

**Testimony of
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**To the State Water Resources Control Board
Workshop to Receive Information on Development of a
Strategic Workplan for the
San Francisco Bay/Sacramento-San Joaquin Delta**

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Good morning and thank you for asking me here today to speak to you.

I appreciate this opportunity to share some of my thoughts and observations that are relevant to development of a strategic-level workplan for the San Francisco/Sacramento-San Joaquin Delta. I will also have some specific comments on the detailed actions to be evaluated and further defined in the strategic work plan.

Since 2000, hundreds of actions have been – and are being – implemented according to the CALFED Bay-Delta Program Record of Decision that was agreed to by 25 state and federal agencies. I know first-hand that decision-making with regard to the Delta is not for the faint-at-heart. It is a mammoth undertaking fraught with conflict and complexity.

A history of the efforts undertaken in the Delta and the agencies involved would take more time to recount than we have set aside for this workshop. And yet the Delta remains in crisis. My desire today is to stress to you the complexity and potential for conflict involved in decision making with regard to the Delta and to offer you a few opinions based on my experience.

Since its early days as a marsh-turned-farmland, the Delta has been a center for change and conflict. This is because the Delta is the hub of our state's water supply and provides significant environmental value for a large part of the state. Two-thirds of all Californians derive at least some of their water from the Delta. At the same time, the Delta is an ecosystem without peer in our state and probably along the western shore of the Americas. It is home to more than 750 native species of wildlife and thousands of plant species, some of which are found no where else in the world.

Man's intervention in the Delta has had mixed results. We can look at the benefits of land reclamation and development of the state and federal water projects with pride – they have

become a productive and important part of our lives. These same successes, however, have dramatically altered the Delta's ecosystem, often with negative results.

Today, the mounting crisis in the Delta can be defined through the objectives of the CALFED Bay-Delta Program:

- Ecosystem Restoration,
- Water Supply Reliability,
- Water Quality and
- Levee System Integrity.

With regard to Ecosystem Restoration, the Delta is at the center of competing demands for water quantity and quality – water to make our economy work and water to make the Delta's ecosystem work. Both of these co-equal functions of the Delta are at risk today.

Between 2000 and 2006, Water Supply Reliability had never been more stable, but recent developments have significantly reduced this reliability. Water exports have been reduced and are under court-ordered monitoring.

Fundamentally, the struggle to improve Delta Water Quality lies in the inherent conflict between water that is good for the ecosystem and water that is fit for agricultural use and drinking. They are vastly different. Desirable water for the ecosystem should have high carbon content and perhaps variable salinity, but increased carbon and salinity in drinking water necessitate costly treatment. This issue makes it difficult and expensive to meet drinking water standards set forth in the CALFED Record of Decision and by other state agencies, including the Board. While new technologies are being implemented, they add to the expense and decrease the quality of drinking water.

The CALFED objective of Levee System Integrity has been on the forefront of all our minds since the 2005 devastation of New Orleans. The potential for Delta levee failures threatens agriculture, urban and – to an extent – environmental uses. Only recently have we begun to make great strides in this area, through funding from Propositions 1E and 84. Subsidence and seismicity, however as well as climate change and sea level rise continue to pose threats to Delta levees. Scientists tell us there is a two-in-three chance during the next 50 years that an earthquake could cripple the Delta, stopping the flow of water to other parts of the state. We have yet to have much of an impact on subsidence, although we know theoretically how to stop it. At some point in the future, that may prove to be just as crippling to the Delta as a major earthquake.

I have already alluded to some of the forces the Delta is facing now and in the future. We view these as grouped into six drivers of change that will impact the long-term sustainability of the Delta.

These are subsidence and seismicity, which I have already mentioned. Then there is climate change and sea level rise. Science has told us the weather patterns in the world are changing and becoming more erratic. Globally, temperatures will increase, causing glaciers and ice caps to

melt. The sea will expand from both the increase in temperature and water flow from melting ice. For an area such as the Delta, where the elevation averages minus 15 feet below sea level, I don't have to tell how dramatic the impacts could be.

The fifth driver of change is invasive species, which have had a stunning impact on the Delta. At this point, we estimate that 90 percent of the Delta's biomass is non native. The Delta is probably one of the most invaded ecosystems in the world. We have found that invasive species seem to thrive more by the negative changes to the Delta at the expense of native species.

Lastly, population growth or urbanization is the sixth driver of change. Despite our best efforts to keep urbanization and development out of the Delta's primary zone, we are now seeing the secondary zone increasingly urbanized to the point of its boundary with the primary zone, leaving little room for flood basins to operate naturally when needed.

A major failure as a consequence of any one of these six drivers of change could lead to catastrophic consequences for the Delta.

On February 29, Governor Schwarzenegger outlined several actions that need to be taken as part of a comprehensive plan for the Delta. These actions are complimentary to those offered by the Delta Vision Blue Ribbon Task Force and are essential to a solution for this area of vital environmental and economic importance.

Conservation – We must develop a plan to achieve a 20 percent reduction in per capita water use statewide by the year 2020. We have to be more aggressive in this area if we are to provide more water for Californians and protect and improve the Delta's ecosystem. Later this week, the California Water Plan Advisory Committee will discuss the Governor's plan for a comprehensive Delta solution, including strategies for increasing urban water conservation.

Protection of the Delta – Protection of Delta floodplains is critical to the protection of people and property, as well as our existing water export system and – to a limited extent – the Delta's ecosystem. The Governor has asked the Department of Water Resources and other appropriate state agencies to expedite evaluations and protections of these critical flood plains. In addition, he has asked DWR and the Office of Emergency Services to develop and implement emergency response plans for the Delta.

Water Quality – The Governor acknowledged that additional storage and improved conveyance will provide greater control of water flows that improve drinking water. He also believes more must be done. He has asked the Board to develop and implement a comprehensive program in the Delta to protect water quality.

Environmental Studies – The Governor has asked that the Resources Agency expedite the completion of the Bay-Delta Conservation Plan, including the environmental review and permitting activities. DWR responded on Monday, issuing a Notice of Preparation for a joint Environmental Impact Report/Statement (EIR/EIS). In conjunction, ongoing Delta actions will provide a foundation to help conserve at-risk species and improve water supply reliability

Interim Actions -- Additionally, the Governor has asked that interim actions be expedited to protect and restore Delta habitat and help water users cope with supply interruptions.

Water Storage – DWR will complete feasibility studies for three CALFED storage projects – Temperance Flat, Sites Reservoir and the Los Vaqueros expansion.

Each of these projects, depending on how they are built and operated, can provide substantial public benefits.

I have already referenced Delta Vision and the Bay-Delta Conservation Plan. And the board is approaching a major undertaking in the Delta. I want to ensure that you are aware of the current "environment" of assessment being undertaken in the Delta. This matrix prepared by my staff offers a look at the nearly 40 initiatives currently underway in the Delta on a state, federal and local level. Each of these initiatives is expected to provide outcomes that may help inform the future of the Delta. Of course, Delta Vision is a very significant effort, scheduled to conclude later this year with a strategic plan. However, the Bay-Delta Conservation Plan and 26 other state and federal initiatives are also progressing, as are 10 county-based efforts now underway.

The magnitude of the Delta's importance to California requires that all these efforts be taken seriously as components of an overall resolution.

You have asked for input on the four planning action areas outlined in Attachment B. I will comment on these as they relate to the Delta. I agree that salinity issues must be addressed in the Central Valley and southern Delta. In particular, I think Central Valley salts and South Delta Salinity Objectives should be reviewed. I caution you, however, to look carefully at enforcement as many enforcement actions are currently on file. I urge you to coordinate efforts on Pelagic Organism Decline and the Delta Smelt Biological Opinion with Delta Vision and support San Joaquin flow workshops in coordination with Delta Vision. Additionally, I urge you to monitor the situation with the San Joaquin River Restoration and obtain status updates from the Department of Fish and Game and NOAA Fisheries on VAMP experiment status and recommendations going forward.

I want to spend some time discussing water rights, public trust and reasonable use. The Governor's Blue Ribbon Task Force has declared that "the foundation for policymaking about California water resources must be... reasonable use and public trust." This has engendered great concern by some that water rights as a system of allocating resources might be under attack. I do not believe that is a reasonable interpretation. Nor is it my belief that water rights can or should be overturned; they are a foundational building block of California law. Instead, I would assert that this is just a reminder of long standing water rights responsibilities. Article X, Section 2 of the California Constitution (added in 1928) requires that all uses of water in California be reasonable and beneficial and that waste of water be avoided.

In the oft-cited Racanelli decision, the court wrote that reasonable use was the "cardinal principle" of California water law. That opinion concluded that reasonableness is not a static concept and that the state board must balance competing consumptive and in-stream needs. The

state board or the courts may limit a water rights holder who is wasting water, using water unreasonably, or using an unreasonable method of use or an unreasonable method of diversion.

What is a reasonable use is a question of fact to be decided in each case. What is reasonable at one time may be unreasonable another time; what is a reasonable use in times of plenty may not be a reasonable use at times of scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time. The determination of reasonable use must take into account not only the rights of water users, but also the broader public interest.

As the California Supreme Court held in *Joslin*: "What is reasonable use of water depends on the circumstance of each case; such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance.

Paramount among these is the ever-increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment."

As Art Littleworth observed: "The concept of immutable vested rights with an absolute priority has given way under Article X, Section 2, to more flexible and context-related rights.

In addition, and perhaps of equal importance, the state board or the courts may amend water rights licenses to protect public trust resources. The Public trust doctrine--which traces its origins to Roman law in the Institutes of Justinian -- embodies the principle that the state owns all of its navigable waters and the land lying beneath them in trust for the benefit of the public. California law has expanded the traditional public trust uses to include recreation, protection of fish and wildlife, preserving trust lands in their natural condition for scientific study and scenic enjoyment, and related open-space uses. No one has a vested right to take water in violation of the public trust.

After saying all of that, it is clear to me that we are not at a place where we have the information necessary to embark on a public trust proceeding. As I understand it, there are approximately 2,000 diversions in the Delta and yet only between 200 and 300 are documented. There are rumors that very soon complaints will be made against more than 100 Delta diverters. Some people have suggested that the Bay Delta watershed may be over-appropriated. There are potentially hundreds of discharges into the Delta and yet only the municipal wastewater discharges are well understood. It has been hypothesized that the Department of Fish and Game should require an incidental take permit for every diversion and potentially implement restrictions on diversions. It seems clear to me that before public trust proceedings we ought to understand the facts.

Delta Vision and the BDCP are also underway and should be taken into account before such proceedings begin as they might significantly alter the scope and direction of such proceedings. I do, however, recommend that a joint fact-finding effort be established. These issues will return and when they return, there should be a much better understanding of the issues.

Before moving forward further into a strategic workplan for the Bay-Delta, I would urge you to think back on how both the board and CALFED have approached the Delta in the past. Some of the actions and approaches we took worked; others did not. I hope we learn from our mistakes so the road forward will be unencumbered. I think a shorthand way to look back on this is very simply put in this slide. From its inception, CALFED was not given the authority to require parties to come to the table or force a path of agreement. However, the program did bring parties together in a collaborative setting to discuss Delta issues in a transparent manner.

I think the board is in a position provide leadership as we move forward in the Delta. Yes, the board's process in the late 80 to try to restrict exports failed, possibly due to the board's lengthiness of the proceedings and its inflexibility in reaching a solution that could be embraced by a broader cross-section of stakeholders. However, the board is still is where much power of decision making lies.

From my perspective, the board has a strong role to take in this process. It has the authority and responsibility to affect change in the Delta. However, I believe the best way for the board to begin that process is to let Delta Vision, BDCP and other major processes now under way in the Delta to take their course and be informed by their outcomes. Further, I would request that the board find a way to proceed by allowing for a more participatory role of those invested in these processes than they have in the past. I note that your pending Strategic Plan update seeks to incorporate more transparency, accountability and consistency in board operations. I commend this and think planning in the Delta is a prime example of why these values are important.

Finally, I would offer my thoughts to you on moving forward based on my experience with CALFED and the Delta. I suggest you use more resources initially to gather information to inform your decision making. The formal hearing environment may not be the ideal way to obtain this information. Instead, I recommend that you institute joint fact-finding with stakeholders who have been involved in the Delta for decades. There is a wealth of information that will be useful to the board. Delta issues are complex and longstanding. The board should expect a solution to be part of a lengthy, long-term process.

Finally, I recommend that the approach you adopt begin in the Delta and move upstream through its tributaries. CALFED followed the opposite course and found, at the end of seven years, that more effort and resources had been spent upstream from the Delta than in the Delta itself. While the entire watershed is critical, more immediate attention should begin in the Delta.

This concludes my formal testimony. I am available to answer your questions.