KERN COUNTY WATER AGENCY'S STATEMENT IN RESPONSE TO QUESTION 1 FOR THE APRIL 26, 1994, BAY/DELTA WORKSHOP

"Which Standards Should the State Water Board Focus on During This Triennial Review?"

Summary of Position

In stating its preliminary answer to this first question, the Board asserts: "The highest priority issues are those for which USEPA is now proposing standards." While Kern agrees that these are high priority issues, the Board should not limit its attention to those few items.

Instead, Kern recommends that the Board announce, at the outset, that the purpose of these proceedings is to develop a comprehensive package of policies and regulatory actions that will balance public trust and water supply needs, and attempt to return full regulatory control of California's vital water resources to the State. To succeed in such an endeavor, the Board will need to focus on a far broader range of topics than those now under review by EPA.

Kern recognizes, however, that once this initial statement is made, some prioritization must occur. The redefined task is much too large to realistically be completed during the next eight months. Even so, the first stage must go beyond the three issues which are the subject of EPA's proposed regulations.

For example, issues related to the protection of endangered species has as much, if not more, potential to impact near-term water supplies than some of the matters pending before EPA. Clearly policies and actions related to winter-run salmon and delta smelt must be included on the list of immediate priorities. Further, the Department of Fish and Game will likely ask the Board to consider flows and operational restrictions during later summer and fall months to protect other species. This area must also be included in the first priority group.

In substance, Kern believes that this spring and summer's workshops and the hearings that follow should develop comprehensive State policies for the balanced protection of fish and wildlife resources and water supplies. These policies should encompass both water quality and water rights issues. If the Board does not tackle all the interrelated fishery and water supply issues in a single proceeding, it will be impossible to know whether it has struck the proper policy balance.[1]

Kern also believes that the Board has the legal authority to proceed in this broader fashion. The remainder of this presentation will discuss the bases of the Board's authority and certain aspects of State and federal law that can not be disregarded if the State is to retain primacy in the regulation of its water resources.

The Board's Regulatory Basis for Action

The moment the scope of the proceedings is defined as described above, the regulatory basis for the Board's proposed actions, as set forth in its workshop notice, needs to be redefined. The notice recites as authority for the workshops only various water quality statutes. If the Board is going to consider the full range of public trust and water supply policy issues, the Board can not so limit its authority. The great majority of the problems associated with the Bay/Delta fishery are unrelated to water quality. Even EPA's proposed standards are primarily directed at flows and diversions. Therefore, the Board should amend its statement of regulatory authority to include the Water Code sections discussed below.

The Board's Planning and Policy Jurisdiction

The Board's water quality planning and policy setting authority is explicitly set forth in the Water Code. The Porter-Cologne Act sections relating to the adoption of water quality control plans (Water Code Sections 13240 - 13244) are unambiguous in that respect.

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[1] Other subjects, such as possible changes for Delta agricultural water quality protection, can be deferred to a later stage of the total process.

However, to the extent the Board is considering flow and diversion policies, it will not be acting under the Porter-Cologne Act, but under its broad water rights authority. As described below, California law gives the Board the discretion to set general flow and diversion policies in advance of a water rights hearing.

Water Code Section 1251 states:

> The board shall make such investigations of the water resources of the State as may be necessary for the purpose of securing information needed in connection with applications for appropriations of water.

Water Code Section 275 states:

> The department and board shall take all appropriate proceedings or actions before executive, legislative or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.

Water Code Sections 1255 through 1259 all instruct the Board to carry out a balancing process to determine what constitutes reasonable uses of water and what terms and conditions to protect public trust and other competing water uses are in the public interest.

These Water Code sections grant the Board broad authority to investigate and develop information and policies to guide water rights holders through the regulatory process. Historically, this has been done on a case by case basis during water rights hearings. But the statutes cited above do not mandate that the policy setting process be carried out in that fashion. Bay/Delta flow and diversion issues are of sufficient importance to the State as a whole that they, like water quality issues, should be implemented pursuant to policy guidance which may be adopted in advance of water rights hearings. There is no reason why the flow and diversion

policies guiding water rights decisions should have to be adopted and readopted anew each time the Board considers whether an application should be granted or whether a permit term should be modified.

The discussion above only examines the Board's policy setting authority and does not address policy implementation. That distinction raises the question of how Board should disseminate any flow and diversion policies that are developed during the workshop process. This question is of fundamental importance, as all potentially affected water rights holders must be assured that their due process rights will be protected before their permits are modified. The Board cannot finally decide what terms and conditions should be added to water rights permits until the quasi-judicial water rights hearings have been completed.

With that in mind, Kern believes that the flow and diversion policies should be provided to all interested parties as non-binding policies, which, if in the public interest, would be implemented through the water rights process. This is exactly what is done under the water quality laws. The Board first adopts policy through the water quality control plans and, if found to be in the public interest, requires water rights permit holders to operate their projects to meet the water quality objectives. (Water Code Sections 1257 and 1258.)

The non-binding nature of the flow and diversion policies will not detract from their usefulness. For example, issuance of such policy guidance should assist EPA's review of water quality standards by supplying it with more complete information on what policies relative to reasonable protection of instream resources will guide the Board during the subsequent water rights hearings. In addition, the policies could also be used to develop alternatives for the water rights CEQA evaluation, and to help interested parties prepare focused evidence for the water rights hearings.

One final point needs to be raised. Providing flow and diversion policy guidance will not conflict with the admonition to the Board set forth in the *Racanelli Decision*. In that opinion, the court stated:

> We think the procedure followed -- combining the water quality and water rights functions in a single proceeding -- was unwise. The Legislature issued no mandate that the combined functions be performed in a single proceeding. The fundamental defect inherent in such a procedure is dramatically demonstrated: The Board set only such water quality objectives as could be enforced against the projects. In short, the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights. In fact, however, the Board's water quality obligations are not so limited. (*United States v. SWRCB*, 182 Cal.App.3d 82, 119-20 (1986).)

Kern is not suggesting that water quality planning and water rights decisions be combined in a single proceeding. The water rights decisions should only be made after separate hearings, and the water quality planning process should be as broad as required by the Porter-Cologne Act. But the Racanelli opinion does not suggest that the Board is prohibited from providing water rights policy guidance to interested parties, based on data developed at the same time as a water quality proceeding. The quote above is not directed primarily at the process the Board adopted, but at the fact that the Board allowed the chosen process to constrain it from carrying out its substantive obligations under the State's water quality laws. We have learned a great deal since the *Racanelli Decision* was issued, and there is little risk today that the Board will misinterpret its statutory obligations because of the process it chooses to follow.

Basis of Board's Water Quality Jurisdiction

The discussion above recommends that the Board develop policies for both water quality and flow and diversions and demonstrates that the Board has authority to adopt flow and diversion policies outside of the quasi-judicial water rights hearings. That discussion accepts as a "given" that the Board has broad policy making authority in the water quality area. However,

given the recent importance attributed by some to the federal Clean Water Act, a brief discussion of the legal interconnection between the CWA and the Porter-Cologne Act is necessary.

The Board, in its workshop notice, correctly emphasizes that its water quality review will be conducted under State law, namely, the Porter-Cologne Act. The Board, as a creature of State statutes, only has such powers as have been granted by the California Legislature. Because the Legislature has not specifically granted the Board authority to implement the federal Clean Water Act when carrying out its planning functions, the Board may not rely on the CWA or its regulations as a basis for a planning decision.[2] Thus, the Board's water quality planning decisions must be rendered in accordance with both the substantive and procedural dictates of the Porter-Cologne Act.

This notion seems to confuse some people, principally because the CWA contains procedures for submitting State prepared water quality plans to EPA for approval. The Board, early in the forthcoming workshops, needs to inform all involved that the EPA approval process does not convert State level water quality planning into a procedure controlled by federal law. The Board needs to emphasize that the balancing process built into the Porter-Cologne Act will be followed.

Kern recognizes that, as a practical matter, EPA's review will always be a factor lurking in the background. However, particularly where salinity intrusion is the primary water quality factor involved, EPA's review should not impact the integrity of California's legislatively mandated balancing exercise.

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[2] Water Code Sections 13370-13389 are examples of how the Legislature can authorize the Board to implement provisions of the CWA. These sections, however, only authorize the Board to implement the federal NPDES program. These Water Code sections are not applicable to water quality planning. Water Code Section 13170 specifically deals with water quality planning for waters subject to the CWA, and instructs the Board to carry out that planning "in accordance with the provisions of sections 13240 to 13244, inclusive, [of the Porter Cologne Act]."

Interaction With the Clean Water Act

As can be seen, Kern expects the Board workshops to emphasize a broad range of matters, irrespective of whether they raise water quality or flow and diversion issues. That approach, however, requires careful attention to how the results will be submitted to EPA.

Kern strongly recommends that the Board state its intent to treat the issues before it in a manner which is consistent with its "Comments on EPA's Draft Standards" which were filed with EPA on March 11, 1994. To be consistent, the Board should:

1. Treat the 2 ppt ("X2") standard as outflow, rather than a salinity intrusion standard;

2. Treat the Salmon Smolt Survival Standard as a flow and diversion issue rather than a water quality issue; and

3. Treat the Striped Bass Spawning Standard as a non-point source pollution or salinity intrusion issue which would be submitted to EPA under Section 208 of the CWA.

The other issues which are considered during the workshops and hearings should be categorized by whether they are water quality or flow and diversion related. If they are water quality related, they must be further categorized as to whether they fall under section 303 or 208 of the CWA. Then, when the process is complete, the Board can provide EPA with a series of submittals; one, if necessary, under Section 303; one under section 208; and one, for information purposes only, which sets forth the water rights policy guidance which will be used as the starting point for the water rights hearings. If this approach is followed, the chance of confusing the proper rolls of the federal and State regulators will be significantly reduced.

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APRIL 26 1994

KERN COUNTY WATER AGENCY'S STATEMENT IN RESPONSE TO QUESTION 2 FOR THE APRIL 26, 1994, BAY/DELTA WORKSHOP

"What Level of Protection Is Required By the California Water Code and the Clean Water Act for Protection of Public Trust Uses in Bay-Delta Estuary?"

Summary of Position

Kern's summary response to this question is short and direct. At the outset of these proceedings, the Board should not establish any historical or other baseline water quality "level" as a target. Such an approach is antithetical to the Porter-Cologne Act as it prejudges the balancing process before it begins.

The same caution should be followed for flow and diversion issues, such as required Delta outflows or operational restrictions on facilities such as the Delta Cross Channel and the State And federal pumping plants. In other words, it would be improper, in the beginning, to establish an historic outflow regimen which the Board then tries to achieve by restricting water supply project operations.

Instead, to avoid prejudging the outcome of the mandatory balancing process, Kern believes that the Board should choose a fairly wide range of alternatives, both quality and flow and diversion related, and request data from experts on the water supply impacts, economic impacts, and biological benefits which would follow from each of those alternatives. A reasonable set of water quality objectives and preliminary flow and diversion policies can then be selected.

This process is not only correct from a policy standpoint, it is also mandated by State law. Further, the provisions of the Clean Water Act are not in conflict with this approach. Set forth below is a brief summary the relevant State and federal laws. This summary will show

that neither State nor federal law requires that any particular level of protection be provided to public trust uses. Instead, the applicable laws require the Board to achieve a reasonable balance which will best promote the public interest.

State Law Requirements

1. Question No. 2, when inquiring about the requirements of State law, refers generally to "the Water Code." It is, therefore, unclear whether the Board is referring only to that portion of the Water Code that deals with water quality or also that portion that deals with water rights. Since Kern, in response to question 1, has recommended a process that involves both water quality and flow and diversion issues, Kern's response will address both statutory areas.

2. The Porter-Cologne Act does not require a water quality control plan to provide a specific level of water quality protection. Instead, it requires that a "reasonable" level of protection be provided to the listed beneficial uses. This reasonableness requirement mandates a balancing exercise, including consideration of the economic impacts of a proposed water quality objective.

3. The Porter-Cologne Act can regulate activities that impact ocean salinity intrusion, but does not regulate flow when the purpose of the flow regulation is unrelated to the maintenance of water quality.

4. State water rights statutes, particularly Water Code sections 1257 and 1258, require the Board to consider water quality control plans in acting on water rights applications. These sections, however, only require "consideration" and state that the Board "may" condition a water rights permit as necessary to carry out a plan. The correct statement of California law is that the Board may condition a water rights permit to require compliance with a water quality control plan, if it finds that such compliance would be "in the public interest."

5. For flow and diversion policies, the law is the same as for water quality policies. Any flow and diversion policies adopted by the Board through the workshop process would be "considered" for implementation through the water rights hearing process. Various Water Code provisions, including section 1257, allow the Board to impose terms and conditions on water rights permits as are found to be in the public interest. However, no specific levels of protection for instream beneficial uses are mandated by this section or other State water rights laws. The *Audubon* decision, which applied the public trust doctrine to water rights, also authorizes the Board to balance public trust needs with consumptive use requirements. That decision, like the Water Code sections, does not mandate a priority or a specific level of protection for instream uses.

Federal Law Requirements

6. The federal Clean Water Act does not "protect public trust uses" from harm if the harm is unrelated to impairment of water quality. Therefore, with respect to federal law, Question 2 is phrased incorrectly. It should be rewritten to ask: "What water quality levels are required to be maintained under the CWA to protect Public Trust Uses in the Bay-Delta Estuary from harm caused by water quality impairment."

7. Of the issues for which EPA is currently proposing standards, only the striped bass spawning standard is water quality related. Therefore, it is the only issue that is arguably governed by provisions of the CWA. Flow and diversion issues are governed solely by State water rights law.[1]

[1] This statement is made with the understanding that reduced flows can cause an increase in salinity intrusion and that salinity intrusion is defined as a non-point source of water quality degradation under the CWA. If, however, flow itself (for transport or to create circulation patterns, etc.) is what is being regulated, water quality is not involved and these CWA provisions do not apply. When Kern uses the term "flow and diversion" (as a contrast to "water quality") it is referring to the direct regulation of flow, not the regulation of salinity intrusion.

8. Other water quality issues that are likely to be before the Board are all non-point source related, including ocean salinity intrusion. Under the Clean Water Act, such sources are to be regulated by the states through the Section 208 areawide waste treatment management planning process. EPA takes the position that the CWA's antidegradation regulation applies to a state's Section 208 plans. Even if EPA is correct, non-point sources, including salinity intrusion, are to be controlled "to the extent feasible." Therefore, at most, federal antidegradation standards should be viewed as objectives rather than as obligations when non-point sources are involved.

9. EPA also takes the position that, if a water quantity allocation decision impacts water quality, the State must attempt to comply with the antidegradation regulation. The EPA recognizes, however, that Section 101(g) of the CWA requires that the authority of each state to allocate quantities of water "not be superseded, abrogated or otherwise impaired" by the federal Act. Therefore, if there is a material conflict between California's water allocation laws and the CWA, including its antidegradation regulation, State water rights law will control. This result is consistent with the obligation described in Section 208 that salinity intrusion is to be controlled "to the extent feasible."

Conclusions and Recommended Procedure

10. Neither the Porter-Cologne Act nor the CWA mandate a specific level of water quality protection for the Bay/Delta system. Similarly, neither state water rights laws nor the public trust doctrine require a particular level of protection for instream uses. In all cases, a reasonable balance must be struck.

11. The Board should follow the procedural and substantive mandates of the Porter-Cologne Act for the water quality related issues which come before it.

12. The same approach should be followed for flow and diversion issues. State laws should be followed in setting and implementing policies relative to outflow and operational

controls.

13. It will be unclear until the process is complete whether there is a potential conflict between the Board's results and the policies of the CWA. If the Board's balancing process results in water quality conditions in the Bay/Delta system which are at least equivalent to those which are to be maintained under federal law, there may be no conflict. If, however, after balancing, the reasonable water quality conditions selected by the Board represent a quality lower than that described in federal law, the principals set forth in Section 101(g) of the CWA (protection of State water allocation programs) will come into play. If the Board finds that providing better quality water would not be in the public interest under Water Code Section 1243.5[2] and similar code sections, or if the Board finds that providing better quality would result in a waste of water in violation of Article X, Section 2 of the California Constitution,[3] then Section 101(g) should require the CWA to give way to California's water allocation system. There is no need, however, to reach that issue until the Board decides what constitutes a reasonable level of Bay/Delta water quality protection and, possibly, until it has implemented its policies by imposing terms and conditions upon the various water rights permits.

[2] "In determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for the protection of beneficial uses, including any uses specified to be protected in any relevant water quality control plan established pursuant to Division 7 (commencing with Section 1300) of this code." (Emphasis added.)

[3] This is what the Board did in Decision 1485 for Suisun Marsh salinity maintenance flows.