



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

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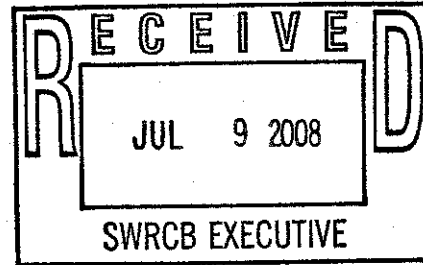
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Via First Class U.S. Mail
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Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812



Re: Bay-Delta Strategic Workplan Comments

Dear Ms. Townsend:

The Central Delta Water Agency joins in the comments on this Workplan submitted by the South Delta Water Agency and hereby supplements those comments with the following addition comments.

1. **WORKPLAN ELEMENT: "Water Right Compliance, Enforcement, and Other Activities to Ensure Adequate Flows to Meet Water Quality Objectives."**
 - a. **The Initial Focus of this Element is Misplaced; The State Water Board Must, at the Outset, Determine the Extent to Which the Water Quality Objectives are Intended to Offset the Projects' Impacts to the Watershed..**

One of the two goals of this element is "to ensure that adequate natural and abandoned flows are available to meet water quality objectives . . ." (June Draft, p. 80.) The Workplan goes on to state:

Even if water diverters do possess appropriate water rights, permittees and licensees are not authorized to divert water when it is unavailable, taking into consideration the instream flows needed to satisfy water quality objectives and senior water rights.

(June Draft, pp. 80-81.) The footnote to that sentence (fn. 6) states:

The fact that DWR and USBR are required to meet water quality objectives for the Delta does not give other water right holders who are not expressly responsible for meeting the objectives the right to divert natural and abandoned flows needed to meet the objectives, or the right to divert previously stored water that has been released to meet the objectives.

With regard to the "right to divert natural and abandoned flows needed to meet the objectives," under certain circumstances, other such water rights certainly *may* have a right to divert such flows. For example, if the objectives are necessary to mitigate the Project's impacts on water quality or fishery resources resulting from their expansive construction and operation of various dams and facilities throughout the Bay-Delta watershed, then other water right holders who are not responsible for such impacts should *not* be restricted from using natural and abandoned flows to meet their beneficial needs. If they were so restricted, then the burden for mitigating the Project's impacts would unfairly and illegally be shifted to them.

In its description of the scope of this element, the Workplan states:

In order to address these issues, the State Water Board must investigate why natural and abandoned flows are inadequate to meet water quality and flow objectives.

(June Draft, p. 82.)

If the water quality and flow objectives are necessary to correct and offset the Project's impacts on water quality or fishery resources throughout the Bay-Delta watershed, for example, then it may very well be that there is not enough natural and abandoned flow to meet those objectives even if everyone in the entire watershed stopped diverting such flow. Thus, the first step in this effort should be to definitively determine why each of the current water quality and flow objectives are necessary in the first place.

Since the Projects are by far the largest water users in the Bay-Delta watershed, and since Water Code section 11460, among other laws, prohibits the "construction and operation" of the Projects from "directly or indirectly" depriving at water users within the Bay-Delta watershed of the right to use water from that watershed, the largest potential "illegality" that should be thoroughly investigated at the outset is whether any water right holder within that watershed is being required to cease diversions in order to contribute to the Project's mitigation of its impacts.

And to enable that investigation, the State Water Board must thoroughly investigate and determine, as best it can, the full range of the Project's direct and indirect impacts on the water quality and flow Bay-Delta watershed and, in particular, on instream uses such as fishery resources. As the State Water Board recognized and held in its 1978 Decision-1485, at page 13:

To provide full mitigation of project impacts on all fishery species now would

require the virtual shutting down of the project export pumps.

Instead of shutting down the Project's export pumps, it is common knowledge that exports have steadily increased since that finding. A good starting place for this investigation would be an examination of the Project's full range of directly and indirect impacts on fishery species and what amount of water quality and flow is necessary to offset those impacts.

The forgoing investigations of the Project's impacts would provide the most informative and pertinent information towards the State Water Board's achievement of its goal of determining "why natural and abandoned flows are inadequate to meet water quality and flow objectives" (June Draft, p. 82) and its goal to "vigorously enforce water rights . . ." (*Id.*, p. 80.) Since the State Water Board has acknowledged in footnote 6 on page 81 of the Workplan that it believes that water rights holders must refrain from using natural or abandoned flows that are needed to meet water quality objectives, to the extent any of those objectives either entirely or partially are necessary to offset the Project's impacts, which is appears to be common knowledge that many (if not all) are, the State Water Board has acknowledged that it is shifting the Project's mitigation burden to other water right holders. Accordingly, it is imperative, and should be the State Water Board's top priority under this element, to straighten this out and avoid any further illegal deprivations of water right holders' ability to utilize natural and abandoned flow.

b. **At the Outset The State Water Board Needs to Determine the Projects' Responsibilities for Salinity Control Under the Delta Protection Act and Other Laws.**

Yet another critical threshold determination which the State Water Board must make before it continues to embark on efforts to curtail water right holders from diverting natural and abandoned flow that is needed to meet the water quality objectives, as well as efforts "to ensure that [the Projects'] developed water supplies are not adversely affected by unauthorized diversions" (June Draft, p. 80), is the determination of the Projects' responsibilities under various state and federal laws, not the least of which are the Delta Protection Act (Wat. Code, § 12200 et seq.) and Public Law 99-546, section 102, subdivision (c)(1), to provide salinity control in the Delta.

For example, to what extent are the Project's required to utilize their developed water supplies to provide salinity control under such laws, and who should pay for such developed water, the taxpayers?¹ Questions such as this cannot be ignored and answers to such questions are essential and threshold to the accomplishment of the goals of this element.

¹ See e.g., *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, at p. 295 ["The Central Valley Project is multi-purpose in nature. That portion of the project expense attributable to . . . salinity prevention . . . is nonreimbursable"; and Public Law 99-546, section 102, subdivision (c)(1) ["The [CVP's] costs of providing water for salinity control shall be nonreimbursable"].

c. **The Initial Focus Solely on the Delta is Misplaced.**

The Workplan explains:

Many water right holders in the [entire] Central Valley continue to divert under their appropriative water rights when water is not available, taking into consideration the amount of water needed to meet water quality and flow objectives and senior in-basin demands.

(June Draft, p. 81.)

The number and magnitude of illegal diversions in the Bay-Delta watershed is unknown. However, it could be quite significant.

(June Draft, p. 82.)

In light of the Workplan's acknowledgment that illegal diversions are occurring throughout the entire Central Valley, the focus should not be initially on the Delta. Instead, the focus should be on the entire Bay-Delta watershed.

Moreover, with respect to the Delta, a major issue in each instance of alleged illegal diversions will be whether riparian rights were severed. This will boil down to a discretionary determination by the State Water Board of the intent of the parties buying and selling the particular parcels at issue. The determination will be whether persons/entities subdividing land in the Delta (typically in the late 1800's) into large parcels intended to eliminate the right of the purchaser of those parcels to utilize any water from the nearby rivers. Why would anyone fairly and in good faith assume that it is more likely than not, or otherwise, that the intent of both the seller and purchaser of such large parcels was to permanently eliminate the rights of the purchaser of such parcels to use water from the rivers? The huge concern at the time was that there was too much water and the matter on everyone's mind was how to control the overflow and flooding of their lands. To assume, as the State Water Board did in Order WR 2004-0004, that there was an intent to sever such rights is completely unfair and unreasonable.

Before the State Water Board once again rushes to the unfair and unreasonable conclusion that riparian rights were intentionally forfeited by one or more landowners within the Delta or rushes to an unfair and unreasonable interpretation of the scope of riparian/overlying rights, the State Water Board should carefully examine whether making that conclusion and interpretation will actually achieve the two goals set forth in the impetus for this element which are the following:

[T]o ensure that sufficient flows are available to meet water quality objectives and to prevent DWR's, USBR's, and other water right holders' developed water supplies from being adversely affected by unauthorized diversions.

It is not at all clear that curtailing diversions would actually achieve either of those goals. For example, as the State Water Board has previously recognized in its Decision-990, at page 46:

The reclamation of the lands in the Delta has eliminated a large area of aquatic vegetation such as cat-tails and tules which consume three to four times as much water as the crops which are grown on these reclaimed lands. As a result, it appears probable that the consumption of water within the Delta has been decreased by reclamation development, and that a greater proportion of the stream flow entering the Delta now reaches the lower end of the Delta to repel saline invasion than before reclamation.

See also Investigation of the Sacramento-San Joaquin Delta, Report No. 4, "Quantity and Quality of Waters Applied to and Drained from the Delta Lowlands," prepared by DWR in July of 1956, wherein the investigation concludes at page 30:

The Delta lowlands act as a salt reservoir, storing salts obtained largely from the channels during the summer, when water quality in such channels is most critical and returning such accumulated salts to the channels during the winter when water quality there is least important. Therefore agricultural practices in that area enhanced rather than degraded the good quality Sacramento River water enroute to the Tracy Pumping Plant.

2. **WORKPLAN ELEMENT: "Characterize Discharges from Delta Island."**

The scope of this Workplan element states that "[t]here is a need to better understand the quantity, timing, location, and quality of discharges from the Delta islands." (June Draft, p. 52.)

The Workplan does not adequately explain why there is not also a need to better understand the characteristics of discharges from all of the upstream areas that drain into the Delta. To the extent there are numerous, cumulatively "very large, uncharacterized, potential source[s] of contaminants to the Delta waterways" located upstream of the Delta within the expansive Delta watershed, at a minimum, the Workplan should simultaneously include such areas within the scope of this Workplan element. (June Draft, p. 51.) If there are no such uncharacterized upstream sources, then the Workplan should thoroughly explain why that is so.

Any characterization of discharges from the Delta islands should include a characterization of the benefits to water quality and flow from the farming of such lands as discussed immediately above.

3. **WORKPLAN ELEMENT: "Coordination with the Department of Pesticide Regulation and Delta County Agricultural Commissioners on In-Delta Pesticide Use."**

The goal of this element is “to ensure pesticide use does not impair aquatic life beneficial uses in the Delta.” (June Draft, p. 56.) The scope (once again) “focuses on pesticide use within the legal Delta . . .” (*Id.*, p. 58.)

As with the above “characterization of discharges” element, the Workplan fails to adequately explain why the focus is solely on pesticide use in the Delta. If none of the pesticide use upstream of the Delta has the potential to impair aquatic life beneficial uses in the Delta, or the Water Boards otherwise believe there is no need “to determine whether and what additional information is needed to evaluate the need for increased measures to control pesticide levels in [*the areas upstream of*] the Delta” (*id.*, p. 56), then the Workplan should thoroughly explain why that is so.

4. **WORKPLAN ELEMENT: “Comprehensive Monitoring Program.”**

With regard to the scope of this element, the Workplan explains:

Although tributaries upstream of the legal Delta are not the initial focus, they may become important elements of the RMP to the extent that Delta water quality issues are affected by or linked to upstream tributaries.

(June Draft, p. 60.) Is there any good faith dispute whether “Delta water quality issues are affected by or linked to upstream tributaries”? There should not be, and, hence, the initial as well as long term focus of this element should logically and fairly include such tributaries.

5. **WORKPLAN ELEMENT: “Other Activities: Screening Diversions in the Delta and Tributaries.”**

While the title of this element references the Delta’s “tributaries,” the text of this element indicates that its focus is on “diversions from the Delta . . .” (June Draft, p. 91.)

The texts further states:

DFG surveys have identified approximately 2,300 diversions in the Delta. Approximately 200 of the 2,300 diversions are screened and fewer than 700 of these diversions are identified in the State Water Board’s water rights database.

(*Ibid.*) By way of comparison, the Workplan should indicate how many diversions there are, or estimated to be, within the entire Delta watershed and how many of them are (1) screened; and (2) identified in the State Water Board’s water rights database.

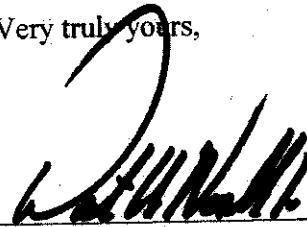
In any event, the Workplan should correct the text of this element to match its title and broaden the focus to include all of the upstream tributaries to the extent there is a substantial

number of unscreened diversions within those tributaries.

6. **Conclusion.**

Thank you for considering these comments and concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dante John Nomellini, Jr.", written over a horizontal line.

Dante John Nomellini, Jr.