

COMMENTS OF THE DEPARTMENT OF WATER RESOURCES  
ON THE DRAFT WATER QUALITY CONTROL PLAN  
FOR THE SACRAMENTO-SAN JOAQUIN DELTA/SAN FRANCISCO BAY ESTUARY  
DECEMBER 1994<sup>1/</sup>

For many years, the State Board has been in the unenviable position of trying to implement major water policy for the State with respect to the use of the waters of the Bay-Delta estuary before that policy was made or known. There are dozens if not hundreds of individual policies that apply to different areas or aspects of Delta water use, but, until recently, none which directly addressed the central issue of how to balance and make compatible the estuary's significant fisheries and environmental value with its value as the State's single most important source of water supply. Because of the importance of this issue, State and federal agencies and water user and environmental interests ultimately became involved, not only in the Board's administrative hearing process which began eight years ago, but actively and directly in the process of working out, themselves, a policy consensus on this central issue.

As we all know, major policy consensus was reached on December 15, 1994, in the execution of the "Principles For

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1. Presented by David B. Anderson, February 23, 1995

Agreement". This consensus forms the basis of the Board's planning objectives as well as a context for planning for long-term Delta solutions. It also forms the basis for coordinated project operations of the CVP and SWP in the Delta that do not result in jeopardy findings for listed species under the ESA.

The Department fully supports this new consensus. In this spirit, we have been working cooperatively with the consensus group to "fine-tune" the December 1994 understandings and have worked productively with both CAL-FED and the CAL-FED Ops Group to implement the Principles for Agreement. Specifically, we have shared our concerns and comments on the Board's Draft Plan with these groups in order that they may be assimilated into consensus comments to the Board or into consensus-based revisions the Board has undertaken on its own since the Draft Plan was first released. Therefore, the Department does not itself offer any comments on the objectives in the plan but supports those modifications or adjustments as have been agreed to by the consensus group.

The Department similarly supports the comments of Pat Coulston of the Department of Fish and Game as representative of the Interagency Ecological Program with respect to the monitoring aspects of the Principles For Agreement.

The Department also supports the views expressed in the comments of the "Joint Users Group" on the institutional and legal framework of the Board's planning process, specifically those pertaining to the inappropriateness of the Board's reliance upon water quality authorities exclusively to support a planning effort which includes non-water quality parameters such as flow and diversion. These are views which the Department has presented to the Board (and to Board staff) on numerous occasions, most recently in our comments at the Board's September 1, 1994, Workshop. We are not going to repeat them here, but we hope that their support and re-articulation by the larger universe represented by the Joint Users Group will be persuasive to the Board.<sup>2/</sup>

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2. Related to this subject matter, however, we do offer two instances in the narrative of the Draft Plan where we feel the Board's phrasing is unfortunate with respect to federal-State jurisdictional issues and needs to be changed. We bring these up now because we feel they can contribute to significant and harmful misunderstanding:

a. The first is the use of the phrase "designation of beneficial uses." (See, e.g., Draft Plan p. 6, paras. 2 and 3; p. 10, para. 2.) It is true that Porter-Cologne speaks of the "designation or establishment" of beneficial uses. We have previously recommended, however, that it would be judicious for the Board to use only the word "establishment" in order to avoid confusion with the terminology of the federal Clean Water Act, which carries a greatly different meaning. The Clean Water Act uses the term "designated uses". But designated uses are significantly different from beneficial uses. Water quality standards under the Clean Water Act are composed of designated uses and water quality criteria. Balancing under the Clean Water Act occurs at the designation of use stage of standard-setting, not in the adoption of criteria. Under Porter-Cologne, the establishment of beneficial uses does not entail any balancing. Rather, it is at the point where water quality objectives for those beneficial uses are adopted that balancing occurs. The confusion of State beneficial uses with federal designated uses is a point on which EPA's proposed standards were criticized

The Department will be submitting comments on the Program of Implementation portion of the planning document and on the Draft Environmental Report by March 10. In general, we concur with the approach taken in the Program of Implementation section of the Draft Plan, and we think that it comports with the Court of Appeal's 1986 interpretation of the Porter-Cologne Act's broad indication of responsibility for implementing water quality objectives. We think, in this regard, that the statement at the end of the third paragraph on page 1 must be an erratum ("Full implementation of this plan by the SWRCB will occur through the adoption of a water rights decision." (emphasis added)). The Program of Implementation properly identifies implementation through waste discharge permits (p. 24) and through recommended actions by other agencies (p. 26), in addition to water rights actions. Undoubtedly, much of the implementation will occur

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because it allowed unbalanced State-established beneficial uses to be combined with unbalanced federal water quality criteria, producing unbalanced water quality standards in conflict with the fundamental water policy of this State. It would seem to be best to use language that does not lend itself to this kind of confusion.

b. The second point is related to the first. Footnote 3 on page 7 declares that criteria (under the Clean Water Act) are "the equivalent of objectives under State law". They are not. The most important difference is that the adoption of objectives requires balancing, and the adoption of criteria does not. There is no felicitous correspondence of uses, criteria, and objectives under State and federal water quality laws. What one may properly say is that water quality objectives for beneficial uses under State law satisfy the requirements of water quality standards under federal law, which standards are comprised of designated uses and water quality criteria. Less complete articulations of this proposition will likely be incorrect and are almost always misleading.

through water rights actions, but not necessarily all of it, and Chapter IV expressly recognizes that.

One last area the Department would like to address regards the water quality objectives for the interior Suisun Marsh. Parties to the consensus effort had indicated that, of the many complex and important items addressed in the December 15 consensus, one area in need of some clarification was the objectives for the Suisun Marsh. This clarification was arrived at, in part, through the offices of the Cal-Fed Ops Group and concurred in by the four public agency signatories to the Suisun Marsh Preservation Agreement and is appended to these comments. It provides, in essence, that the objectives for stations S-97 and S-35 would not become effective until October 1, 1997.<sup>3/</sup> As expressly noted, this is intended to provide sufficient time to allow a Suisun Marsh Ecological Work Group to convene and discuss water quality objectives for these latter two stations. The Work Group, which is discussed on page 38 of the Draft Plan, should also include EPA and NMFS.

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3. It also provides that the non-deficiency objective for these four stations for November would be 16.5 EC.

COMPLIANCE LOCATION	INTERAGENCY STATION NUMBER	PARAMETER DESCRIPTION	WATER YEAR TYPE	TIME PERIOD	VALUE
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**WESTERN SUISUN MARSH SALINITY**

Chadbourne Slough at Chadbourne Road  -and-  Suisun Slough, 300 feet south of Volanti Slough	S-21 (SLCBN1)	Electrical Conductivity (EC)	Maximum monthly average of both daily high tide EC values (mmhos/cm), or demonstrate that equivalent or better protection will be provided at the location	All but deficiency period- To become effective Oct. 1, 1995  Deficiency period (6)	Oct	19.0
	S-42 (5) (SLSUS12)				Nov	16.5
Cordelia Slough at Ibis Club  -and-  Goodyear Slough at Morrow Island Club		S-97 (SLCRD06)			All but deficiency period- To become effective Oct. 1, 1997 (X)  Deficiency period (6)	Dec
	S-35 (SLGYR03)	Jan				12.5
					Feb-Mar	8.0
				Apr-May	11.0	
					Oct	19.0
					Nov	16.5
					Dec-Mar	15.6
					Apr	14.0
					May	12.5

[X] Implementation date will provide sufficient time to allow a Suisun Marsh Ecological Work Group to convene and discuss water quality objectives for these two stations.