



STATE WATER CONTRACTORS SUBMITTAL

Regarding the State Water Resources Control Board Notice of Public Workshop to Receive Recommendations to Improve Fishery Resources, Including Actions to Slow or Stop the Decline of Delta Smelt, and Improve Water Quality Conditions in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

June 19, 2007

The State Water Contractors¹ share the State Board's interest in improving the fishery resources of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and, particularly, the need to identify critical stressors to pelagic species. We believe the best available science supports a conclusion that the decline of pelagic species in the Sacramento-San Joaquin Delta, including the protected delta smelt, is the result of multiple causes and multiple stressors. The State Contractors also believe the Board can assist in the multi-agency efforts that are now underway to identify these causes and stressors and develop appropriate actions to address them.

Within the past year, the salvage of delta smelt at the State Water Project ("SWP") Banks Pumping Plant and the Central Valley Project ("CVP") Jones Pumping Plant has been extremely low: less than 600 juvenile fish salvaged from a probable smelt population in April 2006 of more than seven million juveniles. For more than a year, from April 22, 2006 until the end of May 2007, salvage at the SWP pumps was zero and salvage at the CVP Jones pumps was extremely low (144). Nevertheless, smelt abundance appears to have significantly declined over this same period. This decline, in the face of very modest or no Project salvage, strongly suggests the presence of other causal factors. Indeed, during the last year, the SWP and CVP reduced pumping rates in order to limit the number of adult smelt that would move towards and spawn near the Project pumps. This action was successful, but nevertheless a major reduction in the young of the year Delta smelt has been observed in the 2007 surveys. There is some evidence that toxic conditions in the north Delta, in the form of pyrethroids and organophosphates, may have caused a catastrophic loss of young Delta smelt in that area.

Other factors that could have affected the smelt population include local in-Delta diversions which, as recognized by the State Board's D-1641 EIR, number in the thousands. These diversions collectively pump around 4,000 cfs, a level equivalent to the CVP's Jones Pumping Plant and, in virtually all cases, are unscreened. Nor should it be forgotten that stress to protected species is also caused by certain kinds of predatory fish, including significant

¹ The State Water Contractors organization is a nonprofit mutual benefit corporation comprised of twenty-seven of the twenty-nine public entities that hold contracts with the State of California for the delivery of water from the State Water Project. Collectively, the members of the State Contractors provide all, or a part, of the water supply delivered to approximately 25 million Californians, roughly two-thirds of the State's population. The State Contractors provide this water to retailers, who, in turn, serve it to consumers throughout the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California.

populations of non-native striped, small-mouth and large-mouth bass residing in the Delta. These fish do, by all means, provide a sports fishery, but they do so at the expense of protected species native to the Delta, including delta smelt.

The State Contractors believe it is appropriate for the State Board and Central Valley Regional Board, in cooperation with other involved federal and state agencies, to evaluate the effects upon Delta pelagic species from the other known stressors that are not already the subject of scrutiny or evaluation in other forums. As the State Board is aware, the state and federal courts have asserted their jurisdiction to consider compliance by the SWP with the California Endangered Species Act (Fish and Game Code §§ 2050 et. seq.) and federal Endangered Species Act (16 U.S.C. §§ 1531 et. seq.) and compliance by the CVP with the federal statute.² In each case, the exercise of jurisdiction by the courts is related to concerns about the impact of Project operations on protected fish species in the Sacramento-San Joaquin Delta and, in most cases, the species of interest is the delta smelt. Additionally, the United States Fish and Wildlife Service ("FWS") has already asserted jurisdiction over SWP and CVP operations, with respect to the delta smelt, through the re-initiation of formal consultation on the Projects' Operations Criteria and Plan ("OCAP") pursuant to Section 7 of the federal Endangered Species Act. 16 U.S.C. § 1536. The California Department of Fish and Game ("CDFG") is actively participating in that re-consultation pursuant to a Memorandum of Understanding it executed in May 2007 with the California Department of Water Resources ("DWR"). Federal ESA re-consultation regarding the smelt is now underway, with DWR participating directly as an applicant, and is anticipated to be completed by July 2008.

The Board included an Endangered Species Act provision in the SWP and CVP water right permits as Condition 7 on page 158 of D-1641, a condition that should be included in *all* water use permits and licenses for in-Delta diversions. The condition specifies that the permit does not authorize the taking of any listed species; that the SWP and CVP shall obtain a take authorization from the appropriate fishery agency for any take of listed species; and that the SWP and CVP must comply with the applicable Endangered Species Act. Because the SWP and CVP are already consulting with the appropriate fishery agencies to obtain take authorization for delta smelt and are taking other action separately and together with the federal agencies to comply with the Endangered Species Acts, the SWP and CVP are in compliance with D-1641. Since the operators of the SWP and CVP already are working with the appropriate fishery agencies regarding operations of the SWP and CVP as they may affect pelagic species generally and the smelt specifically, and since the state and federal courts have also asserted their jurisdiction, the State Contractors believe it is not necessary for the Board to assert similar jurisdiction, particularly where, as here, it would lead to confusion and potentially inconsistent

² See, e.g., *Natural Resources Defense Council v. Kempthorne, et al.*, United States District Court for the Eastern District of California Case No. 1:05-CV-01207; *Pacific Coast Federation of Fishermen's Association v. Gutierrez, et al.*, United States District Court for the Eastern District of California Case No. 1:05-CV-1207; *Watershed Enforcers v. California Department of Water Resources, et al.*, Alameda County Superior Court Case No. RG06292124 [California Appellate Court, First Appellate District Case Nos. A11750, A11715]; *Watershed Enforcers v. Broddrick, et al.*, Alameda County Superior Court Case No. RG07326290. Under its current schedule, the United States District Court will hear argument in the case of *Natural Resources Defense Counsel v. Kempthorne, et al.*, No. 1:05-CV-01207, regarding proposed operations of the SWP and CVP pending the completion of re-consultation concerning the delta smelt, on August 21, 2007, in Fresno. The argument will allow the court to determine whether the SWP and CVP operations proposed by the California Department of Water Resources and the Bureau of Reclamation pending the completion of re-consultation with the FWS are sufficient to prevent SWP and CVP operations from jeopardizing the continued existence of delta smelt in the interim.

regulatory requirements. (See, e.g., *Environmental Defense Fund, Inc., v. East Bay Municipal Utilities District* (1980) 26 Cal. 183.)

Again, the Contractors appreciate and support the State Board's efforts to identify and address water quality concerns and critical stressors to pelagic species in the Sacramento-San Joaquin Delta, including the protected delta smelt, to the extent the State Board, the fishery agencies or the courts have not yet asserted jurisdiction. The State Contractors' specific responses to the matters set forth in the Workshop Notice are provided below in the order set forth on page 2 of the Notice.

1. Should the State Board exercise its water quality authority under section 13267 of the California Water Code to require that persons who discharge waste, furnish the State Water Board with technical or monitoring reports?

The State Contractors agree that entities and persons who discharge waste to the Delta, directly or indirectly, should be required to provide technical and monitoring reports to the State Board or the Central Valley Regional Water Quality Control Board with regard to such discharges. The authority to require such reports is provided in Water Code sections 13267 and 13225(c), and the State Contractors support the State Board's application of that authority to persons discharging waste directly or indirectly to the waters of the Delta. In this regard, it is critical that water quality monitoring and reporting requirements should not be geographically limited just to the Delta, but should also include and apply to entities and persons whose waste discharge is to waters that are tributary to the Delta. The State Board and Central Valley Regional Board both have an affirmative obligation to control point and non-point source discharges of pollution that impact water quality in the Delta and the State Contractors support the collection and the reporting of waste discharge information to enable the appropriate agency to enforce water quality measures intended for the protection of species that reside within the Delta or use it as a migration corridor.

2. Should the State Board require reduction or cessation of point and nonpoint sources of pollution into the Delta?

The State Contractors believe that in light of the decline in certain pelagic species, the need to protect migrating fish species, and the recent discovery of toxic levels of pyrethroids and organophosphates the State Board and Central Valley Regional Board should take immediate steps to analyze potential point and nonpoint discharges into the Delta and implement restrictions on activities that have a demonstrated detrimental impact upon fishery species. Substantial data currently exist which show that urban and agricultural discharges are a significant source of pollution. By comparison, there have been significant *reductions* in selenium and salinity loading on the San Joaquin River from agricultural drainage on the Westside of the San Joaquin Valley. This type of reduction in waste discharge needs to be achieved in the Delta itself and for other constituents. The State Contractors support active pursuit by the State Board or Regional Board of regulatory and enforcement measures to address water quality issues in the Delta emanating from these significant pollutant sources. To this end, the State Contractors support and will participate in proceedings commenced by the State Board or the Central Valley Regional Board leading to the issuance or enforcement of waste discharge requirements for identified dischargers.

3. Should the State Board require a reduction in diversions, for export or in-Delta use, from Delta channels? What would be the timing, magnitude, and geographic extent of any recommended curtailment(s)?

SWP and CVP operations have been drastically scaled down to minimum operating levels. That is not true of other diverters within the Delta. An attempt by the State Board to reduce SWP diversions below current levels will potentially impact public health and safety, which effect will grow to significant statewide impacts as water levels within San Luis Reservoir continue to decline. For the reasons discussed above in the State Contractors' introductory comments, we believe consideration of a reduction in diversions should now focus on non-Project activities in the Delta which, to date, have been largely unregulated. Indeed, as noted above, DWR is already complying with the conditions imposed by the State Board in D-1641 on SWP permits and additional ESA related requirements. Consequently, there is no need or basis for the State Board to assert concurrent jurisdiction over SWP and CVP operations in relation to the matters set forth in the Workshop Notice. Doing so would unavoidably create the potential for inconsistent regulatory requirements affecting the SWP and CVP. Rather than pursue that course of action, the State Board should evaluate non-Project diversions within the Delta since all indications are that they may contribute to the decline of protected species and their critical habitat, as well as cause water quality degradation, and other harmful effects to Delta resources. The State Board possesses ample authority to do so pursuant to Water Code sections 100, 275 and 2500 et. seq., as well as pursuant to Article 10, Section 2 of the California Constitution.

As noted above, the State Board's could also add its standard endangered species condition to existing permits or licenses through its obligation to protect the public trust. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) and its ability to enforce such a condition to help protect fishery resources is clear (Water Code §§ 1675, 1825, 1831).

4. Should the State Board require releases of water from upstream storage?

The existing X2 objective and similar Delta outflow requirements contained in the SWP and CVP permits are directed at providing flows for fishery habitat. From a short-term perspective, scientific information available to date does not indicate that additional releases from upstream storage on the Sacramento River during the summer and fall months will provide a measurable benefit to pelagic species such as delta smelt. It is possible that flows from the San Joaquin, Mokelumne and Calaveras Rivers could provide some benefit to these fisheries. However, as it relates to the CVP, flow requirements from the San Joaquin River are currently being considered by the federal court as well as NMFS, FWS and DFG as part of the on-going Section 7 re-consultation process under the federal Endangered Species Act.³ From a longer term perspective, as noted above, both the CVP and SWP make storage releases in the winter and spring (X2 in particular) for the purpose, among others, of protecting pelagic fish. Further, those flows are currently being considered as part of the ESA re-consultations. Thus, again, the SWP and CVP already are complying with the State Board's D-1641 requirements and adding an additional layer to the regulatory activity already being employed by the State Board, the fishery agencies and the courts will neither benefit the fish nor decrease the probability of inconsistent regulatory actions relating to the Projects.

With respect to other reservoir operations, the State Contractors are concerned about and urge the State Board to carefully consider the scope of its jurisdiction over previously stored water in reservoirs. There is a significant difference between imposing conditions on the

diversion of water to storage and requiring previously stored water to be released for purposes beyond those contemplated by the owner of the reservoir. With this caveat in place, the State Contractors would support an examination of water operations on the San Joaquin, Mokelumne and Calaveras Rivers to determine how they may impact Delta fishery resources. The appropriate time to do that is at the State Board's previously noticed workshops on San Joaquin River flows, which we understand will be scheduled for this summer.

5. Should the State Board require measures that will ease potential dry year conditions, in order to ensure reasonable protection of water quality and beneficial uses in the Delta?

State Board Decision 1641 establishes a comprehensive set of water quality measures and requirements that are incorporated into the permits of the SWP and CVP to ensure the reasonable protection of water quality and beneficial uses in the Delta. These measures and requirements already apply in all water year types and, with the notable exception of the South Delta agricultural objectives, properly include dry and critically dry year relaxations. The water quality measures and requirements of D-1641 will be satisfied this dry year with the possible exception of interior South Delta objectives that are caused by factors outside the control of SWP and CVP operations. However, given the very limited pumping operations that are presently occurring at Banks and Jones pumping facilities, any violation of these objectives is unlikely to be attributable to SWP or CVP operations. Nor should it be overlooked that SWP and CVP operations already provide a far better water quality environment in the Delta in many months than would exist under non-Project conditions. Notwithstanding these facts, the State Contractors support the State Board's consideration of measures applicable to non-Project diversions that will ensure the reasonable protection of water quality and beneficial uses in the Delta. In regard to the SWP and CVP, the State Contractors believe it appropriate for the Board to consider adding operational flexibility to certain components of D-1641, such as Delta Cross Channel Gate closures, that would allow protection for both salmon *and* pelagic species – including delta smelt.

6. Should the State Board require any other actions if voluntary actions are not currently being implemented?

It is beyond dispute that non-native fish species in the Delta prey on native threatened and endangered species protected under the state and federal Endangered Species Acts, including delta smelt, juvenile winter-run and spring-run salmon, and steelhead trout. In light of this unassailable threat, CDFG should take actions to reduce the population of striped, large-mouth and small-mouth bass in the Delta. Among other steps, CDFG should immediately remove all size and daily bag limits on these species. Given record declines in delta smelt population, and minimized SWP and CVP diversions to protect the smelt and its habitat, it no longer makes sense to support bass fisheries that prey upon smelt, juvenile salmon and steelhead species, and other native fish in the Delta. A proceeding conducted by the Board to evaluate the reasonableness of continuing to support predatory, non-native fish in the Delta is entirely compatible with the Board's authority under Water Code sections 100 and 275 and is long overdue.

The State Contractors are committed to helping the State Board identify water quality impediments and other adverse stressors to protected fish species in the Sacramento-San Joaquin Delta. The State Contractors also believe the State Board can and should play a complementary role, along with the other participating State and federal agencies, in developing long-term solutions for improving Delta fisheries along the lines described above.