



San Joaquin River Group

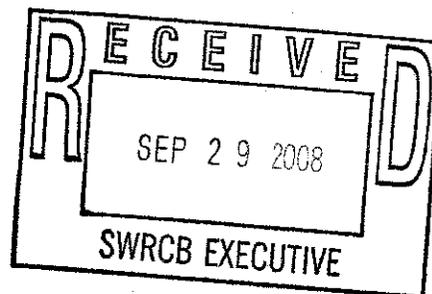
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State Water Resources Control Board
c/o Jeanine Townsend
1001 I Street, 24th Floor
Sacramento, CA 95812-2815

September 29, 2008



Re: Evidentiary Hearings

Dear Members of the Board:

These comments are written on behalf of the San Joaquin River Group Authority ("SJRG"). The SJRG remains unclear as to the entire nature, scope, process and procedure of the evidentiary hearings. At the Workshop Mr. Howard and the Board committed to get the parties a description for how the evidentiary hearings would be integrated into the Periodic Review and/or Bay-Delta Strategic Plan. It would also be helpful for your attorneys to explain how this process will work, the procedures and how the evidence gathered in the evidentiary process will be used. The SJRG has been one of the most vocal parties on the issue of bringing more science and rigor to the State Water Resources Control Board processes.

The SJRG fully supports evidentiary hearings as part of the Sacramento, San Joaquin River Bay-Delta Basin planning process. The San Joaquin River Group Authority sued when the Basin Plan Objectives were adopted in 1995 because there was little or no science to support the San Joaquin flow objectives. Water Right Decision 1641 and your subsequent Periodic Review of the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* both found a lack of science to support the San Joaquin River flow standards. One of the main purposes of Vernalis Adaptive Management Plan was and is to try to establish or better understand the relationship between flow and exports with the Head of the Old River Barrier on survival of Fall Run Chinook Salmon smolts through the Delta.

A review of the San Joaquin River Flow Objectives should be a subject of evidentiary hearings. The SJRG will fully participate in such evidentiary hearings.

San Joaquin River flow objectives are to be established in the context of weighing and balancing all competing reasonable and beneficial uses in the San Joaquin River, Bay-Delta.

* While the San Joaquin River Group sued on the Periodic Review it was a technical issue to preserve the earlier right established by the 1995-Dismissal. (*San Joaquin River Group Authority v. State Water Resources Control Board* (Sacramento County Superior Court Case No. 07CS00975).)

While Delta Vision, and others, may espouse that the Public Trust trumps all other reasonable and beneficial uses, such a view was expressly rejected by Judge Robie, in the *State Water Resources Control Board Cases*, when he stated:

While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses. It was for the Board in its discretion and judgment to balance all of these competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives.

(*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 778.)

An evidentiary process will assist the State Water Resources Control Board and its staff in gathering credible information necessary to formulate a decision and prepare adequate environmental documentation. Many of the recent lawsuits against the Central Valley Regional Water Quality Control Board and State Water Resources Control Board have focused on the inadequate environmental review and documentation to support various State Water Resources Control Board and Central Valley Regional Water Quality Control Board decisions. An evidentiary hearing on San Joaquin River flow objectives will allow the proffering of evidence subject to challenge, cross-examination, and rebuttal so that the truth and veracity of the evidence can be ascertained.. This process would assist the Board in drafting an adequate environmental documentation.

The SJRGA has tried to put forth in discrete sections the various facts and issues the Board will need to address and establish San Joaquin River flow objectives. The proposed outline addresses the competing reasonable and beneficial uses, and the factors affecting Fall Run Chinook Salmon smolt survival through the Delta.

Baseline:

- Natural Hydrology
- Current Hydrology and Near-future Hydrology
- Climate Change Considerations

Beneficial Uses:

- Agriculture
- Municipal & Industrial (Urban)
- Instream
- Power
- Recreation

Groundwater Use:

- Now
- Projected

Factors affecting the Need for Flow:

- Water Temperature on mainstream San Joaquin River and Delta. This is currently an issue raised by the Department of Fish & Game as part of the process for the 2008 Clean Water Act §303(d) List.
- Dissolved Oxygen in the Stockton Deep Water Ship Channel, Stockton.
- Predation in the Delta
- Negative flows on Old and Middle Rivers
- Channel geomorphology in the Delta
- San Joaquin River flows and X-2
- San Joaquin River flow and Fall Run Chinook Salmon smolt survival through the Delta
- Exports and Fall Run Chinook Salmon smolt survival through the Delta
- Head of Old River Barrier and Fall Run Chinook Salmon smolt survival through the Delta
- [Illegal] diversions in the South Delta and their impact on San Joaquin River flow and water quality
- San Joaquin River flow and its relationship to Delta Smelt survival in the Delta
- Flow regime potential impacts on reasonable and beneficial uses.
 - Flows implemented through Water Right Decision 1641
 - Priority of water rights
 - Other proposed flows

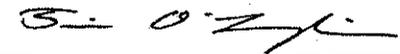
Some of these evidentiary hearings will be shorter in duration than others. The evidentiary hearings could be more efficient and thorough if:

- The State Water Resources Control Board set forth a reasonable time schedule for hearing issues and dates.
- Parties' materials were due 45-60 days prior to the hearings.
- The parties had the ability to subpoena, including subpoenas to federal parties, to take depositions and call witnesses.

Thank you for your consideration of these suggestions.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By:



TIM O'LAUGHLIN

cc: SJRG