

ORIGINAL

Public Comment
Bay-Delta Fact Finding Issues
Deadline: 9/29/08 by 5:00 p.m.

SOUTH DELTA WATER AGENCY

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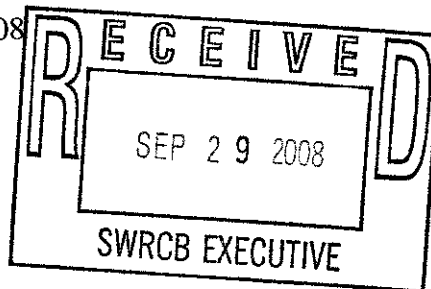
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September 29, 2008



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

Re: Request for Input on Factual Matters for Upcoming Evidentiary Hearings

Dear Ms. Townsend:

The South Delta Water Agency requests the following items be considered for examination in the proposed upcoming evidentiary hearings regarding the Bay-Delta.

1. The impacts of the CVP and SWP on the fisheries and ecosystem of the Delta. The original notice/request produced pursuant to the Board's adoption of its Strategic Plan had a significant omission in attempting to address the causes of Delta problems. The notice refers to a number of issues which may or may not be significant causes of the fishery crashes but fails to mention, much less address the impacts of the export projects.

There is no doubt that exports during the CalFed years increased dramatically; increases which correspond directly to the recent fishery crash. The effects of those increases must be examined in order to fully understand how what is causing the problems. It should be noted that in D-1485 the Board found that project impacts could only be fully mitigated by the virtual shutdown of exports. Since then regulation, including that by the Board, has only changed the timing of some exports and has not done anything to address the findings in D-1485. The projects' effects on river flows, habitat, Delta outflow and fish mortality must be examined under cross examination to determine the extent to which new and additional regulation is necessary.

The fact that other processes are ongoing is irrelevant to this process. The BDCP is an effort to work out one or more conservation plan in order to give exports regulatory assurances. However, that process is not trying to quantify the projects' effects and has as its co-equal goal, maintaining a certain level of exports. Of course, no such level can be determined before it is known what mitigation is necessary. In addition, the BDCP process seeks to give exports assurances before anyone has figured out how to protect/save Delta smelt and other species of concern. Hence the SWRCB must investigate and determine what the project impacts are.

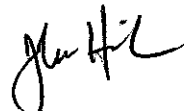
2. Delta outflow. The Board must investigate and hold an evidentiary hearing to determine how much Delta outflow is necessary, and when it should be made available in order to protect fishery beneficial uses. It is obvious that current outflow and X2 requirements are inadequate. Much information is available on this topic, especially previous submittals by the Bay Institute. Fisheries on both the Sacramento and San Joaquin require some level of flow into and out of the Delta to maintain their populations, much less comply with existing state and federal law regarding the doubling of certain populations.

3. Export rates. D-1641 contains the unsupportable and detrimental Footnote 18 to *Export Limits* on Table 3. This Footnote was part of a behind the scenes deal to give exports a baseline protection rather than seek to limit exports to when and what amounts are consistent with preserving fisheries. We have seen that protecting a "baseline" amount of exports has resulted in historically high exports and the destruction of the fisheries. It should be noted that the amount of exports allowed under D-1641 did not even reflect the insufficient Biological Opinions' limitations on exports; rather it allowed high percentages of inflow to be exported regardless of the time of year. This problem was not addressed in the 2006 Plan. The SWRCB cannot simply defer to DFG, FWS, or NMFS limitations on exports, but must itself determine what level of exports is consistent with a healthy fishery.

We assume that in the examination of what is needed to protect fishery beneficial use needs (and other beneficial use needs) the discussion will lead to the amount of water needed to supply areas of origin and Delta Protection Act needs. Regardless of the Board or court's view of who should apply or enforce these statutory protections, the Board will eventually need to know the amount of such needs as it determines what amounts are necessary and available to protect fishery beneficial uses. Without predetermining a water rights proceeding, determining fishery needs is only part of the calculation for protecting those fisheries. The allocation of water for any need is based on underlying legal principles. First, those adversely affecting the fisheries should be identified, and mitigation required. Second, superior rights must be protected, as well as those given statutory priorities. Since the Delta and areas of origin are able to get priority contracts from the projects, regardless of any current right of lack of right, potential/likely project obligations for these purposes will determine what can and can't be exported or available for inflow and outflow.

We understood from the recent workshop that Southern Delta salinity issues and San Joaquin River fishery issues should not be in these submittals as those issues are already being addressed through similar and related processes.

Very truly yours,



JOHN HERRICK