



CLIFFORD W. SCHULZ

April 6, 2009

**VIA E-MAIL BAY-DELTA@WATERBOARDS.CA.GOV,  
and Hand Delivery**

Chris Carr  
State Water Resources Control Board  
Division of Water Rights  
Cal/EPA Headquarters  
1001 "I" Street  
Sacramento, CA 95814

**RE: STATEMENT OF THE STATE WATER CONTRACTORS CONCERNING  
SOUTH DELTA SALINITY OBJECTIVES AND SAN JOAQUIN RIVER  
FISHERY FLOWS<sup>1</sup>**

Dear Mr. Carr:

**Legal Background**

As a result of recent court decisions, the current proceedings to consider (i) appropriate water quality protection for agricultural beneficial uses within the south Delta and (ii) San Joaquin River fishery flows begin with a more well defined and settled understanding of how the interrelated legal and technical issues should be approached. In January 2006, Court of Appeal Justice Ronald Robie provided key guidance to the Board and all the interested parties. (*The State Water Resources Control Board Cases* (2206) 136 Cal.App.4<sup>th</sup> 674)

First, quoting with approval from *United States v. State Water Resources Control Board* (2006) 182 Cal. App. 3d 82, 109–110 (Italics added), Justice Robie described the statutorily derived mandates and discretion that guide the Water Board's determination of what water quality objective should be established to protect a particular beneficial use:

In formulating a water quality control plan, the Board is invested with wide authority 'to attain the highest water quality *which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and*

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<sup>1</sup> Presented to the State Water Resources Control Board on April 22, 2009, in response to its February 13, 2009 Notice, as revised by its March 27, 2009, Notice.

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*detrimental, economic and social, tangible and intangible.*’ (§ 13000.) In fulfilling its statutory imperative, the Board is required to ‘establish such water quality objectives ... as in its judgment will ensure the *reasonable* protection of beneficial uses ...’ (§ 13241), a conceptual classification far-reaching in scope. [fn. omitted.]’ “Beneficial uses” of the waters of the state that may be protected against quality degradation include, but are not necessarily limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.’ (§ 13050, subd. (f).) Thus, in carrying out its water quality planning function, the Board possesses broad powers and responsibilities in setting water quality [objectives]....)

This quote’s emphasis on the balancing of competing values clearly follows the mandate of Article X, Section 2, of the California Constitution and is consistent with the California Supreme Court’s statement in *National Audubon Society v. Superior Court* (1983) 33 Cal. 419, 421 that “All uses of water, including public trust uses, must now conform to the standard of reasonable use.” Thus, a report on crop tolerance or someone’s desire concerning protection of their particular beneficial use is not dispositive of what water quality objective should be adopted. Such data just begins, not ends, the Water Board’s task of balancing various proposals against their impact on other statewide interests. (See *Joslin v Marin Municipal Water District* (1967) 67 Cal.2d 132, 140: “What is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance.”)

Second, Justice Robie distinguished the task of determining what objectives are reasonable from the separate task of determining the appropriate means for achieving those reasonable objectives. In the process, he described the Water Board’s authority and discretion under its water rights jurisdiction in a manner that limits the Water Board’s discretion to adopt water rights terms and conditions that deviate from the objectives established in the water quality control plan. The objectives cannot be undermined in a water rights implementation process.

These key rulings arose from challenges to the Water Board’s approval of the Vernalis Adaptive Management Plan (VAMP) through water rights Decision 1641. In Decision 1641, the Water Board decided to substitute the VAMP flows for the San Joaquin River flow objectives that had been established through the 1995 Bay-Delta water quality control plan. It authorized implementation of the VAMP as an alternative means of providing certain spring San Joaquin River fishery flows and investigating the relative importance of flows versus export pumping on the survival of juvenile salmonids. Justice Robie rejected that decision as follows:

... [A] water quality control plan must include water quality objectives and a program of implementation needed for achieving

those objectives. (§ 13050, subd. (j).) Moreover, the program of implementation must include “[a] description of the nature of actions which are necessary to achieve the objectives” and “[a] time schedule for the actions to be taken.” (§ 13242, subds. (a), (b).)

In Decision 1641, the Board relied on the “time schedule” provision of section 13242 to justify its approval of the San Joaquin River Agreement flow regime as an “interim” requirement. On appeal, the Board likewise argues that “[t]he [Vernalis Adaptive Management Plan] experimental period constitutes a ‘time schedule’ for meeting the [flow] objectives” in the 1995 Bay-Delta Plan. The first flaw in that argument is that, by law, the time schedule for the actions to be taken to achieve objectives in a water quality control plan must be included as part of the plan itself. (§ 13242.) The 1995 Bay-Delta Plan contains nothing about “[t]he [Vernalis Adaptive Management Plan] experimental period.” The Board must point to a time schedule in the 1995 Bay-Delta Plan that authorized it to postpone implementing the Vernalis pulse flow objective. The Board has failed to identify any such provision.

The second flaw in the Board's argument is that, regardless of the timing issue, the Board has failed to identify anything in the plan that authorized it to implement a flow objective other than the Vernalis pulse flow objective, even temporarily. The Vernalis pulse flow objective required a minimum monthly average flow of water at a particular point in the San Joaquin River for a 31-day period in April and May each year, ranging from 3,110 to 8,620 cubic feet per second. Nothing in the 1995 Bay-Delta Plan authorized the Board to implement a different flow regime that could provide less than that amount of water.

This same flaw defeats arguments made by San Joaquin River Group and State Water Contractors. The San Joaquin River Group contends that under the 1995 Bay-Delta Plan, because there was no specific schedule for achieving the Vernalis pulse flow objective, the Plan provided that implementation “should be immediate.” San Joaquin River Group then argues at length about the meaning of the word “should,” concluding that because “should” is generally permissive and advisory, the Board had the power not to implement the Vernalis pulse flow objective immediately and instead provide for a staged implementation. San Joaquin River Group points to nothing in the plan, however, that authorized the

Board to implement a different flow objective than the Vernalis pulse flow objective, even on a temporary basis.

The decision then significantly concluded:

Contrary to State Water Contractors' assertion, the trial court's decision does not rest on "the assumption that water right decisions adopted by the ... Board must provide for full and immediate implementation of the water quality objectives set forth in any applicable water quality control plan." The trial court's decision rests on the conclusion (with which we agree) that when a water quality control plan calls for a particular flow objective to be achieved by allocating responsibility to meet that objective in a water rights proceeding, and the plan does *not* provide for any alternate, experimental flow objective to be met on an interim basis, the decision in that water rights proceeding must fully implement the flow objective provided for in the plan. *The guiding principle is that the Board's power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing.*

In a few lines of text, Justice Robie put the Water Board on notice that the determination as to whether and to what extent water quality objectives should, in the public interest, be implemented by water rights holders must be considered in the quasi-legislative basin planning process. No longer can that task be left to the quasi-judicial water rights process. As a result, the language of the water quality plan, if not carefully worded, may be controlling in subsequent water rights hearings, and the Water Board's water rights discretion "constrained" by the language included in the plan.

Thus, a more critical examination of all relevant data needs to occur at the basin planning stage to ensure that a proposed water quality objective is reasonable in light of "all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." The limits on Water Board authority to deviate from an approved objective<sup>2</sup> based on additional information derived from during later quasi-judicial water rights hearings, calls out for development, presentation, and consideration of detailed testimony and exhibits during the basin planning proceedings. Similarly, water quality control plan implementation provisions must be carefully worded to ensure that they are broad enough to enable the Water Board, during water rights hearings, to balance the impacts of using vital public water supplies for dilution of pollution against other available methods to achieve the water quality goal that will better serve the overall public interest.

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<sup>2</sup> Justice Robie indicated that such a change could only be accomplished by reinitiating the water quality control planning process.

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This legal backdrop has led the State Water Contractors to treat the forthcoming quasi-legislative proceedings as the forum within which the Water Board will make most of the important discretionary decisions concerning the way water in the portion of the Delta dominated by San Joaquin River flows will be managed in the future. The SWC and its members plan to present significant technical data in the form of historical materials, model output, and statements by experts in the fields of hydrology, hydraulics, fisheries biology, water quality, agronomy, and other relevant disciplines. The factors that the SWC and its members consider to be the most important and the process that they recommend be followed are spelled out in more detail in the remainder of this statement

### South Delta Salinity

In its 2006 water quality control plan, the Water Board continued to rely on a factual misstatement concerning the causes of higher salinities in the south Delta that first appeared in the 1995 plan:

Elevated salinity in the southern Delta is caused by various factors, including low flows; salts imported to the San Joaquin Basin in irrigation water; municipal discharges; subsurface accretions from groundwater; tidal actions; *diversions of water by the SWP*; CVP, and local water users; channel capacity; and discharges from land-derived salts, primarily from agricultural drainage. (2006 Plan, p. 27; italics added.)

To the extent that this sentence implies that the operation of the Banks Pumping Plant causes a measurable degradation of salinity conditions in the south Delta from that which would exist in the absence of those pumping operations, the statement is incorrect. Hydrology and DSM II modeling have demonstrated that Banks pumping does not increase salinity concentrations in the south Delta. In fact, the salinity of San Joaquin River inflow at Vernalis, together with discharges of agricultural drainage from the south Delta islands, are the primary drivers that control salinity at the four south Delta compliance locations. The SWC will participate in producing the latest DSM II and related studies that will once again demonstrate that there is no correlation between SWP pumping and increases in south Delta salinity. These studies will also address contentions that the pumping operations have created null zones where lack of positive flows cause salts to concentrate.

To the extent that the quotation above implicitly contends that the SWP is degrading south Delta salinity levels because the Banks Pumping Plant operations import salts to the San Joaquin Basin, that contention is flawed for several reasons. First, no SWP water is delivered within the San Joaquin Basin except for the Oak Flat Water District which has a Table A allocation of 5700 acre feet and is located six to eight miles west of the San Joaquin River and west of both the California Aqueduct and the Delta Mendota Canal. There is no data that indicates that saline return flows from this area reach the San Joaquin River. Second, the only non-SWP water that is moved through SWP facilities is CVP water wheeled through joint-point

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operations. The SWC will supply the Water Board with exhibits describing the amounts of water wheeled for the CVP and their ultimate destinations. Some of that water, such as that moved to the Cross Valley Canal in Kern County, cannot impact water quality in the San Joaquin Basin. As for CVP wheeled water that may be used within the San Joaquin Basin, Water Code section 1810 et seq. obligates the owners of public water facilities to make capacity available to transfer water from one place to another based on State policy that unused capacity in existing infrastructure should be fully utilized to avoid wasteful construction of redundant facilities and allow water markets to function more efficiently. To the extent that CVP water moved through the SWP facilities imports salts which may slightly impact south Delta salinity levels, the responsibility for that impact, if any, should as a matter of good policy and fairness rest with the entity using the water, not the entity that complies with State law and provides access to excess conveyance capacity. Statements by Water Board staff that it is appropriate to make the SWP jointly liable for maintaining south Delta salinity levels because it assists the CVP in importing salts to the San Joaquin Basin, should be expressly disavowed by the Water Board as a position contrary to State law and policy. One person has described the contrary position as "no good deed goes unpunished."

Finally, the SWC believes the Board must carefully consider how recent Delta smelt protection actions will affect both the reasonableness of any proposed south Delta salinity objective and the means available to implement such objectives through modifications in export water operations. As noted previously, San Joaquin River inflow and the quality of that inflow are the central drivers that control south Delta salinity levels. Even if SWP Delta operations could improve salinity conditions at the south Delta compliance locations (which we do not believe is the case), that could only occur through even greater Old and Middle Rivers reverse flows (to draw Sacramento River water into the area) that the fishery agencies and the courts have prohibited. Further, the Water Board and the parties, this time around, need to abandon the notion that permanent, operable barriers in the South Delta will be available in the near future to improve south Delta conditions. Once again, the fishery agencies continue to oppose the installation of permanent barriers and they are not likely to exist for some time, if ever. These realities require a fresh look at what constitutes a reasonable salinity objective for the south Delta and whether salinity reduction strategies, including within the south Delta, make more sense and are more compatible with potentially conflicting fishery objectives.

In summary, it will be the SWC's position in these hearings, that no matter what salinity conditions are determined to be needed to provide reasonable protection to crops grown in the south Delta, that SWP Delta operations have not been shown to have any measurable impact on the salinity at Brandt Bridge, or at any other south Delta compliance location. Therefore, like the Vernalis salinity objective, the program of implementation for the four interior south Delta compliance locations should not designate the SWP as an entity required to help meet the objectives at those locations.

Nevertheless, the SWC will participate in and develop recommendations based on the studies being carried out by Dr. Hoffman and others to evaluate the salinity tolerance of the major crops now being grown in the south Delta. Several important considerations need to be

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kept in mind as this work product is applied to the task of setting objectives.

First, the Water Board should not rely just on steady-state data from laboratory experiments. Real time salinity levels likely control crop success as contrasted to a single average over the full growing season. It may very well be that lower salinity water is important for young seedlings and less important for mature plants. Further, historically, the south Delta has typically experienced better quality water in the spring and deteriorating water quality in the summer months as natural San Joaquin River flows drop and irrigation demands and salt laden drainage from south Delta fields increase. The Water Board should consider salinity objectives that recognize increasing crop tolerances over the growing season and the naturally occurring changes in channel salinities as the snow melt ends and river flows drop. Such objectives could provide for lower salinities in the spring and higher salinities in the summer months that properly reflect crop needs and the natural in-channel conditions that have always prevailed. In all cases, however, the salinity objective at any time should not exceed that needed for reasonable protection of the beneficial use.

Second, the Water Board should not equate reasonable protection with absolute protection (100 percent yields in all fields in all years), which has not historically occurred in the delta given its variable hydrology. If such absolute protection may cause unreasonable impacts on conflicting "demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (Water Code section 13000), balancing may require actions that reduce the impacts on conflicting values, such as a lesser level of protection, or a method of implementation that is staged, or a focus on other actions that increased salinity such as local discharges. This is exactly what dry-year relaxations are designed to recognize in other objectives. Further, at the present time, only a small percentage of acreage in the south Delta is farmed with the most salt-sensitive crops. It may not be reasonable to provide full salinity protection in all year types to those who choose to grow salt sensitive crops on tight soils in an area that is known to have changeable salinity water from year to year and over the months of a single year.

Third, the Water Board should not assume that the south Delta water users all have valid water rights that authorize diversions during certain low flow, summer months of dryer water years when San Joaquin River flows entering the Delta are less than the amount needed to meet all in-Delta demands. As the *Phelps* case determined, there are times when a number of south Delta landowners do not have the right to divert. In those circumstances, the level of legal demand to be protected is lower and the return flows from illegal diversions should not be allowed to degrade the in-channel supply. The combination of reducing diversions to the level authorized by legal rights combined with the reduction of in-Delta polluting discharges may significantly assist in meeting reasonable south Delta salinity objectives.

With respect to non-flow ways to improve south Delta salinity conditions, the SWC is aware of and supports the many actions that are occurring in the San Joaquin Basin, such as the Grasslands Bypass program which has significantly reduced the salt load reaching the River and ultimately the Delta. The SWC does not believe that the Water Board has taken into account the large decreases in salt load that has already occurred. The SWC is also aware that the Friant

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settlement has now been approved by Congress and that this program may provide additional flows to the lower San Joaquin River, which in conjunction with New Melones operations may improve water quality at Vernalis. It is a fact that water quality at Vernalis and local discharges from Delta cities and lands are the dominant factors that regulate salinity in the south Delta. The existence of the Brandt Bridge objective and the three interior south Delta objectives are somewhat meaningless unless these two factors are properly included as part of the equation. The SWC will urge the Water Board, in lieu of trying to enforce water operations that will be largely ineffective, unreasonable, or contrary to fishery needs, to focus on salinity reduction programs both upstream and within the delta and to establish a schedule for compliance that provides the time for them to work.

### **San Joaquin River Fish Flows**

Currently, San Joaquin River flows for the protection of San Joaquin River salmonids (and perhaps Delta smelt) are in effect from February through June and are measured at Airport Way Bridge – Vernalis. The Bureau of Reclamation has been assigned the interim responsibility for meeting those flow objectives, except during the spring pulse flow when the VAMP experiment calls for certain enhanced flows and reduced export pumping that are maintained to study their effect on smolt survival. During VAMP, supplemental water is provided from the major San Joaquin River tributary reservoirs. During VAMP and the remainder of the February through June time frame, Reclamation, through operation of New Melones Reservoir, ensures that the necessary base flows exist. The SWC is operating under the assumption that Reclamation, through its New Melones operations, will continue to play a major role in meeting any revised fishery flow requirements as measured at Vernalis.

Except for its financial and scientific participation in the VAMP program, the SWC and the State Water Project properly have no obligations with respect to flows at Vernalis. The SWP does not have any facilities that impact San Joaquin River flow rates. Nevertheless, the SWC is interested in the proper management of fishery flows and plans to carefully monitor the California Department of Fish and Game's proposals and the modeling and other scientific information presented to support its recommendations. However, until the SWC can review Fish and Game's recommendations and their supporting documents, the SWC is unable to describe what, if any, materials it will present.<sup>3</sup>

### **Procedures**

As was pointed out at the beginning of this statement, the water quality control planning process has, for the export projects and their water users, taken on a far greater importance since

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<sup>3</sup> It should be noted that south Delta salinity levels, during part of the irrigation season, will be influenced by what fishery flows are required to be maintained at Vernalis through the end of June. However, the critical months when south Delta salinity is most difficult to control are July and August, when the snowmelt is complete and base flows entering the Delta from the south are at their lowest.



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Justice Robie described the degree to which decisions made in developing the water quality control plan may constrain the Water Board's discretion when it holds water rights hearings to implement the water quality plan. It was for that reason that the SWC supported the use of an evidentiary process for the water quality proceedings, with cross examination, to test the accuracy of claims made by all parties, including witnesses for the SWC.

At all times the SWC has supported such an evidentiary process even though water quality proceedings are quasi-legislative. The SWC's objections at the earlier Water Board workshops and meetings were not to an evidentiary process, but to the format that was being proposed. It was unrealistic to believe that they could be completed within time period proposed and the concept of filtering cross-examination questions (which were euphemistically referred to as "clarification of evidence") through Water Board staff was simply unacceptable given the importance of the hearings.

We again request that the Water Board consider providing an opportunity, even a tightly time limited opportunity, to cross-examine sworn testimony. Such time limits, if enforced, can effectively compel counsel to decide what is so important that it must be vetted through cross examination, as compared to providing rebuttal evidence. Nevertheless, the act of swearing witnesses who know they will be questioned on their opinions can lead to far more constrained and factual presentations, a factor that is of utmost importance.

The SWC looks forward to working with the Board to develop an accurate and complete administrative record for this important process.

Very truly yours,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

  
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