



# United States Department of the Interior

BUREAU OF RECLAMATION  
Mid-Pacific Regional Office  
2800 Cottage Way  
Sacramento, CA 95825-1898  
AUG 08 2012

IN REPLY REFER TO:

HAND DELIVERY

Craig Wilson, Delta Watermaster  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Subject: Notice of Violation (Notice) of State Water Resources Control Board Decision 1641 (D-1641) by United States Bureau of Reclamation (Your Letter dated July 18, 2012)

Dear Mr. Wilson:

Reclamation is in receipt of the subject Notice. This Notice states the following:

- The spring pulse flow requirements for Vernalis contained in Table 3 of the 2006 Bay-Delta Water Quality Control Plan (2006 Plan) were set for 2012 at a minimum monthly average of 3,540 cfs;
- The San Joaquin River Agreement (SJRA) expired in 2011;
- The pulse flow target for 2012 under the SJRA would be a minimum monthly average of 3,200 cfs;
- The flows at Vernalis on the San Joaquin River for the period April 15 – May 15 averaged 3,092 cfs;
- This average flow failed to meet either the Table 3 or SJRA requirement;
- Therefore, Reclamation is in violation of D-1641.

Reclamation has questions and concerns regarding aspects of this Notice. The first issue is procedural - it is unclear under what authority the Delta Watermaster is proceeding by issuing a "Notice of Violation" to Reclamation. Under Water Code § 85230, the Delta Watermaster is delegated the authority to issue proposed cease and desist orders or proposed administrative civil liability complaints.<sup>1</sup> However, we can find no authority for the Delta Watermaster to issue a "Notice of Violation" under Water Code § 1834. There is a crucial distinction between the Delta Watermaster's authority under § 85230, and State Board authority under § 1834 - the distinction

<sup>1</sup> The State Board delegated this authority to the Watermaster in Paragraph 1.5 of the State Board's Resolution No. 2010-0048:

Issue notices of proposed cease and desist orders, and, when a hearing has not been timely requested, issue cease and desist orders in accordance with Water Code section 1831 et seq.

C) SJTA

is whether Reclamation is required to request a hearing, in writing, under § 1834(b). The Notice of Violation does not cite any authority under which the Delta Watermaster is proceeding, and is silent with respect to any right or obligation to request a hearing as required by § 1834(a). Under § 1834(b), if the recipient of a Notice of Violation does not request a hearing, in writing, the State Board may issue a cease and desist order without such hearing:

Unless a written request for a hearing signed by or on behalf of the notified party is delivered to or received by mail by the board within 20 days after receipt of the notice, the board may adopt a cease and desist order, based on the statement of facts and information set forth in the notice, without a hearing.

We respectfully request further clarification as to precisely where the "Notice of Violation" fits into the Delta Watermaster's or the State Board's statutory enforcement authority, so that Reclamation can clearly understand its substantive and procedural rights and obligations under the law with respect to this Notice. If the State Board or the Delta Watermaster finds that the Notice of Violation does fall under § 1834(b), it would be Reclamation's view that the 20 day timeframe to request a hearing does not run until Reclamation receives clarification on this point.

In addition to the procedural ambiguity of the Notice of Violation, Reclamation respectfully disagrees with the Delta Watermaster's assertions with respect to Reclamation's substantive D-1641 requirements. The State Board's view that Reclamation is solely responsible for the entire instream flow requirements for the San Joaquin River basin at Vernalis is not supported by any rational basis in the record, nor otherwise. When D-1641 was originally adopted by the State Board, the expectation was that the State Board would permanently assign responsibility to other diverters in the basin by 2012. However, the State Board has yet to do that, and Reclamation's diversions in the basin are not solely responsible for depletions to flow at Vernalis. Therefore, Reclamation reiterates its position previously set forth in our May 4, 2012 letter to State Board Executive Director Tom Howard.

Second, the Notice states that the requirement contained in Table 3 of the 2006 Plan (3,540 cfs) is the applicable pulse flow requirement. Reclamation maintains its position that the modified SJRA target<sup>2</sup> as negotiated in our agreement with Merced Irrigation District (MID) is in effect. The SJRA did expire at the end of 2011, and Reclamation entered into discussions with several water districts about extending the spring pulse flow provisions of the SJRA. MID was willing to enter into an agreement to coordinate operations with Reclamation to help meet a SJRA-like spring pulse flow target for 2012 and 2013. As noted in our May 4 letter, it is Reclamation's position that the San Joaquin River flow provisions of the SJRA are essentially still in effect through the end of 2013 due to the agreement with MID. Therefore, under the terms of D-1641, the applicable flow requirement at Vernalis during the spring pulse flow period of 2012 was the SJRA target of 3,200 cfs.

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<sup>2</sup> The negotiated terms of the Reclamation-MID agreement specify a SJRA spring pulse flow requirement that explicitly excludes the double-step requirement of paragraph 5.6 of the SJRA.

Finally, the Notice states that the flow at Vernalis of 3,092 cfs failed to meet either requirement. As noted above, Reclamation is of the opinion that the applicable standard for 2012 was 3,200 cfs. The Annual Technical Reports submitted to the Board pursuant to the implementation of the SJRA from 2000 through 2010 describe in detail the inherent complexities in meeting an absolute flow objective through the coordinated operation of three upstream reservoirs managed by three different agencies, combined with factors such as accretions and depletions of unpredictable amounts along the San Joaquin River and accuracy of the gage measurements<sup>3</sup>. Under the SJRA, the real-time coordination of releases to meet the SJRA spring flow target required significant resources throughout the life of the SJRA. For these reasons, the parties coordinating this program (including the State Board, the Fish and Wildlife Service, National Marine Fisheries Service (NMFS), and Department of Fish and Game) have long considered compliance with these flow targets in the SJRA to be within  $\pm 7\%$  of the target. Furthermore, with Reclamation operating New Melones Reservoir releases to meet the requirements of the NMFS Biological Opinion, only Lake McClure was available in 2012 to adjust releases to meet this target. Despite the inability to schedule releases from a third reservoir, a 30 day average minimum monthly flow of 3,092 cfs<sup>4</sup> was achieved during April 15 – May 15 (96.6% of the SJRA target for 2012).

Our May 4 letter describes some of the challenges faced by Reclamation in meeting spring pulse flow requirements at Vernalis – unfortunately, it is not a simple matter of making releases from reservoirs until the target flow is met. All reservoir operators face significant operational constraints that make meeting these objectives challenging.

In summary, we are however committed to improving coordination of release of flows in 2013 to the extent possible. We believe that a meeting with you to discuss all the complexities involved in meeting these standards will be beneficial to both of us in understanding these issues, and in determining a common path forward.

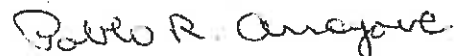
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<sup>3</sup> The U.S. Geological Survey's *Policy Statement on Stage Accuracy* (available at <http://water.usgs.gov/admin/memo/SW/sw93.07.html>) states that "Accuracies of discharge records for individual days commonly are about 5 to 10 percent." *Policy Statement*, at p. 1. The Survey warns that "Data users are cautioned to consider carefully the provisional nature of the information before using it for decisions that concern personal or public safety or the conduct of business that involves substantial monetary or operational consequences." *USGS Frequently Asked Questions - Real-Time Streamflow Data* – "Why might USGS streamflow data reports not be accurate?" Retrieved from <http://md.water.usgs.gov/faq/realtime.html#A2>.

<sup>4</sup> This figure is preliminary estimate; the final figure will be determined upon completion of the customary USGS review of hydrological data.

If you are amenable to such a meeting, please contact Mary Johannis at 916-978-5082 with your availability. We look forward to meeting with you soon. In the interim, please feel free to contact me at 916-978-5013 if you have any questions.

Sincerely,



Pablo R. Arroyave  
Deputy Regional Director

cc: Allen Short

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# Washington Update

*The Modesto Chamber of Commerce*



Invites you to a luncheon with

**United States Senator  
Dianne Feinstein**

**Wednesday, August 29th, 2012**

**11:30 a.m. - 1:30 p.m.**

**Modesto DoubleTree Hotel**

1150 9th Street  
Modesto, CA

## **REGISTRATION**

Individual Cost: \$35

Table of 10: \$325

If purchased by 8/24/12

Table \$350 after 8/25/12

## **All Seats Must Be Reserved**

Call: Modesto Chamber (209)577-5757

Email: [reception@modchamber.org](mailto:reception@modchamber.org)

Checks can be mailed to:

Modesto Chamber 1114 'J' Street, Modesto, CA 95354

**Please RSVP by August 24th.**