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VIA ELECTRONIC MAIL AND CERTIFIED US MAIL

December 7, 2006

Tam Doduc, Chairperson  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814



**Re: 12/13/06 BOARD MEETING - Comments on Revised Draft 2006  
Water Quality Control Plan for the San Francisco Bay/Sacramento-  
San Joaquin Delta Estuary**

Dear Chairperson Doduc:

These comments are submitted on behalf of the San Joaquin River Group Authority ("SJRG") in response to the Revised Draft 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Plan"), issued November 29, 2006.

**1. The San Joaquin River Spring Flow and Pulse Flow Objectives in the 1995 Plan Were Products of Negotiation and Compromise, Not Science.**

The SWRCB notes that the recommended changes in the San Joaquin River Spring Flow and Pulse Flow Objectives were not substantiated by sufficient scientific information. (Revised Draft 2006 Plan, p 7.) However, the flow objectives called for in the Revised Draft 2006 Plan are totally without scientific justification. They are the result of a negotiation and compromise and were never subject to scientific peer review or analysis. Therefore, the following sentence should be added after the second sentence on page 7:

"However, the San Joaquin River flow objectives in the 2006 Plan were adopted, unchanged, from the 1995 Plan, which adopted the San Joaquin River flow objectives with no scientific basis. Further study must therefore be conducted to develop the scientific knowledge necessary to develop, establish, adopt, and eventually implement adequate flow objectives."

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Similarly, on page 24, the sentence "Additional data and scientific analyses are needed to either support or modify the current spring flow objectives" should be modified to read, "Additional data and scientific analyses are needed to either support or modify the current spring flow objectives, which lack any scientific basis."

The SWRCB has requested a peer review of the VAMP, but the VAMP was the subject of an informal peer review when it was developed.<sup>1</sup> It was not created in a vacuum by the San Joaquin irrigation districts. It was a collaborative effort by scientists, biologists, and statisticians from EPA, FWS, DFG, environmental organizations, universities, and water users.<sup>2</sup> The SJRA was also the subject of an evidentiary hearing, wherein testimony was under oath and subject to cross-examination. While the 2006 Plan is a quasi-legislative process, any "evidence" submitted to change the San Joaquin River Spring Flow and Pulse Flow Objectives or the VAMP, whether scientific or otherwise, should therefore receive a higher level of scrutiny than is typical in quasi-legislative processes.

Finally, the SJRA is an agreement. The SWRCB is not a party to the agreement and cannot change the terms of the agreement. Notwithstanding the SWRCB's process, the agreement contains provisions for modifying the SJRA and the VAMP.

**2. The Program of Implementation for the Southern Delta Water Quality Objectives Should Emphasize the Permit Terms Imposed upon the US Bureau of Reclamation in Water Rights Decision 1641.**

Regarding "Agriculture in the Southern Delta", on page 28, paragraph v, the Bureau's legal obligations should be emphasized, consistent with the State's position in amicus briefing in *Stockton East Water District, et al. v. United States* (United State Court of Federal Claims, Case No. 04-541 L). That paragraph should therefore read:

"The water rights of the DWR and the USBR are conditioned upon implementation of the southern Delta salinity objectives to protect agricultural beneficial uses. In Decision 1641, the State Board specifically stated that the "[USBR] shall, at all times, meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis. (D-1641, p 161.) The State Board further indicated that, in the absence of compliance with these salinity... objectives, "no diversion is authorized for consumptive uses." (*Id.* at 162.) Because the requirements of the USBR permits and licenses reflect applicable California law relating to the control, appropriation, use and

<sup>1</sup> In Appendix 1, p61, the State Board mistakenly requests that the "SJRG" conduct a peer review of the VAMP, whereas it should request that the "parties to the SJRA" conduct a peer review. This change will make Appendix 1 consistent with page 7 of the Revised Draft 2006 Plan

<sup>2</sup> For a review of the history of the VAMP see the direct testimony of Morhardt, Brandeis, Herbold, Hanson, and Loudermilk from the SWRCB Public Hearing, 1998 Bay-Delta Water Rights Hearing (July 21, 1998). Also see Exhibits USDI005, SWC002, and DFG013 submitted as part of that hearing. The design of the VAMP experiment was submitted under oath and also subject to a rigorous, multi-day cross-examination.

distribution of water within the meaning of Section 8 of the Reclamation Act of 1902, the United States is obligated to meet these requirements in operating New Melones as a matter of first priority, before delivering any water. (California v. United States (1978) 438 US 645, 674; Central Delta Water Agency v. US Bureau of Reclamation (2006) 452 F.3d 1021, 1026.) Indeed, the CVPIA itself affirms this conclusion, inasmuch as it directs the Secretary of the Interior (acting through the Bureau of Reclamation) to operate the CVP "to meet all obligations under State and Federal law, including but not limited to... all decisions of the California State Water Resources Control Board on applicable licenses and permits for the project." (CVPIA, Pub; L. 102-575, 106 Stat. 4706, Section 3406(b).) Decision 1641 allows the United States to meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis water quality requirements of its permits through means other than New Melones Dam releases, where feasible alternatives are available to the United States. However, the State Board is unaware of any feasible alternative to releases from New Melones Dam that were available to the United States during the 1993-2004 time period that would have satisfied these requirements. (State Water Resource Control Board Cases (2006) 136 Cal.App.4<sup>th</sup> 674, 764.) Since 1995, there have been no exceedances or violations of the Vernalis water quality objectives for agricultural beneficial uses at Vernalis."

**3. Measures Requiring a Combination of State Water Board Authorities and Actions by Other Agencies, Described in the Program of Implementation for the Southern Delta Water Quality Objectives, Should Accurately Describe Whether the Measures Have Actually Been Implemented.**

On page 29, the discussion of the Southern Delta Agricultural Salinity Objectives among "Measures Requiring a Combination of State Water Board Authorities and Actions by Other Agencies" implies that the San Joaquin River Salinity Control Program in the Central Valley Regional Water Quality Control Board's (Regional Water Board) Water Quality Control Plan for the Sacramento and San Joaquin River Basins ("SJR Salt & Boron TMDL") already implements Salinity objectives in the San Joaquin River at Vernalis when in fact the Basin Plan Amendment was only approved by the Office of Administrative Law ("OAL") in August of 2006. Due to its recent approval by OAL and the implementation schedule, it cannot be said that the SJR Salt & Boron TMDL "currently" implements the salinity objective at Vernalis. The third sentence on page 29 should therefore be modified to read:

"Salinity objectives in the San Joaquin River at Vernalis have, since 1995, been implemented through regulated flow releases from New Melones Dam. Non-water right actions by other agencies, such as the Grasslands Bypass Project, West Side Regional Drainage Plan, and the San Joaquin River Salinity

Control Program in the Central Valley Regional Water Quality Control Board's (Regional Water Board) Water Quality Control Plan for the Sacramento and San Joaquin River Basins, may assist in implementing the Salinity objectives in the San Joaquin River at Vernalis as they are implemented."

**4. Participants Should Have the Opportunity to Ask Questions at Workshop Proceedings.**

At workshops, particularly the workshop scheduled for January 30, 2007, participants must have an opportunity to ask questions. In addition, materials should be submitted well in advance of the workshop to allow parties a chance to review them.

**5. Use of the Term "Testimony" in a Quasi-Legislative Proceeding is Inaccurate and Should Not Be Used.**


Throughout the Revised Draft 2006 Plan and its supporting documents, the State Board sometimes refers to materials submitted by the parties to the triennial review of 1995 Plan as "testimony". "Testimony" is defined as "the statement or declaration of a witness under oath or affirmation, usually in court; evidence in support of a fact or statement; proof." This should be changed to reflect that only information, comments, statements, and recommendations were submitted.

**6. Footnote 5 on Page 15, Referring to "San Joaquin River Salinity" is Incorrect.**

The Footnote 5 on page 14, in the "Value" column, as stated in the footnote, only refers to the Suisun Marsh Salinity Control Gates. They have no relation to San Joaquin River Salinity between Jersey Point and Prisoners Point. As a result, Footnote 5 should be deleted from the "Value" column of San Joaquin River Salinity.

Very truly yours,  
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