

SOUTH DELTA WATER AGENCY

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Public Comment
Bay-Delta Strategic Workplan
Deadline: 7/9/08 by 12 p.m.

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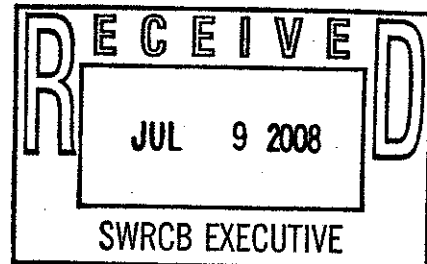
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July 9, 2008

Via E-mail

State Water Resources Control Board
Ms. Diane Riddle, Senior Environmental
Scientist Hearings and Special Programs
Section Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812



Re: Bay-Delta Strategic Workplan

Dear Ms. Riddle:

Below are the South Delta Water Agency's comments to the Draft Strategic Workplan for the Bay-Delta.

Although the Plan contains a number of elements which are necessary to allow the SWRCB to function as the main water right and water quality regulator of the State, the Plan contains certain elements which indicate the Board has chosen to protect exports at the expense of senior water rights and the environment.

Inexplicably, the Plan, and therefore the Board are apparently uninterested in determining how much water is needed in the Delta for the protection of fish and wildlife beneficial uses. As exports have risen to record levels in the 2000's, the fisheries have crashed, with some species now near extinction. Notwithstanding this catastrophe, the Board makes no plans to determine how much water is needed in the system or how much less is then available for exports. To the contrary, the Board is deferring to the BDCP process which seeks to maintain, and then increase exports levels while acknowledging that water quality objectives might need to be "changed" in

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order to maintain exports. This blatant prejudice in favor of exports has tainted nearly every Delta related action of the SWRCB and is the certainly one of the direct causes of the fishery crash

In addition, the Board now seeks to investigate "illegal diversions" in the Bay-Delta, based apparently on the verbal allegations of upstream dam operators who currently make no releases for downstream rights and fisheries. If one were concerned about illegal diversions in general, and how they might be affecting Delta flows, other right holders and the environment, one would investigate such possible illegal diversions wherever they may be occurring. Sadly, the Board thinks that it must start in the Delta, coincidentally with those diverters who rely on the water quality objectives the Board refuses to enforce. It would be natural to wonder under what circumstances those standards would be enforced until one reads the Plan. It is clear that the export contractors unwritten "commitment" to meet water quality standards only if it costs them no water, is now being amended by the Board into a principle which seeks to take water away from Delta agriculture so that exports can increase.

1. The Plan references the Delta Vision process. The regulator of water quality in the Delta should not be a part of, or defer to a process such as Delta Vision. The Vision's first and most important recommendation is that exports and the environment should be co-equal goals. Given the Board's obligation to regulate water rights, it cannot subscribe to any recommendation which seeks to elevate the (generally) most junior water right holders in the system, the DWR and USBR. It is the obligation of the SWRCB to protect beneficial uses of water and to issue and regulate appropriative water rights, not to single out one type of users and work to protect them.

2. The Plan references the Bay Delta Conservation Plan process. It is inappropriate for the regulator of water rights and water quality to participate with one group of stakeholders who wish to protect some beneficial uses, and not all. The BDCP seeks to implement a project which will adversely affect Delta water quality, and consequently, blithely recommends changing the water quality objectives in order to achieve its goal. As will be more fully described below, the Board should be instigating its own process which will determine how much water is needed for the Delta, including how much is needed from the various water storage projects upstream. Thereafter, one can calculate how much may be available for exports under certain conditions. The BDCP approach is the opposite; a certain level of exports is necessary, and what other actions might be done to allow those exports. This latter approach is what has destroyed the Delta fisheries.

3. Under "Water Boards Activities" the Plan notes that the SWRCB has committed to "Enforce the southern Delta salinity objectives ..." Since the objectives became fully effective, the SWRCB has chosen to *not enforce* them each time they have been violated, including this

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summer. What possible purpose is served by including the referenced commitment when it is the exact opposite of what the Board is actually choosing to do?

Under these same listed commitments, there is not one which seeks to examine or limit export operations as they may be affecting smelt or other species of concern. Why is the Board not committing to working with the POD to develop suggested limitations on exports in line with the Delta Smelt Action Plan? If the crisis in the Delta is so closely related to the smelt decline, why wouldn't the Board address the major cause of the decline? Such a course of action is even more important given that neither DFG, FWS, or MNFS made any recommendations to the Board as to what might be done in the short term to protect smelt at the January 200 workshop. This shocking circumstance indicates that the fishery agencies have abdicated their responsibilities, leaving it up to the SWRCB. The Board should notice a hearing to evaluate implementing the Smelt Work Plan recommendations and other possible limitations on exports.

4. Under "Actions to be Evaluated" the Board considers a proceeding to "balance competing demands for water in and from the Bay-Delta." How does one balance competing needs between a riparian and a junior permit holder? Between a pre-1914 right holder and a junior right holder? Between a senior right holder and a junior right holder. The answer is that legally one does not. Junior right holders must, under California law, give way to senior right holders. Hence the Board can't "balance" the needs of exporters against an in-Delta permit holder who is senior to the exports. This principle of priority is the core of California water rights and has been expanded to include such things as area of origin and Delta Protection Act preferences.

5. Water Quality and Contaminants Control. The Plan continues the recently adopted policies of the State and Regional Board that in order to address in-Delta water quality one should focus on the Delta. In actuality, upstream contributions of Delta contaminants far exceed those of in-Delta sources. The confusion arises from the exporter mantra that it is not just them who have destroyed the fisheries, but others too. The current data suggests the opposite. Although there are a number of factors which affect fish or the food chain, those factors did not cause a catastrophic collapse of the fisheries in the last ten years; export increases and changes in timing did. Hence, although further investigation and actions to address in-Delta contaminants is certainly part of an overall strategy to protect water quality, it is a diversion of limited resources to focus on it under the current circumstances.

The San Joaquin River salinity problem makes it clear that the Board is not interested in protecting all beneficial uses. Well before D-1641 directed the Regional Board to develop an upstream standard, the SWRCB was recommending/suggesting and directing the Regional Board to take action. It has been eight years since D-1641, and yet the Regional Board does not even anticipate setting a hearing for such a standard. After adopting a TMDL for salt (and boron), the Regional Board defers implementing any restriction against the Bureau which it identified as the

major cause of the contamination. Protection of the Delta requires the Boards to finally take action and start regulating those who add salts to the River to the detriment of downstream beneficial uses.

The Plan references low DO in Old and Middle River, but notes that "limited information exists on the cause of the problem or the responsible parties." This is a surprising comment. Decreased River flows and export operations result in no net flow of the River exiting the southern Delta. No net flows means stagnant or null zones where temperature rises, algae thrives and DO plummets. Rock tidal barriers, installed to partially mitigate exports adverse effects on local water levels, increase these null zones and create others. The Board should begin a process whereby DWR and USBR are required to maintain net flows in southern Delta channels. This would also go along way in addressing the salinity problem and decrease upstream actions related to solving the same problem.

6. Characterize Discharges from Delta Islands. As referenced above, the focus on in-Delta contributions to contaminations is a result of a policy which favors exports over superior rights. Delta discharges are currently regulated under the Regional Board's Irrigated Lands Program. As such, a Regional Board approved monitoring and sampling program is ongoing in the Delta. If the SWRCB believes this program is insufficient to address agricultural contributions in the Delta, it can make the relevant comments in the Regional Board process currently underway to develop a follow on program.

Further, the contaminant load into the Delta includes significant contributions from other local and upstream sources which far exceed the in-Delta agricultural contributions. It does not make sense "to start here" when huge amounts of pesticides, salts, selenium, nutrients, etc. are entering the system from neighboring sources. It may make sense to categorize all contributions, but focusing on only in-Delta agricultural contributions only highlights the Boards prejudice for preserving exports.

It should be noted that the ILP program has resulted in real progress and benefits. Problems associated with legal and "according to label" uses have been identified and changes in practices or changes in chemicals have been instituted. No such progress has been shown from other, out of Delta contributors.

The issue of monitoring and measuring flow of discharges is also set forth. Again, this appears to be another misdirected focus, as no such concerns arises with regard to other contributing drainage flows. Delta drainage flows are inextricably related to seepage and high ground water. Monitoring drainage flows doesn't give information about a usage or even contaminant loads because every discharge is different and changing. What is appropriate is sampling of selective sites and estimating contributions; but for all sources. The Plan reveals its bias when it tells us this information is needed to evaluate "future conveyance alternatives."

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Water Code 12205 requires that upstream release be coordinated to assist in meeting in-Delta supply and quality needs. This appears to resolve any "alternative conveyance" issue. When the Board proposes that exports can only occur to the extent there is surplus water to the system and in a manner that does not impair other beneficial users, we can then discuss what needs to be examined regarding the conveyance of water across the Delta.

8. Effects of Ammonia on Smelt. Any efforts to examine how ammonia might be affecting smelt populations must first start with an examination as to whether or not there was any significant increase in ammonia discharges during the time of the POD. If not, then ammonia is (or may be) one of the factors affecting the fish populations or the food chain, but is not a priority in addressing the smelt decline.

9. Coordination with DPR and Agricultural Commissioners on in-Delta Pesticide Use. Again, the fact that there is no such coordination related to areas immediately upstream or neighboring the Delta indicates this is not a sincere attempt to address water quality. In the Regional Board ILP process, it was determined that such efforts were duplicative at best. The local Coalitions are already working closely with the commissioners, and pesticides of concern are already under new review by the DPR. Focused and detailed efforts are underway along these lines already.

10. Comprehensive Monitoring Program. Efforts along these lines have occurred in the past and resulted in large amounts of unused data. The premise here is that through some expensive program, someone will find some data suggesting an easy cure to water quality problems. Such is unlikely. The Regional Board recently reviewed a similar effort and decided other actions were more likely to produce benefits. Enforcement of NPDES permit, an effective ILP and the restoration of necessary net downstream flows on the San Joaquin River are the best methods to improve and maintain water quality in the Delta. The Board's fascination with an alternate conveyance facility for exports will make all efforts to improve water quality meaningless.

Again, having a comprehensive monitoring program which excludes all the upstream and neighboring contributors indicates a lack of serious effort.

11. Southern Delta Salinity and San Joaquin River Flow Objectives. The *Objective* under this section includes "evaluate compliance with southern Delta salinity ... objectives and take enforcement and other actions ... as appropriate." The *Impetus* notes that the southern Delta salinity ... objectives may not be appropriate." Its hard to imagine a more nonsensical combination of statements from a regulator.

The standards were developed more than 20 years ago. The implementation was delayed over and over again, but finally completed in April of 2005. At every step of the way the DWR

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and USBR acceded to the standards, without bringing any challenge to them. However, once they actually had to implement the standards, the projects and the contractors suddenly question the standards. Nothing has changed since the standards were developed; plants still take up water the same way, soils still have differing leaching capabilities, plants still react to salt build up in soils, and farmers plant different crops depending on the market and local conditions.

In spite of this, the Board now questions itself as whether the standards are *really* necessary and has decided that rather than enforcing them, it will undertake a review and *possibly* make changes. In the mean time, it chooses to not enforce the standards even though they were found to be necessary to protect agricultural beneficial uses. The excuse for this abdication of responsibility is the D-1641 Appellate Court decision. That decision did not direct the Board to re-evaluate the standards; it told the Board that it could not relax (i.e. change) standards after implemented without going through the proper process for a change because the relaxation was in fact a change. The ruling was based on the infamous footnote to the objectives (added without discussion to D-1641) which allowed the standards to relax if the projects built permanent barriers in the south Delta. Since those barriers did nothing to change the needed protections for local agriculture, the Court noted that such an end-around change to the standards was illegal.

We see that the Court's declaration that implemented standards can't go away without being properly changed has strangely morphed into a question about whether the standards are needed. It's almost as if the Board has some understanding that southern Delta salinity standards are only needed to the extent it costs the contractors no water. But of course, such an understanding would be illegal.

The Board should institute a process to determine and establish needed downstream flows to create sufficient flow to re-establish the San Joaquin River's connection to the Bay, order the projects to operate to maintain this condition and promptly enforce all water quality violation of these standards. Forty years would seem to be sufficient time to wait for protection from the project induced pollution. In addition, the Board should not allow the projects to enjoy the benefits of their permits unless they are complying with the obligations thereto. Hence JPOD should not be allowed when the standards are being violated.

It is ominous to read that the Board has set out a time line for changing the standards before it has finished its own review of the information supporting the current standards. This can only be interpreted as a decision to make the changes, which is of course inappropriate.

With regard to the flow standards, it is clear that without any enforcement, the Bureau will simply choose what it will abide by and what it will not. The Board should immediately enforce existing flow standards and begin the process to determine what flows on what tributaries and the main stem are necessary to protect beneficial uses. As the Board is well

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aware, the tributaries make no releases for San Joaquin River water right holders or for environmental needs. This situation must be corrected.

12. Review of Water Rights. As mentioned in brief above, there is no apparent valid reason for the Board to suddenly begin a review of in-Delta water rights. If the Board is concerned about whether water is available for any particular diverter, it will necessarily have to review all upstream rights to clarify priorities. If the Board is concerned about what water is available for quality and environmental needs, it will again have to examine upstream rights. If the Board is concerned that there may be parties who are not complying with permit/license terms and conditions, (and how that affects Delta flows) there is no reason to believe that in-Delta diverters are somehow more "inattentive" than other upstream permit/license holders.

The origin of this unfair treatment lies with the Board's lack of desire to enforce water quality obligations and regulate the projects so they do not harm fisheries and other right holders. Some parties have argued that an insufficient San Joaquin River flow means that southern Delta users must have a shortage of available water, and must therefore be sharing the shortage. Since they are not, the argument goes, they must be illegally diverting. This analysis is wrong. Absent any inflow from the San Joaquin River, southern Delta channels always contain water due to the elevation of the channel bottoms. This means that no matter what conditions exist (except a drop in ocean levels) diverters in that area could always divert.

Subsequent to local diverters exercising their rights, the CVP, SWP, and all other upstream projects altered the system to one degree and another. The argument is therefore, "now that we have changed the system, someone who could always divert before we built our project cannot not now divert because it interferes with our project." This is of course a nonsensical position and contrary to law. They then argue that project(s) requirement to maintain water quality at some times (though the quality is generally always worse now than before) means that if in-Delta diverters divert, the requirement increases and it cost them more water. Again, they are actually arguing that they want to operate their projects in such a manner that prevents someone who can always divert from diverting.

It should be remembered that the obligation to maintain water quality is to protect the very people they now try to prevent from diverting. According to them, the state law, federal law, state regulations and permit terms and conditions which require water quality be met, actually means they do not have to meet the water quality. That the SWRCB and its staff have bought into this illogical, contrary to law, and factually false argument bodes ill for the Delta's future.

The Board should further note that any examination of water rights brings into play the area of origin statutes, the Delta Protection Act and other priority and preference laws. The promises of the past are very clear; exports were to be of surplus water only, the areas or origin

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and the Delta were to be protected, and export supplies were dependant on developing sufficient supply and be decreased by water quality needs. All of these principles and laws are being avoided. The Board should apply the laws and protect those with the priorities. What is needed with regard to water rights is an independent investigation of dam and export pump operations to determine the degree to which permits and licenses are being violated.

13. Investigate SWP and CVP Method of Diversion. Although the SDWA agrees that the manner in which DWR and USBR operate the export pumps is unreasonable and contrary to the public trust, the description in the Plan suggests that the proposed investigation by the SWRCB will be geared at determining that a better method of diversion will be to use a peripheral canal. A peripheral canal is contrary to Water Code Section 12205, area of origin, Delta Protection Act and water right priorities. The SWRCB investigation should be in line with the Delta Smelt Work Plan to determine how the existing export pumps should be limited in order to protect the environment and other users. The SWRCB should not be used as a method of proposing and "approving" a new export facility.

14. Water Right Compliance. As referenced above the emphasis on in-Delta rights is merely a ruse to protect exports, and the availability of water for local diversions is not an issue. Consequently, there can be no limitation put on local diversions in determining what is available for water quality objectives. The projects are not entitled to the use of any natural flow or return flows to meet their water quality obligations if it deprives superior right holders the ability to divert that water. Stored water is and should be released to meet such obligations regardless of in-Delta diversions because in-Delta right holders always have a supply to use. Placing the water quality obligations on the projects cannot result in a decrease in those in-Delta rights.

The Central Delta Water Agency joins in these comments. Please contact me if you have any questions or comments.

Very truly yours,

John Herrick