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From: Deirdre Des Jardins <ddj@cah2oresearch.com>
Sent: Thursday, November 9, 2017 12:07 PM
To: WB-DWR-Bay-Delta
Subject: Phase II Bay-Delta Plan Input
Attachments: CWR Phase 2 update comments.pdf

Please see attached comments from California Water Research

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Via electronic mail

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Comments on the Phase 2 Bay-Delta Plan Update

1. The Final Scientific Basis report includes conclusions about the Bay-Delta standards

The Final Scientific Basis report does not simply provide the scientific information necessary to support the Board's selection of alternatives for setting standards for the Phase 2 update to the Bay-Delta Water Quality Control Plan. The Scientific Basis report includes conclusions about the standards set for the Phase 2 update. To the extent that these conclusions preclude evaluation of alternative standards in the SED for the Phase 2 update Bay-Delta Water Quality Control Plan, this is contrary to CEQA.

2. The Final Scientific Basis report does not include the BDCP/WaterFix project, and inappropriately defers consideration of interior Delta flow objectives

The Notice of Preparation for the Phase 2 Update to the Bay-Delta Water Quality Control Plan states that the update will include consideration of changes to water quality objectives needed for the BDCP/ WaterFix project.

The 2009 Staff Report on the Periodic Review of the 2006 Water Quality Control Plan, documents that the Board knew in 2009 that the BDCP/WaterFix project would "likely require changes to the Bay-Delta Plan and water rights implementing that plan" (p. 8.) The 2009 staff report documents the following potential changes to flow objectives in the Bay-Delta Water Quality Control Plan:

1. Re-evaluation of the export to inflow objectives (p. 19);

2. Adding reverse flow (OMR) objectives (p. 25);
3. Increasing Delta outflow objectives (p. 17);
4. Modification of Delta Cross Channel gate closure objectives (p. 22);
5. Changes to Rio Vista flow objectives (p. 5-6.)

The 2009 staff report also documents that the Board deferred analyses of these flow objectives to the Department of Water Resources in the BDCP/WaterFix process, to avoid duplication of effort. The Board is now proposing to defer setting of interior Delta flow objectives a future process. Section 5.5 states

[t]he interior Delta flow requirements for Old and Middle River reverse flows, export limits, and DCC gate closures would be determined and based on monitoring of fish presence and a consultation process involving staff from the fisheries agencies, DWR, and Reclamation, with the addition of the State Water Board. (p. 5-41.)

The statement describes standards that simply fail to meet the requirements of the Porter-Cologne Act. According to Water Code section 13242,

The program of implementation for achieving water quality objectives shall include, but not be limited to:

- (a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.
- (b) A time schedule for the actions to be taken.
- (c) A description of surveillance to be undertaken to determine compliance with objectives.

To the extent that the proposed consultation process simply involves the inclusion of Water Board staff in the implementation of protective flow criteria set by the National Marine Fisheries Service, the U.S Fish and Wildlife Service, and the Department of Fish and Wildlife under the federal and California Endangered Species Acts, the process itself is fundamentally inadequate to achieve the Board's broader responsibilities under the Porter-Cologne Act.

Water Code section 85086(c)(2) also requires the Board to adopt "appropriate Delta flow criteria" to protect the public trust, and to include those criteria in any order approving a change in point of diversion. However, the WaterFix Change Petition Hearing Notice stated that the Board was only proposing to adopt "interim" flow criteria, and that longer term criteria would be considered in the update to the Bay-Delta Water Quality Control Plan. To the extent that this deferral to a future consultation process is the ultimate implementation by the Board of the "appropriate Delta flow criteria" required by Water Code section 85086(c)(2) to protect the public trust, the proposal simply fails to meet the plain meaning of the statute.

3. The Final Scientific Basis report assumes a legally indefensible water rights implementation of the objectives

To Final Scientific Basis report describes “inflow based” Delta outflow objectives. This description is a legal standard of implementation of flow objectives that exempts the State Water Project and Central Valley Project exports from the implementation of Delta outflow objectives. As such, the proposed implementation is contrary to more than a century of established law on water rights priority.

The Racanelli decision (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82) did not provide for this preferential treatment of diversions by the projects. The decision simply over-ruled the Board’s setting of water quality standards at “only at a level which could be enforced against the projects.”

California Water Research provides the following comments on the program of implementation:

(Question 2) How to ensure that water released to meet objectives is protected through the system and not rediverted for other purposes?

When senior water rights holders are curtailing diversions, the Board will have to resolve the issue of diversions by other senior water rights holders in the watershed.

For more junior water rights holders, California Water Research proposes Term 92, analogous to Term 91:

When natural and abandoned flows are insufficient for all diversions, because of requirements to provide instream flows for public trust purposes, direct diversions by junior water rights holders should be curtailed.

When senior water rights holders are reducing diversions, the State Water Project and Central Valley Project should be limited to rediversion of stored water or water imported to the watershed, less estimated loss to groundwater and carriage water for exports.

This is the only implementation of protection for public trust instream flows that is consistent with water rights priority and the area of origin protections. In Decision 1650 on the Woodland-Davis permit, the Board held:

This does not mean that a permit holder in the watershed of origin is entitled to use water previously diverted to storage by the CVP or SWP. (*El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 962.) It does mean, however, that at times when natural and abandoned flows are insufficient for all diversions, diversions for export by the CVP and SWP, including diversions to storage for export later in the year, must be curtailed before any diversions entitled to watershed of origin are curtailed.

While Term 91 does not include a groundwater loss term, studies have found that loss to groundwater in the lower Sacramento River during severe droughts can be as high as 7%.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a stylized flourish at the end.

Deirdre Des Jardins

Principal, California Water Research