Sunday, August 30, 2009 5:56:48 PM
From: MJDelPiero
To: alf.brandt@asm.ca.gov, Alf.Brandt@asm.ca.gov

DEAR ALF:

Thank you for talking to me the other day, and for the opportunity to review the legislative package that is to be presented to the Conference Committee of the state legislature. After over twenty-five years in the public and private practice of water law, and as an adjunct professor of Water Law at Santa Clara University since 1992, I am very worried.

These bills, sadly, are just not very good and appear to be a thinly disguised attempt to reallocate the state's water and represent a backdoor attack on 130 years of California water law and legal precedent. The scary part is that it appears that no one understands or wants to publicly admit the unintended consequences that are going to result if these bills go forward without major clarifications.

Suffice to say that I am very, very concerned that this will make the situation far worse in the arena of litigation, and muddy the last thirty years of judicial decisions which have clarified the Public Trust Doctrine. It's not surprising that the State Water Contractors are supportive of this scheme to enable water exporters, who are holding the most junior water rights, to secure upstream water at the expense of the most senior water rights holders. Incredulously, the scheme then tags the upstream water rights holders with much of the expense for facilitating the reallocation of water and mitigating the environmental consequences of reallocation. This will do great damage to Sacramento Valley farmers and municipalities in the medium and long term, and will be the full employment act for lawyers in the short term.

The package's failure to specifically, and without nuance or ambiguity,define numerous terms like "coequal," "balanced" or "reliable" ensures twenty years of litigation (and millions of dollars of attorney's fees) as attorneys and the courts battle over their meaning. None of the bills acknowledge the fact that the State Water Board has issued rights to far more water than actually exists. Absent an admission of that TRUTH, there will never be a resolution to our water crisis.

Indeed, the legislation avoids the two actions that would meaningfully address the present water crisis: a mandate that the State Water Board aggressively begin the long overdue process of bringing water rights into conformance and balance with the amount of water that

actually exists and an immediate repeal of the Monterey Agreement provisions that eliminated an “urban preference” that originally ensured water for the 20 million people on the South Coast during California’s inevitable droughts. Surely, there should be a legislative water preference for 20 million people and the public trust resources of our state over cotton crops in Kern County.

I disagree with the Delta Vision Task Force’s findings that new governance is required in the Delta. What is needed now is a legislative acceptance of the truth and legislative directives to reform the system to reflect the truth.. An action that is desperately needed is meaningful enforcement of existing legal public trust and constitutional water doctrines and laws through the existing State Water Resources Control Board, not a new layer of bureaucracy and institutional inertia. Consequently, I urge that you recommend to the committee chairs to reject the legislation that promotes more water bureaucracy and wasteful spending on large water projects that will increase legal conflict and reduce water supply reliability far into California’s future. "BEFORE ANYBODY SPENDS ANY MORE TAXPAYER DOLLARS AND BUILDS ANOTHER PIPE OR CANAL, THEY SHOULD BE REQUIRED BY THE LEGISLATURE TO PROVE THAT THEY HAVE REAL, WET WATER (TO WHICH THEY HAVE A REAL LEGAL ENTITLEMENT) THAT IS AVAILABLE TO FILL THE PIPE OR CANAL."

The Central Valley Project and the State Water Project have some of the most junior appropriative rights in California, with a face value of approximately 130 million acre-feet. A lot of that water doesn't even exist except in the wettest of years. By themselves, the face value of state and federal water rights in the Delta watershed exceed average annual Central Valley watershed runoff (29 million acre-feet) by a factor of 4.5. The California Department of Finance originally filed for these permits back in 1927, while other rights were filed for in the late 1930s. In terms of water appropriations, this is quite late in California history, since some pre-1914 appropriations date to Gold Rush days.

California has constitutional provisions prohibiting unreasonable use and diversion of water, a comprehensive Water Code, state and federal endangered species acts, water quality acts, environmental review acts and a Fish and Game Code that - while imperfect - are sufficient to equitably distribute available water and protect pelagic and salmonid fisheries. We have regulatory and resource agencies charged with implementing and enforcing these laws. The present crisis would have been prevented had these laws had been complied with and enforced. These laws are sufficient to fix the problem over time, if enforced.

Since at least 1979, it was recognized by the State Water Resources Control Board that “To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the export pumps.” See SWRCB D-1485 page 13. Since that time, the export pumping has steadily increased to the point that the courts have recently intervened to curtail illegal export pumping.

In 1992 and 1993, when I was on the State Board, we came very close to adopting a Water Rights Decision (Draft Decision 1630) that would have addressed many if not all of these desired outcomes sought for the Delta today. I supported that draft and its policies. However, the then-administration intervened to keep the board majority from adopting the draft decision, which led to adoption of the Bay Delta Accord in 1994, followed by the establishment of the CalFED process, and the Monterey Amendments to the State Water Project contracts. These compromise actions have now clearly failed to keep the promise of “balance” and to protect the public trust resources in the Delta. Further, the Davis Administration made things even worse by allowing DWR to increase real exports from the Delta since 2001 that pushed the ecosystem into collapse by 2007. The current Administration can't legislatively create water, any more than the Wilson and davis Administrations could, and these bills don't fix the problem either.

Despite an abundance of rhetoric on the value of the Bay-Delta ecosystem and "the expressed, bi-partisan, good intentions to restore it", the bill package is embarrassingly silent on specific standards, goals, or specific yardsticks that would measure and ensure restoration. It assigns all responsibility to develop protective measures to a Bay Delta Conservation Plan (BDCP) process that is largely comprised of the representatives of interests, individuals, and agencies that for the last two decades ignored, acquiesced, and chaperoned the complete and practically irreversible collapse of the estuary. In fact, BDCP is largely a conveyance project masquerading as a Habitat Conservation Plan.

Since it is reasonable to assume that a Peripheral Canal would be operated without sufficient respect for Delta farmers and ecosystems, we may all expect the Canal (or other designs, such as “dual conveyance”) would remove fresh water supplies from Delta ecosystems, further reduce the diversity of aquatic habitats for failing species, and literally de-water the water rights of profitable Delta farms and communities with senior water rights.. This is not conjecture, this is what will happen given the foreseeable consequences of these proposals within the context of existing laws.

A Peripheral Canal would shift the point at which Sacramento River water is exported to a point north of the Delta. This would shift the impacts of export diversions directly to the Sacramento River (and away from the San Joaquin), the last river in the Valley supporting substantial, but vulnerable salmon and steelhead populations. I believe this poses very grave long-term risks for salmonid fisheries that are already on the ropes. This is well documented by both the US Fish and Wildlife Service's Anadromous Fisheries Restoration Program and the National Marine Fisheries Service's recent biological opinion on present operations of the State Water Project and Central Valley Project.

A Peripheral Canal would increase the residence time of river flows reaching the Delta not otherwise diverted into the canal. This will do great damage to farmers and to the Sacramento Valley economy. Without greater regulation of upstream land uses (specifically agricultural practices and development restrictions, slower and lower water flows would increase pollutant concentrations, water temperatures, and dissolved oxygen problems in the Delta—all of which further compromise fish habitat, including the migration corridors of endangered anadromous salmonid fisheries and other beneficial uses of water. Lower freshwater flows to the Delta would increase algal blooms, and would increase exposure of fish larvae and smolts to predators and entrainment in reverse river channel flows heading to the export pumps.

Thank you very much for accepting these comments. As I indicated, I do not represent any clients on this matter, I don't have " a dog in this fight", but, as you know , I served from 1992-1999 on the SWRCB. I offer these comments because our state faces a grave crisis that will be made worse without significant revisions to these pieces of legislation.

This is a lot of information in a single e-mail but, as I said, the potential for a real and potentially irreversible NEW water rights problem will surely present itself unless more specific findings of fact, more legal detail, and more specific standards are included into any legislation before it is passed.

Very Best Regards to you and the Assemblyman,

Marc Del Piero