

DRAFT 02/14/97

SUBJECT: If the Bay Delta Accord Expires....

TO: Club FED

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This memorandum identifies, in summary fashion, what will happen "legally" if the Bay Delta Accord expires on December 15, 1997.

The Bay Delta Accord included both "continuing commitments" (an ongoing commitment to perform a certain task or maintain a certain policy) and "single-action commitments" (tasks that need to be accomplished only once).

Expiration of "Continuing Commitments"

The following continuing commitments expire with the Accord on December 15, 1997, with varying impacts that are described:

(1) The Federal government's "hold harmless" agreement (that any additional water supply needs caused by additional ESA listings will be provided by willing-seller purchases by the Federal government) expires this December. Accord, p. 5.

(2) The Federal government's commitment to "credit" any CVP water used to attain the new water quality standards against the CVPIA §3406(b)(2) water expires this December. Accord, p. 6.

(3) The Federal government's commitment that it will not impose additional water costs through biological opinions (other than those that can be met through "no net loss" in the Ops Group) expires this December. Accord, p. 3.

(4) The Bureau's obligation under the Accord to provide San Joaquin River flows at Vernalis, pending State Board action to assign that burden, expires this December. Nevertheless, the Bureau may still be obligated to provide these flows under the ESA delta smelt OCAP biological opinion, because these flows were included in the project description and failing to provide these flows would trigger a reinitiation of Section consultations on the

opinion.¹ Accord, Attachment B.

Single-action Commitments That Have Been Accomplished

(1) The State Board adopted, and EPA approved, the 1995 Water Quality Control Plan reflecting the water quality provisions in the Accord. The objectives (standards) in this Plan remain in effect until and unless they are revised as part of the State Board's next "triennial" review. Accord, p. 6.

(2) The State Board adopted Decision 95-6, which substantially implemented the 1995 WQCP during the interim period. Accord, p. 6. In effect, Decision 95-6 imposes the burden of meeting many of the provisions of the 1995 WQCP on the State and Federal projects. This Decision expires in December 1998. Unless a subsequent implementation order is adopted before Decision 95-6 expires, the state implementation plan reverts to the old Decision 1485 order. If that occurs, the projects would, in essence, be governed by the existing ESA biological opinions, which are generally stricter than D-1485.

(3) The Services finalized revised biological opinions on the State and Federal water project operations, consistent with the Accord. Accord, p. 6.

The March 6, 1995 OCAP Biological Opinion discussed the "phased improvement to habitat requirements for the delta smelt and Sacramento Splittail." The three major initiatives that were described in the Biological Opinion included (1) implementation of the State Board's 1995 WQCP standards, (2) Federal agencies carrying out their ESA §7(a)(1) responsibilities, and (3) expected fish protection measures resulting from reopened or expired FERC licenses and expired CVP water contracts occurring in the near future. Therefore, the OCAP Biological Opinion implied that if progress was being made to phase in these actions the Biological Opinion would not expire at the end of three years. However, at some point in the future (3-6 years), if additional progress on these initiatives was not forthcoming, reinitiation would be required.

¹This is one of the more complicated issues we face. The State Board, in Water Rights Decision/Order 95-6, ordered the implementation of most of the water quality provisions in the Accord, and these provisions must be met under the Order until it expires in December 1998 (unless superceded earlier by a subsequent opinion). However, the State Board did not include the Vernalis flow objectives from Attachment B, Section one of the Accord in its Water Rights Decision/Order. For that reason, the Vernalis flows are being implemented through the OCAP biological opinion, which does not expire until the projects fail to comply with its terms.

The November 2, 1994 Biological Opinion on EPA's Water Quality Standards also discussed phasing. This Biological Opinion discussed short-term actions as those "that will be available for implementation in the next three years" and long-term actions which "will not be available until after 1998." No incidental take was authorized for this Biological Opinion. Reinitiation of consultations would be required if "...the State Board adopts an implementation plan, proposes new or revised standards pursuant to the triennial review or...on any other occasion the standards are revised."

Single-action Commitments That Have Not Been Accomplished

(1) The State Board has not yet assigned responsibility for the San Joaquin Vernalis flows, as it was required to do within three years of the Accord. Accord, Attachment B, Par. 1. Consistent with Accord, the State Board has initiated the broad water rights proceeding that could lead to this action.

(2) EPA has not yet finalized its withdrawal of Federal water quality standards under the Clean Water Act, although it has initiated this withdrawal process. Accord, p. 5, Par. 1.

(3) The parties have not yet funded the \$180 million addressing "Category III" non-flow factors. To date, the water user community has contributed \$22 million, Proposition 204 has approved \$60 million, and the 1997 Federal budget has recommended \$___ million. The parties have substantially completed a review of the expected benefits of screening programs for listed species. Accord, Attachment C.