

SOUTH DELTA WATER AGENCY

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January 9, 2009

Via E-Mail william.h.guthrie@usace.army.mil

Mr. William Guthrie
U. S. Army Corps of Engineers
Sacramento District, Regulatory Division
1325 J Street, Room 1480
Sacramento, CA 95814-2922

Re: Public Notice Number SPK-1999-00715

Dear Mr. Guthrie:

The following is submitted on behalf of the South Delta Water Agency and The Central Delta Waster Agency. The application for a Section 10 permit by the California Department of Water Resources ("DWR") to divert an additional 1,000 acre feet (or 500 cfs) from Clifton Court Forebay should not be granted until additional evaluation is done, and then only if certain conditions are met. We respectfully request a public hearing be conducted for the consideration of the permit and the issues involved in its evaluation.

1. The Project lacks current NEPA or CEQA review.

Although the Corps Notice states that the information developed through the comment process will allow it to prepare the relevant Environmental Assessment and/or Environmental Impact Statement, this approach appears to be inadequate.

Previous exports operations by DWR and USBR have been subject to various environmental review processes, some of which have also reviewed the requested additional Clifton Court Forebay exports of 500 cfs. However, substantial changes to the environment, especially the fisheries have occurred since these reviews. Delta smelt are now at record low

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population levels. In addition, other species including various runs of salmon (both on the Sacramento and San Joaquin River systems), longfin smelt, sturgeon, and steelhead are either at record lows, or near record lows. News reports indicate that returning fall run salmon on the Sacramento system are 23% lower than they were in 2008. The 2008 numbers were sufficiently low enough to result in a closure of the entire fishing industry.

The projects themselves, and exports in particular are the main cause of the recent crash of the fisheries. The recent Biological Opinion (“BO”) for Delta smelt issued by FWS on December 12, 2008 states that although other factors may affect fishery populations (especially Delta smelt), “when taken together they do not control hydrodynamic conditions throughout the Delta to any degree that approaches the influence of the Banks and Jones export facilities” (BO at page 202). The BO concluded that this hydrodynamic control had changed the conditions in the estuary and was the main cause of the fishery crash. It also states that “chronic outflow conditions during the summer and fall” may be responsible for the increase in invasive species which have adversely affected the smelt habitat. Further, the effect of export pumping on the location of habitat and the killing of endangered species was also noted and highlighted in the BO.

In addition, exports increased in recent years to record levels during the CalFed years, were then radically reduced during a portion of the year pursuant to a federal court decision, and are now subject to new limitations under the recent FWS BO (and a DFG decision on the protection of longfin smelt). The terms of the recent BO set forth criteria whereby *Reasonable and Prudent Alternative* actions must be taken to avoid jeopardy to Delta smelt, though the exact project operations under these alternatives depends on conditions existing at various times of the year. The BO includes an evaluation of the proposed additional 500 cfs export pumping, but that evaluation is only for smelt, and does not include any of the other species listed above, or which also may be of concern in the Delta.

This is only a portion of the regulatory oversight of export pumping. At no time since Delta smelt were listed as either endangered or threatened has DWR been in compliance with California ESA law. It does not have a “take” permit under those statutes, nor does it have any DFG written determination that the FWS BO adequately satisfies CESA requirements. It should be noted, that generally, the federal ESA requires that actions or projects do not cause jeopardy, while the CESA requires full mitigation and recovery. To date, there has been no analysis of the full impacts to the environment resulting from the operation of the CVP and SWP.

Given the significant changes in the operational practices of the projects and the catastrophic changes in the environment, the proposed project requires a detailed and complete NEPA and CEQA review. Such processes cannot be satisfied by a request for comments by the Corps as set forth in the Notice. Clearly there is sufficient information to preclude any Negative Declaration or Finding of No Significant Impact because the action is likely to have a significant impact on the environment.

2. Delta Outflow and River flows must be determined before approval of the project.

According to the BO, decreased outflow in the summer and fall is a probable cause of the recent decline in Delta smelt, and likely for other species. The project seeks to increase exports through the use of existing flows or water released from upstream storage. In order to authorize additional export of either of these, it must first be determined if those flows are needed to (or are the obligations of someone to) mitigate the projects' adverse effects on outflow and consequently the fisheries. The projects are required by statute to repulse salinity intrusion in the Delta and current actions have proven inadequate. Neither NEPA or CEQA allow a lead agency to defer this analysis or a decision thereon. Before it can be determined if this additional export can be done without further harm to the environment, it must be determined what river flows and Delta outflow are necessary to protect fisheries. As referenced above, the BO notes that outflow, especially at times of the year when the 500 cfs would be allowed, is a major concern. Statements that some other party or process will review conditions and make decisions about the 500 cfs action do not take the place of an environmental review. How the 500 cfs affects flows, where it comes from, and whether there is sufficient water remaining in the system for future needs must be evaluated.

3. Impacts to navigation and local diversion have not been addressed.

To date, the Corps has taken no meaningful action to protect the navigability of southern Delta channels. The Notice references that before the additional exports can occur, all three temporary rock barriers must be in and operated, and Clifton Court Forebay gate operations must avoid impacts to local water users. This has proven inadequate for many areas, and does not address other areas at all. First, previous estimates by SDWA and DWR were that a 0.3 foot msl elevation in Middle River (between its head and the temporary rock barrier) should be sufficient to protect local diverters. DWR attempts to operate to this criteria, however, this elevation has proven inadequate. DWR has declined to adjust/determine what level is more protective. During the periods when the additional 500 cfs exports were allowed, local diverters have sometimes not been able to divert as needed. This low level of water (evidenced by the inability to divert) and local observations indicate that Middle River is periodically incapable of carrying any boat traffic whatsoever. This means that the project's effects on navigation (both for fishing and other recreational use) have not yet been determined.¹

¹ DWR modeling of levels generally appears to be accurate, but is periodically "off" significantly. Modeling of the effects of the additional exports virtually always indicates that the "regular exports" are the cause of the local low water levels, and the additional 500 cfs is not a "significant factor." SDWA believes that if the regular exports cause a harm, additional exports cannot be authorized even if they are alleged to cause no significant additional harm. The model inputs and results should be subject to an independent review.

Second, areas downstream of the barriers are also subject to low levels affecting diversion needs and navigation. These areas include, but are not limited to Old River west of Union Island and east of Coney Island, and Victoria Canal. DWR previously dredged portions of the Old River area referenced immediately above, but anecdotal information suggests that siltation has filled in most of the dredged areas. It is well known and easily verified that this area is generally incapable of any boat traffic under many conditions. Any additional exports could only exacerbate the problem. At this time, our information indicates that DWR/USBR have no plans to review the areas previously dredged to determine if additional dredging is required either for local diversions or to maintain boat traffic.² It appears that there is insufficient time for DWR/USBR to do the proper analysis and get the necessary permitting to dredge before July of 2009, the time when the additional 500 cfs export would begin.

Third, in addition to Middle River, another area upstream of the barriers experienced water level problems during times of additional exports. Tom Paine Slough has had extremely low levels in summer months (though not during 2008). Subsequent efforts by DWR and RD 2058 (the RD which diverts from this channel) to remove hyacinth and siltation *may* have corrected the problem. However, DWR's monitoring gauges have been found to be periodically incorrect in this area. After completing the hyacinth removal, DWR conclude in its own internal report that any further problems would be the result of a lack of dredging in the slough.³ However, per DWR, the modeling of the Slough suggests that there is some "unknown" in the system. Something is missing in the model assumptions and inputs resulting in a situation where the inflow and outflow numbers in the modeling do not match. That is to say, the model does not accurately show what is going on. It is reasonable to conclude that the effects of the additional 500 cfs on Tom Paine Slough water levels have not yet been determined. We are enclosing an excerpt from a 1980 Report authored by the USBR and SDWA which analyzes the effects of export pumping on water levels [see for example figure VII-3]. This information indicates that incoming tides necessary to fill the Slough may be especially susceptible to changes in export levels.

4. No increase in exports should be allowed when DWR and USBR are in violation of their permits.

SWRCB Decision 1641 assigned responsibility for meeting the Water Quality Objectives for Agricultural Beneficial Use (or the salinity standards) measured at Vernalis to USBR, and

² Local diverters and RD's are not responsible for dredging Delta channels, and generally cannot do so because project impacts to the areas have resulted in all the channels becoming critical habitat for various endangered, threatened species, or other species of concern.

³ An agreement exists between RD 2058 and DWR regarding the responsibility for dredging. The degree to which dredging may be needed or how current exports may affect a fully dredged or not fully dredged channel are unknown.

the three interior Objectives measured at San Joaquin River at Brandt Bridge, Middle River at Old River, and Tracy Boulevard at Old River to both DWR and USBR. In 2006, the SWRCB issued a Cease and Desist Order against DWR and USBR, confirming that these standards were threatened, and confirming that DWR and USBR were solely responsible for meeting them.

Since that time, numerous violations have occurred, including especially, continuous violations of the Tracy Blvd. at Old River location during all of July through August for 2007 and 2008, as well as an ongoing violation of the Brandt Bridge violation, first reported in December of 2008. DWR and USBR maintain that the violations are “due to local salinity accumulation and poor circulation in south delta (sic) channels, which are beyond the control of the projects.” First, no such limitations for other factors are contained in their permits. D-1641 and the CDO unequivocally state that although other factors may be involved, the projects are responsible for meeting the standards, and that no other parties share the responsibility.⁴ This is because the CVP (operating with DWR under their Coordinated Operations Agreement) is responsible for the San Joaquin River salinity which accumulates in the channels.

Second, the operation of the projects’ upstream dams and export pumps creates and exacerbates null zones in the channels. Under current project operations, the San Joaquin River never reaches the Bay; all of the flow which is not used locally is exported. This imbalance in supply to the export pumps causes reverse flows in some channels. The result is that some channels have flows entering from both ends, thus creating null zones where salts accumulate. Without any net flow in these channels, salinity rises and the standards are violated.

Third, the control of net flows in the channels is directly within the control of the projects. Contrary to repeated public statements by DWR and USBR that they cannot control these flows (especially during the time when the additional 500 cfs exports would occur), both DWR and USBR are participating in a technical work group which seeks to create/increase flows in the main southern Delta channels. Attached hereto are the most recent modeling results prepared by DWR in that process. In brief, the results indicate that minor (one foot or less) alterations in the temporary barrier heights, and altered operations of culverts in one barrier

⁴ Current law clearly provides that such standards must be fully implemented. This means that the DWR/USBR allegation that they are only obligated to meet the standards if they “caused” them is legally incorrect. If that were the case, it would mean that the SWRCB’s implementation of the standards was only partially done, an interpretation preclude by case law.

should create net flows of a sufficient amount as to control salinity.⁵ These actions are within the control of DWR and USBR

To produce these flow alterations (from adjustments to barrier heights and culvert operations) there must also be a certain amount of San Joaquin River flow, and export operations must follow certain guidelines. Each of these is also under control of the projects. It should be noted, that besides operating two dams on the San Joaquin system (which can provide/maintain River flows, USBR (and DWR) have recently undertaken three recirculation projects which increased San Joaquin River flows during the times when the additional 500 cfs would occur.

No justification remains for allowing additional exports while water quality standards are being violated. If and when the Corps grants DWR the requested permit, it should be conditioned on compliance with all terms and conditions of DWR and USBR's permits, including compliance with the above referenced water quality standards.

5. The effects on wetlands and other habitat have not been determined.

As stated above, low water levels exist in various areas of the southern Delta, including Middle River, Old River, Victoria Canal and Paradise Cut. Whether intentional or accidental, these low levels result in a different habitat than would exist in the absence of the current export regimen, including the proposed additional export of 500 cfs. Changes thereto may affect whether any particular area with low levels remains covered with water, partially covered with water, periodically covered with water, or not covered at all. Although these changes may be subtle, they are in fact a change in habitat and may be a significant effect on the environment and may significantly affect endangered or threatened species. The additional pumping sought by DWR has some unknown effect on these areas. Until such effects are fully identified and evaluated, the Corps cannot grant the application.

6. No information has been provided regarding the project's effects on shoreline erosion and accretion.

The southern Delta area is impacted by changes in sediment transport through the Delta. The public has not been provided any information to allow it to evaluate or comment on how it might affect these issues.

⁵ DWR acknowledges that water quality modeling is unreliable for Delta channels. Therefore, in this process, net flows and not quality is being modeled. Evaluating the flow modeling, DWR staff speculates that the amount of increased flows in the channels under the proposals is likely to meet the standards.

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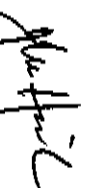
7. The Application does not appear to comply with the Current BO.

The Notice states that the operation of the additional 500 cfs of exports is controlled or limited by the CalFed Ops Group/WOMT process. It appears that the process for review and authorization set forth in the Notice reflect the previous process under the old, no longer effective BO's. [The Application was submitted well before the BO was released.] The new BO clarifies that although portions of the CalFed process are continued to be used, FWS has the final authority regarding both the 500 cfs operation, as well as other operations. If this is correct, then the Notice does not give the public an accurate description of the project and therefore cannot adequately evaluate and comment on the project.

For the above reason, SDWA and CDWA request the Corps hold a hearing before further considering the Application. It is clear that some of the project's effects will certainly have a significant impact on the environment, and that other effects are unknown, but must be determined. Under NEPA, it appears that the probable adverse effects and the markedly changed circumstances require detailed and new environmental review. It does not appear that any previous environmental review can be relied upon in light of the radical changes in the Delta in recent years. These changes bring into question authorization for any export pumping, and certainly require more review for the proposed change. Although the recent BO provides some evaluation of impacts, it cannot legally replace the Corps' obligations under NEPA (or DWR's obligation under CEQA).

Please feel free to contact me if you have any questions or if you would like me to provide you with any materials supporting the above referenced facts.

Very truly yours,



JOHN HERRICK

Attachments

cc: Mr. Mark Holderman
Dante J. Nomellini, Esq.
Dan Nomellini, Esq.
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