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State Water Resources Control Board

Division of Water Rights

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Edmund G. Brown Jr.
Governor

April 15, 2011

Terry Macaulay
Deputy Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Ms. Macaulay:

SECOND DRAFT DELTA PLAN

Thank you for the opportunity to provide comments on the second staff draft Delta Plan. We appreciate that the Delta Plan recognizes establishment of flows in tributaries to the Delta and other flow-related measures as important to achieve the Coequal Goals. We request clarification or suggest revised language for a number of policies and recommendations that involve State Water Resources Control Board (State Board) authorities and actions.

WR P1. Water Flow Standards

When establishing water quality objectives in water quality control plans, the State Board must consider factors other than public trust, including all past, present, and probable future beneficial uses of water (and other factors per Water Code Section 13241). Certain flow objectives already are contained in the State Board's 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The State Board is in the midst of a phased process to review and amend existing, or adopt new, flow objectives and a program of implementation to achieve those objectives in the Delta. We anticipate completing the first phase of this process for San Joaquin River flows by June 2012, at which time we will commence the process to revise other Delta flow objectives. We do not anticipate that we will complete the process to adopt other flow objectives for the Delta before June 2014. Please also note that we intend to consider, and perhaps reference, environmental documentation prepared by the Department of Water Resources for the Bay Delta Conservation Plan in our process. Thus, the timeframe for preparation of the environmental documentation for BDCP will affect the State Board's timeframe for reviewing and revising flow objectives in the Bay-Delta Plan. We recommend revising this section as follows:

The State Water Resources Control Board should develop flow criteria and establish flows as follows:

- a) *By June 2, 2014, adopt flow objectives for the Delta that are necessary to achieve the Coequal Goals.*
- b) *By January 2, 2018, develop flow criteria and establish flows for high priority tributaries in the Delta watershed that are necessary to achieve the Coequal Goals.*

In December 2010 the State Board completed a prioritized schedule and estimate of costs to complete instream flow studies for the Delta, in accordance with Water Code Section 85087. The report, Instream Flow Studies for the Protection of Public Trust Resources (Instream Flow Report), is available on the State Board's website at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/instream_recommendations/index.shtml

The estimated cost to complete instream flow studies for high priority rivers and streams tributary to the Delta, per the report, is approximately \$32 million. This information could be used to determine instream flow criteria for these rivers and streams. Flow criteria, however, would have no regulatory effect. This cost estimate therefore does not include the cost of using these flow criteria and other information to establish flow objectives with regulatory effect. Flow objectives could be established administratively either as part of the State Board's planning processes, which would then require subsequent implementation actions, or directly as the result of a regulatory action taken with respect to specific projects, either through amendment of water right permits and licenses or through water quality certification in connection with federal permits and licenses. Either approach would require compliance with the California Environmental Quality Act (CEQA) and the Water Code, as well as other regulatory and procedural requirements. Costs for implementing these approaches could vary widely. A simple case with a smaller watershed and limited water use would cost approximately \$600,000. A larger watershed with more complex water use issues would cost several million dollars. The State Board has no funding sources specific to the development of flow criteria or for establishment of flow objectives for the list of high priority rivers and streams tributary to the Delta.

State Board staff would therefore like to work with Delta Stewardship Council staff to identify a list of high priority tributaries in the Delta watershed that are necessary to achieve the Coequal Goals, that could reasonably be achieved by January 2, 2018. Based on current and anticipated future activities, staff suggests the following priority streams:

- Merced River
- Tuolumne River
- Stanislaus River
- Lower San Joaquin River (SJR)
- Deer Creek (tributary to Sacramento River)
- Lower Butte Creek
- Mill Creek (Tehama County, tributary to Sacramento River)
- Cosumnes River
- American River

We are in the midst of a process to establish flow objectives for the Merced, Tuolumne, Stanislaus, and San Joaquin Rivers. Per the Instream Flow Report, criteria development for each of the five tributaries outside of the SJR watershed listed above (Deer Creek, Lower Butte Creek, Mill Creek, Cosumnes River, and American River) is estimated to range between \$400,000 and \$800,000, for a total of \$2.0 to \$4.0 million. Establishing flow objectives would cost a minimum of an additional \$600,000 for each of the five tributaries, for a total of \$3.0 million, although the costs for setting objectives is likely to be much higher for larger watersheds such as the Cosumnes and American Rivers. Total flow criteria and standard setting for the five tributaries is therefore expected to range, at a minimum, from \$5.0 to \$7.0 million.

WR P3.

This water resources policy states, in part: "agencies currently receiving water diverted or exported from the Delta or Delta Watershed, and those anticipating receiving water diverted or exported, shall report the amount of water diverted and the amount of water used, through the State Water Resources Control Board's Electronic Water Rights Information Management System (eWRIMS) annually." The meaning and intent of this policy is unclear in two areas: it is not clear what is meant by "anticipating" water use or by "agencies receiving water." All entities currently diverting water must report water use to the State Board. Appropriate water right holders with water rights permit and licenses are required by the terms and conditions of their permit or license to annually report water use. All other water diverters, including riparian and pre-1914 appropriate water right holders, with some exceptions, are required by Water Code Section 5101 to report water diversion and use information every three years. There are currently no requirements for either: 1) reporting anticipated water use for future years; or 2) reporting of water use by agencies that are not diverting water, such as for water received under contract from a water right holder.

WR R2.

This water resources policy states: "Should local agencies fail to sustainably manage their groundwater basins, the State Water Resources Control Board should begin to regulate surface water and groundwater together as components of the same system on a balanced regional basis that prevents groundwater overdraft. Groundwater and surface water are part of the same system and failure to integrate management of groundwater and surface water makes it difficult, if not impossible, to achieve the coequal goals." Although we agree that groundwater and surface water are part of the same system, and that failure to integrate management of groundwater and surface water makes it difficult to effectively manage either, practical and institutional limitations make regulating surface and groundwater together as components of the same system problematic. Even in those areas of the state where a court or local agency regulates pumping in accordance with principles of sustained yield, groundwater is managed to prevent adverse impacts on other groundwater users and to prevent subsidence, not to avoid reductions in surface water flows. Staff therefore requests clarification on what is intended by this policy.

Per Water Code Section 1200, the State Board only has permitting and licensing authority over surface water diversions. Although existing authorities, including Water Code Section 275, provide authority that might be used to address overdraft, in theory, they do not include administrative mechanisms that would make it practicable to rely on them in cases where overdraft is the cumulative effect of large numbers of diversions. Even with those mechanisms, imposing limitations on groundwater pumping to prevent overdraft would be very expensive and time-consuming requiring a major new source of funding.

The State Board also has authority to initiate adjudications to protect groundwater quality. To the extent water quality problems result from groundwater overdraft, the Board can limit water users by initiating a groundwater adjudication. Several steps must be followed before the State Board may initiate a groundwater adjudication: (1) an investigation by the Department of Water Resources or some responsible governmental agency, indicating the quality of certain groundwater to be threatened with irreparable injury; (2) a public hearing by the State Board; (3) a determination of the necessity of an adjudication for restricting the pumping or for a physical solution; (4) intervention in any pending adjudicative proceeding, or one in which appropriate jurisdiction has been retained; (5) a determination whether a local public agency

overlying all or part of the basin groundwater will undertake the adjudication (if so, the State Board will take no further action); (6) an action filed by the State Board, only if no other action is taken. The State Board may then file an action in Superior Court "to restrict pumping, or impose physical solutions, or both, to the extent necessary to prevent destruction of or irreparable injury to the quality of ground water."

In addition, Article X, Section 2 of the California Constitution prohibits the waste or unreasonable use of water and the unreasonable method of diversion of water. This constitutional prohibition applies to the use of all waters, and is a limitation on every water right and every method of diversion. Thus, in a particular case, the doctrine may limit the amount of groundwater that may be pumped under an appropriative or overlying right.

Fees

Page 56 discusses fees, including water right fees assessed by the State Board. Because the draft plan appears to characterize the State Board's fees as "diversion fees," clarification is required. The State Board assesses regulatory fees to cover the costs of the board's regulatory water right program (per Water Code Section 1525). The annual water right permit and license fees are based on the maximum amounts authorized under the permit or license, and not on the amount actually diverted or used. In addition, the State Board also assesses one-time filing fees for certain water right actions, including processing applications and change petitions involving transfers (see California Code of Regulations Title 23, Sections 1066, 1062, and 1064).

I and other State Board staff look forward to continuing to work with Delta Stewardship Council staff on preparation of the Delta Plan. If you have any questions regarding these comments, please contact me at (916) 341-5428 or lgrober@waterboards.ca.gov.

Sincerely,



Leslie F. Grober, Manager
Hearings and Special Programs Section

cc: Thomas Howard, Executive Director
State Water Resources Control Board

Barbara Evoy, Deputy Director
Division of Water Rights
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