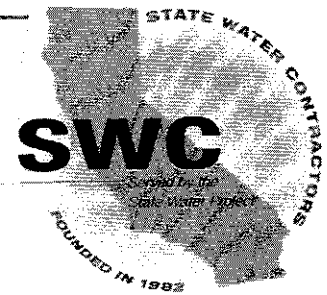
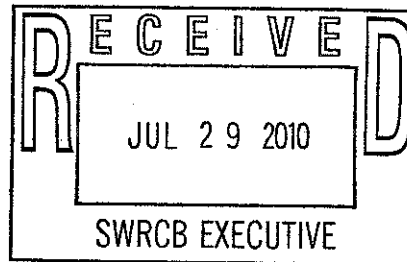


July 29, 2010

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**Re: COMMENT LETTER – DRAFT DELTA FLOW CRITERIA
REPORT**

Ms. Townsend:

The State Water Contractors (“SWC”) appreciates the opportunity to submit comments to the State Water Resource Control Board (“SWRCB”) on its Draft Report on the Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (“Draft Flow Report” or “Report”). The SWC is a non-profit association of 27 public agencies from Northern, Central and Southern California that receive Delta supplies under contract from the California State Water Project^[1]. Collectively, SWC member agencies deliver water to more than 25 million people and approximately 750,000 acres of highly productive farm land. The SWC has coordinated our comments with the comments of the State and Federal Contractors Water Agency (SFCWA) and strongly supports the SFCWA comments.

The SWC recognize the work the SWRCB and its staff have put into the Draft Flow Report in the short timeframe provided by the Legislature in Section 85086 of the Delta Reform Act. To its credit, the Draft Flow Report clearly articulates the extreme narrowness of the analysis it was asked to do and has done. The Board was not asked to develop or analyze how flows in the Delta and its watershed could be managed to mitigate impacts to the public interest *directly caused by water supply operations*. Instead, as the Board has interpreted its task, it assumes that none of the “other stressors” impacting the public trust will be addressed and that the Delta will remain as it is today without any of the actions that will be implemented through the Delta Reform Act to improve conditions for public trust resources. In other words, flow must be used to correct harm being done by the other stressors in the currently

^[1] The 27 member SWC agencies are: Alameda County Flood Control and Water Conservation District Zone 7, Alameda County Water District, Antelope Valley-East Kern Water Agency, Casitas Municipal Water District, Castaic Lake Water Agency, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, County of Kings, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire-West Side Irrigation District, Kern County Water Agency, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Geronio Pass Water Agency, San Luis Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

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degraded system. Not surprisingly, the proposed criteria result in water supply reductions averaging as much as 67%. Unfortunately, development of flow criteria constrained in this manner simply cannot add to resolution of the public trust issues in the Delta and its Watershed, and certainly will not advance the co-equal goals. Ultimately, we believe the Report will have limited utility in informing the discussion of how to achieve benefits for Delta species in furtherance of the co-equal goals of the Delta Reform Act.

The Draft Flow Report acknowledges that none of the reasonable use and public interest balancing requirements of California law—including the balance required by the public trust doctrine itself—were considered in developing the flow criteria. Again, the criteria are of limited value as they ultimately are meaningless and cannot be implemented without additional proceedings which “ensure the reasonable protection of beneficial uses, which may entail balancing of competing beneficial uses of water, including municipal and industrial uses, agricultural uses and other environmental uses.”

While doing what it believed it was directed to do, the Board succinctly describes the limited utility of that direction at pages 3-4 of the Draft Flow Report:

The water supply costs of the flows identified in this report illustrate to the State Water Board the need for an integrated approach to management in the Delta. Best available science supports it is important to directly address the negative effects of other stressors, including habitat, water quality, and invasive species, that contribute to higher demands for water to protect public trust resources. The flow criteria highlight the continued need for the BDCP to develop an integrated set of solutions and to implement non flow measures to protect public trust uses.”

The Draft Flow Report concludes that while “there is sufficiently strong scientific evidence to support the need for functional flows to support particular functions . . . this does not necessarily mean that there is scientific evidence to support specific numeric criteria.” The SWC agree, and would like to point out a few of the limitations in the science and the Draft Flow Report’s use of that science.

Overall, the report does not make consistent and rigorous use of information sources or rigorously distinguish among the types of information that it considered. For example, the Draft Flow Report’s Category A recommendation requiring 75% of January to June unimpaired Delta outflow is based in large part on an unpublished submittal by The Bay Institute. Even that applies only to one species (Longfin smelt) and does not specifically identify the mechanism that is assumed to cause the identified changes to its population. By contrast, several studies are referenced related to the impacts of nutrient changes on the Delta ecosystem that are published (Dugdale et al, 2007 and Glibert 2010), describe specific mechanisms causing ecosystem impacts and (in some cases) include correlations. These publications, which arguably provide a higher level of scientific certainty than the flow recommendation references, are dismissed as “hypotheses.” The Draft Flow Report does not contain any description of why it dismissed these studies and why it also does not provide any recommendations for Delta Water Quality, as directed by the legislature.

The Draft Flow Report also includes some measures that are being seriously questioned – Fall X2 and Old and Middle River (OMR) limitations. The Draft Flow Report itself references some of the scientific criticisms of the proposed Fall X2 measure by agencies such as the National Research Council, but chooses to include that measure in its flow recommendations. A Fall X2 measure is included, even though the Draft Flow Report apparently recognizes that the measure would result in flows in excess of unimpaired conditions. The Draft Flow Report also includes numerous OMR restrictions, including a -2,500 cubic feet per second limitation from November through June when salmonids are present in the Delta. The U.S. District Court for the Eastern District of California recently ruled that the less restrictive -5,000 cfs OMR flow restrictions imposed by the National Marine Fisheries Service (NMFS) for salmonid species was not supported by the best available science. As the Court noted, “[t]he only discernable and scientifically justifiable support provided in the BiOp for the negative 5,000 cfs ceiling on OMR flows under Action IV.2.3 is the salvage data, represented in Figures 6-65 and 6-66 of the BiOp.” The Court highlighted “serious questions” about whether NMFS’s had support for its OMR flow criteria. The particle tracking models they relied upon were “not a reasonably accurate prototype for behavior of [listed salmonids].” Additionally, NMFS improperly relied upon salvage data that was not scaled to population size, “an undisputed failure to use the best available science.” NMFS also arbitrarily and capriciously relied upon ambiguous studies that in fact did not support their conclusions. Accordingly, the Court held that “[t]he -5,000 cfs OMR ceiling is based, predominantly on speculation . . . is not scientifically justified and is not based on best available science . . . and is arbitrary and capricious.” That conclusion is even more applicable to the more restrictive -2,500 cubic feet per second criteria included in the Draft Flow Report.

Although the Draft Flow Report recognizes the need for adaptive management, its specific application of adaptive management appears limited to the Fall X2 measure and a reference to the Smelt Working Group. The SWC strongly endorse the need for adaptive management conducted in a scientifically rigorous manner. Beyond the specific examples cited in the Draft Flow Report, all flow recommendations (including already implemented measures) should be subject to ongoing scientific review and evaluation. For example, the OMR restrictions have been in place for several years now. If export reductions were the solution to the Delta ecosystem’s problems, some response of the pelagic fish species should have been seen. As would be expected based on the lack of past relationships with OMR flows and fish abundance, there was no observed improvements in population levels of any of these species following OMR flow restrictions in 2006, 2008, 2009, 2010, and partial restrictions in 2007. An ongoing evaluation of the effectiveness of OMR restrictions should be conducted and reviewed for future proposed flow recommendations.

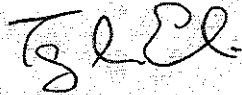
Finally, the water supply analysis in Appendix B raises as many questions as it answers. It is not at all clear that the analysis reflects how the current water rights regulations would be implemented and appears to significantly reduce Central Valley in-basin water users with senior water rights. Additionally, the analysis makes the unrealistic assumption that Central Valley

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groundwater use would not increase to compensate for reduced surface water use. Any increase in groundwater use would result in reduced accretions and increased seepage that would considerably reduce Delta inflows. In spite of the questionable assumptions for revising water use, the analysis indicates that there are significant reductions in the level of coldwater pool remaining in Sacramento Valley reservoirs. There is no corresponding indication of the effect on San Joaquin Valley reservoirs, but they are likely to be similarly affected. The projected level of reduction in coldwater pool, which is likely considerably understated, would result in significant effects on migratory species like salmonids.

In conclusion, the SWC believe that cautionary note stated in the Executive Summary of the Draft Flow Report is extremely important. While the develop of the draft flow criteria may have been an interesting theoretical exercise, the acknowledged limitations in the resulting Draft Flow Report mean that it is not a useful resource in its current form. If you have any questions, please contact me at (916) 447-7357.

Sincerely,



Terry L. Erlewine
General Manager