



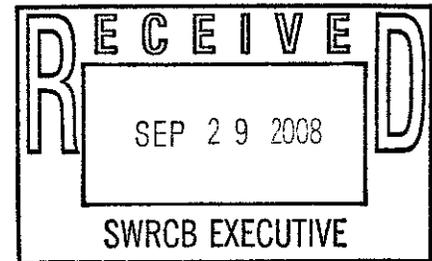
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September 29, 2008

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: Factual Issues Regarding the Bay-Delta

Dear Ms. Townsend:

Through this letter, the San Luis & Delta-Mendota Water Authority, on behalf of its member agencies, Westlands Water District, State Water Contractors, on behalf of its member agencies, and Kern County Water Agency (collectively referred to herein as the "South of Delta Contractors") respond to the State Water Resources Control Board's ("State Water Board") request for written input on factual issues regarding the Bay-Delta.

The South of Delta Contractors recognize the desire of the State Water Board to receive evidence during hearings on Bay-Delta issues, and for each of the issues, to establish the facts, to the extent possible, including statements that the science is as yet inconclusive, when appropriate. The South of Delta Contractors, along with several other parties participating in the State Water Board's workshops, have raised questions regarding manner in which the State Water Board will conduct the hearings. The South of Delta Contractors raise their specific questions in this letter. They also propose additional factual issues that could be the subject of the hearings.

1. Comments on Structure of Hearings

The written and oral statements by members of the State Water Board and its staff have not clearly stated the purpose and affect of the evidentiary hearings, the manner in which the State Water Board intends to conduct the evidentiary hearings, or how it proposes to use the developed information in subsequent proceedings. The California Water Code and the California Code of Regulations identify at least three types of hearings: informal hearings, formal hearings, or investigatory hearings. Because of this uncertainty, the State Water Board must take the time now, prior to

commencing the hearings, to explain the type of hearing it intends to hold and the procedures it will follow. The need for an explanation is greater than simply understanding process.

In order to understand what the State Water Board expects from the parties and what impact the hearings might have on them, and allow them to properly prepare for the hearings, the parties need to understand their legal structure under the relevant regulations and how any findings or statements made at the conclusion of the hearings will affect subsequent State Board proceedings. Since, at the same time, the State Water Board is commencing periodic review of its 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2006 Bay Delta Plan) the South of Delta Contractors assume these hearings primarily are to build the record for that process. However, at this point, it is not clear how the State Water Board might use findings or statements it makes or against whom, if anyone, the findings or statements will be binding. Greater certainty is also needed as to how the evidentiary hearings will relate to or affect other processes, including implementation of a revised 2006 Bay-Delta Plan, the Bay Delta Strategic Workplan, the State's Delta Vision, and the Bay Delta Conservation Plan. Finally, greater certainty is needed to ensure the hearings effectively elicit information. There must be adequate time to prepare direct testimony, review the testimony and exhibits submitted by others, and possibly prepare cross-examination and rebuttal material.

To address these concerns, the South of Delta Contractors recommend the following:

A. Hold these evidentiary hearings only as part of an investigation into issues that could assist the State Water Board with the periodic review of the 2006 Bay Delta Water Quality Control Plan and development of any revisions to that Plan, which is a quasi-legislative action.

B. Assure the parties that the evidentiary hearings are not adjudicatory proceedings (formal or informal) and that any resulting findings or other statements by the State Water Board will have no preclusive effect in any future adjudicatory processes, such as water rights hearings or enforcement actions.

This approach will clarify the purpose of the hearings and limit concerns over the nature and future use of findings or statements resulting therefrom. Also, to avoid potential conflict with other processes and to allow adequate time to prepare cases, the South of Delta Contractors propose that the State Water Board issue a notice for the hearings this fall, but schedule the hearings to begin no earlier than February or March 2009. For planning purposes, it may be appropriate to reserve 5 to 10 hearing dates for each issue or related groups of issues.

2. Proposed, Additional Factual Issues

The South of Delta Contractors propose the following, additional factual issues on which the State Water Board might hold an evidentiary hearing.

A. The State Water Board's August 28, 2008, request for written input on factual issues includes, as one of the issues, the biological benefits, if any, of requiring fish screens on the numerous in-Delta unscreened diversions. To ensure that the evidence is sufficiently definite to analyze the magnitude of the issues and where effort should be directed, the evidence should provide data on:

- i. The Number/location of in-Delta diversions;
- ii. The number of those diversions that are screened;
- iii. The quantity of water diverted at in-Delta diversion points and the timing of those diversions.

The South of Delta Contractors believe that the biological impacts (including impacts on abundance) of in-Delta diversions is already encompassed in the State Water Board's notice that it will consider the potential benefits of fish screens.

B. While the State Water Board's August 28, 2008, request included a topic of sources of salt, it did not explicitly describe the breadth of this inquiry. The South of Delta Contractors believe that the issues listed in paragraphs A(i), A(ii) and A(iii), above, are also relevant to this issue. The sources of salt inquiry should be broadened to explicitly include the following topics, some of which may also be relevant to the impact of Delta diversions and water use on fishery resources.

- i. The Number/location of in-Delta discharges;
- ii. The Quality of water discharged by in-Delta dischargers;
- iii. Biological impacts (including impact on abundance) of in-Delta discharges;
- iv. Impacts of in-Delta diversions and discharges on water quality downstream of Vernalis.

C. The South of Delta Contractors believe that past Bay-Delta regulatory actions have not sufficiently considered the relative magnitude of impacts on fishery resources caused by Central Valley Project and State Water Project operations as contrasted with other stressors. In the August 28, 2008, request, the State Board began

to recognize these other stressors when it included in its basic list ammonia and other toxics. The South of Delta Contractors support these inclusions. However, the recent science has begun to identify other stressors, some of which may be of such overriding significance that other potential regulatory actions would provide little, if any, benefit to the target species. Some of these stressors include ocean conditions, the increasing populations of predators such as large mouth bass, increasing water temperatures, and the exotic clam species and how they affect the lower trophic levels of the food chain. With these factors in mind, the South of Delta Contractors believe the following should be included in any fact finding process:

- i. Biological impacts (including impact on abundance) of in-Delta Central Valley Project and State Water Project diversions;¹
- ii. Biological impacts (including impact on abundance) on changes in in-Delta water temperature;
- iii. Biological impacts (including impact on abundance) on changes in in-Delta water turbidity;
- iv. Biological impacts (including impact on abundance) of endocrine disrupting compounds;
- v. Biological impacts (including impact on abundance) of in-Delta channel dredging;
- iv. Sensitivity to biological resources of changes in net outflow;
- v. Sensitivity to biological resources of changes in the Export/Inflow ratio;
- vi. Biological impacts (including impact on abundance) of Suisun Marsh salinity standards and operation of the Suisun Marsh control gates;
- vii. Food chain impacts of invasive species, ammonia, toxics, water temperature, and other factors;
- viii. Impacts of non-native predators on native species of concern.

¹ The South of Delta Contractors recognize that the State Water Board must consider the impacts of the Central Valley Project and State Water Project as a part of any investigation on relative impacts from all sources. The South of Delta Contractors are prepared to present evidence on the latest studies on the impacts of Central Valley Project and State Water Project operations.

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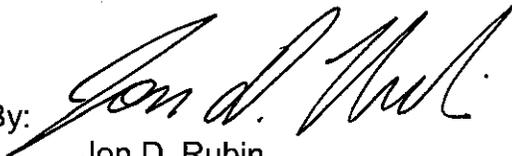
This list is addition to the items listed in paragraphs A and B above that are related to biological stressors. In addition, this list should be considered exemplary of the types of interrelated scientific subjects that the State Water Board must address and consider before it can develop a plan or program that can effectively balance and protect all beneficial uses in the Bay-Delta system.

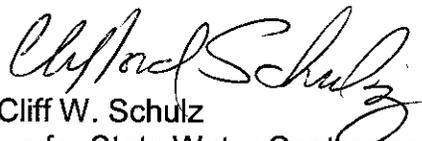
Thank you very much for your consideration of these comments.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

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