

Memorandum

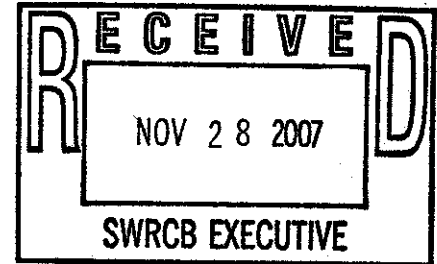
12/4/07 Bd. Mtg. Item 18
SF Bay/Sac Delta Estuary
Deadline: 11/28/07 by Noon

Date: November 28, 2007

To: Tam M. Doduc, Chair
State Water Resources Control Board
Division of Water Rights
1001 I Street
Sacramento, California 95814

From: Department of Water Resources

Subject: DWR comments on the SWRCB's proposed Resolution
"San Francisco Bay/Sacramento-San San Joaquin Delta Estuary"
Board meeting scheduled December 4, 2007, Agenda Item 18



The Department of Water Resources (DWR) has reviewed the proposed State Water Resources Control Board Resolution specifying actions the Water Boards will take to protect beneficial uses of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Although DWR supports the Water Board's strategy intended to improve the Bay-Delta, the Resolution as written appears overly broad in scope given the proposed schedule for actions. Implementing the associated work plan will require a tremendous amount of staff support, funding and time, not only for the Boards but also for the same parties intensely focused on the Delta Vision, the Bay-Delta Conservation Plan (BDCP), and the POD studies. DWR is concerned that the Boards' process to develop and, more importantly, implement the work plan will compete with these other processes and reduce the support required for these efforts to meet their objectives. DWR recommends the scope of the work plan be narrowed to focus on elements that are not being sufficiently addressed in existing forums.

Below are DWR's general comments related to the Resolution. Attached are specific comments on the Resolution to help clarify and add information that may assist the Board in developing a strategy to carryout its goals.

General Comments

DWR continues to support and encourage the Board to work closely with agency staff, consultants and advisory groups in the development of the BDCP and, as a governing agency, implementing a Delta Vision. The Delta Vision Taskforce will provide a draft Vision this month and will develop their strategic plan for implementation throughout next year. The BDCP Steering Committee is working on the development and scientific review of conservation alternatives in the Delta to protect endangered species. It is anticipated the Steering Committee will complete a conservation plan by the end of 2008 and begin environmental review

of various conservation alternatives. Additionally, CalFed continues to fund programs and provide educational workshops covering many of the issues addressed in the proposed Board Resolution.

This year the Board held public workshops where agency scientists presented information identifying multiple causes for the decline of pelagic fish species in the Delta. The proposed Resolution incorporates this information in paragraphs 12 through 16 with a separate emphasis on toxicity and pollutant issues. DWR supports the Board's attention to these issues and to monitoring and studying TMDLs as specified in the proposed Resolution, including those additional efforts that may produce better data for the Board's analysis and strategy. As stated in Resolution 8, the Board recognizes the need to require characterization of discharges to and from Delta Islands for water quality purposes. DWR believes that this fact-finding step should be given high priority.

The proposed Resolution concludes on page 9 that the Board will initiate public trust proceedings to: (1) consider the protection of public trust resources and the balancing of the competing demands for water in and from the Bay-Delta; and (2) evaluate the reasonableness of the State Water Project's (SWP) and Central Valley Project's (CVP) method of diversions from the Delta. This balancing and evaluation of water project operations is the current undertaking of the BDCP. Supporting that process, DWR and other agencies have dedicated staff and resources to inform, gather data and assist the Steering Committee with the development of a conservation plan to address these very same goals. In addition, the same staff and resources are focused on developing actions to minimize the impacts of water project operations to the delta smelt, salmon and steelhead species to be incorporated into the revised biological opinions for the SWP and CVP. To adequately participate in a public trust hearing for this Board would require reassigning staff and resources away from these current efforts. If a hearing were set, it would undoubtedly delay the progress and completion of the BDCP and possibly the various studies and projects designed to improve Delta fisheries and address water quality issues, including salinity.

Conclusion

The Department recognizes that the State Water Board and the Regional Boards have continuing important roles in the development of a strategy and plan to help the Delta. The Board has the authority and resources needed to focus on identifying and regulating water pollution and local diversion effects. Developing and implementing a work plan to address specific elements of pollution would

Tam M. Doduc, Chair
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significantly contribute to understanding the components, quantities and effects pollutants have on the ecosystem and public health in the Delta. Although a challenging area, such action could lead to improved management of the Delta. In addition, the development of a Board strategy for 2008 that both provides continued participation with the Delta Vision and the BDCP and focuses on issues outside of these forums would contribute to a holistic approach for improving Delta water quality and water right activities.

DWR appreciates the opportunity to provide these comments. If the State Water Board would like additional information on the above, please contact Paul Marshall, Principal Engineer with the Bay-Delta Office (916) 653-7247 or Michelle Morrow, Senior Staff Counsel at (916) 653-7352.



Cathy Crothers
Assistant Chief Counsel
(916) 653-5613

Attachment

Attachment

Department of Water Resources Specific Comments to the SWRCB Proposed Resolution

Below are DWR's Specific comments to the SWRCB's proposed Resolution "San Francisco Bay/Sacramento-San Joaquin Delta Estuary", Agenda Item 18, to be discussed at the Water Board meeting scheduled December 4, 2007. The specific comments are referenced to the paragraph number of the finding or item of the proposed Resolution and to page numbers.

Finding 4. (page 3)

The Department of Fish and Game, U.S. Fish and Wildlife Services and National Marine Fisheries Service are not signatories to the planning agreement but serve as advisory agencies assisting the Steering Committee with the planning and development of a NCCP and HCP for delta water operations.

Finding 10 and 11. (page 4)

In May 2007, DWR requested the Water Board modify the schedule of implementation for the permanent operable barriers identified in ORDER WR 2006-0006 issued against DWR and USBR. The Board has not published a notice of the requested modification. DWR staff continue to work with Board staff in studying issues related to southern Delta water quality. In that regards, DWR supports the Board's commitment to review available data to determine all contributing factors to increased salinity in the South Delta. In addition, DWR refers the Board to the attached September 11, 2007, letter to Vicky Whitney concerning Joint Points of Diversion and the southern delta salinity objectives.

Finding 19 (page 6)

The IEP has expanded its scope to coordinate the Delta research, monitoring and analyses as needed to meet the needs of all its participating agencies. During this last year, the SWRCB and Regional Boards have increased their staff participation to coordinate some of their toxic studies with the POD research.

Finding 21, third bullet (page 7)

DWR is unaware of any evidentiary reports from DFG linking south Delta fish kills solely with the presence of the temporary barriers.

Finding 21, fourth bullet (page 7)

In addition to the salinity TMDL upstream of Vernalis, the Water Boards should embark on a TMDL process for salinity in the Delta below Vernalis. The Water Board's current schedule to work on this TMDL in 2011 is inadequate.

Finding 23 (page 7)

Toxicity events noted in Finding 23 should also be mentioned in the first bullet of Finding 22 in so far as these events may be linked to pesticides used in replacement of the OP pesticides.

Resolution, Item 3 (page 9)

Actions 1-3 are premature until the processes started to further characterize these issues are complete. The CV-SALTS process must develop its program before the Board decides to implement the program sight unseen. DWR's request for modifying the time schedule for implementing the permanent barriers in the Cease and Desist Order 2006-0006 has not yet been noticed. The Board could develop a reasonable time schedule based on required permitting for such an action. Enforcement of salinity objectives is premature until the Water Board's review of southern delta salinity is completed, including the study by the consultant the Board has hired to evaluate agricultural water quality needs. .

Resolution Item 7, (page 10)

Other monitoring efforts of all dischargers within the watershed should also be brought into this comprehensive monitoring program.

Resolution Item 9, (page 10)

It is our understanding that this study has been developed in coordination with the IEP's POD coordination group. The resolution might indicate that the SWRCB will implement the study in coordination with the POD investigation.

Resolution Item 11, (page 10)

As stated previously, the Water Boards should embark on a TMDL process for salinity in the Delta below Vernalis.

Resolution Item 12, (page 11)

Because some pesticides are toxic below their detection threshold, data on contaminants must also include the Pesticide Use Reporting in addition to ambient water quality monitoring. Real-time data on pesticide use should be posted on a website for scientists to correlate toxicity events quickly and possibly sample for specific pesticides.

Memorandum

Date: SEP 11 2007

To: Vicky A. Whitney, Division Chief
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, California 95814

From: Department of Water Resources

Subject: Southern Delta Water Quality Objectives for Agricultural Uses and Joint Points of Diversion

I am responding to your letter, dated August 21, 2007, regarding joint point operations under Decision 1641(D-1641) and the potential exceedance of interior South Delta agricultural objectives. I want first to reiterate our appreciation of the time and effort the State Water Resources Board (SWRCB) staff is spending in working with the Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) to assure compliance with D-1641 and the public purposes it serves. We also appreciate your acknowledgment and understanding of the interest we share in securing adequate water supplies at a time when the system is under great stress from the dryness of the year and the extraordinary measures that have been and may be needed to protect threatened and endangered species in the Delta.

On the specific question of project responsibility under joint point operations, and the suggestion that DWR and Reclamation do not concur with the SWRCB's assessment of the requirements of D-1641, I do not believe we really are in disagreement with you. It seems that we may be falling back into the false conflict we experienced earlier that was caused by a difference in the use and interpretation of regulatory terminology rather than by a substantive difference with intent and ultimate effect of D-1641. It is helpful to turn to the clarifications provided in Executive Director Cantu's letter of October 13, 2006, to Director Snow on how to address the compliance/ enforcement issues involved in South Delta salinity. We think that whether the diversions are normal water right diversions by the CVP and SWP or they are joint point diversions by these same projects, the salinity issues are the same. We believe the constructive observations and substantive processes outlined by Ms. Cantu on South Delta salinity objectives in general are fully applicable to the matters you raise on the use of joint points of diversion (JPOD) allowed under D1641.

Three important points in Ms. Cantu's letter are particularly relevant to the JPOD issue. The first is that enforcement under D-1641 is appropriate if the exceedance was caused by actions within the reasonable control of the SWP or CVP; and, conversely, enforcement should not be taken against the SWP or CVP where the

exceedance was caused by actions beyond the SWP's or CVP's reasonable control. DWR will properly and fairly be held responsible for those actions for which it is responsible. To our view, this is the test applicable to joint point operations as well: if salinity exceedances being experienced in the South Delta are not being caused by actions under the reasonable control of DWR and/or Reclamation, including during the exercise of JPOD, then there is no reason to curtail DWR/Reclamation JPOD operations. The issue and the concern are the effects of Project operations on achieving the salinity objective, not what label happens to be on the water involved in those operations.

Second, Ms Cantu's letter refers to all parts of the South Delta compliance in Condition 6. It restates that DWR and Reclamation are to develop a report if an exceedance occurs and the Executive Director is to evaluate that report to determine if the exceedance was caused by actions that are beyond the reasonable control of DWR and Reclamation. Later Ms. Cantu's letter emphasizes that use of JPOD is conditioned on meeting the terms and conditions of our water rights by saying ". . . DWR and USBR are authorized to use each others points of diversion, provided that DWR and USBR operate pursuant to water right conditions in their permits and licenses, including the applicable response plans(s) required by D-1641." This language was carefully crafted and importantly did not specifically mention the achievement of the 0.7 EC objective in Condition 6. The appropriate interpretation of this language as it relates to Condition 6 is that if the Condition 6 South Delta objectives are not being met, and a report by DWR and USBR is filed explaining that the non-compliance is beyond the reasonable control of the two projects, and the SWRCB Executive Director agrees, then the DWR and USBR are "operating pursuant to the water right conditions" and the JPOD is allowed.

The third important point in Ms. Cantu's letter is the recognition that a review of the salinity requirements and responsibility for salinity effects in the South Delta is necessary and that an amendment of the Water Quality Control Plan and/or D-1641 then needs to be considered. This is particularly important in light of the direction from Judge Robie in the 2006 decision in the SWRCB to conform the setting of water quality objectives in the water quality control plan and the plan's program of implementation. Actual implementation of the objectives--whether through water rights or otherwise--should then be consistent with that program. In addition, as requested in our meeting August 17th, I have asked Paul Marshall to work with your staff in a review that includes interested parties to assess the current water quality objectives for the South Delta. We look forward to a technical review of these objectives and will assist in funding such a effort.

Victoria A. Whitney

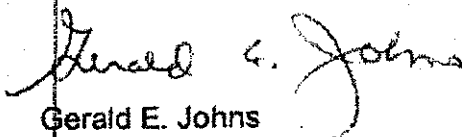
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On the other specific matter in your letter regarding what feasible measures may exist for increasing San Joaquin River flows, that is a question best left to Reclamation which has facilities on the San Joaquin system and which, I understand, is currently preparing that information for you. I would like to note that DWR has been assisting the Reclamation in the water recirculation efforts to increase flows into the southern Delta.

You also referred to the significant JPOD activities DWR and Reclamation have been engaged in this summer. These have primarily been conducted under the EWA in connection with our efforts to protect endangered species. With the dryness of the year, recent Delta smelt operations and curtailments, and the recent court ruling on OVP/SWP ESA operations, Delta water resources and Project capabilities are becoming increasingly stretched. DWR will very likely be looking to more transfers and JPOD actions over the coming year to increase the state's water management options. We recognize that we need to work with the SWRCB to assure that these important water management options are made available in a way that fully conserves and protects the public interest under the authority of the SWRCB.

With respect to the operation of the temporary barriers this year, the Department will continue to operate the barriers as needed by tying open culvert flap gates to improve water circulation without causing unacceptable water levels. Our status reports for the temporary barriers are distributed weekly via e-mail. We have added Gita Kapahi to the distribution. When the active operation is no longer needed, a summary report describing the operation will be prepared. We will send a copy of this report to you.

If you have any further questions or need additional information, you may contact me at the number below or Cathy Crothers, Assistant Chief Counsel of the Legal office, at (916) 653-5613.



Gerald E. Johns
Deputy Director
(916) 653-8045

Attachments(s)

cc: (see attached list)