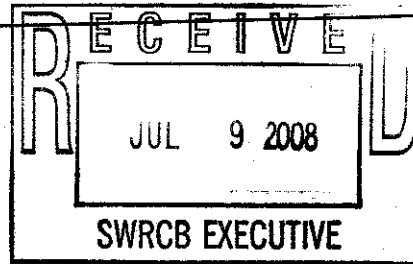




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Public Comment
Bay-Delta Strategic Workplan
Deadline: 7/9/08 by 12 p.m.



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July 9, 2008

VIA OVERNIGHT MAIL AND E-MAIL TO: DRIDDLE@WATERBOARDS.CA.GOV; AND
COMMENTLETTERS@WATERBOARDS.CA.GOV

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Re: Bay-Delta Strategic Workplan Comments

Dear Chairperson Doduc and Board Members:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively "County") we respectfully submit the following comments regarding the 2008 Draft Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Strategic Workplan" or "Workplan").

The Strategic Workplan will be considered by the State Water Board at its meeting on Wednesday, July 16, 2008. The County commends the State Water Board for taking action to address the critical issues facing the Bay-Delta, and developing a Strategic Workplan to tackle these problems. This is a massive and complex undertaking, but one that is absolutely necessary.

The County submits the following comments regarding the draft Strategic Workplan and respectfully requests that the State Water Board amend the document to recognize and rectify the serious shortcomings of the Workplan as indicated herein.

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BDCP. The County is very concerned about the State Water Board's ongoing participation in the Bay Delta Conservation Plan ("BDCP"). Such participation by the State Water Board, if any, must be conducted in such a way to eliminate any conflict of interest or bias that can result from the State Water Board's participation in and future action on the BDCP, which is being prepared by a group of interested parties. The County is not satisfied that the current involvement and participation by the State Water Board is being conducted, or even can be conducted, in a manner that eliminates the potential for a conflict of interest, violations of due process and/or bias.

By state law, the role and responsibility of the State Water Board is adjudicatory in nature, that is, to serve as the entity that determines, implements, and enforces water rights and water quality laws. As result of this quasi-judicial role, due process requires the State Water Board to act in a neutral and impartial capacity. Pages 73-75 of the Workplan discuss the State Water Board's contemplated participation in the BDCP, and attempts to prevent any potential problems resulting from this participation by pointing to the BDCP process itself and the State Water Board's contemplated future reliance on the BDCP environmental document. However, the County is not assured that these limitations can be fully implemented or that these limitations will be effective in eliminating conflict of interest, bias, or other improper influences on the State Water Board's decision-making process. The County respectfully requests that the State Water Board seriously consider the concerns raised by South Delta Water Agency in its May 13, 2008 letter to the State Water Board regarding these important issues and concerns.

The Workplan states at page 75 as follows: "The State Water Board will in no way be bound by any agreements that may be made by participants in the BDCP and will use its own quasi-legislative and quasi-judicial processes to determine what, if any, changes should be made to water quality objectives or water rights, to implement other measures." The State Water Board must strictly ensure that this will occur. The State Water Board has a duty to consider and apply state water law independent of influencing factors, including the exercise of judgment and discretion related to "flows, water quality, and other water rights issues." As indicated on page 73 of the Workplan, the "Water Boards have the primary regulatory authority over these issues in the Bay-Delta." This regulatory authority needs to be independently exercised by the Water Boards and any extraneous processes or procedures, such as those called for by the BDCP and the Delta Vision, cannot be relied on as a matter of course.

The goal of the BDCP is to improve "the reliability of the SWP, CVP and other water supplies" as stated at page 30 of the Workplan. Although this may be a worthwhile goal, the State Water Board must critically examine whether this goal can be reached within the constraints of current California water law and proper implementation of water rights and water quality restrictions. The goal of the SWP and CVP and other water supplies may not be consistent with state water law, which the State Water Board must independently evaluate and apply.

2. Delta Vision. The County is equally concerned that the State Water Board properly perform its duty to determine and implement water rights and water quality laws, rules, and regulations, in accordance with state water law with respect to any recommendations from the Delta Vision process. The Workplan at page 22 indicates that upon "... completion of the Delta Vision Strategic Implementation Plan, the Water Boards will reevaluate this strategic workplan to assure that it sufficiently complements that effort." This is of grave concern to the County. The State Water Board's role is not to "complement" plans developed by other groups, particularly groups such as the Department of Water Resources ("DWR"), a water user, which the State Water Board is charged with regulating.

Again, the County's concerns regarding neutral decision-making by the State Water Board related to the BDCP process also applies to any implementation of the Delta Vision recommendations by the State Water Board. The State Water Board must develop its Strategic Plan and take action that is consistent with the State Water Board's important legal role in state water law. The State Water Board cannot assume that these outside processes result in the development of plans or recommendations that are consistent with and properly implement state water law. As mentioned before, by law the State Water Board is the adjudicatory body that implements and enforces state water rights and water quality laws, and, as a result, the Board is imposed with the legal duty to objectively implement, apply, and enforce these laws. The Board was specifically created by the Legislature to "provide for the orderly and efficient administration of the water resources of the state" exercising "the adjudicatory and regulatory functions of the state in the field of water resources." *Wat. Code* § 174. The State Water Board is required to carry out these important functions properly, in a neutral and impartial manner.

3. San Joaquin River Quality. In order to address the issues associated with the Bay Delta, water quality in the south Delta and the San Joaquin River must necessarily be addressed. The County contends that the Workplan does not properly prioritize and implement the important tasks required to address this critical issue. The undertaking of meaningful actions to address the salinity of the San Joaquin River must be required by the State Water Board. These required actions would likely have the most effective impact on water quality issues associated with the Bay Delta. Such actions are mandated by state law as well as past decisions, directions and orders of the State Water Board.

- a. Existing TMDL. The Water Board's TMDL for the control of salt and boron for the lower San Joaquin River provides that the Bureau shall enter into a management agency agreement ("MAA") to include provisions requiring the United States Bureau of Reclamation ("Bureau") to: (1) Meet Delta Mendota Canal ("DMC") load allocations; or (2) Provide mitigation and/or dilution flows to create additional assimilative capacity for salt in the Lower San Joaquin River equivalent to that of DMC salt loads in excess of their allocation. The only mention of such MAA in the Workplan is at page 34. The current draft MAA which the Regional Board is considering approving this month does not address these requirements. The MAA and accompanying Action Plan largely relies on perpetuating the status quo. It is evident from past water quality violations the status quo is not, and does not, address the salinity problems of the lower San Joaquin River. Meaningful action to implement "mitigation and/or dilution flows" to address the salinity of the lower San Joaquin River is not currently being taken. The draft MMA fails to address these issues and the Workplan fails to address this issue requiring meaningful action by the Bureau and the Regional Board.

It is imperative that the Workplan, both in the document itself and in its actual implementation, requires the Bureau to meaningfully address the salt problem on the lower San Joaquin River, including but not limited to, making meaningful progress on an out-of-valley drain.

In 1961 the County sought and obtained the passage of the San Joaquin River Protection Act (*Wat. Code* §§ 22000 *et seq.*) which declared that "... a serious problem of water quality exists in the San Joaquin River between the junction of the San Joaquin River and the Merced River and the junction of the San Joaquin River and Middle River." *Wat. Code* § 12230. As a result, the serious problem of water quality was officially recognized by the State as early as 1961.

In 1960, when the United States Congress authorized construction of the San Luis Unit of Central Valley Project (Act of June 3, 1960, Public Law 86-188, 74 STAT. 156) it provided that the construction of the San Luis Unit shall not be commenced until there were assurances for the drainage system for the San Luis unit. This was the out-of-valley drain referenced above, which has never been constructed. The Regional Board has identified the out-of-valley drain as the only feasible long-term solution to the drainage problem. D- 1641 p. 85. In *Firebaugh Canal Co., et al. v. United States of America, et al.*, (9th Cir. 2000) 203 F.3d 568, the Ninth Circuit Court of Appeals required the Bureau to provide drainage service. Despite court orders, the Bureau continues to delay making meaningful progress on the out-of-valley drain. The Workplan should address such shortcomings by the Bureau. The Workplan does not identify activities to support or require meaningful progress to be made on the out-of-valley drain.

b. Establish Salinity Objective Upstream of Vernalis. In order for meaningful progress to be made and improvement of the water quality to protect beneficial uses, salinity objectives must be set at additional locations on the San Joaquin River upstream of Vernalis in addition to a plan of implementation to meet the salinity objectives. The Workplan should include a task to support and require the Regional Board to move forward on establishing a salinity objective upstream of Vernalis. At page 34, the Workplan indicates that this concept has been committed to in Resolutions, and at page 39 there is a discussion of this requirement and a statement that the Regional Board is currently developing a TMDL for the San Joaquin River upstream of Vernalis. However, this is not occurring in a timely manner. During my June 30, 2008 telephone conversation with Regional Board staff related to the draft Bureau MAA, Regional Board staff informed me that there is no established time period for moving forward on establishing these salinity objectives upstream of Vernalis, and that staff assigned to work such were redirected on other issues. The Regional Board could not provide me an estimated timeline of when the draft TMDL establishing such salinity objectives would be available to the public. This strongly indicates that no meaningful, timely progress is occurring on this important task. The Strategic Plan needs to be modified to require the establishment of a salinity objective on the San Joaquin River above Vernalis.

For many years the Regional Board has been working on a Basin Plan Amendment to establish salinity objectives on the San Joaquin River upstream of Vernalis. In 1999, the State Board directed the Regional Board in Decision 1641 to "promptly develop and adopt salinity objectives and a

program of implementation for the main stem of the San Joaquin River upstream of Vernalis.” (Emphasis added.) The Regional Board is subject to the direction of the State Board, and it is impossible to interpret Decision 1641 to mean anything other than the upstream standards should have been set. In 2006, the Regional Board staff presented a schedule for adopting the salinity standards above Vernalis. This schedule provided that the draft Basin Plan would be released by the Regional Board by April of 2006 with approval by the Regional Board in September, and approval by the State Water Board by December of 2006. The State Water Board’s Resolution 2005-0087, which approved the Basin Plan Amendments implementing the salt and boron TMDL for Vernalis dated November 16, 2005, resolved that the Regional Board shall adopt such water quality objectives for salinity and boron from Mendota Dam to Vernalis by September 2006. This has not occurred.

The draft Basin Plan Amendments and TMDL have never been released by the Regional Board nor acted upon. The Regional Board is required to follow the direction of the State Water Board, and must act to establish salinity objectives above Vernalis. This action would constitute meaningful progress toward addressing the salinity of the lower San Joaquin River. The Workplan must require and plan implementation of the salinity objective and set it as a funding and implementation priority.

The deplorable condition of the lower San Joaquin River, which essentially acts as a sewer by serving as the much-needed Valley Drain, has been tolerated far too long by those who have the ability to correct the problem. The state of the lower San Joaquin has an effect on the condition of Bay Delta. The problem should not be allowed to continue.

4. Compliance with existing Water Quality Objectives is obligation of Bureau and DWR. Despite the objectives and obligations imposed by Decision 1641 and WR 2006-0006, the Department of Water Resources (“DWR”) and the United States Bureau of Reclamation (“Bureau”) have failed to meet the Southern Delta salinity objectives, and the State Water Board has failed to take any enforcement action against these parties. The record is clear that the southern Delta salinity standards were exceeded in the spring and summer of 2007 and the State Water Board Staff did not recommend enforcement action against DWR and USBR for exceeding the salinity objectives at the interior southern Delta compliance locations. Violations have already occurred in 2008. Joint points of diversion (“JPOD”) were utilized despite these permit

condition violations. The Workplan at page 65 indicates that the "... question of enforcement, and what constitutes a violation, will continue to be an ongoing issue." However the State Water Board has the legal duty to address this ongoing issue. The beneficial uses within the Bay-Delta depend on the State Water Board fulfilling its obligation to enforce these standards it has imposed to protect these beneficial uses.

The discussion in the Workplan regarding a proceeding to modify the southern Delta salinity objectives may be interpreted as an effort to excuse DWR and the Bureau from its obligations to meet these salinity objectives. Such an effort is vehemently opposed by the County. A relaxation of the standards should not be the State Water Board response to DWR and the Bureau's continued violation of the standards. The County sincerely hopes that this is not the purpose of the contemplated water quality control plan modification proceedings.

The State Water Board must take enforcement action against violators, including DWR and USBR. While State Board Staff admits and recognizes the violations of DWR and USBR, enforcement is not pursued. The southern Delta salinity standards need to be meaningfully enforced by the State Water Board against all violators. The Workplan indicates in several places, including at page 37 that "If a single discharger is responsible for an impairment, the Water Boards can address the impairment by taking appropriate regulatory action" (revising a permit, taking enforcement action, etc.). The State Water Board needs to take meaningful action against the Bureau of Reclamation, a permit holder, who causes serious impairment of the water quality of the San Joaquin River and thus the southern Delta.

5. Significant Enforcement Efforts Against in Delta Users is Misplaced Enforcement.

The Strategic Workplan indicates that significant resources (6 PYS) will be utilized in the efforts of water right enforcement by Delta users to identify and enforce "illegal diversions" within the Delta. This enforcement effort is misplaced. The State Water Board's resources should be dedicated to tasks that more effectively impact water quality within the Bay-Delta and which are more clearly legally supportable.

The Workplan provides at page 80 that the increasing demands on the Bay-Delta and mounting environmental concerns have "intensified the need for the State Water Board to vigorously enforce water right requirements to

ensure sufficient flows are available to meet water quality objectives and to present DWR's, USBR's and other water right holders' developed water supplies from being adversely affected by unauthorized diversions." First, this assumes that DWR, USBR and other water right holders' developed water is adequate to meet those permit holders' permit obligations. Second, it assumes there are substantial numbers of illegal diverters within the Delta. The County submits that both of these assumptions are incorrect.

As indicated above and within the Strategic Workplan, it is evident that DWR and the Bureau are violating their existing permits and not meeting their obligations to provide developed water to meet the established water quality objectives. Past decisions by the State Water Board support that the salinity problem of the San Joaquin River and the south Delta are due to the actions of the exporters, and thus it is the exporters who have the obligation to mitigate these impacts. The projects must be required to do so by the State Board. This includes the need to provide assimilation capacity within the San Joaquin River so that legal downstream diverters do not cause the salinity standard to be deviated from thereafter. The County contends that the projects are not providing for such assimilation capacity to provide for all "legal" delta diverters; thus the standards are being violated. This is a permit obligation of the Bureau and DWR, and enforcement action against such parties is appropriate, rather than enforcement action against in-Delta users.

The County also is concerned that illegal diversions should be eliminated, and that enforcement actions against illegal diverters need to be actively pursued. However, records indicate that such illegal diversions are the exception, not the norm, and the number of such diverters are not great. As a result, the dedication of substantial State Water Board resources to the seeking out of illegal diverters and pursuing enforcement actions against them is misplaced.

First, riparian water right holders and pre-1914 appropriative water right holders have senior water rights to divert water from within the Delta. The County contends that many of the hypothesized "illegal Delta diverters" are actually senior water right holders of this type. Furthermore, when the Central Valley and State Water Projects were initially authorized by state law, certain protections were developed to ensure that the Delta users' future use of water was protected. It is disheartening that now, in this time of serious water supply shortages, the Project exporters appear to have a priority over these more senior Delta users, which are entitled to protection under state law.

The Delta Protection Act (*Water Code* §§12200 *et seq.*) places certain burdens on export of water from the Delta and places certain protections on in-Delta users. The Act requires that the Delta be kept as a "common pool" for in-Delta and export supplies. The Delta users are to be provided an "adequate supply," and no quantified, absolute supply is guaranteed to export users. The Act prohibits the export of supply needed for in-Delta users' water use needs or salinity control. The bottom line is that exports cannot include water to which in-Delta users are entitled.

is the County reiterates that it is disappointing that the State Water Board intends to focus on significant and substantial enforcement actions against in-Delta users, and the County believes such focus is not only misguided, but unwarranted under the circumstances. Unfortunately, the unsupported arguments of the exporters which place blame on the Delta users are given credibility by the State Water Board. This approach should be reconsidered by the State Water Board, and the Workplan should be significantly modified to reduce the importance of, and resources dedicated to, these enforcement actions which serve only as a distraction away from the real issues of importance.

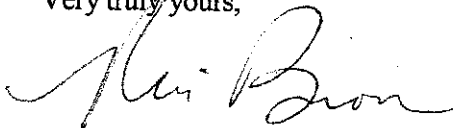
6. State water rights law does not allow for "equitable administration". The Strategic Workplan indicates that there will be "equitable administration of water rights." Water rights should not be "equitably" administered by the State Water Board. Rather the State Water Board has the legal duty and obligation under State law to implement and apply the state water laws, including water right priorities. There should be no "equitable allocation" of water rights by the State Water Board.

California state water law does not allow the balancing of competing interests. The "reasonableness" provision of Article X, Section 2 cannot ignore the priority system of California water law, and it cannot eliminate vested water rights. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250.) Rather, the State Water Board as the judge that implements state water law in California. As such, it is bound to impose the established priority system of state water rights. Shortages are addressed by the implementation of this system. The most senior water rights are protected, while junior water rights necessarily suffer. This is the foundation of California's water right system and the State Water Board is entrusted, by California law, to implement this water right system. Competing demands for water in and from the Bay-Delta are properly resolved by applying the

priority system, not by "balancing." If there is insufficient water in a stream system to support all appropriators, then diversions must diminish, starting with the most junior appropriators. (*Pleasant Valley Canal Company v. Borror* (1998) 61 Cal.App.4th 742, 770.) The County supports the State Water Board's efforts to address the shortages of water within the Bay-Delta by enforcing the California priority system of water rights and other California water laws, such as the Delta Protection Statute (*Wat. Code* §§ 12200 et seq.), the Watershed Protection Statute (*Wat. Code* §§ 11460 et seq.) and the Area of Origin Statute (*Water Code* §§ 10500 et seq.).

The County of San Joaquin looks forward to continuing to participate in the development of the State Water Board's Strategic Workplan and is hopeful that the State Water Board, by implementing state water law, will guarantee the future of the Bay Delta, including the beneficial uses and water rights within the Bay Delta.

Very truly yours,



DeeAnne M. Gillick
Attorney at Law

cc: Dr. C. Mel Lytle

Dictated by the writer
signed and mailed in his
absence to avoid delay.