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# California Farm Bureau Federation

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**COMMENTS OF CALIFORNIA FARM BUREAU FEDERATION**

**TO U.S. ENVIRONMENTAL PROTECTION AGENCY**

**AND**

**U.S. FISH AND WILDLIFE SERVICE**

**ON THE PROPOSED**

**WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE SACRAMENTO RIVER, SAN JOAQUIN RIVER, AND SAN FRANCISCO BAY/DELTA OF THE STATE OF CALIFORNIA;**

**PROPOSED CRITICAL HABITAT DETERMINATION FOR THE DELTA SMELT;  
PROPOSED DETERMINATION OF THREATENED STATUS FOR THE  
SACRAMENTO SPLITTAIL;**

**AND**

**DRAFT REGULATORY IMPACT ASSESSMENT OF THE PROPOSED WATER QUALITY STANDARDS FOR THE SAN FRANCISCO BAY/DELTA AND CRITICAL HABITAT REQUIREMENTS FOR THE DELTA SMELT**

**MARCH 11, 1994**

## SUMMARY

The California Farm Bureau Federation is very concerned about EPA's proposed water quality standards and the FWS' designation of critical habitat for the delta smelt. We are also concerned that additional listings, such as the Sacramento splittail, will only make matters worse.

California's farmers and ranchers depend upon the waters of the Bay/Delta for their livelihood and to provide our state with the productive open space lands and attendant habitat. These waters, which are entirely within California, are now being taken by four federal agencies without any regard for the economic, social, and environmental hardship that California and its citizens will encounter. This simply cannot be tolerated. Farm Bureau urges FED to reevaluate and modify its proposals to adhere to the following set of principles which we believe are essential to any delta solution. These principles can be succinctly stated as follows:

1. California should govern its own waters;
2. We cannot turn back the clock;
3. Throwing water at the problem is not a solution; comprehensive water management is a solution;
4. Water transfers must be part of any solution;
5. Each FED agency must only proceed under its specific authority;
6. The Colorado River cannot be ignored in this process; and
7. FED must prepare an adequate economic analysis.

In EPA's draft water quality standards for the Bay/Delta and FWS' designation of critical habitat, the federal agencies apparently believe that they have the unfettered discretion to make water decisions in California, despite well-established laws and rights to the contrary. By taking these waters from farmers, ranchers and others, the federal agencies exceed their regulatory jurisdiction. EPA does not have the authority to reallocate water in the manner it has proposed; for example, EPA:

1. Has failed to consider agricultural uses of Bay/Delta waters as required by law;
2. Has proposed water quality standards that substantially exceed the level of protection required for fish and wildlife, and considering the potential impacts of its decision, this cannot be tolerated;
3. Has used a flawed hydrological reference; and
4. Has exceeded its authority in setting salinity standards, a striped-bass standard and salmon smolt survival indices.

Additionally, the FWS has not complied with the law in designating critical habitat for the smelt. The FWS:

1. Must comply with NEPA by preparing an EIS;
2. Must cooperate with the State of California, and particularly the SWRCB, to carry out the Endangered Species Act;
3. Cannot incorporate EPA's water quality standards into its designation.

The FED must now reconsider its draft proposals. The FED must consider the principles stated above to fashion new delta protections that will benefit aquatic species while maintaining the beneficial uses of water for agricultural and other purposes.

## **I. INTRODUCTION**

Farmers and ranchers throughout California depend upon the waters of the Sacramento and San Joaquin Delta/San Francisco Bay ("Bay/Delta") to maintain their livelihood and to provide the food, fiber, nursery products, open space, wildlife habitat and tax base we all depend upon. These waters are now being taken away from the farmers and ranchers by four federal agencies, collectively known as the Federal Ecosystem Directorate ("FED"), without any regard for the economic, social and environmental hardship which California will encounter as a result of FED's disruptive presence. In addition to not making sense, these actions exceed the jurisdiction of the federal agencies and to that extent do not comply with existing law.

On November 23, 1993, we wrote the President expressing our concerns regarding the increased federal intervention. In the letter, we essentially asked the President to do three things: first, to let California govern its own waters; second to help the state engage in comprehensive water management as a solution to the delta rather than simply throwing water at the problem in the short term; and finally, to direct the federal agencies to seriously participate in discussions with the Governor's Water Policy Council and the Bay/Delta Oversight Council to mutually work towards both a short and long-term delta solution. We are now asking the U.S. Environmental Protection Agency ("EPA") and the U.S. Fish and Wildlife Service ("FWS") to carry out these policies.

Farm Bureau appreciates the opportunity to comment today on behalf of its more than 75,000 member families throughout the state. Farm Bureau is the largest agricultural organization in California, representing more than 42,000 farm and ranch families--more than 80% of the state's commercial agricultural producers. Farm Bureau also represents more than 30,000 people who, although not directly involved in commercial agriculture, live and work in rural communities and are therefore very concerned about the continuing economic health of the agricultural industry as the backbone of their communities and way of life. In this representative capacity, Farm Bureau will describe the current problems created for California agriculture by the increased federal intervention in the Bay/Delta, followed by our comments. The first comments are addressed generally to the FED followed by more specific comments to EPA and the FWS.

## **II. THE PROBLEM**

Agriculture will bear the burden of meeting the FED's proposals, including EPA's water quality standards and the designation of critical habitat for the delta smelt by FWS. Urban areas will appear to be affected by these proposals, but, as we all recognize, they will be able to secure water supplies with their financial resources and the tendency of human nature to meet urban water demands. Agriculture will therefore not only bear the burden of meeting the impacts specifically attributed to it, but it will also continue to be forced to meet the increasing urban demands that will result from FED's proposals.

Our greatest concern with the FED proposals is that family farm operations in California will be seriously harmed. The FED must recognize that its proposals will place burdensome requirements on family and small rural farmers who, as a matter of general practice depend upon traditional, efficient and cost effective farm management practices, such as participation in co-operatives and sharing of equipment. These farmers also depend in large part on the water purveyors that were

established by their ancestors to deliver affordable water to the farm. This type of community is vital to agricultural success and remains one of the virtues of rural California life. Any attempt by FED to destroy the social fabric of rural life through water reallocation will lead to unfortunate results and may not even address the perceived problem the FED is facing.

Agricultural users of water are already facing severe cutbacks in their water usage and the FED proposals will further reduce water usage. On February 3, the California Department of Water Resources ("DWR") issued a water allocation schedule which calls for delivering 50% of each contractor's entitlement. On February 15, the Bureau of Reclamation ("BOR") indicated that it would deliver 75% of entitlements to the Sacramento River water right holders and the San Joaquin exchange contractors; 32% to the Friant Division Users; 35% to agricultural contractors and 0% for Stanislaus River users dependent upon New Melones Reservoir. These requirements are based upon satisfying the existing legal requirements in the Central Valley Project Improvement Act (CVPIA)<sup>1</sup> and the Endangered Species Act (ESA)<sup>2</sup>. These forecasts are particularly troublesome for two reasons. First, carryover storage in reservoirs from last year was significantly greater than many previous years, and because of both the wet year and FED's increasing regulation, will of course be higher than most future years. Second, the BOR has indicated that deliveries south of the delta will remain at these low levels on a regular basis.

These forecasts would be much more grim for agricultural users if EPA's proposed water quality standards or any new and additional requirements under the ESA were included. Water supply impacts resulting from either EPA's proposed standards or the critical habitat designation will range from 510,000 acre-feet to 1.5 million acre-feet on average, and from 1.6 million acre-feet to 3.0 million acre-feet during a drought. For agricultural purposes these averages do not accurately reflect the real impacts to agriculture which will occur in critically dry years. As these numbers suggest, they are averages which of course mean that for every wet year there is a corresponding dry year. These figures therefore could be much worse during any given year, which is all that matters to a farmer who needs water for his or her crops. A fundamental inequity is also built into these figures since in wet years the water users will not be able to completely recapture the amount curtailed during a dry year. This means that even the average impacts are skewed against water users and particularly those in agriculture.

DWR's most recent water budget, generally known as Bulletin 160-93, predicts a large and increasing water deficit in the State of California. Population is expected to be 36.5 million people in the year 2000 and 48.9 million by 2020. The projected deficit (or water shortfall) in the year 2020 is expected to be 1.3 million acre-feet to 3.3 million acre-feet during an average year and 3.2 million acre-feet to 5.2 million acre-feet in drought years. These figures reflect an optimism that increased water conservation, water recycling, conjunctive use and storage south of the delta will all be effective in reducing the water deficit. These figures also do not account for the FED proposals.

To put these impacts into an agricultural perspective, 1.0 million acre-feet of water will provide 84 million pounds of hamburger, which at McDonalds equates to 336 million quarter-

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<sup>1</sup> P.L. 102-575, Title 34.

<sup>2</sup> 16 U.S.C. §1531 et seq. The California Endangered Species Act is found at F&G Code §2050 et seq.

pounders. The same amount of water also would provide over 13 billion pounds of potatoes, nearly 3 billion pounds of white bread, nearly 3 billion gallons of milk, half a billion pounds of chicken, nearly 5 billion pounds of broccoli, over 3 billion pounds of green beans, and nearly a million pounds of rice.<sup>3</sup> The impacts of FED's proposals will therefore have a substantial impact on agriculture and cannot be taken lightly.

### III. COMMENTS TO FED

#### A. California Should Govern Its Own Waters

The increased federal intervention in the Bay/Delta has a fundamental flaw which is often overlooked: Four federal agencies now claim power to control and limit the productive uses of a river system which is entirely within the state of California. Federal regulators seem to feel that they are more capable or have some superior ability to tackle the difficult water issues in which California and its people have been actively involved since statehood. This arrogance is very perplexing to the citizens of California, and will only convolute and muddy California's waters more than they already are. The regulators hide behind claims that they have mandates under federal law to allocate California's waters. This also could not be further from the truth, as the discussion in section IV and V will indicate. We therefore ask the FED to take a step back and take a hard look at why it has chosen to meddle in California's waters.

Individual states have had the authority to adopt and carry out their own water policies since the early settlement of the West. This settlement was made possible by several acts of Congress in the late 19th and early 20th centuries, all of which recognized that waters were to be treated differently than the federal lands; thus the states had complete authority to govern the waters within their borders. This has been confirmed by the U.S. Supreme Court in two landmark decisions, California Oregon Power v. Beaver Portland Cement (295 U.S. 142 (1935)) and California v. U.S. (438 U.S. 635 (1978)), as well as other decisions. Congress has confirmed the state's authority on several occasions. For example, the Federal Water Pollution Control Act, under which EPA is setting its water quality standards, states:

"It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]. It is further the policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

(16 U.S.C. §1251(g)(hereinafter §101(g)). The so-called McCarran Amendment provides that state law governs the administration of water and therefore the federal government is subject to the adjudication and administration of water. (43 U.S.C. §666(a).) Congress in the CVPIA requires the

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<sup>3</sup> These figures have been extrapolated from both Schulback and Kreith.

BOR to modify its water right permits and licenses with the SWRCB before reallocating water, and this must be done "in a manner consistent with the provisions of... state law...." (CVPIA §3411(a).) Read together, a state's authority over its water resources remains a vestige of federalism and a cornerstone of the laws and policies governing our nation's natural resources.

Although there is undoubtedly a role for the federal government in resolving disputes between states, with respect to the Bay/Delta, it must concede to the state the ultimate control and administration of waters which are entirely within state jurisdiction. The SWRCB has indicated that in April it will begin its triennial review process under the CWA. We are optimistic that the SWRCB will be able to work with FED to formulate water quality standards that will address the legitimate concerns of the federal agencies. This cooperation is necessary considering that the SWRCB has the ultimate responsibility to implement any requirements for additional flows into the Bay/Delta.

#### **B. We Cannot Turn Back the Clock**

We must all recognize that we cannot turn back the clock to a simpler and less populous time. This is not possible nor does it make sense to even try this as a matter of policy. Farm Bureau recognizes that the state's water resources have been managed in a way that has led to avoidable harmful impacts on fish and wildlife resources. But fish and wildlife propensity is also commensurate with the droughts and floods that have always been an ingredient of the Central Valley, as well as many other factors. Contrary to FED's beliefs, the state is now engaged in a painful but necessary effort to restore and protect those fish and wildlife resources to the extent reasonable and conducive to the greater good of the state as a whole.

As a part of this process, California agriculture is committed to environmentally sound food and fiber production. The waters of the delta now provide irrigation water for 250 crops, including 45% of the nation's fruits and vegetables. Most of this production is on 8.5 million irrigated acres of farmland.

To understand California agriculture and its water needs, it is instructive to look at the origins of agriculture and its relationship to population. For the first 99% of human existence, men and women lived as hunters and gatherers. As the number of mouths to feed increased, the hunter-gatherers expanded their geographic areas to meet the increasing demand. As territorial expansion reached its limits, the growing population had to artificially increase the density of desired food, thus beginning the practice we know today as agriculture.

In the early years, agriculture took place mostly along streams, rivers and lakes. As the population increased and the demand for food became greater, agriculture necessarily expanded to lands away from the water sources. In the arid and semi-arid lands of California this was made possible by the prior appropriation doctrine of state water law, which allowed beneficial uses of water for agriculture on lands removed from the water source. This began with small mutual water companies and water districts and eventually required projects with the magnitude and capital of the Central Valley Project and State Water Project.

From its riparian roots to today, agriculture has been dynamic and has continued to adapt to population growth and the current environment. For example, agriculture is committed to water conservation and transfers, and can stand on a solid record of success. Agriculture has not increased

its share of California's waters in 20 years, but it has increased agricultural production during this period by 50%. This is real conservation.

The increased water demand in California is primarily for domestic and other urban uses due to the tremendous increase in California's population. This population growth will continue to force people to readapt to their environment, and the Bay/Delta is no exception. We all must bear in mind that in the near future, the expanding urban population of the state and the nation will require further substantial increases in food and fiber production, and we must plan accordingly. Despite the FED's desire to "fully offset the impacts of water development," we cannot restore our natural resources to untenable levels which existed during times of significantly fewer people. (F.R. at 819, f.n. 8.) The California Supreme Court explicitly recognized this in its decision that serves as the high-water mark for aquatic preservation:

The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. California Constitution, its statutes, decisions, and commentators all emphasize the need to make efficient use of California's limited water resources: all recognized, at least implicitly, that efficient use requires diverting water from in-stream uses. Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm [in-stream uses], and can be justified only upon theories of reliance or estoppel.

(National Audubon Society v. Superior Court (1983) 33 Cal.3d 419,446.) The FED cannot continue to proceed against the grain of history by seeking to prohibit water diversions for agricultural and urban use.

California currently provides homes, jobs and food for the more than 31 million people residing in the state. It is blessed with a diverse economy and with a particularly strong agricultural sector which provides an inherent buffer against the worst impacts of cyclical national economic infrastructure downturns. Each of the state's interest sectors is dependent upon a future water supply, but agriculture is particularly vulnerable to insecurity in the quantity, quality, availability and reliability of its water. DWR's water budget has predicted that agriculture in California will have 2 million acre-feet less water than presently allocated, despite a population increase of 8 million people by the year 2020. We therefore urge FED to be mindful of the needs of agriculture, and of the singular benefits a healthy agricultural sector provides not only to the economy of this state, but also to its environment through the open space and habitat farming provides mostly without compensation.

We must also recognize that certain mistakes have been made, and that rather than pointing fingers while nothing is accomplished, we should instead search for real and positive solutions. We cannot, for example, undo the serious problems in the delta and the rivers created by mine abandonment and hydraulic mining. We also cannot ignore the fact that 95% of delta species were introduced into the system, and that this has had a significant impact on many of the native species. The location of the delta pumps is another good example of a past mistake. The placement of the pumps in the southernmost part of the delta creates special problems for fisheries by essentially forcing the San Joaquin River to flow upstream. The real solution to this problem is to isolate the pumps from the flows in the delta system, thereby minimizing the pumping impacts on the delta habitat. These types of real solutions to existing problems need to be part of a comprehensive management process.

**C. Throwing Water at The Problem Is Not a Solution; Comprehensive Water Management Is a Solution.**

The federal solution to the Bay/Delta problems appears to be to throw more water at the problem; which means less water for people, much less water. It also means a loss in the productive environment which agriculture provides in open space and wildlife habitat, in exchange for tenuous environmental benefits in other parts of the state. Depending on the modeling assumptions used, the water supply losses will range from 1 million to 3 million acre-feet per year. To put this in perspective, current water deliveries from the delta to the State Water Project and the federal Central Valley Project are only 6 million acre-feet per year. As a practical matter, when supplies are curtailed the burden of these water losses will rest squarely on the shoulders of farmers. Throwing water at the problem is surely not the only, nor is it the best, solution to our state's resources problems.

Rather than simply throwing water at the problem, we all need to work toward comprehensive water management as the real solution to the delta problem. This must include the construction of carefully planned facilities. A facility is particularly needed to efficiently move water through the delta, which, as a concept, is not disputed by any credible biologist who understands this complex system. Other facilities will also be needed to transfer and store water throughout the state. Rather than simply setting water quality standards and designating critical habitat to require more freshwater inflow into the delta, FED should instead work with the Army Corps of Engineers and the state to assure the construction of sound facilities that will actually benefit the delta's aquatic species while preserving the other uses of delta waters.

Management tools will also include the continued use of acoustic and light barriers, as well as other new technologies, which have great potential to protect fish in the delta. There is also a need to address non-project impacts on the delta, most notably the effect of exotic species on indigenous species. As a means to add water to the delta for environmental purposes, voluntary water transfers are the preferred method as opposed to the mandatory reallocations which the agencies have proposed. Water transfers for instream uses are currently allowed under Water Code §1707.

It is particularly ironic, and perhaps hypocritical, that increased freshwater flows have a strong base of support in the Bay Area, a metropolitan area that receives water from diversions upstream of the delta. This water would otherwise contribute to the fresh water inflow into the delta. As a simple proposition, water purveyors who are physically capable of diverting their water from the delta should do so instead of diverting from its tributaries. This change in point of diversion would increase delta flows, particularly on the San Joaquin River, without affecting water rights.

Simply throwing water at the problem means a drastic loss of jobs in both urban and rural areas, but beyond jobs, the environment will also lose. Every day is "Earth Day" on the farm. Agriculture provides our state with productive open space lands and the attendant habitat for many species. It also provides a stable tax base and the heart and soul of our rural communities. These benefits are all in addition to the food and fiber on which California depends both for domestic consumption and foreign trade. The decision to take water from agriculture as the only solution to the in-stream resource problems does not make environmental or economic sense. We simply cannot afford to be hit with an artificial drought while recovering from a prolonged recession.

The financial repercussions of this federal intervention extend far beyond losses to the agricultural base of our state's economy. You must recognize that FED's actions are attempting to turn California's water rights system on its head. This in turn has produced confusion and uncertainty in the collateral value of land assets and in the general security of all business loans in rural communities. In a state which is very dependent upon the delta as the hub of its water supply system, it should be clear that all lenders, industries and markets will be affected.

**D. Water Transfers Must Be Part of Any Delta Solution**

Any comprehensive delta solution must include the ability to transfer water. The FED apparently does not understand that its proposals make any water transfer through the delta nearly impossible. The State Water Bank in 1990 and 1991 is a good model of how transfers can achieve the needed flexibility in our water system. What FED seems to ignore is that ESA pumping restrictions in the delta essentially preempted the Water Bank and continue to be the major problem with respect to any water transfers. Until a delta solution is in place so that pumping can occur, the FED should refrain from using water transfers as a pretext to minimize the expected impacts to water users, and should instead focus on assuring that such transfers can actually occur.

Most important to agriculture, geographically diverse transfers give the needed flexibility to California's water system and provide a mechanism which can work in conjunction with California's well established water laws and rights. The California Legislature has clearly stated our state's policy "to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import." (Water Code §109.) The Central Valley Project Improvement Act also allows for water transfers of Central Valley Project water out of its service area. (CVPIA §3405(a).) As previously mentioned, DWR's Water Bank in 1990 and 1991 produced excellent examples of how transfers can add flexibility to our water system and also provide water for instream needs in the delta. There is also a provision in the state law which allows for voluntary transfers to instream uses. (Water Code §1707.). Any FED proposal must include the ability to transfer water.

**E. Each FED Agency Must Only Proceed Under Its Specific Authority.**

The formation of the Federal Ecosystem Directorate (FED) is a positive and necessary step to coordinate the efforts of the numerous federal agencies. We support the FED concept to achieve this coordination and we expect that the FED will assure that any prescribed amount of instream water will be used to satisfy numerous overlapping requirements for the delta. It is important to remember, however, that FED has no legal authority of its own to make decisions affecting the Bay/Delta. The individual agencies that make up FED do have specific authority and the agencies must act in accordance with their enabling legislation. In other words, although EPA and FWS may have somewhat similar goals in the delta, EPA can only proceed under the Federal Water Pollution Control Act and its amendments, and FWS can only act in accordance with the Endangered Species Act. Blending imperatives in the delta is dangerous, particularly considering the potential impacts of either critical habit designation or water quality standards. Each agency must trace back to the source of its authority, which will be discussed in sections IV and V.

#### **F. The Colorado River Cannot Be Ignored in This Process**

California is a hydrocommon, which means that most of the state is linked together by its demands for water. California benefits when Southern California users obtain a maximum supply of water from the south, and most particularly the Colorado River. It is therefore very important that California's Colorado River contractors secure a full allocation for the agricultural contracts in unison with a full Colorado River Aqueduct. The Colorado River is projected to have an annual water shortage of 1.22 million acre-feet by the year 2010; but by meeting its needs from the south to the extent possible, Metropolitan Water District will rely less upon the more expensive Central Valley water, which lessens the pressure on Central Valley water users and will likely make water more affordable to Southern California users. The agencies that make up FED all have significant roles in the Colorado River system which cannot be ignored in this process, since any water supply impacts in one system will directly affect the other systems.

#### **G. Economic Analysis**

The EPA and FWS have issued their "Draft Regulatory Impact Assessment of the Proposed Water Quality Standards for the Bay/Delta and Critical Habitat Requirements for the Delta Smelt." EPA and FWS will receive significant comments on the RIA from many water users and purveyors throughout the state. Farm Bureau will therefore defer to, and incorporate by reference, these economic analyses, which when taken in their entirety, will unquestionably paint a picture of the State of California which is much worse than that contained in the RIA. It is obvious that if FED adopts its proposed decisions, then people throughout the state will be seriously affected. These people deserve a realistic assessment of the impacts of the proposed decisions. We are particularly concerned that FED did not analyze the impacts based upon the specific water quality standards which it has proposed, but rather in a more generic fashion. We therefore urge FED to seriously consider the economic analyses submitted by the water users in this state.

### **IV. SPECIFIC COMMENTS TO THE ENVIRONMENTAL PROTECTION AGENCY**

#### **A. The Agricultural Uses of Bay/Delta Waters Must be Considered by EPA in Setting Water Quality Standards.**

The Federal Water Pollution Control Act (FWPCA) and subsequent amendments<sup>4</sup> require that EPA's water quality standards must "protect the public health or welfare" and "shall be established taking into consideration their use and value for... agricultural... and other purposes...." (33 U.S.C. §1313(c)(2)(A).) EPA has failed to recognize agricultural and other uses and has instead focused entirely on the alleged need to protect designated instream uses of water. Evidence of this is seen in the Federal Register, where EPA has conveniently deleted the parts of the FWPCA language which refer to uses other than fish and wildlife. (F.R. 812.) To protect the designated instream uses, EPA

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<sup>4</sup> The Federal Water Pollution Control Act was enacted on June 30, 1948 and amended on October 18, 1972. Section 303 of this Act, now codified at 33 U.S.C. §1313, was part of this Act. Further amendments were made in 1977, generally known as the Clean Water Act. Since our focus is on §303, we collectively refer to the entire package as the Federal Water Pollution Control Act.

has proposed standards that far exceed those required under the FWPCA. The act, however, requires a more balanced approach to the water quality standards. Considering the important long-standing agricultural uses of the Bay/Delta, and the serious economic, social and environmental impacts of its proposal on these uses, EPA can only set standards that are specifically required under the FWPCA.

**B. EPA's Proposed Standards Substantially Exceed the Level of Protection Required by the FWPCA for Fish and Wildlife.**

The FWPCA and its regulations only require water quality standards to include beneficial use designations and water quality criteria sufficient to protect use designations. (33 U.S.C. §1313(c); 40 C.F.R. 131.6) The standards must also be consistent with the state's anti-degradation regulations, which require that existing uses--those that existed on or after November 28, 1975--be maintained and protected.<sup>5</sup> (40 C.F.R. §§131.3, 131.12.) The minimum level of protection thus required under the FWPCA is to protect uses that existed on or after 1975.

EPA's proposed standards, however, far exceed those required to protect uses that existed in 1975. EPA has evidently decided that it is a desirable to re-create hydrologic conditions in the Bay/Delta as they were in the late 1960's and 1970's. (F.R. 819.) The apparent basis for this time period is that it proceeded the full operation of the State Water Project. (*Id.*) Yet EPA cites no authority for it to ignore the anti-degradation provisions and arbitrarily choose this time period as the model ecosystem. This is an abuse of discretion that cannot be tolerated.

By November 28, 1975, the date specified in the FWPCA, a large percentage of water projects in California were using delta waters. A conscious decision had been made by our society to take water out of the delta system for important agricultural, domestic and industrial uses. As our earlier comments indicated, it does not make sense to try to go back in time, and, quite simply, the law does not even allow for EPA to do this. This is particularly important considering the substantial impacts that the proposed standards will have on beneficial uses of water and on the ensuing economy of the state of California. Instead of setting its proposed standards, EPA should defer to the SWRCB in its triennial review process and assure that the anti-degradation provisions are satisfied.

Additionally, the state policy on anti-degradation allows some degradation to occur if consistent with the maximum benefit to the people of the state. (Water Code §§ 13140 through 13147; SWRCB Resolution 68-16.) We submit to EPA that after taking a hard look at the economic and other impacts of its proposed standards, it should recognize that a certain amount of degradation will and must occur to benefit the people of California.

**C. EPA's Hydrologic Reference is Flawed.**

EPA has suggested that 1940 through 1975 is the time period upon which it should base its hydrology:

Given that the hydrologic conditions were fairly consistent throughout the longer 1940-1975 period, EPA believes this longer historical reference period serves as a better long-term

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<sup>5</sup> 40 C.F.R. §131.3(e) provides that "existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."

indicator through all water year types of the habitat conditions existing in the recommended target years of the late 1960's to the early 1970's.

(F.R. 820) What EPA has failed to account for is that this 35 year period is sandwiched between two of this century's worst droughts, that in 1928 to 1933 and 1976 to 1977. How can this period serve as a meaningful historical reference period when there were no extended droughts such as the two periods mentioned, as well as the most recent drought in 1987-1992. Water planning without consideration of the droughts is meaningless, since the greatest competition for water will occur during the dry years. This flawed analysis may account for the FED's water supply impacts analysis which was significantly lower than DWR's analysis.

#### **D. EPA Has Exceeded Its Authority Under the FWPCA.**

In its January 6th, 1994, draft water quality standards for the Bay/Delta, EPA apparently believes that it has the unfettered discretion under the FWPCA to dictate water allocation decisions in California, despite firmly established laws and rights to the contrary. EPA does not have the legal authority to reallocate water in the manner described in its January 6th proposal.

##### **1. Salinity (2X) Standard**

As previously mentioned, EPA's proposed standards substantially exceed the level of protection for fish and wildlife required by the FWPCA. EPA apparently believes that salinity standards are necessary to carry out its responsibilities under the FWPCA. EPA has suggested that it is refraining from proposing direct revisions to the flow criteria, yet this assertion blindly ignores the simple fact that a salinity standard is a flow standard by any other name, and it fails to recognize that its standards are intimately involved with the allocation of water. (F.R. 813.) As a consequence, they fall out of EPA's regulatory reach. For EPA to promulgate its standards, it must ignore the legislative history of the FWPCA and its amendments, the specific language of that legislation, as well as judicial opinions directly on point. The EPA's authority to regulate in this area is limited by the provisions of the FWPCA and subsequent amendments. In adopting this act, Congress specifically dealt with downstream water changes, such as salt water intrusion, that are caused by dams, and left them subject to local control.

The FWPCA does not allow EPA to regulate these types of facilities. As originally proposed, the FWPCA contained stringent provisions relevant to salinity control. Deletion of these provisions occurred specifically in response to concerns expressed by the SWRCB that it was "losing control of its water resources program" and was intended by Congress to preclude water quality goals from interfering with state water allocation plans. (See National Wildlife Federation v. Gorsuch, 692 F.2d 156 (D.C.Cir.1982; 117 Cong.Rec 10,256 (1971); 1972 Leg. History 484-485.) Indeed, the Gorsuch case clearly states that the point source permitting system and corresponding authority associated with EPA's ability to regulate applies to dams only if five elements are present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source. (Id. 693 F.2d 156,165.) These requirements, according to the court, have the effect of excluding from the NPDES permit system--and, thus EPA's direct regulatory control--discharges from dams as well as the regulation of such facilities to control discharges to repel salinity intrusion and other similar water quality concerns. (Id.) The D.C. Circuit Court noted that this limitation was based upon Congress' belief that certain pollution control efforts were better left to the states to pursue, in accordance with the inherent power to regulate not only water quality, but also water rights.

"Congress did not want to interfere any more than necessary with state water management, of which dams are important components...In light of its intent to minimize federal control over state decisions on water quantity. Congress might also if confronted with that issue have decided to leave control of dams insofar as they affect water quality to the states. Such a policy would reduce federal-state friction and permit states to develop integrated water management plans that address both quality and quantity."

(Gorsuch at 178-179.) The foregoing discussion indicates an unambiguous congressional intent to leave certain water quality issues which involve water allocation--such as salinity intrusion--to the states. *A fortiori*, non water-quality issues which involve water allocation, such as EPA's proposal, are clearly outside of EPA's jurisdiction. Moreover, this limitation was specifically made part of the FWPCA. Section 101(g), 33 U.S.C. §1251(g) provides:

"It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state...."

The SWRCB triennial review process is therefore the proper forum for establishing salinity and flow standards; not EPA's standard setting process.

EPA in its proposal cites a memorandum of its General Counsel along with two cases, Riverside Irrigation District v. Andrews, 758 F.2d 508,513 (10th Cir. 1985) and U.S. v. Akers, 785 F.2d 814 (9th Cir. 1986), for the proposition that Section 101(g) has no meaning and apparently should be ignored when it serves EPA's agenda. (F.R. 813.) Despite EPA's desires to ignore this section, it is clear that Congress had a much different and careful idea of what §101(g) meant. The two cases cited by EPA involved FWPCA §404, which requires individual permits for dredging and filling our nation's waters. In these cases the courts focused upon the permitting process, stating that §101(g) "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose." (Riverside at 513.) The specific grant of jurisdiction in these cases is the Army Corps of Engineers' authority to grant the permits specified in §404.

With respect to the water quality standards that EPA has proposed, they go beyond the specific grant of authority contained in the FWPCA. EPA only has the authority to approve or disapprove the state's water quality standards. (33 U.S.C. §1313(c)(3); 40 C.F.R. 131.5(a)(5).) As previously mentioned, EPA has no permitting authority except for point source discharges. It also has no water allocation authority. If EPA disapproves the state standards (as it has), then it can only promulgate water quality standards to replace the proposed state standards. (33 U.S.C. §1313(c)(4).) In other words, EPA can only promulgate water quality standards, not reallocate water.

The court in Gorsuch confirmed this distinction stating that "with respect to a case where quantity and quality are in conflict--salt water intrusion caused by water diversion--Congress explicitly declined to require the states to control water quality." (Gorsuch at 179, f.n. 67.) As previously noted, this was intended to prevent water quality goals from interfering with state water allocation plans. California therefore regulates flow requirements in the delta as part of its water rights authority, not its water quality authority. (See U.S. v. SWRCB (1986) 182 Cal.App.3d 82,103.)

These water allocation decisions are governed by the public interest and balancing provisions in Water Code §§ 1243.5, 1253, 1256, 1257, and 1258. EPA's authority only mirrors the state's water quality authority, therefore it cannot regulate flows or its proposed delta salinity standards. (40 C.F.R. §131.22(c).)

## **2. Striped Bass Standard**

EPA has proposed an electrical conductivity criterion to protect striped bass on the lower San Joaquin River. (F.R. 826) This standard might best be described as draconian. As a fundamental matter, it is difficult to understand how an introduced species is a good indicator of the health of the estuary. The federal agencies seem at one time to say that this is an indicator species of the natural health of the delta, and at another time that we should be trying to restore the delta to its natural and pristine condition. The federal agencies cannot have it both ways. The striped bass is an introduced species and will have a very difficult time living, let alone rebounding in the delta. The reasons for this are complex, but in its most simple form, the delta food chain has evolved away from the striped bass. For example, the copepods favored by young striped bass are being replaced by Asian copepods that striped bass do not like. Additionally, the yellow fin goby feeds on striped bass and has undoubtedly contributed to their decline. It is particularly ironic that the striped bass is being protected despite the fact that it preys on the endangered salmon in the delta. By protecting the striped bass, the federal agencies are essentially aiding and abetting the criminal taking of an endangered fish.

## **3. Salmon Smolt Standard**

The third part of EPA's proposed standards is the salmon smolt survival indices for the Sacramento and San Joaquin Rivers. (F.R. 823.) Again, EPA is intending to restore habitat conditions to late 1960's and early 1970's conditions. As previously mentioned, trying to re-create these conditions does not make sense and is not in accordance with the law.

The smolt survival issue also points to one of the serious problems with EPA's proposal: the control of water temperature. Water is currently being stored in Shasta and other reservoirs throughout the year so that cold water releases can be made under the ESA for the salmon at appropriate times. Yet, EPA's proposal will require freshwater inflows to the delta throughout the year, which will drain the reservoirs, and the cold water, thereby losing the ability to meet the ESA requirements for the salmon. EPA's proposed standards conflict with the ESA.

Smolt survival also lends itself to many of the water management solutions which have already been discussed. These include fish screens, and acoustic and sound barriers to keep the smolts out of the delta. Before EPA requires more water for the smolts, it should take a hard look at the other options available that will not so severely impact California's water supplies and economy.

# **V. SPECIFIC COMMENTS TO FISH & WILDLIFE SERVICE**

## **A. FWS Must Comply With NEPA in Its Designation of Critical Habitat.**

In 1978, the ESA was amended to require the balancing of competing needs. The ESA now requires FWS to consider "the economic impact and any other relevant impact of specifying any

particular areas critical habitat." (16 U.S.C. §1533(b)(2).) These amendments altered the often cited proposition from TVA v. Hill (1978) 437 U.S. 153, that the ESA requires the protection of listed species "no matter what the cost."<sup>6</sup> Support for this balancing requirement is also seen in the Legislative History of the 1978 Amendments. (124 Cong.Rec. 38134; Also see 1982 Amendments, H.R. 567, reprinted in U.S. Cong.Code & Admin. News, 2807,2812.)

The FWS notes this balancing requirement in the Federal Register, but then suggests that "the direct economic and other impacts resulting from" its designation "may be incrementally small." (F.R. 857.) As discussed in section III G, the economic impacts of the critical habitat designation are grossly understated in the RIA. How the FWS arrived at the conclusion that the other impacts are minimal is unknown and is not evident from its proposal. Rather than making a mere conclusion, FWS must comply with the National Environmental Policy Act (NEPA) to assure that these other impacts are fully analyzed.

NEPA compliance was required for the designation of critical habitat with respect to the spotted owl. (Douglas County v. Lujan, 810 F.Supp. 1470.) The court suggested that the FWS, in determining "any other relevant impact" must prepare an Environmental Impact Statement (EIS) to analyze a wide range of impacts. The Douglas court's analysis is particularly instructive:

"I find that to impose the procedural steps required by NEPA in addition to those FWS must take under ESA would not either duplicate information FWS already has to develop and analyze or represent information that FWS may not legally consider in the designation process. Contrary to defendants' argument, there are no clear bright lines that limit the impacts the Secretary may consider in designating critical habitat. NEPA review is designed to require consideration of all the implications of the proposed agency action. Such a review is not incompatible with the purpose or requirements of ESA and there are no conflicting statutory mandates."

Moreover, NEPA regulations specify that "to the fullest extent possible, agencies shall prepare [an EIS] concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Endangered Species Act...." (40 C.F.R. 1502.25.) The language "to the fullest extent possible" is the same words chosen by Congress to describe the obligations of federal agencies to fully comply with the directions in NEPA §102. (See 42 U.S.C. §4223; 115 Cong.Rec. 39,703 (1969), quoted in Calvert Cliff's Coordinating Committee, Inc. v. United States Atomic Energy Commission 449 F.2d 1109,1114-15 (D.C.Cir.1971).)

This section in NEPA requires FWS to look at the environmental impacts of its decision. The FWS, although an agency with a mission to protect the environment, is not exempt from NEPA and the preparation of an EIS. Section 102(2) of NEPA requires FWS to prepare detailed findings on the environmental impact of the critical habitat designation, as well as any of the adverse environmental effects resulting from implementation. (Id.) The environmental impacts of FWS' designation will be significant to these areas where water is currently being used, but in which water will be curtailed in the future due to FED's regulations. The impacts would primarily be in agricultural areas, therefore resulting in land fallowing, increased particulate matter in the air, the loss of agriculturally created

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<sup>6</sup>Although TVA v. Hill was decided after these amendments, the decision did not consider the new amendments.

wetlands and habitat, and possibly most significant, increased groundwater pumping would deplete the groundwater basins and will lead to subsidence. FWS must also analyze the relationship between the benefit to the delta as a result of designation and the maintenance of long-term productivity in the State of California. It is our sense that such a comparison will reveal that the actual benefit to the delta will be very small, if at all, and the costs in productivity throughout the state will be very significant. FWS designation will also irreversibly and irretrievably commit resources, such as productive farmland, to other uses. This must be analyzed by FWS. In preparing the EIS, the FWS must also consider alternatives to the designation, which it has not done.

Finally, as FWS has correctly suggested, the FWS "may exclude any areas from critical habitat should it be determined that the benefits of such exclusion outweigh the benefits of specifying such an area as part of the critical habitat unless it is determined, based on the best scientific and commercial data available, that the failure to designate such an area as critical habitat will result in the extinction of the species concerned." (F.R. 857; 16 U.S.C. §1533(b)(2).) This provision clearly gives FWS flexibility to exclude certain areas of the delta short of making the species extinct. It is our belief that after fully understanding the impacts described in its EIS, the FWS will determine that exclusion of significant areas of critical habitat will be warranted.

#### **B. FWS Should Cooperate with the State of California to Carry Out the ESA.**

As previously mentioned, the decisions relating to water allocation of the Bay/Delta should remain solely with the State of California. Just as we have requested the EPA to work with the SWRCB in the water quality standards process, FWS should do the same in its designation of critical habitat. The critical habitat designation will, to the extent that the critical habitat is adversely affected by water uses, essentially reallocate the waters of the Bay/Delta. The designation of critical habitat is therefore intimately involved with the water allocation authority held by the State of California, and more particularly, the SWRCB.

The FWS should recognize that the SWRCB is authorized to protect instream uses of water in a manner similar to that proposed under the Endangered Species Act. For example, in the granting of permits and licenses, the SWRCB must consult with the California Department of Fish & Game ("DFG") to assure "the amounts of water, if any, required for the protection and enhancement of fish and wildlife resources." (Water Code §1243.) The SWRCB must also take into account, when in the public interest, the amount of water required for fish and wildlife purposes. (*Id.*; Also see Water Code §§1243.5, 1257 and 1258.) The SWRCB is also required to consult with DFG when water is transferred from one use or place to another. (Water Code §§386, 1243.) Importantly, the SWRCB can accomplish instream flow protections in the context of its state water rights authority.

Additionally, the FWS is encouraged under §6 of the Endangered Species Act to coordinate its efforts with the California DFG to carry out its mandates under the act. (16 U.S.C. §1535.) FWS should strongly consider entering into cooperative agreements with DFG as soon as possible to allow California to govern its own waters.

#### **C. Critical Habitat Must Not Refer to EPA's Water Quality Standards.**

The FED agencies cannot blend their authorities in the delta. A good example of this is the FWS' reference to EPA's water quality standards in its designation of critical habitat. (F.R. 853.) By doing this, FWS is essentially forcing the ESA upon the water quality process that is purely the

jurisdiction of EPA and the SWRCB. This is merely a subversion of California water rights authority that is arbitrary and capricious. FWS must delete this reference to avoid such subversion.

## VI. CONCLUSION

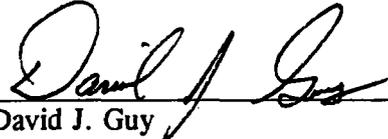
As the foregoing has stated, Farm Bureau urges both the EPA and FWS to recognize the impacts that its proposals, if adopted, would have on agriculture in California. We also urge EPA and FWS to strongly reconsider its proposals to reallocate water in California, and to instead work with the State of California to fashion delta protections that will actually benefit aquatic species while maintaining the beneficial uses of water for agricultural and other purposes.

Dated: March 10, 1994

Respectfully Submitted,

CALIFORNIA FARM BUREAU  
FEDERATION

By: \_\_\_\_\_

  
David J. Guy