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Tam Doduc, Chair
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
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RE: 11/18/08 BOARD MEETING Bay-Delta Strategic Workplan

Madam Chair:

These comments on the above-referenced agenda item are being submitted on behalf of the San Joaquin River Group Authority (SJRGA). The SJRGA has on several occasions provided recommendations to the SWRCB on the topics and procedures that the SJRGA feels are necessary to conduct a proper and fair hearing on the San Joaquin River flow objectives and other Delta objectives. To date, those recommendations have been largely ignored and the SJRGA's questions about the process remain mostly unanswered.

The SJRGA has made repeated attempts to introduce important evidence regarding San Joaquin River fall-run Chinook salmon, but has been stymied by the SWRCB at every step. The SWRCB requested that the SJRGA not submit its information at the September 17 workshop, suggesting that the information be presented at the scheduled November 5 workshop. The Board then cancelled the November 5 workshop. Now it appears that the SJRGA is once again prevented from submitting this important information as the draft notice has completely disregarded any San Joaquin River flow and salinity issues from the list of key issues. The SWRCB cannot take "evidence" concerning the use of biological indicators or targets as objectives to better protect fish and wildlife beneficial uses of the Delta when it eliminates the San Joaquin River from the issue list. If the SWRCB is going to accept evidence submitted that pertains to San Joaquin River issues it raises serious

notice issues.

It is unclear from the process outlined in the draft notice how this proceeding will interface with the separate, but related, proceeding to review San Joaquin River flow and salinity. Will the SWRCB conduct two separate proceedings and then combine them at a later date? How will information gathered in one proceeding be used in the other? Do you propose to conduct two separate environmental reviews to comply with the California Environmental Quality Act? If these two processes will be run concurrently, then the SWRCB will need to delineate clear boundaries for each process to ensure that the water rights of the SJRGA members and other participants are afforded the necessary quasi-judicial procedural safeguards.

The SJRGA again repeats the recommendations in its July 10, 2008 letter which outlines the type of process that should be followed and the topics that should be covered in order to adequately assess the flow and salinity objectives in the San Joaquin River and the South Delta. The SJRGA recommends that the SWRCB proceed with informational hearings on the San Joaquin River flow objectives first, followed by a draft initial study and a proposed staff report with draft objectives. Right now the process is backwards. The SWRCB cannot simply pull flow recommendations out of thin air.

The 2006 Bay-Delta Plan stated that "[a]dditional data and scientific analyses are needed to either support or modify the current spring flow objectives." (2006 Bay-Delta Plan, p. 24) If there is insufficient information to support the current spring flow objectives, then there is insufficient information to support their inclusion in the Bay-Delta Plan. Since the adoption of the 2006 Bay-Delta Plan, nothing has been submitted to the SWRCB which would either support or justify modifications to those objectives. The SWRCB has received only two pieces of information—the CDF&G San Joaquin Salmon Model 1.5 and the SJRGA update on the Vernalis Adaptive Management Plan (VAMP).

If this is an *informational* hearing, why are the witnesses required to submit their testimony under oath? Legally, it makes no difference if the witnesses are under oath or not as this is supposed to be a non-adjudicatory hearing. Similarly, why are the authors required to present their own findings? Since this is not an adjudicatory hearing, the rules of evidence, and the rules regarding the use of hearsay evidence, do not apply. Taking testimony under oath

without exposing such testimony to rigorous cross examination will be of little or no value in future proceedings and itself smacks of "Star Chamber" proceedings. The draft notice states that conclusions from this proceeding will not be binding on a party in further proceedings, yet the requirement to submit testimony under oath suggests otherwise.

How will "interested persons" be determined? According to the draft notice, interested persons may participate *as authorized* by the hearing officer.

The draft notice provides that no cross examination will be permitted and that only questions from the hearing officers and staff will be permitted. With apologies to the SWRCB, the hearing officers and staff are incapable of asking the right questions. They do not know or understand the issues as well as the parties. This is understandable given their varied experience, assignments, and multiple responsibilities. Board members and staff should be disinterested parties. Let the parties ask the questions and probe the veracity and probity of the evidence.

The inability to conduct cross examination and present rebuttal evidence also raises serious due process concerns for the SJRGA as the evidence gathered in this proceeding will be the basis for allocating water to implement the objectives adopted in the water quality control plan amendment. The procedure for submitting so-called "clarifying" questions does not resolve the SJRGA's due process concerns, as the notice requires questions to be submitted in advance of the hearing and then leaves it to the discretion of the hearing officers whether or not to ask the questions. Questions that arise during oral testimony and examination by the hearing officers and SWRCB staff will not be allowed except at the hearing officer's discretion. Do submitted clarifying questions become part of the administrative record? If the answer is yes, is the same true for submitted, but rejected, questions?

If the SWRCB is going to proceed, then it should be done the right way. The SWRCB needs to expand the staff and time necessary to do the Periodic Review and the subsequent water right phase correctly, as was done in D-1641. The D-1641 implementation hearing covering the San Joaquin River flow objectives addressed the VAMP. It took two phases and many days of hearings. This time around, the water right phase is likely to be longer and much more complicated.

The SJRGA's letter of September 29, 2008, identified

several key issues it suggested should be reviewed during this process. These have apparently been rejected by staff.

Our recommendations to you are as follows:

1. The informational fact-finding proceeding described in the Bay-Delta Strategic Workplan should proceed.

2. The issues identified in the SJRGA letter of September 29, 2008, should be included in the informational issues identified for inclusion in the proceeding.

3. The parties should be permitted to cross examine witnesses and present rebuttal testimony or the testimony should be unsworn.

4. The staff's periodic review report should be put on hold until the informational proceedings are completed.

5. The initial study and environmental documentation pursuant to the California Environmental Quality Act should not start until after completion of the informational proceedings. Otherwise, you have placed the cart is before the horse, and we may have to start the process over.

Very truly yours,

MASON, ROBBINS, BROWNING & GODWIN

By _____
Arthur F. Godwin

cc: SJRGA