

**COMMENTS OF THE
CALIFORNIA RICE INDUSTRY ASSOCIATION
TO THE STATE WATER RESOURCES CONTROL BOARD REGARDING
STANDARDS FOR THE SAN FRANCISCO BAY/
SACRAMENTO-SAN JOAQUIN DELTA ESTUARY
July 13, 1994**

On behalf of the California Rice Industry Association, thank you for the opportunity to comment on this very important issue of water quality standards for the Bay-Delta Estuary. The Delta captures nearly one-half of the state's annual runoff and provides water to more than 20 million Californians. Additionally, water from the Delta supports the production of more than 200 crops on millions of acres of irrigated land and provides habitat for approximately 120 species of fish and wildlife. Clearly, it is a resource of enormous importance to all residents of the state.

At the April 1994 workshop, the State Board asked interested parties to comment on whether the U.S. EPA's (EPA) draft standards should be considered as alternatives in the State Board's review. Before EPA's draft standards can even be considered as possible alternatives, it is imperative that a thorough analysis of the true costs (economic, social and environmental) be completed. Further, we believe the proposed standards themselves are substantively flawed and therefore should not be used by the State Board unless significantly modified.

It is precisely because of the Delta's importance that we believe a complete analysis of the true costs of the proposed standards is absolutely essential. Accordingly, we were disappointed by the incomplete effort set forth in EPA's Regulatory Impact Assessment (Assessment). The Assessment glosses over many serious impacts and completely ignores others. The document demonstrates a fundamental lack of understanding of how water is used in California, the nature of

the state's agricultural industry and its importance to the overall economy and to the significant wildlife habitat that exists upstream of the Delta.

We were also troubled by EPA's clear advocacy of a specific implementation plan. Throughout the Assessment, EPA asserts a commitment to respect state water law in a manner consistent with the intent of Congress as stated in the Clean Water Act. Despite these assertions, however, the Assessment is absolutely clear in advocating a specific implementation plan many in California are calling "share the pain." This advocacy is a direct contradiction of the Clean Water Act which states in pertinent part:

It is the policy of the Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is further the policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. (Federal Water Pollution Control Act, Section 101(g) (33 U.S.C.A. 1251(g)).)

Further, the specific plan advocated is in direct conflict with state law as will be fully illustrated below.

For these reasons, CRIA strongly believes that the State Board should not rely upon the EPA's flawed proposal and faulty analysis as a foundation for an undertaking as important as the establishment of standards for the Delta. Instead, we urge the Board to restore the state's authority in this area by undertaking an independent analysis of the broad costs and benefits associated with establishing these standards.

I.

THE IMPLEMENTATION PLAN ADVOCATED BY
U.S. EPA IS CONTRARY TO STATE LAW

- A. California Law Clearly Establishes Salinity Control in the Delta as a Function of the State Water Project in Cooperation with the Federally Operated Central Valley Project.

Water Code Section 12202 specifically provides that meeting salinity and water quality standards in the Delta are "among the functions to be provided by the State Water Resources Development System (State Water Project) in coordination with the activities of the United States...through operation of the Federal Central Valley Project..." This is not only clear, it is also plainly contrary to the share-the-pain philosophy endorsed by U.S. EPA.

This conclusion is supported by the holding of the California Court of Appeal which found the intent behind Water Code Section 12202 to be unmistakable:

Salinity control in the Delta was unquestionably contemplated by state and federal authorities as one of the purposes to be fulfilled by the state-wide water projects: the U.S. Congress when authorizing the Central Valley Project (Sen. Rep. No. 1325, 72d. Cong. (1933)); and the California Legislature when authorizing the state water project to function "in coordination with the [Central Valley Project] activities"...in providing

salinity control in the Delta. (U.S. v. SWRCB, 182 Cal.App.3d 82, 128-129 (1 Dist. 1986).) (The so-called Racanelli decision).

Further evidence of this legislative intent can be seen in Water Code Section 12204 which states:

In determining the availability of water for export from the Sacramento - San Joaquin Delta, no water shall be exported which is necessary to meet the requirements of Sections 12202 (salinity control and maintenance of an adequate supply for Delta water users) and 12203 (Delta Water Rights).

In U.S. v. SWRCB, the court interpreted this statutory scheme to "prohibit project exports from the Delta of water necessary to provide water to which the Delta users are 'entitled' and which is needed for salinity control and an adequate supply for Delta users." (182 Cal.App.3d at 139.)

B. The Implementation Plan Advocated by U.S. EPA Violates California's Area and Watershed of Origin Protection Statutes.

Largely to allay the fears of northern Californians that development of the State Water Project (SWP) and Central Valley Project (CVP) would lay claim to water needed for future economic vitality, the California Legislature adopted Water Code Sections 11460 through 11463, inclusive. According to then Attorney General Edmund G. "Pat" Brown, these statutes effectuate legislative intent to create and preserve a "preference for the watershed of origin as a whole" and confer

"extremely valuable rights upon watersheds of origin." (25 Ops.Cal.Atty. Gen. 8, 23 (1955).)

Specifically, Water Code Section 11460 provides:

In the construction and operation by the authority of any project under the provisions of this part, a watershed or area in which water originates, or an area immediately adjacent thereto which can be conveniently supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

The Attorney General construed Section 11460 to have the effect of reserving to the entire body of inhabitants and property owners in the watersheds of origin a priority as against the water project authority in establishing their own rights in the usual manner as their needs increase from time to time up to the maximum of either their ultimate needs or the yield of the particular watershed (25 Ops.Cal.Atty.Gen. at 20).

In the same opinion, the Attorney General concluded that Water Code Sections 11460 through 11463 do not create in the protected class "a presently vested title or right to any specific quantity of water..." Instead, "as the need of such an inhabitant develops, he must comply with the general water law of the state, both substantively and procedurally, to apply for and perfect a water right for water which he then needs and then can put to beneficial use."

It was the view of the Attorney General that the real effect of Water Code Section 11460 came after the application was filed:

However, when he makes such an application, as a member of the class of persons protected by the statute, his application is not to be gainsaid, denied or limited by reason of any activity on the part of the water project authority. Specifically, this means that if, prior to the development of the applicant's increased needs, the authority had been exporting from the watershed in question, water required to supply the applicant's increased needs, such use by the authority would not justify denial of the application. (25 Ops.Cal.Atty.Gen. at 21.)

Further, "the priority thus reserved to inhabitants of watersheds of origin by Section 11460 may not in any way be defeated by any action or proceeding by the authority." (Ibid.)

Further evidence of the state's intent to protect areas of origin from which water would be exported by the SWP and CVP can be found in Water Code Section 10505 which limits the ability of the state to assign water rights to agency operating facilities authorized as a part of the state's water management system including the SWP and CVP as follows:

No priority under this part shall be released nor assignment made of any application that will, in the judgment of the Board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.

The State of California's commitment to the promises that the projects would only be allowed to export "surplus" water was reaffirmed by the Legislature with the adoption of Water Code Section 12202 which states in pertinent part:

Delivery of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460-11463, inclusive, of this Code.

That these protections apply equally to the state and federal government can be seen from Water Code Section 11128 which provides:

The limitations prescribed in Sections 11460 and 11463 shall also apply to any agency of the state or federal government which shall undertake the construction or operation of the project or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained and operated as a part of the project and furtherance of the single object contemplated by this part.

The Racanelli Court considered these area of origin protection statutes and concluded:

Under the provisions of Section 11460 (Department of Water Resources), project operations cannot deprive a watershed or area wherein water originates or in an area immediately adjacent thereto which can be conveniently supplied with water

therefrom, ... of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed area... A similar limitation upon federal agencies was later imposed. (U.S. v. SWRCB, supra, 182 Cal.App.2d at 138-139.)

Any question as to the continuing vitality of the area of origin protection statutes was laid to rest by the Racanelli court in determining what constituted an "adequate supply" for the Delta.

"Water Code Section 12201 clarifies that an adequate supply is a supply sufficient (1) to maintain and expand agriculture, industry, urban and recreational development in the Delta and (2) to provide a common source of fresh water for export to water-deficient areas, subject to the provisions of the watershed and county of origin statutes." (Emphasis added.) (Id. at 139, n.37.)

The Racanelli court's reading of the area of origin protection statutes is consistent with the U.S. Supreme Court's decision in California v. U.S., 438 U.S. 645 (1978):

Unquestionably the state... has a right to appropriated waters, and the United States may not question such appropriation unless thereby the navigability of the [river] be disturbed. (Id. at 662, citing U.S. v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).)

Following the lead of the Supreme Court, the Ninth Circuit Court of Appeals held that the SWRCB could under state law

condition the operation of New Melones Dam by the Bureau of Reclamation provided the conditions were not "inconsistent with Congressional directives." (U.S. v. SWRCB, supra, 694 F.2d 1171.) Significantly, among the conditions approved by the court was a requirement that the project abide by the county of origin preference of California law. The Court said the preference operates to withhold "authority to use water outside of the county of origin which is necessary for the development of the county." (Id. at 1180.) The court based its conclusion on a finding that the area of origin protections "far from working against Congressional purposes, lead to results anticipated, and apparently encouraged, by Congress." (Id. at 1181.)

Finally, the meaning of Water Code Section 11460 and its applicability was settled by the Ninth Circuit Court three years later:

California Water Code Section 11460 (as made applicable to the Central Valley Project by Section 11128) contains state law limiting the CVP's operations. (South Delta Water Agency v. U.S. Dept. of Int., 767 F.2d 531, 538 (9th Cir. 1985).)

The court went on to state: "After correctly determining that Section 11460 adequately constrained federal defendants, the District Court also correctly determined that Section 11460 did not conflict with expressions of Congressional intent." (Id. at 539.)

The California Rice Industry Association believes this case law and nearly 100 years of legislative intent make it clear that the CVP and SWP may only export water that is in fact surplus to the needs of the watershed of origin. State law makes it unmistakable that the projects cannot deprive areas of origin

of the water necessary to meet their beneficial needs. It is unquestioned that environmental purposes are beneficial needs. U.S. EPA has identified several environmental needs within the Sacramento River Watershed of Origin that are not being met. Accordingly, under state law and its application to the federally operated CVP, the projects must curtail exports to avoid taking water that is not surplus.

Any other implementation plan will invariably lead to numerous water right applications being filed by inhabitants of watersheds of origin to establish rights to water that is currently being exported. In practical terms, state law clearly places the burden of meeting Delta water quality and salinity control standards on the SWP and CVP. This law is made expressly applicable to the implementation of proposed standards by the Clean Water Act. Therefore, the EPA's reliance on the share-the-pain implementation plan is misplaced and results in a gross underestimation of the proposed standards' impact on the California economy.

II.

U.S. EPA'S ASSESSMENT SIGNIFICANTLY UNDERSTATES THE ECONOMIC IMPACTS OF THE PROPOSED STANDARDS

The EPA's Assessment primarily relies on spreading the burden of meeting the water quality standards as broadly as possible and maximizing water transfers to reduce the adverse economic and social impacts of the proposed standards.

- A. This Reliance is Misplaced Because the Standards Themselves will Severely Limit Transfers Across the Delta.

The proposed standards along with the take limits currently in place in the Delta as a result of the Endangered Species Act will severely restrict export pumping throughout the year. The only areas of the state with any significant amount of water that could be transferred are upstream of the Delta. Those areas that will be looking to buy water are largely dependent on exports from the Delta. Accordingly, the standards will serve to exacerbate the water supply "bottle neck" that currently exists and will further restrict through - Delta or across - Delta movement of water.

The practical effect of this will be to concentrate economic impacts in areas of the San Joaquin Valley which currently depend on water supplies exported from the Delta. This will focus the impacts in a relatively small area and cause significant economic and social dislocation. The Assessment's failure to acknowledge this constraint on transfers leads to an underestimation of local impacts.

B. If Transfers are Implemented to the Extent Recommended by U.S. EPA, it will Serve to Shift the Impacts Disproportionately into the Sacramento Valley.

As stated above, the bulk of the water that might be available for transfer is upstream of the Delta. A large percentage of that is in the Sacramento Valley. If market-driven transfers are utilized (disregarding the physical and regulatory constraints in the Delta) to reallocate the burden of meeting the proposed standards, it will invariably shift the bulk of the water costs to the Sacramento Valley.

Areas looking to throw money rather than water at the problems in the Delta will choose to purchase water from upstream users

to meet the standards. The only logical place to look for that water will, of course, be the Sacramento Valley.

Over time, this process will reduce the Valley to the status of a water colony and the region's future vitality will be sacrificed to allow continued urban growth in southern California and the San Francisco Bay area. The Assessment completely ignores this reality and in so doing understates the impact of the proposed standards on the Sacramento Valley.

C. The Impacts to Agriculture are Understated due to the Assessment's Failure to Address Ongoing Conservation Efforts, Limitations on Crop Shifting, Adverse Impact on Land Values, and the Availability of Farm Credit.

1. *The Assessment Overestimates the Amount of Water that Can be Made Available through Agricultural Conservation.*

In relying on water conservation (increases in efficiency of use), the Assessment fails to recognize the significant efforts that have already been made. The result is the overstatement of the potential of this management tool and the underestimation of the amount of land fallowing that will occur. This also results in the minimizing of third party community impacts.

In the rice industry, aggressive water conservation practices have resulted in a 38 percent decrease in water use per acre over the past 30 years. That this reduction in demand is the result of increased efficiency can be seen from the fact that during the same time frame yields have increased dramatically. In fact, California's rice farmers are now producing almost twice as much rice as they did 30 years ago while using nearly 40% less water.

From this it is clear that efficiency in rice production has been increased to the point that many farmers will be left with no choice but to fallow land in the event significant shortages are mandated to meet U.S. EPA's proposed standards. While this may comport with the view that rice is a "low value, high water use" crop, it ignores the findings of the Rand Study on the 1991 drought water bank that taking land out of rice production has significant community impacts.

The failure to acknowledge these water conservation accomplishments results in over reliance on agriculture's ability to increase efficiency. It also understates the amount of fallowing that will occur. Therefore, the Assessment leads to an inadequate representation of community impacts. This is especially true in the Sacramento Valley where rice, a high impact crop, predominates.

2. *The Assessment Underestimates Impacts by Overstating the Ability of Farmers to Shift to the Production of Alternative Crops.*

Rice is the dominant crop in the Sacramento Valley where more than 97 percent of California's rice is grown. The concentration of rice production is due to the suitability of the clay pan soils common in the area. Unfortunately, the very characteristics that make the land valuable for rice production render it unsuitable for the production of most other crops. Therefore, for a majority of rice farmers, crop shifting is simply not a realistic alternative.

To the extent the Assessment relies on crop shifting to avoid the community impacts of the proposed standards, those impacts are understated.

3. *The Assessment's Characterization of Negative Impacts on Land Values Understates the Harm to Land Owners and Ignores the Resulting Decrease in Local Tax Revenues.*

The Assessment portrays declining land values as having no net impact on farmers. This economic "slight of hand" is accomplished by reference to something called "economic rent" which is apparently a fictional cost of using the land. This analysis disregards the fact that for many farmers the equity in their land represents their single largest asset.

One need only look to the Westlands Water District in the San Joaquin Valley to see the detrimental impact reduced water supply has on land values. This reduction restricts a farmer's access to bank credit and diminishes his or her purchasing power. Clearly this can only be accurately described as a detriment to the farmer as well as to the economic well-being of the community in which he or she lives.

The Assessment also fails to take into account the fact that declining property values have an adverse impact on the property tax base of local and regional governments. Here too, the west side of the San Joaquin Valley provides a very clear example. In recent years, depressed land values resulting from reduced water supplies have led to the reassessment of vast tracts and cost area governments nearly 2 billion dollars.

The Assessment's silence on this very important impact at a time when local and regional governments are struggling to make ends meet is unacceptable. If for no other reason than this, the Assessment is clearly incomplete.

4. *The Assessment Includes Little or No Evaluation of the Proposed Standards' Impacts on Farm Credit Availability.*

The Assessment makes no attempt to quantify the impacts of the proposed standards on the availability of financing which is essential to crop production. The entire analysis of this complex topic is accorded barely two pages and concludes that the "overall extent of the change cannot be determined at this time."

This clearly is inadequate and the proposed standards' impacts in this area must be fully explored before the true cost of the proposals can be estimated. Credit is essential to California's agricultural industry, just as it is to every business in the state economy. The direct impact of restricted credit access and the indirect effects on communities must be quantified.

III.

U.S. EPA'S ASSESSMENT FAILS TO ADDRESS THE UPSTREAM ENVIRONMENTAL COSTS OF IMPLEMENTING THE PROPOSED STANDARDS

In recent years it has become increasingly clear that rice lands, properly managed, provide significant wetland habitat for over-wintering waterfowl of the Pacific Flyway. As in the Delta, the preservation of this habitat in the Sacramento Valley generates substantial economic and social benefits. The Assessment completely ignores the detriment to Sacramento Valley waterfowl that will accompany the fallowing of land currently devoted to rice production. As a result, it also fails to account for the economic and social impacts associated with that habitat loss.

The Assessment disregards the significant economic and non-economic benefits generated by the fact that rice fields provide habitat for more than 20 wildlife species of special concern, including many which are listed as threatened or endangered. Given the limited ability of rice land to produce other crops and the extensive conservation activities already implemented, it is unlikely that rice farmers faced with severe cutbacks will be able to continue to provide and maintain these essential habitat values.

IV.

FISHERY DECLINES FROM CAUSES SUCH AS POLLUTION AND UPSTREAM WATER DIVERSIONS

A. Implementation of Delta standards Must Include a Recognition of the Millions Invested by the Rice Industry in Water Quality Improvement and Conservation Efforts.

We would also like to offer some comments about the role of rice pesticides as a factor attributed to the decline of the fisheries in the Bay-Delta. In verbal comments provided by others during the State Board workshop held in June 1994, it became clear to us that outdated information continues to surface regarding the detrimental effects of rice field runoff.

We want to set the record straight that rice field discharges no longer adversely affect Delta water quality. We readily admit that rice field runoff did contribute to water quality problems in the 1970s and 1980s. It was in response to those problems that the rice industry voluntarily agreed to cooperate with the Central Valley Regional Water Quality Control Board,

Department of Pesticide Regulation, Department of Fish and Game, and the county agricultural commissioners to initiate the Rice Pesticide Control Program.

The executive officer of the Regional Board Bill Crooks has called this program "one of the most successful water quality control programs in the United States." The rice pesticide loads in the Sacramento River have been reduced by over 99 percent in the last ten years, from 40,000 pounds in 1982 to 178 pounds in 1992. The 1993 monitoring program revealed that rice pesticides were below detectable levels at all locations down river of the Sacramento I Street Bridge, the northern boundary of the Delta. The industry is continuing to work with the Regional Board and the Department of Pesticide Regulation to further reduce pesticide discharges.

We offer this information about the dramatic improvement in Sacramento Valley water quality not only to clarify and correct the record, but also to urge the Board to include in any Delta water quality control plan, a mechanism which recognizes and gives credit for past and ongoing water quality improvement efforts. The remarkable water quality improvements by rice growers have not come without a price. Rice growers pay three times more than others in irrigated agriculture for compliance with the Regional Board's Basin Plan -- a cost which exceeds \$7.5 million annually, or about \$15 per acre. Based on these figures, the rice industry has invested over \$30 million in Delta water quality improvements since 1990.

Over the years, rice growers have also invested millions of dollars in recirculating and closed water systems in order to allow for the degradation of rice pesticides and to conserve water. Since the early 1980s, rice growers have decreased their net water use by approximately 30 percent. This conservation effort shows that the water quality improvements are in fact real, not merely the result of dilution. As with efforts in

water quality , we ask that the Board give credit for efforts in water conservation when deciding on implementation plans for the Delta.

B. The Rice Industry Invites the State to Join it in a Commitment to the Development and Funding of "Fish-safe" Water Delivery Systems.

We also feel compelled to make the Board aware of activities currently underway in the Sacramento Valley to address the impacts of unscreened diversions on Delta fisheries. Taking water from rivers and streams through unsafe diversions for any purpose can harm fish, and in some instances does. The California rice industry has established a credible record of working with fishery groups, government agencies and environmental interests to design and implement "fish safe" water delivery systems in northern California. Specific examples are set forth below.

- On the Sacramento River, efforts are underway to rebuild a \$40 million state-of-the-art screen facility at Glenn Colusa Irrigation District. GCID is the largest agricultural water district in northern California. It also supplies more rice farms than any other district in California, nearly 100,000 acres.

- Another northern California water agency that services a major rice-producing area, the Maxwell Irrigation District, voluntarily installed a multi-million dollar screen this year to protect the Sacramento River fishery.

- On Butte Creek, the rice industry and the Northern California Water Association are helping foster an environmental/agricultural consensus on a plan to restore

the Spring-run salmon. Our two organizations are also participating in the CVPIA process to help draft a coordinated program for funding and building fish screens on the Sacramento River to protect winter-run salmon and other species.

We point out these examples to demonstrate that unscreened diversions on the Sacramento River are already receiving attention by local water districts, in cooperation with the proper state and federal agencies.

The rice industry is eager to participate in programs that prioritize and facilitate the screening of diversions based on biological need. All we ask is for a coordinated program with clear goals and objectives, backed up with meaningful financial resources.

V.

CONCLUSION

The California Rice Industry Association appreciates the difficult and complex nature of attempting to analyze the impacts of proposals as sweeping as the Delta standards. We believe, however, that the very basic "cost-benefit analysis" underlying the U.S. EPA's Assessment is flawed. We further believe that the State Board must conduct a true and independent comparison of the costs and benefits before any specific plan can be proposed. Obviously, this cannot be done without a full measure and complete consideration of all costs associated with the Board's ultimate decision.

Any standards adopted by the State Board need to fully address upstream environmental, social and economic impacts. EPA's

Assessment completely disregards adverse impacts on local tax revenues, losses caused to farmers by depressed land values and the community impacts of reduced production. We note with particular concern the lack of any reference to rice mills, for example. Clearly, no assessment can be considered complete in the absence of any mention of the businesses which support and depend upon agricultural production. For these reasons, we believe the Assessment is wholly inadequate and cannot be used by the State Board as the basis for a decision as important to the State of California as the imposition of Delta standards.

Finally, we strongly object to the EPA's clear advocacy of a specific implementation plan. This effort to guide the implementation of the proposed standards is undeniably contrary to the provisions of Section 101(g) of the Clean Water Act. Furthermore, the plan advocated is in direct conflict with state law and nearly 100 years of state and federal legislative history.

We look forward to working with the State Board toward the realization of a set of Bay-Delta standards that fully weighs the true costs and benefits and is consistent with State law.