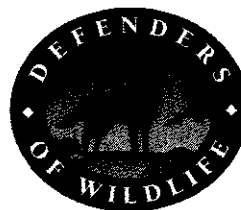




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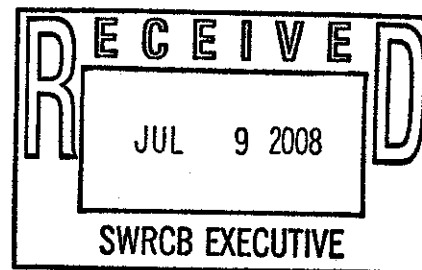


Public Comment  
Bay-Delta Strategic Workplan  
Deadline: 7/9/08 by 12 p.m.



July 9, 2008

The Honorable Tam Doduc and Members of the Board  
c/o Jeanine Townsend  
State Water Resources Control Board  
PO Box 100  
Sacramento, CA 95812



**Re: Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary**

Dear Chair Dudoc and Members of the Board,

We write on behalf of several million members of our organizations, Natural Resources Defense Council (NRDC), Environmental Defense Fund, Defenders of Wildlife, and the Sierra Club, hundreds of thousands of whom are Californians, to offer comments on the most recent draft of the Strategic Workplan ("Draft Plan") for the San Francisco Bay/Sacramento-San Joaquin Delta.

As the heart of our state's water supply, the Delta faces numerous threats. Fish populations have crashed, an entire fishing industry was recently closed, and the state faces the driest season on record. Over 25 million people in the state rely on the Delta for part of their drinking water supply. It is critical that the state act now to deliver solutions to protect and restore the Delta while ensuring water supply reliability for the state. Below are our comments to the Draft Plan:

**Comprehensive Review of the Bay-Delta Plan, Water Rights and Other Requirements to Protect Fish and Wildlife Beneficial Uses and the Public Trust**

The Draft Plan states that the goals of this project for the Board are to (1) implement water quality objectives that are "protective" of fish and wildlife and to (2) to assure that "thorough analyses are conducted to inform changes" to the State and Federal water project permits. **We recommend inclusion of a third goal: to identify appropriate instream flow and other biological requirements necessary to ensure the long-term health of the fish and wildlife resources subject to the public trust.**

The Draft plan further states that: "the BDCP must consider the flow [and other] needs of the ecosystem" and appears to delegate to the BDCP the job of determining, at least primarily, what those biological needs are. The Draft Plan indicates that the Board intends to subrogate its public trust responsibilities in this regard to monitoring and participating in the BDCP process, and that the Board will undertake no independent review of the biological needs of the trust resources of the Bay-Delta system unless -- and until -- "the BDCP is unable to achieve the State Board's objectives to analyze a broad range of

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alternatives." Simply analyzing alternatives is an insufficient goal in light of the Board's affirmative obligation to protect public trust resources. In addition, we respectfully disagree that it is appropriate for the Board to defer its own analysis of the public trust needs of the Bay-Delta system until the BDCP process has essentially concluded. Without its own analysis of the water flow and other biological needs of the ecosystem, the Board will have no reasonable way of assessing whether or not the BDCP process has in fact developed feasible alternatives. **We recommend that this portion of the Draft Plan be substantially revised.**

The BDCP is a process run by regulated parties to obtain long-term "take" permits under the Endangered Species Act. If done correctly, this process has substantial potential to provide long-term benefits to the ecosystem and limit water supply disruptions. However, it is the State Board -- not the regulated parties -- that should be determining in the first instance what the appropriate level of public trust protection is required for the public trust resources of the Bay-Delta ecosystem. As the legal trustee of these resources, it is incumbent upon the State Board to identify in particular the flow requirements sufficient to satisfy the State's public trust obligations, including a sufficient buffer or "uncertainty cushion" as appropriate to address changes attributable to climate change. **We recommend that the State Board convene a limited proceeding to determine the public trust requirements of the fish and wildlife and other trust resources of the Bay-Delta estuary.**

Activities to Ensure that the SWP's and the CVP's Methods of Diversion in the Delta are Reasonable, Beneficial and Protect the Public Trust

The Draft Plan indicates that the Board has the responsibility to protect the public trust only "where feasible" when administering water rights. **This is in incorrect statement of the Board's legal obligations and the Plan should be revised accordingly. The Board's duty to protect public trust resources is substantially greater than indicated in the current draft.**

As established by the California Supreme Court, the public trust doctrine imposes a substantive obligation on the State, through the Board, to affirmatively protect trust resources. The public trust is "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right only in rare cases when abandonment of the right is consistent with purposes of the trust." *National Audubon v Superior Court* (1983). The State must protect public trust resources and must also "attempt, so far as feasible, to avoid or minimize any harm to those interests." *National Audubon*, 658 P.2d at 723.

The extent of the State Board's trust obligations in connection with the Bay-Delta estuary appears to be in contention notwithstanding the 25 years of relatively consistent case law following *National Audubon*. For this reason, it may be useful for the Board to call for legal briefing on this issue from interested parties separate from, or at least in advance of, any proceeding. This would provide the Board with clarity about the stakeholders' legal reasoning on this issue, and could thus provide the Board the opportunity to provide these parties and the public with its own position on this crucial issue.

The Draft Plan indicates that the Board will make its determination regarding the "need" for this activity based on the results of the BDCP process. We respectfully believe this to be in error. **As indicated above, we recommend that as the State agency with the legal obligation to protect trust resources and determine reasonableness of use and method of diversion, the**

**Board itself should set the parameters for what constitutes appropriate levels of protection for the Bay-Delta rather than relying on the BDCP process to develop these.**

Actions to Address Water Use Efficiency Among Urban and Agricultural Water Users

Water use efficiency and conservation provide a critical and cost-effective means of ensuring water supply reliability in the state, while reducing energy use and greenhouse gas emissions. The Board's prioritization of these tools is a critical first step. The Governor's recent executive order to reduce water use in the state by 20% by 2020 provides an important impetus to the Board to act now. The Draft Plan moves in the right direction to implement a water conservation plan, but neglects to mention specific plans to meet the Governor's conservation objectives. The Draft Plan does not adequately acknowledge through its actions the Board's constitutional and statutory right to implement water conservation measures. In effect, the Draft Plan lacks teeth. We recommend the following:

*Urban Water Use Efficiency as it relates to water supply*

**The single most effective move the Board can take is to require urban water agencies to implement measurable and verifiable conservation and efficiency efforts into their water right renewal process.** Water agencies should be required to demonstrate to the Board that they have a measurable and verifiable program in place to save water, and the Board should take into account the agency's water savings goal when approving any new, renewed, or amended water right permit.

- 1) The California Urban Water Conservation Council (CUWCC) is presently engaged in a major revision process for the Best Management Practices (BMPs) as they are outlined in the Memorandum of Understanding Regarding Urban Water Conservation in California (MOU). In 1997 CUWCC engaged in a major revision process for most BMPs, clarifying implementation requirements and reporting standards. In the ten years since 1997, CUWCC has engaged in an ongoing process of revising BMPs. Thus, the BMPs are best considered a dynamic body of conservation strategies, rather than a static checklist. While we commend the Board's desire to make certain BMPs mandatory, it is important for the Board to consider how it will review and establish compliance among water agencies. **Nevertheless, we still recommend that the Board make it a requirement for water agencies to be members of the CUWCC "in good standing" and compliant with BMPs.**
- 2) We strongly support and encourage the Board's willingness to seek conservation pricing for retail water suppliers. We note that seasonal rate differentials (peak season pricing) can be a useful interim step while tiered rate structures are under development, and may be more practical than tiered rates for customer classes with heterogeneous patterns of water consumption, such as large commercial, industrial and institutional users. The Board should also consider setting parameters for

wholesale water rates to ensure that such rate structures and/or take-or-pay contract provisions do not work at cross purposes to the water efficiency efforts of retail water agencies.

- 3) All pressurized water distribution systems leak, some more than others. There is no effective way for the end-user to be responsible for water that is lost in the distribution system. We recommend that the Board regard all urban distribution system water losses that are economically recoverable as an unreasonable and wasteful use of water. The Board should require urban water rights holders to demonstrate that all cost-effective measures to reduce distribution system leakage are being fully implemented, leaving only economically unrecoverable losses remaining by a date certain.

#### *Urban Water Use Efficiency as it relates to wastewater*

- 1) The Draft Plan does not the application of water efficiency measures by or through wastewater treatment agencies. The majority of Californians receive residential wastewater treatment service through flat, non-volumetric rates, greatly dampening the effect of conservation pricing by retail water suppliers. While it may be challenging for the State Board to determine water pricing and for all retail water suppliers, it can certainly move to require volumetric pricing for wastewater agencies.
- 2) As a necessary precursor, the Board should establish a policy for the sharing of metered water delivery data with wastewater treatment agencies.
- 3) Wastewater treatment plants are costly to build and can have deleterious effects on the environment. As part of its State Revolving Fund criteria, the Board should require that wastewater agencies demonstrate that water conservation efficiency has been taken into account in the sizing and timing of wastewater treatment infrastructure proposed for SRF funding.

#### *Agricultural Water Use Efficiency*

The state cannot afford to delay the implementation of water efficiency measures in the agricultural sector if there is any hope of meeting the ambitious but necessary water use goals for 2020 now under discussion. Agriculture uses 80% of water use in the state but is routinely ignored when addressing reducing water use in the state. The Draft Plan suggests mandatory improvements in urban water management and pricing, similar to the Delta Vision Strategic Plan, but generally avoids giving strong recommendations in the agricultural sector, which has a greater impact on Delta conditions. The Board should not just adjudicate an agricultural water user, but should recommend a more active step to eliminate wasteful practices and reduce unnecessary agricultural water use. There are several ways to do this:

- 1) Require all agricultural water deliveries to be measured at the farm turnout with an accuracy (+/- 6%) sufficient to use for volumetric pricing;
- 2) Require the recovery of all variable costs and at least a portion of fixed costs of agricultural water suppliers to be recovered from water users through volumetric rates;

- 3) Require agricultural water users to develop measurable and verifiable water savings programs as part of the permitting process.
- 4) Requiring agricultural water users to provide information reports to the Department of Water Resources on an annual basis.
- 5) Develop rigorous independent measurement and evaluation of savings and reporting of agricultural water use.

#### Southern Delta Salinity and San Joaquin River Flow Objectives

In addition to reviewing and revising the salinity and flow objectives in an expeditious manner to ensure that they are protective of beneficial uses, the Board should also consider the reasonableness of water use in the San Joaquin Valley, particularly those users who disproportionately contribute to downstream loading of salts and other contaminants or who disproportionately divert water from the Bay-Delta system, and consider the adoption of practices to ensure reasonable use, including drainage reduction requirements, land retirement programs, and other measures.

Furthermore, the Board's salinity and flow objectives and implementation of these objectives should ensure that its activities will support the planned restoration of flows and fisheries to the San Joaquin River. Pursuant to the settlement of the long-standing Friant litigation, spring-run Chinook salmon are to be returned to the river no later than 2012.

#### Minimum In-Stream Flow Standards

The Draft Plan appears to limit the Board's activities to development of minimum flow standards for streams with no current requirements and to enforcement efforts on streams with existing flow standards. There is ample evidence to indicate, however, that existing minimum flow standards are not fully protective of public trust resources, even when fully implemented. The unprecedented Chinook salmon crash in 2007 is a prime example of the inadequacy of the existing Delta flow regimes. Thus, it is imperative that the state Board re-examine flows to facilitate Chinook migration to the Pacific Ocean from the Sacramento River. This migration was impossible for the Chinook last year, necessitating large-scale translocation of Chinook from hatcheries into San Pablo via trucking. These Chinook constitute extremely sensitive public trust resources and they risk extinction in the near term without augmented flows. The Board should use the highest standard of feasibility in weighing flow objectives against resource extraction needs.

The Board should therefore also identify and prioritize streams where current flow standards are inadequate to protect species at high risk, e.g., salmon and steelhead, and review and revise minimum instream flow requirements in a timely manner. Overall, the approach that should be followed by the Board should be to identify and prioritize those watersheds where public trust resources are most at risk and develop, revise and/or enforce minimum instream flow standards on a schedule that addresses the highest priority watersheds first and proceeds to address other watersheds in descending priority over a reasonable amount of time.

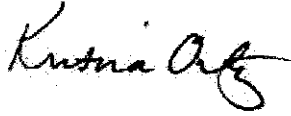
*Comments on the State Water Resources Control Board Strategic Workplan for Activities in  
the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*

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Thank you for considering our comments.

Sincerely,



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