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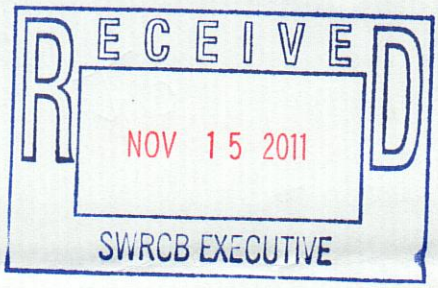


Charlie Hoppin
State Water Resources Control Board
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Re: *Southern Delta Salinity and San Joaquin River Flow Objectives*

Dear Mr. Hoppin:

Pursuant to California Water Code section 13170, the State Water Resources Control Board ("State Water Board") is required to comply with California Water Code section 13241 as it reviews the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta) (2006 Bay-Delta Plan) to establish updated southern Delta salinity and San Joaquin River flow objectives and identify changes to the program of implementation for those updated objectives. (Cal. Water Code § 13170.) Compliance with those statutory requirements commands the State Water Board to weigh and balance a variety of factors in its development of reasonable water quality objectives. (Cal. Water Code § 13241.) The analysis the State Water Board must perform when developing water quality objectives is similar to that conducted by the Honorable Oliver W. Wanger ("Judge Wanger") in In re Consolidated Delta Smelt Cases (2011 WL 3875512).

In that case, Judge Wanger compared the expected benefit of implementing the Reasonable and Prudent Alternative Component 3, Action 4 ("Fall X2 Action") of the United States Fish and Wildlife Service's December 15, 2008, biological opinion,[1] to the burden its implementation would induce when balancing the equities for injunctive relief. (Id. at 57-61.) Specifically, Judge Wanger evaluated the water supply impacts that would result from the placement of X2 in a location designed to improve habitat for Delta smelt growth and rearing pursuant to the Fall X2 Action. (Id.)

[1] This Biological Opinion addresses the impacts of the coordinated operations of the federal Central Valley Project ("CVP") and State Water Project ("SWP") on the threatened Delta smelt (*Hypomesus transpacificus*).

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In his evaluation of the Fall X2 Action, Judge Wanger found no scientific support had been submitted for placing X2 at the 74 kilometer location identified in the Fall X2 Action, which was far west of the confluence of the Sacramento and San Joaquin Rivers. (Id. at 62.)

> "The scientific evidence in support of imposing any Fall X2 action is manifestly equivocal. There is essentially no biological evidence to support the necessity of the specific 74 km requirement set to be triggered in this "wet" water year. The agencies still "don't get it." They continue to believe their "right to be mistaken" excuses precise and competent scientific analysis for actions they know will wreak havoc on California's water supply." (Id.)

Rather, the only support for the placement of X2 that Judge Wanger found concluded that the habitat index decreases dramatically when X2 is located east of the confluence of the Sacramento and San Joaquin Rivers. (Id.) Thus, once X2 was located just west of the confluence at kilometer 79, little or no benefit was achieved from pushing X2 further west to the 74 kilometer location specified in the Fall X2 Action.

Conversely, Judge Wanger found that the negative water supply impact increased over 200 percent as X2 moved further west from the 79 kilometer location to the location of the Fall X2 Action at the 74 kilometer location. (Id.) The likely negative water supply impact of placing X2 at kilometer 79 is 90,000 acre feet. Positioning X2 at kilometer 74, as opposed to kilometer 79, would have a likely water supply impact of 300,000 acre feet. (Id. at 61.) Thus, placing X2 at kilometer 74 increases the negative impact by 210,000 acre feet in most water year types. (Id. at 62.)

In balancing the hardships, Judge Wanger found that the evidence submitted did not demonstrate that any increased benefit would be achieved from the placement of the Fall X2 Action at kilometer 74 as compared to the placement of X2 at kilometer 79, yet the negative water supply impacts at kilometer 74 were 300,000 acre feet as compared to 90,000 acre feet at kilometer 79.

> "Balancing the imperiled status of the species, the equivocal and highly disputed support for the X2 action, and the even weaker and unjustified support for positioning X2 at 74 km, against the substantial and damaging water supply impact of doing so, limiting the X2 position to 80 km or 79 km achieves equity." (Id.)

Therefore, to achieve the most benefit while incurring the least burden as required in the balancing, Judge Wanger not only enjoined the implementation of the Fall X2 Action as established at the 74 kilometer location, but also enjoined the placement of X2 at any location west of kilometer 79.

When establishing updated southern Delta salinity and San Joaquin River flow objectives, the State Water Board is statutorily required to conduct the same type of

analysis as Judge Wanger and weigh the expected benefit against the burden to determine the most reasonable water quality objectives. To date, however, the State Water Board has failed to comply with the statutory requirements for water quality control planning. Therefore the San Joaquin River Group ("SJRG") urges the State Water Board to engage in a proper weighing and balancing of all demands being made and to be made on the southern Delta and to the San Joaquin River and to develop the most reasonable water quality objectives. (Cal. Water Code §§ 13000, 13170, 13241.)

The State Water Board asserted in the October 29, 2010, Draft Technical Report on the Scientific Basis for Alternative San Joaquin River Flow and Southern Delta Salinity Objectives ("DTR") that it intends to establish updated southern Delta salinity and San Joaquin River flow objectives for the 2006 Bay-Delta Plan that will provide the most protection possible for salmon and steelhead, i.e. "what fish need." The California Water Code, however, prohibits the State Water Board from doing so. (Cal. Water Code §§ 13000, 13170, 13241.) Rather, when establishing the southern Delta salinity and San Joaquin River flow objectives to protect the beneficial uses in the southern Delta and San Joaquin River, the State Water Board is required to consider whether it can establish water quality objectives of a lesser standard that still reasonably protect beneficial uses while at the same time reduce the burden required to achieve the protection of beneficial uses. (Cal. Water Code § 13241.)

Thus, the State Water Board must identify the ways in which amending the San Joaquin River flow and southern Delta salinity objectives by increasing flows will protect the salmon and steelhead beneficial use. Next, the State Water Board must determine the level of flows that are most protective of the salmon and steelhead beneficial use and the level of flows that are least protective, yet will still provide protection, of the salmon and steelhead beneficial use. Finally, the State Water Board must evaluate the impacts resulting from meeting the flow requirements at both the most and least protective levels and for the range in between to determine whether it can establish water quality objectives requiring a lesser flow increase that still reasonably protect the salmon and steelhead beneficial use while at the same time reduce the burden required to achieve protection of the salmon and steelhead. (Cal. Water Code § 13241.)

Such analysis includes consideration of all beneficial uses, not just "what fish need," because not all beneficial uses are reasonable. (Cal. Water Code §§ 13000, 13241; El Dorado Irr. Dist. v. State Water Resources Control Bd. (2006) 142 Cal. App. 4th 937, 984; Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal. App. 3d 548, 570.) As the reasonableness of a beneficial use depends on the facts and circumstances of each individual case, the State Water Board needs to determine whether it is reasonable to provide protection of the salmon and steelhead beneficial use at a level solely based on "what fish need" and at the expense of other beneficial uses. (Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal. 2d 489, 567; Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal. App. 3d 548, 570-571; Joslin v. Marin Municipal Water District (1967) 67 Cal. 2d 132, 140.)

Although the state has an affirmative duty to protect the fisheries from harm and/or degradation as a public trust resource, the current process is being conducted under the authority granted to the State Water Board under Porter-Cologne, not under the public trust. Thus, the public trust resources will be weighed and balanced in this proceeding, as will all beneficial uses. Even if this were a public trust proceeding, however, the "public trust doctrine" does not suppose or grant any heightened value to public trust resources. (National Audubon Soc'y v. Superior Court (1983) 33 Cal.3d 419, 447, fn. 30). The "public trust doctrine" only requires that such interest be "taken into account" in making allocation decisions. The California Supreme Court noted that taking such interest into account will not always end up favoring protection of the public trust resources, but that "as a practical matter, the state may have to approve appropriations despite foreseeable harm to public trust uses." (Id. at 446). Ultimately, the State Water Board has a duty to consider and reasonably protect *all* beneficial uses of water, including municipal, industrial, and agricultural uses. (Cal. Water Code §13241.)

The State Water Board's analysis, however, is not finished once the value of competing beneficial uses has been evaluated. Rather, the State Water Board must also analyze the indirect impacts that will result from meeting flow requirements to protect the salmon and steelhead beneficial use. Thus, the State Water Board must assess whether the water quality objectives are feasible, and must evaluate the short and long-term water supply impacts, as well as the sociologic and economic impacts. (Cal. Water Code § 13241.) For example, as the State Water Board is required to identify sources of funding for any agricultural impacts caused by the adoption of a basin plan amendment when agriculture is affected by the amendment, the State Water Board must assess such consequences. (Cal. Const., Art XIIIB, § 6.)

The SJRG is concerned because the State Water Board has inexcusably failed to take any of the steps required by law in amending the San Joaquin River flow and southern Delta salinity objectives. First, the State Water Board has not even established a link between the recommended flows and the expected benefit to the salmon and steelhead located in the Delta in the February-June timeframe. In the DTR, the State Water Board relies entirely too much on general studies and propositions that equate "more" flow with "better" conditions without actually making any specific scientific connection regarding flows in the Delta. Specifically, the State Water Board has failed to explain how increasing flows on the San Joaquin River will lead to increased abundance, population, salmon smolt survival through the south Delta, and escapement. On every issue, including velocity, turbidity and temperature, no quantifiable scientific evidence was provided to support the belief that the higher flows will improve any or all of these elements. While there may well be studies that indicate that increased flow results in increased food production, such studies are not specific to the Delta and the DTR provides no link between such studies and protection of salmon and steelhead in and through the Delta in the February-June timeframe.

Despite the requirement to develop water quality objectives that ensure reasonable protection of all beneficial uses, the State Water Board has not demonstrated that increasing flows is in fact **reasonable.** The State Water Board has not shown any

quantifiable benefit that will be achieved from increasing flows. As Judge Wanger found in his analysis of the Fall X2 Action, because no evidence had been submitted that demonstrated any greater benefit would be achieved by placing X2 at kilometer 74 as compared to kilometer 79, he enjoined X2 from being placed west of kilometer 79. So too must the State Water Board in this proceeding provide evidence that demonstrates the benefit to the salmon and steelhead that is expected to materialize from the proposed flow increase. Amending the San Joaquin River flow and southern Delta Salinity objectives without any established link between the recommended flows and the expected benefit to the salmon and steelhead is not only **not reasonable**, but it is also against the law.

Second, the State Water Board failed to consider all beneficial uses and all other demands being made on the southern Delta and San Joaquin River. Even though the California Water Code prohibits the State Water Board from developing one sided, single purpose water quality objectives that will negatively and severely impact water users, (Cal. Water Code §§ 13000, 13170, 13241), the DTR focused only on "what fish need" and contained no weighing and balancing.

Additionally, having laid out a thorough, open, transparent, lengthy and honest process designed to obtain information from all interested parties on all aspects affecting the Delta, the Board simply walked away from such process with nary a word of explanation. On February 13, 2009, the State Water Board initiated the process to consider amendments to the San Joaquin River flow and southern Delta salinity objectives by issuing a notice of both a scoping meeting for the environmental documentation and a staff workshop. As part of this process, the State Water Board requested technical information and comments on proposed modeling alternatives it selected, as well as identified dates and times for several additional workshops. After only one workshop on April 22, 2009, however, the State Water Board cancelled all but one of the remaining workshops previously scheduled. At the final workshop scheduled, the State Water Board simply gave an update on modeling activities and nothing more. For a period of 16 months, the State Water Board did not communicate at all regarding the San Joaquin River flow objectives, although it released, obtained comments on, and received the final report of Dr. Glenn J. Hoffman concerning crop salt tolerance in the summer and fall of 2009, related to the southern Delta salinity objectives. There were no San Joaquin River flow objective workshops scheduled, no reports released, no models released for public comment and no requests for additional technical information on any of the identified topics of importance.

The State Water Board is charged with attaining "the highest water quality which is **reasonable**," (Cal. Water Code § 13000), **not** necessarily most protective, but reasonable. The most protective standard, or the fully protected standard, may not be a reasonably protective standard when considered in the context of competing uses. To date, the State Water Board has merely determined what is most protective for the salmon and steelhead beneficial use, but has not considered in any way what southern Delta salinity and San Joaquin River flow objectives will actually be reasonable. Nor does it appear that the State Water Board has any immediate future plan to consider other beneficial uses or related impacts associated with the one sided water quality objective it intends to

implement as it has not requested any information, nor planned any workshops. The State Water Board must engage in weighing and balancing to develop the most reasonable southern Delta salinity and San Joaquin River flow objectives as is required per the California Water Code.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**

TIM O'LAUGHLIN

TO/tb
cc: San Joaquin River Group