modification authorized additional exports of fish flow water, and that water could have been used for outflow and/or Western Delta objectives, the SWRCB was in fact inappropriately "re-balanced" D-1641 findings. No such balancing is allowed under the law.

The Draft Order makes no mention of SDWA's argument that such abandoned fishery pulse flows would add to the Delta pool and provide quantity and quality benefits to various in-Delta beneficial users. It also makes no mention of why previously exported water in San Luis Reservoir was not used to be used to meet San Joaquin River fishery flow needs.

2. Due Diligence of Petitioners. The Draft Order attempts to re-write Section 1435 but ignores the clear language of the statute. As quoted by the Draft Order, the SWRCB ". . . shall not find a petitioner's need to be urgent if the Board in its judgment concludes, if applicable, that the petitioner has not exercised due diligence in petitioning . . ." under the normal change process. The statute contains the mandatory "shall." This mandate is not erased by the later use of the phrase "in its judgment." The "judgment" refers to deciding whether or not the there was time to file a "normal" change petition, or if some other circumstances precluded that filing. It does not mean the SWRCB can simply ignore a lack of due diligence. If the Board has complete discretion to rule on due diligence or any lack thereof, there would be no reason for the statute. Section 1435 clearly requires the SWRCB to examine whether or not the petitioner could have undertaken the normal, public process, or whether an unknown, unanticipated emergency precluded such action.

In this instance, the projects were unable to meet D-1641 objectives/permit terms in 2013 due to the "drought," which drought continued through summer of 2013, fall 2013 and 2/3 of the winter of 2013-2014. There is really no rational opposing position to the conclusion that DWR and USBR failed to act with due diligence. The projects had insufficient water to meet 2013 obligations, drained the reservoirs to insure even less water was in storage for late 2013 and 2014 and then were "surprised" they could not meet outflow in February of 2014. [Did they think in November they could meet the February outflow? In December? In January? Only some fanciful hope of torrential rains would have alleviated the situation, which means the projects knew but waited; such is not the stuff of due diligence. It is also very clear that the purpose of the last minute Urgency Petition was for to avoid any public hearing on the urgency changes so as not to allow public airing of the projects' poor planning and intentional violations of water quality standards. The lack of public process was likely meant to preclude any airing of the 2013 decisions made by the SWRCB and projects regarding permit/water quality violations and export levels.

Besides negating the existence of Section 1435, the SWRCB's reasoning in the Draft Order is circular. It opines that since it had discretion to decide due diligence, by finding there is a current, strong need for action, that somehow trumps any prior due diligence by the petitioner. The statute does not in any way allow the decision on "need" to overcome the lack of prior due diligence (because the public process could also have addressed that need). It is clear the projects failed to act with due diligence and thus the SWRCB's approval of the TUCP was inappropriate and reversible error. This conclusion is further supported by the fact that none of the TUCP modifications even addressed the Section 1435 issue.

3. Injury to Legal Users. The Draft Order claims that relaxation of water quality standards for salinity could not injure legal users of water because the resulting salinity was better than that which would have existed absent the projects. This truly amazing conclusion suggests that the standard against which any project modification may be judged is how the resulting conditions compare to pre-project conditions. [Obviously a prelude to BDCP change petitions.] Of course such is not the case. The mandate to "not injury and legal user of water" is only met by showing that other parties are not adversely affected by the sought after change. The TUCP clearly increased salinity when compared to the pre-change conditions. Since the beneficial users protected by the standards are being protected against elevated salinity levels, allowing the increase is per se harmful.

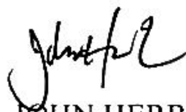
Beneficial users are not somehow detached from the objectives in place to protect them. They are not protected only when "natural flow" is providing the protection, they are in fact entitled to stored water being released from the projects' reservoirs to meet the objectives. Allowing the projects to decrease storage releases needed to meet water quality standards will and did "harm legal users of water."

In the Delta's situation, the channels always have water in them and the projects are obligated to insure a certain water quality is present in order to protect beneficial uses, especially agricultural uses. The obligation on the projects is not conditioned on there being sufficient natural flow, it anticipates (and was thoroughly examined in D-1641) and requires releases of stored water to keep the Delta of useable quality. The Draft Order makes the remarkable statement that "... water right holders ... are not entitled to have water released from upstream storage in order to provide better water quality than would otherwise exist ..." (DO at 22-23) The opposite is certainly the case. Should USBR fail to make releases from upstream storage to meet the Vernalis standard, agricultural beneficial users downstream clearly have the ability and right to file a complaint against the SWRCB to force such permit-required releases. Otherwise, no water quality objective would have any meaning. [See also D-1641 Section 6.3.4.2.4, page 35].

4. Changes to D-1641. SDWA agrees with the arguments of other parties that the TUCP was an unlawful modification to both the regulatory process to adopt water quality objectives and the water rights process to implement such objectives. In recent years the SWRCB, in an effort to protect exports at levels which exceed the available surplus supply, have latched on to the urgency process as a way of altering permit and water right decision mandates. The "urgency" process was conceived of and meant to be a process by which unexpected emergencies can be partially addressed. It was not and is not a process by which poor planning by water deficient exporters can get the rules changed when their shortage becomes too great. Neither the SWRCB or the projects had even the semblance of preparedness for 2014. No drought plans were made, no contingencies were anticipated, no public petitions were even contemplated. D-1641 modeled and examined the various hydrologic conditions and clearly anticipated years when there would be insufficient water to meet objectives and exports would be at minimums. The TUCP shows just how ill-prepared the projects were; not ill-prepared to meet the anticipated drought, but ill-prepared to avoid its impacts to themselves. Last minute urgency orders are no way to run the state's major water supply projects. Clearly, the extreme conditions of this year were known to be possible if not likely during and after 2013. The 5-month TUCP process whereby objectives were regularly changed, parties denied a hearing, and daily operational decisions were made in conflict with existing water quality control plans and water right decisions is an unacceptable practice. At some point, the SWRCB will have to apply the rules to the projects if California is to have any future.

Enclosed herewith are all of the SDWA correspondence covering the TUCP process. Please call me if you have any questions or comments.

Very truly yours,



JOHN HERRICK

Attachments

From: Jherrlaw <Jherrlaw@aol.com>
To: craig.wilson <craig.wilson@waterboards.ca.gov>
Cc: Ngmplcs <Ngmplcs@pacbell.net>; dantejr <dantejr@pacbell.net>; dean <dean@hprlaw.net>; tshephard <tshephard@neumiller.com>; Jennifer <Jennifer@spalettalaw.com>; jherrlaw <jherrlaw@aol.com>
Subject: Amended Order Approving Urgency Petition of DWR and USBR
Date: Tue, Feb 11, 2014 2:32 pm

Dear Mr. Wilson:

I note that on February 7, 2014, at the *beginning* of the most recent California storms the SWRCB amended its previously issued Order on the Bureau's and DWR's Urgency Petition. As I understand the changes contained in the amendment, the projects are allowed to increase exports if they (at some point) show that any exports over those amounts necessary for health and safety consist of "natural or abandoned flow." [Paragraph 2, page 14]

I note that this post Order change must be pursuant to some sort of (again) last minute request by the projects and assume it is not something the SWRCB undertook on its own. Please forward me copies of the documents underlying this second, or altered Urgency Request. My reading of the relevant statutes does not suggest that some sort of real time discussion can be the basis for either an Urgency change or an amendment thereto not contemplated in the original order.

The new urgency change to allow increased exports seems to present a problem with regard to Term 91 restrictions. As you know, Term 91 can be used to preclude diversions by those parties who have the Term in their license during times when the projects are releasing previously stored water to meet water quality obligations and when "natural flow" is insufficient to meet those obligations. I note that for some reason the projects are allowed to "use" any such "natural flow" to meet their burdens even when other superior right holders might use that "natural flow" to meet their needs. Regardless, at this time Term 91 remains in effect (as it has been since last spring) which means there are three local diverters (and others) who cannot divert under their licenses at this time.

I note from CDEC that combined inflow to Shasta, Oroville and New Melones as of yesterday is 22,593 cfs. It is unknown how long this recently elevated inflow will continue or the degree to which any upstream (of these reservoirs) operations affect this inflow. However, when there is 22,593 cfs "natural flow" upstream of the in-Delta Term 91 diverters and required outflow of 7100 cfs (I believe) there appears to be no reason why Term 91 should be in effect as the inflow to these project reservoirs means that no stored water (in gross) is being released to meet project water quality obligations. I therefore ask that you confirm the numbers and make sure that the application of Term 91 is not being incorrectly done. Notwithstanding the recent rains, it is likely that Term 91 diverters will still need to irrigate as much as possible in the next few months.

The above inflow numbers raise other issues as well. If the export projects are allowed to export any "new and fortuitous" natural flow, the net result will be increased exports but a continuation of the current reservoir shortages. That is to say, it the projects trapped that flow in their reservoirs instead of exporting it, the supply of stored water for future (including this year) needs would increase. This additional supply could be used to satisfy cold water

needs, later outflow needs, pulse flow needs and other water quality standards; all of which appear to be at risk. In addition, the projects' operation of the reservoirs appears to favor "exports when possible" over reasoned operations which would increase future supplies especially if the drought continues. Since it is not clear how increased exports of this fortuitous precipitation will affect the projects' ability to meet later in this and next year obligations, I ask that you inform the public how the recent rainfall will be "managed" to insure maximum compliance with water quality standards and permit terms. I realize that various factors affect these sorts of decisions, including runoff downstream of the rim reservoirs, but there appears to be a very real threat that the projects will take every last drop of the rain and leave the system as short as it was before the storms.

Finally, I would like to note that the precipitation runoff is contributing storage to many reservoirs, not just the projects' As the runoff/reservoir inflow decreases, we may again reach the point where you are considering ordering licensees, and possibly even riparians to cease diversions . In light of that, I hope you are monitoring upstream flows so that if natural flow drops below downstream riparian and pre-1914 needs, all of that inflow will be allowed to pas through the dams (excepting to the degree upstream right holders of equal priority can share in the only available flow. Although we believe the normal limits on in-Delta riparians are not applicable due to the tidal zone, it would seem appropriate and necessary to make the required effort to protect these riparians in light of upstream demands, which in the absence of SWRCB orders would take and store every drop of natural flow without regard to downstream rights.

I look forward to your responses. JOHN

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March 28, 2014

Via e-mail thoward@waterboards.ca.gov

Mr. Thomas Howard, Executive Director
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812

Re: March 18, 2014, Order Modifying an Order that Approved a Temporary Urgency Change in License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions

Dear Mr. Howard:

These comments are to the March 18, 2014, Order Modifying an Order That Approved a Temporary Urgency Change petition by the Department of Water Resources and the Bureau of Reclamation, which original Order was modified on February 7, 2014 and again on February 28, 2014.

The March 18, 2014 Order, like those before it contain no evaluation by the SWRCB of the requirements of Water Code Section 1435(c) which deals with the "diligence" of the Petitioners. An urgency change cannot be granted unless the Board determines that the petitioner exercised due diligence in both seeking a temporary change petition under the "non-urgency" provisions of the Code (e.g., Section 1726) and pursuing such a petition.

It is clear that neither DWR or USBR sought a temporary change other than the Urgency petition they submitted on January 29, 2014. It is equally clear that storage, inflows, precipitation and forecasts indicated well before January 2014 that drought conditions existed and that the projects would be unable to comply with some if not most of their Delta-related obligations under D-1641 and their permits. The workshop conducted by the SWRCB on (after) the Urgency Order clearly showed that as early as last spring, the projects forecasted dire conditions, including extremely low storage levels for 2014. At worst, in the fall of 2013, the projects knew (as conceded at the workshop) that absent a wet winter they would be unable to meet some of their obligations. Thus, the complete failure of the projects to plan ahead (both as to operations and as to seeking relief from permit requirements) precludes the granting of any urgency petition. The Order again states/concludes that there is an urgent need, but unless the SWRCB can find that the projects were diligent in getting the change through the normal process, an urgency order cannot be issued.

As stated at the workshop, the reason for the "diligence" requirement is that the "normal" process allows for a hearing, testimony and cross-examination, while the urgency process is conducted outside of the public's purview, with no notice, no chance to comment, and no hearing. In fact, DWR, USBR and SWRCB were specifically asked to notify various other third parties when any urgency petition was filed, and for a copy of same. None of those three parties complied; instead we were informed that no such notice was required. We understand what the requirements under Section 1435 are, but cannot understand why the regulator would not let interested parties know of such an urgency petition given the significant impacts resulting from non-compliance with D-1641 in the bottom of the worst drought on record. One would think the SWRCB would encourage input to such an important issue, not prevent participation.

This becomes even more relevant for two reasons. The first is that the current Order is periodically being changed, each time without any public input, in a sort of ongoing back room negotiation to constantly alter the criteria and mandates of D-1641 and the project permits. That such a process of near constant rule making and water right adjustments could be acceptable much less practiced by the SWRCB is truly remarkable. Second, the Bureau will shortly be filing another urgency petition this time to alter (at least) some of its San Joaquin River water quality obligations just days before those obligations become effective. This issue will be dealt with in a separate letter, but it bears noting here that there is no possible scenario under which the Bureau has not known for months that it would be unable to meet both the fish flow requirements or the salinity requirements; both of which are now, or were recently violated without comment or action. Even the Vernalis salinity standard, the only one of the four south Delta standards given notice was violated without even notice by the SWRCB. The idea that the Bureau can again wait until the last minute for relief suggests they know the SWRCB will grant the petition. This conclusion should raise numerous and serious questions.

The current, March 18 new (or revised) Order is for the purpose of allowing the non-compliant projects to squeeze even more export water out of the system while still violating numerous permit requirements. Specifically, the Order allows the projects to export water for purposes above and beyond "health and safety" needs (the limitation on exports in the original January 31 Order) as long as they are in compliance with Footnote 10 of Table 3 of D-1641, but they do not have to comply with Table 4; all dealing with outflow mandates. This change is to allow the projects to get even more water for export due to the fortuitous rain events of February which increased runoff below the rim dams and thus increased river flows into the Delta.

The logic of the changes falls apart upon examination. The projects have no water in storage to meet virtually any level of export needs, allocations being generally zero for contractors. The projects also do not have any water in storage to meet all of their obligations for critical year fishery or other water quality needs, much less future needs. When rainfall events increase flows into the Delta, they provide the additional water needed to meet those critical year water quality needs, which have a priority over exports. This most recent change to the urgency Order seeks to not meet the critical year water quality needs, but divides the "new/extra" inflow among water quality obligations and export desires as if they have equal priority. In practice, this means that the SWRCB has decided to "re-balance" various and conflicting needs to make changes to D-1641. That Water Right order, conducted over 80 days, with numerous witnesses and cross-examination itself was the basis for the SWRCB to weigh the evidence, review the record and balance the needs as allowed and required by law. The Order, through a non-public process now "re-balances" the D-1641 conclusions and finds that critical year needs for fish and other beneficial uses dependent on water quality are entitled to less water than under D-1641 and

export desires are entitled to more. Based on what, one might ask? Apparently it is based on the desire for a small increase in water supply for those who have no water supply this year.

The magnitude of this process and of these conclusions cannot be understated. We are all aware of the severity of the drought and of the extreme impacts being visited on those dependent on exports for their supply. However, these issues were addressed and resolved in the D-1641 process. Until a new Water Quality Control Plan is proposed and new objectives adopted, there can be no legal method by which the SWRCB "adjusts" the obligations of the projects as applied through their permits. The SWRCB presumably thinks it is "helping" during this drought, but it is doing the very opposite. The "re-balancing" of needs and water allocations insures that the fisheries will not get the protection they needed in critical years, which may ultimately make the protections in other years meaningless and futile. All at a time when many Delta-related species are at historic levels.

Additionally, the "extra" outflow (which might perhaps meet the Table 4 amounts) would have the effect of increasing the amounts in the Delta pool, which of course pushes ocean salts farther west. This additional pool of protection would determine how soon and to what extent ocean salts would intrude in later months if and when the projects are not able to fully control the intrusion. Hence, allowing the export of this water which (to some degree) would provide additional Delta protections is once again the same old practice of "operate to maximize export benefits with no regard for the future;" the principle which lead us to this disastrous situation.

These and other issues would be covered in a public process where all parties could participate and test the exporter world view. Under the urgency process only the agencies who operated and regulated us into this situation participate. Clearly the latter do not consider issues such as the one raised immediately above.

It is important to note that during the original Order and now under the most recent modification thereto, it appears the projects have violated the inflow/export ratio during March while taking advantage of this latest change to the Order. I do not believe any of the Orders relaxed that standard. Similarly, D-1641 requires the project to be in compliance with federal and state ESA law. I doubt I am up-to-date on this topic given the recent court rulings, but it appears that such things as the Old/Middle River reverse flow mandates have too been violated.

It is equally important to note that there is no remedy to all of this. Apparently the public can object to the Orders, which may or may not result in a hearing before the SWRCB, but such hearing would certainly occur well after the damage is done by allowing additional exports.

In summary, SDWA objects to (I) the ongoing non-public process that considers and then alters D-1641 requirements; (ii) any changes in project permits which increase exports; and (iii) the SWRCB's continued failure to enforce the existing rules, regulations and laws. It was made clear to us at the workshop that once curtailment notices are sent, the SWRCB expects to have a significant number of enforcement personnel seeking out who might not be complying (and of course starting with in-Delta farmers). At the same time, the SWRCB not only authorizes, but cooperates with the projects to get excused from compliance so that they made avoid operating under their permits. The Board would never grant an urgency petition to a local diverter to violate the conditions of his/her license, but it encourages and condones such by DWR and

USBR. I encourage you and the Board to correct this situation and enforce the rules against the projects.

Very truly yours,

JOHN HERRICK

cc (via e-mail):
Ms. Dorene D'Adamo, Board Member
Ms. Frances Spivey-Weber, Vice Chair
Ms. Felicia Marcus, Chair
Mr. Steven Moore, Board Member
Ms. Tam Doduc, Board Member
Dante J. Nomellini, Esq.
Dean Ruiz, Esq.

From: Jherrlaw <Jherrlaw@aol.com>
To: Craig.Wilson <Craig.Wilson@waterboards.ca.gov>
Cc: deltakeep <deltakeep@me.com>; jherrlaw <jherrlaw@aol.com>; mjatty <mjatty@sbcglobal.net>; Ngmplcs <Ngmplcs@pacbell.net>
Subject: Re: FW: USBR SJR flow request
Date: Fri, Apr 11, 2014 9:42 am

Dear Craig:

Thank you for providing me with the Bureau's request for an urgency change to the D-1641 Fish and Wildlife protections contained in their permits. I note a few things. First, the Bureau, as DWR and the Bureau previously refused, the Bureau refused to provide SDWA with a copy of these materials as requested. The Bureau also informed me that it was ***not*** "negotiating these changes with the SWRCB, but indeed it now appears that such negotiations were indeed ongoing.

Second, the Bureau's claim that there will be benefits to storage appears to have not supporting data. It is legally incumbent on the petitioner to provide the SWRCB with the storage amounts, anticipated inflows and a comparison of proposed operations to mandated operations in order that both the SWRCB and the public can see if the Bureau's claims are accurate. As you know, just two weeks ago the Bureau purported to give some of the stakeholders its forecasts for New Melones and the San Joaquin River, but in fact the data was worthless as acknowledged by the Bureau. One wonders how or why the Bureau can seek permit changes when it does not know or will not provide the underlying data.

The Bureau also claims the severe alterations to New Melones releases and Water Quality Objectives will somehow benefit its meeting of the salinity standard. However, at the recent meeting with the Bureau I recall that not just the stakeholders, but Bureau personnel agreed that the expected low flows in the River would actually result in a ***decrease*** in needed New Melones releases to control salinity. Ergo, purported "savings" to help meet water quality appear to be false.

Fourth, the Bureau provides no information regarding to whom it is delivering water in order that the public might see just how much water is going to consumptive uses instead of meeting D-1641 and permit obligations. Are we shorting fish flows in order to provide a small amount of water to other users who actually have no supply in droughts such as this? Is it SWRCB policy to alter water right hearing decisions if at some point one party or parties feels the original decision is too harsh. Do the benefits of a projects somehow supercede the obligations placed on that project's operations?

Fifth, once again the Bureau has failed the statutory test that in order to be granted an urgency change it must show diligence in seeking a permit change under the normal change provisions. No clearer case can be made than here, where the Bureau has known of the severity of the drought, but waited 4, 6, 9 months to petition for a change using the non-public process of the urgency provisions of the Code. This intentional failure to act promptly in and of itself precludes the SWRCB from approving the urgency petition.

At some point this recklessly negligent behavior by the Bureau must be stopped. The Bureau takes no action to plan for the drought or its worsening, does no scientific analysis of

the conditions or possible actions it might take, and then waits until the very last minute (after violating the standards) to seek changes to its permits. I note that as part of its request for relief from its permits the Bureau has the unmitigated gall to assert it is unfair for New Melones to be burdened by the obligations. It is the Bureau that chooses to uses New Melones exclusively, and these obligations when adopted via D-1641 went unchallenged by the Bureau.

I realize the SWRCB is attempting to ease the burden of the drought by relaxing standards and trying to free up more water for other users. However, the current practices (urgency petitions, no public participation, multiple changes to such petitions, etc) are only helping those who did not plan and those who cheat. The southern Delta standards are being violated, the fishery standards are being violated and the interests charged with meeting those standards are being helped to get more water. A more upside down situation one cannot imagine.

In parting, I note that the DWR website http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaWQ.pdf with Delta related operations and water quality data suddenly shows "NC" for the 30-day running average of Vernalis salinity, coinciding with the time frame when that standard appears to be in violation. When the standard is violated the projects suddenly cannot add up 30 days of numbers and divide by 30? Does the EC monitor stop working when the salinity exceeds the standard by some percentage? Sad days indeed. Please consider this an objection to the Bureau's Petition. I request the SWRCB schedule a hearing on this as soon as possible. JOHN

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In a message dated 4/10/2014 9:20:23 A.M. Pacific Daylight Time, Craig.Wilson@waterboards.ca.gov writes:

From: Grober, Les@Waterboards
Sent: Thursday, April 10, 2014 8:49 AM
To: Stein, Russell@DWR; Rea, Maria@NOAA; Reece, Kevin@DWR; pfujitani@usbr.gov; Moon, Laura K.@DWR; Wilcox, Carl@Wildlife; PABLO ARROYAVE; Helliker, Paul@DWR; Wilson, Craig@Waterboards; Cowin, Mark@DWR; Jeff McClain; Murillo, D@USBR; Castleberry, Dan@fws; Ren_Lohoefener@fws.gov; Garwin.Yip@noaa.gov; dan.keeton@noaa.gov; Riddle, Diane@Waterboards; Aufdemberge, Amy; Leahigh, John@DWR; Fry, Susan@USBR; kaylee.allen@sol.doi.gov; Ryan.Wulff@noaa.gov; michael_chotkowski@fws.gov; William.Rasch@noaa.gov; RMILLIGAN@usbr.gov; Idlof, Patti@usbr.gov; William W. Stelle; Bonham, Chuck@Wildlife; Croyle, William@DWR; Mizell, James@DWR; Holderman, Mark@DWR; Garcia, Cindy A.@DWR; dan.keeton@noaa.gov; Howard, Tom; Mead, Michelle@NOAA; Christopher Keifer; Alan.Haynes@noaa.gov
Cc: Friend, Janiene@DWR; Hunnicutt, Maggie@DWR
Subject: USBR SJR flow request

-----Original Message-----
From: "pfujitani@usbr.gov" <pfujitani@usbr.gov>
To: "Grober, Les@Waterboards" <Les.Grober@waterboards.ca.gov>, "Howard, Tom"
<Tom.Howard@waterboards.ca.gov>
CC: "RMILLIGAN@usbr.gov" <RMILLIGAN@usbr.gov>, PABLO ARROYAVE
<PArroyave@usbr.gov>
Subject: Vernalis Flow Letter
Date: Wed, 9 Apr 2014 23:09:20 +0000

Tom and Les,

Attached is our letter regarding the Vernalis flows.

thanks
Paul

--
Paul Fujitani
(916) 979-2197

SOUTH DELTA WATER AGENCY

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April 25, 2014

Via E-Mail michael.buckman@waterboards.ca.gov

Mr. Michael Buckman
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Urgency Change Order

Dear Mr. Buckman:

On behalf of the South Delta Water Agency, I am submitting the following comments to the April 18 changes to the above-referenced Urgency Change Order of the same date, as well as other terms and conditions of that Order and its five subsequent changes before the April 18 changes.

As per my prior comments, nowhere in the Order or any of its permutations does the SWRCB make the necessary findings under Water Code Section 1435(c). That subsection requires that the SWRCB find that the "urgency need" asserted by the Petitioner is in fact an urgent need. The subsection precludes the SWRCB from finding an urgency need if the Petitioner failed to exercise "due diligence" in seeking the changes under the regular Water Code provisions dealing with short term and long term changes. The purpose of this subsection is to make sure that any petitioner does not wait until the last minute to seek a permit change rather than go through the more detailed process under the other sections of the Code. This is important in that the regular provisions for seeking permit changes include public notice and participation, whereas the urgency provisions include no such public notice or process. As you know, I and others specifically requested that DWR, USBR and SWRCB provide the public with such change petitions before any order was issued. None of those parties provided any documents until after the Urgency Order was issued or changes thereto made.

In this instance, there can be no doubt that DWR and USBR have indeed waited until beyond the last minute to seek permit changes. The current drought began well over a year ago, but the projects failed to take any action to address its continuance. Even as the fall of 2013 progressed and no precipitation occurred, the projects simply waited and waited and waited, exporting as much water as they could while making no plans for the drought. Importantly here, the projects did not file any petition for permit changes ahead of time, in the event the lack of rain continued and they would be unable (as they assert) to meet current permit terms and

conditions under D-1641 and ESA mandates. It was not until January 29, 2014, three days before the projects' obligations for Delta outflow kicked in that the projects first sought relief from those permit obligations. At what point between last spring and January 29, 2014 would a reasonable person (or agency) conclude that compliance with permit obligations for outflow and other water quality objectives might not be met, and that changes to existing permits would be necessary? Clearly that point was months before January 29, 2014. In fact, I recall that the presentations of the projects at the Drought Workshop included references to prior months of modeling and estimations of how the drought shortages might preclude compliance with permit terms and conditions. A complete lack of planning and total inaction cannot constitute due diligence.

Hence, the January 31, 2014 Order, silent on the required finding of Section 1435(c), is contrary to the statutory requirements underlying an urgency order. Since that January 31, 2014 Order, the SWRCB, DWR and USBR have constantly discussed, negotiated and agreed to six further changes, including the April 18 change. Although a few precipitation events occurred after the January 31 Order, there is no conceivable excuse for DWR and USBR's failure to address the other topics contained in the six subsequent Urgency Changes. Issues such as fishery flows, insufficient storage, export levels, and water quality objectives were at the core of the projects' concerns when they petitioned for the initial Urgency Change. By not including the requests for subsequent changes at the time of the January 29 Urgency Petition, the projects, in collusion with the SWRCB piece-mealed not only the entirety of the changes sought, but also any examination of the effects of the changes.

As an example, at the time of the January 29 Petition, the USBR knew full well that it was not going to meet the Vernalis fishery base flow or pulse flow this year. Rather than include its desired changes to these water quality objectives/permit conditions in the January 29 Petition, it waited a further 72 days (January 30-April 11) to request relief from these San Joaquin River fishery flow obligations. It strains credulity to describe this as the projects exercising "due diligence" in seeking these changes as required by Section 1435 (c). To the contrary, the projects did the opposite of exercising due diligence, they assumed that once the SWRCB had ignored this requirement for an urgency permit change, that they could simply make permit changes on a near real-time basis as their whims and preferences dictated. Amazingly, the SWRCB agreed to this process and now consults on a weekly basis with the permittees to decide on how to alter permit terms and conditions to best help increase exports.

The Urgency Change Order and its numerous changes/amendments appear to be based upon the notion that in a severe drought crisis, permit terms and conditions adopted after an 82 day hearing are unfair as limitations on export operations and are biased in favor of fishery and other water right interests. For some unexpressed (in the Order) reason minimum fishery protections are now not needed and will not be enforced. This position is based upon a premise that even if there is no surplus water available for exports and no project storage or yield in excess of that which is needed to comply with permit terms and conditions, actions must be taken to find and allow exports anyway. Such a position presents serious legal, factual and hydrological conundrums. If the current drought does not result in all available "project" water being used exclusively for compliance with existing permit terms and conditions, under what scenario would it? Will the SWRCB seek to find ways to allow exports if it doesn't rain for another year? It would make sense perhaps to ease current conditions in order that some amount of carryover storage be available for future obligations, but there is no rational scenario under

which permit changes should be granted to increase exports when the system is millions of acre-feet short of water.

Bizarrely, the projects and the SWRCB have concluded that any outflow that exceeds a minimum fishery standard is somehow "lost" to beneficial use or not being put to its fullest use, while at the same time agreeing to lower the minimum flows on (seemingly) alternate weeks. Why is not any flow in excess of a minimum fishery flow seen as a benefit, partially "making up" for the shortages from which the fisheries were denied? Why is not the additional flow a short term benefit to the estuary and beneficial uses as a whole by pushing ocean salts farther west? Why is the desire of contractors (without any water supply in this drought) a need against which other beneficial needs and permit requirements is balanced? When did the priority of water rights, area of origin statutes and existing mandates in permits and Water Quality Control Plans become on par with the junior-most water right holders? It is perplexing to say the least that the SWRCB believes one class of contractors (not even water right holders) must "get something" at the expense of all other interests and water right holders.

Worse still, the latest change to the Urgency Order allows for the export of fishery pulse flow water instead of that water traveling downstream a few miles to help meet another fishery requirement. Apparently, the USBR negotiated with the SWRCB that in exchange for it ***not*** meeting the San Joaquin River Water Quality Objectives for the protection of fish and wildlife beneficial uses, it could take water needed for USBR and DWR outflow requirements. One can only wonder at how this discussion progressed and what the SWRCB was trying to protect when it conditioned non-compliance on other non-compliance. One is supposed to bargain to get something in exchange; not bargain against oneself.

At this point one must ask a few questions of the SWRCB. If the projects, which are without a water supply, which refuse to meet minimum permit obligations during a drought, and which demand as much export water as possible can get agreement from the Board, can other permittees and licensees similarly negotiate with the Board? Can a licensee who is subject to a curtailment notice file an urgency petition seeking the ability to divert anyway? Divert some? Take some fishery water? Cannot he/she ask the Board to balance the needs of all those license holders against the "unfair" water rights priority system and fishery needs? Can he/she argue that any export water (being used by contractors under the junior most water rights) be shared with others, just as the minimum fishery flows have been "balanced" against export needs? What does a licensee have to show in order to get the SWRCB to "re-balance" the current water allocations during this drought, as the projects have done. Of course, no such urgency petition would be entertained, which bares the current Urgency Order as the ill-advised and illegal document it is.

If the SWRCB were interested in trying to protect those beneficial uses designated in the current Water Quality Control Plan and D-1641, it would condition any exports above those alleged to be for "health and safety" be used to meet existing permit conditions. How much water has been exported since the January 31 Order? Why could that water not be re-introduced into the San Joaquin River to fully meet base and pulse flow fishery obligations? To meet outflow obligations? To meet Western Delta agriculture standards? To meet Vernalis or Brandt Bridge salinity standards? Instead, the exported water goes to somehow protect an unwritten "Export Contractor Beneficial Use Water Quality Objective." The explicit requirements contained in D-1641 become illusory or merely suggested permit terms and conditions. They are

not subject to change via a noticed hearing with cross-examination, but subject to change in non-public discussions whereby the needs of those without water supersede adopted water quality objectives, while the fishery agencies try to look the other way.

The most recent changes to the Urgency Order were supported by virtually no analysis, modeling or storage and release estimates. There appears to be no record supporting the SWRCB's relaxation of the San Joaquin River fishery flow requirements, and no rational support for allowing exports to take water needed to meet outflow or other water quality objectives. SDWA objects to and opposes each permutation of the Urgency Order and recommends the projects be ordered to meet their obligations before being allowed to reap any benefit from their permits.

Very truly yours,

John Herrick, Esq.

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May 13, 2014

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Re: May 2, 2014, Revised Order on TUCP and Prior Orders

Dear Mr. Buckman, Mizell, Fujitani, and Ms. Aufdemberg:

The following comments are submitted on behalf of the South Delta Water Agency and are intended as both objections to the May 2, 2014 changes to the Order on the Temporary Urgency Change Petition by DWR and USBR, as well as continued objections to the prior Orders to which SDWA has previously objected to and for which SDWA has requested a hearing.

First and foremost, it must be again stated that the current Order, as well as the previous ones fail to make the necessary finding under Water Code Section 1435(c) that the Petitioners, DWR and USBR have acted with due diligence in seeking these changes through the "normal" process for changes to permits and licenses under Section 1725 et. seq. The failure of DWR and USBR to have acted diligently in seeking these changes through the normal process is fatal to their urgency request, and makes the SWRCB's Order contrary to the clear language of the applicable statute.

As SDWA as stated before, the drought began somewhere between a year and half ago when we experienced a below normal year, and the January 29 TUCP filed by the Petitioner. It is

inconceivable and contrary to logic to think that DWR and USBR could not and should not have filed for changes to their permits no later than by fall or early winter of 2013. All projections at that time indicated an insufficient amount of storage to meet project obligations. This would have allowed a public process to have been undertaken by the SWRCB and all of the involved and affected interests could have participated and cross-examined the DWR, USBR, FWS, DFW and NOAA witnesses. Instead the Petitioners waited literally until the last minute to file the TUCP, thus avoiding the necessity of any sort of public process. The reasons for the "due diligence" requirement are clear and being ignored by the current process. Instead of interested parties being able to participate in the process, they are shoved to the side, denied any hearing and given ineffective "comment periods." This while the SWRCB staff and the guilty DWR and USBR operators and planners (who apparently did not plan at all) make daily decision on how best to ignore and violate current Water Quality Control Plan Objectives for the protection of beneficial uses, permit conditions and California water right priorities. Truly the current process is a black eye on the Boards already tarnished reputation and confirms that the only thing that matters to the SWRCB is maximizing exports at the expense of all other interests.

Although the entire process is clearly and unarguably contrary to the mandates of Section 1435(c), the most current permutation of the Order nicely evidences the reason why the due diligence requirement exists. The current Order (May 2) makes changes (i.e. decreases) to DWR and USBR permit requirements for agricultural water quality protection and fishery flow needs through next November. One must therefore ask what prevent s the SWRCB from requiring the Petitioners to use the "normal" process to seek these longer term changes rather than the urgency process? The Board has known for quite sometime (April 9) that the Petitioners wanted permit changes through November. What is the reason for not considering these changes in a publically noticed hearing? Why can the affected parties not call witnesses and cross-examine DWR/USBR witnesses on the proposed changes? Perhaps such a public effort would show that any water being exported should more correctly be used to meet (or move closer to meeting) the existing standards? Are the non-public discussions between SWRCB staff and exports (who made no plans for a drought) somehow sacrosanct and unassailable? Is there not any chance that the projects which waited until the last minute to avoid the public process might possibly be misleading someone, overstating something or not adequately evaluating something? Why on earth would the SWRCB think that no other party has anything to contribute to the consideration of the changes? DWR and USBR have constantly violated their permit conditions over the years and should not be considered reliable or accurate sources. Recall in 2009 when also seeking urgency changes (again waiting until the very last minute) the projects increased exports from 2000 cfs to 4000 cfs at the time the outflow standard was 11,400 cfs. This left the actual outflow at 7,000 cfs; the projects thus illegally misappropriating approximately one-third of the minimum fishery flow in a drought. In addition, the SWRCB has been notified that the USBR passed out useless and inaccurate information when San Joaquin river interests demanded a meeting on projected flows. Yet with this history of disregard for the facts and the rules, the projects are now in a near real-time "Drought Operations Management" group figuring out each day how to misappropriate additional water while not meeting their obligations. One can only guess how and why the SWRCB can consider this "acting in the best interest of the public."

It is very instructive to note that the SWRCB's Division of Water Rights is currently preparing some sort of "emergency regulations" to address (i.e. shut down most other water right holders) while the Order and its permutations are being cooked. It appears that ***once*** the Order is to the exporters' satisfaction, the Division will ***the***n issue the emergency regulations. The obvious purpose of this is to make sure that any order to shut down superior right holders comes after the projects have siphoned off as much of the minimum fishery flow as possible before having to abide by the export limits for "health and safety." To our knowledge, the SWRCB's stern mandate that exports will only be for health and safety has been somehow lost or misplaced. The projects have not been able to actually identify just what those health and safety needs are specifically, but perhaps someday we will find out. How the exports can continue operation when all superior right holders are shut down will become the most interesting violation of law fought over in the near future.

SDWA's previously raised issues remain unaddressed by the current Order. It appears that those issues have been ignored in order for us to reach the "too late" scenario so deftly used by SWRCB staff. After every water quality standard violation or other permit violation, the SWRCB always wrings its hands and states, "well it's too late now." In this instance, every drop of water (above health and safety needs of course) exported since January 29 (September 2013?) could have been re-introduced into the San Joaquin River and Delta in order to help meet fishery pulse flows, fishery base flows, outflow, western Delta agricultural standards and even help meet southern Delta salinity standards. Imagine, the water produced in the system, stored in project reservoirs or entering the Delta as runoff downstream of those reservoirs used to meet D-1641 and ESA obligations. It is a radical idea, but desperate times require desperate actions.

All of those exports could have been stored in San Luis reservoirs (the permits of which are burdened by D-1641 criteria) and released into the River. Such a released has occurred four times in the past, and accomplished within 6o days of SDWA's prodding of the USBR. In this time of emergency, there is no doubt permitting could have been accomplished and all that water could have been used to meet the standards as well as push the ocean salts back a little farther which would of course incrementally help protect the Delta from future intrusion. That water would have not only helped meet the standards, but also help provide a supply for other users and uses. As the SWRCB knows, **ALL** the fishery water on the San Joaquin is officially "abandoned" once it reaches Vernalis, and thus becomes a supply for all the licensee and pre-1914 right holders who of course are protected by areas of origin laws. Those laws requires the projects to not "directly or indirectly" deprive areas of origin from all the water they need.

Thus requiring the projects to meet (or try to meet) their obligations and the water quality standards would have provided multiple beneficial effects to all interests except exports. Which course of action is best in the "Public Interest" as required by Section 1435 et. seq.? The SWP Final Delivery Reliability Report 2011 contains a Table 6-3 which specifies/estimates the amount of water available under a "Single Dry Year (1977) as being ***302,000 acre feet***. Of course the SWP has exported many times that since last fall, indicating that not only did the projects know their supply was virtually nil if the drought continued, but also that they intentionally sought to

get more water by shorting other superior needs and users. Perhaps this is why the TUCP was filed at the last minute and why the SWRCB does not want to hold a hearing. Once it's "too late" all we can do is hope for what might have been.

However it is not too late. All the water going into San Luis reservoir can still be used to meet San Joaquin fishery pulse and base flow, salinity standards, outflow standards, western Delta agricultural standards and once abandoned meet consumptive use needs in the Delta. So we return to the question: what is more in the public interest, meeting standards and helping fish and wildlife, agricultural and all other beneficial uses in the Delta, or harming all those uses to increase the supply of the parties who are without a supply(?), which parties are obligated to meet those standards. Any rational person would choose the former as being in the public interest. Only an exporter or those under their influence would choose the latter.

The Order's conclusion that it is in the public interest is also flawed because of its misunderstanding of the Bay-Delta process. First, all water that flows out to the ocean is going to some beneficial use. At the very least, any incremental movement of X2 downstream is believed to actually create additional habitat for fish, such habitat being the historic area where many of the Delta related species rear. Why would not additional habitat during a year when minimum fish flows are discarded not be in the public interest. The "balancing" that the water is better used for farming in arid areas than for outflow is unsupported.

Second and just as important, the "balancing" that is necessary in developing (or altering via a non-public process) changes to water quality objectives has already been done. During the hearing leading to D-1641, the involved parties as well as the SWRCB were well and fully aware of the modeling which showed how much water was available under the historic dry and drought periods. That Decision process did not opine that "well these standards are needed except that we will have to change them in a drought." That decision chose the standards after balancing the needs and effects. The trade-off between how much might be exported and how much should go to meeting beneficial use protections was done then. Doing it now is not only unsupportable, it is contrary to law. The CEQA equivalent document for ***D-1641 examined the effects on the environment and on export users***. It did not and could not legally examine these effects during droughts and also include some sort of escape clause that droughts would necessitate changes ***which were not*** therein examined. Otherwise, the CEQA (equivalent) documents would not have been complete or sufficient under the law. Of course the document was complete and sufficient which means the project (the 1995 WQCP) anticipated certain adverse impacts to users of export water resulting from compliance with the water quality obligations. Now that those impacts are before us, DWR and USBR as well as the SWRCB are determined to make sure that those fully examined impacts do not occur, but that additional adverse impacts which were not examined do occur. There is no legal or rational basis for that position.

We hereby incorporate the previous SDWA comment/objection letters of February 11, 2014, March 28, 2014, April 11, 2014, and April 25, 2014 as well as the comments and letters of the Central Delta Water Agency.

SDWA hereby continues to object to the Order on the DWR and USBR TUCP, requests the SWRCB reconsider the Order and its prior permutations and respectfully demands a hearing be scheduled as soon as possible to allow for the presentation, subpoenaing, and cross-examination of witnesses.

Please call me if you have any questions or comments.

Very truly yours,

John Herrick, Esq.