

JON D. RUBIN

September 14, 2004

**VIA HAND DELIVERY AND
FIRST CLASS MAIL**

Ms. Debbie Irvin
Clerk, State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Draft Staff Report on Periodic Review of the 1995 Water Quality Control
Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

Dear Ms. Irvin:

I am writing on behalf of the San Luis & Delta-Mendota Water Authority and its member agencies (Authority) in response to the request by the State Water Resources Control Board (Water Board or SWRCB) for comments on its staff's draft report entitled "Periodic Review of the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary," dated August 2004, and the proposed resolution thereon (Draft Staff Report). The Authority appreciates this opportunity to comment.

The Authority is a joint powers authority, consisting of 32 member public agencies¹ that contract with the United States Department of the Interior, Bureau of Reclamation, for supply of Central Valley Project (CVP) water. The water supplied to the Authority's member agencies is used to meet the needs of over 1 million acres of highly productive agricultural lands within the western San Joaquin Valley, San Benito County, and Santa Clara County, California. Authority members also supply water for municipal and industrial uses, including the delivery of water to the Silicon Valley, and provide approximately 250,000 to 300,000 acre-feet of water for waterfowl and wildlife habitat in the San Joaquin Valley. The uses of water by the Authority's

¹ The member agencies of the Authority are: Banta-Carbona Irrigation District; Broadview Water District; Central California Irrigation District; Centinella Water District; City of Tracy; Columbia Canal Company; Del Puerto Water District; Eagle Field Water District; Firebaugh Canal Water District; Fresno Slough Water District; Grassland Water District; James Irrigation District; Laguna Water District; Mercy Springs Water District; Oro Loma Water District; Pacheco Water District; Pajaro Valley Water Management Agency; Panoche Water District; Patterson Water District; Plain View Water District; Pleasant Valley Water District; Reclamation District 1606; San Benito County Water District; San Luis Canal Company; San Luis Water District; Santa Clara Valley Water District; Tranquillity Irrigation District; Turner Island Water District; West Side Irrigation District; West Stanislaus Irrigation District; Westlands Water District; and Widren Water District.



Ms. Debbie Irvin
Clerk, State Water Resources Control Board
September 14, 2004
Page 2

member agencies are afforded protection under the 1995 Plan. For this reason, the Authority has a vital interest in any effort by the Water Board to reconsider objectives contained in the 1995 Plan.

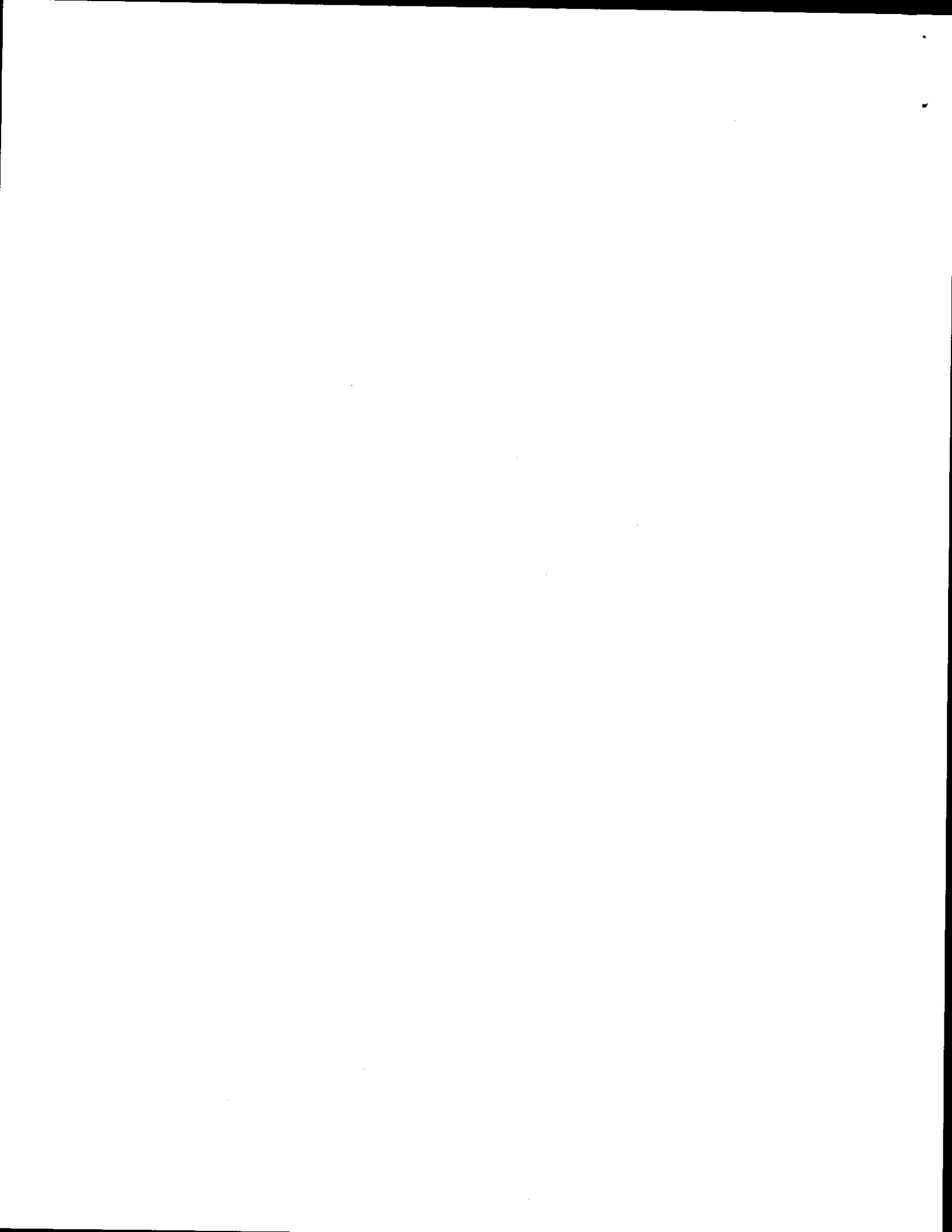
The Authority applauds the efforts of the Water Board to review the objectives established by the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Plan), and the efforts of the Water Board's staff to identify those objectives in the 1995 Plan that require reconsideration. In particular, the Authority looks forward to working with the Water Board and its staff to ensure that the Water Board fully appreciates the potential economic and social impacts, beneficial and harmful, associated with changes to existing objectives. The Authority also looks forward to assisting the Water Board in furthering beneficial use by moving from the historic measurement of the benefits or harm caused to fish by changes to the existing objectives – water – to a measurement based on fish populations. This change in the paradigm is possible because, unlike 1994, technical modeling is now available to assess the effects on fish populations caused by changes made to objectives contained in the 1995 Plan.

I. General Comments

A water quality control plan must establish beneficial uses. Water Code § 13050(j). The uses of water by the Authority's member agencies, through export of water from the Delta, are among the beneficial uses designated in the 1995 Plan. As the 1995 Plan notes: "[t]he waters of the Bay-Delta Estuary serve a multitude of beneficial uses, both within the Estuary and throughout the State." 1995 Plan, at p. 12. Those beneficial uses include municipal and domestic supply, and agricultural supply. *Id.* The Water Board's staff has not proposed any changes that would effect the designation of beneficial uses.

A water quality control plan must establish water quality objectives that will "ensure the reasonable protection of beneficial uses." Water Code § 13241. In recent years, the Authority's member agencies have suffered significant reductions in their water supplies from the CVP. That loss of supply has impaired the beneficial uses that depend upon those supplies. The Water Board should therefore seek opportunities to amend the objectives in ways that will increase the CVP supplies available to the Authority's member agencies, to better protect those beneficial uses, while maintaining the same or a similar level of protection for other protected, beneficial uses.

It is therefore appropriate to reconsider the objectives contained in the 1995 Plan. Revised objectives may be appropriate to attain the goal of the highest water quality that is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible. For that reason, the Authority supports the Water Board's staff recommendation that the Water Board review (1) objectives for Delta outflow, flow in the San Joaquin River at Airport Way



Ms. Debbie Irvin
Clerk, State Water Resources Control Board
September 14, 2004
Page 3

Bridge, Vernalis, salinity, Delta cross channel gates closure, and (2) changes to the water quality compliance and baseline monitoring and to the program of implementation.²

Although the Authority believes the objectives set forth above may require reconsideration, the Authority supports a schedule different from that presented in the August 17, 2004, Notice of Public Workshop – Consideration of Potential Amendments or Revisions of the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. The schedule presented in that Notice would have the multiple-date workshop commencing in mid-October and continuing through mid-November. The order of reconsideration would be as follows:

1. Objectives Related to Delta Outflow
 - a. Delta outflow
 - b. River flows: Sacramento River at Rio Vista
 - c. River flows: San Joaquin River at Airport Way Bridge, Vernalis: February - April 14 and May 16 - June
 - d. Export limits
2. Flow Objectives in the San Joaquin River at Airport Way Bridge, Vernalis: 31 day pulse flow April 15 - May 15
3. Salinity Objectives
 - a. Southern Delta electrical conductivity
 - b. Chloride objectives, compliance location at Contra Costa Canal at Pumping Plant #1, and potential new objectives
4. Miscellaneous Topics
 - a. Salmon protection
 - b. Delta cross channel gates closure
 - c. Changes to the water quality compliance and baseline monitoring
5. Recommended Changes to the Program of Implementation

The Authority recognizes that the stakeholders could be prepared by mid to late-October to discuss and present information to the Water Board on quasi-administrative aspects of the 1995 Plan, like changes to the water quality compliance and baseline monitoring. That, however, is not the case for the more substantive aspects of the 1995 Plan that the Water Board may reconsider. For those aspects of the 1995 Plan, the proposed schedule is too aggressive. The Authority respectfully requests at least 120 days to develop and analyze the data related to those objectives. The basis for this request is two-fold.

First, the Authority and the other stakeholders will not know which objectives the Water Board will reconsider until September 30, 2004, the date on which the Water Board will act on

² Because of time limitations, the Authority has not been able to fully consider whether additional objectives contained in the 1995 Plan require reconsideration. The Authority therefore reserves the right to request that the Water Board reconsider additional objectives.



Ms. Debbie Irvin
Clerk, State Water Resources Control Board
September 14, 2004
Page 4

the Draft Staff Report and adopt a resolution identifying those objectives contained in the 1995 Plan that it will reconsider. Thus, the Authority and other stakeholder will have only two to six weeks, depending on the schedule for when objectives will be discussed, to prepare for the workshop. Given the significance of this matter, such limited preparation time is inadequate.

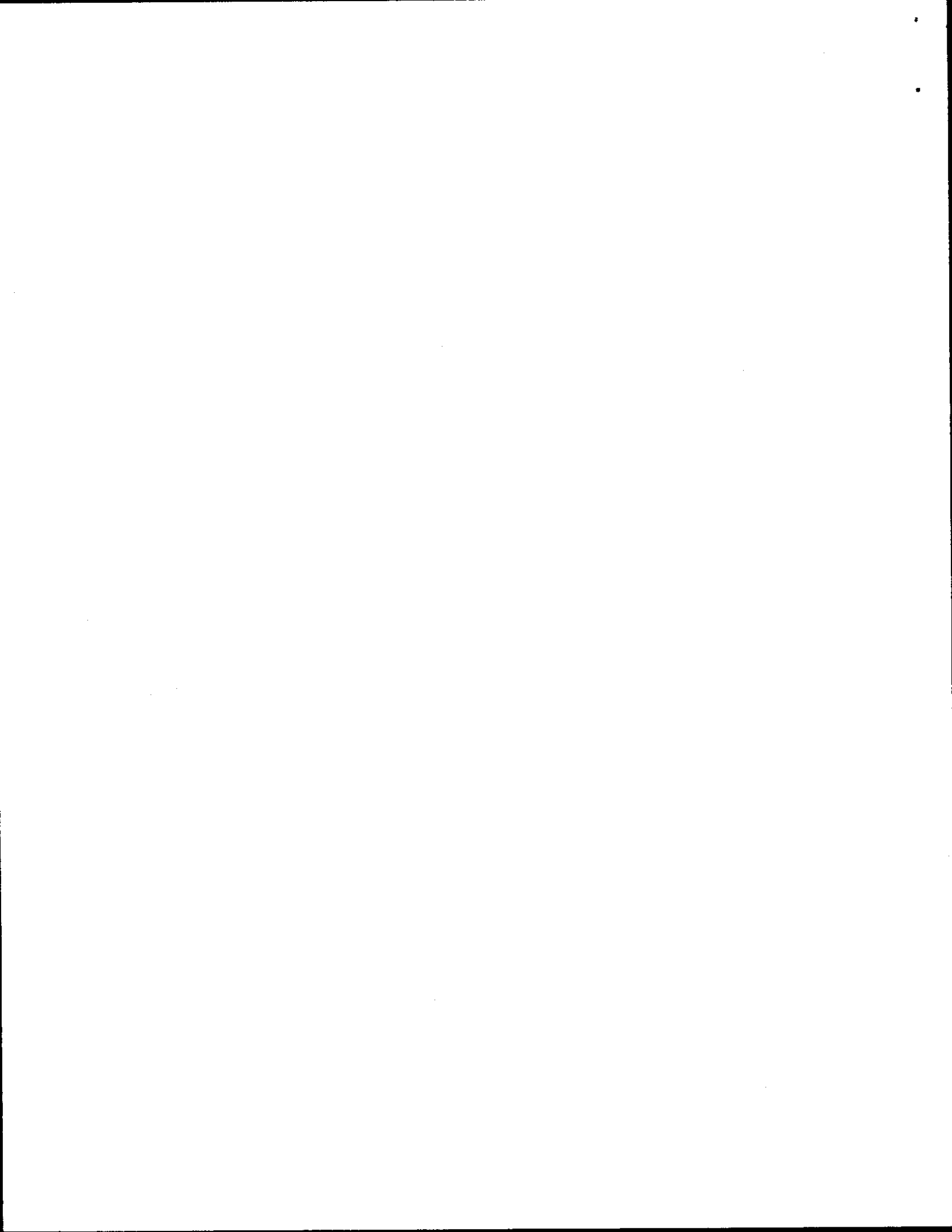
Second, the Authority is hopeful that, during the period after the Water Board designates those objectives it will reconsider and the start of the workshop, the stakeholders could develop alternatives and reach agreement on recommendation to the Water Board for changes in 1995 Plan. As the Water Board and its staff likely remember, such a process was encouraged by the Water Board in 1994 and resulted in "Principles for Agreement."

The process followed by the Water Board when developing the 1995 Plan, the same process the Authority is now advocating the Water Board promote for its periodic review of the 1995 Plan, is explained in the Water Board's resolution adopting the 1995 Plan. That resolution provides:

The SWRCB commenced this proceeding on March 25, 1994 by issuing a notice of a series of public workshops to review the existing standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Estuary). The SWRCB held six public workshops in April through October 1994 and the SWRCB staff held three additional public workshops in September and October 1994. Notice of all workshops was sent to all parties who indicated an interest in receiving notice.

During the workshops, the SWRCB urged the interested parties to develop alternatives for revising the previous water quality objectives for the Bay-Delta Estuary. The Department of Fish and Game, Bay Institute of San Francisco, Delta Wetlands and United States Environmental Protection Agency developed proposals for the SWRCB to consider. The SWRCB evaluated these alternatives in its environmental review for the development of a draft Bay-Delta plan. After negotiations, a number of parties reached an agreed-upon recommendation to the SWRCB for changes in the Bay-Delta water quality objectives. This agreement is called the "Principles for Agreement" and was signed on behalf of numerous interest groups and governmental agencies on December 15, 1994. The SWRCB used several elements of this agreement (with some modifications) and the other recommendations from interested parties in preparing the draft plan.

State Water Resources Control Board, Resolution No. 95-24 at Whereas ¶¶ 3, 4. That process worked in 1994 and the Authority is hopeful it would prove productive during this review.



Ms. Debbie Irvin
Clerk, State Water Resources Control Board
September 14, 2004
Page 5

II. **Specific Comments**

Issue 7: Salmon Protection

The Draft Staff Report notes that the United States Environmental Protection Agency (EPA) "has not rescinded its standards for the Bay and Delta despite its commitment to do so once it approved the SWRCB's 1995 Plan." Draft Staff Report at 36. The Staff Report should further note that EPA's standards are of no legal effect. In September 1995, the EPA approved the Water Board's 1995 Plan. Under the Clean Water Act, once EPA approves a revised or new standard, "such standard shall thereafter be the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3). By operation of law, therefore, the 1995 Plan governs regardless of whether EPA later, formally rescinded its standards.

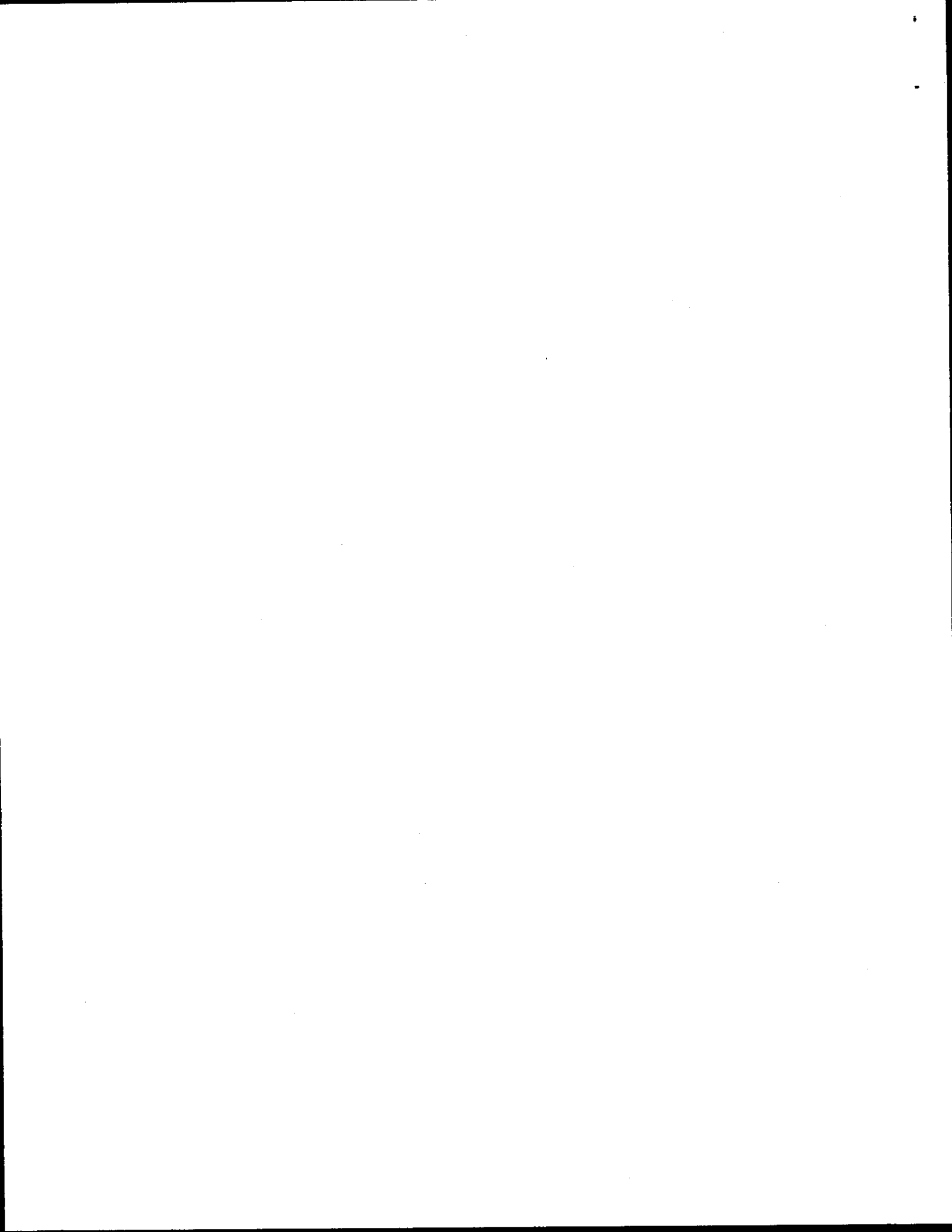
Issue 13: Export Limits

On page 47, the Draft Staff Report attempts to summarize the Authority's comments regarding export limits by providing:

[The Authority] comments that the export limit should simply be based on inflow. In addition, [the Authority] comments that the export limit flexibility that already exists should be modified to account for the effects of a growing population.

These sentences mischaracterize the Authority's comment.

The Authority proposed reconsideration of objectives that limit exports because of increased fish populations, as new data may show that increased flexibility in export limits may be available without or with a minimal corresponding degradation of other beneficial uses protected by the 1995 Plan. The characterization contained in the Draft Staff Report improperly states that export limit should simply be based on inflow and could be incorrectly read as the Authority asking for export limit flexibility because of or to accommodate human population growth. Those characterizations clearly do not reflect the Authority's comment. Accordingly, the Authority respectfully requests that the Draft Staff Report be revised to reflect that the



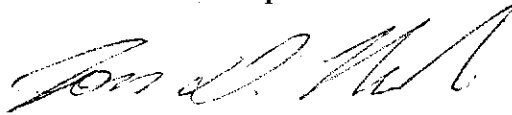
Ms. Debbie Irvin
Clerk, State Water Resources Control Board
September 14, 2004
Page 6

Authority requested reconsideration of objectives that limit exports, not because of a potential to base export limit solely on inflow or due to changes in human population, but due to changes in fish populations and the scientific communities ability to protect fish through measurement of effects on population rather than water supply.

Thank you for your consideration of the Authority's comments.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



By Jon D. Rubin
Attorneys for San Luis & Delta-Mendota Water Authority

cc: Daniel Nelson
Thomas Birmingham
James Snow
Thomas Boardman
B.J. Miller
Tom Mongan

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