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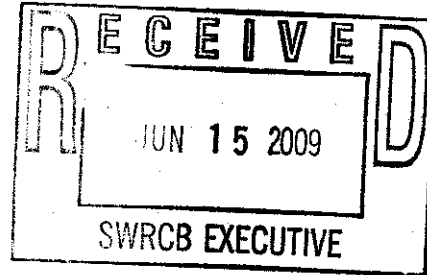
CENTRAL DELTA WATER AGENCY

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June 15, 2009

Via First Class U.S. Mail (15 Copies)
and Email: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Re: Comments on the Draft Staff Report for the Periodic Review of the 2006
Bay/Delta Water Quality Control Plan.

Dear Ms. Townsend:

1. **Fish and Wildlife Objectives.**

The Central Delta Water Agency (CDWA) supports the Staff Report's recommendations to further review the various fish and wildlife objectives in the 2006 WQCP. As the CDWA explains in its October 1, 2008 comments on this topic (a copy of which are attached hereto), in particular, major consideration should be given to requiring both higher flows and lower exports for the protection of fishery resources.

2. **Program of Implementation.**

With regard to the "Program of Implementation," the Staff Report states at page 31:

"Pursuant to the State Water Board's water right authority, the board has assigned responsibility primarily to DWR, the USBR, or both, for implementation of the flow-based water quality objectives and the salinity objectives in the Bay-Delta Plan. Other water rights holders are assigned responsibility for portions of the flow-related objectives. The State Water Board may reallocate responsibility for meeting these objectives among water right holders or other entities based on information it receives in a water right proceeding or water quality proceeding."

While a water right holder other than DWR or USBR may voluntarily assume responsibility to meet one or more of the Bay-Delta water quality objectives, as explained in CDWA's October 1, 2008 comments, before the SWRCB can lawfully force such a water right holder to assume such responsibility the SWRCB must first consider, interpret and apply numerous state and federal laws, policies and principles applicable to DWR and USBR's operations, which, thus far, the SWRCB has not done. Examples of such laws, policies and principles are set forth on pages 4 and 5 of the attached October 1, 2008 comments.

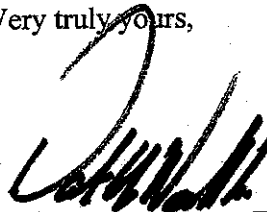
a. **Term 91 Must be Forthrightly Addressed in the Program of Implementation.**

As also explained in those October 1, 2008 comments, through the imposition of Term 91, the SWRCB is indeed forcibly imposing responsibility to meet the Bay-Delta water quality objectives on water right holders other than DWR and USBR. Such imposition, however, is taking place notwithstanding the lack of any mention of Term 91 in the implementation plans set forth in the 1995 or 2006 Bay-Delta WQCPs, and notwithstanding the SWRCB's lack of consideration, interpretation and application of those state and federal laws, policies and principles applicable to DWR and USBR's operations (as well as the lack of examination of threshold factual issues such as the identification of what particular objective the Term 91 water right holder is being held responsible for and whether that water right holder's water use actually negatively impacts that objective, etc.).

As explained more fully in the attached comments, the SWRCB's practice of imposing responsibility to meet the Bay-Delta water quality objectives through Term 91 outside of its Bay-Delta water quality control plan process and/or its subsequent water right proceeding to assign responsibility to meet the plan's objectives must cease. Such imposition is unlawful and will continue to be so until the SWRCB forthrightly embraces such imposition, and the propriety thereof, in a future water quality control plan and/or the subsequent water right proceeding to assign responsibility to meet the plan's objectives.

Thank you for considering these comments and concerns.

Very truly yours,



Dante John Nomellini, Jr.

DJR/djr
Enclosure



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October 1, 2008

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and Email: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: Periodic Review Workshop for the 2006 Bay-Delta Water Quality Control Plan.

Dear Ms. Townsend:

The Central Delta Water Agency (CDWA) submits the following preliminary comments on matters that should be addressed in the SWRCB's review of the 2006 Plan.

1. **The Water Quality Objectives for Fish and Wildlife Beneficial Uses Should be Revisited.**

In light of the collapse and/or dire state of numerous fish species, the SWRCB should revisit the 2006 Plan's fishery objectives pertaining to salinity, Delta outflow, river flow, export limits and Delta Cross Channel gate operation.

The 2006 Plan acknowledges that:

"[A]vailable information indicated that a continuum of protection [for fishery resources] exists. Based on that information, higher flows and lower exports provided greater protection for the bulk of estuarine resources up to the limit of unimpaired conditions." (2006 Plan, p. 11.)

With regard to export impacts, the SWRCB has previously acknowledged the following in its 1978 Water Right Decision, D-1485, at page 13:

"To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps."

In light of the fact that the Projects export pumping has not shut down, but, instead, has steadily increased since 1978, and the fact that the SWP has failed to develop various projects on the North Coast Rivers to annually supplement the water supply in the Delta with 5 million acre feet of water by the year 2000, it should be no surprise that the Delta's fishery resources are having a hard time coping with diminished flows and higher exports.

Accordingly, the SWRCB should give major consideration to requiring both higher flows and lower exports for the protection of fishery resources in its updated plan.

2. **The Implementation Plan Needs to Be Modified to Forthrightly Address Term 91.**

In the recent administrative and legal proceedings over Term 91 in Phelps v. SWRCB (2007) 157 Cal.App.4th 89, it became clear that Term 91 is simply a mechanism to impose responsibility on an appropriative water right holder within the Delta watershed to meet the various Bay-Delta Water Quality Control Plan objectives. As the SWRCB explains in WRO 2004-0004, at pages 5 and 6:

"In effect, Term 91 requires appropriators with this term in their water right permits or licenses to forego diverting natural flow that is needed to meet the flow-dependent water quality objectives. When there is insufficient flow to meet the water quality objectives, diversions by Term 91 appropriators could contribute to increased concentrations of salts in the Delta channels."

A major problem, however, is that the implementation plans set forth in the 1995 as well as 2006 Plans do not even mention Term 91. Instead, both plans state the following:

"The State Water Board will consider, in a future water rights proceeding or proceedings, the nature and extent of water right holders' responsibilities to meet these objectives." (1995 Plan, p. 4; 2006 Plan, p. 3; emphasis added.)

For Phelps, et al., and presumably numerous other water right holders subject to Term 91, Term 91 was imposed on their water rights well *before* the 1995 and 2006 water quality control plans were even adopted, much less implemented. Moreover, the "future" water rights proceeding that was intended to establish the nature and extent of water right holders' responsibilities to meet the 1995 objectives, and which culminated in the SWRCB's Decision 1641, makes no mention of the assignment of responsibility to meet those objectives on Term 91 water right holders.

This practice needs to stop. If the SWRCB is going to impose responsibility on Term 91 water right holders to meet one or more of its water quality plan objectives, then the SWRCB must forthrightly address the propriety of such imposition in its water quality control plan and/or in its subsequent water right proceeding to assign responsibility to meet the plan's objectives. As

it stands, the SWRCB has been wrongfully imposing responsibility on Term 91 water right holders without any mention of such imposition in either its water quality control plans or the subsequent water right proceedings, much less any examination of issues such as the following:

- (1) What specific water quality objective is the Term 91 water right holder being held responsible for?
- (2) Does the Term 91 water right holder's water use actually negatively impact that water quality objective?
- (3) Assuming it does, is it nevertheless legally proper to impose responsibility to meet that objective on that water right holder?

For example, with regard to the second question, it is not at all clear that Term 91 agricultural users in the Delta lowlands negatively impact any salinity objectives. In fact, the available evidence demonstrates that such use may actually *benefit* such objectives. As DWR's "Investigation of the Sacramento-San Joaquin Delta, Report No. 4, Quantity and Quality of Waters Applied to and Drained from the Delta Lowlands," dated July of 1956, explains at page 30:

"The Delta lowlands act as a salt reservoir, storing salts obtained largely from the channels during the summer, when water quality in such channels is most critical and returning such accumulated salts to the channels during the winter when water quality there is least important. Therefore agricultural practices in that area *enhanced* rather than degraded the good quality Sacramento River water en route to the Tracy Pumping Plant." (Emphasis added.)

And similarly, with regard to outflow objectives, the available evidence demonstrates that agricultural water use in the Delta lowlands likely results in a net *benefit* to outflow. For example, as the SWRCB recognized in its Decision-990, at page 46:

"The reclamation of the lands in the Delta has eliminated a large area of aquatic vegetation such as cat-tails and tules which consume three to four times as much water as the crops which are grown on these reclaimed lands. As a result, it appears probable that the consumption of water within the Delta has been decreased by reclamation development, and that a greater proportion of the stream flow entering the Delta now reaches the lower end of the Delta to repel saline invasion than before reclamation."

With regard to the third question set forth above, i.e., whether it is legally proper to impose responsibility to meet a Bay-Delta water quality objective intended to benefit fish and wildlife or any other beneficial use on a Term 91 appropriator, before it imposes any such responsibility, the SWRCB would have to ensure that it has complied with and honored all applicable laws and priorities associated with any such imposition and, in particular, ensure that the SWP and CVP are fully complying with their various legal obligations.

For example, and in general outline form, the SWRCB would have to take into consideration, among other matters, all of the following before it sought to lawfully impose responsibility to meet a water quality objective on a Term 91 appropriator (or on any water right holder within the Bay-Delta watershed for that matter):

- (1) The SWP and CVP must bear full responsibility for full mitigation of their impacts including without limitation the impacts from reverse flows, reduced outflow, the drainage into the San Joaquin River from the westside of the San Joaquin Valley, and damage to spawning areas.
 - (a) Note: the impacts of ship channels are burdens of the State and Federal Government; and the burden of westside drainage is that of the CVP and should fall most heavily upon the San Luis Unit in that the unit was not to go forward without a drain.
- (2) The SWP and CVP must provide adequate salinity control. (See e.g., Wat. Code, §§ 12200 et seq. & 11207; U.S. v. Gerlach Livestock Co. (1950) 339 U.S. 725; Ivanhoe Irr. Dist. v. McCracken (1958) 357 U.S. 275.)
- (3) The CVPIA burdens are those of the CVP.
- (4) Preservation of fish and wildlife is the responsibility of SWP and CVP with cost to be paid by users. Where possible enhancement must be incorporated with the cost of enhancement attributed to the State General Fund. (Wat. Code, § 11900 et seq.; Goodman v. County of Riverside (1998) 140 Cal.App.3d 900.)
- (5) The SWP and CVP must to the maximum extent possible operate and manage releases from storage into the Delta to provide salinity control and maintain an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development. (Wat. Code, § 12205.)
- (6) In allocating the burden within the CVP and SWP, the uses within the Delta and other areas and watersheds of origin must be accorded priority over exports. (Wat. Code, §§ 10505 et seq., 11460 et seq. & 12200 et seq.)
- (7) The remaining burden which would appear to be in the tributaries above the Delta is allocable among the other water users in accordance with water right priorities. The burden for bypass flows and other fish and wildlife requirements applicable under law to the various impoundments should not be shifted to other water users. Exporters other than the CVP and SWP must yield priority to the users within the Delta and other areas and watersheds of origin. (See Wat. Code, § 1215 et seq.; see also Wat. Code, §§ 12203 & 12205.)

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- (8) To the extent that a water user within the Delta and the other areas and watersheds of origin is required to yield water which can be replaced with CVP or SWP water, then the CVP or SWP water should be burdened provided that if the water is not unregulated flow, bypassed natural stream flow, return flow from upstream use, natural tidal flow or physical solution water, etc., and is truly "stored water," then a requirement of a contract or other mechanism for reasonable payment for the storage benefit may be appropriate. (See Wat. Code, §§ 11460 et seq.)

Up to this point the SWRCB has not even mentioned the assignment of responsibility to meet the Bay-Delta water quality plan objectives on Term 91 water right holders in its 1995 or 2006 water quality control plans or subsequent implementation proceedings, much less properly examined any of the above-listed three questions or any of the forgoing eight legal considerations. Accordingly, CDWA submit that the SWRCB's current imposition of responsibility to meet the existing water quality objectives on Term 91 water rights holders is contrary to law (as well as the express implementation language in the 1995 and 2006 plans) and any future imposition of such responsibility on such holders will continue to be unlawful unless and until the SWRCB forthrightly embraces such imposition, and the propriety thereof, in a future water quality control plan and/or the subsequent water right proceeding to assign responsibility to meet the plan's objectives.

Thank you for considering these comments and concerns.

Very truly yours,



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DJR/djr