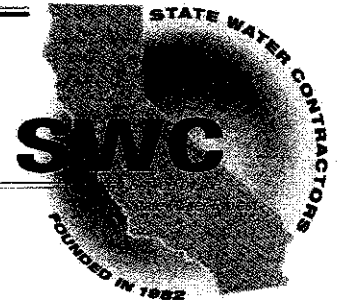
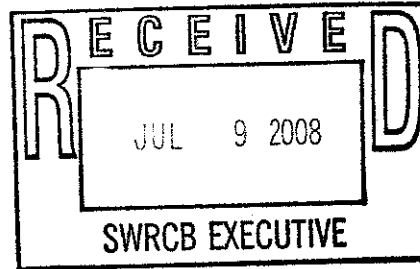


July 9, 2008



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

Re: State Water Contractors' Comments on the June 2008 Draft "Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary"

Dear Ms. Townsend:

Introduction

The State Water Contractors (SWC)¹ is pleased to comment on the June 2008 draft "Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary." The SWC compliments the State Board for recognizing the need to coordinate its regulatory and oversight activities with the myriad of other efforts that are underway to address environmental and water supply conditions in the Bay-Delta Estuary. The SWC and its members are currently focusing on and devoting substantial resources to finalize and implement the Governor's Delta Vision and to bring about a federal Habitat Conservation Plan and a State Natural Communities Conservation Plan (the Bay-Delta Conservation Plan ("BDCP")), which the SWC believes will lead to historic improvements in Bay-Delta conditions.

These efforts are likely to significantly change the way Delta water is diverted and managed. Thus, your long-term planning process will need to take into account the outcome of these parallel regulatory and non-regulatory efforts. Your draft Strategic Plan seems to acknowledge this, as does your decision to dedicate staff to monitor and assist in advancing these important processes. The SWC appreciates this approach and will work to help ensure that the Board's needs and concerns are reflected in the outcome of and the environmental documentation for the BDCP.

The SWC does, however, have a few specific comments on elements of the Strategic Plan that we believe could use some clarifications or slight modifications in emphasis.

¹ The SWC is a non-profit association of 27 public agencies from Northern, Central, and Southern California that purchase water under contract from the California State Water Project (SWP). The SWP is the state's largest water delivery system, and collectively, members of the SWC deliver SWP water to more than 25 million residents throughout the state and more than 750,000 acres of highly productive agricultural land.

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Public Trust, Reasonableness, and the Public Interest

Throughout the Draft Strategic Plan, particularly in Actions 5 (public trust), 6 (reasonable methods of diversion), and 8 (conservation), there is much discussion that can, in the SWC's view, lead to an incorrect view of the statutory bases for possible State Board actions under the proposed Strategic Plan. Fundamentally, while the State Board must take public trust interests into consideration, they cannot be accorded presumptive priority over other potential uses of the State's waters.

In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-448, the California Supreme Court fully addressed the role of the public trust in the context of the State Board's regulatory authority:

Plaintiffs, for example, argue that the public trust is antecedent to and thus limits all appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully. Defendant DWP, on the other hand, argues that the public trust doctrine as to stream waters has been 'subsumed' into the appropriative water rights system . . .

We are unable to accept either position.

...

... Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm the public trust uses, and can be justified only upon theories of reliance or estoppel.

The state has an affirmative duty to *take the public trust into account* in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that *appropriation maybe be necessary for efficient use of water despite unavoidable harm to public trust values*, it demonstrates that an appropriative water rights system administered without *consideration of the public trust* may cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity *the state may have to approve appropriations despite foreseeable harm to public trust uses*. In so doing, however, the state must bear in mind its duty as trustee to *consider the effect of the taking on the public trust.*"

(Italics added)

In the recent *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 772-779, Justice Robie, speaking for the Third District Court of Appeal, wrote:

Seizing on the phrase 'whenever feasible,' the Audubon Society parties contend that 'conflicts between public trust values and competing water uses must, whenever possible, be resolved in favor of public trust protection.' . . .

We are not persuaded. . . . In a passage from *National Audubon Society* that the Audubon Society parties ignore, our Supreme Court concluded that when the state, acting through the Board, approves appropriations to water 'despite foreseeable harm to public trust uses,' 'the state must bear in mind its duty as trustee to *consider* the effect of the taking on the public trust, and to preserve, *so far as consistent with the public interest* (emphasis in original), the uses protected by the public trust. Thus, in determining whether it is 'feasible' to protect public trust values like fish and wildlife in a particular instance, the Board must determine *whether* protection of those values, or *what level* of protection is '*consistent with the public interest.*'" Thus, in determining whether it is 'feasible' to protect public trust values like fish and wildlife in a particular interest, the Board must determine *whether* protection of those values, or *what level* of protection, is 'consistent with the public interest.'

(Italics added)

This reasoning is fully consistent with Justice Racanelli's underlying rationale in the landmark case of *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 113 where the court held: "In the final analysis, the touchstone for the Board's actions is the 'public interest.'" In that opinion, of course, Justice Racanelli specifically dealt with the State Board's water quality and water rights authority.

These decisions are not surprising given that the California's Constitution and Water Code establish that the State Board's authority rests primarily on the public interest. Article X, section 2 of the Constitution requires that the waters of the State be put to use "to the fullest extent of which they are capable" and used reasonably "in the interest of the people and for the public welfare." (See also Water Code section 100) In exercising its water quality control authority the State Board must follow the legislative policy to provide the "highest water quality which is reasonable, considering all demands being made and to be made on those waters." (Water Code section 13000) Similarly, in the exercise of its water rights authority the State Board is authorized to approve the appropriation of water under terms and conditions that "best develop, conserves and utilize in the public interest the water sought to be appropriated," and in particular to impose fish and wildlife protections "whenever it is in the public interest." (Water Code sections 1253 and 1243) In light of these statutes and court holdings, the SWC urges the State Board to review the way it has described public trust and reasonable use concepts to ensure that they are clearly described as factors to be considered during public interest deliberations, and not independent bases for action apart from the public interest determinations.

This need for balancing prior to determining what is in the public interest should also lead to caution in establishing minimum flow objectives for streams tributary to the Delta. It is difficult to see how such minimums could be finally established in a vacuum, without knowledge of the potential competing needs for the waters from that stream system that would help define the public interest.

We also applaud the State Board's recognition of the value and importance of, and commitment to engage in, the BDCP process. As the draft Workplan states, the BDCP process will provide much of the information State Board will need in the water quality and water rights processes the Workplan describes, and on a timeline that matches well that of the Workplan. Use of the information developed in the BDCP process and its accompanying environmental documentation will State Board's actions and the result of the BDCP to complement each other. However, while we encourage the State Board to engage in and coordinate with the BDCP process to ensure that the BDCP environmental documentation covers State Board actions required to implement the BDCP, the BDCP EIR/EIS must remain focused on the BDCP and should not be expected to cover State Board actions not directly related to BDCP implementation.

Conservation

While the SWC understands the State Board's interest in ensuring that appropriate water rights are used wisely, the draft Strategic Plan's description of how the Board proposes to proceed in this area raises concerns that overlap and inconsistent standards could result. The draft Strategic Plan does not discuss how the Board's conservation actions will relate to the specific duties that DWR currently has to consider conservation potential when preparing the California Water Plan updates. In particular, Water Code section 10004.6 requires DWR to develop estimates of water demands based on projected water conservation policies and assumptions. Then Water Code section 1005(a) states:

It is hereby declared that the people of the state have a primary interest in the orderly and coordinated control, protection, conservation, development, and utilization of the water resources of the state by all individuals and entities and that it is the policy of the state that The California Water Plan, with any necessary amendments, supplements, and additions to the plan, is accepted as the master plan which guides the orderly and coordinated control, protection, conservation, development, management and efficient utilization of the water resources of the state.

The SWC requests that the State Board include a more specific discussion of the interface between the Board and DWR with respect to water conservation planning to ensure that inconsistent policies and expectations are not created to the detriment of those that are attempting to plan and implement responsible conservation programs. In that same vein, the Board should recognize the California Urban Water Conservation Council's current evaluation of best management practices (BMPs), which is likely to result in substantial changes to the BMPs adopted by the Council by the end of 2008. Rather than taking action on its own, we recommend that the Board cooperate with the Council to update the BMPs, identify water agencies that have not signed the BMP Memorandum of Understanding and provide incentives for those agencies to sign and implement the MOU.

Monitoring

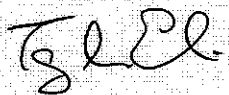
The SWC interprets Action 2, Monitoring, as describing a program that will develop a recommendation as to how the myriad Bay-Delta monitoring programs can be best coordinated, and not as a decision that the State Board is the proper entity to take on that coordination function. Assuming that interpretation is correct, we believe that the text should more specifically identify other key public entities that will participate in this decision making process. Obviously, the Interagency Ecological Program (IEP) should have a major role. In addition, the BDCP will be establishing monitoring programs that will inform its adaptive management program. Further, the SWP and CVP carry out compliance monitoring pursuant to the terms and conditions of their water rights permits. These are only a few of the entities that carry out some form of monitoring and data assessment.

In the draft, these entities are simply denominated as "stakeholders" and, at the end, the draft seems to say that the State Board will make the final decision on the appropriate long-term structure after considering the views of the stakeholders. We believe that this part of the Strategic Plan should be revised to clearly treat the several public agencies who have been involved for years in monitoring and data assessment as co-equals with the State Board in the final decision making process. We believe that these agencies are more than stakeholders who views should be considered.

Conclusion

The SWC supports, in most instances, the actions and the timing of actions described in the draft Strategic Plan. In particular, we urge the Board to move as quickly as possible in the toxics area, particularly with respect to ammonia where, daily, new evidence of its impact on fish and the entire food web is coming to light. In addition, we support the early workshops on South Delta salinity and San Joaquin flow questions and will participate in those as parties. Finally, we applaud the board's decision to emphasize enforcement actions against illegal diversions, and we join with the San Joaquin River Group in asking that this effort include in-Delta diversions.

Very truly yours,



Terry Erlewine
General Manager