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February 24, 2004

Diane Riddle
Environmental Scientist
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

RE: Comments By Merced ID, Modesto ID and Turlock ID to Proposed Order Regarding Petition for Long-Term Transfer

Dear Ms. Riddle:

Please accept the following comments on behalf of the Merced ID, Modesto ID and Turlock ID (hereinafter "the Districts") to the SWRCB's proposed order regarding the petition for long term transfer that was issued on February 5, 2004. A representative of the Districts will attend the March 2, 2004 workshop to discuss these comments and to respond to any additional issues raised by other commenting parties.

The Districts' primary concern is with the refill criteria developed by the SWRCB which is more onerous than (1) was developed as a condition upon the changes obtained for the original SJRA/VAMP in D-1641, and (2) was agreed upon by the Districts and the USBR as a means of protecting the USBR's water right to the satisfaction of the USBR. The agreement between the USBR and the Districts resulted in a resolution of the USBR's protest prior to the evidentiary hearing. The Districts disagree with the legal and factual determinations upon which the SWRCB bases its proposed refill criteria, and contend that the evidence that was submitted as part of the hearing does not support such determinations.

The SWRCB conditioned the order to prohibit the Districts from refilling their reservoirs after a release under the SJRA during periods when the USBR is making releases and/or bypassing inflow to meet Vernalis objectives for the sole and express purpose of protecting the USBR's water rights. (Proposed Order, p. 17 ["To protect USBR's water rights..., this order is conditioned..."]). The SWRCB's finding that approval of the petition without the refill condition would result in an injury to the USBR's water right was based upon its finding that the Districts' refill might reduce flows in the San Joaquin River, causing the USBR to release or bypass more water than it would absent the approval of the petition. (Proposed Order, p. 16-17).

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The SWRCB's conclusion that the USBR's water right could be harmed absent the imposition of the refill criteria was based not upon direct evidence and testimony submitted by the USBR, but rather upon two indirect pieces of evidence. First, the SWRCB accepted the evidence submitted by SEWD that a reduction in carryover storage might affect the USBR's ability to provide water to it pursuant to the USBR-SEWD water service contract. (Proposed Order, p. 16). Second, the SWRCB found that the USBR did not agree to make up for any instream flows that may be reduced as a result of the Districts' storage operations. (Proposed Order, p. 17). Both of these pieces of indirect evidence are dependent upon a legal and factual sleight-of-hand that contradicts the fact that the USBR itself determined that the long-term petition could be approved, and that the only protection it needed was the imposition of the same refill criteria that was placed upon the changes obtained in D-1641.

1. Direct Evidence Shows USBR Consented to Petition Upon Condition of D-1641 Refill Criteria.

In D-1641, the SWRCB justified its imposition of a refill criteria on the proponents of the SJRA/VAMP by arguing that the evidence was not clear that the USBR had agreed to accept potential impacts to New Melones storage that might occur as a result of certain refill by the Districts. As Mr. Howard of the SWRCB explained during the hearing on reconsideration,

> "However, I would note that the Bureau has offered to backfill the San Joaquin River Agreement. And when we looked over the San Joaquin River Agreement, it wasn't necessarily clear to us that this backfill commitment included this particular water supply impact. If, however, the Bureau wants to state that it did, in fact, or was intended to backstop this water supply impact as well, then the recommendation of staff would be to change the language in the water right permit term..." (March 15, 2000 Hearing Transcript, p. 13).[1]

In this case, the SWRCB justified the imposition of a more onerous refill criteria by arguing that the USBR has not agreed to make up for increased instream flows due to certain refill operations by the District. (Proposed Order, p. 17). Although the SWRCB's conclusion in D-1641 that there was no clear evidence that the USBR intended to accept the possible impacts to its storage at New Melones that may result from the Districts' refill after the SJRA/VAMP was questionable,[2] the SWRCB's proposed finding in this case is blatantly incorrect.

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[1] A similar statement is found in Order WR 2000-02. (2000 WL 348461, p. 18).

[2] The proponents of the SJRA made it clear that the only water they would provide would be the up to 110,000 acre-feet in the April-May pulse flow period, supplemented by certain flows in October. The record was fairly clear, therefore, despite the SWRCB's confusion, that the USBR had agreed to the impacts from the Districts' refill and there was no need originally for any refill criteria to be imposed.

On November 16, 2001, the USBR filed a protest of the Districts' long-term petition. As part of that protest, the USBR proposed three specific conditions that it recommended the SWRCB adopt as part of the approval of the long-term petition to protect its water right. (USBR letter, Nov. 16, 2001, p.1). The USBR letter stated

> "Reclamation would like to ensure that implementation of the proposed actions will not adversely impact the Central Valley Project operations. Therefore, we are requesting that the following conditions, in conformance with SWRCB Decision D-1641, be included in any approval of the subject petitions..." (Id.).

Upon receipt of this request, the Districts agreed to accept the inclusion of the three conditions proposed by the USBR (Districts' letter, May 21, 2002, p. 1-2). Thereafter, the USBR informed the SWRCB that it and the Districts had "reached an agreement on resolution of Reclamation's protest filed with your office on November 16, 2001." (USBR letter July 11, 2002). As a result of this agreement, the USBR did not submit a Notice of Intent to Appear, did not exchange testimony, exhibits and witness qualifications with the other parties, and did not participate in the hearing.[3]

The instant situation is therefore different than that in D-1641 where the evidence about what the USBR did or did not agree to was arguably in doubt. Here, the evidence is crystal clear that (1) the USBR knew what the Districts were asking, (2) filed a protest in an effort to protect its water rights, (3) suggested criteria which, in its view would protect its water rights, (4) reached an agreement with the Districts as to the conditions that would be imposed as part of the approval of the long-term petition, and (5) chose not to participate further since its water rights were adequately protected. Thus, the SWRCB's statement that "the USBR has not agreed" to certain impacts that may occur as a result of the Districts' refill operations is incorrect and blatantly at odds with the facts of this matter when taken in the proper context.

The SWRCB's finding in this matter also contradicts prior SWRCB decisions containing similar circumstances. In Order WR 2001-14, the SWRCB denied reconsideration requested by the North Gualala Water Company ("North Gualala"). In discussing the history and procedure of the matter, the SWRCB noted that as part of a 1978 petition for a change in place of use submitted by North Gualala, it added amended Term 91 to North Gualala's permit. This addition was made at the suggestion of the Department of Fish and Game as a condition for withdrawing its protest. Although North Gualala never formally accepted or rejected the addition of the amended Term 91, the SWRCB added it anyway, concluding, "North Gualala accepted the amendment to resolve the protest of DFG..." (2001 WL 1880726, p. 1).

In 2001, North Gualala argued that it never consented to the amendment. Without accepting or rejecting this assertion, the SWRCB rejected it as irrelevant, noting that

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[3] The Proposed Order indicates that the USBR did submit a notice of Intent to Appear (footnote 1, p. 5). However, the Districts have no record of this.

North Gualala had an opportunity to challenge the imposition of the amendment through a petition for reconsideration and/or a petition for writ of mandate. (Id.).

In the North Gualala case, the SWRCB evaluated actions of the parties to determine their intentions. The same should be true in this case. Like North Gualala, the USBR had every opportunity to request a refill condition that was more extensive than that contained in D-1641 (and recommended by the USBR as a condition of approval of the proposed change at issue here) and did not do so. Given that this is the second request for amendments to the Districts' water rights for purposes of performing the SJRA/VAMP, and that the USBR had every reason to know what potential impacts, if any, approval of the petition might have on its water rights, the fact that the USBR did not seek a more onerous refill criteria is direct evidence that it determined that such onerous refill criteria was not needed.

2. SEWD Is Not A Legal User of Water, and Its Evidence Is Contradicted By the USBR's Conduct.

SWRCB precedent is clear that a water service contractor cannot be protected from water shortages that may result from an action requested or consented to by the contractor's water supplier that holds the water rights. (Order WR 2000-10, 2000 WL 1177692, p. 9; Order WR 2000-02, 2000 WL 348461, p. 13). In this case, since it is clear that SEWD is not seeking to protect its water rights, but those of the USBR from which it purchases water (Proposed Order, p. 16), whether or not SEWD is a legal user of water depends upon whether or not the USBR has proposed or consented to the petition. Since the Districts proposed the long-term petition, not the USBR, the real question is whether or not the USBR consented to the change.

The SWRCB abandoned this clear precedent, however, and failed to perform the proper review. Rather than determine if SEWD was a legal user of water, and then determine if it would be injured by the proposed change, the SWRCB added the onerous refill criteria to protect SEWD and found that since there would be no injury to SEWD, it did not have to determine if SEWD were a legal user of water. (Proposed Order, p. 12). This formulation is completely contrary to law and cannot justify the SWRCB's actions in this case.

The SWRCB stated that it did not have to determine if SEWD was a legal user of water within the meaning of the Water Code since it would not suffer any injury due to the proposed changes. (Proposed Order, p. 12). However, the only reason that the SWRCB found that SEWD would not be injured by the proposed change *is because it conditioned the proposed changes on the imposition of the onerous refill criteria.* (*Id.*, p. 12 ["the proposed changes, as conditioned in this order, will have no effect on the availability of water for the protestants."]).

The SWRCB's actions are a classic case of bootstrapping. Under the Water Code, SEWD is entitled to protection from changes in place of use, purpose of use, or method of diversion only if it is a legal user of water. (Water Code §§ 1707(b)(2) and 1736).

Thus, the sequence of analysis for the SWRCB must be as follows: (1) Is a protesting party a legal user of water? (2) If so, will the proposed change cause it injury? (3) If so, what conditions, if any, can be added to enable the change while protecting the legal user of water? Of course, if the answer to either the first or second questions is "no," then the SWRCB's analysis must end, and no special conditions to protect the protesting party are appropriate.

Here, the proper sequence of analysis was turned on its head. Rather than ask the first three questions, the SWRCB simply devised a condition that would protect the protesting party (SEWD), and then decided that it did not need to ask either of the first two questions. Using this logic and procedure, a protesting party before the SWRCB will never again have to demonstrate that it is a legal user of water. Rather, all it will have to show is that (1) it will be injured by the proposed change, and (2) that a condition will protect it. The SWRCB can then skip the analysis of whether or not the protesting party is entitled to protection under the law by insisting on the suggested protective measures.

There is simply no legal justification for the SWRCB's departure from the law established by the Legislature in the Water Code. The SWRCB must determine if SEWD is a legal user of water before it determines what conditions, if any, are needed to protect it from injury. By identifying the protective conditions first, the SWRCB not only avoided performing the legal analysis required by the Water Code, but unjustly bootstrapped the need for the protective condition in the first place. Indeed, it seems likely that the only reason the SWRCB acted in this fashion was specifically to avoid the question of whether or not SEWD is a legal user of water.

Had it done the proper analysis, the SWRCB would have found that SEWD is not a legal user of water. As is set out at length in the Districts' closing brief, and amplified by the discussion regarding the evidence of the USBR's conduct above, the USBR consented to the changes proposed by the Districts provided only that it receive the same refill protection that it received as part of D-1641. Given this consent, SEWD's complaints that such refill protection is insufficient become irrelevant. Once the USBR's consent has been given, SEWD loses any claim to the status of a legal user of water, and any concerns that it has with the USBR's ability to meet its contractual obligations are beyond the scope of the SWRCB's jurisdiction.

3. Evidence Submitted By SEWD Insufficient to Support Proposed Refill Condition.

SEWD did not present detailed, scientific evidence regarding the impact that the proposed change might have on the USBR's water rights, nor in support of its proposed refill condition. As for the former, it relied solely on the testimony of the Districts' expert witness, Daniel B. Steiner, whose response to two questions, in the view of SEWD, demonstrated "the **potential** for impact to legal users of water..." (SEWD Br., p. 7)(emphasis added). Assuming, *arguendo*, that SEWD's conclusions arising from Mr. Steiner's testimony are accurate, at best the evidence shows a potential for injury. The evidence does not show that an injury will occur.

As to the latter, SEWD argued essentially that the SWRCB made a mistake in crafting the original refill criteria in D-1641, and that it should now take the opportunity to correct that mistake and extend the refill criteria to apply when any of the salinity or flow objectives at Vernalis are not being met. (SEWD Br., p. 11-12). There is no evidence whatsoever that the SWRCB did, in fact, make a mistake in crafting the original refill criteria in D-1641. Moreover, there is no evidence that the proposed refill criteria will reduce, eliminate or alleviate the potential injury that SEWD complains of.

4. Normal Course of SWRCB Conduct Is To Accept Proposed Conditions As Means of Resolving Protests.

The SWRCB recognized that the purpose of the April 23, 2003 evidentiary hearing was "for the SWRCB to receive evidence that will enable it to make a decision regarding the issues raised by the unresolved protests filed against the transfer." (Proposed Decision, p. 1-2). Despite the fact that the USBR's protest was resolved, and that SEWD did not qualify as a legal user of water[4], the SWRCB nonetheless evaluated evidence regarding the USBR's water rights and the impact, if any, that the proposed change would have on them. The SWRCB's course of conduct in this regard was odd, as the Districts have been unable to locate any other decision where a protestant suggested conditions upon which a protest could be resolved, such conditions were accepted by the applicant, and yet the SWRCB imposed additional conditions beyond those agreed upon by the applicant and protesting party. While the SWRCB perhaps retains the legal authority to, on its own initiative, consider and impose conditions to protect a protesting party in excess of those agreed upon by the applicant and the protesting party, it should not do so unless the parties were clearly aware that the SWRCB was considering such action.

The fundamental principle behind due process is that a party be notified of the issues and be given an opportunity to be heard on them. (Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314-315 (1950)). Here, since the USBR protest had been resolved, resulting in the USBR's consent to the proposed changes conditioned only upon the inclusion of the D-1641 refill conditions, the Districts had no reason to know that the impact that its petition might have on the USBR's water rights was an issue to be addressed at the hearing. As such, the Districts' case-in-chief, including the expert testimony of Daniel B. Steiner, did not address, examine or evaluate the impact that the Districts' refill might have on the USBR's storage at New Melones when it was releasing or bypassing water for Vernalis objectives other than those related to salinity control. To the extent that the SWRCB believes that (1) the USBR did not consent to the proposed change with the inclusion of the D-1641 refill criteria, and (2) that the proposed change might have an impact on the USBR's water right, it should announce a new phase to the hearing and request that the parties, including the USBR, submit evidence addressing the possible impact and proposing conditions that would avoid or minimize the impact. In addition to curing any violations of the Districts' due process rights, this would avoid the

[4] Not to mention the fact that SEWD reneged on their agreement to withdraw their protest upon the Districts' acceptance of the D-1641 refill conditions.

problem currently facing the SWRCB regarding the paucity of evidence on the both the injury to the USBR's water rights and the appropriateness of the proposed refill criteria as a mechanism for eliminating or reducing such injury.

5. The Districts Will Not Accept the Proposed Refill Criteria.

As is discussed at length above, there is absolutely no justification for the SWRCB's attempted imposition of the refill criteria contained in the proposed order. If for any reason the SWRCB intends to maintain the proposed refill criteria as a condition of its approval of the proposed change requested by the Districts, the Districts will withdraw their petition. The proposed refill criteria is simply too onerous to be accepted by the Districts. Moreover, based upon the SWRCB's finding that the Districts can operate their reservoirs to effectuate the provision of the additional 47,000 acre-feet without violating their water rights (Proposed Order, p. 9-12) and without having a detrimental affect on the rights of the Delta parties, groundwater, or fish, wildlife or other instream beneficial uses of water, there appears to be little need for the SWRCB's approval. In the place of a SWRCB approved change petition, the Districts may simply provide the 47,000 acre-feet of water and operate as planned while taking the risk that the water released is diverted before it serves its intended purpose.

I hope that this has been helpful to you. If I can answer any questions or provide further detail before the workshop on March 2, please let me know.

Very truly yours,

O'LAUGHLIN & PARIS LLP

By_____
Tim O'Laughlin
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TO/jd
cc: See attached service list

SERVICE LIST
Workshop on VAMP "Double-Step" Petitions
Mailing Labels
Modified 2/4/04

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