SAVE THE AMERICAN RIVER ASSOCIATION, INC.
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March 6, 1995

Mr. John Caffrey, Chairman
State Water Resources Control Board
P.O. Box 100
Sacramento, CA. 95812-0100

Subject: Proposed Water Quality Control Plan for the San Francisco Bay, Sacramento/San Joaquin Delta Estuary, Draft of Dec. 1994, comment date extended to March 10, 1995.

Dear Chairman Caffrey:

Enclosed are 20 copies of Save the American River Association's comments on the Draft Plan. This letter and the attached Comments are for inclusion in the record of the February 23, 1995 hearing on subject.

Save the American River Association (SARA) is a grass roots organization, established in 1961 to promote the protection, conservation and restoration of the lands, waters and resources of the Lower American River and Parkway. SARA was a co-plaintiff in the lawsuit, Environmental Defense Fund, et al. v. East Bay Municipal Utility District, to protect the waters, fish resources and aquatic ecosystem of the Lower American River. Of extreme concern is the instream regimen and environment required to conserve, protect and restore our native chinook salmon and steelhead trout resources. This concerns extend to all resources, uses and values of the Lower American River, the Sacramento-San Joaquin Delta and San Francisco Bay protected by the public trust doctrine.

SARA understands that the responsibilities of this Board are held as a sacred trust and that one of its paramount duties is to exercise public trust protection over the State's waters and the quality of those waters as both an aquatic environment (fish habitat) and a water supply.

SARA learned from the EDF v EBMUD proceedings that the vagaries of the flow regimen affects all the renewable resources, beneficial uses and ecological values of the Lower American River. The quality of the flow regimen (the amount and timing of flows, temperature and chemical parameters) impact the aquatic ecosystem and affect its ability to produce and maintain fish populations and to keep the aquatic ecosystem in good condition.

SARA supports the flow regimen contained in Judge Richard Hodge's decision of 1990 to protect the waters, fish resources and aquatic ecosystem of the Lower American River (Environmental Defense Fund, et al. v. East Bay Municipal Utility District. Why hasn't the Judge Hodge flows been installed as interim flows for the Lower American River?

SARA understands that the Lower American River, the Sacramento and San Joaquin Rivers, and the Bay/Delta are an integral part of the same system. The Bay or Delta components and their associated resources, can not in any logical way, be separated from its tributary ecosystems and associated resources without having impacts that will spread throughout the entire system.

SARA, as a public trust management advocate, is having trouble reconciling what this Board is doing with what SARA believes you are supposed to be doing. SARA has some questions and hopes you have answers. In addition changes to the proposed Plan are being made almost daily, making the Draft Plan and its components a moving target for analysis.

SARA believes that the proposed Water Quality Control Plan for the Bay-Delta, as presented, is incomplete. The proposed plan is not ecosystem based management, but water / Delta management in the hopes of protecting 2 species on the FESA list. The measures and actions necessary to protect public trust interests throughout the Delta Estuary are lacking or insufficient. The impacts to existing reservoirs are lumped together and not identified. The impacts to tributary systems and their resources, uses and values are not identified. In addition tributary inflow regimens needed to conserve, and assure the restoration and protection of fish resources and water quality have yet to be established. In summary measures to protect and assure sustainability of the Bay-Delta ecosystem, its resources and other interests covered by the public trust are either lacking, are insufficient or incomplete or are not consistent or do not meet or conform to:

* NEPA or CEQA review process and documentation. For example, what is the baseline condition? This must be carefully identified and spelled out. This is important because the baseline becomes the benchmark against which future actions and alternatives are measured.

* The goals of the Federal Clean Water Act, to restore and maintain the chemical, physical and biological integrity of the Nation' waters including anti-degradation of existing water quality or uses.

* Fish and Game Code Section Number 5937, to keep in good condition fish, other aquatic life and the aquatic ecosystem downstream from a dam, and the findings of California Trout, Inc. v. State Water Resources Control Board, (207 Cal. App. 3d 585-1989);

* The principle findings regarding public trust protection of National Audubon Society v. Superior Court (the Mono Lake Decision) California Supreme Court 33 Cal.3d 419 - 1983,

* The points and findings of the United States v. State Water Resources Control Board (Racanelli Decision), including no party has a vested right to appropriate water in a manner harmful to interests protected by the public trust and the Boards water quality powers must be applied to all users and appropriators of water (227 Cal. Rptr. 161- 1986,

* The intent of the principles and findings as discussed in the State Water Resources Control Board's Mono Lake Basin Water Right Decision 1631 - 1994

The Draft Environmental Report (DER) tries to justify a pre-selected action. The DER should contain discussions of various alternatives that meet NEPA and CEQA requirements.

SARA has continuing concerns and many unanswered questions. SARA believes that the aquatic systems tributary to the Delta (like the Lower American River) and the Delta itself and associated trust resources will continue to suffer as the aquatic ecosystem is export to the San Joaquin Valley;

* Until the current philosophy that attempts to manage anadromous fish resources, the native runs of salmon and steelhead trout, is changed to one predicated to managing for these species;

* Until greater constraints are placed on out of basin exports;

* Until there is greater respect for area of origin resources, use and values;

* Until all streams and water right holder contribute their fair ecological share of the water required to meet stream regimens and environmental needs (including water quality); and

* Until success of any Delta Water Quality Control Plan is measured in restored aquatic ecosystems, resources, and water quality and not on acreage irrigated or water exported to the San Joaquin Valley.

SARA's concerns are detailed in its attached Comments regarding the Proposed Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta Estuary (Bay Delta). SARA can also make available to you, "The Lower American River, The Public Trust and In Good Condition, A Discussion prepared by Felix E. Smith for the California Sportfishing Protection Alliance, June 1994, which details impacts to trust interests of the Lower American River.

SARA supports efforts to conserve and restore the renewable resources, uses and values of all rivers and streams tributary to the Sacramento/San Joaquin Delta and San Francisco Bay.

SARA appreciates the opportunity to provide these comments.

Respectfully submitted,

Frank F. Cirill

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Attachments 20 copies

cc:interested parties

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SAVE THE AMERICAN RIVER ASSOCIATION, INC.
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Save The American River Association

Comments Submitted on
Proposed Water Quality Control Plan
for the
San Francisco Bay / Sacramento-San Joaquin
Delta Estuary (Bay-Delta)
Dated Dec. 1994

California at Statehood became the owner, in its sovereign capacity, of its water and to its waterways which were covered by the tide and all those non-tidal waterways which were susceptible of navigation or were navigable in fact. This includes rivers like the Lower American River, places like Mono Lake and its tributaries, and the Bay-Delta and its tributary systems.

The responsibilities of the State Water Resources Control Board are held as a sacred trust. This Board, in carrying out its responsibilities is supposed to gather the facts under oath and then formulate the Plan based on those facts. The proposed Plan in addition to meeting the requirements of the Porter-Cologne Water Quality Control Act must meet the principle findings of case law including the Mono Lake, Cal Trout and the Racanelli decisions and of course the concepts of the public trust. Therefore both the quality and quantity of the state's fish habitat are under public trust protection exercised by this Board. Also this Board under the California Environmental Quality Act, is required to give major consideration (not merely balancing) to the preservation of California's fishery resources in its regulatory actions (Attorney General Opinion No SO 73-44, Nov. 14, 1974).

One of this Board's paramount duties is to exercise public trust protection over the State's waters / aquatic ecosystems. Public trust protection has roots that date back to Roman Emperor Justinian, 529 to 534 A.D. The public trust doctrine is both active and administrative requiring the trustee, not only to protect the trust, but to promote it as well. Today, the public trust is recognized as more than the affirmation of the state's power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands surrendering that right of protection in rare cases when abandonment of that right is consistent with the purposes of the trust (National Audubon society V. Superior Court (33 Cal. 3d 419, 189 Cal Rptr. 346 -1983).

Attachment to Save The American River Association, March 6, 1995 letter to the State Water Resources Control Board.

The Racanelli decision of 1986 (US v. Stat Water Resources Control Board, 227 Cal. Rptr. 161 - 1986) found this Board's decision D-1485 wanting. This decision did not adequately protect the Delta, its resources, uses and values at the time the State issued D-1485 in 1978. Clearly the level of protection for Delta and its trust assets must be weighed against the level of export demand that occurred during the period 1967 through 1978. A couple of key points of Racanelli are that; no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust, and the Board's powers to protect water quality must apply to all users and appropriators of water.

Fish and Game Code Section 5937 states in part "The owner of any dam shall allow sufficient water at all times to pass downstream to keep in good condition any fish that may be planted or exist below the dam". This must include the conservation and protection of the biological, physical and chemical parameters of the Bay-Delta ecosystem necessary to support self-maintaining fish populations, uses and other values throughout the entire length of controlled tributaries, into the Delta and as Delta outflow.

Given the understanding of the Attorney General opinion, Audubon, Racanelli and F&G Code Section 5937, when one appropriates water it must be accomplished in a manner consistent with ecosystem renewability and resource protection. Therefore the greater the certainty that actions and measures instituted by an appropriator or discharger will or do work to protect the aquatic ecosystem and associated trust interests, the greater the certainty of the water supply, its use or discharge permit.

The report "California's Rivers, A Public Trust Report" (State Lands Commission 1993) examined the status of and trends affecting rivers of the state. The report clearly illustrates that the health of California's rivers is stressed and that their viability as sustainable ecosystems is in peril.

This Board's Water Quality Assessment Report of April 4, 1990 indicates that 100 miles of the San Joaquin, 48 miles of the Stanislaus, 60 miles of the Merced and 50 miles of the Tuolumne plus 14 miles of Mud Slough and 15 of Salt slough totaling 287 miles of waterway have seriously impaired water quality impacting fish habitat, fish populations, the fish themselves and other beneficial uses. The SWRCB's Water Quality Monitoring Report No. 82-1 TS, July 1982, describes water quality problems in this same area in 1980 & 81. Impacts include low stream flow, agricultural drainage and wastewater carrying salts, trace elements that can accumulate to toxic levels in the food chain, sediment, herbicides and pesticides some presently in use and some cancelled long ago. Despite these known impacts the degradation continued. This Board has not taken actions necessary to correct the problems in these waterways. The lower San Joaquin River, Mud and Salt Sloughs are the defacto San Joaquin Valley drain. The water quality standards

established for the lower San Joaquin River in the Basin Plan are meaningless in the face of what has happened to water quality and beneficial uses of that River. In 1985 this Board stated if an irrigator fails to implement adequate controls over his drainage, continued irrigation could constitute an unreasonable use of water (WQ 85-1). Also see People v. Gold Run Ditch and Mining Co. 4 Pac. Rpt p. 1152 - 1884 and People v. Truckee Lumber Co. 116 Cal. 397, 48 Pac. Rpt 374 - 1897.

If this Board can't improve the quality of the above waters with flow releases and controls on drain and wastewater discharges, how serious can this Board be about improving water quality and the sustainability of the entire Delta and its resources? Will the proposed plan improve or exacerbate these problems?

The Need for Plan Update

What has happened since the Racanelli Decision (1986) relative to trust resources and water exports. Near record and record exports were pumped out of the Delta during years that were mostly below normal and dry water years with 1986 being a wet year. During these same years saw stream conditions racked and the anadromous fish populations plummeted at the hands of CVP and SWP operators and the massive water exports. The consequences of this water management / export scheme are that several species of the people's fish property are at very low numbers, some are candidates for listing under the ESA, one is listed as Endangered (winter-run) up graded from Threatened and one is listed as Threatened (Delta smelt). The longfin and the splittail became candidates for listing under the FESA. The Sacramento populations of spring-run, the fall-run chinook of the San Joaquin River can be called commercially extinct. The populations on these runs are low enough to warrant FESA protection. Chinook salmon smolts suffered heavy loses both direct and indirect in the Delta. The Fall-run adults from the smolts of 1988, 89 and 90 did not meet escapement goals (122,000) 2.5 years later 1990, 91 and 92 (PFMC Dec. 1994) and this was with harvest restrictions in place on the commercial fishery.

All this happened right under the noses of this Board and water managers and with considerable lead time. There was little change made voluntarily in the operation of the SWP or the CVP to protect the people's fish trust. It took outside entities (public interest groups) and the threat of lawsuits to get the species listed and to change CVP/SWP operations. Changes were fought by CVP/SWP managers / operators and their agribusiness customers.

The Proposed Plan

The purpose of this proposed Plan is to establish water quality measures sufficient to protect public trust and beneficial use (both public and private) of the Bay-Delta Estuary. However the

proposed plan is based on exporting a considerable amount of water to the semi-desert and problem soils of the San Joaquin Valley.

Before there can be any understanding of the various alternatives, there must be what is called "baseline conditions". What aspects comprise the baseline conditions must be spelled out. The baseline / no action level of protection becomes the benchmark against which impacts of future actions, like the CVPIA and any SWRCB decisions, are measured.

The Racanelli decision of 1986 found D-1485 (1978) wanting. The Federal EPA found Draft Decision 1530 lacking sufficient protection for public trust resources, uses and values. During this time Biological Opinions for the winter-run chinook salmon and for the Delta smelt were issued with their restrictions put in place. EPA published its draft standards in January 1994 and published the final rule in January 24, 1995. The baseline conditions, by default, must include the best restrictions of D-1485, of Draft D-1530 and the restrictions of the FESA Biological Opinions for the winter-run salmon and the Delta smelt, take limits and other terms and conditions agree to protect trust interests. As indicated in Racanelli the water quality protection necessary to protect all beneficial uses and the aquatic ecosystem can be met by reduced pumping out of the Delta, with releases from storage, reducing upstream diversions, natural inflow and other measures or combination of actions.

The Sacramento and the San Joaquin Rivers, the Delta and the Bay are an integral part of the same system. The Bay or Delta components and associated resources <u>can not</u> in any logical way, be separated from its tributary ecosystems and associated resources without impacts that will spread throughout the entire system.

The proposed Plan, however, looks like a water export plan, not a plan to protect the public trust resources, uses and values of the Delta, tributary waters and ecosystems as indicated in Racanelli.

On the San Joaquin system storage facilities, during most years, completely control the flows at Vernalis exclusive of agricultural drainage and wastewater. The DRAFT Plan proposes to allow a pumping rate of 1500 to 2000 cfs or 100 percent of the flows of the San Joaquin River at Vernalis under certain conditions. The actions, measures or streamflows necessary at Vernalis to protect water quality, beneficial uses and renewable resources of the lower San Joaquin River and south Delta have not been established. Why? What are the expected impacts to tributary ecosystems, both reservoir storage and instream flows, on the downstream anadromous fish resources while meeting Delta needs?

As a practical matter and a matter of public trust, no diverter or diverters should be allowed to pump/divert 100 percent of the flows of any stream or river at any time. Verification of this is

the recent Board Decision 1631 ordering the City of Los Angeles' Department of Water and Power to release water down tributaries to Mono Lake to restore instream public trust values and to protect the Mono Lake ecosystem.

There should be little doubt that if the CVP/SWP pumps draft flows equal to the Vernalis flows, the water quality and resources of the San Joaquin River and tributary ecosystems will continue to be impacted. This is contrary to the concepts of public trust protection in the Attorney General opinion, Audubon, Racanelli and F&G Code 5937. Several reports and letters (including NMFS's letter of October 31, 1994 to CCWD) show that San Joaquin adult salmon escapement is significantly correlated to the exports and outflow conditions during smolt outmigration 2 and 1/2 years earlier. The greater the San Joaquin River outflow the better the returns are 2 and 1/2 years later. The same could be said for Sacramento River chinook salmon.

On the Sacramento side, there is one thing we should have learned in the last 6 to 8 years. And that is, even with all the water storage facilities, with water imported from the Trinity River and the with the Federal ESA protection measures for the winter-run chinook salmon and Delta smelt in place, and the efforts at adaptive management of the Sacramento River and Delta ecosystems by the SWP / CVP operators still resulted in further degradation of both tributary and Bay-Delta ecosystems and resources. The U.S. Fish and Wildlife Service's report of Nov. 26, 1985 to USBR Sacramento predicted what would happen under such a management scenario and recommended mitigation measures. There has been little recognition of impacts and recommended mitigative measures have been ignored. See EDF v. Andrus 569 F.2d 848, 9th Cir 1979.

Using conservative export data from CCWD's Nov. 12, 1994 letter to the Department of the Interior, the yearly export percent for 1987 was 40 percent, but over 55 percent July-December with a high of 66 percent in September and a low of 21 percent in March and April. In 1988 exports averaged 53 percent with 72 percent in Feb. and 36 in January. In 1989, 71 percent was the high with an average of about 46 percent and a low of 21 percent in March and April. In 1990 the months of Feb, March and April had export percentage of 67, 69, and 69 respectively with the low of 26 percent. And the CCWD's data does not include figures for Delta consumption. This amount could be 1 to 1.5 MAF. Without this information (Delta consumption) the Delta outflow percentage is overestimated while the percentage pumped/exported is underestimated. Anadromous fish need water for migration, not percentages of water.

The reference period in the Draft Environmental Report (DER) is 1984 to 1992 (page VIII-1). This period was chosen because it contained enough water years to capture biological and hydrological variables (2 wet, 3 dry and 4 critical years for the

Sacramento Basin, and 1 wet, 1 above normal, 1 dry and 6 critical years for the San Joaquin River Basin). The years used in the CCWD analysis covered a portion of the core years. During these same years, near record and record (6.7+ MAF in 1989) amounts of water were exported from the Delta. The CVP averaged about 3.27 MAF while the SWP deliveries averaged 2.762 MAF for the years 1987 to 1990 which were classed as dry and critical. According to V-10 the CVP pumped 2.8 MAF and the SWP pumped 3 MAF in 1989. The amount of CVP export should include the CCWD deliveries and the CVP water pumped by the SWP's Banks Pumping Plant. For example CVP Tracy facilities pumped 2.869 MAF (USBR Daily discharge of Tracy PP ending Sept 1989) while the Banks pumping .373 MAF of CVP water (DWR 8-31-1990). The SWP diversion totals must also include the North Bay diversion amounts.

The bottom line is that more water and greater percentages of export from the Delta occurred on average during the core period (1984 - 1992) than at any time before. Peak exports occurred in 1989. During this core period populations of chinook salmon (all races), steelhead trout, American shad and striped bass plummeted to all time lows as massive pumping became a year long event fed by manipulating upstream reservoirs to obtain the desired water.

The proposed Draft Water Quality Control Plan for the Bay/Delta provides considerable certainty (8 on a scale of 1 to 10) for delivering significant amounts of water to San Joaquin Valley agricultural interests. They would get their water by drafting 35 to 65 percent of present Delta inflow. This is after upstream depletions have occurred including diversion to storage, direct diversion, Delta consumption and out-of-basin transfers.

What protection did the people's aquatic ecosystem and associated public trust assets gain? How did our magnificent native chinook salmon and steelhead trout benefit? Based on discussions with biologists who were willing to talk "off the record" and from other sources, it looks like more poor conditions for most fish of concern and for the central Delta and tributary ecosystems. Based on a scale of 1 to 10, the flow and habitat protection measures would be a 4 or 5 at best. For example:

Winter-run chinook salmon - Sacramento River. Will continue to lose out. Needed protection can be provided through greater percentage outflow (more CFS) during out migration November through at least April (NMFS Oct. 1994). They also need greater protection like that provided by the 1993 Biological Opinion, a 1 percent take limit. This run was estimated at 117,800 fish in 1969 and is less than 500 fish today. This species is already commercially extinct, and suffers from reduced diversity of gene pool. Biological extinction is possible before conditions can be turned around. Extinction is forever.

Spring-run chinook salmon - Sacramento River. Also loses out. Naturally spawning spring-run are at very low numbers. There must be greater protection from the impacts of diversions including the Delta pumps during out migration November thru April. This race can be considered commercially extinct. Biological extinction is possible. Reduced diversity of gene pool is occurring. The spring-run was perhaps the most abundant stock in the Central Valley. The San Joaquin River run numbered about 56,000 fish in the mid 1940's. It is now extinct in the San Joaquin Basin.

Late fall-run chinook salmon - Sacramento River. Also loses out. Long term population trend is downward. There must be greater protection from the impacts of diversions including the Delta pumps during out migration April thru November.

Fall-run chinook salmon - Sacramento River. This run, now the most numerous, did not meet escapement goals (122,000) during 1990 91 or 92. In 1953 the Fall-run numbered about 403,000 (DFG April 1990). This run will continue to loose out in the upper Sacramento, Feather, American Rivers as flows are manipulated to meet Delta water quality and export demand. Shasta Reservoir will be used to hold water for flows and temperature control for the winter-run. In tributary systems like the Lower American River, flows fluctuations and temperature levels will continue to degrade the aquatic ecosystem as releases from Folsom Reservoir are manipulated all out to help meet water quality and export demands. (See A Discussion, Lower American River, The Public trust and In Good Condition, by California Sportfishing Protection Alliance-1994). These concerns also apply to the Stanislaus River. Out migrants (smolts) lucky enough to survive their natal systems should find habitat conditions improved in the western Delta under the proposed Delta Water Quality Control Plan. However, what is the net effect? Most believe it is negative for the resource.

Fall-run chinook salmon - San Joaquin River. Potentially the biggest loser of all. The present runs in the Merced, Tuolumne, and Stanislaus Rivers, already at very low numbers, averaging about 1500 fish for 1989, 90 and 91. The 1991 run was less than 500 fish and may warrant protection under the FESA. This run can be called commercially extinct. It is particularly important to protect these stocks during average and wetter years as a buffer against severe losses when conditions are less favorable. Therefore unless there is a concerted effort to have greater and positive outflow from the San Joaquin River and tributaries, (2000 to 5000 cfs over diverted flows) the run may continue as remnant runs having reduced gene pool diversity. The next step could be extinction. The San Joaquin River runs were written off in the 1940's by pressure from the governor which prevented the Department of Fish and Game and others from exercising their full trustee responsibilities. The State failed to act as a public trustee. That action was contrary to the public trust then, just

as it is now. Is the governor and this Board going to sanction another write-off?

Steelhead - The naturally spawning steelhead run is struggling. The steelhead run is now mostly a hatchery product. There no longer are viable steelhead populations in the San Joaquin River system (CDFG 1994). The natural runs have been hit hard by project operations and flow regimens that are incompatible with steelhead young, juvenile and smolt needs. Steelhead juveniles usually spend at least 1 year in freshwater before migrating to saltwater. These fish have year long freshwater habitat requirements that are not being met in most of the rivers of the Central Valley. The steelhead smolts from naturally spawning adults need greater outflow during November, December and January as they pass through the Delta. Under pre-project conditions these smolts would have moved out during the fall freshets along with smolts from the winter-, spring- and late fall-runs of chinook salmon.

The 2 parts per thousand in the western Delta is good goal and worthy standard. This standard should be meet by flows from both the San Joaquin River Basin (25 percent), Delta direct and the Sacramento Basin (75 percent) as if the flow percentages were unimpaired (California Central Valley Unimpaired Flow Data DWR 1987). For biological, ecological, hydrological, chinook salmon out migrants and striped bass spawning reasons, there is greater equity in this 25/75 percent contribution than having the Sacramento River alone provide these flows.

Populations of Delta smelt, longfin smelt, splittail and striped bass should find improved habitat conditions in the western Delta. However populations of these and others in the Central Delta could lose out big time, through entrainment and other central Delta losses, during the massive pumping proposed for July through January. What is the ratio of direct losses at the pumps to the indirect losses of the central Delta? Is the indirect loss 1 to 10, 1 to 15, 1 to 20? Such a level of attrition when added to other mortality will reduce the viability / sustainability of all anadromous fish runs passing through the Delta.

Capping exports at 35 percent of inflow as the amount of water that can be exported during the period February thru June might be reasonable, but it must be followed by a cap on the CFS or acre feet that can be pumped at any time such as 1500 cfs during the peak period of out migration. The period should be extended to include November, December and January (NMFS Oct. 1994 also USFWS December 1994). Allowing 100 percent of the San Joaquin River flows at Vernalis to be diverted is unreasonable. Several reports describe results from studies at flows less than 5,000 cfs. From the relation between survival indices and experimental flow conditions, it is clear that smolt survival is poor at such low flows to protect the fish migration designated uses (EPA Federal

Register Jan. 24, 1995). There must be positive outflows from the San Joaquin River. Club Fed proposed 4,000 to 10,000 cfs to get the smolts past the effects of the pumps (NMFS Oct. 31, 1994). See attached Flows in the San Joaquin River during Chinook Salmon Juvenile Emigration (1955-1988 and Spawning Escapement 2+ Years Later (1957-1990) - Source CDFG Region 4.

The export percentages and the amount of water pumped during 1987-92 (up to 50 to 70 percent) severely impacted the Delta ecosystem and its tributary ecosystems. The 65 percent limit of inflow as the amount of water that can be exported during July thru January is too high. During the 72 months of the 1988 thru 1992, 47 months had export percentages of less than 50 percent. The 1988 and 1990 export averaged greater than 53 percent. The percentage and the amount of water exported during these years, coupled with of poor natal stream spawning conditions, entrainment (salvage numbers), losses in the Central Delta, and the generally poor returns of adult chinook salmon as 3 year olds, is sufficient evidence that exports greater than 50 percent and the amount of water that represents is too high. A 50 percent export/inflow may be a more equitable sharing. Even this percentage may have to be reduced to adequately protect aquatic habitat and to keep fish in good condition as provided for in Fish and Game Code Section 5937 and to protect all the trust assets and beneficial uses. The percentages must be replaced by a cap **i.e. real numbers**, on the CFS or Acre-feet that can be pumped at any time.

Applying public trust principles to managing water and biological resources (the people's salmon resources all runs) requires that these runs be provided with greater protection through greater outflows and other measures than what occurred during recent the period 1984 through 1992 when management for exports and acreage planted dominated CVP and SWP operations.

The DER page VI-1 states that the CVP and SWP export demands south of the Delta is based on a 1995 level of land use patterns, i.e. acres irrigated. Racanelli found the level of export/land use irrigation demands of 1978 (D-1485) lacked measures and actions to sufficiently protect several aspects of fish habitat and other beneficial uses. What is the justification for using the 1995 land use pattern figures instead of the 1978 land use pattern and water demand? The high acreage figure would assure maximum subsidy payments. It could be used to show how much water these lands are being shorted because of ESA or fish resource needs when the present system fails? If the 1995 land use pattern / irrigation demand is used, then the inflow-Delta conditions which provided for the highest salmon populations should be used (adult returns 68,485 fish) on the San Joaquin River tributaries, not the 1967 to 1992 average of 20,644 (Mills and Fisher CDFG 1994). The land use pattern at the time of D-1485 decision (1978) may be reasonable if the Racanelli level of resource protection and Delta water quality can be provided.

More questions. Under what management principle or in which parable does it state that governments must provide water to a person promoting semi-desert lands as arable? Is the 1995 level of land use/water demand being used to protect investments of special interest folks who were foolish to buy land without a water supply? Is this an effort to protect special interest investments for a future buy-out program as a way to get around the no compensation rule?

Another concern. Many of the lands in the CVP San Luis Unit are the source of selenium, boron. molybdenum, other trace elements and salts in the wastewater coming from lands brought into production by cheap water pumped out of the Delta. About 114,000 acres were described as Class 5 land (Special Task Force Report on The San Luis Unit, USBR 1978). Now another question. Is it reasonable to deliver water to irrigate lands when that action results in drainage and wastewater that is toxic to fish, other aquatic life, wildlife and which degrades both public and private beneficial uses of the receiving water? Can this use be called reasonable? Now is the time to speed up the retirement of salt / selenium and erosion problem lands. Retiring 100,000 to 300,000 acres of problem soils could save 1/3 to 1 MAF of firm yield and reduce water quality problems in the San Joaquin River. This water could be used to meet public trust interest uses and needs of the area of origin (lower American River) and the Delta.

The Agricultural and Stabilization and Conservation Service dispensed $559 million to cotton growers in California in 1992. This amounts to $565 per acre and $165,800.00 per farm unit of 295 acres (USDA Annual Report - California 1992). For a greater understanding of how the exported water is used, a table should be added showing the acreages, amount of water applied, crops grown and total subsidies paid to each farm unit receiving CVP or SWP water for the core years 1984 to 1992. For comparison prepare another table showing the number of commercial salmon boats fishing, the first wholesale price received per boat fishing and any subsidies received by these boats for the same core years.

One of the purposes of Racanelli was the protection of the various fisheries and their dependent ecosystems be it in tributaries or the Delta. Racanelli recognized the importance of ecosystem management. Throughout most of California's water development, the available supply has been over estimated, the supply over allocated, and the benefits over stated, while project impacts to interests covered by public trust protection have been understated or just shrugged off.

Modeling efforts have not served resources / ecosystem protection well. Also scientific findings from the real world are continuing to undermine politically motivated promises, truths and decisions. For example about 8 years ago the DWR for SWP and USBR for CVP, with great fan-fare, instituted a 10 point adaptive management

program for operating Shasta Reservoir and the upper Sacramento River to protect the winter-run. The water folks like DWR's Mr. Potter have stated many times "The winter-run issue should be confined to the upper Sacramento River, it is not a Delta issue (quote of Aug. 5, 1992). The winter-run salmon problems in the Delta were ignored by political fiat. The taking of winter-run smolts by the pumps soon became an issue. Today the status of the winter-run is worse off than it was 8 years ago. This population has continued it downward slide toward possible extinction with little comfort from SWRCB, USBR or DWR managers. Are there people who would just as soon have one less fish to worry about? (see CVPWA's memo of Feb. 9, 1995 to Membership). The spring-run of the San Joaquin River was eliminated by pressure from special interests and a politically motivated decision that no salmon run exists on the San Joaquin River. And if salmon runs exist, we don't have to worry about them because protecting them is not compatible with the irrigation purposes of the project (Goldberg and Brown interviews by Regional Oral History Office UCB- 1981).

Page VIII-51. Why isn't Friant Reservoir included as a part of the San Joaquin Valley storage? The operation of this reservoir results in about 2.75 to 3.0 MAF of Delta depletion. Impacts of providing exchange contract water (about 1 MAF) extends from the Delta upstream to the upper Sacramento, American and Trinity Rivers. The Stanislaus River will be impacted by the operation of New Melones Reservoir as it is manipulated all out to provide water to the south Delta and lower San Joaquin River in an effort to support fish habitat beneficial uses and water for export.

Page VIII-62. There is concern about pumping groundwater and its resultant problems. Overdrafting/mining the groundwater and crying for a supplemental surface supply bail-out, are common tactics used by water agencies and their clients to help justify more dams and water transfers. There should be the same concern for mining/ overdrafting the waters of our rivers and streams. This occurs when not enough water has been reserved to conserve and protect the aquatic ecosystem and other public trust interests. The lower American River ecosystem is so manipulated that its anadromous fish resources are seriously impacted. The same can be said for the Stanislaus River. The San Joaquin River at Friant a clear example of mining the waters / ecosystem of a river.

A major issue is --- how are the percentages for export and Delta outflow computed and how real are they. Models used in past water planning efforts have not served planners well, except to get all the water they can. Apparently there are many methods or models, a DWR model, a CCWD model and a Patrick Porgans method to list a few. Computing Delta inflow, export, Delta consumption and Delta outflow and associated record keeping must be standardized. The USGS Water-Data Reports, for example, are the acceptable standard for stream flows and discharges. Such credible data and format

would help improve understanding of Delta inflow/outflow because all folks would be using data they can trust.

The Recommendations 2 a thru 2 m are actions that should have been instituted long ago. These tech-no-fixes could have been instituted at any time under the Board's continuing authority. Why did the Board wait so long? For example Recommendation 2. a. Screening of diversions to reduce losses of all life stages is a worthy goal. However the responsibility for screening diversions was decided long ago, in 1932 (People v. Glenn-Colusa Irr. Dist. 127 Cal. App. 30, 36 and restated in Department of Fish and Game v. Anderson-Cottonwood I.D. Court of Appeals, Third Appellate District 1992). It is the responsibility of the diverter as a cost of doing business. Screening has not been rigorously enforced by the Board. An injunction should be filed by the Attorney General against diverters that are not complying the screening requirements or that have inadequate screens.

Another is Recommendation 2. e. Use of barriers. There has been a lot of talk about the barrier in upper Old River. What are the resource problems with this structure? NMFS and others have indicated that when the barrier is in place, the risk to winter-run and Delta smelt greatly increases without controls on pumping. The fish agencies (Club Fed) suggested a 1500 cfs cap on pumping when the barrier is in place plus San Joaquin River outflows of 4,000 to 10,000 cfs to assist the struggling fall-run chinook salmon survive as they migrate through the Delta to San Francisco Bay and on to the Pacific Ocean.

Another is Recommendation 2. h. Flow regimen and fluctuations. Flow regimen and flow fluctuations during spawning, egg incubation and fry stages have been a concern for a long time. The flow regimen in many tributaries to the Delta are inadequate. Some tributaries have flows that are 10 to 25 percent of natural discharges, have temperature problems and very erratic flow regimens. Such flows will not sustain resource renewability in their respective systems let alone the Delta ecosystem. Does this Board know of any ecological or hydrological system or biological resource that is being maintained in good condition with ecological or hydrological fuel levels that are 10, 15, 25 to 35 percent of that provided by nature? The public trust protection and requirements of F&G Code Section 5937 are not being met by many dams on tributaries to the Delta. Clearly there are grounds for legal action by the Office of Attorney General.

This Board held hearings regarding the Yuba and Mokelumne Rivers 2 to 4 year ago. About 5 years ago Judge Richard A. Hodge weighed many public trust issues (resource protection, uses etc.) relative to stream flows in the Lower American River. Judge Hodge put forth a flow regimen (physical solution) in his decision in EDF v. EBMUD without political influence and after hearing all the facts. This Board could adopt the flows for the Yuba and Mokelumne Rivers

recommended by the CDFG as interim flows now. This Board could adopt the Hodge flows now. Why hasn't this Board acted on those flows regimens recommended by the State's trustee and by Judge Hodge? Friant Dam blocked for diversion almost all the flows of the San Joaquin River. Given Audubon and Racanelli decisions, when does this Board intend to address the water quality/water right issues associated with Friant Dam?

The proposed Plan appears as the pre-selected alternative in the DER. Was data used to justify this proposed alternative carefully selected from the hearing records to support this pre-determined action? Apparently a few good people have put together a lot of good science with some poor resource data, some poor scientific judgment along with some directed faulty assumptions, some tech fixes and some untested gimmicks into this report to support a pre-determined decision. A DRAFT Environmental Report meeting NEPA and CEQA requirements should be released for public review and comment before a plan is selected? The baseline conditions / restrictions must be fully spelled out. This should include any FESA restrictions (for the winter-run and Delta Smelt, take limits, pumping limits, or other restrictions) used during any part of the core period to protect water quality or trust assets. This is necessary because the baseline becomes the benchmark against which future actions and alternatives are measured like the CVPIA measures or future State Board decisions or actions. The various alternatives should be discussed in the same detail. This is how Mono Lake issue was presented.

The Principles of the Agreement were arrived at by consensus by political appointees and a few folks from the Ag/Urban and Environmental communities. A decision by consensus is not justification to bypass the purpose and intent of statute or case law. Who is responsible and accountable for this Draft Plan, the signers of the Agreement (Page XI-30) or this Board? <u>It is this Board</u>. To illustrate, seafaring people take as an article of faith that the captain is responsible and accountable, absolutely and unconditionally, for his ship, crew and cargo. Boards of inquiry provide little forgiveness to captains who fail their role. This Board is the captain of the people's water / aquatic ecosystem ship and protector of the public trust.

Looking in from the outside it appears that this Board, rather than assuming the role of an independent evaluator and enlightened leader managing the public trust interests of the Bay-Delta and tributary ecosystems, chose to rubber stamp the Dec. 15, 1994 Agreement. This Board, in essence, accepted the lowest common denominator, the lowest amount of water exports acceptable to DWR and CVP clients, the banks and other interests south of the Delta. The amount of water was that believed necessary by agribusiness to help pay off the SWP bonds and make land/mortgage payments to lending institutions.

Is such a consensus decision (the Dec 15, Accord), an example of how this Board is going to handle future public trust concerns?

There are many concerns that should be addressed before the people will believe that restoration of the Delta, its tributary systems, associated resources, uses and values will actually occur.

Restoration of the Delta and tributary ecosystems will not occur:

* Until the current philosophy that attempts to manage anadromous fish such as the native runs of salmon and steelhead trout is changed to one predicated on managing for such species;

* Until greater constraints are placed on out of basin exports;

* Until there is greater respect for area of origin resources, use and values;

* Until all streams and water right holder contribute their fair ecological share of the water required to meet stream regimens and environmental needs (including water quality);

* And until success of any Delta Plan is measured in restored aquatic ecosystems, resources, and water quality and not on acreage irrigated or water exported to the San Joaquin Valley.

The bottom line is the Delta and tributary ecosystems, their trust resources, uses and values will continue to suffer as the Sacramento / San Joaquin Rivers, the Delta ecosystems are manipulated to provide water for export to the San Joaquin Valley.

In managing the Delta and tributary ecosystems and associated trust interests, this Board is only wise when it has monitoring programs in place, has rapid and honest feed back, has the ability and the willingness to take the action necessary to protect the people's trust interests. Research findings and the freedom of speech right will continue to undermine the long term validity of politically motivated decisions or actions.

The power of the State as trustee are implied and include everything necessary to the proper execution and administration of the trust (See People v. California Fish Co. (66 Cal 576, 138 Pac. 79-1913 and Long Beach v. Mansell (3 Cal 3d 462-1970). The people are also aware that there is no statute of limitation for filing public trust claims against Board actions that fail to protect the public trust (People v. Kerber, 152 Cal. 731, 93 P. 878 - 1908, in Cal Trout v. State Water Resources Control Board, 207 Cal. App. 3d 585-1989).

The people hope the Board has all the necessary answers.

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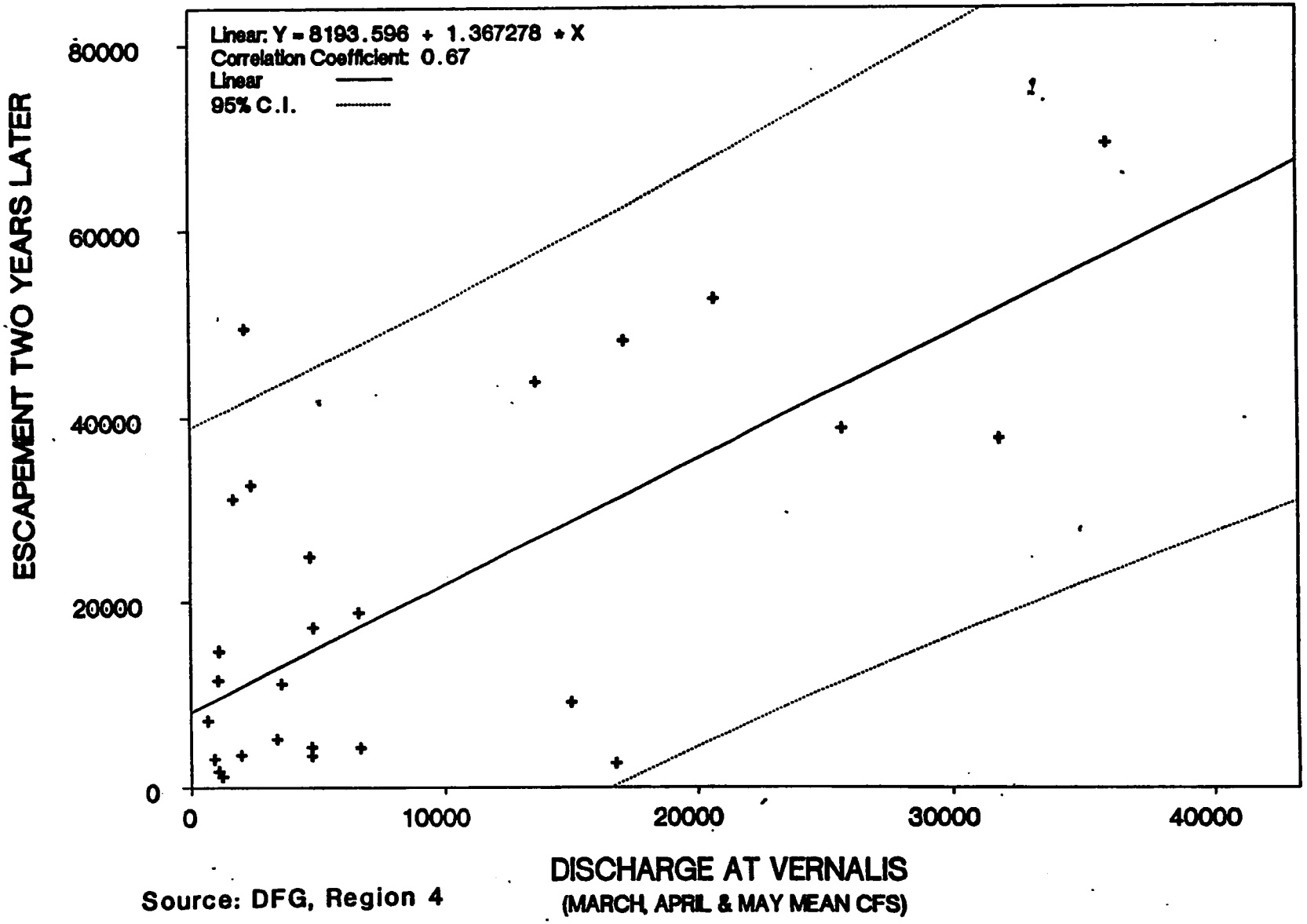
Flows in the San Joaquin River during Chinook Salmon Juvenile Emigration (1955–1988) and Spawning Escapements 2+ Years Later (1957–1990)



Source: DFG, Region 4