SOUTH DELTA WATER AGENCY

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Via e-mail commentletters@waterboards.ca.gov

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Re: Comment Letter - Bay-Delta Plan supplemental NOP - Comprehensive Review

Dear Ms. Townsend:

The following comments are submitted on behalf of the South Delta Water Agency ("SDWA"). The agricultural water users within SDWA's boundaries are directly affected by the compliance and enforcement of most of the water quality objectives in the Bay-Delta. Unfortunately, recent history of such compliance and enforcement indicates a lack of regulatory commitment on behalf of the State Water Resources Control Board ("SWRCB"). Violations of fishery flows, X2, export limitations and salinity standards are the norm rather than the exception. It is therefore difficult to separate the effectiveness of existing objectives from the consequences of a lack of enforcement of those objectives.

We do know that salinity standards in the southern Delta are violated virtually every year, and are in fact being violated at this very time; such violations being expected to continue throughout the summer. We know that certain exports (JPOD) were supposed to be conditioned on compliance with salinity standards but that such limitations were ignored and then changed rather than enforced. We know that when project stored water was insufficient to meet X2, the projects increased exports while violating X2; for all practical purposes taking 1/3 of the minimum fishery flow in a (believed at the time) drought year without any enforcement or sanction by the SWRCB. We know that storage and export permits were conditioned on State Water Project ("SWP") and Central Valley Project ("CVP") compliance with federal and state endangered species law, but that SWP had no take authorization under CESA until 2009. Due to court ordered changes in biological opinions, such compliance may be no longer in effect.

During the application of D-1641 and the 2006 WQCP, numerous fishery species have crashed, indicating that the fishery agencies are incapable or disinclined to take adequate actions to protect fish and wildlife. CalFed, POD, Strategic Plans, conservation proposal, habitat restoration, salinity processes come and go, and yet the estuary declines year after year with little if any improvements being achieved. Hence in considering what changes should be made to the the 2006 WQCP the SWRCB is faced with a Plan that has been almost completely ineffective. Thus each and every objective dealing with fish and wildlife and agricultural beneficial uses should be considered deficient.

It appears that any failure to adopt and enforce adequate water quality objectives is a direct result of the SWRCB's (and the State's as a whole) refusal to identify the underlying water supply of the system and to quantify the adverse impacts of the projects. The former deals with just how much water is available while the latter deals with the SWRCB's inexplicable desire to protect exports, as evidenced by the "no net loss" principle contained in D-1641 and the 2006 WQCP. When there is a lack of supply for export needs/desires, protecting a minimum export supply will necessarily have an adverse effect on all the other beneficial uses dependent on that insufficient supply.

The starting point for any analysis is therefore "how much water does the system provide and how is that supply allocated." Unless and until this is done, any water quality objectives are merely a shell game which benefits those hiding the facts (exporters) to the detriment of all others (e.g. fish and Delta agriculture).

The only data presented by any party regarding the available water supply is that contained in the Weber Foundation Studies provided by SDWA and Central Delta Water Agency. Those studies show that the Sacramento-San Joaquin watersheds produced (all numbers are approximates rather than exact quotes) 17.6 MAF each year in the 1928-34 drought. In-basin needs were listed as 25.6 MAF; meaning that in such a drought the system was 8 MAF short of water each year. As different year types and different combinations thereof change, the amount of the shortage will vary, but the important point is that its is clear than in many years there is simply no available supply for exports. Thus, any "no net loss" or minimum export amount can only be authorized theft of water from some other superior water right. As stated before, in recognition of this shortage (but not as a means of fully mitigating it) the SWP was supposed to have an additional 5 MAF put into the Sacramento River system from north coast rivers. None of that supply has or will be provided.

In contravention of this rational and necessary approach, previous SWRCB, USBR and DWR investigations focus on how great of an impact will be allowed on exports in developing "agreeable" objectives and implementation thereof. Even the SWRCB recognized the fallacy of this sort of approach when it concluded in D-1485 that to fully mitigate the projects adverse effects on fisheries would require a "virtual shutting down" of exports. The point therefore is

that the SWRCB should not really be examining how to adjust any particular project operation to see what effects it might have on fish population improvements, but rather the Board should be trying to determine when any exports are possible. 2009 is the most recent example.

When storage is insufficient to provide for X2 flows, cold water releases, or for senior most federal contractors there simply isn't any water available to export; Yet incredibly, exports during this crisis went from 2000 cfs to 4000 cfs.[1] What was the effect on fisheries when exports stole 1/3 of the minimum fishery flow? Was that flow objective protective of fish? Would species be better off if the flow was provided or enforced? Was more flow needed? Can minimum export "requirements" rely on periodic theft of fishery flows? These fundamental questions highlight the issues facing the SWRCB. Obviously, past modeling by DWR, USBR and SWRCB staff did not anticipate the situation in 2009 when the export system went bankrupt after only two years of drought. SDWA has attempted to determine if DWR has the necessary water supply information. However, DWR's response to the question was to cite amount exported during recent dry times, which of course ignores the question of how much was available. One should not consider "stolen" water was part of the available supply.

Although it may be difficult, contentious and eventually determined by the courts, the SWRCB must address water quality needs by first determining how much is available and when. There is no doubt that how much water is needed for fish (and the environment) is the subject of dispute, and deciding on amounts and timing will be difficult. However, when the analysis starts with the allocation of the insufficient supply among senior right holders, the amounts available for fisheries become mush easier to determine. As it is now, when modeling assumes exports or carryover storage for exports during times when there is no export supply, the analysis is masking (if not hiding) the amounts available for fish or the adverse impacts to fish resulting form such unavailable exports.

SDWA therefore requests that the review of the WQCP include as a first step the determination of the available supply under the various hydrological conditions. The second step must be the allocation of such supply to priority uses (i.e area of origin, in-Delta), including current amounts to provide for existing fish and wildlife objectives. When exports are removed from the calculation/allocation it will be easier to make such allocations. If the available supply is greater than existing priority needs, the Board can then determine if additional water is needed for fisheries, or if exports can be made. It is likely that when exports are removed from the initial allocations, the net benefit to fisheries may allow for significant changes to the fish and wildlife objectives.

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[1] The system was only saved by the fortuitous precipitation which itself resulted in some compliance with objectives.

Implicit in this is a determination of the adverse effects the projects have upon the fisheries. Since the projects are required by law to fully mitigate their impacts, the SWRCB cannot simply analyze fishery needs in the abstract. Fishery needs and protections are largely required because the projects have harmed fisheries; sometimes to the point of near extinction. Since the protection of endangered species affects all other water users, a failure to quantify and mitigate project impacts simple shifts those responsibilities onto other users. That practice is of course inappropriate and should cease. It is certainly the SWRCB's obligation to make this determination, especially since the fishery agencies have abdicated their responsibilities. The best example, as referenced above was DFG's complete failure to require CESA compliance by DWR until a lawsuit forced the issue in 2005. To think that the DFG would stand by and not enforce CESA while endangered and threatened species were being killed is nearly inconceivable. Regardless, in order to determine what objectives are necessary, the SWRCB must first know if one or more parties are the cause of the need for the objectives. As an example, it one party were dumping a toxic chemical into the river, the SWRCB would not seek to determine water quality objectives to protect against the chemical, it would simply enforce existing law and prevent the dumping.

This approach also determines how and if it should also consider issues surrounding the BDCP process. Of course the short answer is that it should not address any BDCP issues. This is so for numerous reasons. First, BDCP anticipates the construction of an isolated facility with the contractors purportedly paying for the facility and its mitigation. However, BDCP also anticipates significant environmental actions including new habitat and programs to address Delta issues in general. However, if the Delta issues in general (declining fish populations, poor water quality) are the adverse impacts resulting from the projects, then they should be responsible for such actions. As currently conceived, BDCP expects state and federal funds, not exporter funds, to pay for these other environmental actions. The SWRCB should not be part of or condone the shifting of project mitigation onto other parties and the taxpayers. The only way to make sure such mitigation obligations are not transferred is to separate out project impacts; which is of course the antithesis of the BDCP process.

Second, BDCP anticipates 50 year "take" authorizations. It goes without saying that in light of the Delta's history for the last 50 years and the ad nauseam "adaptive management" endeavors, there is no rational argument that any set of conditions and criteria could justify 50 year take authorization. Since no actions over the last 20-30 years have improved fisheries, it is impossible to imagine the actions which would recover fisheries while allowing exports.

Third, the recently released "effects analysis" indicates that there are no practical conservation plans being developed. That analysis (preliminary at this point) indicates that although some benefit to one species was possible under the recommended actions of the proposed plan, the remaining species of concern were either not benefitted (one species) or were worse off! This of course is not the stuff of a conservation plan and one must wonder what

changes to the proposed plan could suddenly improve all species of concern. If there were such "magic" actions, they would have been adopted long ago.

Fourth, and perhaps most importantly, is the cost of the BDCP. At a recent legislative hearing the representative for the Metropolitan Water District of Southern California stated that the urban "share" of the projected isolated facility was just under $15B. This statement was shocking in that previous estimates (using 2009 dollars) put the total isolated facility at somewhere between $10-12B. Previously we were told that urban and agriculture would share the cost approximately 50-50. Now we learn that the urban share is $15B. Hence, without even including the tens of billions of dollars for the environmental actions, the BDCP is already at somewhere near a $30B project. Clearly such a project will not go forward.

Regardless of the actual costs, the SWRCB should not be anticipating the effects of and BDCP, especially given that the plan includes the assumption that exports will get some set, agreed to, minimum amount of water. As discussed above, there is no showing of when any water is available for export.

Assuming the SWRCB does not adopt the approach outlined above, it is clear that existing water quality objectives are insufficient to protect beneficial uses while exports continue. In light of this, the SWRCB must evaluate significant changes to outlow/X2, export/inflow, and Suisun Marsh objectives. It is clear from every study (except those done by exporters) that fisheries requires additional flows to both protect them when they are in and moving through the Delta, and to maintain habitat farther downstream than currently required. When exports adversely affect fish, they must decrease until the harm is removed or mitigated.

Lastly, the staff report suggested the examination of potential new floodplain habitat flow objectives. This topic suggests an inaccurate understanding of fishery declines. Over the past 50 plus years the amount of riparian, shallow water and floodplain habitat has not changed in the southern Delta. In spite of this, many processes and interests are recommending the creation of such habitat in the southern Delta as a means of improving fish populations. When the facts indicate the conclusion is wrong, then the conclusion should not be pursued. If fish were both healthy and then crashed when habitat acreage remained constant, then habitat is not a controlling factor, no matter how attractive it seems. Thus, the SWRCB should not be addressing floodplain flows in the southern Delta, as there is no indication that it is a water quality parameter affecting fish populations. The rush for new habitat is simply part of the latest "deal" being concocted in the BDCP: "you let us kill endangered species for 50 years and we will get you lots of new habitat." Since neither part of this negotiation makes any logical sense, the SWRCB should not consider helping.

The South Delta Water Agency joins in the comments of the Central Delta Water Agency.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd