

MAY 16 1994

**STATEMENT OF THE
SAN FRANCISCO PUBLIC UTILITIES COMMISSION
TO THE
STATE WATER RESOURCES CONTROL BOARD
IN THE
MAY 16, 1994, WORKSHOP
OF THE BAY-DELTA HEARINGS**

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The San Francisco Public Utilities Commission submits these comments in response to questions posed by the State Water Resources Control Board (Board) in its April 15, 1994, notice of this public workshop.

San Francisco supports and joins with the comments submitted in this workshop by the urban coalition. In addition, San Francisco offers the following comments to the second question posed by the Water Board for this workshop; to wit: should the Board develop specific standards for the protection of endangered species, or rely on the conditions contained in biological opinions developed under the federal Endangered Species Act (ESA). San Francisco believes that the Board should use the biological opinions as a starting point in formulating its own standards, but should not rely on them as a substitute for its own independent analysis under the Porter-Cologne Water Quality Act.

This stage of the Board's proceedings is being conducted pursuant to the Board's authority under the Porter-Cologne Water Quality Control Act, specifically California Water Code §§ 13240, 13140 and 13142. Notice of April 26 Public Workshop, March 25, 1994. Those sections require the Board to adopt water quality control plans and provide for the adoption and revision of a state policy for water quality control.

A water quality control plan adopted or revised under the Porter-Cologne Act is required to designate 1) the beneficial uses to be protected, 2) water quality objectives for the reasonable protection of beneficial uses of water, and 3) a program of implementation needed for achieving water quality objectives. Cal. Water Code §§ 13050(j), 13050(h). In adopting or revising a water quality control plan, the Board's mandate is to address all "past, present and probable future beneficial uses of water," Cal. Water Code § 13241, including the "preservation and enhancement of fish, wildlife, and other aquatic resources" Cal. Water Code § 13050(f). Thus, the scope of the Board's inquiry in adopting a water quality control plan for the Bay/Delta must go beyond the preservation of individual fish species to the broader goal of preserving and enhancing all species resident in the Bay/Delta system.

The biological opinions for Delta smelt, winter-run salmon, and any future biological opinions for the Sacramento splittail, if listed, are relevant to the Board's standard setting in two respects. First, they contain scientific data regarding particularly sensitive species that will be invaluable to the Board in reaching its own conclusions about measures necessary to protect the health of the Estuary. Second, they provide an important reference as to actual operational criteria currently imposed on the major water users in the Bay/Delta under the ESA.

The substantial research effort represented by the biological opinions will assist the Board in its evaluation

of measures necessary to protect the Bay/Delta estuarine habitat. However, its scientific inquiry should not stop there, as the Board's purpose in these proceedings is quite different from the focus of the biological opinions. The biological opinions contain narrowly applicable measures imposed on specific projects as necessary to save a single species from the brink of extinction. In this proceeding, the Board's goal is to establish water quality objectives based on beneficial uses, characteristics of the water body, whether particular water quality conditions are reasonably achievable under the circumstances, economic and other considerations in the context of a large number of water diversions. Cal. Water Code § 13241.

The Board should keep the terms of the biological opinions clearly before it at all times during these proceedings in order to ensure that its ultimate decision is in harmony with those provisions. No purpose would be served by creating a maze of conflicting regulations between state and federal authorities in the Bay/Delta. Further, coordination of Board standards and implementation plans with ESA requirements may serve the even more important purpose of maximizing the amount of water available to all beneficial uses in the Bay/Delta. Real time monitoring will be a critical component of evaluating the efficacy of measures implemented to protect environmental values and allowing modification of standards to achieve the greatest possible benefit. Coordination between basins of any flow measures adopted and careful timing of flows to simultaneously meet real time ESA, non-listed fish and wildlife, and other beneficial use requirements will ensure that the state will get the widest welfare benefit for its water. The Board has an important role to play in ensuring that water applied to any use is applied with thorough consideration of the benefits it can provide. Careful coordination of the Board's water quality objectives with the requirements contained in the biological opinions will further this goal.

The Board's standard setting obligations are not coextensive with either the California Endangered Species Act (CESA) or the federal ESA. However, the standards adopted by the Board in a water quality control plan under the Porter-Cologne Water Quality Control Act will ultimately be in compliance with the CESA and the federal ESA because of the procedural checks contained in those statutes. Pursuant to the CESA, the Board must consult with the Department of Fish and Game (DFG) regarding the impact of its actions on species listed for protection under the CESA. If DFG finds that the Board's actions may jeopardize a listed species or destroy or adversely modify habitat essential to the continued existence of the species, DFG will so advise the Board. Cal. Fish & Game Code § 2090. The Board may then either follow the reasonable and prudent alternatives set forth in DFG's determination, or, if the Board finds that specific economic, social or other conditions make such alternatives infeasible, the Board may implement the standards in spite of a jeopardy finding under specified conditions, so long as the standards would not actually result in the extinction of a state listed species. Cal. Fish & Game Code § 2092.

Under the federal ESA, the Board's actions are more constrained. The Board's standards may, to the extent applicable, require approval by the EPA pursuant to Section 303 of the Clean Water Act. 33 U.S.C. 1313. In turn, the EPA must consult with the resource agencies of the Department of the Interior before approving the Board's plan, pursuant to Section 7(a)(2) of the ESA. 16 U.S.C.1536(a)(2).

In the case of both the state and federal ESA, the Board and EPA are required to take into account the best available scientific data on the effect of the plan on listed species. Cal. Fish & Game Code § 2090; 16 U.S.C. § 1536(a)(2). Case law interpreting that requirement under federal law clearly holds that federal agencies cannot ignore available biological information in fulfilling that duty under the ESA. *Conner v. Burford* (9th Cir. 1988) 848 F.2d 1441, 1454. Accordingly, in setting standards that will survive CESA and ESA review, the Board must carefully consider the independent scientific data presented to EPA by CUWA and others. San Francisco firmly believes that the Board's review of the urban alternative will show that CUWA's proposed standard is based on sound scientific evidence, and will provide equal or greater protection overall to species resident in the Bay/Delta than EPA's proposed standards with a lesser water cost.

In order to maximize the use of water, the Board should develop a water quality control plan which has the least possible effect on water supply. The CUWA alternative offers a firm scientific basis for a water quality control plan that will survive challenge under the state and federal Endangered Species Acts.