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MAR 10 1995

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Mr. John Caffrey  
Mr. Walt Petit  
State Water Resources Control  
Board  
The Bonderson Building  
901 "P" Street  
Sacramento, California 95814

Re: ENVIRONMENTAL REPORT/Water Quality Control Plan  
for the San Francisco Bay/Sacramento-San Joaquin  
Delta Estuary/ December 1994

Dear Mr. Caffrey and Mr. Petit:

The following are the comments of the Stockton East Water District to the ENVIRONMENTAL REPORT Appendix to Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary dated December 1994.

GENERAL COMMENTS

The Environmental Report ("ER") is seriously flawed, and does not comply with the requirements of the California Environmental Quality Act ("CEQA").

1. CEQA Compliance is Required.

As noted in the ER, the State Water Resources Control Board (SWRCB) must comply with the requirements of CEQA when amending a water quality control plan (at p. I-3). It is acknowledged that the program has been certified by the Secretary of Resources as meeting the criteria in Public Resources Code Section 21080.5. Nevertheless, while the document itself may be accepted in lieu of an Environmental Impact Report, the document and the actions of the SWRCB must otherwise meet CEQA's central

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requirements (Public Resources Code Section 21080.5(a); CEQA Guidelines Section 15250). "Nothing in section 21080.5 supplies a basis for concluding that the Legislature intended the section to stand as a blanket exemption from CEQA's thorough statutory scheme and its salutary substantive goals." Environmental Protection Information Center, Inc. v. Johnson (1985) 170 Cal.App.3d 604, 618.

2. The Project includes adoption of the Objectives as well as Implementation of the Plan.

It is fundamental to CEQA that each project must be fully analyzed in a single environmental document. An agency may not split a project into two or more segments. Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376. CEQA Guidelines define "project" to mean "the whole of an action" that may result in either a direct or indirect physical change in the environment (Guidelines Section 15378(a)).

Surprisingly, the ER contains an accurate project description:

The project is the review, and amendment where appropriate, of both the SWRCB's objectives for protection of fish and wildlife in the Bay-Delta Estuary and the program of implementation for achieving the objectives and protecting the beneficial uses. (Emphasis added.)

The project encompasses both amendment of the objectives as well as a program of implementation for achieving the objectives. This is a two-step approach as outlined by the ER.

Despite the accurate project description, the ER itself does not address, and cannot address, the impacts of the second component of the project description. As a result, the ER addresses only the first component of the project - amendment of the water quality objectives. Such an analysis is fatally flawed under the requirements of CEQA.

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The ER does not attempt to hide the fact that it analyzes only the first phase of the project. Chapter VIII addresses only the "Environmental Effects of the Preferred Alternative". The ER pays lip service to CEQA compliance by including a thorough project description and then fails to analyze the implementation component of the project in the document text. By its action, the SWRCB piecemeals the project into two components, which is strictly prohibited under CEQA.

While we acknowledge the importance of a two-step process - determining water quality objectives independent of water rights - the two actions cannot be separated. They are but one project under CEQA. The SWRCB cannot take action on the first project component until it has fully defined and analyzed the second project component as required by CEQA.

3. The ER Neither Identifies Impacts nor Mitigation Requirements.

CEQA's fundamental requirement is found in Public Resources Code section 21002, which forbids agencies from approving projects with significant adverse impacts when feasible mitigation measures can substantially lessen such impacts. Sierra Club v. Gilroy City Council (1990) 222 Cal.App.3d 30, 41; Citizens for Quality Growth v. City of Mount Shasta (1988) 198 Cal.App. 3d 433, 440-441; Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 711. Public agencies are required to implement feasible mitigation measures for projects that will otherwise cause significant adverse impacts. (Public Resources Code Sections 21002, 21081; CEQA Guidelines Sections 15002(a)(3), 15021(a)(2), 15091(a); Sierra Club, supra; Kings County, supra. A prerequisite to discharging this duty is preparing an environmental document that specifically identifies the significant impacts of the project and the feasible mitigation measures.

By its action of attempting to comply with CEQA before the method to achieve the proposed objectives is clearly identified, the SWRCB has made it impossible to comply with CEQA's mandate. As stated in the ER:

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The effects of reduced total exports on deliveries to specific water customers are uncertain at this time. Discussion of these effects would be speculative because allocation of responsibility for meeting the new standards will be determined through either a future agreement between DWR and the USBR for coordinated operation of the SWP and the CVP, or in the upcoming water right proceedings. (ER at p. VII-14).

Further, while the ER concludes that: ". . .the preferred alternative. . .will cause adverse environmental impacts both upstream of the Estuary and in export areas due to decreases in water supply" (at p. VIII-1) it nevertheless acknowledges that:

The following discussion of environmental effects of the proposed standards is largely speculative because the SWRCB will not implement the objectives by allocating responsibility to meet the objectives until the water right phase of the proceedings. At that time, the SWRCB will prepare appropriate environmental documentation for its action. For this analysis, the SWRCB is using the SWP and CVP as surrogates for the water right holders in the Central Valley that may be held responsible for meeting the standards." (Id).

This statement contradicts the Project Description, which includes both phases. Most importantly, it is clear from the statements quoted above that the ER does not specifically identify the significant impacts on the environment which will result from the action of the SWRCB. Thus, the environmental analysis correctly identifies significant impacts resulting from the standards but then abruptly abandons the further analysis of mitigation measures.

The ER states that: "The SWRCB has not determined who will share in that responsibility, or how the impacts will be allocated" (at p. VII-5). Because the SWRCB does not disclose which water right holders will be impacted and the ER refuses to engage in an independent analysis of

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the range of alternatives available to implement the proposed standards, it cannot identify the impacts to those users. As a result, mitigation measures cannot be identified, the ER is fatally defective.

Public Resources Code Section 21080.5 also specifically requires that the in lieu document must "include. . .mitigation measures to minimize any significant adverse environmental impact" (Public Resources Code Section 210805(d)(3); Citizens for Non-Toxic Pest Control v. Department of Food and Agriculture (1986) 187 Cal.App.3d 1575.

The piecemeal environmental analysis has made it impossible to identify the potential impacts to water users, and, in turn, impossible to identify and include any meaningful mitigation measures to minimize those impacts. The ER acknowledges this shortcoming:

Because implementation actions will not be fully formulated and established in this plan, the SWRCB cannot mitigate for the potential significant impacts of this plan through regulatory actions incorporated into the plan. Such regulatory actions must wait until the plan is implemented through a water right decision.

This admission acknowledges that the ER is inadequate to meet the requirements of CEQA.

4. Interim Impacts are Neither Evaluated nor Mitigated.

The ER even fails to adequately analyze those environmental impacts which can be identified at the first phase level of the project. The Preferred Alternative, as contained in the DRAFT Bay Delta Water Quality Control Plan dated December 1995 ("Draft Plan"), states that the USBR shall provide the San Joaquin River Flow objectives during the three-year period between adoption of the Draft Plan and allocation of responsibility by the SWRCB for those flows (at p. 24). Based upon this statement, the ER must consider the impacts to the New Melones project contractors from this interim re-allocation of water, and

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must identify mitigation measures for any significant adverse impacts. The ER fails to do so.

Stockton East Water District and Central San Joaquin Water Conservation District are CVP contractors from the New Melones project with requests to receive water. The clear impact from the actions proposed by the DRAFT Plan, and the analysis on the long-term yield of New Melones Reservoir contained in Chapter VI of the ER is that there will be significant adverse impacts of the two districts, at least on an interim basis. Nevertheless, the ER fails to identify these impacts, including the impact to the critically overdrafted groundwater basin underlying the two districts. Because these impacts are never addressed, the ER similarly makes no mention of the availability of mitigation measures to address the impacts. Accordingly, the ER fails to discharge its statutory duty to inform decisionmakers and the public of potential environmental consequences from the ultimate proposed action.

5. The SWRCB Cannot Approve the Draft Plan.

The SWRCB cannot approve the Draft Plan until the proper CEQA review has been completed. The proper CEQA review include an analysis of the impacts of implementation of the Draft Plan through the water rights phase. As identified in the project description, both phases constitute the project. It is not enough to say that the first phase has no impact upon the environment independent of the water rights phase.

An "approval" is "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines Section 15352(a)). Adopting the Objectives certainly commits the SWRCB to a definite course of action: the SWRCB will undertake a water rights phase with the goal of meeting the objectives which have already been established. Only if the environmental impacts of implementing the objectives are evaluated before the objectives are adopted, can an independent evaluation be made of the availability of mitigation measures or feasible alternatives. The alternatives discussion contained in the ER is meaningless unless

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impacts to specific water users can be quantified and compared under each alternative.

The ER concludes that the "preferred alternative" will cause adverse environmental impacts (at p. VIII-1). Under CEQA, the SWRCB cannot fulfill its CEQA duties by simply considering the ER before approving this piece of the project - the Water Quality Objectives. Burger v. County of Mendocino (1975) 45 Cal.App.3d 322, 326. In order to approve the Draft Plan despite the significant impacts which are identified in the ER, the SWRCB would be required to make one or more specific findings that changes have been made in the project which mitigate or avoid the significant environmental effects, or that such changes are within the responsibility of another agency or are infeasible. (Public Resources Code Section 21081; CEQA Guidelines Section 15091(a)). These findings must be supported by substantial evidence in the record. (Public Resources Code Section 21081.5; CEQA Guidelines Section 15091(b)). Based upon the current ER, and its failure to identify specific impacts and mitigation measures, such findings cannot be made by the SWRCB. As a result, the Draft Plan cannot be adopted.

The SWRCB cannot defer the obligation to identify and adopt mitigation measures until a future action is taken. Citizens for Quality Growth v. City of Mount Shasta (1988) 198 Cal.App. 3d 433, 442; Kings County Farm Bureau, supra. Consequently, it is not sufficient for the SWRCB to state that it will prepare adequate environmental documentation during the water right phase of the proceedings (ER at p. VIII-1) for adverse environmental impacts which are acknowledged now. The ER does nothing more than "discuss some of the options available to the SWRCB to mitigate the potential adverse impacts of this decision" (at p. X-1).

Such an approach has been specifically rejected by California courts, for the very reason this approach is inappropriate here. Deferring specific environmental assessment until after a project has been approved violates CEQA's requirement that impacts must be identified before the project approval eliminates the ability of the SWRCB to change its course of action. "Environmental problems should be considered at a point in

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the planning process 'where genuine flexibility remains'. Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 307, citing Mount Sutro Defense Committee v. Regents of the University of California (1978) 77 Cal.App.3d 20, 34. "A study conducted after approval of a project will inevitably have a diminished influence on decision-making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." Sundstrom, supra; Mount Sutro, supra; No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 81; Environmental Defense Fund, Inc. v. Coastside County Water Dist. (1972) 27 Cal.App.3d 695, 706. Here, approval of the standards irrevocably commits the agency to a course of implementation which results in significant environmental impacts. The SWRCB cannot set in motion the course of significant environmental degradation and yet, at the same time, avoid discussing ways to minimize adverse environmental consequences.

#### 6. Conclusion.

The conclusion is that the ER is woefully inadequate document which precludes any meaningful analysis of impacts on individual water users and the availability of mitigation measures to address those unidentified impacts. The Draft Plan cannot be adopted by the SWRCB without a direct violation of the requirements of CEQA, as the required findings cannot be made.

### SPECIFIC COMMENTS

#### 1. Area of Origin Protections

At Page I-5 the ER acknowledges that "The watershed protection and area of origin statutes [cites] accord first priority to water rights for use within the watershed", and further that ". . .diversions for export by [the CVP and SWP] are restricted until the needs in the watershed, including protections for beneficial uses in the Estuary, are met." Despite this acknowledgement, the ER indicates that the SWRCB's goals for this project are to: "Minimize the impact of new standards on water supply

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reliability throughout the Bay-Delta watershed and export areas", with no acknowledgement for the are of origin priority.

## 2. Salinity in the Lower San Joaquin River

The ER's discussion of salinity in the lower San Joaquin River is the best example of the SWRCB's failure to identify and impose mitigation measures as required by both CEQA and substantive law. The ER is replete with documentation of the harm to fish and wildlife caused by the poor quality water discharged into the lower San Joaquin River (pp. V-8; V-81). There are numerous discussions regarding the need to address this problem with discharge prohibitions to reduce the amount of freshwater needed to dilute the problem. There are pledges that the SWRCB will address this issue in the water rights phase of the proceeding.

The fact is that the SWRCB had an opportunity to address this issue directly in the Basin Plan recently adopted by the Regional Water Quality Control Board - Central Valley Region, and it failed to do so. The SWRCB approved the plan proposed by the Regional Board despite the fact that it did not include water quality objectives for salinity in the lower San Joaquin River. The statements of concern set forth in the ER ring hollow given the lack of action the SWRCB has taken over the past decades on this issue. The SWRCB and the Regional Board point to other agencies to take action with regard to this problem, when they are the only agencies with the ability to directly control and prohibit discharges into the San Joaquin River.

CEQA prohibits the SWRCB from requiring other agencies to mitigate this problem with it has the direct ability to do so. California Water Law and the California constitution should prevent the use of freshwater flows to dilute a pollution problem which the SWRCB and Regional Board have the ability to prevent; and which the Clean Water Act and the Porter Cologne Water Quality Control Act require them to address.

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### 3. Groundwater Overdraft

The ER states:

Immediate problems caused by overdrafting are localized land subsidence, water quality degradation near Stockton from Salt water intrusion, and higher pumping costs. Since the area will continue to rely on ground water as a source for irrigated agriculture, water agencies are attempting to alleviate the overdraft conditions through artificial recharge and conjunctive use programs. (at p. IV-27).

The ER should correctly note that ground water will continue to be a source for municipal and industrial supplies as well. Most importantly, however, the ER should note that the interim plan to provide all San Joaquin River Water Quality flows from New Melones will effectively eliminate the ability of the water agencies in the Stockton area to implement artificial recharge and conjunctive use programs as planned from that source for the past 25 years.

### 4. Delta Smelt

At p. V-64 the ER acknowledges that: "Very high outflows may be detrimental to the planktonic smelt larvae which may be transported out of the Delta and into San Pablo and San Francisco bays with no way to get back upstream." Despite this statement, the preferred alternative requires outflows higher than historical outflows in most years. This action inconsistent with findings should be addressed.

### 5. Salmon

At page V-81 the ER concludes that: "San Joaquin River basin emigrating smolt losses can be attributed to high water temperatures. . . ." This is contrary to the conclusions reached in the Final Bay-Delta Plan proposed by the United States Environmental Protection Agency which concludes that: ". . . experimental data from releases near the upstream edge of the Delta did not show a

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significant statistical relationship between survival and temperature at release. In other words, on the San Joaquin River, temperature should not be used as the independent variable in the criteria." (40 CFS Part 131; 60 FR 4664, 4690).

#### 6. Model Limitations

The ER indicates that interpretation of modeling results are subject to the uncertainty of the CVPIA allocation of the 800,000 acre feet because "The USBR has not yet established criteria on how this obligation will change CVP operations." (at p. VI-2). Despite this statement, it is true that for the past three years the Fish and Wildlife Service has allocated 200,000 of that 800,000 acre feet from New Melones. Given this precedent, the ER should evaluate this additional impact regardless of its establishment as a permanent criteria. The SWRCB should not ignore on-going actions which are available for analysis in the document.

In addition, the ER indicates that:

DWRSIM is not capable of analyzing the water supply impacts of water quality objectives for the interior stations in the southern Delta because of a lack of adequate understanding of relationships between the San Joaquin River flow and southern Delta water quality.

This statement alone illustrates the inadequacy of the ER as a CEQA document. Not only are the impacts "speculative", not only do they use the CVP and SWP as "surrogates", but even the models used are not capable of analyzing water supply impacts in critical areas of the Delta relating to the San Joaquin River. Water quality objectives should not be adopted when the impact of those objectives are not capable of being measured.

#### 7. Modeling Assumptions

The modeling assumptions utilized in the ER are not supported, and flawed. Table VII-1 does not even calculate demand from the New Melones Unit of the CVP; it cannot adequately measure impact.

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The DWRSIM makes releases from New Melones Reservoir to meet flow requirements on the San Joaquin River. Why? Even given the assumption that the ER uses the CVP as surrogates for all water right holders, there are other CVP units capable of providing the required San Joaquin River flows.

DWRSIM places a cap of 70,000 acre feet on the water releases from New Melones reservoir to meet water quality objectives at Vernalis. Such a cap is unsupported in law or in fact given the increases in poor quality agricultural drainage noted in the ER. Such a limitation is particularly offensive when the SWRCB has done nothing to reduce the poor quality of San Joaquin River water which would make such a limitation more realistic.

#### 8. Water Supply Impacts

The ER at p. VII-5 states that: "The SWRCB has not determined who will share in the responsibility or how the impacts will be allocated." This is not true. On an interim basis the Draft Plan indicates that the Bureau will meet the San Joaquin River flow objectives. Such action must be acknowledged and analyzed.

For the reasons set forth above, the analysis of water quantities needed from New Melones to meet water quality objectives at Vernalis under D-1422 is not reasonable. The mere consideration of "additional measures" will do nothing to reduce the existence of poor quality water in the lower San Joaquin River which will require more than 70,000 acre feet to dilute.

In paragraph 3.b at p. VII-11 it is stated that: "In January, July, and August, additional Vernalis flows of 0.1 TAF, 15.4 TAF, and 8.4 TAF, respectively, are also provided." There is no information as to why such flows are provided. If the model assumes they are needed for water quality purposes, that should be stated.

#### 9. Environmental Effects

At page VIII-9 there is a discussion of the projected need for additional flows to meet the Salinity standard at Vernalis. It is not clear whether or not the analysis of

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the average historical EC at Vernalis in 1984 through 1992 consider the quantity of water releases from New Melones to create the average historical EC used?

At page VIII-50 the ER states that: "These increased flows however, may reduce the capacity to provide dilution water from New Melones Reservoir for salinity control purposes at Vernalis, as required by D-1422, depending on how the responsibility to meet the fish and wildlife objectives are allocated." Again, this conclusion is minimized for two reasons: (1) for the interim period this will certainly happen as New Melones will provide all flows required as provided in the Draft Plan, and (2) the artificial 70,000 acre foot cap is unwarranted.

At page VIII-60 the statement is made that: "If the SWRCB requires upstream water users to provide some of the water necessary to meet these new standards, both crop shifts and land retirement are likely." Again, this conclusion is minimized for two reasons: (1) the Draft Plan provides that upstream water users will provide all the water necessary to meet the San Joaquin River flow objectives in the interim period, and (2) the impact on groundwater overdraft is not discussed.

Again, the statement at p. VIII-65 that: ". . . but the majority of the reductions would be borne by export areas if the CVP and the SWP are largely responsible for meeting the standards" is inaccurate. On an interim basis the Draft Plan requires that all reduction be born by upstream users Stockton East Water District and Central San Joaquin Water Conservation District for the San Joaquin River flows. In addition, this statement fails to acknowledge that there are area of origin users who are CVP and SWP contractors.

#### 10. Mitigation Measures.

The ER discusses Agricultural Water Conservation in Chapter X. This discussion should acknowledge that there are some agricultural districts in the State which do not benefit from all of the agricultural water conservation practices listed. In fact, some districts practicing conjunctive use methods for recharging overdrafted

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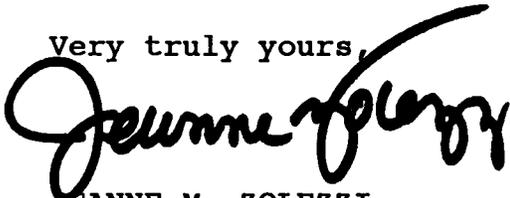
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groundwater basins with surface water specifically discourage some of the listed actions such as lining of canals and mechanisms to decrease surface water use.

The discussions of Water Transfers should acknowledge that this solution is not available on a state-wide basis. There are regions of the state which are physically isolated from water conveyance facilities and which cannot readily avail themselves of this mitigation measure.

The State Water Resources Control Board should not adopt the Draft Plan at this time. To do so in violation of CEQA is not in the best interests of the citizens of the State of California. The SWRCB should proceed with the water rights phase of the proceeding, preparing a preferred alternative for implementation and a comprehensive environmental document for that plan. Only with the preparation of a comprehensive environmental document which addresses the specific environmental impacts upon water users and methods for mitigating such impacts can the water users of the State of California be protected. The law requires no less.

Very truly yours,



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