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DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

REPLY TO
ATTENTION OF

23 June 2004

Construction-Operations Division

Mark Gowdy
California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

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JUN 24 AM 9:08

Dear Mr. Gowdy:

The US Army Corps of Engineers (USACE) has prepared the attached written comments on the Draft Basin Plan Amendment for the Control Program for Factors Contributing the Dissolved Oxygen (DO) impairment in the Stockton Deep Water Ship Channel (DWSC). We appreciate the opportunity to comment on the draft staff report.

If you have any questions, please contact Ms. Monica Eichler at (916) 557-5318.

Sincerely,

Michael Mahoney
Chief, Construction-Operations Division

Attachment

cc:

Ken Harris, State Water Resources Control Board, Division of Water Quality,
TMDL Section, 1001 I Street, Sacramento, CA 95814

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COMMENTS ON BASIN PLAN AMENDMENT FOR THE CONTROL PROGRAM
FOR FACTORS CONTRIBUTING TO THE DISSOLVED OXYGEN IMPAINMENT
IN THE SOCKTON DEEP WATER SHIP CHANNEL

1. To the extent that the proposed TMDL purports to regulate the activities of the United States Army Corps of Engineers (USACE) relating to the maintenance of the Deep Water Shipping Channel (DWSC) at times and places other than those specifically related to DWSC channel maintenance activities (maintenance dredging), the proposed rule is arbitrary and capricious and is without rational basis.
2. To the extent that the proposed TMDL purports to regulate dissolved oxygen depletion resulting from the DWSC's configuration, rather than from the specific activities associated with USACE channel maintenance activities, e.g., the actual dredging operations themselves, such regulation is unconstitutionally overbroad and unduly burdensome.
3. To the extent that the proposed TMDL purports to regulate dissolved oxygen depletion resulting from the DWSC's configuration, rather than from the specific activities of the USACE during channel maintenance, application of such rule to USACE Channel maintenance activities exceeds the waiver of sovereign immunity found in Section 404(t) of the Clean Water Act.

Discussion:

It is a well-understood and long documented phenomenon that there is a relationship between the dissolved oxygen in a stream and the depth, width, and velocity of stream flow in that stream. The dissolved oxygen demand that the proposed TMDL purports to regulate, with respect to the Deep Water Shipping Channel in the San Joaquin River, derives from the configuration of the river, not from the maintenance dredging activities of the USACE. A small amount of oxygen demand may result directly from the activities involved in dredging, but the proposed TMDL seeks to saddle the Corps of Engineers with the demand that is a result of the geometry of the DWSC itself. See attached technical comments for further detail.

These rules, in the guise of attempting to regulate DWSC maintenance activities, actually seek to regulate the DWSC itself. At least since the time of the last deepening, it was recognized that dissolved oxygen in the San Joaquin River would be reduced as a result of the configuration of the Channel. Assuming, for the sake of argument, that the reduction in dissolved oxygen stemming from the existence of this Channel may be regulated by the Board, such regulation should have been imposed upon the Port of Stockton or other interested state parties at the time the Channel was constructed or most recently deepened. Indeed, had such a requirement been suggested at the time of the most recent environmental impact statement, alternatives, including aeration, to mitigate this problem could have been included in project planning and studied from the beginning. These activities could have been considered whether or not the Board had the authority to impose the requirement by regulation.

Instead, the Board now chooses to propose studies and a mitigation requirement, which have a rational relationship only to the existence of the Channel and not to its ongoing maintenance. Such requirements are inherently arbitrary and capricious as applied to ongoing maintenance. Further, the imposition of these requirements is unduly burdensome to the maintenance activities and places the burden for the existence of the Channel on its maintenance.

Moreover, the USACE is a federal agency. The waiver of sovereign immunity applicable to its dredging activities is found in Section 404(t) of the Clean Water Act. That waiver provides:

“Nothing in this Section shall preclude or deny the right of any state or interstate agency to *control the discharge of dredged or fill material* in any portion of the navigable waters within the jurisdiction of such state, including any activity of any federal agency, ...” [emphasis added].

On its terms, the waiver of sovereign immunity is limited to “the discharge of dredged or fill material”. It is well established by the United States Supreme Court that waivers of sovereign immunity are to be construed strictly. In this case, the waiver of sovereign immunity is limited to the discharge of dredged or fill materials. It is outside the scope of a waiver of sovereign immunity to consider the long-term ongoing effect of the shape of the Channel and to impose any form of requirements related thereto.

As noted above, further technical comments are attached to these comments as an exhibit.

EXHIBIT 1 - TECHNICAL COMMENTS

- The Clean Water Act established TMDLs to determine what loads had to be reduced in order to recover the assimilative capacity of a water body. In light of that purpose, the Board should focus on eliminating loads. In this regard, the Draft is not clear if the allocation for the Stockton Regional Water Control Facility is reached after its ten-fold reduction in oxygen absorbing ammonia discharges or not, but presumably it is after this reduction because otherwise the multiple tens of thousands of pounds per day of oxygen demand it creates is not fairly reflected by its fractional allocation of one of the three major factors contributing to the DO impairment.
- Past efforts at modeling the DWSC are based on the premise that it is 500 feet wide at the beginning and 1000 feet wide at Turner Cut. The DWSC only consists of the depression dug into the center bottom of the 500 to 1000 foot wide channel, which was made that wide by forces other than the USACE. The influence of the USACE activities on the DWSC geometry is just a percentage of the depth and breadth caused by others.
- The requirements the Board seeks to impose on the USACE are not identifiable with the maintenance activities of the USACE nor is there any congressionally authorized project that would fund the USACE to perform a study to evaluate the DO impairment caused by maintenance dredging. All past projects on the DWSC were done in compliance with existing law and received regulatory approval.
- The Draft does not apportion loads on a scientific basis according to the peer review comments of Dr. Hermanowicz nor even correctly according to the peer review comments of Dr. Stacey. The Board should produce a scientific allocation of the load not a social and political one as characterized by Dr. Hermanowicz.
- The parameters used in the Chen & Tsai computer model on which the Board bases its conclusion that the channel geometry of the DWSC is an independent cause of low DO levels are not disclosed; therefore, it is not possible for the USACE to comment on the validity of that conclusion.
- The Draft states that currently a multi-dimensional computer model is being constructed of the DWSC. This effort proceeds without any knowledge on the part of the USACE of what parameters are being incorporated into the model and is objected to on that basis.
- The influence of the Stakeholders' report, as recognized by the Draft, is seen in the Draft's schedule and the fact that its adaptive features apply only to "oxygen demanding substances." The result is that the effects of upstream loads, presumably the responsibility of the stakeholders, will be determined last, only after all other allocations have been determined and perhaps after the DO concern has been alleviated. This is not equitable and the Board should place all parties on the same time schedule and provided that all factors are to be the subject of adaptive management.