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In reply refer to: LDE2010-007

October 14, 2010

VIA EMAIL ONLY

Mr. Chad Dibble
Water Branch
California Department of Fish and Game
cdibble@dfg.ca.gov

Re: Comments on Draft DFG Report – *Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta*

Dear Mr. Dibble:

El Dorado Irrigation District (EID) appreciates this opportunity to submit comments on the above-referenced draft report circulated by the California Department of Fish and Game (DFG) on September 21, 2010 (DFG report). EID provides drinking water, wastewater and recycled water services to more than 100,000 residents of El Dorado County. EID also operates a hydroelectric project on the South Fork of the American River, conveying water from four reservoirs high in the Sierra Nevada through miles of gold-rush era flumes and canals and provides water-based recreational opportunities to the public at Sly Park and other reservoirs. Like other water purveyors upstream of the Delta; EID knows that the DFG report, and its interpretation and application by the host of federal and State agencies working to protect the ecological resources of the Delta, are extremely important to our ongoing ability to provide the public with safe, reliable water supplies in a fiscally and environmentally responsible manner.

As recognized by the Legislature in its adoption of the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), the DFG report and the State Water Resource Control Board's (SWRCB or State Water Board) report of August 3, 2010, entitled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (SWRCB report), are important to informing the planning processes of the Delta Plan and the Bay Delta Conservation Plan (BDCP). EID

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understands the statutory responsibilities of DFG and the State Water Board in preparing these reports and appreciates the immense complexity of the many stressors affecting the health of the Delta ecosystem. Yet, for this reason, the limited scope of each report must be recognized going forward with BDCP and Delta Plan.

While water flow is certainly important to the health and function of the Delta ecosystem, it is but one of many factors affecting the estuary. “The timing, magnitude, quality of flows, and way in which water is diverted all influence habitat features such as temperature, turbidity, transport, nutrient loadings, pollutant dispersal and other factors.” (DFG report, Executive Summary, p. 1.) Yet, flow is “not the only factor affecting ecosystem health and the decline of fish populations in the Delta.” (*Id.*) The introduction of “non-native” species, “habitat loss,” “contaminants,” and many other factors can (and in EID’s estimation logically have) adversely affect[ed] the Delta ecosystem by “reducing overall productivity and affecting nutrient dynamics and the base of the foodweb.” (*Id.*) Consequently, “Flows by themselves are not the only consideration when the goal is the overall health of the estuary.” (*Id.*)

Similarly, the SWRCB report highlights the need to conduct a broader inquiry into the many factors affecting the Delta ecosystem. According to the report, “[T]he State Water Board’s approach to developing [flow] criteria was limited to review of instream needs in the Delta ecosystem, specifically fish species and Delta outflows, while also receiving information on hydrodynamics and major tributary inflows.” (SWRCB report, Executive Summary, p. 2.) Notwithstanding, the report states, “The information in this report illustrates to the State Water Board the need for an integrated approach to management of the Delta. Best available science supports that it is important to directly address the negative effects of other stressors, including habitat, water quality, and invasive species, that contribute to higher demands for water to protect public trust resources. The flow criteria highlight the continued need for the BDCP to develop an integrated set of solutions and to implement non flow measures to protect public trust resources.” (*Id.* at p. 4.) Thus, flow is but one of many factors that must be considered.

In addition, under the public trust doctrine, other public trust resources and public interest concerns must be thoroughly considered by the State Water Board before the flow criteria described in these reports can have either regulatory or adjudicatory effect. The “limited process” adopted by the State Water Board to develop its report in only nine months did not include the “comprehensive review” required for setting flow objectives with regulatory effect wherein the State Water Board “reviews and considers all the effects of the flow objectives



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through a broad inquiry into all public trust and public interest concerns.” (*Id.* at p. 2.) Instead, by necessity, the State Water Board focused exclusively on one public trust resource - protection of aquatic resources within the Delta - and one method of protection, increased instream flows. Other mitigation measures and other public trust values within the Delta and throughout its upstream watersheds were not considered. Nor were any public interest concerns such as the economy, human health and welfare, or water supply reliability taken into consideration. (*Id.* at pp. 2-3.)

Implementation of any of the remedial actions contemplated in either of these reports would have a dramatic effect on the ability of upstream water purveyors such as EID to serve its citizens. Yet neither the State nor federal Endangered Species Act allows for the imposition of such burdens, or fees or charges, on those that are not a party to an NCCP/HCP process such as BDCP. Instead, any such initiative should occur through existing water rights and water quality laws and administrative processes of the State Water Board. The longstanding rights and obligations of water appropriators established under law, such as priority of right, must be recognized and applied through existing administrative processes designed to afford necessary due process.

Similarly, the Clean Water Act and Porter-Cologne Act are the appropriate vehicles for determining and imposing regulatory requirements on upstream wastewater dischargers. In that regard, state regulators long ago mandated that EID provide advanced tertiary wastewater treatment for all of its effluent inflow to the Delta, and that it maintain minimum flows of this highly treated effluent to benefit the environment rather than serving customer demands for recycled water. As a result, EID’s ratepayers have already incurred heavy expenses to ensure our wastewater treatment plants produce effluent of near-drinking water quality.

Likewise, the fisheries and downstream environmental impacts of EID’s upstream water diversions for domestic drinking water and generation of certified clean energy have been fully analyzed and mitigated through recent water right proceedings before the State Water Board and hydropower relicensing proceedings with the Federal Energy Regulatory Commission (FERC) with the full participation and concurrence of numerous jurisdictional regulatory agencies and environmental interests. EID operations have been modified accordingly and are continually monitored by stakeholders in the watershed. EID is thus already meeting its commitment to provide essential public services in an environmentally responsible manner.



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As the “cornerstone” of California’s co-equal goals for the Delta – ecosystem restoration and reliable water supply – the BDCP process must take a balanced approach in assessing the information provided in the DFG and SWRCB reports. (*News Alert October 2010*, California Natural Resources Agency.) The Delta Reform Act and each of its resultant processes – BDCP and Delta Plan – are based on the fundamental concept of investing in both the needs of the environment and the public water supply. Any resultant actions must account for these co-equal goals. (Water Code § 85054.) Thus, all parties to the Delta Plan and BDCP must look beyond the limited analysis of the DFG and SWRCB reports in formulating remedial action that satisfies the legislative mandate and addresses all of the critical issues at stake.

Sincerely,

A handwritten signature in blue ink, appearing to read 'David P. Eggerton', is written over a light blue horizontal line.

David P. Eggerton
Senior Deputy General Counsel

DPE:TDC:pj