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August 24, 2009

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**Subject: Reject Preprint SB 1 and Preprint AB 1; opposing the
Peripheral Canal and the Bay Delta Conservation Plan**

Dear Senator Pavley and Assembly Member Huffman:

The California Water Impact Network (C-WIN) urges you to recommend that your committees reject SB 1 (Simitian) and AB 1 (Huffman). These bills will only coddle certain agricultural water districts to perpetuate their movement to eliminate California's system of water rights and make water supplies for the future of California's major urban economic engines, southern California and the South Bay Area less reliable than they now are. Moreover, these bills represent the legislature's efforts to enact the Governor's drive on behalf of his conservative agricultural friends in the San Joaquin Valley for new dams and a peripheral canal, neither of which the California Water Impact Network supports.

We disagree with the Delta Vision Task Force's findings that new governance is required in the Delta. Desperately needed is meaningful enforcement of existing legal public trust and constitutional water doctrines and laws through the existing State Water Resources Control Board, not a new layer of bureaucracy and institutional inertia. Consequently, we urge that you act as committee chairs to reject legislation that promotes more water bureaucracy and wasteful spending on large water projects that will increase legal conflict and reduce water supply reliability far into California's future.

A Better Alternative Legislative Agenda

Instead of focusing on adding a new agency layer atop existing ineffectual and unresponsive state water bureaucracies like the Department of Water Resources and the State Water Resources Control Board, the Legislature's agenda should instead:

- ❖ Require greater investment in water conservation by agricultural water users consistent with urban water conservation targets;
- ❖ Devise ways to more fully insulate State Water Resources Control Board appointees from political influence;
- ❖ Seek legislative solutions to eliminate over-allocation of water rights, which stimulates entities with low-priority rights to push for new water projects and potentially harmful water transfer programs that target vulnerable Sacramento Valley groundwater supplies; and
- ❖ Provide greater funding for the State Water Board to undertake both increased enforcement and more effective and independent regulation of California's water resources.

We copied both of you on a letter to Deputy Interior Secretary David Hayes dated July 30, 2009. The letter is viewable online at www.c-win.org. We urge you to review that letter as well as this one before having your committee vote on these Delta-related bills.

C-WIN firmly believes that California has enough water to meet all its needs. California does not have enough water to continue wasteful and unreasonable uses that harm public trust resources and compromise our state's agricultural, economic, and environmental future. **There is no real surplus water anywhere in northern California to fill a Peripheral Canal, even if it is built.** In January 2008, the State Water Resources Control Board disclosed in its Strategic Work Plan and to the Governor's Delta Vision Blue Ribbon Task Force in September that California's water right permit system down through the years has issued in excess of five to eight (8) times in water rights permits the average amount of water that annually flows in California's rivers and streams. The permits of both the federal Central Valley Project and the State Water Project account for much of this paper water, and are among the most junior and therefore lowest priority water right holders in California.

We (and many others) fear the "surplus" water sought for a Peripheral Canal would be taken from Sacramento Valley groundwater resources and Delta river channels. In the original planning for the first Peripheral Canal (which was soundly rejected by California voters in 1982), its water sources were to be exported from North Coast rivers and streams. In 1961, the California Department of Water Resources told the public that exported water from the Klamath, Mad-Van Duzen, Eel, and Trinity rivers would enter the new state water system. The Smith River was later added to this list. Today, only water supplies from the Trinity are available (to the Central Valley Project). And the Eel, Smith, and others are now unavailable for export to the Central Valley because of their

Wild and Scenic River status. (The Klamath, with its own recent fish kills and water supply controversies earlier this decade, is not practical as a source.) And yet the State Water Project still began operation by 1967 without these surpluses that would have reduced direct effects of export pumping on the Delta. **The Delta and Sacramento Valley cannot be new surplus sources because these regions have long-standing riparian (Delta and Valley) and overlying (Valley) rights attached to these sources.** Resort to drought water banks relying on pumped groundwater substitution for transfers in dry years attests to the high regard the California Department of Water Resources has for aquifers in the Sacramento Valley. But to count on these areas' water supplies permanently for the Peripheral Canal is to attack long-vested property rights of farmers in two of the most productive regions of the Central Valley, and to extend further north the swath of ecological and economic destruction spread by California's artificial water system. It is to set Californians against other Californians—which is a recipe for bad faith in water politics at a time when California already has severe fiscal problems, and public regard for state leaders is abysmal.

The issue of bad faith and trust in our politics is central to the upcoming decision on a Peripheral Canal. **A Peripheral Canal would eliminate the main physical reason to protect the Delta from salt intrusion through upstream releases of flows from rim reservoirs, which have occurred since the 1940s.** These reservoir releases hold back tidal flows emanating from the Golden Gate in San Francisco Bay. Delta exports would only be limited by “assurances” that fisheries would be protected. **Assurances and regulations the Delta should benefit from now are not followed, and are actively undermined.**

Let us count the ways:

- The State Water Resources Control Board issued an emergency order (drafted and approved by just one board member) in 2008 waiving Delta salinity standards in interior Delta for six months because of supposedly low water supply conditions. The Bureau and the California Department of Water Resources later acknowledged to the State Water Resources Control Board that western San Joaquin Valley irrigators and urban southern California water districts received 81 to 99 percent of their historic average (2000-2008) deliveries from the State Water Project and the federal Central Valley Project. It is also well documented from State Water Project data supplied to the State Water Resources Control Board that delta exports were at their historic peak during this 9-year period. **Meanwhile, the Bureau and the Department were given**

carte blanche to violate south Delta water quality standards from July through December 2008.

- Governor Schwarzenegger declared a drought emergency declaration in February 2009 to eliminate due diligence on environmental protections for the Sacramento Valley Giant Garter Snake and Delta endangered fisheries (smelt, salmon, and steelhead). **He also suspended the California Environmental Quality Act and the Delta's water quality control plans, actions that were unwarranted and, frankly, politically-motivated to facilitate transfers of water across the Delta to the low-priority western San Joaquin Valley irrigators with some of the most junior water rights, the intended beneficiaries of the Governor's actions.** The drought emergency declaration was maintained despite significant storms in February, March and May that make 2009 neither a drought nor critical year, but merely another "dry" water year. These late storms enabled the Bureau to revise its supply allocations for the San Joaquin River Exchange Contractors and the Friant Water Authority districts to 100 percent allocations—hardly reasonable pretext to suspend environmental regulations statewide. The same is true for the eastside irrigation districts, such as those along the Merced, Tuolumne and Stanislaus rivers. Western San Joaquin Valley water contractors, by contrast, have lower priority for deliveries in the CVP and were awarded 10 or 15 percent of their normal allocations.
- Yet despite low CVP allocations to the western San Joaquin Valley contractors, Lester Snow, director of the California Department of Water Resources, informed Senator Dianne Feinstein in a letter on May 7th that irrigators in this region will still obtain significant supplies through various sources of water, including purchases from other sources (like the Drought Water Bank) and from pumped groundwater.
- Delta water quality regulations contained in the Bay-Delta Water Quality Control Plan and implemented through the State Water Board's Water Rights Decision 1641 (D-1641) are routinely violated even during normal operations of the State Water Project and Central Valley Project, both of which are held responsible for meeting interior and south Delta water quality standards. Routine violations include these recent instances:
 - **March 2009:** Delta outflow requirements violated.
 - **June 2009:** San Joaquin River flow requirements violated.

- **Since mid-December 2008**, South Delta salinity standards have been violated.
 - **Water transfers are occurring using “Joint Point of Diversion” (JPOD) despite D-1641 prohibiting its use when salinity standards in the south Delta are violated.** These are routine events in the wake of the adoption of D-1641 in 2000.
- A State Board 2006 Cease and Desist Order requiring the projects to comply with D-1641 salinity requirements in south Delta river channels is about to be weakened instead of enforced by the State Board due to dry conditions and low 2009 supply allocations to low priority water contractors in western San Joaquin Valley.

Despite California’s laudable efforts to lead the United States on climate change response planning and energy conservation, this is a poor track record on which to establish good faith assurances that a Peripheral Canal would operate to protect Delta ecology and agriculture. This pattern of official behavior is water management through manipulation of the public’s fears of water shortage. It embodies a failure to lead on water conservation. Political trust of water agency officials and political leaders on matters of Delta water supply protection is, to say the least, in considerable doubt among environmentalists and Delta farming interests.

Since it is reasonable to assume that such a Peripheral Canal would be operated without sufficient respect for Delta farmers and ecosystems, we may all expect the Canal (or other designs, such as “dual conveyance”) would remove fresh water supplies from Delta ecosystems, reduce the diversity of aquatic habitats for failing species, and literally dewater the water rights of profitable Delta farms with senior water rights and associated businesses.

A Peripheral Canal would shift the point at which Sacramento River water is exported to a point north of the Delta. This would shift the impacts of export diversions directly to the Sacramento River (and away from the San Joaquin), the last river in the Valley supporting substantial, but vulnerable salmon and steelhead populations. We believe this poses grave risks for salmonid fisheries that are already on the ropes, as well documented by both the US Fish and Wildlife Service’s Anadromous Fisheries Restoration Program and the National Marine Fisheries Service’s recent biological opinion on present operations of the State Water Project and Central Valley Project.

A Peripheral Canal would eliminate “critical habitat” for fish species in Suisun Bay and the Sacramento River who move around seasonally. This is particularly true for pelagic fish like the Delta smelt, the longfin smelt, and striped bass. A Peripheral Canal would make the Delta more saline, shrinking their habitats, forcing them into Suisun Bay or more marginal brackish wetlands and sloughs that would make them more vulnerable to predation, starve them of food and nutrients, and push them closer to extinction.

A Peripheral Canal would increase the residence time of river flows reaching the Delta not otherwise diverted into the canal. Without greater regulation of upstream land uses, slower and lower water flows would increase pollutant concentrations, water temperatures, and dissolved oxygen problems in the Delta—all of which further compromise fish habitat, including the migration corridors of anadromous salmonid fisheries and other beneficial uses of water. Lower freshwater flows to the Delta would increase algal blooms, and would increase exposure of fish larvae and smolts to predators and entrainment in reverse river channel flows heading to the export pumps.

A Peripheral Canal would increase salt water intrusion into soils and water diversions, thereby reducing yields on hundreds of thousands of acres of productive farmland in the Delta, harming the region’s agricultural economy: business and farm failures could result from lack of credit, farm and agricultural service employees would lose their jobs, and sales and property tax revenues to five counties in the Delta would decrease, worsening an already difficult fiscal and economic situation in California.

You need not take just our word on these impacts of a Peripheral Canal. On July 21, 2009, the Contra Costa Water District made available its analysis of a large Peripheral Canal (one with a capacity of up to 15,000 cubic feet per second [cfs]). Based on models supporting the Bay Delta Conservation Plan process (discussed below), the District finds through its analysis that **a Peripheral Canal would:**

- ❖ **Deliver less water when the water is needed, *not more than is currently exported from the Delta.*** A canal would enclose water from the Sacramento River only, whereas now the export pumps derive water from both the Sacramento and San Joaquin rivers. Sacramento River flows are needed to prevent the river from drying up in the north Delta, and the river carries less than

15,000 cfs only about 46 percent of the time. Minimum instream flows in the river are needed and must be deducted from whatever would be diverted into a Peripheral Canal.

- ❖ **Go empty three times as often as it would operate full.** A peripheral canal would operate at full capacity only 4 percent of the time, but would be empty 12 percent of the time.
- ❖ **Still draw 50 to 75 percent of the water exported from the south Delta, with less fresh water in it than occurs now.**
- ❖ **Worsen stagnant polluted conditions in the Delta** caused by low river inflows.
- ❖ **Fail to solve the key conflict of providing water supply while protecting fish populations.** A Peripheral Canal would be an expensive investment to make without discernible environmental and economic benefits to California.

In 2008, the Public Policy Institute of California scholars (most of whom are from the University of California at Davis), found that dual conveyance canals in the Delta “is not likely to be better for fish than a peripheral canal operated on its own.” For Delta smelt, the Public Policy Institute authors reported a 10 to 40 percent chance of survival for the smelt under either Peripheral Canal or dual conveyance regimes. For endangered salmon species, the authors indicated only a 20 to 50 percent chance of viability with a Peripheral Canal or dual conveyance system in place. The best thing for fish, they concluded, was to end Delta exports. Their research further suggested that California agriculture and southern California cities, with their great size and diversity, would survive and recover. We agree.

The Bay Delta Conservation Plan

The Bay Delta Conservation Plan (BDCP) is the most ubiquitous and far-reaching Habitat Conservation Plan (HCP) ever envisioned together with a massive hydraulic scheme like a Peripheral Canal or dual conveyance. No significantly scaled HCP has ever been completed within the proposed timeframe, and the hydraulic schemes complicate the task. An HCP should focus on needed habitat improvement sufficient to enhance listed species so they may be eventually removed from endangered species lists. Because of this purpose (stated in both state and federal law) C-WIN does not believe the Bay Delta Conservation Plan should include guaranteed water deliver and/or changes in Delta infrastructure as solutions in the

Plan. Maintaining some level of water exports within the framework of an HCP prejudices the ability of the fish species to recover, when an appropriate HCP must rely on adaptive management strategies to both recover endangered species while continuing exports.

C-WIN sees the Bay Delta Conservation Plan as a vehicle for delay for environmental and economic protection of the Delta, and is likely not to result in improvements for the fisheries it is seemingly to protect. It accomplishes this window-dressing function by devising operational criteria by which the State Water Project and Central Valley Project export pumps in the Delta may pump while “taking” (killing) individuals of endangered species with the authoritative blessing of a habitat conservation plan allowed under the Endangered Species Act. **Such a habitat conservation plan would allow a *status quo ante* to continue wherein the California Department of Water Resources and the US Bureau of Reclamation could operate the Delta export pumps with allowed takes of endangered species—just as they do now, but with their killing of fish “legalized” through the habitat conservation plan.** We don’t see how this makes possible meaningful ecosystem restoration or endangered species recovery in the Delta.

Proponents of BDCP have yet to answer basic questions that must be addressed in the plan’s environmental review:

- ❖ How much water does the estuary need to maintain ecosystem integrity?
- ❖ How much surplus water is available for export?
- ❖ What economic and environmental consequences follow from various reduced or no export scenarios?
- ❖ Can a diversion point for junior water rights be legally changed when it will harm senior water right holders and users?

The matter of good faith and trust does not go away with BDCP. The process is supposed to arrive at assurances on how the export pumps and other Delta water facilities are to be operated to ensure the endangered fish species there will recover so they can be de-listed someday. “Assurances” about how Delta conveyance schemes will be operated are not likely to be reassuring given the recent and historical track record of water quality standard violations by the Department of Water Resources and the Bureau. And our faith (and that of others concerned with the Delta) in assurances is further undermined through actions of the Governor to suspend the water quality control plan that sets forth the very water quality standards that are violated. Moreover, “assurances” that water supplies would be unaffected are strictly incompatible with a truly adaptive

management approach to recovering Delta fisheries and ecosystems.

There is still no settled project description for BDCP on which adequate environmental documentation can be performed. Sizing, location, capacity, operational protocols, mitigation measures, assurances and safeguards, and the plan's financing are all unfinished. The treatment of the effects of upstream reservoirs on Delta inflows and fisheries is ignored. An acceptable range of alternatives has still not been settled either, and that range must include no export and reduced export scenarios for evaluation.; the legislation you are considering should make these alternatives required, not just the Peripheral Canal and Dual Conveyance designs.

The Delta cannot afford to wait for the outcome of BDCP. The population crashes reported by the US Fish and Wildlife Service this past April for salmon and steelhead in the Central Valley and Delta smelt indicate these fisheries are in imminent peril. The problems have been known since the 1950s and study after study performed only to see the Delta ecosystem worsen and crash because well-known corrective actions have been avoided and delayed. It is not more study that is needed; only the courage to take corrective actions.

We urge the State Legislature to reject support for the BDCP process and its expected outcomes.

Towards a Legislative Agenda for Water Policy Reform

Water rights law is essentially settled, except for the continued pressures from western San Joaquin Valley agricultural interests. Under California's water rights system, riparian landowners have first claim to water from adjacent streams. Historically, the California courts deemed that water surplus to riparians' needs is therefore available for appropriation. Riparians have priority in time over appropriators. Among appropriators, those with older water rights have priority over those with more recent water rights. Appropriative rights in California further divide into those vested prior to 1914, and those formally permitted under the California Water Code after 1914, subject to quasi-judicial review.

The State Water Resources Control Board has jurisdiction over only those appropriative right permits that were created after 1914. It has no jurisdiction over pre-1914 or riparian water right holders. Recall too that appropriative water rights may be granted only to the extent that the state considers there to be a surplus of water in a stream on which a water right has been applied for.

Mounting Evidence of Over-Appropriation's Effects. The State Water Resources Control Board's adopted Strategic Work plan for 2008-2012 acknowledges that relative to statewide average annual runoff of 70 million acre-feet per year, **the Board has over-appropriated five times as much water as runs off from all of California's rivers and streams. The actual amount factor is higher since the Board's estimate does not include water diverted by riparian right holders.**¹ This means that nearly every watershed in California has significant problems with promises to diverters of more water than is available, including the Bay-Delta's Central Valley watershed .

Over commitment of water parallels the recent financial meltdown: financial regulators failed to regulate new financial and lending instruments, leading to a housing price "bubble" and the generation of "toxic" assets. In California, water regulators failed to regulate appropriations of water adequately, leading to a water "bubble." When water allocation shortages struck, individual farmers with low water right priorities get cut off, losing their crop investments. The water "bubble"—overcommitted Delta exports—caused collapse of native aquatic ecosystems and encourage continued application of water to salt and trace metal-contaminated lands in the western San Joaquin Valley watershed, which in turns impairs water ways in the Valley and in the Bay-Delta estuary. But there is no institution in California water management capable of "printing more water" the way that the Federal Reserve may print more money as an economic stimulus.

The historical agencies of the state responsible for post-1914 appropriative water rights vastly overcommitted water from the Bay-Delta's Central Valley watershed streams. Last September, the State Water Resources Control Board reported to the Delta Vision Blue Ribbon Task Force that while the Central Valley watershed of California has an average annual runoff of 29 million acre-feet, the face value of water rights granted by the state to appropriative water right holders amounted to 245 million acre-feet. ***This means that for every acre-foot of real water in the Central Valley watershed, 8.4 acre-feet of water on paper has been promised by the state where only 1 acre-foot may actually be diverted.*** Small wonder so many streams in California are dry in the summer, and the Delta's ecosystem is crashing. Small wonder too that a water rights system premised on priority appropriation generates water shortages so easily

¹ The State Board has also issued Water Rights Order 98-08 declaring fully appropriated streams in California in which "no water remains available for appropriation for the specified sources during particular months." This report is online at <http://www.waterrights.ca.gov/hearings/wro1998.html>.

when California's weather fails to deliver rain and snow—as it regularly does. (One in three water years in this watershed is considered either dry or critical by the State of California.)

The State Water Resources Control Board further reported to the Delta Vision Task Force that:

There are 100 rights [in the Central Valley watershed] with a face value of 500,000 [acre-feet annually] or more that account for 84% of the total face value of the water rights within the Delta watershed. The Central Valley Project and State Water Project hold 75 permits and licenses within the Delta watershed that account for 53% of the total face value of the water rights within the watershed.²

The Central Valley Project and the State Water Project also have some of the most junior appropriative rights in California, with a face value of approximately 130 million acre-feet. By themselves, the face value of state and federal water rights exceed average annual Central Valley watershed runoff (29 million acre-feet) by a factor of 4.5. The California Department of Finance originally filed for these permits back in 1927, while other rights were filed for in the late 1930s. In terms of water appropriations, this is quite late in California history, since some pre-1914 appropriations date to Gold Rush days.

C-WIN cannot emphasize enough the importance of this historic moment: it represents the culmination of the failure of the Bay-Delta Accord of 1994, of the CalFED process, and of the search for a solution to California's water problems that "balances" the needs of the Delta environment with the needs of some interested groups in continuing to receive and increase water deliveries through contracts with the Central Valley and State Water projects.

In 1992 and 1993, the State Water Resources Control Board came very close to adopting a Water Rights Decision (Draft Decision 1630) that would have addressed many if not all of these desired outcomes sought by C-WIN for the Delta today. However, then-Governor Pete Wilson intervened to set aside the draft decision, which led to adoption of the Bay Delta Accord in 1994, followed by the establishment of the CalFED process, and the Monterey Amendments to the State Water Project contracts. These compromise actions have now clearly failed to keep the promise of "balance" and to protect the public trust resources in the Delta. Now, 17

² State Water Resources Control Board (no author), *Water Rights Within the Bay/Delta Watershed*, 26 September 2008, accessed 5 May 2009 online at <http://deltavision.ca.gov/BlueRibbonTaskForce/Oct2008/BlueRibbonMeetingMaterials.shtml> (scroll down to "SWRCB - Water Rights within the Bay/Delta Watershed.")

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years later, we urge the legislature to undertake a legislative agenda that enthusiastically supports water rights enforcement by the State Water Resources Control Board, including the state's public trust and constitutional protections—before it is too late for the Delta.

We urge you to reject these Delta-related bills. Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Carolee Krieger".

Carolee Krieger, President and
Executive Director