
State Water Resources Control Board

September 8, 2016

Ms. Kim Delfino
Defenders of Wildlife
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Ms. Kate Poole
Natural Resources Defense Council
kpoole@nrdc.org

Mr. Gary Bobker
The Bay Institute
bobker@bay.org

Dear Ms. Delfino, Ms. Poole, and Mr. Bobker:

RESPONSE TO REQUEST FOR EMERGENCY REGULATIONS TO PROVIDE SUMMER DELTA OUTFLOWS FOR DELTA SMELT

This letter is in response to your letter dated August 9, 2016, requesting that the State Water Resources Control Board (State Water Board) adopt emergency regulations pursuant to Government Code section 11346.1. You request emergency regulations requiring the Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation) to maintain a low salinity zone (X2)¹ no further east than 81 kilometers (km) from June 1 through September 30 to be renewed in subsequent years until the State Water Board updates the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The stated purpose of the emergency regulations would be to establish a minimum level of summer Delta outflow for Delta smelt habitat to prevent the possible extinction of the species, to be met through curtailment of water diversions and release of stored water. While not stated explicitly, we presume the request would be for a new stand-alone provision in title 23 of the California Code of Regulations, adopted pursuant to authority provided under Water Code sections 1058 or 1058.5.²

¹ Distance from the Golden Gate Bridge where salinity is about 2 parts per thousand.

² In transmitting a denial of a request for rulemaking to the Office of Administrative Law, Government Code section 11340.7, subdivision (d) requires that the State Water Board include certain information, including the provisions of the California Code of Regulations requested to be affected, and reference to authority to take the action requested.

The State Water Board acknowledges and is very concerned by the severity and duration of the decline of numerous species during the last four years of drought. In particular, no longfin smelt were caught in 2015 fall surveys and nearly no Delta smelt were caught. At the same time, winter-run Chinook salmon experienced high mortality rates in 2014 and 2015, and numerous other threatened, endangered and commercially important species, including fall-run Chinook salmon, spring-run Chinook salmon and steelhead, also experienced significant population declines during the drought. These species declines have led to concern that some of these species, including Delta smelt, may be at the brink of extinction. Distribution and abundance of aquatic resources, including Delta smelt, are existing beneficial uses of water to be protected under the Clean Water Act and Porter-Cologne Water Quality Act, including Estuarine Habitat, Cold Freshwater Habitat, Migration of Aquatic Organisms, Spawning, Reproduction and/or Early Development and Rare, Threatened, or Endangered Species.

While the State Water Board shares the very real concerns for Delta smelt and other species articulated in your letter, the science on this matter requires further review, as does the feasibility of such an action in the context of water right priorities and timing as further described below.

Science on Additional Summer Delta Outflows

During June through September Delta smelt transition from juveniles to sub-adults and are at increased risk from stressors including limited food availability, poor water quality, elevated temperatures, harmful algal blooms, and predation due to higher summer temperatures and reduced flows. As you point out in your letter, information developed by the Department of Fish and Wildlife (DFW) and the United States Fish and Wildlife Service (USFWS) indicates that maintaining X2 downstream of the confluence of the Sacramento and San Joaquin Rivers during the summer period may improve conditions for Delta smelt survival and rearing by reducing exposure to the aforementioned stressors.³ Although this information has not yet been subjected to peer review, it appears very possible that enhancing the quality and quantity of summer habitat may increase Delta smelt survival. However, before developing regulations requiring additional summer outflows a stronger scientific basis and definitive determination from the fishery agencies is needed. The State Water Board is committed to working with the fishery agencies and others to ensure an expeditious independent review of the science on summer Delta outflows for Delta smelt to inform management actions in the near term.

Specifically, the California Natural Resources Agency (Resources) has initiated actions to develop additional science on summer Delta outflows and Delta smelt as well as other flow and nonflow actions that may benefit Delta smelt through their Delta Smelt Resiliency Strategy⁴ (Strategy). While proposed additional outflows identified in the Strategy have not yet been provided this year, additional outflows of up to 250 thousand acre-feet (TAF) (above the minimum flows specified in State Water Board Decision 1641 (D-1641)) are proposed to be provided in 2017 and 2018. It is not clear whether these additional flows would position X2 downstream of the confluence region during the summers of 2017 and 2018. However, a

³ USFWS, Bay Delta Fish and Wildlife Office response to "Will Increasing Delta Outflow Help Delta Smelt?" authored by Dr. Scott Hamilton, Center for California Water Resources Policy & Management, June 2016; DFW Memorandum, DFW Rationale for Summer Delta Flow Augmentation, July 8, 2016.

⁴ Delta Smelt Resiliency Strategy. July 2016. <http://resources.ca.gov/docs/Delta-Smelt-Resiliency-Strategy-FINAL070816.pdf>

management experiment such as that described in the Strategy could enhance scientific knowledge to inform future actions to benefit Delta smelt. The State Water Board will work cooperatively with Resources on this effort and other efforts and will pursue additional scientific review efforts as appropriate, including potential review through the Delta Stewardship Council's Delta Science Program.

Feasibility of Emergency Proposed Regulations

In addition to the need to further develop the science on this matter, there are various issues with the feasibility of adopting emergency regulations that require planning and evaluation. With regard to this year, even without conducting a workshop or other meetings to receive input from the fishery agencies, water management agencies and the public, the State Water Board could not develop and adopt regulations this year in time to provide intended fisheries benefits for the month of September. (See generally Gov. Code § 11346.1 [specifying procedural requirements for emergency regulations, including five-day notice and detailed written findings]; 11349.5–11349.6 [procedural requirements for review by Office of Administrative Law].)

In addition, any emergency regulation would need to comply with water right priorities and water right laws. California has a dual system of water rights, recognizing both appropriative and riparian water rights. All appropriative rights are subject to the rule of water right priority, which means "first in time, first in right." (See *Irwin v. Phillips* (1855) 5 Cal. 140.) Under the rule of water right priority, a senior water right holder is entitled to fulfill his needs before a junior water right holder is entitled to use any water. However, a senior water right holder does not have the right to water previously legally stored by a junior water right holder.

DWR and Reclamation operate the State Water Project and federal Central Valley Project (together referred to as "Projects"), the two largest water storage and conveyance projects in California, both of which convey water through the Delta. While the Projects are junior to many diverters in the watershed, their diversions of previously stored water in the summer are not junior to other diverters. In addition, while State Water Board D-1641 assigns responsibility to DWR and Reclamation for meeting specific Delta outflow and other flow objectives based on voluntary commitments by those agencies to meet the flow objectives of that particular order, that commitment does not automatically extend to any new requirements. Responsibility for any new requirements would need to be evaluated in the context of those new requirements and water right priorities. Because DWR and Reclamation are already releasing previously stored water in many years to meet water quality and flow requirements in the summer, it does not necessarily follow that they should be the only parties responsible for any new summer Delta outflow requirements while other parties are able to continue to directly divert water from the Delta watershed, including previously stored Project water. Involving other water right holders in implementation of any emergency regulation for additional summer Delta outflows would present technical and legal complexities that would require time to evaluate and plan for, as well as a strong scientific basis for the emergency regulations. Further, if the State Water Board were to hold other water right holders responsible for meeting additional summer Delta outflows through implementation of even an emergency regulation, numerous additional parties would likely be involved and the process could be sufficiently complex and take more time than the action requested.

For the reasons explained above, the State Water Board will not initiate an emergency rulemaking at this moment. The State Water Board will continue to expeditiously proceed with the Phase 2 comprehensive update of the Bay-Delta Plan, which will address the issue of

Delta outflow for the reasonable protection of Delta smelt and other fish and wildlife in a comprehensive manner. The State Water Board intends to release a working draft of the Phase 2 Scientific Basis Report shortly for public comment. The State Water Board is looking forward to your further input on that report. In the interim, water managers, fisheries agencies and other appropriate parties are strongly encouraged to pursue adaptive implementation and scientific review of the summer outflow management experiment and the other actions identified in the Strategy as well as other measures to protect Delta smelt that will inform future management and regulatory actions. The State Water Board is committed to being part of the collaborative process to evaluate and consider both flow and non-flow actions to protect Delta smelt through the Strategy and other efforts that it is considering.

If you have any questions regarding this matter, or if any interested person would like to obtain a copy of the petition, please contact Rich Satkowski at rich.satkowski@waterboards.ca.gov or (916) 341-5439.

Sincerely,



Thomas Howard
Executive Director

cc: Office of Administrative Law
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