

SOUTH DELTA WATER AGENCY

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Via E-mail
bay-delta@waterboards.ca.gov

Ms. Diane Riddle
Environmental Program Manager
Hearings and Special Programs Section
Division of Water Rights
State Water Resources Control Board

Re: Comments to Draft Bay-Delta Plan Workshops Summary Report

Dear Ms. Riddle:

The following comments are submitted on behalf of the South Delta Water Agency.

The Draft Report referenced above contains a good summary of the issues and positions submitted by the stakeholders during the workshop process. SDWA has no criticisms or suggested changes to the summary, but believes certain issues need to be addressed further in the Report.

There are a number of fundamental issues that are pre-conditions to the SWRCB Bay-Delta Process. These issues need to be addressed before any of the other issues outlined in the Report can be examined. The first of these is the water supply. Although the Report for the most part accurately summarizes my testimony, I do not believe it adequately recognizes the importance of the issue. The recent history of 2007, 2008 and 2009 not only indicated that the SWP and CVP were incapable meeting minimum fishery flows after just two years of drought, but that those projects were also incapable of delivering export supplies if the two year drought had become a three year drought.

This is not simply an issue of calibrating models, but indicates that the assumption that millions of acre feet can be exported from the estuary on a regular basis is factually wrong. If the

current storage and release rules for the projects cannot meet fishery water quality requirements in the third year of a drought (and thereafter) discussions about multi-year protections for fish are possibly moot. The previous and current Bay-Delta processes were/are based on the assumption that 3-7 MAF of water can be exported from the Delta while still maintaining a healthy estuary and related fisheries. The data from 2007-2009 reveals that not to be the case. Export pump limitations due to fishery concerns did not result in a lack of storage for meeting fishery objectives, and not did limit the amount available for export; *the lack of water did*. Unless the SWRCB believes that fisheries can survive with only a two year protection of minimum fishery flows, the entire process should be suspended until the actual yield of the system, and how that yield can provide for fishery flows is determined. As the SWRCB's D-1485 noted, full mitigation of the projects would require the virtual shutting down of the export pumps. Can the SWP and CVP be operated to protect fish and have enough water thereafter to provide some level of exports?

Of course any investigation about such yield will be vehemently opposed by export interests. However, such opposition does not change the fact that the SWP and CVP *ran out of water after only two years of drought*. It would be a dereliction of duty by the SWRCB to proceed under the assumption that the protection of fisheries will not occur during any years after a two year drought.

Second, there is a fundamental legal and factual issue dealing with climate change and sea level rise. Initially of course, the basis on which predicted sea level rise and precipitation changes will manifest themselves requires extensive analysis and discussion. Clearly the use of models to predict such things is suspect at best and unreliable at worst. However, even if the assumptions being considered are supportable, it raises the question of how to deal with those predicted changes. It is incumbent on the SWRCB (and the fishery agencies) to address the question of "what legal obligations it is under if it believes that 'natural' climate and estuary changes are likely to result in the extinction of certain species regardless of what protective actions it undertakes/requires?"

Put another way, if the SWRCB concludes that sea level rise will cause the extermination of say, Delta smelt, does that mean it can legally *not* protect smelt from the adverse impacts of the projects? It is clear the export interests are trying to lessen their obligations by not only blaming other factors for fish population declines, but also trying to limit future requirements by complaining "the fish are doomed anyway." We know of no legal principle that would allow the take of endangered species based on the "defense" that the species will go extinct anyway. However, that is just what is being asserted in this process. The SWRCB should publically indicate if it believes it has any leeway in protecting fishery beneficial uses based on the speculative conditions resulting from climate change.

Third, the process does not seem to be taking into consideration legal mandates associated with CVPIA's fish doubling requirement and similar California statutes. If federal law requires that the Bureau of Reclamation in conjunction with FWS and NMFS doubles certain listed anadromous fish species, then there appears to be no basis on which to "balance" proposed fishery actions against impacts to parties assigned to meet the obligations. Has not federal law already decided the extent to which actions are required to double said species? If the SWRCB believes it can implement/require/adopt measures that will not meet federal obligations on the federal parties under its jurisdiction, it needs to so state and explain why. We already have an AFRP with complete and detailed specifics on what needs to be done to double the listed fish species; how can the SWRCB contemplate otherwise?

Fourth, much of the report covers the proposals and suggestions for getting better inputs for adaptive management. However, the question of adaptive management itself is not dealt with. It is clear to all outside observers that the practice of adaptively managing the Delta for the past 30 years has been an unambiguous failure. Unless someone believes that failure is the result of faulty data or incomplete data, the very assumption of adaptive management should be re-examined. Apparently there is something inherent in the process which leads to failure at every turn. The likely culprit is the CalFed notion that the "regulated and regulators should work together." Clearly, when regulatory agencies are obligated to take export needs into consideration the fisheries suffer the consequences. The SWRCB should state why it believes the adaptive management process should be continued.

Lastly, SDWA again raises the issue of responsibility and mitigation. The Bay-Delta process seeks to protect fisheries (and other beneficial uses) which requires some level of balancing. That balancing looks at the benefit of the protection compared to the cost of providing the protection. This notion makes sense and is required when the Board is looking at just what is needed from a global perspective. It does not make sense and is not required when the cause of the fishery decline is due to the adverse impacts of one or more parties. It is clear that the export projects are a major cause of the fishery decline and the destruction of the estuary. No balancing is necessary to require such parties to fully mitigate their impacts; they can be required to mitigate those impacts under the Board's authority over the water right permits granted to the CVP and SWP. Thus, before contemplating what other actions are necessary, or who might be required to undertake those actions, the Board should/must first require the "guilty" parties to mitigate their impacts. By not doing this first, the Board ends up "balancing" the cost of making a party mitigate its impacts; clearly not the intent of Water Code Section 13241. In practice, the Board ends up giving those who caused the fishery crash "credit" because its too expensive to fully mitigate those impacts.

Thus, before deciding on any changes to the water quality objectives, the SWRCB should hold hearings on draft Cease and Desist Orders against the projects for their impacts to the fisheries. Of course those hearings will be long, expensive and contentious, but so is every Bay-

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Delta proceeding. Such CDO hearings would resolve the issue of what the projects do to the fish, and rightfully place the costs of mitigating the same.

Please feel free to contact me if you have any questions.

Very truly yours,



JOHN HERRICK