

SOUTH DELTA WATER AGENCY

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Via E-Mail commentletters@waterboards.ca.gov

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

Re: Comment Letter: Delta September 2014 Workshop

Dear Ms. Townsend:

The following are The South Delta Water Agency's comments to the State Water Resources Control Board Notice of Public Workshop regarding Central and Southern Delta Water Availability and Use. SDWA and others strongly recommend that the SWRCB choose one of the following two courses of action:

1. The SWRCB conducts an evidentiary hearing to determine certain fundamental factual and legal issues. Thereafter, the involved parties will likely appeal the findings and determinations to the relevant court and the issues and facts can be finally resolved. Only through an evidentiary hearing can evidence and testimony be adequately tested. Workshops with numerous participants making unverified statements are ineffective and provide no basis upon which the Board or a court can act.
2. The second course of action, and the one preferred by SDWA is for the SWRCB and the involved parties to petition the court for a declaratory relief action to resolve these same factual and legal issues. This course of action is less expensive and less time consuming and allows for these very important, if not controlling issues and facts to be finally resolved. Hopefully this can occur well ahead of a possible third year of drought. SDWA strongly encourages the Boards to adopt this second course of action to expedite such a declaratory relief action.

With regard to the three sets of questions set forth in the Notice, SDWA comments as follows.

Our first comment relates the first two questions posed in the Notice, which were:

Question 1: Is any of the previously stored water in Sacramento River watershed reservoirs that DWR and USBR release from storage (including releases for exports from the Delta or salinity control and public trust, or stored water that is transferred through the Delta from purchase points north of the Delta to points of delivery south of the Delta) available for appropriation by diverters in the central and southern Delta?

Question 2: Does the connection of the Delta to the ocean provide additional water to satisfy water right demand in the central and southern Delta? If so, is this water subject to, or available for appropriation or riparian right? Are there other sources of water available for appropriation or riparian right in the central and southern Delta, other than contributions from Sacramento-San Joaquin watersheds?

The first and second questions confuse the main issue facing the SWRCB. The main issue is not whether stored water is in the Delta when in-Delta diversions are occurring. The main issue is how to determine water availability in the Delta. We propose that Questions 1 and 2 be rephrased as follows:

1. Issue: Is there water available for diversion in the South and Central Delta absent operation of the projects?
 - a. Factual Question: Are there other sources of water in the central and southern Delta, other than contributions from Sacramento-San Joaquin watersheds?
 - b. Legal Question: Are these other sources of water available for appropriation or use under a riparian right?
 - c. Policy Question: How should water availability in the South and Central Delta, absent the projects, be determined?

Answering this question entails numerous other factual determinations, including:

- What water makes up the Delta Pool (or alternatively, “the watercourses from which South and Central Delta diverters divert?”)
- How does the volume of water in the Delta Pool change under different hydrologic conditions?

- Of what does the “natural flow” in the central and southern Delta consist? Inflow from Sacramento River, San Joaquin River, Mokelumne River, Calaveras River, Cosumnes River? Water already in Delta channels? Suisun Bay? San Francisco Bay? Rivers tributary to Bay waters like the Napa River? Artesian flow? Accretions from groundwater?
- Does the effect of the tide maintain a constant pool of water in the central and southern Delta or does that pool dissipate in the absence of inflow from eastside tributaries?
- What effect does the diversion of water from the central and southern Delta have on the total amount of water available from those channels?
- Under natural conditions did the waters of the various tributaries remain distinct after entering the Delta or did tidal action, sea level and varying rates of inflow mix those waters? Did that mixed water travel upstream on tides or did only the water originating from each tributary move back upstream on each tide towards the respective tributaries?
- Does Sacramento River water reach the central and southern Delta channels under natural conditions? Are the central and southern Delta part of the Sacramento River watershed? The Suisun Bay watershed? The San Francisco Bay watershed?
- Do transfers affect accretions to and losses from watercourses upstream of the Delta?
- Is it possible to characterize (e.g. designate as natural flow) any water in the Delta in light of the numerous inputs, accretions, losses, reuse and discharges which occur upstream?

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A number of legal issues also must be addressed. These include the various statutory and regulatory mandates which obligate the DWR and USBR to provide water into the Delta to protect various beneficial uses, regardless if it be “natural flow” or stored water. As examples, if the projects are obligated to meet water quality objectives for the protection of agricultural beneficial uses, is it legal for such users to divert when water stored water released to meet such objective is present in the system? Does Water Code Section 12202 mandate the projects supply central and southern Delta diverters with a supply of useable quality?

As noted in the Comments submitted by the Central Delta Water Agency, legal issues specify who has the burden of proving what first. As an example, the SWRCB seems to be asking in-Delta diverters to first prove why they can divert when project stored water is in the system. The law however requires the projects (i.e those who comingle their water with another’s) first meet this burden. It appears the SWRCB is shifting that burden by contemplating an Order requiring in-Delta diverters to first show why they think they can divert when stored water is in the system.

The third question set forth in the Notice was:

Question 3. Will the required diversion information proposed in the ... draft Order, in conjunction with the information submitted pursuant to the Delta TUCP Order, be sufficient to inform a State Water Board determination on the availability of water for diverters in the central and southern Delta?

The answer to this question is an incontrovertible “no.” As the issues and numerous question set forth above indicate, the SWRCB must make a significant number of additional factual and legal determinations before it can make any ruling on Delta water availability and use. The Notice itself as well as the many statements by staff and Board members indicate the SWRCB does not understand many Delta basics and is predisposed to accept exporter views on Delta related issues. The myriad of legal and factual materials submitted by in-Delta interests remain unanswered by exporters or SWRCB staff, yet the wrong question is continually raised: “are the central and southern Delta diverters stealing water.”

It is important to comment that the Notice is *seeking input* on the process of resolving these issues and inquiring as to other questions that should be addressed. At the same time, the SWRCB includes a draft order to all central and southern Delta diverters wherein they would have to provide certain information within five days. There is certainly no need to burden the Delta diverters unless and until the foundational questions above are answered. This is because the statutory and regulatory obligations of the projects appear to require protection of in-Delta interests regardless of type of water right. [See for example Water Code Section 12202

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referenced above which states in pertinent part: “Among the functions of the (CVP and SWP) ... shall be the provision of salinity control and an adequate water supply for the users of water in the ... Delta.”]

We also note that as per prior submittals/comments, the status of southern Delta water rights has already been addressed through the recent efforts of the SWRCB’s Division of Water Rights and the Watermaster. The Watermaster has given at least two reports to the SWRCB setting forth the results of years of investigations. Unless the SWRCB now seeks to adjudicate all central and southern Delta water rights (which would necessitate an adjudication of the entire watershed) there would seem to be no reason to again seek information previously supplied or discovered.

Regardless of the existence of the Emergency Regulations, the notion that all these water right holders/claimants could actually gather and submit the proposed information within 5 business days is unrealistic and of course has nothing to do with the questions “could Delta diverters divert prior to the projects?” and “can the existence/operation of the projects prevent Delta diversion that could have occurred in the absence of the projects?” Emergency regulations are to address “emergencies;” there is no emergency involved in Delta water right claims as they have already been investigated by the SWRCB.

SDWA supports a joint effort by all parties, including the SWRCB to petition the appropriate court for a declaratory relief action to resolve the factual and legal issues pertaining to the Notice. We look forward to working with the SWRCB and the involved parties to frame the issues and questions for the proposed declaratory relief action.

Please feel free to contact me if you have any questions.

Very truly yours,

JOHN HERRICK