

# South Delta Water Agency

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January 11, 2008

## Via E-Mail

gwilson@waterboards.ca.gov

Re: Pelagic Organism Decline Workshop

Dear Ms. Wilson:

The South Delta Water Agency does not currently employ any biologists or other experts who participate in the evaluation of the causes of the pelagic organisms decline. The Agency does monitor the issue as the actions causing the decline or the actions proposed to address the decline can have an effect on both water quality and availability in the South Delta. In that regard, the SDWA requests the SWRCB consider the following comments as it reviews the issue and considers what actions it might undertake. These comments related to the *Pelagic Fish Action Plan* of March 2007 ("Plan") produced by DFG and DWR.

1. The Plan contemplates delayed installation of the three agricultural tidal barriers in the Southern Delta until June 1. The barriers are installed and operated to mitigate the adverse impacts to local water levels (and to some degree quality) resulting from the operations of the CVP and SWP, especially with regard to those projects export pumps. The evidence indicates that those same export pumps adversely affect pelagic organisms. In order to address the POD, one should not consider the interruption or cancellation of measures which mitigate other adverse effects of the pumps. That is to say, protecting fisheries from the pumps does not supercede protecting local diverters from the pumps.

If the exports allowed during the time which the barrier installation would have occurred in the absence of the Plan are such that local water levels are adequate, then of course the delay would not cause harm to the local diverters. However, low exports during the spring do not necessarily mean that water levels or salinity are acceptable/adequate for local needs or compliance with water quality objectives. Hence, any changes to tidal barrier installation or operations must be based on modeling which predicts adequate conditions, and monitoring which confirms such conditions. If those conditions do not exist, then the projects must further decrease exports or in some other manner mitigate their adverse effects and not "take" any endangered or threatened species.

2. The Plan incorporates a somewhat modified EWA process and as a means of addressing some of the actions/situations thought to adversely affect pelagic organisms. This is a serious error on the part of the regulators. The EWA puts fishery regulators “in the same room” with exporters and asks them to *both* protect fisheries and exports. When the regulator charged with protecting fisheries believes that there is only a limited amount by which he can decrease exports in order to protect fisheries, then he/she has acquiesced to some minimum level of exports. Such does not exist. If exports adversely affect endangered fish, and there is no “take” permit, then export must, by law decrease until they no longer “take.” Having a rule or guideline that exports should not decrease below a certain level regardless of their effects on endangered species is therefore not only counter to the statutory obligations of DFG, FWS, SWRCB, and in fact DWR, but is completely unworkable. In this light, we see that D-1641's “no net loss” has contributed to the POD and should be changed by actually limiting the protection of endangered species.

3. The Plan encourages a “greater enforcement” of Water Code and Clean Water Act provisions which relate to the discharge of materials potentially affecting the pelagic organisms. First, the Plan’s own text indicates that these “toxic” chemicals *may* be contributing to the POD, while project operations correlate directly to the decline. Hence further investigation may be warranted, but a potential problem should not be addressed in the same manner or to the same degree as a real, actual problem.

More importantly though, the Plan (again, authored by DFG and DWR) asks for more stringent enforcement of the rules. This startling recommendation comes from an agency who has been found by the court to have no take permit, but continues to kill endangered and threatened species, and from the regulating agency who did not grant any such permit, but knowingly acquiesced to the continuous unlawful taking! As far as I am aware, DWR has still not sought such a permit. That means if one smelt is taken at the SWP pumps this year, it is illegal. It is clear that if there needs to be any greater enforcement, it needs to be done by DFG against DWR under CESA.

I hope these comments help frame the discussion and deliberations by the Board as it attempts to address the POD. It is clear who have contributed to the decline, though other causes, resulting from others’ actions may also be a factor. The SWRCB should focus on the known culprits, investigate other potential contributors, and not undertake actions which penalize third parties whose long term actions coexisted with a healthy fishery.

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

Very truly yours,

JOHN HERRICK