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April 6, 2009

Mr. Chris Carr
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Consideration of Potential Amendments to the Water Quality Control Plan For the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

Dear Mr. Carr:

Diepenbrock Harrison submits this letter on behalf of the San Luis & Delta-Mendota Water Authority ("Authority") and its member agencies, in response to the revised notice of a staff workshop in the above-reference matter. According to that notice, State Water Resources Control Board ("State Water Board") staff will be available at the workshop to:

> receive information and conduct detailed discussions regarding potential amendments or revisions to the southern Delta salinity and San Joaquin River flow objectives included in the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta) (2006 Bay-Delta Plan) and their implementation.

In response thereto, the Authority provides the following initial, process-based comments. The Authority intends to provide more comprehensive and detailed comments and information at a later point in the State Water Board's process.

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1. Water Quality Objectives Need Not Provide Absolute Protection For Any Particular Beneficial Use

The State Water Board should strive to set water quality objectives that fully protect beneficial uses. However, the law does not require full protection; but instead, it yields to what is reasonable.[1] In section 13000 of the Water Code, the Legislature set forth the State Water Board's basic directive when regulating water quality. The Legislature found and declared:

> [A]ctivities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Water Code, § 13000 (emphasis added).) The Legislature provides the State Water Board with a more direct mandate for the adoption of water quality objectives. The Legislature requires the State Water Board "establish such water quality objectives . . . as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." (Water Code, § 13241.) Reasonable protection is not absolute, but requires a balance; the State Water Board must consider the "totality of circumstances presented." (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 129.) The consideration of the totality of circumstances necessarily requires "balancing of competing interests" and making "policy judgments." (*Id.*, at p. 130.)

The requirement of balance is reflected in the legislative mandate imposed on the State Water Board. When developing a water quality control plan, the State Water Board must consider:

> (a) Past, present, and probable future beneficial uses of water.
>
> (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
>
> (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

[1] Indeed, full protection of a beneficial use may not be possible because that level of protection may impair another beneficial use.

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(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.

(Water Code, § 13241.) Thus, before setting water quality objectives, the State Water Board must be provided with information needed to determine what is "reasonable." The State Water Board must: (a) understand the relative effects on the beneficial use of varying levels of protection (b) consider what measures could be undertaken to achieve the varying levels of protection, and (c) appreciate the potential costs for each of the measures considered.

2. Before Setting Water Quality Objectives, The State Water Board Must Identify The Factors That Impact Water Quality And The Extent Thereof

Also, when setting water quality objectives, the State Water Board must consider the environmental characteristics of the hydrographic unit under consideration and water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area. (Water Code, § 13241(c).) To satisfy those required considerations, the State Water Board should identify factors which affect water quality within the area[2] and how each factor within the area is affecting, and may affect water quality.

For southern Delta salinity, the State Water Board undertook some of that work previously. In its D-1641, the State Water Board concluded:

> Water quality in the southern Delta downstream of Vernalis is influenced by San Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity. . . .

(D-1641, p. 86.)[3]

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[2] The importance of identifying factors that affect water quality within the area of concern has recently been recognized by the State Water Board in the 2006 Plan. (*See* 2006 Plan, p. 3 (stating "This plan establishes water quality objectives for which implementation can be fully accomplished only if the State Water Board assigns some measure of responsibility to water right holders and water users to mitigate for the effects on the designated beneficial uses of their diversions and use of water" (emphasis added).)

[3] The State Water Board did not make similar findings relative to San Joaquin River flow.

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The starting point for reconsideration of the southern Delta salinity objectives should be the factors identified in D-1641, but only the starting point. The State Water Board must update that conclusion. It must consider existing and potential changes to San Joaquin River inflow (i.e., implications of new flow requirements that have occur since D-1641 issued or that are expected to occur), existing and projected levels of southern Delta diversions and discharges, and existing and projected levels of municipal and industrial diversions and discharges.[4] The State Water Board must also account for investments made and actions taken since data were collected to support those 2006 State Water Board findings.

With regard to the flow side, the Authority and its member agencies own no dams and do not control upstream diversions. Their primary water supply is Central Valley Project Water delivered through the Delta-Mendota Canal, with its burden of imported salt. That supply has already been severely curtailed for water quality and environmental purposes. On the water quality side, however, member agencies that discharge to the San Joaquin River have made substantial investments and implemented significant programs which address discharges. Similarly, those member agencies and/or other member agencies have also undertaken significant activities to address drainage issues within their service areas.

Specifically, the Authority and its member agencies have invested their own funds and also successfully pursued federal grants, state grants, federal appropriations, and/or State Water Board low-interest loans for programs to improve infrastructure; acquire and develop reuse areas; and encourage installation of high-efficiency irrigation systems. Some member agencies have also funded their own revolving loan programs to assist growers with return systems, drip irrigation, and other irrigation improvements. From these investments, member agencies have (1) engaged their landowners and water users to achieve broad participation in the Regional Board's Irrigated Lands Program through the Westside San Joaquin River Water Quality Coalition; are implementing an approved watershed management plan and monitoring program for which they pay; and are implementing regionally funded grants for focused programs to accelerate best management practices, (2) complied with waste discharge requirements for the Grassland Bypass Project, including significant load reductions for both selenium and salt, and/or (3) developed a long-term program for drainage management, known as the Westside Regional Drainage Plan, which builds on the Grassland Bypass Project

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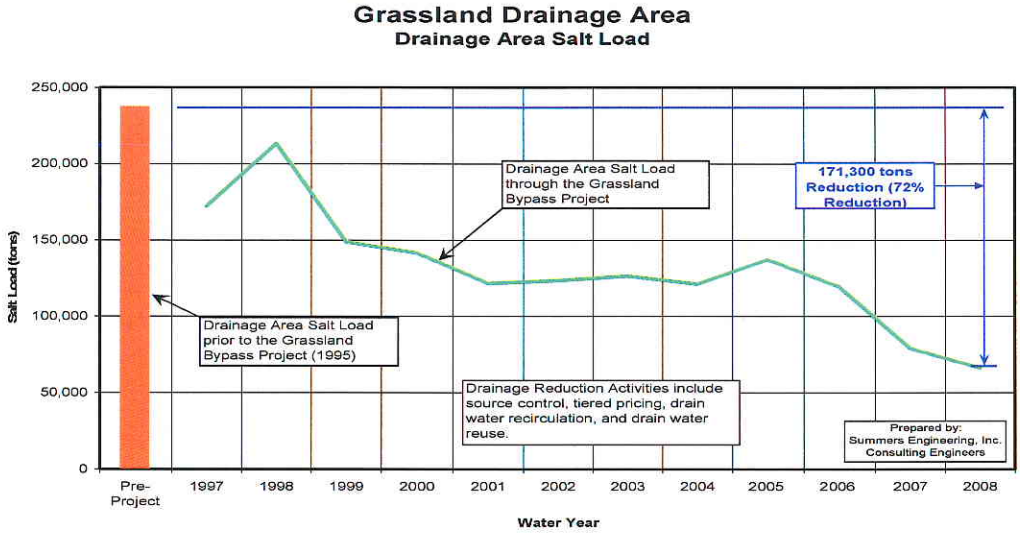
[4] The importance of that update becomes evident when considering the extent of diversions and discharges in the southern Delta, and actions authorizing municipalities to discharge in the southern Delta. (*See*, *e.g.*, Delta Atlas at pp. 32, 34, copies of which are attached hereto as Exhibit 1; Order WQO 2005-0005 (authorizing the City of Manteca to discharge at levels in excess of the southern Delta Salinity objectives).)

and continues as a permanent drainage solution, with the goal of ultimate in-valley management of drainage from irrigation.

The following table depicts some of the improvements resulting from the Grassland Bypass Project.



While the Project is not yet in position to assure zero discharges, the participants are working with a broad group of stakeholders to extend it while they make continued investments to reduce subsurface drainage produced on farm and within the region; to manage the remaining drainage to preserve the viability of irrigated agriculture while achieving ongoing water quality improvements; and to protect the environment. If the Project is extended, the water quality will continue to improve over the next 5-10 years until subsurface drainage generated by irrigation can be managed without discharge into the San Joaquin River system. These improvements cannot be ignored, but must be taken into consideration by the State Water Board as it reviews and updates the Water Quality Control Plan.

3. Conclusion

The Authority thanks the State Water Board and its staff for the opportunity to present these comments and to participate in the process to review and possibly revise

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the southern Delta salinity objectives and San Joaquin River objectives. The representatives of the Authority will continue to provide information to the State Water Board, consistent with the comments made herein. The Authority and its member agencies welcome the opportunity to meet with the State Water Board and its staff to answer questions or address any concerns they may have as a result of this letter.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By 
Jon D. Rubin
Attorneys for the San Luis & Delta-Mendota Water Authority

cc: Daniel Nelson

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Exhibit 1

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SACRAMENTO
DELTA
SAN JOAQUIN
ATLAS

California Department of Water Resources
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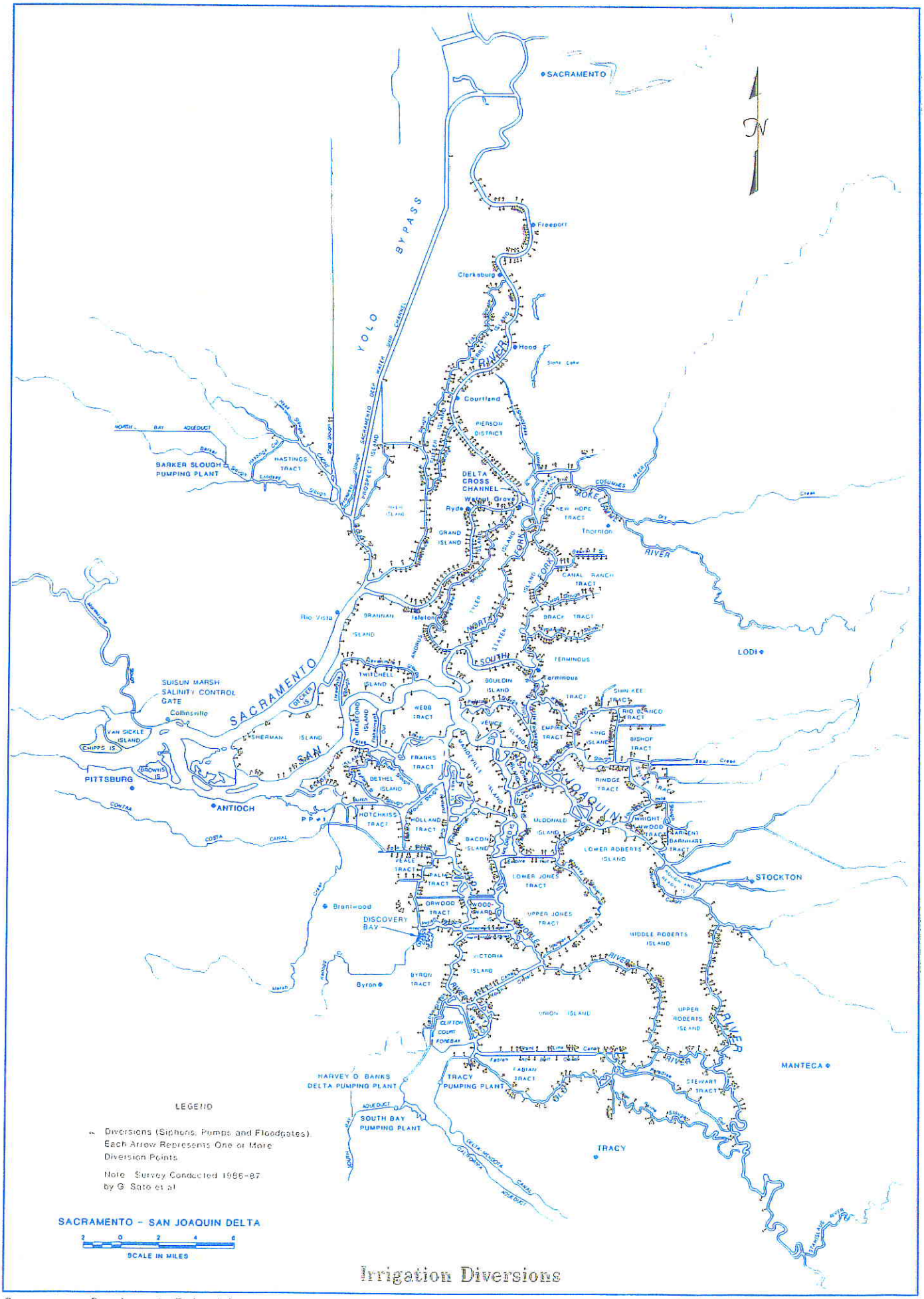

Irrigation Diversions

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