

CENTRAL DELTA WATER AGENCY

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Public Comment
Sthrn Delta Ag & SJR Flow
Deadline: 5/23/11 by 12 noon

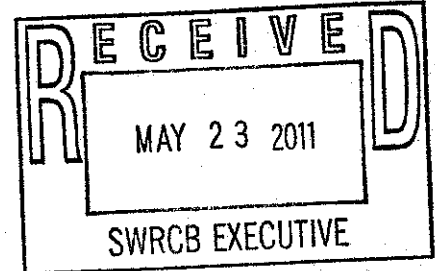
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Via email to commentletters@waterboards.ca.gov
and U.S. First Class Mail (Ten Copies)

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



Re: Comments on the SWRCB's April 1, 2011 Revised Notice of Preparation and Notice of Additional Scoping Meeting re Update to the WQCP for the Bay-Delta Relating to Southern Delta Salinity and San Joaquin River Flow Objectives.

Dear SWRCB:

The Central Delta Water Agency (CDWA) has previously submitted numerous comments on this matter and hereby incorporates its prior comments dated April 6, 2009, entitled, "Comments on PUBLIC STAFF WORKSHOP re Consideration of Potential Amendments to the WQCP for the Bay-Delta Relating to Southern Delta Salinity and San Joaquin River Flow Objectives (which themselves incorporate its prior comments dated March 19, 2009 and October 1, 2008). The CDWA also hereby incorporates its December 6, 2010 comments on this matter entitled, "San Joaquin River Technical Report Comments."¹

The CDWA joins in the comments the South Delta Water Agency is providing on the instant Revised Notice of Preparation (NOP) and supplements those comments with the following.

1. **Actions to Assure San Joaquin River Flows are Not Rediverted by Water Users Downstream of Vernalis.**

On page 4 of Attachment 2 to the Revised NOP, it states:

¹ All of said comments can be found on the SWRCB's website at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/index.shtml

Although the most downstream compliance location for the San Joaquin River flow objective is at Vernalis, the objective is intended to protect migratory fish in a larger area, including areas within the Delta where fish that migrate to or from the San Joaquin River watershed depend on adequate flows from the San Joaquin River and its tributaries. To assure that flows required to meet the San Joaquin River narrative flow objective are not rediverted downstream for other purposes, the State Water Board may take water right and other actions to assure that those flows are used for their intended purpose. In addition, the State Water Board may take actions to assure that provision of flows to meet the narrative San Joaquin River flow objective do not result in redirected impacts to groundwater resources, potentially including requiring groundwater management plans, conducting a reasonable use proceeding, or other appropriate actions.

(Emphasis added.)

The emphasized sentence in the above paragraph is quite a mouthful. At the outset, the NOP does not provide sufficient information regarding such "water right and other actions" for public agencies or other interested persons to meaningfully provide "specific detail" as to "[t]he significant environmental issues and reasonable alternatives and mitigation measures that . . . will need to [be] explored in the draft EIR . . ." regarding those actions. (CEQA Guidelines, § 15082, subd. (b).) For example, reasonable alternatives to what? Similarly, reasonable mitigation measures to what impacts? And what precisely is the "intended purpose" of those San Joaquin River flows once they pass Vernalis, and where is the evidence and analysis to support that purpose?

To the extent the SWRCB is contemplating the restriction of any in-Delta water users from diverting water in order to assure the San Joaquin River flows "are used for their intended purpose [whatever that may be]," the SWRCB must ensure that it has fully complied with and honored all applicable laws and priorities associated with any such imposition of restrictions and, in particular, ensure that the SWP and CVP are fully complying with their various legal obligations.

For example, and in general outline form, among other matters, the SWRCB would have to fully take into consideration, and fully discuss and analyze in its EIR, all of the following before it sought to lawfully impose responsibility to meet a flow (or water quality) objective on any such in-Delta water user:

- (1) The SWP and CVP must bear full responsibility for full mitigation of their impacts including without limitation the impacts from reverse flows, reduced outflow, the drainage into the San Joaquin River from the westside of the San Joaquin Valley, and damage to spawning areas.
 - (a) Note: the impacts of ship channels are burdens of the State and Federal Government; and the burden of westside drainage is that of the CVP and

should fall most heavily upon the San Luis Unit in that the unit was not to go forward without a drain.

- (2) The SWP and CVP must provide adequate salinity control. (See e.g., Wat. Code, §§ 12200 et seq. & 11207; U.S. v. Gerlach Livestock Co. (1950) 339 U.S. 725; Ivanhoe Irr. Dist. v. McCracken (1958) 357 U.S. 275.)
- (3) The CVPIA burdens are those of the CVP.
- (4) Preservation of fish and wildlife is the responsibility of SWP and CVP with cost to be paid by users. Where possible enhancement must be incorporated with the cost of enhancement attributed to the State General Fund. (Wat. Code, § 11900 et seq.; Goodman v. County of Riverside (1998) 140 Cal.App.3d 900.)
- (5) The SWP and CVP must to the maximum extent possible operate and manage releases from storage into the Delta to provide salinity control and maintain an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development. (Wat. Code, § 12205.)
- (6) In allocating the burden within the CVP and SWP, the uses within the Delta and other areas and watersheds of origin must be accorded priority over exports. (Wat. Code, §§ 10505 et seq., 11460 et seq. & 12200 et seq.)
- (7) The remaining burden which would appear to be in the tributaries above the Delta is allocable among the other water users in accordance with water right priorities. The burden for bypass flows and other fish and wildlife requirements applicable under law to the various impoundments should not be shifted to other water users. Exporters other than the CVP and SWP must yield priority to the users within the Delta and other areas and watersheds of origin. (See Wat. Code, § 1215 et seq.; see also Wat. Code, §§ 12203 & 12205.)
- (8) To the extent that a water user within the Delta and the other areas and watersheds of origin is required to yield water which can be replaced with CVP or SWP water, then the CVP or SWP water should be burdened provided that if the water is not unregulated flow, bypassed natural stream flow, return flow from upstream use, natural tidal flow or physical solution water, etc., and is truly "stored water," then a requirement of a contract or other mechanism for reasonable payment for the storage benefit may be appropriate. (See Wat. Code, §§ 11460 et seq.)

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2. **Any Implementation Plan Needs to Forthrightly Address Term 91.**

In the administrative and legal proceedings over Term 91 in Phelps v. SWRCB (2007) 157 Cal.App.4th 89, it became clear that Term 91 is simply a mechanism to impose responsibility on appropriative water right holders within the Delta watershed to meet the various Bay-Delta Water Quality Control Plan objectives. As the SWRCB explains in WRO 2004-0004, at pages 5 and 6:

“In effect, Term 91 requires appropriators with this term in their water right permits or licenses to forego diverting natural flow that is needed to meet the flow-dependent water quality objectives. When there is insufficient flow to meet the water quality objectives, diversions by Term 91 appropriators could contribute to increased concentrations of salts in the Delta channels.”

A major problem, however, is that the implementation plans set forth in the 1995 as well as 2006 Plans do not even mention Term 91. Instead, both plans state the following:

“The State Water Board will consider, in a future water rights proceeding or proceedings, the nature and extent of water right holders’ responsibilities to meet these objectives.” (1995 Plan, p. 4; 2006 Plan, p. 3; emphasis added.)

For Phelps, et al., and presumably numerous other water right holders subject to Term 91, Term 91 was imposed on their water rights well *before* the 1995 and 2006 water quality control plans were even adopted, much less implemented. Moreover, the “future” water rights proceeding that was intended to establish the nature and extent of water right holders’ responsibilities to meet the 1995 objectives, and which culminated in the SWRCB’s Decision 1641, makes no mention of the assignment of responsibility to meet those objectives on Term 91 water right holders.

This practice needs to stop. If the SWRCB is going to continue imposing responsibility on Term 91 water right holders to meet one or more of its water quality plan objectives, including any of the objectives at issue herein, then the SWRCB must forthrightly address the propriety of such imposition in its water quality control plan and in its subsequent water right proceeding to assign responsibility to meet the plan’s objectives, and discuss and analysis such imposition in its EIR for the plan and water right proceeding. As it stands, the SWRCB has been wrongfully imposing responsibility on Term 91 water right holders without any mention of such imposition in either its water quality control plans or the subsequent water right proceedings, much less any examination of issues such as the following:

- (1) What specific water quality objective or objectives is the Term 91 water right holder being held responsible for?
- (2) Does the Term 91 water right holder’s water use actually negatively impact those water quality objectives?

- (3) Assuming it does, is it nevertheless legally proper to impose responsibility to meet those objectives on that water right holder?

For example, with regard to the second question, it is not at all clear that Term 91 agricultural users in the Delta lowlands negatively impact any salinity objectives. In fact, the available evidence demonstrates that such use may actually *benefit* such objectives. As DWR's "Investigation of the Sacramento-San Joaquin Delta, Report No. 4, Quantity and Quality of Waters Applied to and Drained from the Delta Lowlands," dated July of 1956, explains at page 30:

"The Delta lowlands act as a salt reservoir, storing salts obtained largely from the channels during the summer, when water quality in such channels is most critical and returning such accumulated salts to the channels during the winter when water quality there is least important. Therefore agricultural practices in that area *enhanced* rather than degraded the good quality Sacramento River water en route to the Tracy Pumping Plant." (Emphasis added.)

And similarly, with regard to outflow objectives, the available evidence demonstrates that agricultural water use in the Delta lowlands likely results in a net *benefit* to outflow. For example, as the SWRCB recognized in its Decision-990, at page 46:

"The reclamation of the lands in the Delta has eliminated a large area of aquatic vegetation such as cat-tails and tules which consume three to four times as much water as the crops which are grown on these reclaimed lands. As a result, it appears probable that the consumption of water within the Delta has been decreased by reclamation development, and that a greater proportion of the stream flow entering the Delta now reaches the lower end of the Delta to repel saline invasion than before reclamation."

With regard to the third question set forth above, i.e., whether it is legally proper to impose responsibility to meet a Bay-Delta water quality objective intended to benefit fish and wildlife or any other beneficial use on a Term 91 appropriator, before it imposes any such responsibility, the SWRCB would have to ensure that it has complied with and honored all of the above-referenced applicable laws and priorities associated with any such imposition.

Up to this point the SWRCB has not mentioned the assignment of responsibility to meet the Bay-Delta water quality plan objectives on Term 91 water right holders in its 1995 or 2006 water quality control plans or subsequent implementation proceedings, much less properly examined any of the above-listed three questions or any of the above-referenced eight legal considerations. Accordingly, CDWA submits that the SWRCB's current imposition of responsibility to meet the existing water quality objectives on Term 91 water rights holders is contrary to law (as well as the express implementation language in the 1995 and 2006 plans) and any future imposition of such responsibility with respect to the instant San Joaquin River flows

or southern Delta salinity requirements on such holders will continue to be unlawful unless and until the SWRCB forthrightly embraces such imposition, and the propriety thereof, in a future water quality control plan and/or the subsequent water right proceeding to assign responsibility to meet the plan's objectives.

Thank you for considering these comments and concerns.

Very truly yours,



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Attorney for the CDWA

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