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MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

NOV 7 2011

Gerald Meral, Ph.D.
Deputy Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Dear Dr. Meral:

BAY DELTA CONSERVATION PLAN GOVERNANCE CHAPTER 7 (SEPTEMBER 13, 2011 VERSION)

On behalf of the State Water Resources Control Board (State Water Board), I am proffering comments on the proposed structure and responsibilities of the Bay Delta Conservation Plan (BDCP) Stakeholder Council as they relate to the State Water Board's regulatory and adjudicative role in future BDCP-related proceedings. To a large extent, my comments reiterate points in the State Water Board's May 30, 2008, letter to the Department of Water Resources addressing the March 2008 BDCP Notice of Preparation and explaining the board's role in the BDCP process. Given the passage of time and other changed circumstances, however, I thought it would be helpful to provide additional clarification regarding the State Water Board's potential role in this process. My comments address the September 13, 2011, version of Chapter 7 ("Implementation Structure") of the draft BDCP.

The mission of the State Water Board is to preserve, enhance, and restore the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations. In order to provide for the orderly and efficient administration of the state's water resources, the State Water Board exercises the adjudicatory and regulatory functions of the state in the field of water resources. Thus, as you know, the State Water Board administers water rights in California, including rights held for the State Water Project and Central Valley Project. The State Water Board and Regional Water Quality Control Boards also have primary authority over the protection of the state's water quality.

The State Water Board's broad regulatory and adjudicatory responsibilities raise concerns about the board's ability to participate in the BDCP Stakeholder Council, as currently envisioned in the draft Chapter 7, given the board's ultimate role as a decision-maker in adjudicative proceedings that likely will involve consideration of BDCP-related actions. In general, the primary purpose of the Stakeholder Council is to consider matters related to plan implementation and make

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recommendations to the Implementation Office. The State Water Board will be one of many entities invited to participate on the Stakeholder Council. Although the Stakeholder Council is expected to "make reasonable efforts" to provide input to the BDCP Program Manager "that reflects the general agreement of the members," any member of the Stakeholder Council will have the right to object to various proposals and implementation actions on certain grounds. Thus, the draft chapter lays out a dispute resolution process. (Ch. 7, p. 7-21.) Ultimately, any unresolved disputes will be elevated to the Implementation Board and, if still unresolved, they will be elevated for a "decision by the entity with the locus of responsibility for the matter in dispute." (*Ibid.*)


Implementation of the BDCP may require State Water Board approval of changes to the water rights of the plan's proponents. The State Water Board acts in an adjudicative capacity when it acts on a request for water right application, change petition, or other water right approval that may be required for or requested in connection with a proposed project. The State Water Board must be an impartial decision-maker, avoiding bias, prejudice or interest, in any adjudicative proceedings conducted in accordance with the board's regulatory approvals. Thus, the State Water Board must ensure that its participation in the BDCP process is consistent with the need to remain impartial with respect to any proposals that may ultimately need the board's approval.

Accordingly, as explained in previous correspondence, the State Water Board is participating in the BDCP process for the limited purposes of advising the BDCP parties of the board's regulatory requirements and providing technical information. While the State Water Board can provide information that will help guide the BDCP parties towards a successful completion of the BDCP process, the board cannot make a prior commitment to the outcome of any regulatory approval that must be issued by the board. Moreover, State Water Board staff cannot act as advocates for any alternatives or implementation measures considered during the BDCP process.

If the State Water Board receives and accepts an invitation to participate on the Stakeholder Council, it will be for this informational purpose and not as a fully participating member of the Council. In other words, the State Water Board will neither participate in any dispute resolution process nor act as an advocate for any alternatives or implementation measures considered during the BDCP process. In closing, the State Water Board will continue to advise BDCP parties, working groups, technical teams regarding the State Water Board's regulatory and informational requirements and it looks forward to similarly advising the Stakeholder Council, once established.

Thank you for the opportunity to comment. Please contact me at (916) 341-5615 or Ms. Erin K.L. Mahaney, Staff Counsel III, at (916) 341-5187 or emahaney@waterboards.ca.gov if you wish to discuss this matter further.

Sincerely,


Thomas Howard
Executive Director

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