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State Water Resources Control Board
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RE: Submittal of Testimony at the SWRCBs Fifth Public Workshop to Review Standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, September 1, 1994. ■ SWRCBS94

Subject of Workshop:

"The State Water Resources Control Board (SWRCB) is convening this workshop to seek comments and recommendations regarding standards for the San Francisco Bay/Sacramento-San Joaquin Estuary (Bay-Delta Estuary or Delta)."

Members of the Board and Workshop Participants:

I appreciate the opportunity to participate in this workshop to review water quality standards for the Bay/Delta Estuary. While I am aware of the amount of time an effort that this Board has expended since 1987, on the review and establishment of much needed and more stringent water quality standards, I must concede that I am disappointed at the Wilson Administration and this Board's failure to adopt standards.

I am not overly optimistic that these workshops or additional evidentiary hearings will facilitate action by the Wilson Administration and/or this Board to fulfill its mandate to protect the Bay-Delta Estuary and water right holders in the counties of origin, which includes the Delta.

For the record, I am compelled to state that I have even less faith in the so-called "Frame Work Agreement" that was recently adopted by the various federal and state agencies. I have had the opportunity to discuss the substance, intent and the force of this agreement with officials from the government that were involved in composing the agreement. In so doing, I have verified the fact that the agreement does not address policy issues and there are no enforcement provisions in the agreement. Simply stated, the purpose of the agreement is to provide the framework for the various agencies to work together. I respectfully submit that they have had a forum and more than ample time since 1987 to "work together," which the official record shows has been to no avail.

The only entities that "may" have been impressed with the framework agreement are the bonding and investment firms in San Francisco and Wall Street. I can assure this Board that I am not impressed. As a matter of fact, I can see that this agreement can lead to additional delays and false hopes.

Nevertheless, for the sake of discussion, let us "assume" that the agreement "may" bear fruit somewhere down the line. I do not see where consummation of the framework agreement is legally required or needed for this Board to proceed with the actual establishment and/or implementation of water quality standards that are so desperately needed to protect the Bay-Delta Estuary. The mechanism for this Board to adopt the necessary standards already exist by virtue of federal and state laws.

Furthermore, this Board not only has the authority to set the standards, both the U.S. Bureau of Reclamation and the California Department of Water Resources, alone, are mandated by law to meet the Board's water quality standards for the Bay-Delta Estuary.

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As a matter of fact, the USBR and DWR both willingly and graciously agreed to meet any such water quality standards adopted by the Board when they supported H.R. 3113. When they agreed to support this legislation, there was no mention of any upstream diverters having to contribute their "fair share" to meet the water quality standards adopted by the Board. These agencies agreed to meet the standards solely on their own accord, without participation of the upstream diverters.

Furthermore, the terms and conditions contained in the water rights permits issued by the Board to the USBR and DWR specifically stipulate that these agencies will provide water to meet water quality standards adopted by this Board.

Albeit, that the "Racannelli Decision" stipulates that upstream diverters should provide water to meet the standards, and that is an issue that this Board may feel compelled to deal with at some point in time; nevertheless, it is important to remain cognizant of the fact that federal law supersedes state law. In addition, the provisions contained in H.R. 3113 have been recently reinforced by H.R. 429, P.L. 102-575.

If Governor Wilson or this Board are sincere about wanting to provide protection for the Bay-Delta Estuary, then I respectfully suggest it adopt the required water quality standards that will assure the long-term viability of the Estuary. Once again, the law is quite clear that both the USBR and DWR are required to meet Board standards. Those agencies are the major diverters of water from the Delta, and they have publicly acknowledged that their respective water projects and diversions from the Delta have had a significant adverse impact on the Bay-Delta Estuary. The Board already has the necessary data to substantiate the aforementioned facts; therefore, in light of this knowledge, both DWR and the USBR should provide all of the water that is required to meet any new standards the Board adopts. The amount of water each project provides can be based on a similar ratio that is contained in the Coordinating Operating Agreement or by some other comparable formula. Such an action by this Board would provide for the immediate implementation of protections essential for the sustainability of the Bay-Delta Estuary and would negate the need for any further delays.

On the surface, this recommendation may "appear" to place an additional burden on the State Water Project (SWP) and the federal Central Valley Project (CVP); however, such an action is within the purview of the Board's authority. Once the Board has taken such an action, it could then proceed to hold the necessary hearings with other upstream diverters, if it deems it necessary, to determine how much water, if any, these diverters should be required to provide to meet the new standards. If the Board believes that it has the authority to impose such conditions, and is somewhat certain that it will be successful in requiring upstream diverters to provide water, then it could solicit their voluntary participation to meet the standards in advance of what may turn out to be a long and protected hearing process and years of litigation.

Upstream diverters that are reluctant to provide water on a voluntary basis, could be advised that if the Board is successful in compelling them to release water to meet standards, that they may also be required to retroactively make good for any water that either of the projects would have had to release to meet the standards, which would have been the responsibility of upstream diverters. In essence, it would be a kind of de facto water bank.

As a member of the public -- fully cognizant of the fact that neither the USBR nor the DWR "own" the water they have permits to use -- I expect the SWRCB to act expeditiously to enact water quality standards that are mutually beneficial for the enhancement of public trust resources and not just to perpetrate the fortune of the vested interests.

With the aforementioned thoughts in mind, I am formally requesting a reply from the Board regarding the legality of implementing my recommendation. Specifically, I want to know if the Board acknowledges the fact that it has the authority to adopt more stringent Bay-Delta water quality standards forthwith that both the SWP and the CVP would be required by law to meet, regardless of what upstream diverters' contributions may or may not be to meet the standards, and, if it does have the authority, why it has not done so. I am anxiously awaiting your reply. Thank you.