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STATE WATER RESOURCES
 CONTROL BOARD
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 DIV. OF WATER RIGHTS
 SACRAMENTO

Attorneys for
STOCKTON EAST WATER DISTRICT

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)	
)	
PETITIONS FOR LONG TERM TRANSFER)	
INVOLVING A CHANGE IN THE PLACE)	CLOSING BRIEF
AND PURPOSE OF USE OF LICENSES 2685,)	
6047 AND 11395 OF MERCED IRRIGATION)	
DISTRICT AND LICENSES 5417 AND 11058)	
OF MODESTO AND TURLOCK)	
IRRIGATION DISTRICTS)	

I.
INTRODUCTION

This Closing Brief is filed on behalf of Stockton East Water District (SEWD), a party to the Petitions for Long-Term Transfer involving a change in the place and purpose of use of Licenses 2685, 6047 and 11395 of Merced Irrigation District (Merced) and Licenses 5417 and 11058 of Modesto and Turlock Irrigation Districts (MID/TID) (hereinafter referred to as San Joaquin River Group Authority (SJRG) "SJRG Petitions").

The purpose of the SJRG Petitions is to supply an additional 47,000 acre-feet of water to carry out the Vernalis Adaptive Management Plan (VAMP) experiments pursuant to the San Joaquin River Agreement. On or around November 13, 2001, SEWD filed a protest to the SJRG Petitions with the State Water Resources Control Board

(State Board or SWRCB) based on injury to SEWD – a legal user of water. SEWD agreed to withdraw the protest provided that the condition imposed by Water Right Decision 1641 relating to refill was imposed upon the Licenses subject to the SJRGA Petitions. By letter dated May 21, 2002, Petitioners agreed to accept inclusion of the refill language as a condition of approval of the Petition [SEWD 001, pg. 2]. SEWD notified the State Board on May 24, 2002 of its intent to withdraw its protest based on the inclusion of the refill condition. Since that correspondence, compliance by Petitioners with the refill condition as imposed in Water Right Decision 1641 has been questioned by SEWD and the State Board. The ongoing concern with regard to the existing Decision 1641 condition imposed upon refill led SEWD to question the ability of that condition to adequately protect its water supply and resulted in SEWD presenting a case in chief during the Hearing on the SJRGA Petitions.

II.

BACKGROUND

SEWD holds a Central Valley Project (CVP) water service contract with the United States Bureau of Reclamation (Bureau or USBR) for water service from the New Melones Project on the Stanislaus River. SEWD signed a Memorandum of Understanding with the SJRGA supporting the San Joaquin River Agreement (SJRA). That support, however, did not include actions that have a direct affect on the water supplies of SEWD. Throughout the development of the MOU, as well as in the State Board Bay-Delta Hearings on implementation of the 1995 Bay-Delta Water Quality Control Plan objectives, SEWD expressed its concern that implementation of the SJRA would adversely impact the amount of water allocated to the CVP contractors from New Melones under the Interim Plan of Operations (IOP). The Bureau repeatedly assured SEWD that implementation of the SJRA would not impact SEWD's contract allocations.

III.

INJURY TO LEGAL USER OF WATER

Key Issue #1: Would the petitioned changes unreasonably affect any legal user of water or result in substantial injury to any legal user of water?

June 1, 2003 Question 2 – What if any impacts may occur to legal users of water during other months of the year due to releases made during April and May pursuant to the petitions?

June 1, 2003 Question 3 – What if any water quality impacts may result from releases being made pursuant to the petitions during double-step years?

In State Board Water Right Decision 1641 implementing the Bay-Delta Water Quality Control Plan Objectives (D 1641), the State Board concluded “under certain hydrologic and operating scenarios, implementation of the SJRA in conjunction with the Interim Operations Plan formula could cause February end-of-month storage to be lower than it would be without the SJRA resulting in lower allocations to CVP contractors of New Melones” (D 1641 at page 27). The SWRCB further concluded in Decision 2000-02 that, “[m]odeling indicates that, in the absence of the condition, in a few years of record the approved changes could significantly reduce the amount of water the USBR would make available to its water supply contractors from the New Melones Project.” As a result, when approving changes to the water rights of Merced and MID/TID to implement the SJRA in D 1641 the SWRCB imposed the following condition on the permits on both Merced and MID/TID:

At times when the USBR is releasing water from New Melones Reservoir for the purpose of meeting the Vernalis salinity objective, or when Standard Permit Term 93 is in effect, or when salinity objectives at Vernalis are not being met, Licensee shall not replenish (1) stored water or foregone diversions provided for the April-May pulse flow *or the October target flow* at Vernalis, or (2) water transferred to the USBR pursuant to the SJRA. The Executive Director of the SWRCB is delegated authority to ensure that this condition is not used by the USBR to increase the obligations of Licensee. [D 1641 Page 169 and 170 – *Italics Merced Only*]

The purpose of this condition is to protect the junior water rights of the USBR from the effects of the approved long-term changes in the water rights of Merced, Modesto, and Turlock Irrigation districts, pursuant to the requirements in Water Code sections 1707 and 1736 that the change will not unreasonably affect any legal user of water and will not result in substantial injury to any legal user of water, respectively.

As the SWRCB concluded in Order 2000-02:

“D-1641 includes bypass of inflow in the refill constraint because when the USBR bypasses inflow to meet the Vernalis objectives it is foregoing water storage. When it foregoes water storage, its ability to deliver water to its water supply contractors is reduced. As discussed in Part 5.1 of this order, **a water supply contractor can be protected from the effects of injury to the water right holder from whom it obtains water only when the water right holder does not agree to the effects of the change.** Stockton East Water District and Central San Joaquin Water Conservation District, which are water supply contractors, and the City of Stockton, which is in the service area of the contractors, have raised the issue of whether they would suffer reductions in deliveries under some year types due to the change in operations under the SJRA. There is no clear evidence in the record that the USBR agreed to provide water to make up for instream flows that are missing from the river due to increased storage operations late in the diversion season.” [Emphasis added]

In Order 2000-02, the State Board concluded that SEWD, as a water supply contractor, must be afforded protections from the effects of injury to the water right holder from whom it obtains if water. No evidence in the record contradicts the State Board’s explicit finding that SEWD is a legal user of water and entitled to the protections of Water Code sections 1707 and 1736. SEWD clearly demonstrated in the Hearing on the SJRGA Petitions that SEWD has a water supply contract with Bureau for 75,000 acre feet of water [SEWD 001, pg. 2; SEWD 005; R.T. 172]. SEWD constructed \$65 million dollars worth of water conveyance facilities to bring water from the Stanislaus River to the district [SEWD 001, pg. 3; R.T. 172, 176]. Upon completion of the water conveyance facilities in 1993, SEWD requested water from the Bureau under its CVP contract and was denied [SEWD 001; R.T. 176-177]. Since 1995 through 2002 the CVP Contractors on the Stanislaus River have received anywhere from 8,600 acre feet to a

maximum of 57,800 acre feet, a range of 0 to 37% of their contractual entitlement (other CVP contractor average has received an average of 71%) [R.T. 177]. SEWD is a legal user of water that must be protected against injury by the SJRGA Petitions.

In addition to the injury that State Board recognized in D 1641, information in the record demonstrates that SEWD may suffer additional injury by approval of the SJRGA Petitions. First, the Supplemental Environmental Impact Statement and Environmental Impact Report (SUP EIS/EIR) prepared for the SJRGA Petition [SJRGA 1 – Exhibit C: Acquisition of Additional Water for Meeting the San Joaquin River Agreement Flow Objectives, 2001-2010, March 13, 2001] included an analysis of the impact to New Melones Reservoir storage and Vernalis water quality objectives. However, despite SEWD's specific request, the document did not include an analysis of impact to CVP contractors as promised by the parties.

The SUP EIS/EIR appears to indicate nominal impact to New Melones end of February storage when comparing the VAMP 110 with the VAMP 157 allocations. By way of example, New Melones storage is reduced 3,000 acre feet in 1974 and reduced 2,000 acre feet in 1975 [SJRGA 1, Exhibit C, Appendix A; SJRGA 1, pg. 31-32]. However, it is not possible to tell from the data what the resulting impact of this storage reduction in New Melones Reservoir would have on contractual allocations pursuant to the Interim Plan of Operations. In some years, a 2,000-acre foot reduction in storage could result in a 31,000-acre foot reduction in allocation to the contractors [SEWD 001, pg. 3; SEWD 006; R.T. pgs. 84-85, 97].

Furthermore, the impact to New Melones identified in the SUP EIS/EIR could be **greatly understated** in both terms of impact on water quality and flow at Vernalis and impact to New Melones CVP contractors because of the assumption relied on in the analysis that the Bureau would operate in accordance with the IOP. SEWD submitted written testimony from the Chet Bowling – Operations Manager for Bureau of Reclamation which confirmed that the Bureau was not going to operate in accordance with the IOP for this year [SEWD 007, pgs. 4-5] and SJRGA expert witness, Dan Steiner,

confirmed that New Melones would not be operated in accordance with the IOP this year and has not been operated in accordance with the IOP in previous years as well [R.T. 86-87].

Evidence in the record demonstrates that failure to adhere to the IOP may result in increased releases for which there is no allocation under the IOP [SEWD 001, pg. 3; SEWD 006; R.T. 84-85, 97]. This failure to adhere to the IOP may reduce carryover storage, and depending on the hydrology the following year, could adversely impact allocations to SEWD. Moreover, in cross-examination of SJRGA's expert witness on hydrology Dan Steiner, Mr. Steiner confirmed that not only would Stanislaus River operations would be impacted if the IOP was not adhered to, but that conditions at Vernalis would also be impacted:

Ms. Harrigfeld: If the Bureau doesn't operate the Stanislaus River in accordance with the IOP, would your modeling results change?

Mr. Steiner: As far as the obligation the San Joaquin River Group to provide flow for VAMP, it will not. It was written into the agreement that way; that is our basis contractually.

Ms. Harrigfeld: With respect to the associated impact to Stanislaus River operations and obligations, the modeling could change if the IOP was not adhered to?

Mr. Steiner: It would probably change the results at Vernalis. It may not necessarily affect the tributary operations.

Ms. Harrigfeld: It would impact the associated results and impacts to the New Melones?

Mr. Steiner: That is correct. [R.T. pg. 85]

It is SJRGA's expert witness on hydrology opinion that not only will failure to operate New Melones in accordance with the IOP impact carryover storage and future Stanislaus River allocations [R.T. 85-86], but also will impact flows and water quality at Vernalis [R.T. 85]. Because D 1641 imposes the obligation on the Bureau's water right permits for New Melones to not only meet the Vernalis salinity objective, but also the Vernalis flow objectives, sufficient protections must be provided to SEWD to ensure that the legal rights are not injured by the SJRGA Petitions.

In response to the June 1, 2003 question posed regarding impacts caused to legal users of water during "other months of the year" besides during the April and May period, I direct the State Board to the testimony of SJRGA's expert witness Dan Steiner:

Ms. Harrigfeld: What time period does this reduction in release occur in?

Mr. Steiner: It would be anywhere coming October through June, the filling cycle, the winter filling cycle. [R.T. pg. 89]

Mr. Steiner: Go to Table 5 as is on the screen. If you look at the upper half of the table, that is the Tuolumne scenario providing the up to 47,000. The third column over indicates the changes on the Tuolumne River. You also see there will be an increase in April which is what purpose of the extra water was, and then the decreases are showing how it trickles either the immediate year or years following.

Ms. Harrigfeld: So the decrease flow occurs during February of 1945 in the first instance.

Mr. Steiner: For the 1944 operation. [R.T. pg. 93]

This testimony demonstrates the potential for impact to legal users of water by the refilling of the Merced and MID/TID reservoirs occurs throughout the year, including in February and October through June.

Finally, in response to the June 1, 2003 question posed regarding what water quality impacts may result from releases being made pursuant to the petitions during double-step years, I direct the State Board to the testimony of the SJRGA's expert witness Dan Steiner:

Ms. Harrigfeld: How is water quality affected by these reductions in releases?

Mr. Steiner: In overall, as I was just asked a little while ago, if you are going to remove in a particular month the fresher side of water, which is the east side supplies, it will have less fresher water at Vernalis, so the concentration would be high given everything else stays static. [R.T. pg. 91]

Ms. Harrigfeld: If the Bureau doesn't operate in accordance with the IOP and makes more water available, for various purposes, that impacts the modeling results for Stanislaus River?

Mr. Steiner: That would be correct.

Ms. Harrigfeld: And turning to Page 19 of your testimony, you indicate in that first full paragraph on Page 19, that:

For the May supplemental water setting modeling indicates that the Stanislaus River operations may be affected by the recovery of New Don Pedro Reservoir storage in one instance; in this instance the reduction in releases from the Tuolumne during April of '85 results in an increase release in New Melones for water quality objective. (Reading)

So this increase release in April for New Melones is required of the recovery occurring on the Tuolumne?

Mr. Steiner: That is what the results showed. [R.T. pg. 96]

The potential for additional injury as disclosed in these sections mandate that the State Board impose sufficient restrictions to ensure protection SEWD interest as a legal user of water.

IV.

IMPOSITION OF CONDITIONS TO PROTECT LEGAL USERS OF WATER

KEY ISSUE #4: If the SWRCB approves the petitioned changes, what terms and conditions will best develop, conserve and utilize, in the public interest, the water subject to the change (Water Code Section 1707(b)(1)).

June 1, 2003 Question 4 – What if any conditions should be placed on the proposed transfer to avoid impact to other legal users of water?

June 1, 2003 Question 5 – Under what terms and conditions should the SWRCB approve this transfer? In particular, should refill conditions similar to the conditions on the approval in Decision 1641 of the SJRGA transfers be place on this transfer? If so, should any modifications be made to these conditions?

As was detailed above, in D 1641 the State Board imposed a condition on both Merced and MID/TID water rights that limited the respective projects ability to refill their reservoirs for stored water released, foregone diversion or other water provided for pursuant to the SJRA. In order to protect and ensure against injury to SEWD, a legal user of water, and as agreed to by Petitioners, when approving the SJRGA Petitions, the water rights of Merced and MID/TID must be conditioned with the following:

At times when the USBR is releasing water from New Melones Reservoir for the purpose of meeting the Vernalis salinity objective, or when Standard Permit Term 93 is in effect, or when salinity objectives at Vernalis are not being met, Licensee shall not replenish (1) stored water or foregone diversions provided for the April-May pulse flow *or the October target flow* at Vernalis, or (2) water transferred to the USBR pursuant to the SJRA. The Executive Director of the SWRCB is delegated authority to ensure that this condition is not used by the USBR to increase the obligations of Licensee. [D 1641 Page 169 and 170 – *Italics Merced Only*]

However, this condition alone is insufficient to protect SEWD, more must be done.

Evidence in the record makes clear that this condition is meaningless because of the lack of accountability and complete lack of protocol to ensure enforcement of the condition.

[SEWD 003; SEWD 004]. SEWD notified the Bureau in its letter dated February 5, 2003 of an alleged violation of this condition to the State Board and demanded an investigation into the violation. While this condition is for the express benefit of the Bureau (and SEWD), the Bureau readily acknowledged it “does not monitor reservoir releases on other San Joaquin River tributaries before deciding how to operate New Melones.” [SEWD 007, pg. 2] There is a total lack of any coordination of releases among the tributary operators (Merced, Tuolumne and Stanislaus rivers), which results in the Bureau and SEWD relying solely upon Merced and MID/TID **voluntarily** bypassing flow. While Merced and MID/TID acknowledge that they are aware that their respective water rights were conditioned upon compliance with this limitation on refill, NOTHING has been done to ensure compliance. Frankly, it is uncertain whether anything will ever be done by either Merced or MID/TID to comply with this permit term. Their “self-described” expert witnesses on water use testified that they have never considered operations at New Melones Reservoir when refilling their reservoirs:

Mr. Herrick: Mr. Selb, you are aware that D-1641 changed the permit condition for Merced Irrigation District?

Mr. Selb: Yes, that is correct.

Mr. Herrick: [...Mr. Herrick reads D 1641 refill condition]...Are you familiar with that provision?

Mr. Selb: Yes, I am.

Mr. Herrick: In your operation of the dams on the Merced, how do you implement this limitation?

Mr. Selb: That limitation has yet to be developed.

Mr. Herrick: If and when you forego – if and when you are trying to refill previous releases for San Joaquin River Agreement, what investigation do you make to make sure that any of those conditions in that permit term I just read are or are not in effect?

Mr. Selb: Look at the condition with or without VAMP.

Mr. Herrick: Do you do an investigation at that time to see whether or not New Melones is releasing water for water quality?

Mr. Selb: I have not to this time.

Mr. Herrick: Have you received any directions from your Board of Directors or somebody else to do that investigation?

Mr. Selb: No, I have not.

Mr. Herrick: Mr. Ward, I would like to ask you the same questions. Would you like me to go through the background, I will, but the question is: Are there any investigations you do for the Tuolumne River to see whether or not at times of refill New Melones is making releases for water quality?

Mr. Ward: No, I have not.

Mr. Herrick: Have you received any directions or recommendations from Board of Directors or somebody else asking you to make such investigations?

Mr. Ward: No, I haven't. [R.T. 24-27]

Clearly this testimony of Merced and MID/TID expert witnesses' demonstrate that this condition is meaningless without additional safeguards to ensure that it is strictly adhered, enforced and self-executing. It is not as if the operators on the tributaries are not familiar with coordination of releases on the various tributaries, including the Stanislaus River. That is precisely what is done by the three tributary operators during the April/May VAMP pulse period and for months leading up to pulse period and after the period. In cross-examination of Mr. Steiner, he confirmed that "there is a coordination team that is meeting. In fact, making phone calls every morning or periodically in the mornings, right now coordinating the releases. A process that starts about in February." [R.T. 103] This type of coordination is exactly what must be done to ensure that the refill condition is meaningfully and actually protects SEWD. This type of coordination must be mandated by the State Board on a year round basis through a revisions to the Merced and MID/TID permit terms.

Finally, there is one additional modification we request the State Board impose on the permits of Merced and MID/TID which results from an inconsistencies in Revised D 1641. D 1641 was adopted on December 29, 1999. A number of parties, including Merced and Turlock Irrigation District moved for reconsideration of the D 1641. In Order 2000-02, the State Board rejected the request of Merced and Turlock to modify the "refill" condition imposed upon their respective water right permits. The State Board explained the purpose for the refill condition as follows:

7.1 The Reservoir Refill Criteria

The conditions in D-1641 that regulate reservoir refill operations require that Merced Irrigation District and Modesto and Turlock Irrigation Districts refrain, at times when the USBR is releasing water from New Melones Reservoir **to meet objectives at Vernalis**, from refilling their reservoirs to replenish water that they have released for purposes of the SJRA. D-1641 does not fully explain this condition. **The purpose of this condition is to protect the junior water rights of the USBR from the effects of the approved long-term changes in the water rights of Merced, Modesto, and Turlock irrigation districts**, pursuant to the requirements in Water Code sections 1707 and 1736 that the change will not unreasonably affect any legal user of water and will not result in substantial injury to any legal user of water, respectively. Modeling indicates that, in the absence of the condition, in a few years of record the approved changes could significantly reduce the amount of water the USBR would make available to its water supply contractors from the New Melones Project.

D-1641 includes bypass of inflow in the refill constraint because when the USBR bypasses inflow to meet the Vernalis objectives it is foregoing water storage. When it foregoes water storage, its ability to deliver water to its water supply contractors is reduced. As discussed in Part 5.1 of this order, a water supply contractor can be protected from the effects of injury to the water right holder from whom it obtains water only when the water right holder does not agree to the effects of the change. Stockton East Water District and Central San Joaquin Water Conservation District, which are water supply contractors, and the City of Stockton, which is in the service area of the contractors, have raised the issue of whether they would suffer reductions in deliveries under some year types due to the change in operations under the SJRA. There is no clear evidence in the record that the USBR agreed to provide water to make up for **instream flows that are missing from the river due to increased storage operations late in the diversion season**. In the absence of such an agreement, it would be injured within the meaning of sections 1707 and 1736 if the refill condition were changed as requested by Merced and Turlock. [Order 2000-02, pgs. 16-17, emphasis added]

In Order 2000-02 the State Board clearly articulated the justification and purpose of the refill condition is **to protect the junior water rights of the USBR from the effects of the approved long-term changes in the water rights of Merced, Modesto, and Turlock irrigation districts**, namely SEWD, because of the Bureau's releases of water from New Melones Reservoir **to meet objectives at Vernalis**, not salinity objectives, but **Vernalis objectives**. Unfortunately, when the State Board prepared the Revised D 1641 incorporating their 2000 findings on the motions for reconsideration into the December 26, 1999 decision, they failed to expand the refill language to include when the Bureau is making release to meet the Vernalis **flow** objectives. We request that the first sentence of the refill condition imposed upon the Merced and MID/TID permits subject to this hearing be revised as follows:

At times when the USBR is releasing water from New Melones Reservoir for the purpose of meeting the Vernalis salinity or flow objectives, or when Standard Permit Term 93 is in effect, or when salinity or flow objectives at Vernalis are not being met, Licensee shall not replenish (1) stored water or foregone diversions provided for the April-May pulse flow *or the October target flow* at Vernalis, or (2) water transferred to the USBR pursuant to the SJRA. [*Italics Merced Only*]

IV.

CONCLUSION

The State Board has declared SEWD a legal user of water, and as such, imposed a condition in D 1641 to protect SEWD water rights. Implementation of the condition over the course of the last three years has demonstrated that it is woefully inadequate to protect SEWD's water rights. There is no mechanism requiring the operators on the tributaries to communicate and coordinate releases to ensure compliance with the condition. Therefore, we respectfully request that State Board make the modifications proposed herein to the refill to protect SEWD from increased releases for water quality and flow caused by the refilling of Merced and MID/TID respective reservoirs.

Dated: 6/27/03

Respectfully Submitted,


KARNA E. HARRIGFELD
Attorney for Stockton East Water District

PROOF OF SERVICE

I, Peggy L. Garcia, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 2291 West March Lane, Suite B100, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On June 27, 2003, at my place of business a copy of **CLOSING BRIEF OF STOCKTON EAST WATER DISTRICT FOR SAN JOAQUIN RIVER GROUP – PETITIONS FOR LONG TERM TRANSFER** was placed for deposit following ordinary course of business as follows:

BY U.S. MAIL - with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelopes were addressed as follows:

John Herrick
South Delta Water Agency
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BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013©, 2015.5.]

BY PERSONAL SERVICE/HAND DELIVERY.

BY FACSIMILE at approximately _____m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 27, 2003


PEGGY L. GARCIA