

Written Testimony of the California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) for the January 22, 2008 State Water Resources Control Board Workshop on the Pelagic Organism Decline in the San Francisco Bay/Delta estuary.

In the spring of 2007, the California Department of Fish and Game reported that the 2006 Fall Midwater Trawl Abundance Index for delta smelt was 41, the second lowest level ever recorded during the survey's 40-year history and the third consecutive year of record low abundances for this Endangered Species Act-listed fish. The current population levels, combined with peer-reviewed population viability analyses conducted for the species, clearly indicate that the delta smelt is in imminent danger of extinction. Recent scientific research has demonstrated that loss of delta smelt at the water export facilities, particularly during this critical winter/spring period, has been a major contributor to the species' population decline. Trawl numbers for other Pelagic Organisms have continued to decline and the recently released 2007 Fall Midwater Trawl indexes were equally dismal.

On December 14, 2007, federal District Court Judge Oliver Wanger issued an interim order finding the Long-Term Central Valley Project Operations Criteria And Plan ("OCAP") Biological Opinion ("BiOp") unlawful and inadequate, as well as the accompanying Delta Smelt Risk Assessment Matrix ("DSRAM") adopted to implement the 2005 OCAP BiOp, in violation of the Administrative Procedure Act, 5 U.S.C. § 705 et seq. An adequate Biological Opinion for endangered species is a condition of the water rights permits held by the state and federal projects and without adequate protection for fish and wildlife the permits lack fish and wildlife protections required by California public trust and unreasonable use law.

Our two organizations (C-WIN and CSPA) are therefore asking the State Water Board to take immediate action to protect delta smelt and other Pelagic organisms to improve their habitat by amending the export permits of the SWP and the CVP until plans for long-term management and recovery of the species are developed and implemented. Given the current precarious state of the species, these actions should go beyond the interim Court order and beyond those actions designed to minimize poor environmental conditions and harmful water management operations and instead provide conditions that are beneficial to the species to attempt to ensure recovery of all species in the estuary.

The specific recommendations outlined below are based on the improved scientific understanding of delta smelt and its habitat, which has grown exponentially during the past few years. The actions are designed to: (1) minimize to the greatest extent possible direct mortality of delta smelt at the water export facilities and other Delta diversions; (2) facilitate movement of the fish to and from spawning and early rearing habitats; (3) improve estuarine habitat quality during the spring, summer and fall; (4) reduce diversion and hydrodynamic effects on summertime in-Delta primary and secondary production; (5) facilitate transport of food organisms downstream to delta smelt habitat; and (6) potentially prevent the expansion upstream of the invasive clam *Corbula amurensis* into the Delta.

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The actions we recommend are similar to those developed and evaluated by the project and fishery agencies last year as part of the "Pelagic Organism Action Matrix" and as "Potential Actions to Reduce the Effects of Water Management on Delta Smelt Reproduction, Growth and Survival Intended to Increase Delta Smelt Abundance" and which are now included in the Resources Agency's *Pelagic Fish Action Plan* (March 2007). However, our recommendations reflect our concern that, at this point, actions that simply minimize harm to the species may be insufficient to save the delta smelt and other Pelagic species: to reverse the decline of these species, the projects must adjust their management of this system to provide favorable environmental conditions. Furthermore, all of these actions can be implemented immediately via operational changes and/or minor changes in existing infrastructure. We recommend that the Board amend the water right permits of the agencies to require implementation of the following actions:

- Manage Sacramento and San Joaquin River inflows and Delta water exports to prevent negative flow conditions on Old and Middle Rivers during late winter and spring (i.e., Old and Middle River flows ≥ 0 cubic feet per second [cfs] from February-June);
- Restrict export increases during wintertime pulse flow events to levels that avoid negative flows on Old and Middle Rivers;
- Extend the Vernalis Adaptive Management Program export curtailment beyond the required 31-day period until monitoring and salvage indicate that >95% of the delta smelt population is located downstream of the confluence of the Sacramento and San Joaquin Rivers;
- Do not allow installation of the barrier at the head of Old River;
- Do not install the south Delta agricultural barriers until monitoring and salvage indicate that >95% of the delta smelt population is located downstream of the confluence of the Sacramento and San Joaquin Rivers;
- Increase San Joaquin River flows and/or curtail water exports to maintain Old and Middle River flows no less than -5000 cfs during summer (July-September);
- Maintain X2 downstream of 80 km and/or maintain western Delta salinity at levels comparable to those measured during years in which *Corbula* had the most downstream distribution patterns during the fall (September-December).

Basically, these combined recommendations are designed to recreate as much as possible a spawning and rearing environment similar to the one in which delta smelt evolved and to reduce entrainment of adults and larvae in diversions.

These recommendations are not made lightly or without consideration for other beneficial uses of water resources in the Delta. However, given the critical state of this (and other)

species and the good water supply conditions forecast for this year, we believe that significant new actions are both necessary and feasible. Extinction of the delta smelt, an important measure of Sacramento-San Joaquin Delta's ecological health, would be a tragedy. Given our impressive scientific understanding of this species and its ecosystem, much of it generated by research supported by state and federal agencies, application of this knowledge would demonstrate commitment to sound stewardship of the Delta and its remaining native fishes.

The State Water Board relies on local residents, other agencies, and other interested persons to help them identify potential water right violations. This testimony by the California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) is a recurring request to the State Water Board to begin a formal hearing process against the State Water Project and the Central Valley Water Project for the damage done by their respective pumping facilities in the San Francisco Bay/Delta to Pelagic Organisms in the estuary. The last step possible to get the State Water Board to carry out its duty to protect the Bay/Delta estuary is a formal complaint. The formal complaint process affords the State Water Board yet another opportunity to be apprised of unauthorized diversions or of damage done by unreasonable methods of diversions such as these. Information regarding an actual or potential unauthorized activity is often obtained through a complaint filed by the public or by another public agency. It seems unnecessary to bring a formal complaint to the Board to require action on a set of violations that the Board has known about for years, but we will if the Board does not act immediately. Complaints may be based on allegations that a diversion of water is in violation of permit or license terms or conditions, is without basis of right, constitutes the waste or unreasonable use of water, or adversely affects public trust resources. The State Water Board should respond to all written complaints. State Water Board staff then may conduct a field investigation to gather additional information not contained in the complaint or in the water diverter's response to the complaint. State Water Board staff should consider the following Board established policy when analyzing this testimony and determining Board enforcement priorities.

Every violation of a permit or license deserves an appropriate enforcement response. Because resources are limited, however, the State Water Board should balance the need to complete its non-enforcement tasks with the need to address violations. It should also balance the importance or impact of each potential enforcement action with the cost of that action. The first step in enforcement prioritization is the determination of the relative weight of the violation. The criteria for prioritization used by the Board should be applicable statewide and focus on watershed conditions, the injury, or potential for injury, from the violation, and the project characteristics. In the policy area, the State Water Board should use a set of common criteria. The priority of the violation should also consider the water diverter's history of past violations. The State Water Project and the Central Valley Project have a history of violating water quality standards and have caused fishery impacts for decades even before being identified by the Interagency Ecological Program as one of the three causes of the latest Pelagic Organism Decline (POD) that is the subject of this workshop.

The damage done by the state and federal pumps in the Bay/Delta is the most pressing water right and environmental issue in California at the present time. The protection of California's public trust resources in the Bay/Delta estuary should be of paramount importance in allocating Board resources for enforcement. The State Water Board is responsible for protecting existing water rights. Any violations affecting the available water supply of the estuary requires the State Water Board to declare the Delta a fully appropriated stream system pursuant to Water Code section 1205 or any violation that threatens or causes a take of endangered species should be given enforcement priority. The prevention of waste, unreasonable use, or unreasonable method of diversion of water should be given enforcement priority. Any violation that injures a senior right holder like the Delta riparians or the Contra Costa Water District should be given enforcement priority. Any large consumptive use project like these diverting more than 6 million ac/ft of water that receives huge economic benefits from their violations and unauthorized diversions should be given enforcement priority.

A formal enforcement action is a statutorily authorized enforcement action. Formal enforcement actions should result in findings of fact that establish all of the statutory requirements of the specific statutory provision being utilized. Pursuant to Water Code section 1052, an unauthorized diversion or use of water that violates conditions of permits is a trespass against the State subject to a maximum civil liability of \$500 per each day of unauthorized diversion or use of water.

Water Code section 1055.3 provides that:

"In determining the amount of civil liability, the board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator."

Other Factors the Board should consider in establishing water and financial penalties for the actions of the SWP/CVP that have resulted in the Pelagic Organism decline should include:

Avoided Costs

The avoided cost should represent the true cost the violator would have to spend to legally acquire water equivalent to the water supply illegally diverted. This amount is based on the average value of water available in the area of the diversion. If water is not available in the area, the highest regional water cost will be used. Avoided water right fees will be included. Any investment costs for the infrastructure necessary to deliver water to the point of use also may be considered if the infrastructure does not already exist.

Economic Benefit Amount

The Economic Benefit Amount is any savings or monetary gain derived from the acts that constitute the violation in addition to the avoided cost. Economic benefit

includes all savings from, and all income and profits resulting from, the use of the illegally diverted water over the time period of that use. This could include benefits resulting from the time value of money.

Deterrent Amount

The civil liability should be set at a level that will deter future noncompliance by the violator or others in the same regulated community. In establishing this amount, the State Water Board will consider both the violator's culpability and the extent of harm associated with the violation as follows:

Culpability

The culpability amount should be determined based on the nature and persistence of the violation, length of time that the violation has continued, the diverter's knowledge of water rights requirements, the diverter's role in construction and operation of the diversion project, responsiveness to previous notifications by the State Water Board or the Division, and any voluntary efforts undertaken or not undertaken to correct the violation. A diverter's knowledge of the water right system will be assessed based on information in the State Water Board's records.

Extent of Harm Amount

Staff should estimate an amount that mitigates for any harm to public trust resources known to be specifically caused by the violator. State Water Board staff should consult with the Department of Fish and Game, US Fish and Wildlife Services and National Marine Fishery Service in estimating liability amount for impacts to fish and wildlife resources.

Staff Costs

Staff costs should be calculated for all State Water Board staff time expended on the investigation of the violation, preparation and review of the staff report, and preparation and review of the enforcement action. The staff costs should include salary, benefits and all overhead costs. The civil liability amount should, at a minimum, be set at a level that recovers economic benefit plus staff costs.

The State Water Board has the authority under the Water Code, the State Constitution, and the California Public Trust to lower project pumping that harms the estuary. The State Water Board may issue an order to cease and desist when it determines that any person is violating, or threatening to violate (1) the prohibition set forth in Water Code section 1052 against the unauthorized diversion or use of water; (2) any term of condition of a water right permit, license, certificate, or registration; or (3) any decision or order of the State Water Board issued pursuant to part 2 (commencing with section 1200) of the Water Code such as Water Code section 275. The State Water Board may consider imposing civil liability for an amount not to exceed \$1,000 for each day of violation. The

State Water Board may also consider requesting the Attorney General to petition the superior court to impose civil liability, or for the issuance of prohibitory or injunctive relief. A public trust hearing would provide the necessary evidentiary record for the State Water Board to reduce present export levels to an amount of water that is sustainable.

The State Water Board may revoke a permit or license pursuant to Water Code sections 1410 or 1675, respectively. A license may be revoked if the State Water Board finds that the licensee has not put water to a useful or beneficial use, has ceased to put water to such use, or has failed to observe any of the terms and conditions of a license or permit. The State Water Board must provide notice of the proposed revocation. The notice must contain a statement of facts and information on which the proposed revocation is based. Unless a request for hearing is received, the State Water Board may act on the proposed revocation without a hearing.

It is long past the time that this Board should begin the standard hearing process to modify the state and federal export project permits. Workshops of this type have completely failed to arrest the continuing problems caused by the over-appropriation of the Bay/Delta watershed. If this Board is not going to enforce the law against the state and federal projects because of their political power, then what California has for a water rights system is a system of political power, not a system of laws. We believe that the law requires action immediately, and if the State Water Board won't exercise its duty, then the courts will.

Dated: January 10, 2008

Michael B. Jackson
Board Member and Attorney
for C-WIN and CSPA