



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

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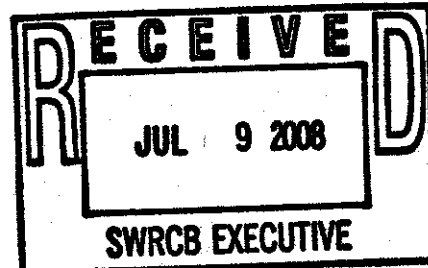
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July 9, 2008

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DIV. OF WATER RIGHTS
SACRAMENTO

2008 JUL -9 AM 11:52

STATE WATER RESOURCES
CONTROL BOARD

Re: Bay-Delta Strategic Workplan Comments

Dear Ms. Townsend:

Through this letter, the San Luis & Delta-Mendota Water Authority ("Authority") and Westlands Water District ("Westlands") provide written comments on the draft Strategic Workplan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Strategic Workplan"). The Authority and Westlands appreciate the collaborative efforts by the State Water Resources Control Board ("State Water Board"), as well as the Central Valley Regional Water Quality Control Board and the San Francisco Bay Regional Water Quality Control Board (collectively "regional water boards"), to describe their proposed actions to protect beneficial uses of water in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta"). The Strategic Workplan is an appropriate mechanism to discuss and coordinate the many issues falling within the jurisdiction of the State Water Board and the regional water boards.

The Authority and Westlands thank the State Water Board staff for considering and often addressing prior comments from the Authority and Westlands when developing the draft Strategic Workplan. Notwithstanding, the Authority and Westlands maintain concerns. The Authority and Westlands present their comments below. The

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Authority and Westlands believe that, if their concerns are addressed, the Strategic Workplan will be more likely to achieve its stated goal.

1. The Foundation Of Draft Strategic Workplan Is Incomplete And Could Be Misleading

The elements of the draft Strategic Workplan appear framed by its background discussion. That discussion is sometimes incomplete and potentially misleading.

a. **Incomplete Description Of Water Development**

The background discussion of "Water Development" is lacking. Presumably, that discussion is provided as context for the potential effect water development may have caused or is causing to the beneficial uses within the Bay Delta. If that presumption is correct, the discussion is far too narrow. The draft Strategic Workplan currently focuses exclusively on diversions by the Central Valley Project, State Water Project, Contra Costa Water District, and two in-Delta power plants. There is no reasonable basis for such a limited focus. Inappropriately absent from the discussion are many other development-related actions, including, but not limited to, descriptions of historical and existing mining and dredging activities, urbanization, development of the levee systems, upstream diversions, and in-Delta diversions.

b. **Misleading Discussion Of Fishery Decline And The Bay Delta Conservation Plan**

The discussion of the "Fishery Declines" and "Other Efforts" may be misleading. The discussions begin appropriately by identifying the bases for concern. The section on the pelagic organism decline discusses what was perceived in 2005 as a "precipitous decline." The section accurately describes the status of the science, as proposing hypotheses to explain the possible causes for the decline. Likewise, the section on Central Valley Salmon declines explains the "unexpectedly low chinook salmon returns to California in 2007." Thereto, the discussion appropriately describes the National Marine Fisheries Service's conclusion that poor ocean conditions are a major factor contributing to the low abundance of salmon. In the "Other Efforts" section, the draft Strategic Workplan also begins with a paragraph that properly frames the "Other Efforts." It identifies many of the factors that affect the Bay-Delta.¹ It properly discusses

¹ The discussion on page 28, under the "Other Efforts" section, identifies "water project operations" as having altered the natural amount, duration, direction, and timing of water flows through the Bay-Delta. Because of the limited discussion of "Water Development", as identified above, one might improperly assume the reference to

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the comprehensive nature of the Delta Vision and the CALFED program. Unfortunately, the remaining discussions within the section on "Fishery Declines" and the discussion in the "Other Efforts" section of the Bay Delta Conservation Plan are not placed into context and therefore could mislead the reader.

The section on Fishery Declines discusses two federal court actions which challenge biological opinions on the effects of Central Valley Project and State Water Project operations. It also discusses decisions by the Pacific Fisheries Management Council and California Fish and Game Commission to restrict ocean and coastal commercial and recreational fishing. The draft Strategic Workplan does not explain why the discussions are presented. Although they appear to serve demonstrative purposes (identifying the drastic nature of actions being undertaken), one might assume the discussions are presented to provide guidance to the State Water Board or regional boards regarding the focus of their efforts. Such an assumption is not supported by science. Neither the science nor the actions above support a focus on the Central Valley Project and State Water Project as the means to address the perceived fishery declines.

In fact, it is a myopic approach to fisheries issues in the Bay Delta over the decades that has led so many regulatory efforts to ignore or downplay the significance of many of the factors potentially affecting the beneficial uses. The Authority and Westlands posit the key to fisheries improvement is grounded in the aggressive examination and addressing of the factors, other than the Central Valley Project and State Water Project.²

"water project operations" is exclusively to the Central Valley Project, State Water Project, and Contra Costa Water District. Clearly, given the extent of other water projects that contribute to the changes in the Bay-Delta system, such a narrow assumption would be unreasonable and inappropriate. The reference provides another example of how the draft Strategic Workplan might be improperly construed because of the incomplete foundation on which the draft Strategic Workplan is built.

² Although some may argue otherwise, the arguments presented to support a focus on the Central Valley Project and State Water Project take liberty with the existing data and analyses. Because of the often misuse of data and analyses, the Authority and Westlands respectfully request that, when the State Water Board and regional water boards consider ongoing efforts to understand the factors affecting the fishery resources dependent upon the Bay-Delta, they be very careful. The scientists developing and analyzing data rarely, if ever, explain the limitations of their work. It is all too easy to take liberties. Interpretations of data or conclusions must be rendered with a complete presentation of available information. Great care must be taken to ensure findings are not misinterpreted, are not misrepresented, and do not have an inappropriate emphasis placed on them.

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The description of the Bay Delta Conservation Plan is accurate and an important effort, which warrants discussion in the Strategic Workplan. However, because the Bay Delta Conservation Plan is an effort undertaken by only a small number of entities ("PREs") that potentially affect the beneficial uses of the Bay-Delta, more context for the Bay Delta Conservation Plan must be provided. In particular, the discussion in the Strategic Workplan should explain:

The PREs have not committed to assume the obligation to implement conservation measures that exceed minimization and mitigation requirements. Rather, the PREs expect that the obligation to fund and/or to implement any such conservation measure would be shared and that the PREs' contribution would be roughly proportional to the impact of the covered activities on covered species and their habitat. . . . Nothing obligates the PREs to fund or implement measures to minimize and mitigate impacts to covered species resulting from the activities of individuals or entities that do not participate in the implementation of the Bay Delta Conservation Plan or to fund and/or implement conservation measure required as a result of such activities.

Such an explanation will make clear the goal of the Bay Delta Conservation Plan is to contribute to the recovery or conservation of covered species, however, the level of recovery or conservation results in principle part, not from obligations of the PREs, but from a desire of the all of those involved in the development of the plan and contributions of non-PRE resources.

2. Specific Concerns With The Workplan Elements

The Authority and Westlands believe one of the greatest benefits of the Strategic Workplan is its ability to establish a comprehensive approach in addressing the extensive factors potentially affecting the Bay-Delta. Unfortunately, possibly as a result of the foundational problems identified above, elements of the Workplan appear improperly focused or possibly incomplete.

a. Water Quality And Contaminants Control

The Authority and Westlands support the development of water quality controls through State Water Board or regional board issued Total Maximum Daily Loads ("TMDLs"). However, water quality management may benefit from using a variety of management tools. Relying on TMDLs as the primary tool to manage water quality

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could stunt the effectiveness of a comprehensive water quality strategy. In addition, the Authority and Westlands are concerned the development of new TMDLs, as proposed by the draft Strategic Workplan, may conflict with existing activities which benefit receiving waters.³

b. Comprehensive Monitoring Program

The Authority and Westlands appreciate the utility of and support a comprehensive monitoring program. The Strategic Workplan must do more than support the collection of contamination-related data. It must develop a process by which contamination data can be analyzed and synthesized to support real-time decision-making. Those discharging contaminants should be subject to real-time changes in operations, if such changes are supported by science and needed to protect beneficial uses of water. Attached is a "work-in-progress" proposal being developed by Dr. William J. Miller that provides an initial framework for such a process.

c. Southern Delta Salinity And San Joaquin River Flow Objectives

The draft Strategic Workplan improperly characterizes the responsibility of Reclamation and DWR for southern Delta salinity objectives. Most recently, the State Water Board in its 2006 Bay-Delta Water Quality Control Plan, made it abundantly clear southern Delta salinity objectives were not being implemented solely through water rights. The State Water Board wrote:

Elevated salinity in the southern Delta is caused by various factors, including low flows; salts imported to the San Joaquin Basin in irrigation water; municipal discharges; subsurface accretions from groundwater; tidal actions; diversions of water by the SWP, CVP, and local water users; channel capacity; and discharges from land-derived salts, primarily from agricultural drainage. These salinity objectives currently are implemented through a mix of water right actions and salinity control.

(2006 Bay Delta Plan at p. 27.) The draft Strategic Work Plan must be revised to comply with the 2006 Bay Delta Plan.

³ The Authority and Westlands are concerned with the potential for adopting TMDLs that are unnecessary or ineffective. The necessity and efficacy of algae and selenate selenium TMDLs should be confirmed with scientific data before being adopted.

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Further, in the section describing the review of the southern Delta salinity objectives, there is a discussion of joint point of diversion ("JPOD") operations. JPOD is not relevant to the review of the salinity objectives and the discussion of JPOD is inaccurate. Accordingly, this discussion should thus be removed.

d. Activities To Ensure The SWP's And CVP's Methods Of Diversion In The Delta Are Reasonable, Beneficial And Protect The Public Trust

The draft Strategic Plan identifies a process to consider method of diversions and effects of diversions on public trust resources. Although there are thousands of diversions occurring in the Bay-Delta system and many factors effecting public trust resources, the Strategic Plan discuss only two diversions: diversions by the Central Valley Project and State Water Project. It is possible the limited focus may be caused by the problems with the background section identified above. In particular, the draft Strategic Plan's improper focus may be due to the incomplete description of the Bay Delta Conservation Plan effort. If the State Water Board holds a "reasonable method of diversion" or public trust proceeding, the PREs should not be penalized for investing significant resources into the BDCP process by drawing the exclusive attention during such a proceeding.

Thank you in advance for your consideration of these comments.

Very truly yours,

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A Professional Corporation



Valerie C. Kincaid
Attorneys for the San Luis & Delta-Mendota
Water Authority and Westland Water District

JDR/jvo

**REAL TIME SMELT
CONDITION
MONITORING &
REMEDIAL ACTION
PROGRAM**

NEED

- SMELT (DELTA AND LONGFIN) ABUNDANCE VERY LOW
- HAVE REAL TIME ACTION PROGRAM FOR EXPORTS
- BUT OTHER FACTORS IMPORTANT TO REVERSING ABUNDANCE DECLINES
- SHOULD HAVE REAL TIME ACTION PROGRAM FOR OTHER FACTORS

OTHER FACTORS INCLUDE

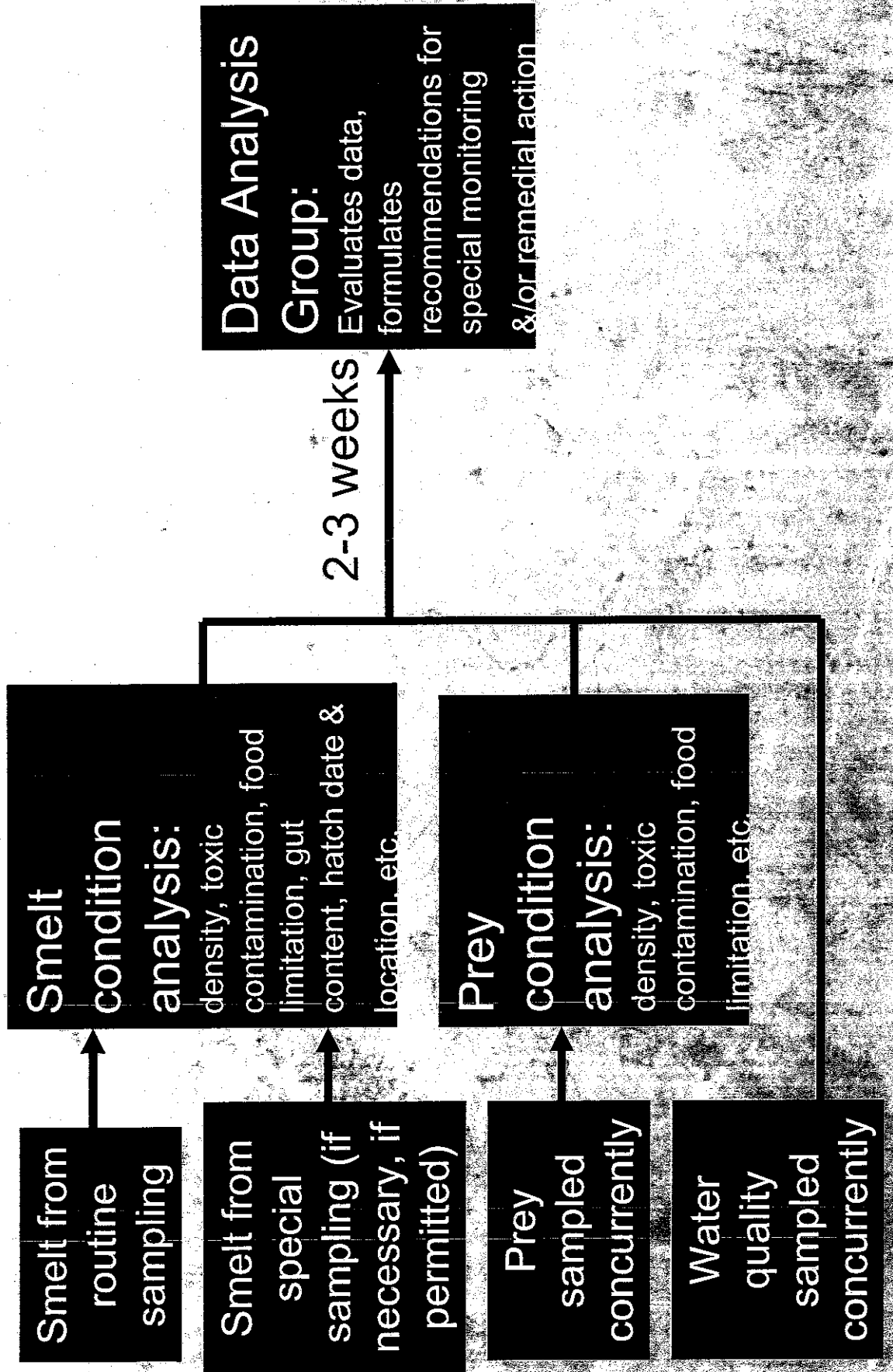
- TOXIC CONTAMINATION
- FOOD LIMITATION
- DISEASE
- INVASIVE SPECIES AS A CONTRIBUTOR TO ANY OF THE ABOVE

CONCLUSION

NEED REAL TIME ACTION
PROGRAM FOR OTHER
FACTORS

THE PROGRAM

REAL TIME MONITORING COMPONENT



THE PROGRAM

REMEDIAL ACTION COMPONENT

Action Implementation Group:

- Appoints Data Analysis Group
- Receives recommendations from Data analysis Group
- Formulates remedial actions
- Implements remedial actions by enforcement or incentives

All done on real time basis

Data Analysis Group:

Evaluates data, formulates recommendations for additional monitoring & remedial action

Action Incentive Fund:

Used separately or in combination with enforcement to implement remedial actions



COMPOSITION OF ACTION IMPLEMENTATION GROUP

(AGENCIES WITH AUTHORITY TO CAUSE
IMPLEMENTATION OF REMEDIAL ACTIONS)

- CVRWQCB
- SFRWQCB
- SWRCB
- DFG
- USACE
- DFA
- NOAA FISH
- DWR
- USBR
- USEPA
- USFWS
- DPR

QUESTIONS & ANSWERS

- WOULD EXISTING REGULATORY AUTHORITIES OF ANY AGENCY BE CHANGED BY THIS PROGRAM?
- NO. AGENCIES WOULD ACT BASED ON THEIR EXISTING AUTHORITIES.
- HOW WOULD AGENCIES DECIDE WHO ACTS?
- THE QUESTION OF WHICH AGENCY IS BEST ABLE TO ACT WOULD BE DISCUSSED IN THE ACTION IMPLEMENTATION GROUP. ULTIMATELY, EACH AGENCY WOULD MAKE ITS OWN DECISION.

- WOULD THIS PROGRAM OBLIGATE AGENCIES TO ACT MORE QUICKLY THAN THEY MIGHT OTHERWISE ACT OR TO COOPERATE WHERE THEY MIGHT OTHERWISE ACT INDEPENDENTLY?
- NO, BUT CONSISTENT WITH THE VERY LOW ABUNDANCE OF SMELT, IT ESTABLISHES A MECHANISM GIVING AGENCIES THE OPPORTUNITY TO ACT QUICKLY AND/OR COOPERATIVELY IF APPROPRIATE

- COULD THE ACTION IMPLEMENTATION GROUP ESTABLISH PROCEDURES FOR REMEDIAL ACTION PRIOR TO COLLECTION AND ANALYSIS OF INFORMATION BY THE DATA ANALYSIS GROUP?
- YES, THAT WOULD FACILITATE RAPID ACTION WHEN INFORMATION INDICATED SUCH ACTION WAS NECESSARY.

- WOULD THIS PROGRAM PROVIDE SCIENTIFIC BENEFITS?
- YES. BY CLOSELY LINKING MONITORING AND ANALYSIS TO ACTION AND BY PROVIDING FOR FOLLOW-UP MONITORING AND ANALYSIS, IT WILL FOCUS THE SCIENCE DIRECTLY ON PROBLEMS.

- WHAT IS THE ACTION IMPLEMENTATION FUND?
- A FUND, PUT TOGETHER FROM VARIOUS SOURCES, THAT THE ACTION IMPLEMENTATION GROUP COULD USE TO PROVIDE INCENTIVES FOR REMEDIAL ACTIONS.
- WOULD IT REPLACE ENFORCEMENT?
- THE FUND COULD BE USED SEPARATELY OR IN COMBINATION WITH ENFORCEMENT, BASED ON THE JUDGMENT OF THE ACTION IMPLEMENTATION GROUP.

- WHY LINK THE MONITORING AND ACTION COMPONENTS? THAT IS TYPICALLY NOT HOW IT IS DONE.
- ACTUALLY, IT IS DONE THAT WAY FOR MANAGING EXPORTS. THIS IS ESSENTIALLY A BROADENING OF THAT CONCEPT TO ADDRESS OTHER FACTORS THAT COULD HAVE CAUSED THE DECLINE. THE PRIMARY REASON TO LINK THEM IS TO EXPEDITE IDENTIFICATION OF PROBLEMS AND SOLUTIONS IF APPROPRIATE.

- IS IT POSSIBLE TO TURN THESE DATA AROUND IN 2-3 WEEKS?
- YES, BUT THIS WILL REQUIRE CAREFUL ORGANIZATION OF SAMPLE COLLECTION, TRANSPORT, & ANALYSIS, & TRANSMISSION OF RESULTS.
- HAS ANY PLANNING BEEN DONE FOR SUCH A PROGRAM?
- YES. CALFED HAS APPROVED A VERSION OF THE MONITORING COMPONENT, BUT IT HAS NOT YET BEEN FUNDED. ALL OF THE ANALYTICAL TESTS HAVE BEEN DEVELOPED.

- WILL ENOUGH FISH BE PRODUCED FOR ANALYSIS BY ROUTINE SAMPLING?
- INITIALLY, YES, AS THE PROGRAM GETS STARTED. THE NEED FOR AND CONSTRAINTS ON OBTAINING ADDITIONAL FISH WILL HAVE TO WORKED OUT AS THE PROGRAM PROCEEDS.
- WHAT IF THE DATA ANALYSIS GROUP NEEDS MORE INFORMATION?
- THAT GROUP WOULD RECOMMEND SPECIAL SAMPLING TO FILL SUCH NEEDS, & THE ACTION IMPLEMENTATION GROUP WOULD APPROVE THOSE RECOMMENDATIONS.

- COULD THIS INFORMATION INCLUDE DATA ON THE IDENTITY, LOCATION, & CHARACTERISTICS OF DISCHARGES OR OTHER FACTORS?
- YES, IF SUCH INFORMATION WERE NECESSARY TO FORMULATE REMEDIAL ACTIONS.

- THIS PROGRAM SEEMS TO ANTICIPATE RAPID REMEDIAL ACTION. WHY, & WHAT IF SUCH SPEEDY ACTION IS NOT POSSIBLE, GIVEN THE LEGAL REQUIREMENTS FOR ACTION?
- THE REASON FOR RAPID REMEDIAL ACTION IS THE VERY LOW ABUNDANCES OF SMELT. INDIVIDUAL AGENCIES WOULD DECIDE WHETHER INDIVIDUAL REMEDIAL ACTIONS WERE NECESSARY & POSSIBLE, ON AN EXPEDITED BASIS OR NOT, BASED ON THE LEVEL OF THREAT AND THE STATUS OF THE SMELT. AFTER DISCUSSION WITHIN THE ACTION IMPLEMENTATION GROUP.

▪ THIS SOUNDS LIKE THE SAME PROCESS, ALBEIT EXPANDED IN SCOPE, THAT WE ALREADY HAVE FOR MANAGING EXPORTS, WITH THE DATA ANALYSIS GROUP INSTEAD OF THE DATA ASSESSMENT TEAM & DELTA SMELT WORK GROUP, & THE ACTION IMPLEMENTATION TEAM INSTEAD OF THE WATER OPERATIONS MANAGEMENT TEAM, CORRECT?

▪ CORRECT.

▪ COULD THE PROGRAM BE EXPANDED TO DEAL WITH OTHER FACTORS, SAY, IN-DELTA DIVERSIONS?

▪ YES. THE ACTION IMPLEMENTATION GROUP COULD DECIDE TO INCLUDE MONITORING, ANALYSIS, AND ACTIONS DIRECTED AT OTHER FACTORS.

▪ COULD THIS EFFORT BE MERGED WITH THE ONGOING REAL TIME PROGRAM DIRECTED AT EXPORTS?

▪ YES. BECAUSE OF AGENCY OVERLAP, SOME COORDINATION OF THE TWO PROGRAMS IS INEVITABLE. MERGING THEM WOULD ALSO BE A FUTURE POSSIBILITY.

- WHEN COULD WE START?
- ON A PRELIMINARY BASIS, ANY TIME, CONTINGENT ON SOME INITIAL FUNDING FOR ANALYSIS. CREATION OF THE ACTION IMPLEMENTATION GROUP COULD PROBABLY BEST BE DONE BY A SIMPLE MEMORANDUM OF AGREEMENT. THEN, THE ACTION IMPLEMENTATION GROUP WOULD HAVE TO APPOINT MEMBERS OF THE DATA EVALUATION GROUP. OF COURSE, AGREEMENTS WOULD BE NECESSARY TO ENSURE THE RAPID, QUALITY-CONTROLLED ANALYSIS & TRANSFER OF SAMPLES & PROCESSING & TRANSFER OF DATA.

- WHERE WOULD ANALYSES BE DONE?
- AT EXISTING LABORATORIES, SOME WITHIN THE AGENCIES AND SOME BY UNIVERSITY LABORATORIES.
- WHAT ABOUT STAKEHOLDERS? HOW WILL THEY PARTICIPATE?
- THEY COULD BE MEMBERS OF THE DATA EVALUATION GROUP. THE ACTION IMPLEMENTATION TEAM WOULD DECIDE HOW OTHER PARTICIPATION BY STAKEHOLDERS AND THE PUBLIC COULD BE ACCOMMODATED.

PROVISIONS OF THE MEMORANDUM OF AGREEMENT CREATING THE PROGRAM

- SIGNATORIES: THE STATE AND FEDERAL AGENCIES LISTED EARLIER
- APPOINT REPRESENTATIVES FROM THEIR AGENCIES WITH AUTHORITY TO ACT AS CONTEMPLATED BY THIS AGREEMENT
- APPOINT MEMBERS OF THE DATA ANALYSIS GROUP
- MEET REGULARLY AND ACT ON RECOMMENDATIONS OF THE DATA ANALYSIS GROUP AND OF PARTICIPATING AGENCIES
- DISCUSS AND ATTEMPT TO CONCUR ON HOW TO USE EXISTING AUTHORITIES TO IMPLEMENT REMEDIAL ACTIONS
- ADMINISTER DISPERSALS FROM THE ACTION INCENTIVE FUND FOR COLLECTION OF INFORMATION AND IMPLEMENTATION OF REMEDIAL ACTIONS
- PROVIDE FOR STAKEHOLDER AND PUBLIC INPUT TO DECISION-MAKING PROCESS