

San Luis & Delta-Mendota Water Authority



P.O. Box 2157
Los Banos, CA 93635
Phone: (209) 826-9696
Fax: (209) 826-9698



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Via Electronic Mail: Bay-Delta@WaterBoards.Ca.Gov

State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: Phase II Bay-Delta Plan Input

State Water Board Staff:

The San Luis & Delta-Mendota Water Authority (“Water Authority”) appreciates the significant effort required to prepare the Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows (“Scientific Basis Report”). It reflects a tremendous amount of information and analysis. We welcome this opportunity to provide input on behalf of our members to inform the development of the Program of Implementation for the Phase II Update to the Bay-Delta Plan, and we encourage the State Water Resources Control Board (“State Water Board”) to continue involving interested parties in the development of the Program of Implementation going forward.¹

The State Water Board has asked what specific provisions should be included in the Program of Implementation. As a representative for water users who have suffered a disproportionate burden of regulation intended to improve conditions for fish and wildlife including regulation under the Bay-Delta Plan, the Water Authority urges the State Water Board to include provisions that: (1) acknowledge the need to carefully and adaptively balance prescriptive water quality requirements with the basic water supply needs of water users, especially under unique hydrologic circumstances; and (2) distribute responsibility for compliance equitably among all water users, with genuine consideration for the disproportionate water supply reductions experienced by south-of-Delta water users and wildlife habitats. The Water Authority also urges the State Water Board to utilize the Program of Implementation, consistent with Water Code section 13247, to mandate compliance with flow and non-flow measures alike. As explained below, utilizing the Program of Implementation in this manner will help avoid waste and unreasonable use of water.

¹ The Water Authority is re-submitting its comments on the 2016 draft Phase II Report. Those comments were largely ignored in the Scientific Basis Report and thus remain relevant. See attached.

The Flow-Centric Approach Taken in the Scientific Basis Report Risks Waste and Unreasonable Use of Water

Unfortunately, the Scientific Basis Report continues to advance a flow-centric approach to establish objectives that has been heavily criticized by many policy makers, scientists, and lawyers. Indeed, the State Water Board itself has previously recognized that a flow-centric approach, which essentially relies on flow as the master variable, could lead to the dedication of water that is inconsistent with the prohibition on the waste and unreasonable use of water established by the California Constitution in Article X, section 2. (See *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (2010), p. 7.) Waste and unreasonable use could occur under a variety of permutations, including because either (1) water is being dedicated to address a stressor, rather than addressing that stressor directly (e.g. using flow to dilute pollution), or (2) water is being dedicated assuming another action will be taken, but that other action does not occur (e.g. water dedicated to inundate floodplains, without action to allow the water to reach the floodplains).

In its 2010 report, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (“2010 Flow Report”), the State Water Board identified flow amounts to protect fishery resources – similar to what has been done in the Scientific Basis Report. In the 2010 Flow Report, the State Water Board, however, recognized:

The flow improvements that the State Water Board identifies in this report as being necessary to protect public trust resources *illustrate the importance of addressing the negative effects of these other stressors that contribute to higher than necessary demands for water to provide resource protection*. Future habitat improvements or changes in nutrients and contaminants, for example, may change the response of fishes to flow. Addressing other stressors directly will be necessary to assure protection of public trust resources and could change the demands for water to provide resource protection in the future. Uncertainty regarding the effects of habitat improvement and other stressors on flow demands for resource protection highlights *the need for continued study and adaptive management* to respond to changing conditions.

(2010 Flow Report, p. 7, emphasis added.)

Presumably based on the belief that large amounts of water were needed under the then-existing conditions to protect fishery resources, the State Water Board concluded: “The information in this report illustrates to the State Water Board the need for an integrated approach to management of the Delta.” (2010 Flow Report, p. 7.) The State Water Board explained that “[s]tudies and demonstration projects for, and implementation of, floodplain restoration, improved connectivity and passage, and other habitat improvements should proceed to provide additional protection of public trust uses and potentially allow for the reduction of flows otherwise needed to protect public trust resources in the Delta.” (2010 Flow Report, p. 6.) The Scientific Basis Report’s focus on flow is contrary to the State Water Board’s prior statements and a departure from some of the wisdom and thoughtfulness expressed in the 2010 Flow Report.

The Program of Implementation Allows the State Water Board to Require Implementation of Non-Flow Measures to Reduce the Existing Undue Burden Placed on Flow and to Ensure Flows Serve Biological Functions

The State Water Board staff posed question 8 – “How should the State Water Board ensure that non-flow measures included in voluntary tributary or regional plans are implemented in a timely and effective manner?” In short, the answer is by including non-flow measures in the Program of Implementation and identifying the agencies responsible for compliance. But the answer to question 8 must not simply address non-flow measures included in voluntary or regional plans, if any; it must address and require *all* of those non-flow measures necessary to reduce the existing undue burden placed on flow and to ensure flows serve intended biological functions. Including non-flow measures in the Program of Implementation can temper the risks associated with the flow-centric approach taken in the Scientific Basis Report.

Water Code section 13247 allows the State Water Board to dictate what actions are required of agencies carrying out activities that affect water quality. Section 13247 therefore provides the legal mechanism to provide the necessary linkage between flow and non-flow measures. Courts have confirmed this authority. (See, e.g., *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 125 [acknowledging § 13247 as requiring compliance with state water quality controls and describing principal enforcement mechanism as “regulation of water *rights* to control diversions which cause degradation of water quality”]; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 730 [finding section 13247 required State Water Board compliance with the 1995 Bay-Delta Plan].)

This interpretation of section 13247 is consistent with positions taken by the Water Authority, as well as other entities including American Rivers and the Northern California Water Association. As previously noted in American Rivers’ comments on the Phase I Substitute Environmental Document for the Bay-Delta Plan Update, section 13247 means that “[o]nce a plan specifies an action in a trackable form (who, what, when, and where), the responsible agency must perform that action . . .” (Comments of American Rivers on Phase 1 Substitute Environmental Document for Bay-Delta Water Quality Control Plan Update (Mar. 29, 2013), p. 13.) The Northern California Water Association has likewise advanced a similar position. (Comments on Revised Substitute Environmental Document – Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water Quality Objectives (Mar. 17, 2017), p. 4 [commenting that the Revised Draft SED “should direct other state agencies to implement the Program of Implementation contained in Appendix K, unless otherwise directed or authorized by statute”].)

Adaptive Management Should Be a Critical Component of the Program of Implementation

In question 7, State Water Board staff asks how they should “structure adaptive management for the new objectives.” The Water Authority provides two responses to that question. First, adaptive management should be structured as part of a comprehensive approach to implement and analyze the efficacy of both flow and non-flow measures that are included in the Program of Implementation. As discussed above, by including adaptive management in the Program of

Implementation, the State Water Board will make compliance with adaptive management mandatory pursuant to Water Code section 13247. Second, adaptive management must be structured as a step-wise approach that incorporates scientific information into decision making. (See Murphy & Weiland, *Science and Structured Decision Making: Fulfilling the Promise of Adaptive Management for Imperiled Species*, 2014².) Best available science should inform management decisions regarding required flow and non-flow measures. To this end, the State Water Board should structure any adaptive management to include specification of the objectives and performance measures, along with scheduled monitoring and evaluation of the efficacy of actions relevant to the new objectives and allow the flexibility to adjust, abandon, or replace measures to best meet those objectives.

Increased Collaboration with Interested Parties

Of all the questions posed, the primary question is the one that is perhaps implied: how to responsibly manage for natural processes in a fundamentally altered system. The Water Authority and its members look forward to the opportunity for further discussion, and encourage the State Water Board to increase its collaboration with interested parties. Specifically, the Water Authority recommends that the State Water Board schedule a series of working meetings with interested parties to discuss how best to utilize Water Code section 13247 and incorporate adaptive management in the Program of Implementation.

The Water Authority appreciates this opportunity to provide the State Water Board with supplemental information and looks forward to continuing to participate in this process. Our intent is to ensure that the amended Bay-Delta Plan will not place an even greater disproportionate burden of water supply reductions on south-of-Delta water users and will provide a reasonable level of protection and accountability for all demands being made on the waters flowing to and through the Delta.

Sincerely Yours,



Jon Rubin
General Counsel
San Luis & Delta-Mendota Water Authority

² Available at https://www.researchgate.net/publication/269105046_Science_and_structured_decision_making_Fulfilling_the_promise_of_adaptive_management_for_imperiled_species.