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Secretary for  
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# State Water Resources Control Board

## Executive Office

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Arnold Schwarzenegger  
Governor

September 30, 2008

Mr. Phil Isenberg, Chair  
Delta Vision Blue Ribbon Task Force  
650 Capitol Mall, 5<sup>th</sup> Floor  
Sacramento, CA 95814

Dear Mr. Isenberg:

### STATE WATER RESOURCES CONTROL BOARD COMMENTS ON THE FOURTH STAFF DRAFT OF THE DELTA VISION STRATEGIC PLAN

The State Water Resources Control Board (State Water Board or SWRCB) continues its support of the work of the Delta Vision Blue Ribbon Task Force (Task Force) in providing a long-term vision for the sustainability of the California Delta. This letter provides comments on the Fourth Staff Draft of the Delta Vision Strategic Plan (Strategic Plan) dated September 12, 2008. In general, the State Water Board agrees with the goals and strategies outlined by the Strategic Plan to achieve sustainable management of the Delta.

We continue to believe, however, that the governance description needs further refinement to better describe the relationship between the proposed California Delta Ecosystem and Water (CDEW) Council (Council) and the State Water Board in order to eliminate the potential for competing or redundant activities and to develop a system of coordinated management of the Delta. Despite the statements in the Strategic Plan regarding support for state agencies' ongoing exercise of existing authorities, the Strategic Plan states that the CDEW Plan will be legally binding on state agencies and that the Council will have the authority to ensure state consistency with the CDEW Plan. The Strategic Plan also envisions the ability of the Council to ensure state consistency with the CDEW Plan through enforcement mechanisms and funding restrictions against agencies. It is unclear what this governance structure means when, under existing law, the State Water Board must independently exercise its regulatory and quasi-judicial authority and responsibility in considering water quality control plan amendments and related adjudicative proceedings.

While the Task Force is finalizing its Strategic Plan, the State Water Board is continuing to move forward on the activities identified in its Bay/Delta Strategic Workplan

(Workplan) adopted on July 16, 2008. Consistent with its Workplan, the State Water Board held a workshop on September 17, 2008 to receive information regarding the San Joaquin River flow objectives for fish and wildlife beneficial uses in the Bay-Delta. This and other planned workshops are intended to inform the State Water Board on potential changes to the 2006 Water Quality Control Plan for the Bay-Delta (2006 Plan). On October, 8, 2008, the State Water Board will hold a workshop to identify the scope of other elements in its 2006 Plan that may need amendment.

Following are comments specific to the Fourth Staff Draft of the Strategic Plan (Fourth Staff Draft):

The Fourth Staff Draft recommends that by 2012 the State Water Board should adopt specific spring and fall Delta outflow requirements and Vernalis flow objectives. The Strategic Plan also recommends that by 2015 these requirements and a requirement for short-duration fall San Joaquin River pulse flows be implemented. In making any water quality control plan amendments, the State Water Board's determination must be supported by evidence in the record before it. We are concerned that the science that is developed and presented to the State Water Board in its workshops and hearings for the 2006 Plan amendments may not result in the same flow prescriptions suggested by the Delta Vision Strategic Plan. Therefore, the State Water Board is encouraged by the discussion of the Task Force at its September 2008 meeting to revise its Strategic Plan to make these recommendations a more general example of what the State Water Board should consider in its planning process.

Similarly, the Strategic Plan also states that:

*by December 2010, the SWRCB should identify any inconsistencies in the SWRCB's water quality control plan in light of the CDEW Plan recommendations and actions and develop a plan to address those inconsistencies within a reasonable time or inform the Council in writing of why it cannot address the inconsistencies and propose alternative action.*

As stated previously, the State Water Board is undergoing a comprehensive review of its Bay-Delta Plan and will consider any amendments to that plan based on the evidence it receives. We believe that the review of the Bay-Delta water quality control plan and the development of the CDEW Plan will be informed by the same science provided by state and federal resource agencies and other scientific efforts. The State Water Board believes that these processes should inform each other. Toward that end, the State Water Board can provide technical and regulatory information to the Council about any particular differences between the 2006 Plan and the CDEW Plan. Ultimately, however, the State Water Board must exercise its independent authority in making any amendments to the 2006 Plan.

The Fourth Staff Draft recognizes that wetland restoration intended to improve ecosystem condition and function may increase the production of methyl mercury and recommends minimizing *"its transport and availability to biota."* In addition to minimizing the transport of methyl mercury, consideration should be given to designing restoration projects to minimize the production of methyl mercury. Should restoration efforts increase mercury methylation, there is potential for mercury impairments to some aquatic species and wildlife in some areas of the Delta.

Similarly, strategy 3.5 recommends that the Central Valley Regional Water Quality Control Board (Regional Water Board or RWQCB) adopt Total Maximum Daily Loads (TMDLs) to control organic and inorganic mercury inputs from tributaries to the Delta by 2012. This strategy also mentions continuing the mercury TMDL for the Delta but does not include timelines for its adoption. Whether or not a timeline is appropriate, this suggests that the Delta mercury TMDL is subordinate to addressing the tributary inputs. We recommend that adopting and implementing the Delta mercury TMDL to address concerns about the impacts to wildlife and people eating Delta fish is an appropriate strategic action for the Plan.

The Fourth Staff Draft identifies a suite of performance measures for water quality under strategy 3.5. Most are appropriate. However, we recommend the following revisions and an addition to the list. The performance measure related to salinity variability seems more appropriate for Strategy 3.4, which addresses Delta flow objectives. Salinity variability would need to be achieved through flow objectives rather than upstream controls. Measures of the *"Number of new contaminants added to the RWQCB Section 303(d) list"* should be removed. The number of new contaminants that cause water quality impairments is in many cases an artifact of the ability to measure a specific chemical and whether or not data are available. In recent years, the number of water body/pollutant combinations added to the 303(d) list of impairments has increased significantly due to the increase in monitoring being conducted. Finally, a performance measure for toxicity such as *"Toxicity to standard aquatic toxicity test organisms"* should be added to the list. Toxicity testing measures the effects of mixtures of contaminants, measures the effects of unknown contaminants (e.g., those that we may not have the capability to measure), and measures bioavailability of contaminants. Many of the Regional Water Board's programs use toxicity testing to measure compliance.

The Strategic Plan states:

*Conflicts over water should be decided through effective use of California's water rights laws, which includes reasonable use and public trust principles. This recommendation that Californians really apply water rights laws may be the most far reaching recommendation made by this Task Force. (Strategic Plan, vol. 1, pp. 7-8.)*

The State Water Board appreciates the Strategic Plan's recognition of the importance of the continued application of California water law. Nonetheless, as the State Water Board has previously noted, effective water right administration depends on adequate enforcement. In particular, one omission from the Third Staff Draft is notable—the removal of certain elements of Strategy 18, which called for improving water diverters' compliance with applicable laws, regulations, and constitutional principles. Strategy 18 recommended that the State Water Board's capacity be expanded, in part, to authorize monetary penalties for monitoring and reporting violations, to impose adequate penalties for unauthorized diversions and violations, and to include provisions for interim relief. These elements are no longer included in the Fourth Staff Draft. Instead, the Fourth Staff Draft relies, in part, on state agencies' *"ongoing effective exercise"* of their existing authorities.

The State Water Board will make use of its existing enforcement authorities to the fullest extent feasible, and through our Bay Delta Strategic Workplan, we are conducting a thorough review to determine what administrative, budgetary and other changes would improve the effectiveness of our enforcement efforts. This review will include whether current penalty provisions provide an adequate disincentive to noncompliance.

As you know, the State Water Board has broad authority to prevent the unreasonable use or unreasonable method of diversion of water, and aspects of the State Water Board's enforcement mechanisms can and should be improved. Improvements are needed to help prevent the unauthorized diversion of water generally, and to improve the State Water Board's ability to take timely actions to protect the beneficial uses of the State's waters (including fish and wildlife protection, navigation and the rights of authorized water users). Enhanced authority should be considered to enable the Board to impose prompt interim relief to reduce or avoid damage to Delta public trust resources or water resources pending the more time-consuming administrative proceeding process (my July 31, 2008 comment letter also speaks to this issue).

The Fourth Staff Draft would require the State Water Board to *"ensure accurate and timely information is collected and reported on all surface water diversions in California by 2012. This action will also repeal all exemptions from reporting to the [State Water Board]."* (Strategic Plan, vol. 2, p. 34.) It is unclear how the State Water Board will "ensure accurate and timely information" is collected and reported as there are currently no disincentives to compel compliance with reporting requirements. Consideration should be given to strengthening the Water Boards' authority to require monitoring and reporting of all surface water diversions and whether imposition of monetary penalties for noncompliance is an appropriate tool for improving compliance. This would include the ability to require an individual diverter to contribute to a joint monitoring program where multiple diversions have a cumulative effect on the stream system.

The Fourth Staff Draft would require the Department of Water Resources, local water districts and counties to ensure information is collected on all groundwater diversions in areas upstream, within, and that receive exports from, the Delta watershed and to report such data to the State Water Board. (Strategic Plan, vol. 2, p. 34.) Rather than establishing a new program, consideration should be given to expanding the current groundwater recordation program (Wat. Code, § 4999 et seq.) statewide to require all groundwater users to report the extraction or diversion of groundwater to the State Water Board. The program is currently applicable to four Southern California counties (Riverside, San Bernardino, Los Angeles, and Ventura). Expansion of this existing program would more efficiently build upon the current expertise and resources of the State Water Board.

Lastly, to ensure that sufficient scientific information is available to support good decision making, we must improve the State Water Board's ability to fund, initiate, request, or direct scientific studies or modeling through an independent science and engineering board, the University of California or California State systems, or the Department of Water Resources.

Thank you for the opportunity to comment on the Fourth Staff Draft of the Delta Vision Strategic Plan. Please contact me if the Water Board can provide additional assistance as the Task Force finalizes its Strategic Plan.

Sincerely,



Tam M. Doduc  
Board Chair

cc: See next page.

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Mr. Phil Isenberg

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