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April 5, 2022

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Re: March 18, 2022 DWR USBR TUCP

Dear Mr. Frazier:

The following is South Delta Water Agency's ("SDWA") comments to the above referenced Temporary Change Petition ("TUCP") and the related Order issued on April 4, 2022. SDWA believes the Petition and Order are ill-advised, not supported by the law and are a continuation policies which have resulted in both the deterioration of the Sacramento-San Joaquin Delta and the exacerbation of drought impacts.

Initially SDWA objects to the SWRCB's practice of noticing a TUCP, designating a due date by which comments must be submitted and then issuing the Order before the comments are due. This disregard for the public and interested parties diminishes the SWRCB and the public process.

1. Seven years ago the State was in its last drought during which the Central Valley Project ("CVP") and the State Water Project ("SWP") (collectively "Projects") were incapable of meeting their permit conditions. After only six months of drought, the SWRCB Executive Director somehow "waived" both the cold-water requirements on the Sacramento River and decided not to enforce the western Delta water quality standard for agricultural beneficial uses. The very next year the projects were incapable of meeting many more of their permit requirements and ended up petitioning the SWRCB eight times in one year for TUCPs. -- a non-public process which in combination with Emergency Declarations by the Governor allows the SWRCB to make changes to the Projects' permits without any public hearing or presentation of evidence and cross examination. The SWRCB's attempts to make the process look open and fair, but by issuing Orders on the petitions before the comment period has expired, we see the Board's preference to "rule" rather be responsive to the laws, regulations or to the public.

During the prior drought numerous violations of water quality standards occurred and many more would have occurred if it were not for the protections of the previous TUCP orders. Because of those orders, the projects escaped any liability for violating their permit conditions while other permit and license holders were curtailed and prosecuted. The sad history of regulation in the Delta leads to only one conclusion; the SWRCB will never enforce the Delta water quality objectives against the Projects. This unjustified policy is likely the single greatest cause of the Delta's environmental problems.

As provided below, the TUCP process is used to allow the Projects to maximize the benefits of their permits while excusing their failure to meet their burdens. The current TUCP, like those before it, is drafted to appear to be an attempt to preserve water in upstream reservoirs for the benefit of the environment but that is merely a word salad. From October 5, 2021 to April 3, 2022, exports have increased San Luis reservoir storage by 689,086-acre feet (which does not account for releases from the reservoir). That reservoir's operations are bound by permit conditions amended by D-1641 and include Delta flow and salinity standards. Notwithstanding the available water, the SWRCB takes no notice and rather than require this source of water to assist in meeting project in-Delta obligations it allows the water to be used for export purposes. The blatant bias of the SWRCB is, once again, clearly revealed.

The SWRCB is of course obligated to develop water quality objectives. Those objectives cover all hydrological scenarios and mandate certain flows at certain times. The objectives are then implemented through water rights proceedings. The vast majority of Delta related objectives are assigned to the Projects which participated in the development of the objectives and in the

process to implement them. Thus, the Projects are well aware that under varying conditions, they must plan ahead to have sufficient supplies available to meet their obligations.

Both the water quality and water rights processes anticipate and model conditions over the various hydrological conditions of the past. The past of course includes the 1928-34 drought, the 1977 drought and the most recent droughts. The historic record clearly shows that California has and will continue to experience droughts of varying degrees. However, both the modeling and the history are ignored by the Projects which simply do not plan for drought conditions. Instead, the Projects “bet on the come line,” export as much as they can when they can and make no provision for the future. Sadly of course, the SWRCB goes along with this gamble and excuses failure at every turn.

As SDWA has complained before, the TUCP reads eerily similar to those produced over and over again in the last drought. The Projects must “report” constantly, “estimate amounts used and saved” “coordinate” with fishery agencies and SWRCB staff, “develop plans” for a continuation of the drought, and take “future actions” if possible, to “benefit endangered species.” One would think that after having made such requirements in the numerous previous TUCP orders the SWRCB would learn that the Projects simply refuse to plan ahead -- but here we are again.

Nothing can undo the circumstances we are in; there is no hidden water supply that can remedy the situation. However, there is a solution for the future. Rescind the TUCP Order, deny all future ones and begin enforcement actions against the Projects. There simply is not enough water on average to meet all the demands. Until the SWRCB enforces the rules against the Projects, the shortages will, as much as possible, be shifted from the Projects onto the environment and other water users and the Delta will continue its not-so-slow spiral into destruction.

2. The TUCP’s allows exports of 1,500 cfs and more under certain conditions, the SWRCB now having dropped the pretense of this being for “health and safety.” What is the justification for any exports under the current conditions? Are the Projects entitled to any amount of natural flow, return flow or stored water when they cannot meet their permit conditions? Is there any information indicating that the Projects will meet water quality standards later in the summer and fall of 2022? Once again, the SWRCB allows the projects to bet on the come line. In the past this fool’s errand was based on hoped for precipitation later in the year, but in this case, there is really no chance of late spring storms improving the situation. Thus, it is no longer betting on the come line, rather it is purely a method to protect exports.

Of course, the underlying problem is the misapplication of the water rights rules by the SWRCB. First, the water right priority system ranks users of water such that as the supply decreases, the most junior right holders are supposed to use less, or not use any water at all. The Projects are junior to virtually all other right holders, and therefore are not supposed to be diverting and using water when the supply results in senior right holders being curtailed.

Second and just as important, the Projects are allowed to store water but that storage is conditioned on the terms and conditions of their permits. They can store, divert and transport water if they meet the water quality objectives which have been assigned to them. We are no in the third year of the Projects' most recent debacle of not being able to meet their permit conditions. Yet during that same time the Projects have (and continue to) export millions of acre feet of water. Under what theory are the junior most right holders entitled to any class of water while in the middle of their ***third year of not meeting their permit conditions?***

The SWRCB has developed some backwards priority whereby they try to “balance” the needs of the junior-most water right holders with the needs of senior right holders and the environment. The notion that exports can continue at any level when Delta-related and other species (many of whom are endangered) are at historic lows and nearing extinction is unfathomable. It is incumbent on the SWRCB to justify its actions. When other right holders face the drought the SWRCB orders curtailments and prosecutes violators. Completely absent from that analysis is any “balancing” of needs such that the various priorities must “share” in the shortage. Yet every year the SWRCB “balances” the needs of exports as it slashes environmental protections and insures the destruction of the Delta.

Perhaps the studies and reporting requirements of the TUCP should proposed operations of the projects in a fourth drought year by which reservoirs could maintain salinity control in the Delta in 2023.

The best example of the current “protect exports at all costs” view of the SWRCB and the projects is the other petition submitted by the USBR at almost the same time as the TUCP. Via a letter and petition dated March 1, 2022 the USBR requested the SWRCB approve a temporary change in permit conditions whereby it could “redivert” San Joaquin River Restoration (sic) flows which are released from Millerton Lake behind Friant Dam and then pumped out of the River at either or both Paterson ID or Banta-Carbons ID. The water is described as being flow under USBR’s control or previously stored in the reservoir. In other words, the USBR wants to be relieved of its obligations to meet in-Delta salinity and outflow requirements but wants ***to export water passing through its facilities before it reaches the Delta!***

There is of course a law that requires upstream project releases to be coordinated as possible to meet in-Delta obligations; its Water Code Section 12205 which covers this exact situation. That USBR would even consider such an embarrassing attempt at avoiding its responsibilities is incredible, but but it seems to fit nicely with the SWRCB’s efforts to maximize exports by balancing instead of enforcing. Given the SWRCB’s continued approval of TUCPs the USBR can be confident that its pattern and practice of squeezing as much water for exports out of a system being destroyed by a lack of water, will be approved by the SWRCB

Sections 12202-12205), project permit conditions (see D-1641 at page 182) and case law (*Racanelli*) require the projects to release water to maintain water quality in the Delta.

If the projects are mandated by their permits to maintain water quality and do not, the downstream Delta riparian would be damaged if the quality then exceeded the standards or otherwise caused injury. It is well past time for the SWRCB to stop claiming that once the projects releases stored water from a reservoir to meet water quality standards, riparians downstream cannot divert that water. That stored water was required to be released for the benefit of the downstream riparians and does not suddenly become protected from diversion. It is for those downstream users' benefit. In addition, case laws clearly states that one cannot add his/her water to a stream and then prevent others from using the stream if they could have used the stream absent the added water.

Further, and as discussed above, Section 12205 requires that project releases from reservoirs be coordinated in order to maximize the fulfillment of the objectives of Section 12200-12202. If the policy of the state is to make sure reservoir releases add to or help in-Delta salinity control, in-Delta water rights and in-Delta supply (Section 12202) then such releases cannot be insulated from those three uses and the users dependent on them.

8. There would seem to be no rational reason to grant a TUCP from now until June 30. This short term "cheat" appears to be a method of insuring summer and fall water quality violations. Why has the SWRCB not included meeting southern Delta salinity standards when "balancing" all the other needs. There is no real expectation that there will be an increase in the available supply in order to meet summer and fall water quality requirements. By granting this TUCP, the SWRCB is itself doing what the projects continue to do; wait until the last minute and then be excused from their obligations. What is the plan for this summer and fall? Is there any expectation that the southern Delta salinity standards will be met? Could San Luis releases meet those standards? Would the Restoration flows incrementally improve water quality?

The SDWA adopts and incorporates the comments by the Central Delta Water Agency and strongly urges the SWRCB to rescind the TUCP Order. The only way to ensure the projects actually plan for droughts is to enforce their permit conditions and, like every other permit and license holder, be held liable when they do not.

Very truly yours,

SOUTH DELTA WATER AGENCY

By: 
JOHN HERRICK, ESQ.