2006 Delta Plan
Deadline: 11/13/06

by email and hand delivery

November 12, 2006

Tam Doduc, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814

RE: DRAFT BAY-DELTA PLAN AMENDMENTS

Dear Chairwoman Doduc,

This letter is submitted as the comments of the Bay Institute regarding the September 2006 draft amended Water Quality Control Plan (WQCP) for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.

We strongly disagree with the Board's findings in the draft Plan Amendment Report that insufficient information exists to revise the numeric objectives in the WQCP. Furthermore, considering the clear evidence that the WQCP's current objectives are failing to protect fish and wildlife beneficial uses – as demonstrated by the recent and ongoing population collapse of Delta pelagic fish species and the fact that a number of salmonid populations in the Central Valley are not on a trajectory to doubling – we are astounded that the Board has failed to take any substantive action to improve the level of protection provided by the WQCP. By adopting the draft WQCP in its current form the Board would plainly and simply be refusing to adequately discharge its federal and state Clean Water Act obligations.

We urge the Board to reconsider its proposed, minor changes to the WQCP and instead adopt stronger, more protective numeric objectives for Delta outflows, river flows, and export controls, including those described in our earlier submittals. If the Board is not prepared to do so, however, we recommend as an alternative that it adopt the following measures – which do not involve developing

new numeric objectives – in order to improve protection of fish and wildlife beneficial uses:

1. Delete the "no net water supply impacts" language from Footnote 18 (also referenced in Footnote 20) to Table 3, Water Quality Objectives for Fish and Wildlife Beneficial Uses. The 1995 WQCP replaced an export criterion that has a weak correlation to biological effects (QWEST) with a criterion that has absolutely no correlation at all (the Export/Inflow, or E/I, Ratio). No party seriously argues that the E/I Ratio has any biological basis as an objective for fish and wildlife beneficial uses. Furthermore, both the magnitude of the seasonal shift in Delta export pumping and the magnitude of related effects on Delta fish species was grossly underestimated at the time the 1995 WQCP was adopted. Recent investigations into the collapse of Delta pelagic fish populations indicate significant correlations between export pumping levels during the December – March period and delta smelt take and abundance(see W.A. Bennett, et al; and P.E. Smith et al; in CALFED, 2006). The ability to reduce export pumping levels during this period is likely to be critical to the survival of delta smelt and other pelagic species. To date, tragically, export modifications of the scale necessary to protect the beneficial use have been constrained by the language in the third sentence of Footnote 18 (referenced in the second sentence of Footnote 20) which is generally interpreted as a prohibition on variations in the E/I ratio that result in net annual water supply impacts. The Central Valley Project and the State Water Project currently modify export operations to the extent that the CALFED Environmental Water Account (EWA) is able to provide replacement water supplies. Unfortunately, the EWA has been consistently under-resourced and under-utilized since its inception. More importantly, the primary source of EWA assets is export pumping to south-of-Delta storage, which may be contributing to the very decline of the species the EWA is intended to benefit. Deleting the third sentence of Footnote 18 would allow more frequent, larger and experimental variations in the E/I ratio in order to respond to emergency conditions for Delta pelagic fish species even if such variations result in net annual water supply impacts. Clearly, the CVP and SWP would modify operations to offset and reduce these impacts, but they should not be constrained from causing such impacts in the first place, in order to ensure that beneficial uses are not degraded beyond repair. Adopting this proposed amendment would not involve the development of any new numeric objectives.

2. Establish a Bay-Delta Protection Fund. In lieu of adopting new numeric objectives, the Board could require water rights permit holders to make payments into a special Bay-Delta Protection Fund to support adaptive management actions to increase protection of beneficial uses. Actions implemented using the Fund could include water acquisitions, habitat restoration, invasive species control, toxics loading reductions, and other projects, to be administered by the Board or a designated resource agency such as the California Department of

Fish and Game. Payments by CVP water users into the CVPIA Restoration Fund could be credited against new Bay-Delta Protection Fund requirements. A description of such a fund should be included in the Plan of Implementation, Section A, Implementation Measures within State Water Board Authority.

3. Require that data collection efforts and analyses necessary to improve WQCP protection are conducted. In a number of places, the draft Plan Amendment Report states that insufficient information exists to revise specific objectives. Our disagreement with these findings notwithstanding, surely the Board must recognize that sufficient information exists to show that fish and wildlife beneficial uses are not being adequately protected, and that additional protections should be developed and adopted. Rather than simply inviting other regulatory agencies and water rights permit holders to present information on a voluntary basis, the Board should require that specific information needs are addressed on a set schedule as part of a continuing review of the WQCP, with the aim of revising particular objectives by a date certain. We recommend that Board consider the use of a neutral institution, such as the University of California or the U.S. Geological Survey, to conduct and coordinate these investigations, in conjunction with and funded by relevant agencies and permit holders. In the Plan of Implementation, Section A, Implementation Measures within State Water Board Authority, the Board should more fully describe its specific information needs, most importantly for revisions to the WQCP's current export criteria and San Joaquin River flow objectives, and numeric criteria to complement the narrative salmon protection objective.

In conclusion, we urge the Board to adopt more protective numeric water quality objectives, or, failing that, the alternative WQCP amendments recommended above that will allow the Board to more adequately fulfill its obligation to protect fish and wildlife beneficial uses. Please contact me if you have any questions regarding these comments.

Sincerely,

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Reference:

CALFED Bay-Delta Program. 2006. Making sense of complexity: science for a changing environment. Abstracts and presentations for the 4th biennial CALFED Science Conference.