



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

OFFICE OF THE  
REGIONAL ADMINISTRATOR

JUN 22 1998

John Caffrey  
Chairman  
State Water Resources Control Board  
901 P Street  
Sacramento, California 95814

Re: EPA Participation in State Board Process

Dear Mr. Caffrey:

The U.S. Environmental Protection Agency (EPA) has received a copy of a letter from Mr. Nomellini to the State Water Resources Control Board (State Board) dated May 4, 1998, in which Mr. Nomellini expresses some concern over EPA's participation in the State Board's workshop last month. In light of questions raised in Mr. Nomellini's letter, it may be useful to clarify for the record EPA's role in the State Board's hearing process and in the larger CALFED process.

EPA's Regulatory Role Under the Clean Water Act

As you know, one of EPA's major responsibilities in the Bay/Delta context is a regulatory role in reviewing and approving or disapproving water quality standards developed and adopted by the State Board for purposes of Section 303 of the Clean Water Act. Most recently in this capacity, EPA reviewed and approved California's 1995 Water Quality Control Plan.

Once EPA has approved a state's water quality standards, EPA's regulatory role under the Clean Water Act is limited to general oversight of the state's water quality standards program. If in implementing approved standards, the state's interpretation of those standards in effect alters the standards approved by EPA, EPA might need to review the standards again pursuant to Section 303 of the Clean Water Act. Further, if EPA has some information indicating that a particular approach to implementation had significant environmental advantages or disadvantages relative to the standards and compared to other approaches, it would appropriately submit that information for the state's consideration. Beyond these general concerns, EPA has no regulatory interest under the Clean Water Act in the particular content of the implementation plan.

In California's case, the State Board has chosen to use its water rights authorities to allocate

the burden of meeting many of the standards included in the 1995 Water Quality Control Plan.<sup>1</sup> The State Board's draft environmental document presents a number of alternatives that will lead to full attainment of the water quality standards. Consistent with its limited role in state implementation decisions, EPA has not become a party to these proceedings, nor has it provided any comments in the water rights process pursuant to its regulatory authority under the Clean Water Act.

### EPA's Role in Club FED and CALFED

EPA's responsibilities in the Bay/Delta context are not, however, limited to its formal regulatory role under Section 303 of the Clean Water Act. As a member of Club FED and CALFED pursuant to the letter and spirit of the 1994 Framework Agreement and Bay-Delta Accord, EPA has a responsibility to help overcome the past fragmentation of government activities by joining in a unified, coordinated federal approach to Bay-Delta and related California water issues. In some cases, this coordination process directly affects other statutes for which EPA has some responsibility. For example, the CALFED process is considering activities that may require efforts under the federal Safe Drinking Water Act or even under the so-called "Superfund" statute. In addition, the Club FED and CALFED efforts require all the involved federal agencies to consider the broadest possible range of alternatives as we attempt to move to consensus decisions on Bay/Delta issues. In these efforts, EPA is acting to meet the responsibilities it has undertaken as a member of Club FED and CALFED, not in its "regulatory" capacity.

Thus, during the past two years of workshops, EPA's participation in the State Board process for implementing the 1995 Water Quality Control Plan has been in its capacity as a member of the Club FED and CALFED efforts, rather than as a regulatory agency with formal oversight over the the State Board process. In this capacity, EPA believes that it has been and continues to be appropriate to join other Club FED agencies in providing policy recommendations to the State Board for its consideration. EPA also believes that Club FED's statements of such recommendations have been consistent with this letter's articulation of our distinct roles and responsibilities.

### Club FED's April 21, 1998 Workshop Statement

Of the Club FED agencies, only the U.S. Bureau of Reclamation and the U.S. Fish and Wildlife Service of the U.S. Department of the Interior are formal parties to the State Board's water rights hearings. Other members of Club FED, including EPA and the National Marine Fisheries Service, are not parties, but do have concerns as Club FED and CALFED members

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<sup>1</sup>EPA appreciates that there is a long-standing dispute between the State Board and EPA over exactly which water quality standards are subject to the federal Clean Water Act. In particular, the status of standards that can be met with revisions to water flow are at issue. It is to both agencies' credit that we have agreed to continue our cooperative efforts in the CALFED process in spite of this continuing disagreement.

about some of the issues raised in the State Board's workshop notice. These non-party Club FED agencies joined the Department of the Interior agencies in a single federal policy statement for the State Board's consideration at its April 21, 1998 workshop. This and other federal policy statements have been presented to the State Board by Patrick Wright, who represents the Club FED agencies through a joint appointment by the Department of the Interior and EPA. The April 21, 1998 statement endorsed a number of broad approaches to developing an implementation plan for the 1995 Water Quality Control Plan. These statements were offered by Club FED, not by EPA in any regulatory role.

In addition, the April 21, 1998 statement included a detailed discussion of the "San Joaquin River Agreement" or "VAMP." This discussion and the endorsement of this particular Agreement was explicitly provided by the two Club FED members from the Department of the Interior. EPA did not and does not intend to take any formal position on the San Joaquin River Agreement. In its final form, the San Joaquin River Agreement includes binding agreements with specific water rights holders assuming specific responsibilities under the umbrella of the State Board's water rights process. In these circumstances, EPA believes it is inappropriate to participate given the Clean Water Act's provision for deference to state water rights allocations. See generally Clean Water Act Section 101(g) and Jefferson County PUD v. Ecology Dept. of Washington, 511 U.S. 700 (1994)("[Section 101(g)] preserve[s] the authority of each State to allocate water quantity as between users.")

EPA emphasizes that its decision to not sign the VAMP should be viewed neutrally - that is, as neither an endorsement of or opposition to the provisions in the VAMP. In the Bay Delta context, EPA endorses the development of consensus agreements as holding the potential to be a more workable and durable approach to implementation. As noted above, so long as the complete implementation package provides for full implementation of the water quality standards, EPA believes that states should have substantial leeway in developing alternative approaches to implementation. In California, EPA has actively encouraged the development of negotiated agreements. For example, EPA's Dr. Bruce Herbold worked extensively with a group of stakeholder representatives to develop the biological underpinnings of the VAMP. However, Dr. Herbold's technical support, including his appearance before the State Board at the workshop or in these hearings, is in his capacity as an expert biologist. It is not as a representative authorized to provide EPA's endorsement of or opposition to the VAMP.

We appreciate that EPA's responsibilities for increased coordination and cooperation as a member of Club FED and CALFED hold the potential for confusion about its regulatory role. However, the creation of both Club FED and CALFED reflects the growing recognition, in California and nationwide, that we can achieve integrated, durable, equitable and effective solutions to our environmental and natural resource problems only if we transcend, in a responsible and appropriate manner, some of the territorial divides that may otherwise cause government agencies to act in a disjointed, inconsistent, and sometimes self-defeating manner. Along with all CALFED agencies, EPA realizes that this entails a particular responsibility to speak clearly regarding the capacity in which the Agency is acting in a given context, and I believe we have made a consistent effort to do so.

I hope this letter is helpful in providing greater clarity in this matter, and specifically in explaining EPA's participation in the State Board process. If further discussion is necessary, EPA believes that the CALFED Management Team or Policy Team forums will provide a good forum for these issues. We look forward to our continued efforts as we collectively address California's water future in the CALFED process.

Yours,

A handwritten signature in black ink, appearing to read "Felicia Marcus". The signature is fluid and cursive, with the first name being more prominent.

Felicia Marcus  
Regional Administrator

cc: Dante Nomellini, Esq.  
CALFED Policy Team

**NOMELLINI, GRILLI & MCDANIEL**

PROFESSIONAL LAW CORPORATIONS

DANTE JOHN NOMELLINI  
 DAVID L. GRILLI  
 DANIEL A. MCDANIEL  
 DANTE JOHN NOMELLINI, JR.

235 EAST WEBER AVENUE  
 POST OFFICE BOX 1461  
 STOCKTON, CALIFORNIA 95201-1461  
 TELEPHONE (209) 465-8883  
 FAX (209) 465-3956

DANTE JOHN NOMELLINI  
 PROFESSIONAL LAW CORPORATION  
 DAVID L. GRILLI  
 PROFESSIONAL LAW CORPORATION  
 DANIEL A. MCDANIEL  
 PROFESSIONAL LAW CORPORATION

May 4, 1998

*AWB*  
 RECEIVED

Via Fax (916) 657-1485  
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MAY 06 1998  
 Regional Solicitor  
 Pacific Southwest Region

State Water Resources Control Board  
 P. O. Box 100  
 Sacramento, California 95812-0100

Attention: Victoria Whitney

Re: Bay-Delta Water Rights Hearing

Dear Ladies and Gentlemen:

As a brief follow up to my workshop comments on behalf of the Central Delta Parties, please receive the following:

1) We do not object to phasing the hearing starting with the San Joaquin River Settlement Agreement and then proceeding with each of the other settlement agreements.

2) We do object to approval of any settlement agreements prior to the conclusion of the entire water rights proceeding. Until the entire burden to be allocated is defined and causation of the various items of harm determined, the fairness of any particular settlement cannot be evaluated.

3) We have serious concerns with regard to the adequacy of the EIR as per our March 31, 1998 comments and we now have the following additional concerns:

a) The Draft EIR does not encompass the impacts of all the various proposed settlement agreements, many of which have not yet been signed or even described.

b) If separate EIRs are to be prepared for each settlement agreement, then the cumulative impacts of the various settlement agreements must be addressed in the separate EIRs, or in some programmatic way.

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Attn: Victoria Whitney

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4) We believe that the U.S. Bureau of Reclamation petition to consolidate and conform its water right permits should be the subject of a separate hearing. The expansion of place of use in particular is an attempt to legalize an otherwise unauthorized and unlawful use of water. The differences in the magnitude of the legally authorized use of water and the proposed "after the fact" legalized use appear to be significant. The differences could substantially impact allocations in the Delta Water Right Proceedings. We are presently evaluating the initiation of proceedings to address such unlawful use of water.

5) There should be adequate time to review the draft EIR prior to the commencement of the hearings.

6) Settlement Agreements should not be the subject of hearings until they are signed by the parties thereto subject only to approval by the SWRCB.

7) As to the EBMUD-Mokelumne River Settlement Agreement, the SWRCB should issue its decision in the matter of the diversion and use of water from the Mokelumne River Hearing November 9, 1992, prior to embanking upon a hearing on the proposed settlement agreement. Approval by the FERC should also be a prerequisite.

#### Other Concerns and Requests

Please furnish us with a copy of the April 17, 1998, letter from Patrick Wright to Mr. Wheeler and Mr. Caffrey and any other communications regarding the Water Right Hearings subsequent to the initial deadline for notices of appearance except those which have been distributed to the parties at the public workshops and the comments on the EIR.

We are very concerned that Federal regulatory agencies are taking advocacy positions on behalf of the United States Bureau of Reclamation, one of the major exporters of water from the Delta, and a major water right holder subject to your authority. The role of the EPA is particularly disturbing since the SWRCB is subject to EPA oversight and possible regulation as to Water Quality Planning and now such agency is appearing before you on behalf of one of the regulated parties as to the implementation of the 1995 Water Quality Control Plan. It is hereby requested that you require that the EPA and other Federal regulatory agencies appear before you in the water right hearings separate

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and apart from the U.S. Bureau of Reclamation so that you and all of the interested parties can distinguish the regulatory concerns from the water right holder concerns.

Yours very truly,



DANTE JOHN NOMEILLINI

DJN:ju

cc: See attached list

**Joint Comments of Club FED<sup>1</sup> to the  
State Water Resources Control Board's  
Workshop on Issues Pertaining to the  
Bay-Delta Water Rights Hearing**

**April 21, 1998**

Good Morning. I am Patrick Wright, and I will be presenting the collective comments of many members of Club FED on the topics identified in the March 16, 1998 "Notice of Public Workshop." I am the Regional Manager for Club FED. Club FED was established to coordinate the federal effort for resolving the environmental and water supply problems associated with the Bay-Delta Estuary and the river systems of the Central Valley.

We have previously participated in and provided comments in the Board's workshops on these issues on August 29, 1995, January 30, February 20, March 12, June 11, and November 18, 1996. Our comments today are intended to supplement our earlier comments.

The Board has asked for comments today on two subjects: the status and nature of negotiated solutions to the water rights issues associated with implementing the 1995 Water Quality Control Plan, and the procedural issues associated with conducting the water rights hearing. In addition, we are providing additional broad comments highlighting our concerns about issues arising out of the Board's draft EIR.

Some of the individual agencies involved in the Club FED effort are formal parties to the upcoming water rights proceeding, and those agencies will be supplementing our general comments during the hearing process.

### **Negotiated Agreements**

We are supportive of the general approach of allowing interested parties to develop negotiated agreements for implementing the 1995 Water Quality Control Plan. We believe, however, that negotiated agreements must satisfy certain criteria before they are adopted by the State Board as part of the implementation program. We encourage the Board to consider the following criteria, which we have more fully described in a companion document attached to these comments. In short, we believe that effective agreements should:

- 1) Ensure compliance with the 1995 Bay-Delta Water Quality Control Plan, at least in concert with other Agreements.**

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<sup>1</sup> "Club FED" is the federal Water Policy Council and consists of 10 federal agencies, including U.S. Fish and Wildlife Service and U.S. Bureau of Reclamation in the Department of the Interior, U.S. Environmental Protection Agency, and the National Marine Fisheries Service in the Department of Commerce, which are presenting this statement.



- 2) **Restore equity to the Projects by reducing the scope of their current responsibility for contributing flows and diversifying contributions to the 1995 WQCP flow objectives from among several parties outside the Delta.**
- 3) **Enjoy the support of a sound legal and technical foundation.**
- 4) **Promote water contributions from an expanded number of tributary watersheds.**
- 5) **Provide comprehensive resolution of the contribution issue in an entire watershed of the Sacramento River, San Joaquin River, or one of the tributaries.**
- 6) **Contribute releases of new, "wet" water that was not flowing to the Delta before the 1994 Accord, not unused, "paper" water that gives no new benefit to the Delta.**
- 7) **Be fair and equitable to all concerned.**
- 8) **Apply consistently through the full range of standards and water year types.**
- 9) **Allow for changes in the State Board's water quality objectives.**
- 10) **Recognize that other processes are independent of the Board's consideration of implementation plans for the WQCP.**
- 11) **Consider the fishery impacts in the stream at issue.**

### **The San Joaquin River Agreement**

The Department of the Interior has been deeply involved in the development of the San Joaquin River Agreement over the past two years. This Agreement, which includes the Vernalis Adaptive Management Plan (VAMP), would address some of the most complicated implementation issues on the San Joaquin River and its tributaries. The two Interior agencies have signed the Statement of Support for the Agreement and, if the NEPA analysis supports implementation, then the Interior agencies will execute the Agreement and work toward full implementation. In our view, the San Joaquin River Agreement would allow immediate implementation of the San Joaquin River portion of the 1995 WQCP, on an interim basis. The San Joaquin River Agreement is intended to achieve three primary objectives:

- \* Implement protective measures for San Joaquin River fall-run chinook salmon within the framework of a carefully designed management and study program which is designed to achieve, in conjunction with other non-VAMP measures, a doubling of natural salmon

production by improving smolt survival through the Delta. However, the Parties recognize that future salmon production cannot be guaranteed.

\* Gather scientific information on the relative effects of flows in the lower San Joaquin River, CVP and SWP export pumping rates, and operation of a fish barrier at the head of Old River on the survival and passage of salmon smolts through the Delta.

\* Provide environmental benefits in the lower San Joaquin River and Delta at a level of protection equivalent to the San Joaquin River Portion of the 1995 WQCP for the duration of this Agreement.

I should note here that a key component of the Agreement is full participation by all parties and we hope they all will soon sign on to the Statement of Support. We encourage you to provide a full public process and consideration of the San Joaquin River Agreement and to adopt an order that allows implementation upon completion of NEPA analysis.

#### **Narrative Objective - Suisun Tidal Marsh**

We wish to express our mutual concern about the Board's reluctance to develop particular provisions implementing the narrative objective protecting the brackish and salt marshes of the Suisun Marsh area. These marshes constitute a valuable resource protecting many aquatic and terrestrial species, including many listed or proposed for listing under the state and federal endangered species acts.

In addition, we believe that the Board should move expeditiously to evaluate water quality, and then adopt specific actions to implement the narrative objective in the brackish and salt marshes, including development of scientifically-sound numeric standards. If a broad triennial review of the Bay-Delta standards is substantially delayed, we suggest that the Board consider a more focused review of the Suisun Marsh in the near future, to develop scientifically-based standards that protect and enhance all fish and wildlife resources.

#### **Narrative Objective - Salmon Protection**

We are concerned that the Board's evaluation of the narrative objective for salmon protection is incomplete and does not provide support for the Board's conclusion that measures implementing the existing narrative doubling objective are not necessary. The present analysis is inadequate in that it does not provide an integrated consideration of the combined effects of the 1995 Water Quality Control Plan, related provisions of the Bay Delta Accord that were not included in the 1995 Water Quality Control Plan (which are being implemented pursuant to biological opinions under the Endangered Species Act), and other measures in the watershed, including the Central Valley Project Improvement Act. Without this integrated evaluation, we think it is premature for the Board to

preclude analysis of additional measures implementing the narrative objective.

As with the Suisun Marsh narrative objective, we believe the Board should begin considering how it could develop more specific implementation plans or provide specific numeric criteria for the narrative salmon doubling objective. This analysis should begin in the near future so that this issue may be resolved in the next triennial review.

### **Environmental Impact Evaluation**

We are concerned that the Board's present analysis does not reflect the combined effects of several recent water management developments. In particular, it does not include an analysis of the effects of joint point operations that includes full implementation of the Bay Delta Accord and implementation of the CVPIA fish measures included in the Department of the Interior's November 20, 1997 announcement. By making this comment, we are not asking the Board to reconsider its baseline analysis for the formal "no action alternative." We are instead noting that the interested public needs this more integrated analysis of the current regulatory scenario. We need to discuss how the State Board intends to address this issue.

### **Hearing Process and Schedule**

Finally, we note that the federal agencies provided comment on the Board's proposed hearing schedule in a letter to Mr. Wheeler and Mr. Caffrey dated April 17, 1998. A copy of this letter is attached for your information. We should add here that our ultimate comment on the scheduling issue depends on the outcome of this workshop. The appropriate parties will need to meet and discuss how to proceed.

We thank you for this opportunity to participate in your workshop.

## EVALUATION CRITERIA FOR DELTA SETTLEMENT AGREEMENTS

Negotiated agreements provide the opportunity for all parties to identify what they believe is their share in satisfying the flow objectives for the San Francisco Bay/Sacramento-San Joaquin Delta (Delta). The Department of the Interior (Interior) has developed a set of general principles that it applies when it considers whether to support proposed agreements aimed at implementing the State Water Resources Control Board's (State Board) 1995 Water Quality Control Plan for the Bay-Delta (1995 WQCP). In order to receive Interior support, the proposed agreement, to the extent reasonably possible, should:

- 1) **Ensure compliance with the 1995 Bay-Delta Water Quality Control Plan, at least in concert with other Agreements.** The cornerstone of any workable agreement remains the State Board's 1995 WQCP. The aim of this process is implementing the 1995 WQCP. Any agreement therefore must foster full implementation of the 1995 WQCP and, when combined with other measures, help meet the 1995 WQCP's narrative salmon objective. An agreement seeking State Board approval certainly cannot weaken the protections provided by the 1995 WQCP.
- 2) **Restore equity to the Projects by reducing the scope of their current responsibility for contributing flows and diversifying contributions to the 1995 WQCP flow objectives from among several parties outside the Delta.** California's two major water projects have shared full responsibility for complying with the 1995 WQCP standards for more than three years, only as an interim measure, and have shared full responsibility for Delta standards for almost 40 years (D-990, D-1379, D-1485 and others). The State Board's current implementation process is intended to distribute participation in 1995 WQCP compliance more broadly and more equitably among all water users within the Delta's watershed. The *US v. SWRCB* (i.e. Racanelli) court decision charges the State Board with the responsibility for determining how best to expand that participation.
- 3) **Enjoy the support of a sound legal and technical foundation.** In order to avoid further conflict and litigation, an agreement should be consistent with federal and state law. The State Board and/or the agreement proponents need to comply with CEQA, NEPA and ESA. In addition, success of the agreement will depend on its ability to fit within the operational framework for the rivers and the Delta and on implementation in a reasonable manner. On issues such as conservation and water banking, some agreements will face the dual challenge of complying with the law and operational standards, which have developed over many years and, in fact, continue to be developed.
- 4) **Promote water contributions from an expanded number of tributary watersheds.** Prior to development in the upstream watersheds, the Delta ecosystem benefitted from water and sediment coming from all the rivers and tributaries that feed it. In order to restore the Delta's ecosystem, the Delta needs to recover at least some of that diversity of in-flows. Consistent with Interior's and Club FED's previous statements to the State Board, proposed agreements should consider the ecological benefits of an approach that would reflect widely shared responsibility throughout the watersheds for both salinity and flow requirements.
- 5) **Provide comprehensive resolution of the contribution issue in an entire watershed of**

**the Sacramento River, San Joaquin River, or one of the tributaries.** Considering the difficulty of distributing the burden of compliance, an agreement ideally should encompass the entire watershed of the Sacramento and/or San Joaquin River. In any case, an Agreement should distribute responsibility at least throughout a tributary watershed in order for the Board and others to better evaluate the Agreement and minimize the time required for hearings. If the Agreement does not include all water rights holders in the watershed, then the Board should consider applying similar criteria for responsibility to the non-settling parties. At the end of the State Board's proceedings, water right holders in similar situations should be treated similarly.

**6) Contribute releases of new, "wet" water that was not flowing to the Delta before the 1994 Accord, not unused, "paper" water that gives no new benefit to the Delta.** In order for any party to receive credit for contributing to the fulfillment of the flow objectives, the water needs to provide some benefit to the Delta ecosystem after the Agreement takes effect. "Giving up" water that already goes downstream to the Delta does not provide any new or different environmental benefit or benefit to the Projects' operations. Providing additional flows, for example, at times the standards are not controlling Project operations will provide little or no added benefit to the Projects.

**7) Be fair and equitable to all concerned.** Considering California law's emphasis on "reasonable use" of the State's waters, the structure for implementing the 1995 WQCP must be reasonable and equitable. An agreement that either imposes an unfair burden on one or more parties or shifts an unfair burden to other "non-agreement" parties should not be considered reasonable.

**8) Apply consistently through the full range of standards and water year types.** An effective agreement should contribute to 1995 WQCP compliance in all water year types, although contributions may be adjusted based on water year type or some other logical criteria.

**9) Allow for changes in the State Board's water quality objectives.** The Delta's WQCP will go through triennial review, which may lead to changes in flow objectives. An agreement should be structured to establish flow contributions that can be adjusted based on changes in the standards. At the least, the agreement should provide for some sort of conflict resolution as circumstances change.

**10) Recognize that other processes are independent of the Board's consideration of implementation plans for the WQCP.** Other venues (e.g. FERC) may set flow requirements in rivers tributary to the Delta. These are separate requirements. However, agreements that look comprehensively at the watershed and the Delta provide the opportunity for meeting the requirements of both the Board and the other venues. While the Board may consider the judgments made in other arenas, those judgments do not dictate the outcome for the State Board. Similarly, the State Board's judgment as to the proper contribution to the Delta's flow objectives do not dictate the outcome in those other arenas.

**11) Consider the fishery impacts in the stream at issue.** Fish who live in or pass through the Delta, particularly anadromous fish, often rely on flows and habitat upstream from the Delta. The focus of these proceedings is the Delta. Proposed agreements should include specific consideration of instream flow needs on each tributary in helping to meet the WQCP's narrative salmon objective.

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 OFFICE OF REGIONAL COUNSEL, REGION IX  
 75 Hawthorne Street  
 San Francisco, CA 94105

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 (b) Incoming "Complaint"  
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