



## CENTRAL DELTA WATER AGENCY

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August 25, 2009

Honorable Senator Fran Pavley  
Chair  
Senate Natural Resources and Water Committee  
State Capitol, Room 4035  
Sacramento, California 95814  
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Honorable Assemblymember Jared Huffman  
Chair  
Assembly Water, Parks and Wildlife Committee  
P. O. Box 942849  
Sacramento, California 94249-0006  
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Re: AB 39, SB 12, and SB 458

Dear Senator Pavley and Assemblymember Huffman:

### Co-Equal Goals

The expression of co-equal goals as restoration of the Delta and water supply reliability has added confusion and uncertainty as to recognition of the priority of existing legal mandates. It should be made crystal clear that SWP and CVP water supply reliability remains junior to senior water rights, the needs of the public trust, present and future needs within the "areas of origin" (WC 11460, et seq.), salinity control and an adequate water supply for the Delta (12200 et seq.), protection of endangered species and full mitigation of project impacts. SWP and CVP adverse impacts are not limited to those caused by operation of the export pumps. Dams have inundated and otherwise blocked access to critical fish spawning areas, diversion structures have interfered with fish passage and increased predation, water temperatures have been altered, natural spring flushing flows are in many years being captured and stored. The projects have major diversions upstream of the Delta and project operations have induced non-project upstream diversions. In the case of the San Joaquin River, the CVP has for most years dewatered major stretches of the River. The SWP and CVP deliveries of water for use on the west side of the San Joaquin Valley leach latent salts from the land and also add the huge quantities of salt contained in the delivered water. These salts reach the San Joaquin River through direct drainage from irrigation and stormwater runoff and through accretion from adjoining groundwater. The

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remaining salts are accumulating in the soil and groundwater. The Federal San Luis Unit was not to proceed without a valley drain with an outlet to the bay or ocean. The cost of mitigation of these project impacts should not be shifted to the taxpayers or other water users. Additionally, the SWP and CVP have particular project purposes to be carried out at the cost of and as a part of the projects. The CVPIA 3406(b)(1) requirement that natural production of anadromous fish in Central Valley rivers and streams will be sustainable on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991, and the SWP requirement to include as a reimbursable cost of the project the preservation of fish and wildlife as per Water Code section 11912 are examples. The costs for these purposes should not be shifted to the taxpayers or others.

The cornerstone to the export of water from northern California to the San Joaquin Valley and southern California was the promise that only water surplus to the present and future needs of the north would be exported. The promise included salinity control for the Delta to eliminate the historically infrequent naturally occurring intrusions of salinity from the Bay and to mitigate for the salinity intrusion caused by State and federal flood control channel projects as well as project induced diversions both upstream and downstream from the Delta. The interior of the Delta was to serve as the common pool serving both in-Delta diverters as well as the exporters. Although imperfect, the common pool resulted in a common interest for Delta preservation. If the water quality is bad for the in-Delta users, it will be bad for the exporters.

It was always recognized that the Sacramento and San Joaquin Rivers Watershed were not capable of yielding the water necessary to meet the growing demands both within and outside the watersheds and still preserve the environmental needs. The State Water Project, the entire cost of which was to be borne by the water contractors, was to construct a number of dams on northcoast rivers to capture floodwaters and deliver the surplus developed water to the Delta to serve export demand as well as meet expected increased demands within the Sacramento and San Joaquin River watersheds. The plan was to provide five (5) million acre feet of supplemental water to the Delta by the year 2000. Due to a combination of Wild and Scenic Rivers legislation, environmental concerns and costs, the five (5) million acre feet of supplemental water was not developed. The export contractor desired water supply reliability cannot be based on the water available in the Sacramento and San Joaquin Rivers Watershed. The contracts are for water surplus to the present and future needs of the north and recognition of the environmental needs is growing and more water rather than less will be required. Since at least 1979, it was recognized by the State Water Resources Control Board that "To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the export pumps." See SWRCB D-1485 page 13. Since that time, the export pumping has steadily increased to the point that the courts have recently intervened to curtail illegal export pumping.

Water Supply Reliability Cannot Be Achieved With The Focus On Diversions Of Water From the Delta Watershed.

While it is of threshold importance to determine the amount and timing of the present and future availability of surplus water in the Delta, measures outside the Delta Watershed must be included. Planning for major new conveyance facilities should follow not precede the determination of the present and future needs within the Delta Watershed. Instream flow requirements in the tributaries as well as Delta outflow requirements necessary for protection and restoration of fish populations are a critical part of such determination. Water supply reliability requires a broader focus. Irrigation of permanent crops in areas intended to receive only surplus water and continued development of areas not now supplied with water deserve particular attention. Land use outside the Delta, water conservation, water reclamation including desalting brackish groundwater, municipal wastewater and in some cases ocean water must all be part of water supply reliability. The vulnerability of water delivery facilities other than Delta levees must also be a consideration. Conveyance of water across the Delta to pumps, canals and pipelines which are vulnerable to earthquakes, terrorism and subsidence will not achieve reliability. Restoration of the SWP contract provisions for area of origin priority and urban water use preference deleted in the Monterey Agreement should be a part of this legislation.

The Bay-Delta Conservation Plan Process Has Been Corrupted With A Required Buy-In Preference For A Peripheral Canal And Reliability For Exports.

It is likely that the environmental health of the Bay-Delta Estuary cannot be sustained with exports anywhere near the levels experienced in recent years. Greatly reduced exports in low flow periods and maintenance of carry-over storage to assure that water quality standards will be met during a succession of dry years appear to be necessary elements. The State and Federal fishery agencies appear ill equipped to regulate their sister agencies which operate the projects.

The arms-length relationship between the regulators and the regulated does not exist. In the 1994 Framework Agreement creating CALFED, the destruction of the otherwise weak arms-length regulation was formalized. The actions which followed left no doubt. The "Delta Accord" provided agreement for no net loss to the exports for additional endangered species requirements over and above SWRCB water quality standards even though the standards did not meet the requirements of previous biological opinions or EPA requirements. Establishment of the "Environmental Water Account" where additional fishery protection could not be required unless water was available from other sources to make up for export losses greatly eroded protection of the environment and turned the concept of exporting only "surplus" water on its head. The Bay Delta Conservation Plan is another regulator and regulated process constrained by the commitment to sustain exports from the Delta and construct a Peripheral Canal.

Council Structure Needs Local Majority Control To Assure A Solution That Will Benefit The State As A Whole.

Harming one part of the State to benefit another part is inappropriate. The goal should be

to benefit all areas with harm to none.

No State project should move forward in any area without the support of the affected local governments. A Delta Stewardship Council could be tailored to help develop a plan which could be supported. The Council should be given the authority to approve or reject the Bay-Delta Conservation Plan.

The Council should not have authority to fund or construct projects but should make recommendations to the legislature. Final project authorization and funding should be left to the legislature.

The Council role should not be limited to determining if the Bay-Delta Conservation Plan is "based on" particular requirements but rather on determining whether or not the plan will meet the required objectives.

Absent from the requirements is preservation and enhancement of Delta agriculture which is the cornerstone of the Delta Protection Commission Plan. Protection of the various islands and levee systems is critical to sustaining the food needs of migratory waterfowl and the economy of the region. Delta levees which were constructed, operated and maintained by government agencies such as Reclamation Districts are not private levees. Although there are some levees built, operated and maintained by landowners, the vast majority are project and non-project levees operated and maintained by Reclamation Districts. Project levees are typically reclamation district levees improved as a part of a federal project. Except for some project levees along the Sacramento River operated and maintained by the State through the Central Valley Flood Protection Board, the project levees are operated and maintained by Reclamation Districts.

The impacts from flooded islands to adjoining levees and lands due to seepage, wind waves and in some cases degradation of water quality are not changed by whether the levee is private or public. Preservation of all should be the goal with a greater level of protection for those with the greatest immediate impact.

#### The Water Master Authority Is Inappropriate.

The State Water Resources Control Board (SWRCB) suffers from a substantial conflict of interest and bias in addressing matters involving the State Water Project and, due to coordinated operation, the Federal Central Valley Project. Board members are appointed by the Governor and governors have intervened in the quasi-judicial functions of the SWRCB involving the SWP. Directors of the Department of Water Resources have had a role in screening and recommending appointments to the Board. There has been and is an inter-relationship of staff even at the deputy director and board member level.

Operation of the SWP and CVP has favored export of water over compliance with water

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quality standards and protection of fish. State and Federal agencies responsible for protection of fish have looked the other way.

SWRCB decisions involving the SWP should be subject to direct review by the Appellate Court with the Court exercising its independent judgment as to both legal and factual determinations. Good faith compliance in operations of the SWP and CVP is the issue.

Water master authority for administering adjudicated systems is already in place and should not be implemented as suggested. Attached is a general outline of our suggestions.

The present package of legislation includes major changes to our present water rights systems and delegation of authority which should remain with the legislature. It is very complex and has far reaching consequences. These matters are of extreme importance and deserve extensive review and debate.

The proposed schedule for action will not provide an appropriate opportunity for interested parties to address the major issues inherent in the legislative package. We urge that the bills be held over for further input and revision.

Respectfully submitted,



DANTE JOHN NOMEILLINI  
Manager and Counsel

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Enclosures

cc: Senator Joe Simitian  
Senator Lois Wolk  
Assemblymember Mike Feuer

## OUTLINE OF GOVERNANCE CONCERNS

- 1) New Independent "Council" to develop the Delta Plan. The Council shall have real representation of in-Delta interests. The Delta Plan must be based on a realistic determination of the timing and availability of water for export. Such availability must be based upon full protection of senior water rights and recognition of the present and future needs including environmental needs within the Delta and other areas of origin. Development of the Delta Plan shall include review of any drafts of the BDCP and NCCP plans prior to submission of such plans for permit issuance. The Delta Plan shall include water supply augmentation and/or demand management sufficient to overcome the water supply deficits of the water export projects. The assurance of the balance of supply and demand must precede any major commitment to conveyance.
- 2) Creation of an oversight entity or modification of the California Water Commission to assure that the State Water Project a) is fully self-supporting without subsidy; b) is in full compliance with law including without limitation area of origin laws, Delta Protection Act, Endangered Species Acts and water right priorities; and c) is operating to provide sufficient carryover storage to meet water quality standards and the needs in the Delta and other areas of origin including environmental needs in preference to exports during extended dry periods.
- 3) Provision should be made for an independent inspector general with authority to ensure SWP compliance with all legal requirements, including without limitation the requirement that the SWP shall be fully self-supporting without subsidy and that the present and future water needs including environmental needs in the Delta and other areas of origin be met as a prerequisite to export of water from the Delta.
- 4) Land use authority in the Delta will remain with local government, co-ordinated through joint planning efforts with the Delta Protection Commission, and consistent with the Delta Plan, including its flood management component. Regional entities similar to the Delta Protection Commission shall be created for all regions importing water from the Sacramento and San Joaquin Rivers watershed to assure that land use changes do not create new water demand and to limit development in areas subject to high risk hazards such as from floods, earthquakes and fires.
- 5) A Delta Conservancy with representation for in-Delta interests will be formed with a secure source of funding to implement and manage projects to preserve agriculture and wildlife friendly agricultural uses of land. Such plans shall require the approval of the Delta Protection Commission and the local government agencies wherein the project is located.
- 6) Water quality and water rights authority would remain with the State Water Resources Control Board but all of its decisions and plans concerning the San Francisco Bay-Delta Estuary and its watersheds shall be directly appealable to the California Appellate Court for the Third District. The court shall exercise its independent judgment on the evidence in all cases and no deference shall be accorded to the board on any interpretation of law including without limitation those related to Area of Origin Law, Delta Protection or Public Trust.