



## LATE COMMENT

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**Sent:** Wednesday, July 02, 2014 9:23 AM

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**Subject:** Propose Language for Emergency Regulation

Dear Board members and Staff:

In an effort to follow up on the discussion last night regarding the draft emergency regulation, I am submitting the following for your consideration. It appeared the Board was willing to adopt the regulation (in some form) to deal with post-1914 right holders, but was unsure how to proceed with regard to pre-1914 and riparian claimants.

It is clear from the presentations, comments and discussions at yesterday's hearing that the issue before the Board is not so much the protection of senior water right holders (staff estimates already indicate they believe there is or will shortly be little or no water for pre-1914 and riparians) but a single focus on the southern Delta diverters continually referenced as "illegal diverters."

This focus is understandably of concern to SDWA given the recent history of constant allegations that local diverters did not even possess any rights. Now that the Watermaster and the Division of Water Rights staff have concluded to the contrary, the south Delta and the south Delta alone are once again the subject of what we think are baseless allegations, unchallenged in any evidentiary hearing.

Regardless, I believe the following language accurately describes the issue and provides the proper process for the SWRCB to address the issue. My suggested language is:

"The Board finds that the protection of carryover storage in CVP and SWP reservoirs, to the degree such protection is not contrary to applicable law, regulation and permit conditions, is of significant importance during the current drought conditions. The initial analysis by Staff and the comments of a number of water right interests suggest that the consumptive use of riparian and pre-1914 water right claimants in portions of the Delta are adversely affecting CVP and DWR storage releases by increasing the amount needed for the repulsion of ocean salinity in the Delta and for other purposes. The Board concludes that the any action taken in this regard is premature and will address the issue either as part of the already planned Phase 3 of the Bay-Delta process, or at an earlier time as may be prudent.

The Board defers addressing this issue for the following reasons:

1. Current calculations of water availability by Staff have been disputed by separate technical analysis and therefore require further inquiry and evaluation;
2. Evidence submitted suggests that in-Delta diversions during previous droughts, and at times before the CVP and SWP were in operation were both possible and did occur, suggesting that river inflow data does not give a complete picture of the water availability of in-Delta supply;
3. Evidence presented suggests that the Board's previous position that the southern Delta is not riparian to the Sacramento River system may be incorrect;
4. Questions remain as to whether any suspension of in-Delta rights is proper or legal in light of the mandates in Water Code Section 11460 especially give No. 2 above;
5. The issue of the comingling of stored water and other available flows requires a much greater inquiry and analysis than has been done at this time;
6. Other legal issues have been presented to the Board which suggest statutory and other legal obligations on the projects may affect any decision on the authority or right of in-Delta diverters to divert during times when previously stored project water is in the system;

7. The issue of in-Delta water rights as related to project obligations has been unresolved for at least 60 years and any action taken under emergency regulations would be unfair to all parties;

8. The projects currently operate by including storage releases which cover in-Delta consumptive uses and have so for many years, as required by D-1641. During that time, DWR and USBR have not made any claim for payment of such water, have not brought a complaint before the Board or in any court, and have not challenged D-1641;

9. Given No. 8 above, it would be unfair to in-Delta diverters to preliminarily decide their continued diversions are unauthorized, especially this far into the growing season; and

10. The appropriate amount of water needed in storage to protect various beneficial uses and to comply with existing permit obligations is undetermined at this time and requires further investigation.

Staff is hereby directed to propose a process and timeline for undertaking the issues referenced above and other related issues. Such process to include but not be limited to one or more evidentiary hearings in which the parties can fully present fact and argument. The Board will then decide whether to undertake this suggested process or defer further action until the appropriate phase of the Bay-Delta process."

I do not believe anyone can materially dispute the above as it simply describes the views and presentations the Board has received to date. I encourage the Board to consider this approach rather than use the drought crises to address long-standing unresolved issues without giving Delta interests the opportunity to counter this perpetual slander in an evidentiary hearing. Thank you for your consideration, JOHN HERRICK