



September 29, 2015

Tom Howard
Executive Director, State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: Preliminary Comments Regarding the Notice, Fact Sheet and Petition for Change in Point of Diversion for the California WaterFix

Dear Mr. Howard:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, Golden Gate Salmon Association, Friends of San Francisco Estuary, and The Bay Institute, we are writing to provide preliminary comments regarding the State Water Resources Control Board's (SWRCB) notice relating to the California WaterFix. The notice and fact sheet indicate that the SWRCB will complete review of the change in point of diversion petition prior to the completion of phase 2 of the update of the Bay-Delta Water Quality Control Plan, and DWR's Petition states on pages 10-11 that the Board's review of the change petition will be limited to the existing Water Quality Control Plan and D-1641. As discussed below, this approach is unlawful, and the SWRCB must ensure completion of the update of the Bay-Delta Water Quality Control Plan with adequate flow and water quality objectives to protect fish and wildlife beneficial uses and public trust resources, prior to issuing any order approving a change in point of diversion.

Contrary to the statements in DWR's petition,¹ the Board cannot lawfully rely on the existing Bay-Delta Water Quality Control Plan and D-1641 in assessing injury to fish and wildlife beneficial uses and public

¹ DWR's petition states that, "Thus the WQCP and the water rights decisions stemming from implementation of the WQCP and earlier water quality plans, including D-1641, are protective of beneficial uses until replaced through

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trust resources under the Water Code. The 2009 Delta Reform Act compels the SWRCB to adopt updated flow criteria in assessing whether the change petition would cause unreasonable injury to fish and wildlife, and the SWRCB has previously acknowledged that the water quality standards must be updated in order to review the change petition. In addition, numerous agencies – including the SWRCB – have concluded that existing flows under D-1641 and the existing water quality control plan fail to reasonably protect fish and wildlife beneficial uses and public trust resources.

First, the 2009 Delta Reform Act requires that the SWRCB adopt “appropriate” flow criteria for any change in point of diversion, rather than simply limiting review to D-1641 and the existing Water Quality Control Plan. The Act specifically requires the SWRCB to include, in any order approving a change in point of diversion, “appropriate Delta flow criteria” that shall be informed by the Public Trust Flow Report mandated by section 85086(b)(1) and which shall be subject to adaptive management. Cal. Water Code § 85086(b)(2). The legislative analysis of the bill supports this conclusion:

This bill's "flow criteria" reflect a landmark concept of the state exercising its public trust authority to ask - FIRST - what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan....

Paragraph (c)(2) specifies that certain water right change orders, involving specified changes in the points of diversion for the Central Valley Project or the State Water Project, must include "appropriate" Delta flow criteria. While the analysis used in developing flow criteria under paragraph (c)(1) will be considered in setting flow criteria under paragraph (c)(2), neither the analysis nor the criteria themselves predetermine the outcome of the later proceeding to determine what criteria are "appropriate" for inclusion in the water right change order. In addition, while the flow criteria developed under paragraph (c)(1) do not have regulatory effect - they serve instead as recommendations for consideration in the Delta Plan and the Bay Delta Conservation Plan - the flow criteria set under paragraph (c)(2) are included in the water right change order, and have the effect of terms and conditions of that order.

This requirement for flow criteria should also be read in the context of the savings clauses in Water Code Sections 85031-32, which ensure protection for all water rights holders as the Bay Delta Conservation Plan and the Delta Plan develop. Several upstream parties have raised concerns about these flow criteria, suggesting that they will be held responsible for complying with these flow criteria. The combination of the focus on use of flow criteria early in Delta planning efforts, specified process for developing flow criteria, and the savings clauses ensure consistent legal protection for

the update process and constitute the standard for determining injury to those beneficial uses when considering this Petition.”

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upstream water users without rewriting water law to focus protections on specific concerns.

Assembly Floor Analysis, SB 7X 1, November 4, 2009.

Second, the SWRCB has already concluded that it must update the water quality control plan in order to assess impacts to beneficial uses from a change in point of diversion permit. In a January 25, 2012 letter,² the Executive Director of the Board denied requests by some stakeholders to delay issuance of a Notice of Preparation for review of Delta objectives, stating:

There are three reasons I believe the State Water Board needs to issue the Supplemental NOP now. First, restoration of the Delta is an essential goal of the State. Numerous scientific documents have identified flow as a major factor affecting fisheries and other public trust uses of water in the Delta. The State Water Board is the State agency responsible for establishing water quality and flow objectives for the Bay-Delta to protect these uses. Second, the Delta Stewardship Council's draft Delta Plan includes direction to the State Water Board to adopt and implement flow objectives for the Delta by June of 2014. The Council is charged with pulling together all Delta activities into an integrated, coherent process. While the June 2014 target date will be very difficult to meet, the accelerated timeline is critical because flows are fundamental to Delta decision making. **Third, the Delta Reform Act specifies that no construction of Bay-Delta Conservation Plan (BDCP) facilities is allowed until the State Water Board approves any necessary changes in the point of diversion. A change in the point of diversion will require updated Delta flow objectives.** Because the State Water Board's flow-setting process can take several years, it must be conducted in parallel, rather than sequentially, to the BDCP process so as not to interfere with BDCP implementation.

(emphasis added).

Third, the SWRCB, California Department of Fish and Wildlife, Delta Stewardship Council, and other agencies and stakeholders have concluded that D-1641 and the existing water quality control plan fail to reasonably protect fish and wildlife beneficial uses and public trust resources in the Bay-Delta. For instance, the SWRCB's 2010 Public Trust Flows report explicitly states that, "The best available science suggests that current flows are insufficient to protect public trust resources."³ Similarly, testimony and presentations to the SWRCB during Phase 1 and Phase 2 of the periodic review of the water quality control plan have demonstrated that existing flow and water quality standards are inadequate to

² This letter is available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/environmental_review/docs/cmp_rvw_cmmnt/swrcb_water_power_response_120125.pdf.

³ Available online at:

http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf

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reasonably protect native fish and wildlife species, their habitats, and the underlying conditions that support them. For instance, the May 12, 2012 comments from the California Department of Fish and Wildlife stated that, “Fish population declines coupled with these hydrologic and physical changes suggest that current Delta water flows for environmental resources are not adequate to maintain, recover, or restore the functions and processes that support native Delta fish,”⁴ and the Department’s presentation to the SWRCB explicitly states that the “Bay-Delta Plan [is] insufficiently protective of smelt species,” including longfin smelt and delta smelt.⁵

Moreover, the issuance in recent years of new biological opinions under the federal Endangered Species Act, and consistency determinations and permits under the California Endangered Species Act, *per se* demonstrates that D-1641 and the existing water quality control plan fail to reasonably protect fish and wildlife. Indeed, although the CEQA/NEPA document for the California WaterFix is substantially flawed and legally defective, even it admits that the No Action Alternative will result in significant adverse impacts on native fish and wildlife including winter run Chinook salmon. See Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft EIR/ Supplemental Draft EIS, at ES-48 (identifying significant impacts of water operations on rearing habitat for covered fish species and significant and unavoidable impacts on spawning and egg incubation habitat for winter run Chinook salmon and green sturgeon).

Therefore, an assessment of the impact of the proposed California Water Fix on the standards and requirements described in the current Water Quality Control Plan and D-1641 fails to adequately assess the project’s impact on protected fish and wildlife beneficial uses and public trust resources.

In addition, ensuring reasonable protection of fish and wildlife requires far more than meeting minimum ESA and CESA standards, and the SWRCB must also protect public trust resources to the extent feasible.⁶ Similarly, the existing flow and water quality standards have proven inadequate to achieve the salmon doubling objective in the existing water quality control plan, and the Board must ensure that the “appropriate flows” required pursuant to section 85086(b)(2) will be sufficient to achieve this objective of the water quality control plan.⁷ Alternative 4A in the California WaterFix fundamentally fails to meet

⁴ Available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/comments_042512/scott_cantrell.pdf. In addition, the Department’s 2010 report on biological objectives for the Delta reached an identical conclusion.

⁵ Available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/wrkshp1/fishagencies.pdf

⁶ For more information, please review the comments of the Natural Resources Defense Council and The Bay Institute to the SWRCB dated October 26, 2012, available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/doug_obegi.pdf.

⁷ DWR’s petition also inappropriately asserts that the “appropriate flow criteria” required by the Delta Reform Act should likewise be limited to D-1641 and the existing water quality control plan, as well as the flows presented by Alternative 4A: “Consideration of this Petition under Water Code §85086(c)(2) should occur within the existing

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the requirements of the ESA, CESA, and the salmon doubling objective of the existing Bay-Delta Water Quality Control Plan. The SWRCB must ensure that, should it eventually approve a change in point of diversion, it includes conditions sufficient to ensure achievement of the salmon doubling objective of the existing Bay-Delta Water Quality Control Plan.

In conclusion, the SWRCB must complete its periodic review of the Bay-Delta Water Quality Control Plan prior to approving any change in point of diversion, and the SWRCB cannot use D-1641 and the existing plan as the measure of determining whether the change in point of diversion would unreasonably harm fish and wildlife beneficial uses and public trust resources. We respectfully request that the SWRCB revise its notice and fact sheet to state that the SWRCB shall complete the periodic review of the Bay Delta Water Quality Control Plan before it issues any order authorizing a change in point of diversion, and make clear that the standards for review of whether the change in point of diversion causes unreasonable impacts on fish and wildlife shall not be limited to D-1641 and the existing water quality control plan.

Sincerely,



Doug Obegi
Natural Resources Defense Council



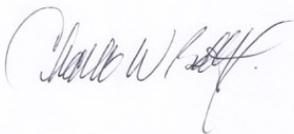
Rachel Zwillinger
Defenders of Wildlife



John McManus
Golden Gate Salmon Association



Tim Sloane
Pacific Coast Federation of Fishermen's Associations



Charles Batts
Friends of San Francisco Estuary



Gary Bobker
The Bay Institute

regulatory framework for the Delta provided by the WQCP and D-1641. Flows presented by Alternative 4A, beyond those required by D-1641, satisfy the appropriate Delta flow criteria to be considered by the Board under 85086(c)(2).” This is incorrect, as flows under Alternative 4A are likely to lead to continued population declines of longfin smelt, delta smelt, and numerous salmon and steelhead runs, are likely to violate requirements of the state and federal endangered species acts, and are insufficient to achieve the salmon doubling objective of the water quality control plan.