

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for)
Changes in the Water Rights)
Authorizing Diversion and Use)
of Waters in the Watershed of)
the Sacramento-San Joaquin)
Delta, held by)

ORDER: WR 95-14

CALIFORNIA DEPARTMENT OF)
WATER RESOURCES and)

UNITED STATES BUREAU OF)
RECLAMATION)

ORDER DENYING PETITIONS FOR RECONSIDERATION
OF ORDER WR 95-6, WHICH APPROVED CHANGES IN
THE WATER RIGHTS OF THE CALIFORNIA DEPARTMENT
OF WATER RESOURCES AND THE UNITED STATES
BUREAU OF RECLAMATION AFFECTING THE
BAY-DELTA ESTUARY

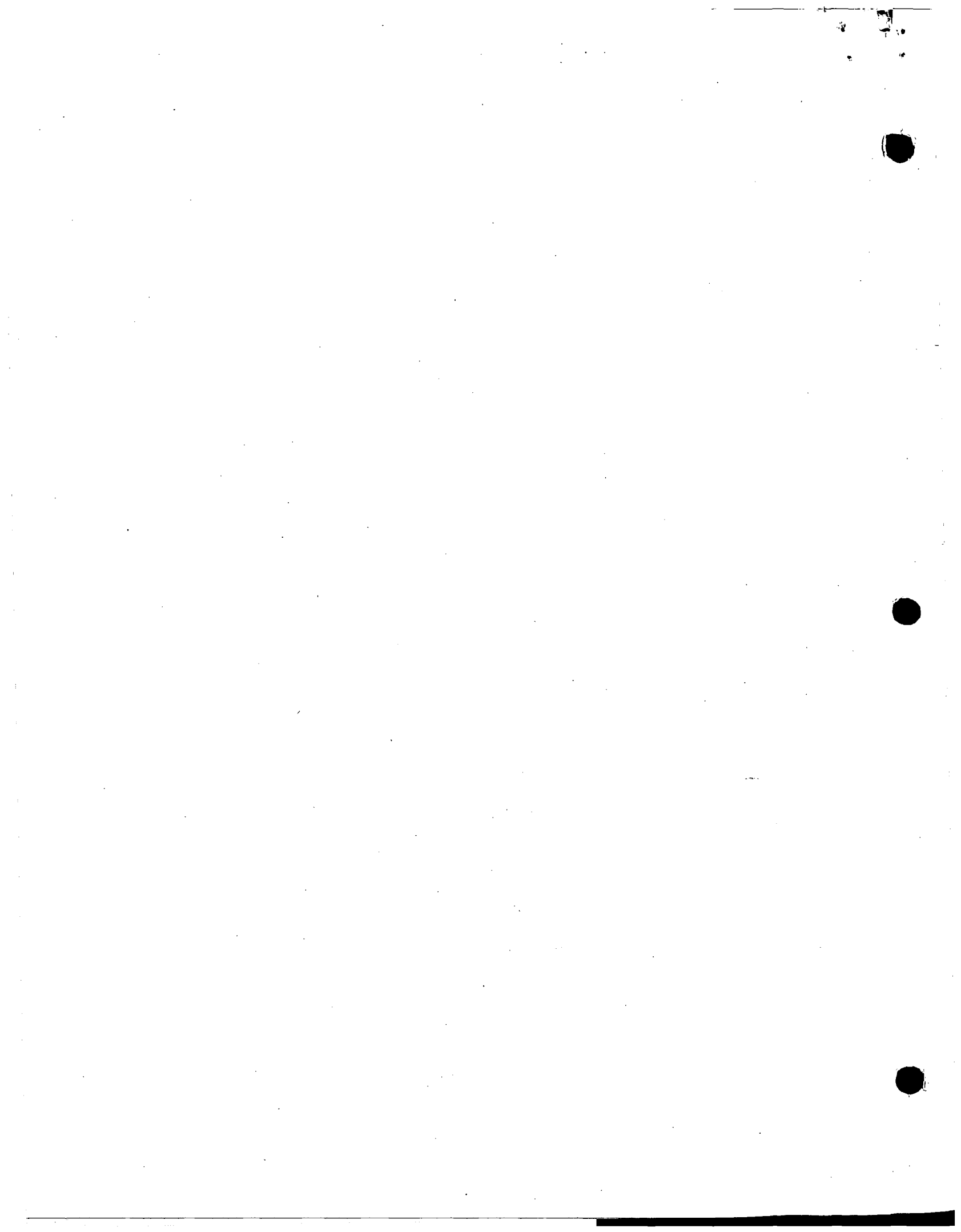


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BY THE BOARD:

1.0 INTRODUCTION

On June 8, 1995 the State Water Resources Control Board (SWRCB) adopted Order WR 95-6. Order WR 95-6 approved, in part, a petition for changes filed by the California Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR). The approved changes include changes in the standards to be met by the DWR and the USBR for striped bass spawning salinities, Suisun Marsh salinities, export rates in the southern Delta, and operation of the Delta Cross Channel Gate; a change in the salinity to be maintained by the USBR at Vernalis on the San Joaquin River; and a limited authorization for the USBR and the DWR to use each other's water diversion points in the southern Delta. In the absence of a further order of the SWRCB, these changes will expire on December 31, 1998.

On July 10, 1995, the SWRCB received three timely petitions for reconsideration. A single petition was jointly filed by several

persons and entities located in San Joaquin County, including the County of San Joaquin (County), Stockton East Water District (SEWD), Central San Joaquin Water Conservation District (CSJWCD), Central Delta Water Agency (CDWA), South Delta Water Agency (SDWA), Reclamation District No. 2072 (Reclamation District), R.C. Farms, Inc. (R.C. Farms), and Alexander Hildebrand (Hildebrand) (collectively, these parties are referred to herein as San Joaquin). The other two petitions were filed by Patrick J. Porgans (Porgans) and by a group designated as Certain Area I Representatives and Other Area I Landowners (Area I) within the Westlands Water District.

2.0 GROUNDS FOR RECONSIDERATION

The SWRCB may order reconsideration on all or a part of a decision or order adopted by the SWRCB upon petition by affected persons. (Wat. Code § 1357.) The SWRCB's regulations (23 Cal. Code Regs. § 768) list the following causes upon which an interested person may petition the SWRCB for reconsideration:

- a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- b. The decision or order is not supported by substantial evidence;
- c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d. Error in law.

2.1 Area I's Grounds

Area I alleges that the first full paragraph on page 13 of Order WR 95-6 (in section 3.3.1) is subject to misinterpretation or

misconstruction, which Area I argues could result in an error in law. This allegation is discussed in Part 4 below.

2.2 San Joaquin's Grounds

San Joaquin alleges as grounds for reconsideration that the SWRCB violated the California Environmental Quality Act (CEQA), that the SWRCB failed to consider and apply certain statutes, that Order WR 95-6 is not supported by substantial evidence, that the SWRCB violated San Joaquin's due process rights through alleged bias in the proceedings, and that the SWRCB violated San Joaquin's rights through vagueness in WR 95-6. Thus, San Joaquin alleges three of the above causes: (1) that there is error in law, (2) that the order is not supported by substantial evidence, and (3) that there was irregularity in the proceedings. As a remedy, San Joaquin requests that the SWRCB set aside Order WR 95-6 and hold a hearing on disqualification of SWRCB members and staff. San Joaquin's allegations are discussed in Part 5 below.

2.3 Porgans' Grounds

Porgans alleges as grounds for reconsideration that Order WR 95-6 is not supported by facts. This is in effect an allegation that the order is not supported by substantial evidence. Based on this allegation, Porgans requests that the SWRCB rescind Order WR 95-6. Porgans' petition is discussed in Part 6 below.

3.0 BACKGROUND

The SWRCB adopted Order WR 95-6 after holding a three-day evidentiary hearing, receiving written closing statements, and circulating the draft order to the interested parties in advance of the meeting at which the SWRCB adopted Order WR 95-6. Order WR 95-6 approved some but not all of the changes that the DWR and the USBR requested in their petition.

The SWRCB tightly conditioned its approval of the selected changes to ensure that its action complied with CEQA, with Water

Code sections 1700 et seq., and with all other applicable laws. The conditions include termination of the approved changes on or before December 31, 1998. The conditions also include restrictions on the joint use of the export pumping facilities of the DWR and the USBR in the southern Delta to ensure that there are no increases in overall exports as a result of the authorization and that the authorization can be used only in connection with efforts to protect fish from entrainment by the export pumps. Order WR 95-6 requires that, prior to using the export pumps for these limited purposes, the DWR and the USBR obtain the review of interested parties to avoid any adverse effects. With these conditions, Order WR 95-6 will not injure any legal user of the water involved and will not unreasonably affect fish, wildlife, or other instream beneficial uses.

4.0 ISSUE RAISED BY AREA I

Area I asserts that its members hold the rights to the water delivered to its members by the USBR. Area I further asserts that the USBR cannot reduce the allocation of water to Area I. Area I requests that the following paragraph on page 13 of Order WR 95-6 be clarified to avoid misinterpretation:

"Some contract holders who buy water from the USBR also claim injury, but their rights to use water are dependent on the USBR's right to divert and use the water. Where the USBR has obligations either under its permits or under other laws to limit the amount of water it diverts and the times when it diverts the water, the contract holders' entitlements in the same water are likewise limited. Additionally, the USBR's water right permits and licenses, while they authorize the USBR to divert water for beneficial uses, do not require the USBR to do so. The permits and licenses set the maximum amounts that the USBR can appropriate, but the USBR can appropriate less than its permits allow. Where the USBR decides to take less water than it is allowed and supplies less water to a contract holder than the contract holder claims as an entitlement, the contract holder's dispute is with the USBR."

Area I believes that this language could be misconstrued or misinterpreted regarding the extent of an appropriator's water rights. Although the staff of the SWRCB explained the meaning and basis of this statement by letter dated June 26, 1995, Area I requests that the SWRCB formally clarify the specified language.

Area I's concern centers on the first two sentences of the above paragraph. Area I urges the SWRCB to clarify these sentences by stating that an appropriator's right to water can be no greater than the SWRCB-issued water right permit authorizing such appropriation. This is a correct statement. These sentences are based on the discussion and holding in United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, 145, 227 Cal.Rptr. 161, 197-198. These sentences point out that under state law the rights of water users who buy water from the USBR are no greater than the water rights of the USBR. For example, where the USBR's water right permit establishes a maximum quantity of water that the USBR can appropriate, the purchasers of water from the USBR do not have a right under the permit to obtain more water than the USBR can appropriate under the permit. This point also is supported by California v. United States (1978) 438 U.S. 645, 675-677, 98 S.Ct. 2985, 3001-3002.

The subject paragraph also points out that while SWRCB-issued water right permits establish the upper limits on water appropriations, they do not oblige a permit holder to take the maximum amount of water to which it is entitled. The paragraph further recognizes that regulatory agencies other than the SWRCB (including the U.S. Fish and Wildlife Service and the National Marine Fisheries Service acting under the federal Endangered Species Act) have the authority to issue orders that may have the effect of reducing the amount of water a water right holder such as the USBR feasibly can appropriate.

5.0 ISSUES RAISED BY SAN JOAQUIN

San Joaquin filed both a petition for reconsideration and a petition for writ of mandate in the Sacramento County Superior Court. The contents of the petition for writ of mandate are similar to the petition for reconsideration, but the allegations are organized differently.

5.1 CEQA Compliance

San Joaquin argues that the SWRCB violated CEQA in three ways: by using the Environmental Report (ER) as an environmental document for Order WR 95-6; by using the ER as a programmatic document under CEQA; and by failing to address the impacts of Order WR 95-6 in the ER. The use of an ER as an environmental document and the ability to use an ER (i.e., a certified program analysis) as a programmatic document are discussed together in Sections 5.1.1 and 5.1.2 of this order. Under the specific circumstances of this action the ER was properly used and is adequate to satisfy the requirements of CEQA.

5.1.1 *The Statutory Basis for Using the ER as an Environmental Document*

The SWRCB used the ER as the environmental documentation for the adoption of Order WR 95-6. The ER was prepared under Public Resources Code section 21080.5 as a certified program analysis of the environmental effects of the 1995 Bay-Delta Plan. Order WR 95-6 temporarily implements some of the objectives adopted in the 1995 Bay-Delta Plan. As a result of Order WR 95-6 and the actions of other agencies, the 1995 Bay-Delta Plan will be implemented in the short term.

Order WR 95-6 at pages 31-35 explains why the use of the ER as the environmental documentation for Order WR 95-6 is appropriate. Primarily, the SWRCB relied upon the opinion of the Deputy Secretary and General Counsel (Resources Counsel) of the California Resources Agency issued April 4, 1995. The Resources

Counsel pointed out that the rules that apply to the use of an EIR by a responsible agency also apply to the use of a certified program analysis prepared under Public Resources Code section 21080.5. (See 14 Cal. Code Regs. § 15253.) This means that a responsible agency is required to use the environmental analysis prepared pursuant to a certified program in the same manner as reliance on an EIR or negative declaration.

As the Resources Counsel further explained, a single EIR can be used to support implementation of an entire program without having to prepare additional EIRs or negative declarations. (14 Cal. Code Regs. § 15168(c)(5).) The CEQA Guidelines, at section 15165, require that when individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project. (14 Cal. Code Regs. § 15165.) Where an individual project is a necessary precedent for action on a larger project, or commits the agency to a larger project, with significant environmental effect, the EIR must address itself to the scope of the larger project. (Id.) A program EIR is used for actions that are logical parts in the chain of contemplated actions. A program EIR must address itself to the scope of the larger project as well as providing an adequate analysis of the initial activity. (See 14 Cal. Code Regs. § 15168.) In preparing the ER, the SWRCB intended to meet the substance of sections 15165 and 15168 in the ER notwithstanding that the ER is a substitute for an EIR.

The Resources Counsel pointed out that to dispense with additional EIRs or negative declarations for later projects, the program EIR must be comprehensive and specific. (14 Cal. Code Regs. § 15168(c)(5).) Subsequent activities that are within the scope of the project described in the program EIR require no further documentation. (Id.) If a subsequent project would have

significant impacts that are not addressed in the program EIR, a subsequent or supplemental EIR is required. (See 14 Cal. Code Regs. § 15168(c).) The program EIR can be used to simplify the task of preparing any environmental documents that are required for later parts of the program. (14 Cal. Code Regs. § 15168(d).)

The Resources Counsel explained that, while not mandatory, a certified program's analysis may be prepared in the same manner as a program EIR. All provisions of CEQA apply to the use of a certified program analysis in the same manner as a regular EIR, except the provisions that are specifically exempted. (EPIC v. Johnson (1985) 170 Cal.App.3d 604, 216 Cal.Rptr. 502.) Based on EPIC, it is the opinion of the Resources Counsel that an environmental analysis which is prepared programmatically may serve as a basis for subsequent implementing actions without the need to prepare additional environmental review documents.

The SWRCB explained in Order WR 95-6 at page 33 a second reason why an EIR substitute should be adequate for a subsequent action on the same project when the lead agency takes the subsequent action. That is, the CEQA regulations require the use of an EIR substitute by a responsible agency for a subsequent approval when the EIR substitute meets the specified criteria. (14 Cal. Code Regs. § 15253.) This regulation does not, however, discuss the use of an EIR substitute by the same agency for a subsequent approval. Apparently this is an oversight, since most lead agencies do not need to take more than one action to carry out a project. The SWRCB, however, must take a second action under separate authority to carry out the project described and analyzed in the ER. If the SWRCB's water right action were carried out by another agency, all of the criteria in section 15253(b) would be met, as is explained in Order WR 95-6.

5.1.2 *The ER Meets All of the Requirements for Use as a Programmatic Document*

The project analyzed in the ER is the adoption and implementation of the 1995 Bay-Delta Plan. The 1995 Bay-Delta Plan, however, is not self-implementing. If only the effects of adopting the plan were analyzed, there would be no need for an analysis because there would be no immediate changes in the physical environment. A subsequent action to implement the plan was required before the 1995 Bay-Delta Plan could have any physical effect.

The ER analyzes the effects of implementation because the CEQA Guidelines direct an agency not to piecemeal the analysis of the effects of a larger project where a series of individual actions are required to complete the project. The ER follows this directive to the extent possible, but does not reach the upstream effects of the future allocations of responsibility to water right holders¹ who do not currently have responsibility to meet Bay-Delta water standards. The ER analyzes the effects of implementation on areas upstream of the Estuary using the assumption that all of the implementation responsibility will be carried out by the DWR and the USBR. The ER also analyzes the effects of adopting and implementing the 1995 Bay-Delta Plan on the environment in the Estuary and in the areas that receive water exported from the Estuary. The analyses for the Estuary and for the export areas may not require future supplementation.

All of the environmental effects of currently implementing the changes in the water quality standards through the efforts of the DWR and the USBR are adequately analyzed for CEQA purposes within the ER. Although Order WR 95-6 does not require the DWR and the

¹ *These parties have not yet been identified. Their responsibilities will be quantified in a water right proceeding which is currently commencing, but that proceeding will not be completed for approximately three years. Subsequent environmental documentation will cover the currently unknown effects of requiring additional water right holders to help meet the standards.*

USBR to implement all of the new standards, the DWR and the USBR are currently required, as a result of Order WR 95-6 plus the actions of other regulatory agencies, to meet the full set of new standards. San Joaquin nevertheless contends that the ER does not adequately analyze the effects of the SWRCB's temporary (until the end of December 1998) action to complete current implementation of the 1995 Bay-Delta Plan through the DWR and the USBR. In effect, San Joaquin is arguing that the SWRCB should prepare an environmental document that ignores the net effect of the several agencies' actions (which is identical to the effect of implementing the 1995 Bay-Delta Plan) and instead dissects the effects of each standard as if it had a separate effect. The standards interact, however, and the effect of their interaction differs from the sum of their individual effects. As a result, the dissection San Joaquin argues for would produce a theoretical result, and it would not disclose the actual physical impacts that are most likely to occur.

San Joaquin asserts incorrectly that the ER does not discuss its role as a "Program EIR". In fact, the ER discusses both the programmatic nature of its analysis and the effects of implementation actions by the DWR and the USBR. The programmatic nature of the ER and the implementation of the plan are specifically discussed in the ER as follows. On page I-13, the ER points out that the SWRCB will use it "in conjunction with subsequent implementation proceedings to modify D-1485 to eliminate inconsistencies between that decision and the plan." On page II-1, the project definition describes the project as including review and amendment of both the objectives and the program of implementation. The project definition says that the program of implementation includes actions the SWRCB will undertake. In sections VII, VIII, XII, and XIII of the ER, the effects of implementation of the 1995 Bay-Delta Plan are analyzed. At page VIII-1, paragraph 2, the ER explains that because the objectives will not be implemented until a later

decision, the ER analyzes the effects of implementation by using the USBR and the DWR as surrogates for the entire set of water right holders who ultimately may be responsible for meeting the objectives.

The SWRCB in Order WR 95-6 did not, as San Joaquin suggests, conclude that the ER is a programmatic EIR. The ER is a substitute for an EIR. Rather, the SWRCB concluded that the ER meets the requirements for a programmatic EIR. (See Order WR 95-6, page 32, 3d paragraph.)

As discussed above and in the CEQA Guidelines, a program EIR can be used to cover the first action in a series and to (1) cover the effects of some or all later actions or (2) simplify the task of preparing a subsequent EIR or negative declaration for a later action. (14 Cal. Code Regs. § 15168(c), (d).) The ER so far has been used for the initial action of adopting the 1995 Bay-Delta Plan and for the short-term implementing action which is Order WR 95-6. For future implementation of the 1995 Bay-Delta Plan, the ER will be used as a tiering document to simplify the task of preparing subsequent environmental documentation. Any necessary subsequent environmental documentation will be prepared for the future phases of implementation. This is in part because a different analysis will be needed when the SWRCB considers assigning responsibilities to parties in addition to the DWR and the USBR. Where implementation actions will not have any significant adverse effects which were not analyzed in the ER, as is the case for Order WR 95-6, subsequent or supplemental documentation is not required.

5.2 Water Code Compliance

Next, San Joaquin contends that the SWRCB failed to consider and apply a number of sections of California water law in approving the change petition filed by DWR and USBR. San Joaquin cites and copies numerous Water Code sections which it claims Order WR 95-6

violates, including sections from the Delta Protection Act (Wat. Code § 12200 et seq.), the San Joaquin River protection statute (Wat. Code § 12230 et seq.), the Watershed of Origin Act (Wat. Code § 11460 et seq. and § 11128), and the County of Origin Act (Wat. Code §§ 10505 and 10505.5). San Joaquin does not, however, explain in its petition for reconsideration why it believes these statutes have been overlooked or violated by the adoption of Order WR 95-6. Nor does San Joaquin explain why these statutes are material to a determination to approve a change petition in which no new rights were accorded to the USBR and the DWR. Notwithstanding San Joaquin's contention, Order WR 95-6 complies with all applicable Water Code provisions.

5.2.1 Background

San Joaquin apparently contends that Order WR 95-6 authorizes the DWR and the USBR to deprive San Joaquin's members of water supplies to which they are legally entitled. San Joaquin's members are situated in San Joaquin County, and the USBR's New Melones Reservoir is on the Stanislaus River upstream of San Joaquin's members. Apparently San Joaquin's members are concerned that in some way approval of Order WR 95-6 could reduce the amount of water from the Stanislaus River available for their uses. Some of San Joaquin's members buy or would like to buy water from the USBR's New Melones Project. Others of San Joaquin's members claim that they have water rights in the Delta that are senior to the rights of the USBR.

San Joaquin's water buyer members apparently want the SWRCB to order the USBR to deliver water to them. To justify such an order, San Joaquin is attempting to establish that its water buyer members have a water right to water the USBR has appropriated at New Melones Reservoir. The buyers have contracts with the USBR to buy water when water is available, and they apparently assert that these contracts establish their water rights. In addition to seeking to establish a right under state

law, SEWD and CSJWCD have filed an action against the USBR in federal court in an attempt to force the USBR to deliver water to them in preference to fish releases. The U.S. District Court for the Eastern District of California denied their request for a preliminary injunction on March 17, 1995. (Stockton East Water District and Central San Joaquin Water Conservation District v. United States of America et al., No. CV-F-94-6103 OWW.)

San Joaquin's water buyer members are not getting as much water from New Melones Reservoir under their contracts as they anticipated. At the time of the hearing, the USBR in 1995 planned to deliver up to 37,000 acre-feet (af) to CSJWCD, but no water to SEWD. SEWD and CSJWCD recently completed the Goodwin Tunnel to transport New Melones water to their service areas from Goodwin Dam on the Stanislaus River. The tunnel cost \$65 million and their contracts with the USBR allow them to buy up to 155,000 acre-feet per annum (afa) of water. Their contracts to buy water from the USBR, however, are prioritized behind earlier contractors. SEWD's contract provides only an interim water supply that can be reduced as demands by other contractors, including CSJWCD, increase. (SEWD 1, page 5.)

San Joaquin's members who claim senior water rights for agricultural use in the Delta want the USBR to release water from New Melones Reservoir on a schedule that will ensure that they will receive high quality water throughout their summer irrigation season. They are concerned that if more water than necessary is released for fishery protection early in the year, New Melones Reservoir will run out of water by the end of the summer.

5.2.2 Allegations that the USBR's Permits are Violated

San Joaquin contends that Order WR 95-6 allows USBR to release more water from New Melones Reservoir for fishery protection than is necessary, and that the USBR is exporting the water released

for fish when the water reaches the Delta. San Joaquin further alleges that the export of water that originated in the Stanislaus River and was controlled by the New Melones Project is a violation of the New Melones water right permits. The New Melones water right permits prohibit the USBR from delivering water appropriated under these permits for consumptive uses outside the counties of Stanislaus, Calaveras, Tuolumne, and San Joaquin. For the reasons discussed below, however, the USBR would not necessarily violate its New Melones project permits even if it exported the water when it reached the Delta pumps.

The flow releases San Joaquin apparently is most concerned with do not fall within the scope of the SWRCB's current proceeding. The current proceeding addresses a petition filed by the USBR and the DWR asking for changes. San Joaquin has not followed the appropriate procedures for requesting that the SWRCB take an enforcement action against the USBR. San Joaquin could file a complaint with the SWRCB under Title 23, California Code of Regulations, section 820 et seq.

Nevertheless, San Joaquin's issue merits some discussion of whether and under what circumstances a permit violation could occur under the facts alleged by San Joaquin. As is discussed above in Part 4.0, a water right permit holder is not obliged by its permit to appropriate the maximum amount of water to which it is entitled. Nor does the permit prohibit the permittee from either abandoning the water or using the water for fewer than all of the beneficial uses for which it was appropriated.²

Among other beneficial uses, the USBR's New Melones permits authorize appropriation of water for fish and wildlife

² A permit may, however, require that certain amounts be released or bypassed for specified uses that are to be preserved, including fishery uses or prior water rights.

preservation and enhancement uses. During the time since the New Melones permits were approved under Water Right Decision 1422 in 1973, the USBR's water right permits have not limited the amount of water the USBR can release for fishery protection. Order WR 95-6 did not change this. Consequently, the USBR can release as much water as is necessary for fishery protection without violating its water right permits. The USBR currently is using its New Melones permits to satisfy its obligation under the federal Endangered Species Act to minimize its take of Delta smelt incident to operation of the Central Valley Project. New Melones is a component of the Central Valley Project. The Biological Opinion for Delta smelt establishes minimum flows at Vernalis that are coupled with export limitations at both the USBR and the DWR pumping plants to protect Delta smelt habitat in the lower San Joaquin River. The San Joaquin River instream fish flow releases are like return flow from irrigation; after the water has been put to the beneficial use for which it was appropriated, it is abandoned. If water has been abandoned, it can be appropriated again. The export constraints in Order WR 95-6 and in the Biological Opinion limit the amount of this water that can be reappropriated.

Because of the limited places of use authorized in the New Melones permits and because the permits do not authorize a point of diversion or rediversion in the southern Delta, the USBR would need changes in its permits before it could use its New Melones water rights to export water. However, the USBR has other permits that allow appropriation from the channels of the Delta and the USBR can appropriate any unappropriated water, including abandoned water, in the Delta under these permits. Thus, if the USBR releases water from New Melones Reservoir for the beneficial use of fish and wildlife preservation and enhancement, and this use is satisfied, the water remaining in the river becomes abandoned water that the USBR could appropriate along with unappropriated water from other sources.

It is unlikely that the USBR intentionally would release an unnecessarily large amount of water from New Melones in an attempt to export more water. If the USBR were to do this and then reappropriate and export the water, it could be argued that such a release constituted an unreasonable use of water, which would be a violation of its permits. Additionally, this water could be appropriated between the point where it was abandoned (at Vernalis) and the export pumps by other water right holders with seniority over the USBR's Delta permits. Since even new water appropriators (including San Joaquin's members) can obtain seniority over the USBR with respect to water that otherwise would be exported for use outside the watershed of origin, it is unlikely that the USBR could export substantial amounts of abandoned water that originated in the San Joaquin River watershed. Further, if any abandoned water reached the southern Delta pumps, the DWR as well as the USBR would have the right to appropriate it. Thus, the USBR may not be able to recover enough excess water abandoned from New Melones Reservoir to make excess releases worthwhile. Finally, if the USBR were to make releases in excess of the amounts needed to protect fish, San Joaquin could request an enforcement action.

5.2.3 *Alleged Violation of San Joaquin River Protections*

The sections that San Joaquin cites and quotes from the San Joaquin River protections are discussed in Order WR 95-6 at pages 13 and 14. As the order explains, the San Joaquin River protection statute (Wat. Code § 12230 et seq.) does not apply to the permits amended by Order WR 95-6 for New Melones Reservoir.

5.2.4 *Alleged Violation of Watershed of Origin and County of Origin Acts*

The Watershed of Origin (Wat. Code §§ 11460 et seq. and 11128) and County of Origin acts (Wat. Code §§ 10505 and 10505.5) (Area of Origin laws) also do not support San Joaquin's arguments. The

Area of Origin laws³ allow prospective in-area water users to obtain permits that have seniority over export water rights if (1) there is no water available for appropriation within the area and (2) water from the area is being exported to another area under a permit or license that is subject to one of the above statutes.

An exporter who knows that a prospective water buyer could obtain a senior water right could choose to serve the water in question within the area of origin instead of in the export area. If the exporter did not agree to serve the water within the area of origin, however, the in-area user's only recourse would be to pursue an application to appropriate the exported water. (25 Ops.Cal.Atty.Gen. 8, 20-21 (1955).) Since the USBR does not have permission to export water appropriated under its New Melones permits, a new in-area water user such as San Joaquin's members could not get seniority over the USBR's New Melones water right permits under these statutes. In the case of County of Origin applications, a new appropriator could only appropriate the amount of water that is produced within the county; water produced upstream in other counties would not be available to San Joaquin under this statute. (See id. at 17.)

San Joaquin alleges that the USBR nevertheless is exporting water previously stored in New Melones Reservoir to areas outside the area of origin. San Joaquin alleges that releasing water for fish in the Delta is a use outside the county or watershed of origin. The fish releases San Joaquin complains of, however, are not required by Order WR 95-6. Even if Order WR 95-6 somehow caused increased releases from New Melones Reservoir, this allegation does not help San Joaquin. Because the water from the Stanislaus River (New Melones) flows in its natural course

³ See, generally, 25 Ops.Cal.Atty.Gen. 8 (1955); 25 Ops.Cal.Atty.Gen. 32 (1955); 28 Ops.Cal.Atty.Gen. 307 (1956); 29 Ops.Cal.Atty.Gen. 136 (1957).

through the Estuary to the sea, the entire Estuary is within the watershed. The Watershed of Origin Act does not provide a basis for San Joaquin to obtain any preference or priority over other uses, including instream beneficial uses, that are in the watershed. The fish releases also are beneficially used within the place of use for New Melones water, since their purpose is to provide flows in the lower San Joaquin River, within San Joaquin County.

5.2.5 Alleged Violation of Delta Protection Statutes

Regarding San Joaquin's allegation that the Delta Protection statutes are violated, there is again no explanation of how Order WR 95-6 will cause a violation of these sections. The Delta protection statutes (Wat. Code § 12200 et seq.) are intended to require the DWR and the USBR to provide salinity control and an adequate water supply for users of water in the Delta, as a condition of exporting water from the Delta. The purpose of Order WR 95-6 is to protect Delta water quality, not to increase exports. The changes approved in Order WR 95-6 and by other agencies improve water quality protection. If any violation of these sections by the DWR or the USBR exists, it is the result of the actions of entities other than the SWRCB, and not the result of adoption of Order WR 95-6. If San Joaquin believes that a water right holder is violating its water rights, San Joaquin could, as explained above, file a complaint with the SWRCB. San Joaquin has not done so.

5.2.6 Allegation Regarding Water Code Section 12931

Finally, San Joaquin without explanation notes that Water Code section 12931 deems the Delta to be within the watershed of the Sacramento River. By its own terms, this statement is true only for the purposes of the chapter in which this section appears. That chapter addresses funding for construction of the State Water Project. It specifically does not affect water rights.

(See Wat. Code § 12931.) Therefore, this section adds nothing to San Joaquin's contentions.

5.3 Allegations of Injury to Legal Users of Water

San Joaquin contends that Order WR 95-6 is not supported by substantial evidence. San Joaquin bases this contention on its assertion that there are no findings under Water Code section 1702⁴ that say that the changes approved in Order WR 95-6 will not operate to the injury of petitioners as legal users of the water. Order WR 95-6 complies with section 1702. The SWRCB gave substantial attention to the potential effects of the changes on San Joaquin's members. To ensure there would be no injury to San Joaquin's members or others who claim to be legal users of the water involved, the SWRCB modified the proposed changes. In other words, Order WR 95-6 as adopted will not operate to the injury of any legal user of the water involved; nor will it operate to the injury of San Joaquin's members.⁵ This is not a finding, however, that actions taken independently by other agencies including the USBR will not affect the water supply of water users who obtain water from the USBR.

5.3.1 Change in Points of Diversion

San Joaquin makes numerous allegations that it contends show violation of section 1702. First, San Joaquin rewords a finding on page 46 of Order WR 95-6 to imply that the SWRCB did not examine the effect of a change in the USBR's point of diversion in the southern Delta on other legal users of water. As reworded by San Joaquin, it would say the SWRCB "does not presume that the

⁴ Water Code section 1702 requires the petitioner asking for a change in an existing water right to establish to the satisfaction of the SWRCB that the change will not operate to the injury of any legal user of the water involved.

⁵ The SWRCB has not determined whether or not San Joaquin's members are legal users of the water involved within the meaning of Water Code section 1702.

USBR will [implement the flows in a manner that will cause harm to legal users]." In fact, the finding simply rejected an argument that if any change in point of diversion was allowed, the USBR would use it for the purpose of violating existing restrictions in its permits. The SWRCB refused to assume that the USBR would intentionally violate its permits if the SWRCB approved a change order.

Next, San Joaquin makes the bizarre contention that by placing limitations on its approval of the joint points of diversion to prevent injury to legal users of water, the SWRCB somehow violated section 1702. The very purpose of these limitations was to ensure compliance with section 1702 including avoiding any potential adverse effects on the environment and to protect San Joaquin's members from any possible loss of water attributable to Order WR 95-6.

The heart of San Joaquin's argument is a claim that the DWR and the USBR did not provide evidence to support a finding that the requested changes would not harm any legal user of water. This is simply incorrect. The DWR and the USBR did provide evidence for this purpose, but since the requested changes could have added as much as 30,000 af of water per year to the more than 6 million af annual diversions in the southern Delta, the SWRCB restricted its approval of the changes. San Joaquin, however, failed to rebut the evidence regarding lack of harm or explain why the evidence was unpersuasive. San Joaquin instead chooses to accuse the SWRCB of improperly shifting the burden of proof to the parties who claim to be legal users of water. The SWRCB did not, however, shift the burden of proof. It made its findings in accordance with the weight of the evidence. These findings, of course, are based on the changes approved by the SWRCB. There is no requirement that the SWRCB find that the changes as proposed by the DWR and the USBR would not have caused injury to any legal

user of water. The changes as approved will not cause injury to any legal user of water.

5.3.2 *Change in Export Rate Limits*

Next, San Joaquin attacks the change in export rate limitations in May, June and July. The export rate limitations under D-1485 are 3,000 cfs in May and June and 4,600 cfs in July at each of the two pumping plants. Under Order WR 95-6 combined export rates are limited to 35 percent of Delta inflow during February through June and 65 percent of Delta inflow during July through January.⁶ This change replaces a springtime export limit with all-year limits. Apparently San Joaquin fears that this represents an increase in exports in the spring, and that an increase in exports will mean a lack of water for its members' uses later in the summer. During wetter springtime periods more water will be exported and during drier springtime periods less water will be exported than previously. A higher export during wetter periods will not harm other water users since more water generally is available during these circumstances. On an average annual basis, this change reduces the net quantity of water that can be exported. It also shifts substantial quantities of export diversions from springtime, when fish are more susceptible to entrainment, to other times of year.

San Joaquin expresses particular concern about an export limit in Order WR 95-6 which applies from about April 15 through May 15 for 31 days.⁷ San Joaquin misunderstands this limit. Assuming that San Joaquin wants to limit or reduce exports, this limit will benefit San Joaquin. This new limit, set forth in

⁶ This change is intended to respond to the relationship between flows, exports, and fish entrainment in the export pumps. When flows in the Delta are higher, exports have less of an effect on aquatic resources.

⁷ This is not a May-June limitation as San Joaquin states. It applies roughly from April 15 through May 15.

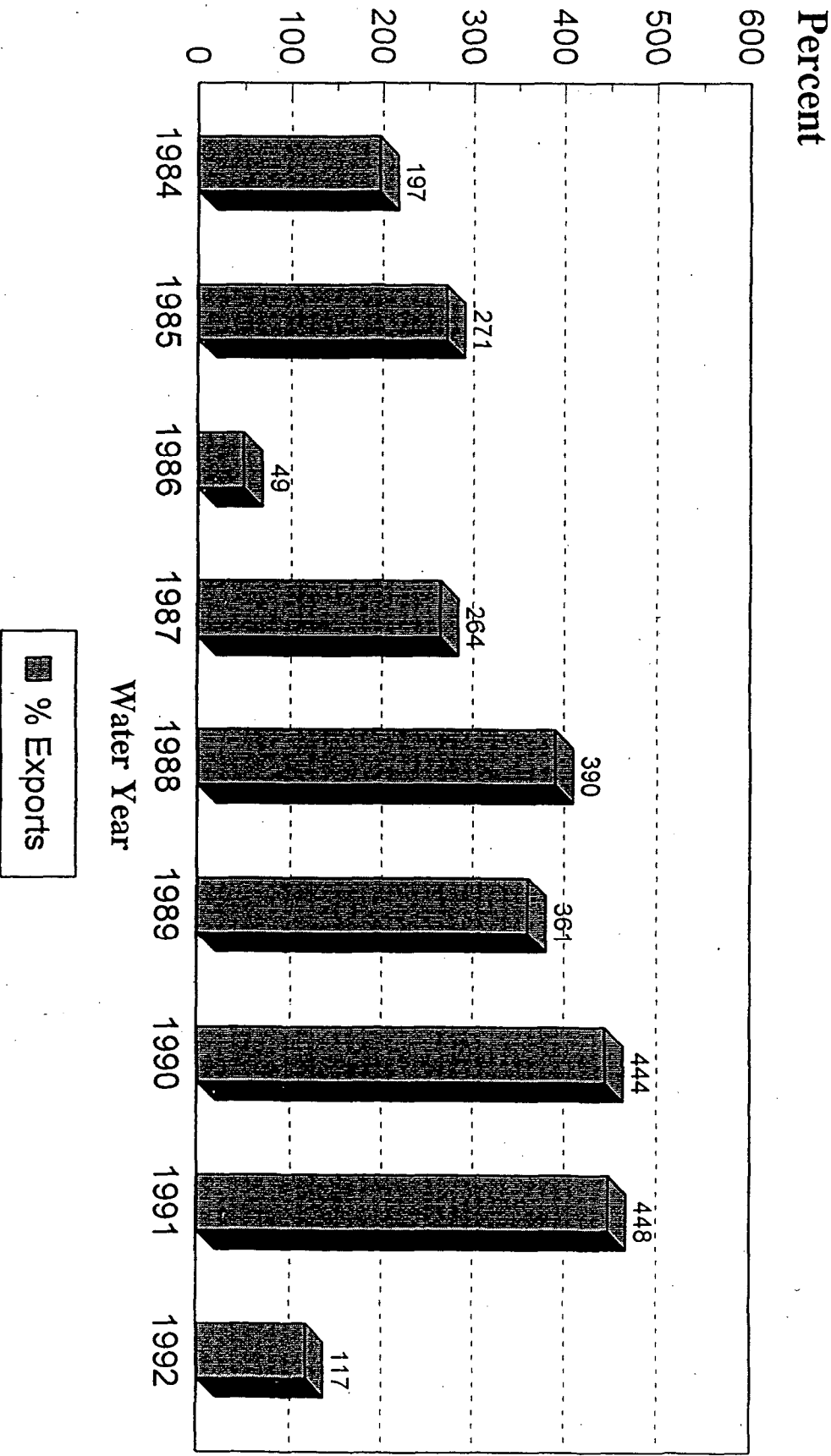
Attachment B and in footnotes 10 and 11 of Attachment B, limits the combined export rate to 1,500 cfs or 100 percent of the average San Joaquin River flow at Vernalis, whichever is greater. This export limit is further limited so that combined exports in any event will not exceed the overall limit during February through June of 35 percent of Delta inflow. San Joaquin believes that this limit allows an increase in exports from the southern Delta. To the contrary, this reduces exports when it is in effect.

First, this is a new limit. Previously, the export rate could exceed the rate of flow in the San Joaquin River at Vernalis during this period. Figure 1 shows that during the reference period of 1984 through 1992, the exports in the southern Delta exceeded 100 percent of the Vernalis flow during the April 15 to May 15 period in all except one year, which was a wet year. Figure 1 shows that exports regularly have exceeded 250 percent of San Joaquin River inflow and in two years exceeded 400 percent. Further, Figure 2 shows that under modeled conditions using the 1984 through 1992 hydrology and existing water supply demands during April and May when the 100 percent limitation is in place, exports under D-1485 would be higher except in May of 1986 than they would be under the new standards (preferred alternative) with the increased Vernalis flows.

Second, some of the water that will be exported in the southern Delta during this period will come from other sources. For example, modeling studies indicated that when Sacramento River flow is 15,000 cfs; San Joaquin River flow is 5,000 cfs; and export pumping is 9,000 cfs (180 percent of San Joaquin River flow), approximately 75 percent of the water exported originates in the San Joaquin River. (SWRCB-4, Item 142: Miller, Dr. William J., "Preliminary Analysis of Transport in the Sacramento-San Joaquin Delta.") Thus, the full flow of the

FIGURE 1

Average Historical Exports as a Percent of Vernalis Flow April 15 through May 15 Water Years 1984-1992



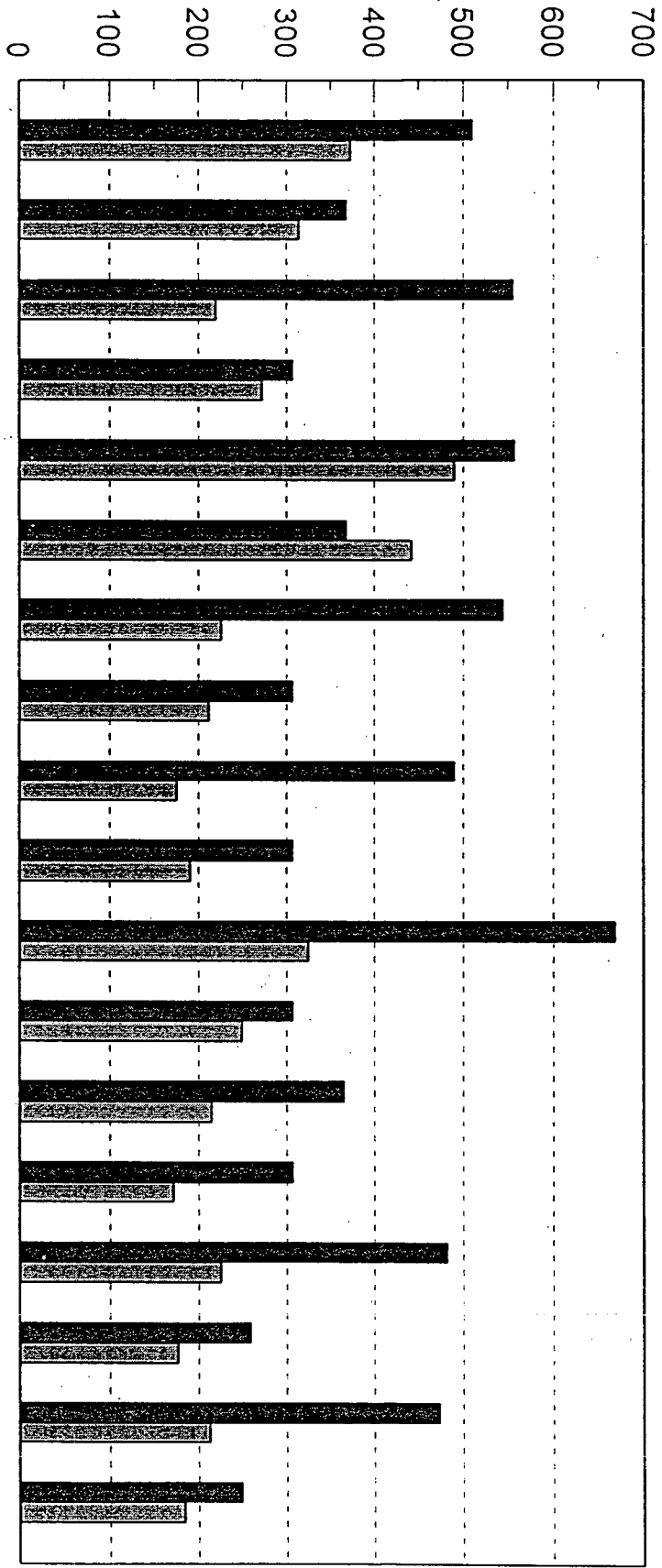
Source: DAYFLOW
Percent exports is defined as the sum of SWP and CVP pumping divided by San Joaquin River flow at Vernalis, times 100

FIGURE 2

AVERAGE MODELLED EXPORTS IN APRIL AND MAY

Water Years 1984-1992

Exports (TAF)



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San Joaquin River would not be exported during this period in any event. The 100 percent figure is merely a way of measuring the exports to ensure that exports are not so high that they will take too many young fish. San Joaquin apparently assumes that, like water in a stream system, the water at the export pumps is all from one source. Because the export pumps are in a tidal estuary, however, the waters from various sources are mixed at the pumps.

5.3.3 General Allegations of Harm

Next, San Joaquin argues that consolidation of the points of diversion and other changes will cause an increase in rates of diversion resulting in adverse effects on the quality of water used by San Joaquin's members. San Joaquin does not explain how this will occur; nor does it cite any evidence in the record to this effect. The record shows that the authorized changes will not have these effects. It is possible, however, that changes instituted by the USBR to comply with the Endangered Species Act could have these effects. The SWRCB did not require, in Order WR 95-6, the instream flows at Vernalis that USBR independently is providing for fish. Apparently San Joaquin believes that these flows may deplete New Melones Reservoir early in the year, leaving inadequate water for salinity control later. As explained in Order WR 95-6, the USBR is not excused from meeting the agricultural salinity requirements at Vernalis. Consequently, if the USBR fails to manage its New Melones water supply adequately to ensure that the salinity requirements will be met, San Joaquin's members could file a complaint with the SWRCB alleging permit violations.

5.3.4 Changes for Striped Bass, Suisun Marsh, Delta Cross Channel Operations, and Southern Delta Agriculture

Next, San Joaquin alleges that Order WR 95-6 replaced the water quality standards for striped bass spawning and for Suisun Marsh protections with higher standards which San Joaquin apparently

believes will put more demand on the waters of the San Joaquin River. Actually, the new Suisun Marsh standards require less salinity protection than the previous standards. Also, the water that flows into Suisun Marsh at Montezuma Slough is primarily from the Sacramento River, and the flows in the San Joaquin River are not a significant source of salinity control for the Suisun Marsh. The new striped bass standard requires a lower (better) salinity than previously, but this standard almost always will be met by the agricultural salinity standard for that time period.

Next, San Joaquin contends that the change in the standard for Delta Cross Channel gate operation will cause deterioration in water quality at Vernalis. This is physically impossible. The Delta Cross Channel is in the northern Delta, connecting the Sacramento River and the Mokelumne River. Vernalis is on the San Joaquin River at the point where it enters the southern Delta. San Joaquin also repeats its contention at this point that the changes in export limits will result in additional exports. As explained above, this contention is incorrect.

Finally, San Joaquin contends that the change in the Vernalis agricultural salinity standard from that in condition 5 of Water Right Decision 1422 will cause the release of water from New Melones rather than taking this water from exports, reducing the quantity of water available for CSJWCD and SEWD to buy from the USBR. This contention is erroneous. The change merely improves the standard when improvement is needed for crops and reduces it when better quality is not needed for crops. The net water supply impact of this change is zero. Further, water for salinity control has been provided from New Melones Reservoir since New Melones Reservoir commenced operating. Consequently, this change causes no added burden on New Melones Reservoir.

5.4 Allegations of Conflicts of Interest

San Joaquin contends that the SWRCB has denied it due process by having ex parte contacts with the parties to the Principles for Agreement which was executed December 15, 1994. The Principles for Agreement is a recommendation to the SWRCB for adoption of a particular set of water quality objectives and implementation measures for what became the 1995 Bay-Delta Plan. The Principles for Agreement was considered as evidence in a hearing on a draft of the 1995 Bay-Delta Plan, and the plan incorporates many of the features of the Principles for Agreement.

The Principles for Agreement also discusses changes in water rights to implement the Principles for Agreement or to implement the water quality control plan. San Joaquin's members are concerned that the SWRCB may believe that it is bound by the Principles for Agreement because the California Secretary for Environmental Protection signed it, and the SWRCB is under the California Environmental Protection Agency. This fear is unfounded. The SWRCB's members serve four-year terms and can be removed from office only by the Legislature and only for dereliction of duty, corruption, or incompetency. Further, the SWRCB is an independent agency and is not bound by law to follow the direction of the Secretary for Environmental Protection.

The SWRCB in its water right hearing received evidence regarding the Principles for Agreement along with other evidence. In adopting Order WR 95-6, the SWRCB was not bound by the Principles for Agreement. For example, the SWRCB selectively approved only those changes which it found were appropriate and did not harm any interests. Further, it approved the changes for only a limited period.

While some of the wording in the Principles for Agreement may appear to direct the substance of the SWRCB's actions, the SWRCB believes this is merely an unfortunate choice of words. The

parties to the Principles for Agreement had no authority to control the actions of the SWRCB. Also, most of the directive language in the Principles for Agreement is procedural, and is copied from the Framework Agreement which was executed in June and July 1994. The Framework Agreement sets a schedule for agency actions directed toward resolving Bay-Delta problems. The SWRCB signed the Framework Agreement, agreeing to proceed on a time schedule but not agreeing to the outcome. SWRCB's procedures in the Framework Agreement are the same procedures the SWRCB routinely uses.

Some staff of the SWRCB attended some of the negotiations or meetings that led to the Principles for Agreement. During the negotiations the Executive Director, the Assistant Division Chief for the Division of Water Rights, and the Chief of the Bay-Delta Unit attended a few meetings and provided institutional information. At the end of the negotiations, these staff members attended some meetings to listen to the parties go through their list of agreed points. During the negotiations, no staff member supported a particular interest, although staff did at times provide input on procedural matters and reported on discussions between the staffs of the SWRCB and the U.S. Environmental Protection Agency on related issues that were not the subject of negotiations. Although San Joaquin implies that staff contacts with the negotiations were not disclosed prior to the water right hearing that led to Order WR 95-6, the Chairman of the SWRCB in fact disclosed the existence of the staff contacts at the beginning of the hearing on April 18, 1995. Additionally, it was announced during the public workshops held in the fall of 1994 that the staff would maintain contact with any parties who sought to negotiate agreements. San Joaquin's members participated in the workshops and could have raised their objections when this was announced or at any time after it was announced. Further, there is no legal prohibition against the staff contacts since the staff did not make the decision in Order WR 95-6 and did not

communicate the substance of the information received to the members of the SWRCB. The Board members were not involved, even indirectly, in the negotiations.

At the hearing, the Chairman of the SWRCB also pointed out that no member of the SWRCB had attended any meeting in which the Principles for Agreement was negotiated. The members of the SWRCB are the sole decisionmakers with respect to Order WR 95-6. San Joaquin nevertheless now assumes and argues that members of the SWRCB engaged in ex parte contacts.

The SWRCB through its attorneys has provided CDWA, a member of San Joaquin, access to all nonprivileged public documents in the possession of SWRCB staff that relate to negotiation of the Principles for Agreement. CDWA's attorney viewed these documents on May 31, 1995 and requested copies of some. These documents are in the files of the SWRCB, and the SWRCB's staff entered the files in evidence at the start of the hearing. SWRCB's attorney provided the copies to CDWA's attorney by letter dated June 6, 1995. CDWA's attorney distributed copies of the documents to all parties by letter dated June 7, 1995 and distributed copies to participants at the Board meeting on June 8, 1995. CDWA's attorney additionally commented on the documents at the June 8, 1995 Board meeting.

The members of the SWRCB pointed out at the Board meeting when they adopted Order WR 95-6 that none of them had any ex parte contacts regarding the Principles for Agreement. While CDWA's attorney pointed out that a few documents related to the negotiations apparently were directed to the Chairman during the negotiations, the Chairman specifically pointed out at the Board meeting that he did not read the documents. Other Board members likewise pointed out that they were isolated from the negotiations on the Principles for Agreement.

Finally, San Joaquin says that at the Board meeting for adoption of Order WR 95-6, one of its members requested a hearing on the impartiality of the SWRCB members and staff, and was denied. The request at the Board meeting was untimely. With diligence, San Joaquin's member, CDWA, could have obtained all of the information on this subject before the Board's hearing which commenced on April 18, 1995. CDWA could then have presented this material as evidence and have received a ruling based on the evidence. Also, only certain staff had contacts with the negotiations, and since there is no legal impediment to the staff having the limited contacts that they had, a hearing on their involvement would not show any bias in the decisionmaking.

5.5 Allegations of Vagueness

Lastly, San Joaquin suggests that it has been denied due process because of vagueness in Order WR 95-6. San Joaquin's contention is based on SEWD's apparent confusion during the hearing over the parameters of the change in points of diversion requested by DWR and USBR and the effects of the proposed change. The difficulties arose when expert witnesses explained the effects of the proposed change and variations of the change. Even though SEWD may have had difficulty understanding the evidence, the SWRCB, which is required to judge the evidence, has expertise in this area and understands both the request and the evidence that was provided. As a result of reviewing the evidence and the effects of the change, the SWRCB prepared a change which, while it is within the scope of the requested change, is considerably narrower. Based on the data and the analytical methods presented in the hearing, the SWRCB determined that the approved change could not adversely affect the environment or harm other legal users of water.

At the Board meeting, SEWD made further protestations of noncomprehension and now alleges confusion regarding the approved change stemming from comments at the Board meeting. Apparently

SEWD's confusion arose because the findings in Order WR 95-6 point out that the petition, if approved as filed, would have allowed an increase in export yield from the southern Delta. Because the petition could have allowed an increase in export yield, the SWRCB only partially approved the petition, narrowing its approval to the point that there can be no increased yield as a result of Order WR 95-6. In fact, the change in point of diversion is simply a change in the language of Term 3 of D-1485 to update it to the current standards. This is in effect a denial of this part of the change petition. SEWD ignores this. At the Board meeting, SEWD asked for further explanation and the SWRCB's staff explained again that the order would cause no change in water supply. The meaning of the DWR's and the USBR's request is no longer an issue.

6.0 ISSUE RAISED BY PORGANS

Porgans alleges that the order is not supported by substantial evidence, but he does not specify what part of the order lacks factual support. Nor does he specify the part or parts of Order WR 95-6 to which he objects. Because of its lack of specificity, Porgans' petition is denied. Nevertheless, the following discussion is included in this order to clarify the order with respect to Porgans' concerns.

Porgans' comments in Attachment B of his petition for reconsideration address effects on striped bass. The SWRCB assumes that Porgans is objecting to adverse effects he believes Order WR 95-6 will have on striped bass. Porgans' concern apparently is based on Figures VIII-37 and 38 in the ER. The third and fourth bars in Figure VIII-38 show a lower striped bass population under the preferred alternative (580,000) than would occur if the SWRCB took no action to change D-1485 (620,000). This is the result of an error in preparing Figure VIII-38. The third bar, showing the striped bass population if there were no action to change D-1485, should show 560,000 striped bass using

the calculation method that was employed. This is consistent with the text and graphs, which together indicate that the preferred alternative with a 1995 water supply demand level will produce striped bass populations which are essentially the same as D-1485 with a 1995 water supply demand level. The method used for calculating the future change in striped bass population is the best method available to the SWRCB, but like all models this method cannot predict the future population changes exactly. The calculation methods are explained in the text on pages VIII-34 and 35.

The ER is supported by the available evidence and supports the changes in the water rights of the DWR and the USBR that were approved in Order WR 95-6. Porgans has not established any deficiency in the evidentiary support for Order WR 95-6.

Apparently Porgans' principal difficulty is with the comparison of the preferred alternative to the 1984 through 1992 reference period. The ER compares modeled conditions under the preferred alternative to the actual hydrology and aquatic resources conditions from 1984 through 1992. Additionally, the ER compares modeled conditions under the preferred alternative to modeled conditions under D-1485 conditions, using either the 1984 through 1992 hydrology or the 1922 through 1992 hydrology and assuming that the 1995 water supply demand level exists. Compared with keeping D-1485 in effect, the preferred alternative has no adverse effect on aquatic resources in the Delta.

7.0 CONCLUSIONS

1. A certified program analysis prepared under Public Resources Code section 21080.5 can properly be used as environmental documentation for subsequent actions that implement the certified program action.

2. The environmental report for the 1995 Bay-Delta Plan is adequate to serve as environmental documentation for the action taken in Order WR 95-6.
3. The SWRCB by adopting Order WR 95-6 did not violate any provisions of the California Water Code directed toward protection of the San Joaquin River, protection of areas where water originates, or protection of the Delta.
4. No legal user and no entity that claims to be a legal user of the water involved will be injured by the SWRCB's partial approval of the DWR's and the USBR's change petition.
5. On an average annual basis, Order WR 95-6 will not result in an increase in exports of water from the southern Delta compared with exports under D-1485.
6. Suisun Marsh protections do not affect San Joaquin's members.
7. Delta Cross Channel gate operations do not affect water quality at Vernalis.
8. The change in the agricultural salinity standard for the New Melones project will not change the amount of water dedicated to this use from New Melones.
9. San Joaquin's members were not denied due process in the proceedings leading to Order WR 95-6.
10. Striped bass populations will be essentially the same under Order WR 95-6 in comparison to the striped bass populations that would exist if D-1485 were to remain in effect.
11. The rights of entities who purchase water from the USBR are no greater than the water rights of the USBR under its water

right permits. Further, a water right permittee is not required to appropriate all of the water authorized for appropriation under its permit.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 6, 1995.

AYE: John Caffrey
Mary Jane Forster
James M. Stubchaer
John W. Brown

NO: None

ABSENT: None

ABSTAIN: Marc Del Piero



Maureen Marché
Administrative Assistant to the Board

STATE WATER RESOURCES CONTROL BOARD

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DIVISION OF WATER RIGHTS

P.O BOX 2000, Sacramento, CA 95812-2000

**OCT 4 1995**

Interested Parties:

CORRECTION TO WATER RIGHTS ORDER 95-14

An error on page 22 of Water Right Order 95-14, which denied petitions for reconsideration of Water Right Order 95-6, has been brought to our attention. Pursuant to Water Code Section 1359 and the authority delegated me under Resolution 95-36 (paragraph 3.1.6), I am correcting this oversight. The second sentence in the last paragraph on page 22 ends "...approximately 75 percent of the water exported originates in the San Joaquin River." It should read "...approximately 75 percent of the water that originated in the San Joaquin River is exported."

Attached is a revised page 22 to replace the one in your copy. I hope this transposition of words has not caused any inconvenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edward C. Anton".

Edward C. Anton, Chief
Division of Water Rights

Attachment

Attachment B and in footnotes 10 and 11 of Attachment B, limits the combined export rate to 1,500 cfs or 100 percent of the average San Joaquin River flow at Vernalis, whichever is greater. This export limit is further limited so that combined exports in any event will not exceed the overall limit during February through June of 35 percent of Delta inflow. San Joaquin believes that this limit allows an increase in exports from the southern Delta. To the contrary, this reduces exports when it is in effect.

First, this is a new limit. Previously, the export rate could exceed the rate of flow in the San Joaquin River at Vernalis during this period. Figure 1 shows that during the reference period of 1984 through 1992, the exports in the southern Delta exceeded 100 percent of the Vernalis flow during the April 15 to May 15 period in all except one year, which was a wet year. Figure 1 shows that exports regularly have exceeded 250 percent of San Joaquin River inflow and in two years exceeded 400 percent. Further, Figure 2 shows that under modeled conditions using the 1984 through 1992 hydrology and existing water supply demands during April and May when the 100 percent limitation is in place, exports under D-1485 would be higher except in May of 1986 than they would be under the new standards (preferred alternative) with the increased Vernalis flows.

Second, some of the water that will be exported in the southern Delta during this period will come from other sources. For example, modeling studies indicated that when Sacramento River flow is 15,000 cfs; San Joaquin River flow is 5,000 cfs; and export pumping is 9,000 cfs (180 percent of San Joaquin River flow), approximately 75 percent of the water that originated in the San Joaquin River is exported. (SWRCB-4, Item 142: Miller, Dr. William J., "Preliminary Analysis of Transport in the Sacramento-San Joaquin Delta.") Thus, the full flow of the