

PART III. MISCELLANEOUS COMMENTS

Comment: It would be helpful if the environmental report included a brief summary of expected actions to ensure the implementation of plan requirements, including the triennial review process, water rights proceedings, and additional monitoring and data collection efforts. In that regard, members of the Joint Agencies already have identified a number of elements that should be considered as part of the triennial review process, including compliance with standards, habitat response to standards, Category III implementation, water supply impacts, and possible modification of standards. This group expects to provide the SWRCB with additional information on this subject prior to the close of the public comment period for the plan. (JCWU-1)

Response: The environmental report is an appendix to the plan. The summary of expected actions to implement the plan is provided in the program of implementation of the plan.

Additional information on this subject was not submitted by the commenter.

Comment: The environmental report would be more useful and accessible if it contained a list of organizations and persons consulted throughout the preparation process. (JCWU-1)

Response: SWRCB staff met to discuss the plan and the environmental report with any person or organization that requested a meeting. However, no record of the meetings was kept. The index of exhibits of the proceedings provides a list of all the documents considered by the SWRCB during the proceedings.

Comment: The Commission has previously testified and commented to the SWRCB on the need to consider protection for the entire San Francisco Bay Estuary ecosystem, including the important role of the South Bay, which includes 40 percent of the total Estuary. Unfortunately, there is no mention of the important role freshwater flow pulses play in improving water quality, increasing primary production and reducing toxicity of benthic organisms in the south Bay, nor in fact any mention of the south Bay, in the entire plan. The plan should explain the reasons for excluding the south Bay and should include a monitoring and research program aimed at developing recommended standards. (BCDC-1)

Response: Specific standards were not proposed for the south Bay for two principal reasons. First, the issue was not raised by any of the participants in the SWRCB's workshops leading to preparation of the draft plan. Second, the magnitude of Delta outflows necessary to affect significantly salinity in the south Delta cannot be reasonably provided by reservoir operation. These large flows can only be provided through uncontrolled runoff during large storm events, such as occurred this year.

The special studies element of the monitoring program will be developed through the IEP, in coordination with other monitoring programs such as the San Francisco Estuary Institute's Regional Monitoring Program.

Comment: The draft environmental report has a tendency to presuppose a broad-based allocation of responsibility for meeting Delta requirements. (SFPUC-1)

Response: The environmental report uses the SWP and the CVP as surrogates in order to determine the water supply impacts of the alternatives under consideration. In several places throughout the report the statement is made that no inference from this analysis should be made regarding distribution of water supply impacts to specific water users. This statement is not meant to imply that a broad-based allocation of responsibility is likely, but rather that this issue is not addressed at all in the plan. The allocation issue will be considered by the SWRCB in the water rights proceeding.

Comment: Current water users are relieved of any liability or pressure to give up more water if endangered species in the Delta continue to decline because of a lack of clean water. (PORGANS-1)

Response: This comment appears to be based on the Principles for Agreement which states that, if additional federal ESA listings are necessary, any additional water needs will be provided by the federal government on a willing seller basis financed by federal funds. This provision is not incorporated into the draft plan. The provisions of this plan will be reviewed periodically to ensure that the aquatic resource protections are reasonable.

Comment: There is no guarantee that the water quality standards contained in the plan will ever be enforced by either the State or federal government. (PORGANS-1)

Response: The standards will be incorporated into the water right permits of the responsible parties through the water rights proceedings following adoption of this plan. Violation of the terms and conditions of a water right permit will trigger a review by the SWRCB. After review of the circumstances surrounding a violation, the SWRCB can initiate an enforcement action. Federal enforcement activities are not under the control of the SWRCB.

Comment: The draft plan opens the door to another Peripheral Canal proposal, sure to reignite the north-south bitterness that earmarked the 1982 Peripheral Canal proposal. (PORGANS-1)

Response: The program of implementation of the plan includes a recommendation to evaluate alternative water conveyance and storage facilities of the SWP and the CVP in the Delta but makes no recommendation favoring construction of the Peripheral Canal. The current water diversion facilities in the Delta adversely affect aquatic resources. The SWRCB is obligated to ensure that methods of diversion are reasonable.

Comment: The plan is unlikely to end the continued pollution of the Delta from toxic drainage water from western valley factory farms. This bottleneck in any comprehensive Delta protection plan remains unsolved a decade after the Kesterson National Wildlife Refuge disaster. Indeed, after \$100 million in studies and cleanup, the growers that polluted Kesterson are still pushing for a master drain canal to dump the agricultural drainage into the Delta near Chipps Island. And on December 17, 1994, a federal judge in Fresno, at the request of the Westlands Water District, ordered the USBR to apply to the SWRCB for a permit to finish the agricultural drain to the Delta. (PORGANS-1)

Response: Implementation of the objectives and the recommendations to other agencies in the plan should adequately control pollution from San Joaquin Valley agricultural activities. The plan includes a recommendation that the USBR reevaluate alternatives for completing a drain to discharge salts outside of the San Joaquin Valley.

Comment: A water quality monitoring station should be established on the San Joaquin River above its confluence with the Stanislaus so that the flow and water quality implications of water from sources other than the Stanislaus River can be anticipated and understood before problems arise. (CDWA-1)

Response: There are water quality monitoring stations on the San Joaquin River above its confluence with the Stanislaus River. The nearest monitoring station on the San Joaquin River upstream of its confluence with the Stanislaus is at Maze Road.

Comment: An EC water quality standard the same as the Vernalis standard and an accompanying monitoring station should be added to the San Joaquin River downstream of its confluence with the Merced River. The sole measuring point at Vernalis encourages the USBR to meet the standard through New Melones flows (SJC-1).

Response: The standards in the draft plan are limited to locations within the legal boundaries of the Bay-Delta Estuary. The Vernalis monitoring station is located on the San Joaquin River at the southern boundary of the Delta. Water quality standards and compliance monitoring stations upstream on the San Joaquin River are principally the responsibility of the Central Valley RWQCB. The Central Valley RWQCB should adopt salinity standards on the San Joaquin River as necessary to protect beneficial uses. Coordination between the SWRCB and the Central Valley RWQCB will be needed to implement these objectives. It should also be noted that D-1422 requires the USBR to meet salinity standards at Vernalis through releases from New Melones.

Comment: The determination of Bay-Delta water quality standards should be integrated with the other major water actions being considered within northern California at this time, including the CVPIA, Trinity River restoration, San Joaquin River restoration, etc. All of these activities could have direct impacts on the timing and availability of water to meet Bay-Delta requirements. (WAPA-1)

Response: In 1994, the Governor's Water Policy Council and the Federal Ecosystem Directorate (FED) entered into a Memorandum of Agreement, referred to as the Framework Agreement. The purpose of the agreement is to establish a comprehensive program for coordination and communication between the council and the FED with respect to environmental protection and water supply dependability in the Bay-Delta Estuary and its watershed. The actions identified by the commenter are incorporated into this coordination process.

Comment: The SWRCB should make every effort to provide more water to support adequate fisheries in the San Joaquin River below Friant Dam. (BCDC-1)

Response: At this time, the SWRCB is not setting any instream flow requirements upstream of the legal boundaries of the Delta. Such flow requirements may be developed during the water right proceeding to implement the plan.

Comment: The fall-run chinook salmon will lose out as flows on tributaries are manipulated to meet water quality and export demand. Habitat conditions will improve in the Delta, but most people believe the net effect will be negative. (SARA-1)

Response: The SWRCB will consider the extent to which the issue of fluctuating flows on tributaries must be considered when it allocates responsibility to meet the Delta objectives during the water rights proceeding.

Comment: We hope that the SWRCB recognizes that it must retain its discretion to modify the new Bay-Delta water quality objectives, to adopt alternative objectives, and to adopt adequate mitigation measures, if any such action is necessary, to avoid or mitigate any adverse environmental impacts in upstream areas. CEQA requires detailed analyses of the potential impacts of SWRCB water right actions in upstream areas, and appropriate changes and mitigation measures in any SWRCB water right decision. (BART-1)

Response: The SWRCB recognizes that it must retain its discretion to modify the new Bay-Delta water quality objectives, to adopt alternative objectives, and to adopt adequate mitigation measures, if any such action is necessary, to avoid or mitigate any adverse environmental impacts in upstream areas.

Comment: The following comments address the process that resulted in the Principles for Agreement.

1. The draft plan was hammered out by the same interests and agencies that have been overdrafting Delta supplies for decades, and omitted a number of people that participated in the SWRCB's hearings. (PORGANS-1)
2. The Principles for Agreement and the subsequent plan were the result of negotiations between State, federal, environmental, and water contractor interests. There was no

representation in that process by the San Joaquin River system riparians or appropriators upstream of the Delta. In fact, a representative of the CUWA/Ag group confirmed that such lack of representation was necessary in order for an agreement to be reached. (SDWA-2)

3. The SWRCB chose to rubber stamp the December 15, 1994 Principles for Agreement rather than assume the role of an independent evaluator managing the public trust interests of the Bay-Delta Estuary. The SWRCB accepted the lowest common denominator; the lowest amount of export reductions acceptable to the DWR, the USBR, the banks, and other interests south of the Delta. (SARA-1)

Response: The SWRCB and its staff invited all participants in the workshops dealing with the triennial review of the 1991 Bay-Delta plan to propose alternative standards for consideration. Several parties availed themselves of this opportunity and DWRSIM operation studies were undertaken and the results distributed for all alternatives submitted to the SWRCB. The preferred alternative was selected because, among other reasons, it provided reasonable protection to aquatic resources in the SWRCB's judgement, and it was agreed to by a broad range of participants, including some urban, agricultural, and environmental organizations.

The SWRCB has always encouraged the parties to the Bay-Delta proceedings to confer on appropriate standards and reach consensus. The SWRCB does not, however, control this informal consensus process. The SWRCB's process of public workshops and hearings was open to all interested parties.

Comment: To equally balance Delta water flow, enhance south Delta flows and revive the San Joaquin River and salmon numbers, the SWRCB needs to take the following actions in the next five years. First, develop a federal and State agreement to reduce flood control at Don Pedro and New Melones by 200 TAF each. The project's capacity will allow fishery flows and additional irrigation water without compromising flood control features. Second, San Francisco should be required to release 50 TAF to restore salmon runs. And third, Friant should be required to release 200 TAF in all but drought years to improve south Delta water flow, dilute agricultural drainage and restore San Joaquin salmon. (NHLC-1)

Response: Comments regarding water allocation decisions will be considered during the water rights phase of the proceedings.

Comment: Neither the draft plan nor the other initiatives required as part of the comprehensive management package completely discharge the SWRCB's obligations under State and federal law to provide full protection of the beneficial uses of the Estuary's waters. Several laws are cited, including the Water Code, the federal Clean Water Act, Fish and Game Code section 5937, the public trust doctrine, and the Racanelli Decision. (BISF-1, SARA-1)

Response: The draft plan is adequate to discharge the SWRCB's legal obligations. The law does not require the SWRCB to provide "full" protection. The SWRCB is required, in setting objectives, to provide reasonable protection of the beneficial uses and to prevent nuisance. (Wat. Code §13241) As noted in the draft plan, no clearly defined threshold levels exist which can be used to set objectives for flows and project operations. Instead, a continuum of protection exists which depends largely on the amounts of inflow and exports occurring in the Delta. Therefore, the draft plan sets objectives which will meet the reasonable needs of the beneficial uses.

Meeting the Water Code requirement also satisfies the requirements of the federal Clean Water Act for water quality standards, since the objectives in the draft plan are based on a consideration of their use and value for the established beneficial uses. (33 U.S.C. §1313(c).)

The federal and State antidegradation policies require that existing instream water uses and the water quality necessary to protect the existing uses shall be maintained and protected. The SWRCB expects that compliance with the objectives will maintain and protect the existing beneficial uses, and that the other measures called for in the plan will enhance protection of the existing uses. Therefore, the plan complies with the antidegradation policies.

Under the public trust doctrine, protections of public trust uses are subject to the rule of reasonableness set forth in California Constitution Article X, section 2. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 443, 189 Cal.Rptr. 346, 362.) The plan includes reasonable protections for public trust uses which meet this requirement.

Fish and Game Code section 5937 requires that adequate water be released or bypassed below a dam to keep downstream fish in good condition. This section may be a consideration in the water right phase. Nothing in the plan is inconsistent with this section.

Comment: The water quality objectives should not force the SWRCB to deviate from the water right priority system and the area of origin statutes in the water rights proceeding. The water right decision that implements the plan should adhere to these laws. Additional environmental water demands that would preclude additional upstream water development should not be imposed on upstream water supplies and storage. In implementing the standards the SWRCB should follow the area of origin laws, require the Delta exporters to fully mitigate their adverse environmental effects, follow the water right priority system, not give municipal and domestic uses preference, and prepare an EIR. (DTAC-1, MCWRA-1, BART-1)

Response: Nothing in the plan is intended to drive the future water right proceeding toward a predetermined water allocation scheme. The SWRCB will consider how to allocate responsibilities for meeting the objectives among water right holders when it conducts the water rights phase of the Bay-Delta proceedings. In the water rights phase, the SWRCB will

consider all applicable laws and will prepare appropriate environmental documentation before considering an action.

Comment: Water users in Area 1 of Westlands Water District receive water from the USBR under contract. They assert certain rights to receive a quantity of water from the USBR. The comment describes these rights and asks that the SWRCB enforce their protection. The USBR has reduced their water allocation in recent years, and they find the USBR's explanations inadequate or lacking. One of the explanations is that the reductions are needed to comply with federal Clean Water Act standards. Section 101(g) of the Clean Water Act, at 33 U.S.C. §1251(g), states that it is the policy of Congress that nothing in the Clean Water Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. (WWD AREA1-2)

Response: The SWRCB will not require water users to comply with the new objectives in the plan until the SWRCB has held a water rights proceeding and has amended water rights. To the extent that the commenter urges the SWRCB to take enforcement action against the USBR under Water Code section 1825, the commenter may request such an action by filing a complaint with the Division of Water Rights. The United States Supreme Court, in PUD No. 1 of Jefferson County v. Washington Dep't of Ecology (1994) 114 S.Ct. 1900, narrowly interpreted section 101(g) to allow a state to regulate water users under the Clean Water Act to prevent their having an adverse effect on water quality. The Supreme Court pointed out that insufficient flows can cause water quality violations, and that reduced habitat caused by low flows may constitute pollution.

Comment: The SWRCB may need to reconsider the objectives during the water rights phase as part of an economic balancing and environmental analysis. (SFPUC-1)

Response: The SWRCB recognizes that some changes may be needed in the objectives after the water rights phase. The plan is subject to periodic review pursuant to Water Code section 13240 and may be revised upon review. Therefore, the SWRCB will have an opportunity to make needed changes.

Comment: The burden of mitigating project-created impacts on Delta public trust values cannot be transferred to other entities. To the extent that mitigation of project impacts requires additional water to flow into the Delta, it would be unfair and would violate the area of origin laws (Wat. Code sections 10500 et seq and 11460 et seq.) to require upstream non-project water right holders to provide such mitigation flows.

We are concerned that the SWRCB will not adequately consider our water requirements. The draft plan focuses on water quality and environmental uses in the Delta. There is almost no discussion of upstream uses. (SJTA-1, SJTA-2)

Response: The draft plan focuses on uses in the Bay-Delta Estuary because its purpose is to provide reasonable protection for those uses and because this is the area where the plan is

applicable. The SWRCB will consider the allocation of responsibility to provide water to meet the objectives during the water rights phase. The SWRCB recognizes the importance of complying with all applicable statutes when it allocates responsibility to meet the objectives in the plan.

Comment: The commenter asserts that the SWRCB's procedures for adopting the draft plan do not comport with the requirements of the Administrative Procedures Act, set forth at Government Code sections 11340 et seq. The commenter cites Government Code sections that apply to general rulemaking, and also cites SWRCB v. Office of Administrative Law (1993) 12 Cal.App. 4th 697 as authority for the comment. (WWD AREA1-1)

Response: As is noted in the Court of Appeal's decision which the commenter cited, the Legislature enacted Government Code sections 11352 through 11354 in 1992. The new sections did not affect the above litigation, which was pending at the time of the legislative enactment. (See Gov. Code §11354) Section 11353 exempts the adoption of a water quality control plan after June 1, 1992 from most of the rulemaking provisions of the Administrative Procedures Act, and it imposes special requirements. The procedures being used to adopt the draft plan fully comply with the requirements set forth in section 11353.

Comment: The plan should specify a charter under which the CALFED operations group, established under the Framework Agreement, will operate, including its authority and procedures. The plan should charter the operations group to include as voting members at least the signers of the Principles for Agreement and the commercial and sport fishermen. The charter should specify the voting members, the voting rules, the rules for convening and conduct of meetings, and the process for referring disputes to CALFED. The operations group should be constituted in conformance with the Federal Advisory Committee Act and California's Brown Open Meeting Act. The SWRCB and the federal agencies should seek the advice, respectively, of the California Attorney General and the Regional Solicitor regarding the formation of the operations group to conform to the Brown Act and the Federal Advisory Committee Act. The charter should provide that the operations group and CALFED are not empowered to constrain the State and federal agencies with respect to decisions on take under the ESA. (NHI-1, LWV-1, BISO-1)

Response: The organization of the operations group currently is the responsibility of the parties who executed the Principles for Agreement. The SWRCB will not implement the objectives in the plan until it has adopted an appropriate water right decision. Until then, the parties who executed the Principles for Agreement intend to implement the agreement through the operations group. Therefore, any organizational actions to ensure that the operations group is properly constituted should be carried out by the parties who executed the Principles for Agreement. The Bagley-Keene Open Meeting Act, not the Brown Act, will apply to the state agencies who are parties to the Principles for Agreement.

The water right decision after the water rights phase of the Bay-Delta proceedings will be the appropriate SWRCB determination to include specific provisions regarding an advisory body

to conduct real-time management of fishery protections in the Bay-Delta Estuary. The parties should be prepared to recommend a specific structure for the operations group or its successor when the SWRCB conducts a hearing in the water rights phase.

Comment: The plan should include default requirements for the \$180 million mitigation and enhancement fund that is described in the Principles for Agreement. Without adequate assurances regarding funding of Category III activities, the plan does not provide equivalent protections to the USEPA standards. The default requirements should establish a water user fee program and apportion responsibility between the State and federal agencies and the water users. The plan should provide for the payment of the assessments to a non-governmental, nonprofit entity. The funding should consist of new monies -- that is, funds not otherwise available for habitat improvements in the Estuary. The use of funds should be coordinated with the use of funds under the CVPIA. The plan should set forth criteria governing the types of non-monetary contributions that would qualify as fund contributions, and the proposals should be reviewed by the fish and wildlife protection agencies for approval. The plan should specify the types of activities that would qualify for funding, and these activities should include restoration and water purchases. (NHI-1, LWV-1)

Response: The plan is not the place to establish an enforceable requirement for the payment of fees. At a minimum, further proceedings would be necessary to accomplish this, since the draft plan contained no such proposal upon which the parties could comment.

Further, such a requirement would be better suited for consideration in the water rights proceeding which will implement the plan. Any interim implementation should be conducted by the parties to the Principles for Agreement. Interested parties should be prepared during the water right phase to provide detailed recommendations for establishing a fee program. The parties should recognize, however, that legislation may be necessary to facilitate a fee program if the SWRCB is involved in it.

Comment: A draft environmental report meeting NEPA and CEQA requirements should be released for public review and comment before a plan is selected. The alternatives should be discussed in the same detail. (SARA-1)

Response: The environmental report meets the requirements of CEQA, under Public Resources Code section 21080.5. As this is not a federal action, NEPA does not apply. CEQA does not require that the alternatives be discussed in the same detail as the preferred alternative.

Comment: The draft environmental report must meet the central requirements of CEQA. (SEWD-2)

Response: The draft environmental report meets the requirements of CEQA by meeting the requirements of Public Resources Code section 21080.5.

Comment: The project includes both adoption of the objectives and implementation of the plan, but the draft environmental report does not address the impacts of implementation. (SEWD-2)

Response: The draft environmental report is a programmatic document. It addresses some of the impacts of implementation, where the impacts are known or can be estimated using reasonable assumptions. CEQA does not require speculation as to the effects of actions, and provides for the use of a programmatic document when a project will be completed in stages. Later documents can be used to describe specific actions in appropriate detail. Since the project includes adoption of both the objectives and the program of implementation, further documentation will be prepared before the objectives are implemented.

Comment: The draft environmental report contains some extrapolation and estimation regarding likely future outcomes and leaves some unresolved issues regarding project implementation, some of which must be resolved by other agencies, but the project is sufficiently well-defined for an adequate analysis of potential impacts. The analysis and conclusions in the draft environmental report are well-reasoned and based upon the best available evidence. While some of the analysis is "speculative" in the sense that future events cannot be predicted with complete accuracy, it is not speculative in the sense of being premature or incomplete. This point should be clarified in the text where appropriate. (JCWU-1)

Response: The SWRCB agrees that the draft environmental report is well-reasoned, based upon the best available evidence, and adequate to comply with the requirements of CEQA. The meaning of the term "speculative" is clarified in the environmental report and in this response to comments.

Comment: The SWRCB cannot adopt the draft plan until the proper CEQA review is completed. (SEWD-2)

Response: As discussed in the plan, the proper CEQA review for adopting the plan has been completed. Additional CEQA review as appropriate will be conducted before water right holders are required to meet the objectives in the plan unless the effects on such water right holders has been adequately analyzed in the environmental report.

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