



ORAL COMMENTS BY NICK DICROCE
SAN JOAQUIN FLOW CRITERIA AND SOUTH DELTA SALINITY

March 20, 2013

Chair Hoppin and Members of the Board:

I am Nick Di Croce, a Facilitator for the Environmental Water Caucus; we have the following comments related to the San Joaquin SED:

The State Water Board has failed to carry out its Public Trust responsibilities for the people of California. There is a failure to ensure sufficient flows to restore salmon and steelhead populations in the San Joaquin River; there is inadequate attention to remedying years of water quality violations both in the San Joaquin River and the South Delta. Let me describe the main deficiencies that we have noted:

First, There is a Failure to Apply the State Water Board's Public Trust Responsibilities:

Under the public trust doctrine, the State Water Board must take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. That was established in 1983 in the *National Audubon Society* suit in the Mono Lake case, which you certainly remember.

In the development of the State Water Board's 2010 Delta Flow Criteria Report, the Board identified a set of broad flow regimes for upstream tributaries inflow to the Bay-Delta Estuary that fish need to survive and recover. *Those criteria concluded that 60% of the unimpaired San Joaquin River inflow from February through June was necessary.*"

While it may have been appropriate in this previous report not to make any determination regarding the feasibility of Public Trust recommendations, it is wholly inappropriate to now recommend in the SED a specific flow criteria for the Lower San Joaquin River without evidence that public trust values have balanced the export water with fishery and habitat benefits from improved flows. Furthermore, the SED selection of only 35% of unimpaired flows during February through June for the three main tributaries to the Lower San Joaquin River is not based on scientific or biological analysis of the flow needed to preserve and protect public trust values. The Board must know that the selection of a 35% flow criteria – little more than the current inflow – will do little to reverse the decline of the fisheries and fails to protect other public trust values and beneficial uses. The courts and the law require adequate flow in the river to ensure the safe spawning, migration and riverine habitat. The 60% flow requirement established by the Board's review is much closer to what is necessary to recover fish species.

Since the landmark application of the Public Trust Doctrine by the State Water Board in the Mono Lake case, the principle of how extractive water demands can be alternatively met while ensuring public trust values are protected is well established. In fact the Los Angeles Department of Water and Power, which vociferously objected to relinquishing export flows, now extols the virtue of their water efficiency program that has resulted in meeting public trust values. This established principle of ensuring adequate flows, habitat, temperature, and water quality to meet public trust responsibilities while seeking other alternatives such as water use efficiency to meet extractive demands is not only cost effective, it is the law. We urge the Board to apply similar Public Trust balancing in order to arrive at a more equitable and effective flow for the San Joaquin River and the Sacramento-San Joaquin Delta, and San Francisco Bay. Failure to provide these fresh water flows ensures almost a permanent regulatory drought for the estuary and bay and the economies that depend on this healthy ecosystem for their livelihoods, jobs, and economy.

Secondly, The Plan Illogically Segments the San Joaquin River.

The SED arbitrarily limits the plan area of the San Joaquin River to the confluence between the Merced and the Stanislaus Rivers. Left out of the flow consideration is the river's main unimpaired flow above the confluence with the Merced up to Friant Dam. This main stem San Joaquin River portion can generate 28% of the unimpaired inflows to the river, yet is not considered a part of the river for the purposes of this river restoration SED. There is no data or scientific justification for this arbitrary limit to restoration flows needed for the river habitat, estuary, and bay. The ongoing San Joaquin River Restoration Program on this stretch of river does not preclude the State Water Board from including such an important amount of flow for the health and protection of these public trust values. It seems only logical that the exporters who receive the bulk of the San Joaquin River water out of the operation of the Central Valley Project Friant Dam participate in mitigating the impacts of their diversion and ensure adequate flows to achieve this recovery program as well. Since the objective of the plan amendment is to increase river flows on the San Joaquin, it is arbitrary to exclude the impacts of such a large diversion of river flow and fail to require these diverters participation in ensuring sufficient flows in the San Joaquin River.

A Third Deficiency is the Weakened Salinity Standards in the South Delta.

The Clean Water Act and the Porter-Cologne Act clearly intend that water quality control plans are intended to improve water quality, and not to degrade it. The proposed plan, by relaxing salinity standards in the Delta will harm beneficial uses and does not meet statutory requirements to ensure that water quality objectives and standards are met. The proposed plan attempts to meet standards by sanctioning the present violations of safe water quality objectives. Without data or scientific justification this plan appears to be based on the hope that continued violations of these standards will be sanctioned and the US Environmental Protection Agency will somehow agree that this plan complies with federal water quality law. Federal Clean Water Act regulations require that water quality objectives be set so as to protect the most sensitive beneficial uses in the water body. The proposed SED will not meet these federal obligations. Instead, the Board actions propose to sanction existing water quality violations that have and continue to impact beneficial uses both in the river and downstream.

Both state and federal antidegradation policies demand more. National water quality policy since 1987 requires satisfaction of antidegradation requirements that EPA established in Clean Water Act regulations. Under that policy, the State Water Board is abusing its discretion by undertaking a planning process to relax salinity water quality protection standards and objectives in the South Delta. Federal and state law require that prior to any such change in water protective standards, that adequate data, scientific analysis and public review be conducted to document that such standards will protect the beneficial uses of the river and downstream users along with the protection of public trust values.

IN SUMMARY, the plan fails in the adequacy of flows for the river, in an illogical segmenting of the river, and in the plan for water quality degradation. We look forward to a reconsideration of this plan with actions that actually can achieve the goals that have been established.

I thank you for the opportunity to provide our comments.