



April 1, 1998

California Office
Rockridge Market Hall
5655 College Ave.
Oakland, CA 94618
(510) 658-8008
Fax: 510-658-0630

John Caffrey, Chair
State Water Resources Control Board
901 P Street
Sacramento, CA 95814

BY FAX AND MAIL**Re: Draft EIR for Implementing the 1995 Bay-Delta WQCP**

Dear Mr. Chairman:

Decision 1485, adopted by the State Water Resources Control Board in 1978, was acknowledged by the Board at that time to be an interim (and inadequate) approach to the protection of fish and wildlife in the San Francisco Bay/Delta estuary. The Board's explicitly stated expectation at the time was that a Peripheral Canal would be constructed within the expected ten-year life of D-1485, and that fish and wildlife protection standards substantially different from those incorporated in D-1485 would govern after the Canal had been completed.

The Environmental Protection Agency, despite its recognition of D-1485's legal and environmental inadequacies, in exercising its obligations under the Federal Water Pollution Control Act, nevertheless "approved" D-1485 in 1980, on the basis of a set of conditions that EPA (and everyone else involved) knew were not being met and could not be met. Two years later, the Peripheral Canal was resoundingly defeated by California voters in a statewide referendum. Yet D-1485 lives on as the Board's governing operative water rights decision, its interim life now twenty years, with EPA never having required the Board to meet the conditions EPA itself set 18 years ago.

Despite the blatantly obvious legal and environmental inadequacies of D-1485 during these last twenty years, the State Water Resources Control Board has allowed the health of public trust resources throughout the San Francisco Bay/Delta to continue to deteriorate. In response, EDF alone has already submitted many hundreds, if not thousands, of pages of comments, testimony, legal briefs, and supporting materials as a formal participant in several major State Board proceedings, addressing everything from the unmet needs of Bay-Delta ecosystem resources to the affirmative policy alternatives that could help all parties adjust to what is, and always has been, their legal liability and obligation to protect and restore the public trust resources that remain at risk. (We urge the Board to review this record in detail.)

National Headquarters

257 Park Avenue South
New York, NY 10010
(212) 505-2100

1875 Connecticut Ave., N.W.
Washington, DC 20009
(202) 387-3500

1405 Arapahoe Ave.
Boulder, CO 80302
(303) 440-4901

128 East Hargett St.
Raleigh, NC 27601
(919) 821-7793

44 East Avenue
Austin, TX 78701
(512) 478-5161

Project Office

6 Faneuil Hall Marketplace
Boston, MA 02109
(617) 723-2996

Today, on the fifth anniversary of Governor Wilson's decision to withdraw from further consideration the Board's last significant effort to meet its long-deferred statutory obligations (i.e., draft Decision 1630), the Board seeks comment on those parts of a draft Environmental Impact Report which, remarkably, are not intended to improve freshwater flows nor to address water project operations in the Bay/Delta estuary. Comments on flows and operations are deferred to an indefinite future date, after the Board considers any number of as-yet unsubmitted proposed "agreements" on these flows and operations which are currently being negotiated by the parties who themselves have been most responsible for the catastrophic environmental conditions the Board is statutorily mandated to remedy.

This bifurcated review is sadly typical of the manner in which the Board has approached its public trust responsibilities over the last twenty years. Its principal goal, since 1978, has apparently been to protect the interests of the State Water Project, the Central Valley Project, and, most importantly, the principal clients of those projects, the state and federal water project contractors. The DEIR perpetuates this trend, stating that "regulatory requirements will revert to those in D-1485" if the Board fails to issue a permanent decision prior to December 31, 1998 – a finding that ignores, among other problems, the very existence of laws like the 1992 Central Valley Project Improvement Act. (That Act's critically important water management reforms were made necessary, in significant part, because of the many obvious inadequacies of D-1485.)

It is worth especially noting here, however, that the Board's draft EIR, bifurcated for the purposes of current analysis or not, is itself in obvious legal violation of the Board's own 1995 Water Quality Control Plan because it fails to analyze or even consider the flow and operational improvements that are needed to achieve the Plan's narrative objectives for Suisun Marsh and for "a doubling of natural production of chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law."¹

In light of all the above, what follows are EDF's initial comments on some of the flow, export, salinity control, finance, funding, and ecosystem protection and restoration issues that appear in (or are missing from) various chapters and sections of the DEIR, many of which have not yet been finalized by the Board and many of which are inextricably linked to those unfinished chapters and sections. To the extent that our comments are deemed premature on these matters, we will incorporate them again by reference at such time as the Board determines that comments on flows and project operations are timely. We also reserve the right to re-submit and/or amend our comments on these and other sections upon review of a more complete and coherent revised draft EIR, whenever it finally becomes available.

¹ The 1995 Water Quality Control Plan specifically promised that the Board would initiate a water rights proceeding to address the Plan's "water supply-related objectives ... includ[ing] those for Delta outflow, river flows, export limits ... *and fish and wildlife*" through a water rights decision that would "allocate responsibility for meeting the objectives" by June 1998. Yet the draft EIR, and the water rights evaluation it contains, now states that it will defer to some future triennial review even consideration, let alone adoption, of measures needed to meet these critically-important fish, wildlife, and ecosystem restoration objectives.

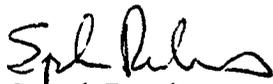
EDF expects that the Board will provide the needed additional time and opportunity for such review and comment by all interested parties. We also urge the Board to amend the draft EIR forthwith with flow and salinity alternatives which are designed to accomplish the entire scope of its statutory and public trust obligations, including those which have heretofore been characterized only as "narrative" objectives. We recommend further that completion of the draft EIR should be directly followed by water rights hearings which are intended to implement fully the terms of Order 95-6 and the Water Quality Control Plan, and that the Board not assume that any number of negotiated "deals" will come close to satisfying the Board's obligation to adjudicate water rights responsibilities for meeting all of the standards that it has established.

If the Board does not pursue this approach, by its own admission, it will again be violating state and federal law, in an even more obvious fashion than it has been doing over the past twenty years. More importantly, it will perpetuate the decline of a once-great aquatic ecosystem and very likely doom several of the species that the Board is supposed to protect, at best, to an increasingly precarious existence and, at worst, to extinction.

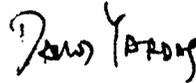
Sincerely yours,



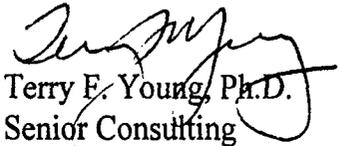
Thomas J. Graff
Senior Attorney



Spreck Rosekrans
Hydrologic Analyst



David Yardas
Senior Analyst



Terry F. Young, Ph.D.
Senior Consulting
Scientist