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**COMMENTS OF ENVIRONMENTAL DEFENSE FUND
BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
FIFTH WORKSHOP TO REVIEW SAN FRANCISCO BAY/DELTA STANDARDS**

**Presented by
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Introduction

The Environmental Defense Fund (EDF) appeared this past April at the Board's first workshop to review the state's San Francisco Bay/Delta standards. Since that time we have followed these proceedings but have not actively participated in them because, frankly, we have been skeptical of the state's avowed intent to come up with meaningful protections for the Bay/Delta estuary. This skepticism has been fueled by the well-known failure of this Board to adopt standards after over seven years of proceedings, and the past withdrawal by the Board, on two occasions, of draft proposals for improved standards in the face of political pressure from water users.

In the intervening months, however, there has been movement toward agreement among at least some of the various parties with an interest in the Bay/Delta estuary on the need for better standards, on at least some elements of what those standards should include, and on implementation. For example, EDF and other environmental organizations have been engaged in discussions with urban agencies that I believe have led to some significant areas of such agreement. These developments give us some hope that broad-based support for improved standards and a plan for their implementation is possible. In our view, the state can play a key role in ensuring that improved Bay/Delta protections are achieved in the most efficient and equitable manner, especially in the area of standards implementation.

An especially important development is the recent recognition by the California Urban Water Agencies (CUWA) of the need for a Roe Island compliance point as part of an estuarine standard. While we still have disagreement with these agencies over some of the other specifics of their proposed estuarine standard, and there are other issues raised by the urban proposal that concern us, we generally view their most recent position as a positive step toward a comprehensive "package" of improved Bay/Delta protections.

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Implementation of Standards

There are two major elements to any such "package" of protections: the standards themselves and a plan for the implementation of the standards. The state has a unique role to play in the latter. While we believe it is ultimately desirable for the state to establish its own standards that will be approvable by the U.S. Environmental Protection Agency, we also strongly believe that the state's, and this Board's, immediate focus should be on implementation. This will include not only development of a plan for short-term implementation but also commitment to a schedule for the issuance of necessary water rights decisions.

We are generally supportive of CUWA's proposal for phased implementation, which, as we understand it, would be comprised of three steps: immediate implementation for the coming 1995 water year, an interim water rights decision to initially allocate implementation responsibility among water users, and a final allocation which refines this interim decision. However, we have two concerns about the CUWA proposal.

First, because the EPA standards will be final standards this coming December, and will become the operative standards for the Bay/Delta estuary until the state adopts final approvable standards (which under the most optimistic scenario will not occur until well past February 1995), it is the EPA standards that should be implemented in the immediate term. Second, while we would welcome a voluntary agreement by the State Water Project and Central Valley Project and their customer to comply with new standards this coming year, if such agreement is achievable, greater assurance that the standards will in fact be implemented is needed.

Immediate implementation of new standards is a critical element of the recently signed state-federal Framework Agreement, and in our view is an essential prerequisite to the longer-term planning process contemplated in that agreement. It cannot depend solely on whether the state and federal projects and the projects' contractors voluntarily agree to comply with new standards. It is therefore incumbent upon the state (and federal) government to ensure that standards will in fact be implemented as part of next year's state and federal water project operations.

Use of Economic Incentives and Market Mechanisms

A key element of any implementation program should be the use of economic incentives and market mechanisms to reduce the overall economic costs to other users of improved Bay/Delta protections. These include not only water transfers among consumptive water users, whose benefits are well-documented, but also the use of direct transfers to Bay/Delta environmental needs through water acquisitions. The federal CVPIA establishes such a Restoration Fund that makes monies available for such purposes. The state should move to create a similar fund, such as that originally proposed by the Board in Decision 1630. One way the Board could begin moving toward the creation of such a fund would be to incorporate a "restoration fund" scenario into its economic analysis of new Bay/Delta standards. Such a scenario would demonstrate that a program that makes monies available to target "least cost" water to meet Bay/Delta needs through voluntary water transfers would help

reduce or avoid the environmental costs to other users of making more water available to meet the estuary's needs.¹

State Standards

While we urge the Board to focus more attention on implementation of improved standards, we also believe that it is ultimately desirable for the Board to adopt state standards that can be approved by EPA consistent with the requirements of the Clean Water Act and applicable regulations. In doing so, however, there are several key points that Board should take into account in considering the various proposals by CUWA and others that are now before it.

First, any state standards, to be approvable, must comply with minimum federal requirements, as well as additional requirements under state law. These minimum requirements include the antidegradation provisions of state and federal law. There should be no dispute that under state law, the applicable reference date for these antidegradation provisions is 1968, the date incorporated into State Resolution 68-16. Moreover, antidegradation provisions require protection of uses that existed as of the applicable date. While this requisite protection may correspond to water quality conditions that prevailed at the time, this is not necessarily the case. In the case of the Bay/Delta estuary, there is considerable evidence that water quality was beginning to deteriorate in the late 1960s and early 1970s as a result of increasing freshwater diversions, and that "existing uses" in the estuary were therefore not adequately protected. For this reason, incorporating years after 1968 into the reference period for antidegradation purposes is not appropriate. This issue is discussed in more detail in the comments of EDF on EPA's proposed standards that have already been submitted to the Board.

Moreover, and perhaps even more importantly, antidegradation provisions represent the minimum requirements under federal and state water quality law and should not be used to establish longer-term goals for water quality and other habitat restoration. State policy, embodied in this Board's 1978 water quality control plan for the Bay/Delta estuary, was to require the state and federal water projects to fully mitigate their impacts (the so-called "no project" alternative) with the longer-term goal of attaining "recent historical levels" of fish and wildlife (defined as the average abundance of a fish or wildlife resource estimated to have existed during the 1922-1967 period).² Establishing only the minimum requirements of state and federal

¹Restoration fund monies could be targeted for acquisitions above a certain level of water reallocation from consumptive uses (similar to the use of Restoration Fund monies under the CVPIA to supplement the 800,000 acre-foot dedication to fishery purposes), and in this sense could be a limited type of "cap" on such reallocations. They would not be a true cap, however, because water users would still be required to meet Bay/Delta water needs to the extent water was not acquired.

²While the court in U.S. v. State Water Resources Control Board, 182 Cal.App.3d (1986) found that the court erred in limiting its water quality standards to those that would be enforceable only against the state and federal projects (Id., at 120), setting standards that consider the impacts of all diverters in the Bay/Delta watershed should require more protective, not less protective, water quality standards.

antidegradation provisions as the state's longer-term goal would be a significant retreat from this commitment.

In addition to meeting minimum federal and state antidegradation requirements, state water quality standards must protect the full range of Bay/Delta beneficial uses. Notably absent from any of the proposals currently under consideration by the Board (as contained in the August 18, 1994 memorandum from Thomas Howard to George Barnes) are adequate standards for the protection of Suisun Marsh. While other standards, including improved estuarine standards, could provide additional incidental protection for the important resources of the Marsh, the evidence before the Board establishes that existing standards do not adequately protect the managed portions of the Marsh, and there are currently no standards for protection of the Suisun Bay tidal brackish marshes.

Similarly, while the inclusion of the Roe Island compliance point in the estuarine standard is critical, it does not assure adequate protection of estuarine resources downstream of Suisun Bay in San Pablo Bay and the South Bay. Standards for these areas, as well as Suisun Marsh, have been proposed in comments to EPA by EDF, the Bay Institute of San Francisco, and other organizations, and I would refer you to those documents for the specifics.³

In addition to improved estuarine standards, a comprehensive "package" of improved Bay/Delta protections must include additional standards to protect salmon, delta smelt, striped bass, and other fish populations. While the CUWA proposal endorses the need for additional operational measures to serve this purpose, the proposal lacks any specifics on what these standards should entail. We hope to continue our ongoing dialogue with the urban agencies, and to engage with other interests, on what appropriate standards might be. However, the Board has an obligation to develop such protections independent of agreement among the parties.

We would also note our disagreement with CUWA on its proposed deletion of EPA's striped bass spawning standard. The rationale that this standard is not appropriate because striped bass eggs and larvae would only be entrained at the project pumps ignores the obvious solution to this concern: develop better operational measures to address the entrainment problem, as is in fact being proposed. Moreover, this standard will provide an additional basis for controlling drainage discharges to the San Joaquin River, which will have overall ecosystem benefits.

Coordinated Estuarine Program

We agree with CUWA that a comprehensive program for protection of the Bay/Delta estuary will require actions beyond the adoption of improved Bay/Delta standards. However, we view the adoption of these standards as the

³In addition, CUWA's proposal to utilize a "sliding scale" approach to determine the number of days required for X2 compliance at Collinsville fails to account for the overriding need to move fish populations to more favorable habitat downstream of Delta channels, which in turn requires the full 150 days of compliance proposed by EPA.

most critical immediate need for restoration of the estuary, and (as CUWA also recommends) do not believe that the existence of other problems in the estuary should serve as grounds for delay in adopting standards.

The CUWA proposal discusses a wide range of other factors that affect Bay/Delta resources, and while we have not had an opportunity to review their proposal in specifics, we would agree that the problems outlined deserved greater attention from the Board and other entities. We do have considerable concern, however, about the proposal for "mitigation credits" presented by CUWA. While we would agree with (and indeed encourage) the creation of a mitigation fund or other approach that facilitates the acquisition of water from lower-cost sources to meet Bay/Delta water needs, the granting of "credits" that can be offset against the meeting of flow or salinity requirements for other actions that might benefit the estuary is fraught with potential problems. Such an approach fails to recognize that improved Bay/Delta standards are needed in combination with other actions as part of a comprehensive estuary restoration program, and that other actions cannot be substituted for such standards. Moreover, existing regulatory mechanisms already allow for the periodic review of Bay/Delta standards through the triennial review process, and these standards can be adjusted if additional information and experience demonstrate that taking other protective actions justifies such adjustment. At the very least, considerably more information is needed on the various other factors affecting the estuary outlined by CUWA before it would be appropriate even to consider the mitigation credit approach they suggest.