

ATTACHMENT A

Public Comments on Draft MAA and Regional Water Board Staff Responses

Written comments were submitted on behalf of the following parties. Copies of the comment letters are included in the agenda.

- San Joaquin River Group Authority (SJRGGA)
- United States Fish & Wildlife Service (USF&WS)
- San Joaquin River Exchange Contractors Water Authority (SJRECWA)
- California Department of Water Resources (DWR)
- County of San Joaquin and San Joaquin County Flood Control and Water Conservation District (CSJ)
- South Delta Water Agency (SDWA)
- Stockton East Water District (SEWD)

1.) Comment: "The MAA is preempted by the San Luis Act"

SJRECWA commented that the San Luis Act required the State of California or Reclamation to make provision for a master drainage outlet for the San Joaquin Valley prior to constructing the San Luis Unit, and that the MAA is preempted by the provisions of the San Luis Act. SJRECWA suggested that, by reallocating the United States' drainage responsibility to entities such as the Exchange Contractors, the MAA would be in conflict with the explicit provisions of the San Luis Act; and said that any action by the Regional Water Board short of rejecting the MAA would constitute abuse of discretion in violation of the law.

Staff Response: The Regional Water Board's Water Quality Control Plan contains a salinity control program for the San Joaquin River that allocates a salt load to Reclamation and the purpose of the MAA is to spell out the steps that will be taken in the short term to move toward compliance with this allocation. The MAA does not reallocate any drainage responsibility and Reclamation retains the discretion to determine the most appropriate means of providing a drainage solution for the basin. This agreement is not in conflict with the San Luis Act.

2.) Comment: "Reclamation must acknowledge its legal responsibility to provide a drainage solution for the San Joaquin River"

SJRECWA commented that the MAA must include Reclamation's acknowledgement of their legal responsibility to provide a drainage solution for the SJR.

Staff Response: A Federal Court has determined that Reclamation has a legal responsibility to provide drainage for lands served by the San Luis Unit of the Central Valley Project. But the salt load requirements prescribed to Reclamation in the salt/boron TMDL are based on Reclamation's role as one of many, albeit a major,

contributor to the salt load in the river. Therefore, it is not essential that the MAA contain an acknowledgement of Reclamation's individual legal responsibility to provide a drainage solution.

3.) Comment: "The MAA fails to specify when or how the State will provide a subvention of funds to construct major treatment facilities"

SJRECWA commented that the California Constitution includes a standard that local government entities, like the Exchange Contractors, should not be made subject to new regulatory burdens by the State, without receiving payment ("subvention of funds") for the costs of implementing those regulatory programs. They went on to explain that a real-time management program for agriculture would require the construction of reservoirs and facilities to temporarily retain water and that these would presumably be considered point sources and be subject to discharge permits. SJRECWA's contention is that, by the Regional Board's not enforcing the San Luis Act (federal law) and instead enforcing Porter-Cologne, it establishes the subvention of funds requirement, and asked when these funds will be delivered to stakeholders such as the Exchange Contractors.

Staff Response: The MAA does not require SJRECWA or anyone else to participate in a real-time management program. Because this would be a voluntary program, the issue of subvention of funds does not appear to be relevant.

4.) Comment: "Adoption of the MAA misses the Regional Board's own deadline of July 28, 2008"

SEWD commented that adoption of the MAA will miss the Basin Plan deadline for entering into an MAA and will not comply with the legal requirements of the Plan.

Staff Response: Regional Water Board consideration of an MAA at this meeting meets the intent of the Basin Plan.

5.) Comment: "The draft MAA does not require Reclamation to do what the Basin Plan amendment prescribes it to do"

Several entities commented that the draft MAA failed to require Reclamation to either

- meet its load allocations; or
- provide mitigation and/or dilution flows equivalent to its excess load as prescribed in the Basin Plan amendment.

*Staff Response: The proposed MAA has been revised to address this concern. **NOW, THEREFORE1a** has been inserted and reads:*

1. Reclamation agrees:

- a. To meet its load allocations, or provide mitigation and/or dilution flows equivalent to its excess load as prescribed in the Basin Plan;*

6.) Comment: “The MAA gives Reclamation another two years after 40 years of not addressing their problem”

Several entities made comments to this effect.

Staff Response: Staff understands the historical perspective of those who provided comments of this nature. However, this has not been a very well defined process and, in many ways, has been new territory for both agencies. Reclamation staff has met with Regional Water Board staff regularly and Reclamation management has met with Regional Water Board management on at least two occasions. Reclamation has prepared an Action Plan that has provided a basic idea of how they intend to address their obligations. And they have committed to and begun working on efforts to initiate a real-time water quality management program to address salinity in the San Joaquin River. Although enough progress was not made to enter into a definitive and long-term MAA, it is staff’s opinion that the progress made warrants the phased MAA approach and the two-year information-gathering and evaluation initial phase proposed in this agreement.

7.) Comment: “The draft MAA is too generic and lacks adequate specificity.”

Most commented that the MAA was too vague and needed more specificity in the way of goals, obligations, or ways to measure progress toward meeting Reclamation’s requirements.

Staff Response: Staff has added new language to the proposed MAA in an attempt to address this comment. NOW, THEREFORE 1b reads:

1. Reclamation agrees:

b. To continue to implement existing projects that will offset a minimum of 15% of their excess DMC salt load by July 1, 2010. This salt load reduction goal will be used to measure Reclamation’s progress toward meeting DMC load allocations contained in the Basin Plan.

8.) Comment: “The Regional Board should reject the MAA and request a report of Waste Discharge”

Several entities commented that no progress would be made until the Regional Water Board forces Reclamation to take appropriate action and recommended the Regional Water Board reject the draft MAA and immediately request a Report of Waste Discharge.

Staff Response: While it is not clear at this time that the MAA will be the appropriate mechanism for addressing DMC salt imports, enough progress has been made to warrant entering into this agreement and proceeding with the initial phase proposed. The alternative would be to reject the MAA and request a Report of Waste Discharge.

The process that would ensue in pursuing that alternative could be lengthy. Until it is clearer that the MAA process will not work, staff sees a greater advantage in trying to build on the progress made up to this point, as opposed to moving into a regulatory mode.

9.) Comment: “Requirements of CEQA, NEPA, and other environmental compliance regulations have not been met”

SJRECWA commented that CEQA has not been complied with and that the Regional Water Board must explain the environmental documents it is relying on to support entering into the MAA, or explain its reasons for concluding that compliance with CEQA is not necessary. SJRECWA and USF&WS made similar comments regarding Reclamation’s failure to comply with NEPA and related Federal environmental compliance laws.

Staff Response: For purposes of complying with CEQA, the Regional Water Board performed an analysis at the time the TMDL was developed and approved. The MAA only requires the implementation of existing projects and studies to monitor the ability to export salts from the waterways, and will not have a significant effect on the environment. When the MAA is revisited in two years, it may include mandated changes to water system management and/or capital improvements. At that time, additional CEQA analysis may be required.

Additionally, new language has been added to the proposed MAA to address these comments. NOW, THEREFORE 3a now reads:

3. *It is mutually agreed:*
 - a. *That both agencies will comply with all State and Federal environment compliance laws and regulations;*

10.) Comment: “There is no readily apparent method for ascribing proportionate salt load responsibility to the various drainers in the watershed”

USF&WS provided this comment.

Staff Response: The basin plan amendment contains formulas for assigning proportionate salt load responsibility (base load allocations and real-time load allocations for agricultural and wetland dischargers; DMC load allocations for Reclamation).

11.) Comment: “Why and how will Reclamation receive salt load offset credits for mitigating the salt effects of the DMC?”

CSJ commented that the MAA provides that Reclamation should receive salt load offset credits for each element of Reclamation's Action Plan, but it is unclear how and why Reclamation should receive salt load credits for mitigating for the salt effects of the DMC and meeting their salinity obligations.

Staff Response: Why - The only way to assess whether or not Reclamation is providing mitigation and/or dilution flow equivalent to the excess DMC salt load is to quantify the salt control benefit (salt offset credits) of the various elements in Reclamation's Action Plan, and compare the sum of their salt offset credits against the imported DMC salt load in excess of the DMC load allocation.

How - The Basin Plan already contains a formula for calculating dilution flow credit, however, there is no mechanism provided in the Basin Plan for quantifying offset credits for other mitigation activities. As part of the MAA, Reclamation would agree to submit a draft Compliance Monitoring and Evaluation Plan that would propose, among other things, quantification methods for determining the salt offset credits to be applied to the various mitigation elements of Reclamation's plan. The Regional Water Board would review Reclamation's proposal and negotiate a final plan that would provide an appropriate mechanism for determining which elements of Reclamation's plan should receive offset credit and how those credits should be quantified..

12.) Comment: "Reclamation should not be able to claim offset credits for action in the Salinity Management Plan that they are not responsible for implementing"

SEWD and DWR both made comments to this effect.

Staff Response: Staff agrees with this comment. It is staff's intention to ensure that there is a clear and accurate accounting of Reclamation's participation and responsibilities in joint efforts, and to allow credit equivalent only to that proportion of the project or activity that Reclamation can justifiably claim.

13.) Comment: "Why, if Vernalis objectives have not been exceeded since 1995, the year the water quality objective was adopted, are these requirements, which may impact wetlands, being mandated?"

This question was posed by USF&WS.

Staff Response: The requirements were adopted by the RB in 2005, before a full range of water year types had been experienced, and, although 2007 was a critically dry year, it is still unclear whether or not the Vernalis objectives will be met if there are back-to-back or several consecutive critically dry years.

14.) Comment: "Reclamation's claim regarding the Vernalis objective being met during all water year types is misleading, and that by choosing to only dilute the high salt concentrations in the River at Vernalis, Reclamation has ignored the need to also meet standards in the southern delta."

SDWA pointed out that Tracy Bridge and Old River standard has been violated both last summer and this winter, and indicated it was because Reclamation denied downstream users access to any assimilative capacity and because of the way the projects have altered flows in the southern Delta.

Staff Response: South Delta standards were violated last year. However, the purpose of the MAA and of the TMDL amendment is to help meet the Vernalis objective, and the South Delta objectives are, for the most part, outside the purview of the MAA.

15 Comment: "The Regional Water Board should affirm the adequacy of CAL-SIM II for the real-time management program effort"

The San Joaquin River Management Group commented that Reclamation's official planning model for salinity conditions at Vernalis is CAL-SIM II, but that the Regional Board's stance has been that CAL-SIM II was not an appropriate tool for prescribing alternative flow or water quality objectives. They said that, given Reclamation will surely use CAL-SIM II for some significant modeling, the Regional Water Board must now believe CAL-SIM II is sufficiently developed for planning functions such as prescribing alternative flow, and, if so, the Regional Water Board should affirm its adequacy for the real-time effort.

Staff Response: Staff is not aware that any decision has been made or even contemplated regarding appropriate models to use as part of a real-time management program.

16 Comment: "WHEREAS #6 of the draft MAA states that the Vernalis objectives should be met 'through the actions of Reclamation under this agreement and through the actions of other responsible parties'. The MAA should specify what other parties are responsible for achieving the Vernalis objectives."

SJRWGA commented that in D-1641, the State Board has already allocated responsibility for this compliance to Reclamation, and that the MAA should specify what other parties are responsible for achieving the Vernalis objectives.

Staff Response: D-1641 did assign the initial and primary responsibility for meeting the Vernalis objectives to Reclamation. However, one of the goals of the salt and boron TMDL Basin Plan amendment for the Lower San Joaquin River is to meet the Vernalis objective, and therefore all parties subject to load allocations under that amendment will also have some responsibility for meeting the Vernalis objectives. Staff has taken this comment under consideration and has proposed the following language change for this item in the MAA:

"Salt and boron objectives prescribed in the Basin Plan for the San Joaquin River at the Airport Way Bridge near Vernalis should be achieved through the actions of Reclamation under this agreement and

*through the actions of **other parties in meeting their obligations prescribed in the salt/boron TMDL basin plan amendment.*** (changes in bold)

17 Comment: “**WHEREAS: # 11** of the draft MAA states that stakeholders along the San Joaquin River that are subject to salt and boron load allocations in the Basin Plan must participate in the real-time program to qualify for conditional waivers of waste discharge requirement. This statement does not accurately reflect the language of the Basin Plan Amendment.”

SJRECWA communicated to staff that it was their opinion that this statement does not accurately reflect the language and intent of the Basin Plan Amendment.

SJRGGA also commented that the Basin Plan only requires participation in a real-time management program approved by the Regional Board, and does not limit participation to a real-time program organized by Reclamation.

DWR, in commenting on this item, asked whether qualification for a conditional waiver would be enough of an incentive to get stakeholders to participate in a real-time program.

Staff Response: Staff agrees with SJRECWA’s opinion that this statement in the draft MAA does not accurately reflect the language of the Basin Plan Amendment. Because the statement is not an essential part of the MAA, it has been removed from the proposed MAA.

Regarding SJRGGA’s comment, the Basin Plan Amendment does not require stakeholders to participate in any real-time management program. However, in order to qualify for real-time load allocations instead of fixed base load allocations, stakeholders must participate in a Board-approved real-time program. SJRGGA’s comment is correct in that the program must be Board-approved, but does not have to be organized by Reclamation.

Regarding the DWR comment, the primary incentive in the Basin Plan Amendment to encourage participation in a real-time management program is that participants in a real-time program would qualify for real-time load allocations, which will generally allow more loading to the San Joaquin River than fixed base load allocations.

18 Comment: “**NOW, THEREFORE 2a** of the draft MAA states that the Regional Water Board agrees that Reclamation’s successful and timely implementation of its Action Plan and the MAA is a cooperative means of achieving DMC load allocations as set forth in the Basin Plan in spite of the fact that it is not clear that implementation of the Action Plan will actually achieve compliance with DMC load allocations.”

Staff Response: The phased approach discussed previously has been proposed in order to provide the Regional Water Board with the opportunity to evaluate the plan

*more thoroughly. The language of this section has been revised slightly to say that the Regional Water Board agrees: "that Reclamation's successful and timely implementation of its Action Plan and the MAA is a cooperative means of **working to achieve** DMC load allocations as set forth in the Basin Plan". (changes in bold)*