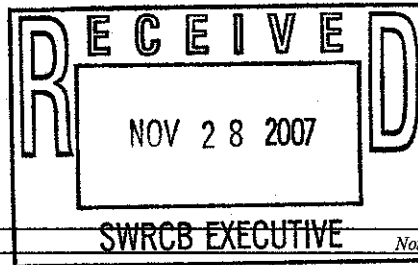




Natural  
Heritage  
Institute



12/4/07 Bd. Mtg. Item 18  
SF Bay/Sac Delta Estuary  
Deadline: 11/28/07 by Noon

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Non-Profit Law and Science for Global Resource Solutions

November 28, 2007

**COMMENTS OF THE NATURAL HERITAGE INSTITUTE  
ON THE RESOLUTION SPECIFYING ACTIONS TO PROTECT THE DELTA**

The Natural Heritage Institute is pleased to present these comments and recommendations regarding the draft resolution, to be considered at the December 4, 2007 meeting of the State Water Resources Control Board. NHI is a non-profit, natural resources conservation organization whose core mission is to restore and protect water-dependent ecosystems in California and worldwide. NHI serves on both the Steering Committee for the Bay Delta Conservation Plan and on the Stakeholder Coordination Group of the Delta Vision process. We have represented environmental interests in the several State Board proceedings between 1987 and 1995 that led to the adoption of the 1995 Water Quality Control Plan for the Bay-Delta Estuary in D-1641.

NHI commends the State Board for the suite of measures it proposes to undertake to rescue the alarmingly distressed condition of the pelagic fish and aquatic species in the estuary, and urge their immediate adoption and implementation. Resolutions # 2 and #6 have particular salience for the BDCP and Delta Vision processes in which we are engaged, and we therefore address these particularly.

In resolutions # 2 and # 6, the State Board would instruct its staff to "prepare a strategy and workplan for, among other good and useful initiatives, the initiation of a public trust proceeding to "(1) consider the protection of public trust resources and the balancing of the competing demands for water in and from the Bay-Delta; and (2) evaluate the reasonableness of the SWP's and CVP's method of diversion from the Delta". The SWRCBs power to enforce the public trust is through water rights proceedings to amend the existing diversion and facility operation permits in the delta. Water rights proceedings are made on the basis of a quasi-adjudicatory hearing record. We note here that such a water rights proceeding should probably also proceed under the authority of the Porter Cologne Act to amend the 1995 Water Quality Control Plan, as it is obvious that that plan is not sufficient to protect the designated beneficial uses in the estuary pertaining to fishery and environmental resources, and the mandated triennial review is, in any event, now long overdue.

The Steering Committee of the BDCP has recently developed "Points of Agreement for Continuing into the Planning Process" which establishes an important milestone on the delta conveyance facility element of an eventual habitat conservation plan under the federal and state endangered species acts. If final agreement is achieved by the BDCP and adopted by the permitting agencies, its terms and conditions will be incorporated into the permits that will govern the operation of the delta water export facilities by the state and federal water projects. Thus, the BDCP is no mere planning process as the agreement is intended to have legal force and effect.

In this document, the Steering Committee agrees that the most promising water conveyance option for achieving the BDCP conservation and water supply goals includes the "construction and operation of a new point of diversion in the north Delta on the Sacramento River and an isolated conveyance facility around the Delta". However, that endorsement is highly qualified. Ultimate agreement by NHI and the other environmental NGOs will depend on satisfactory assurances as to the design, operation and governance of such a facility. It may be desirable, for such assurances, to be considered satisfactory, to also embody them in a SWRCB water rights order.

Clearly, the operation of such an additional point of diversion and an isolated conveyance facility would require an amendment of the existing water rights permits by the SWRCB. Thus, a water right proceeding will be necessary to implement the BDCP in due course. However, funding, construction and permitting of the isolated facility, including environmental reviews under the California Environmental Protection Act and the National Environmental Policy Act, will require many years or even decades to accomplish. Meanwhile, the fate of the delta will continue to ride on how the existing south delta pumping facilities are operated.

The key question, therefore, is whether the SWRCB staff's June 2008 strategy and workplan should call for commencement of a water right proceeding to run concurrently with the BDCP (and presumably focus on the interim operations of the current delta export facilities), or whether the strategy and workplan should defer commencement until the BDCP is finalized and an application to amend the current diversion permits has been filed by the projects. In that event, the water rights proceeding would presumably focus on the coordinated operations of a dual conveyance facility, and would consider incorporating the negotiated assurances as to design, operations and governance of those facilities.

It is obvious to NHI that the estuary cannot wait decades for diversion and conveyance improvements to alleviate the stressors that the current pumps inflict on the public trust resources. Interim relief by the State Board is indispensable. Therefore, we strongly favor commencement of a water rights proceeding to

consider permit amendments no later than the completion of the BCDP. Whether an interim proceeding during the pendency of the BDCP is necessary because of the public trust resources emergency that has arisen in the estuary is a matter on which we look forward to working with your staff in the development of the June 2008 strategy and workplan.

Submitted by:

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