



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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August 26, 2003

Ms. Sammie Cervantes
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

RE: Draft Environmental Impact Report/Environmental Impact Statement for the CALFED Bay-Delta Program Environmental Water Account

Dear Ms. Cervantes:

The California Farm Bureau Federation ("Farm Bureau") is a non-profit voluntary membership corporation whose purpose is to work to find solutions for the problems of the farm, the farm home, and the rural community. Our membership consists of 90,000 members throughout California who are farmers and ranchers, or otherwise concerned about the future of agriculture and rural communities in California. The Farm Bureau is pleased to have this opportunity to comment on the Draft Environmental Water Account Environmental Impact Report/Environmental Impact Statement ("Draft EIR/S").¹

The concept of the Environmental Water Account ("EWA") was introduced in the 1999 draft of the CALFED Bay-Delta Program Environmental Impact Report/Environmental Impact Statement, but no details were provided as to its size, its operation, its impacts or how its impacts would be mitigated, or what the fishery agencies would require in order to grant "assurances" at the pumps that no uncompensated water would be taken to offset the impacts of the operation of the project². This valuable information was not revealed until the June 9th Framework Agreement, and ultimately, the August 28, 2000 Record of Decision. The EWA has been improperly operated for the last three years with CALFED acting as if all of the acquisitions are entirely separate and unrelated projects. Categorical Exclusions from CEQA and Negative Declarations have been used repeatedly and improperly for water acquisitions totaling 185,000 acre-feet³ annually,

¹ All cites refer to the Draft EIR/S unless otherwise stated.

² For example, in the first three years of operation, the EWA could not be considered "operational" for assurances purposes unless the Ecosystem Restoration Program ("ERP") received funding at a certain level.

³ The total water acquired annually totaled 380,000 acre-feet, with 195,000 acre-feet acquired through re-operation of the water project.

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with 200,000 acre-feet as an initial water investment. As a result, the cumulative impacts for the first three years of the program have never been considered or mitigated, thus the environment has been impacted. The impacts of this program now are being considered in this environmental document for the first time three years after the program has already begun operation.

Equally problematic is the lead agency's attempt to completely disregard the Final CALFED Bay-Delta Programmatic Environmental Impact Report/ Environmental Impact Statement ("CALFED EIR/S"). Farm Bureau agrees that the CALFED EIR/S is legally insufficient; but to the extent CALFED insists on continuing with its flawed program in contravention of law, it is the guiding document for this program. While the litigation is pending⁴, CALFED cannot pick and chose which portions of the program it will implement and which it will ignore. For this reason, the Draft EIR/S cannot incorporate by reference only selected portions of the CALFED EIR/S. We understand that the CALFED Program as described in the CALFED EIR/S is flawed, but the EWA must be operated consistent with 2000 CALFED Record of Decision unless or until a new document is adopted.

The Farm Bureau strongly urges CALFED to do the environmental documentation for the EWA properly this time. A legally defensible EIR/S will require the following changes.

I. THE EWA HAS THE POTENTIAL TO NEGATIVELY IMPACT THE ENVIRONMENT, WHICH INCLUDES AGRICULTURAL RESOURCES

The Draft EIR/S is proposing significant agricultural land idling. According to the Draft EIR/S, land retirement in the northern Sacramento Valley could reach 89,600 acres and the land retirement could reach 182,800 acres in southern Central Valley. (p. 11-36 and p. 11-44.) These figures represent significant agricultural land idling, even if the same parcels are not idled every year. The farming communities in the target areas will have a consistent and long-term agricultural land and water loss each year.

In order to understand the magnitude of the impacts, the Farm Bureau requests clarification as to whether the land idling figures are a "cap", meaning that no idling will be permitted above these levels in each region. We would also like to know how the 89,600 acre and 182,800 acre figures were generated. Currently, it is unclear whether the 600,000 acre-feet proposed for acquisition under the Flexible Alternative could come entirely from land retirement if that is the only significant source of water. It is our understanding that the usual operation of the EWA would not include land retirement as the leading source of water, but could land retirement be the primary source of water in an unusual year? This information is important for decision-makers and the public to understand because agricultural land and water resources are an important part of the

⁴ Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, Sacramento Superior Court Action No. JCCP 4152, and Laub v. Norton, United States District Court, Eastern District of California, Action No. CIV F-00 6601 AWI SMS

physical environment. Farmers and ranchers need these land and water resources to provide the proper environment for growing crops and raising animals.

One of the major principles of the California Environmental Quality Act (“CEQA”) is to sustain the long-term productivity of the state’s agriculture by conserving and protecting the soil, water, and air that are agriculture’s basic resources. (*See*, Cal. Pub. Res. Code §21060.5; 14 C.C.R § 15360; CEQA Guidelines.) In fact, the California Legislature amended CEQA in 1993 because there was concern that agricultural resources were not being sufficiently protected; thus lead agencies required additional guidance as to how to properly review impacts to these resources. (*See*, Sen. Bill No. 850 (1993-1994 Reg. Sess.) (adding Pub. Res. Code §§ 21060.1 and 21095).

During the 1993 CEQA amendment process, the Legislature made clear its intent that CEQA is to protect agricultural resources:

Agriculture is the state’s leading industry and is important to the state’s economy.

The continued productivity of agricultural lands in California is important in maintaining a healthy agricultural economy.

The conversion of agricultural lands to nonagricultural uses threatens the long-term health of the state’s agricultural industry.

The California Environmental Quality Act plays an important role in the preservation of agricultural lands.

It is the intent of the Legislature in enacting this act to encourage wise and efficient land use decisions based on the best available information by promoting the adoption and use of land evaluation and site assessment criteria by state and local agencies based on the system developed by the United States Soil Conservation Service to implement the Farmland Protection Policy Act (7 U.S.C. secs. 4201, et seq.).

Legis. Counsel’s Digest for Sen. Bill No. 850, Environment-Agricultural Land Preservation (1993-1994 Reg. Sess. This explicit statement by the Legislature highlights two important points: (1) that the legislature is concerned about “conversion of agricultural lands to non-agricultural uses;” and (2) that an important purpose of CEQA is to ensure the “preservation of agricultural lands.” *Id.*

Moreover, Appendix G of the CEQA Guidelines further identifies the type of agricultural impacts that must be considered under CEQA. Appropriately, it states:

- AGRICULTURAL RESOURCES: ...would the project:
- (a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to

the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?

- (b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?
- (c) Involve other changes to the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use?

The Draft EIR/S does not properly consider agricultural land and water resources per this CEQA guidance.

Agricultural resources similarly are considered a part of the existing environment under the National Environmental Policy Act ("NEPA"). On August 30, 1976, the Council on Environmental Quality ("CEQ"), in cooperation with the Department of Agriculture, issued a memorandum to federal agencies informing them of the need to consider loss of farmland as a potentially significant environmental impact. On August 20, 1980, the CEQ issued additional guidance to the heads of agencies as losses of agricultural lands had continued:

Approximately one million acres of prime and unique agricultural lands are being converted irreversibly to non-agricultural uses each year. Actions by federal agencies such as construction activities, development grants and loans, and federal land management decisions frequently contribute to the loss of prime and unique agricultural lands directly and indirectly. Often these losses are unintentional and are not necessarily related to accomplishing the agency's mission.

45 F.R. 59189. The CEQ further states:

If an agency determines that a proposal significantly affects[s] the quality of the human environment, it must initiate the scoping process...to identify those issues, including effects on prime or unique agricultural lands, that will be analyzed and considered, along with the alternatives available to avoid or mitigate adverse effects related to inducing changes in the patterns of land use...cumulative effects...mitigation measures...to lessen the impact on...agricultural lands.

Id. Pursuant to this CEQ guidance, CALFED was obligated to consider impacts to agricultural resources.

a. THE DRAFT EIR/S INSUFFICIENTLY CONSIDERS DIRECT AND INDIRECT IMPACTS

The Draft EIR/S did not adequately consider impacts to agricultural resources as directed by both NEPA and CEQA because the document does not recognize the indirect effects of consistently taking a significant amount of farmland out of production every

year. The fact that the same parcels may not be idled every year cannot be equated with negligible impacts.

As CEQA provides, "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." 14 Cal. Code Regs. § 15126.2(a). "The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services." *Id.* The Draft EIR/S violates this requirement of CEQA by failing properly to consider the direct impacts of the EWA's proposed changes in agricultural water, agricultural land, and the human food supply.

NEPA similarly requires a consideration of direct and indirect impacts. 40 C.F.R. §§ 1502.16(a), (b). Among other things, EIS's must consider "the environmental impact of the proposed action," and "any adverse environmental effects which cannot be avoided should the proposal be implemented."

When a substantial segment of agricultural land is consistently removed from production every year, the farming infrastructure is damaged and farmland and farm water will be converted to other uses. A viable agricultural sector needs access to various support services, such as farm workers, supply companies, equipment dealers, transportation providers, pesticide applicators, processors, and marketers. These support services, in turn, require a critical mass of farmers to remain viable. But as agricultural land and water are converted to other uses, resulting in fragmentation of agricultural land, these necessary support services typically leave the area. Land fragmentation also reduces economies of scale, and increases traffic on rural roads with which agricultural traffic must compete. The net result of these impacts is to discourage farmers and ranchers from remaining in or entering the agricultural business, which in turn leads to further conversion of agricultural land and water.

The aforementioned loss of farm infrastructure and viability are not just economic or social impacts. The loss of infrastructure is also a physical impact to the environment because the agricultural soils and the water required for production of food and fiber have lost their productive capabilities when they are converted to other uses like urban development, wildlife refuges, and parks. Moreover, when farmland and farm water are converted, there are other environmental impacts to consider besides the loss of agricultural productivity. The impacts vary depending on the use that replaces agriculture, but they may occur whether agricultural land is converted to urban development or wildlife habitat. These potential impacts include, but are not limited to, a change in drainage patterns, diminished groundwater recharge, increased in water use, deterioration in water quality. Therefore, these secondary effects cause a "reasonably foreseeable indirect change in the environment" - by depleting agricultural infrastructure and is encouraging additional conversions of agricultural land and water to other uses -

and thus must be analyzed as an environmental impact under CEQA. Pub. Res. Code § 21065.

With the above points in mind, the Draft EIR/S is incorrect when it states that the FPPA and the NEPA Memorandum on Farmland Protection do not apply because there will be no permanent conversions. (See pp. 1-18 and 1-19.) First and foremost, neither law is limited in its application to only permanent agricultural land conversions. At the same time, there may be indirect impacts from the project that will cause permanent agricultural land conversions.

b. THE DRAFT EIR/S INSUFFICIENTLY CONSIDERS CUMULATIVE IMPACTS

The Draft EIR/S does not sufficiently consider the cumulative impacts of crop idling, short and long-term, as required by both CEQA and NEPA. Significantly, the Draft EIR/S does not consider any of the agricultural land retirement programs that are currently being undertaken throughout the region, nor does it consider widespread urban pressures to convert agricultural land.

CEQA requires that every EIR “shall discuss cumulative impacts of a project when the project’s incremental effect is cumulatively considerable.” 14 Cal. Code Regs. § 15130(a). “The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” *Id.* at § 15355(b); Los Angeles Unified School Dist. v. City of Los Angeles, 58 Cal. App. 4th 1019, 1024-1025 (Cal. Ct. App. 1997). Thus, it is well established that one “overwhelming consideration” of CEQA is that environmental considerations “do not become submerged by chopping a large project into many little ones- each with a minimal potential impact on the environment- which cumulatively may have disastrous consequences.” Bozung v. Local Agency Formation Com., 13 Cal. 3d. 263, 283-84 (Cal. 1975).

NEPA regulations also require a federal agency to consider “cumulative actions, which when viewed with other proposed actions have cumulative significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. 1508.25 (a)(2). *See also id.* at 1508.25(c) (requiring discussion in EIS of cumulative impacts).

Although this is by no means an exhaustive list, the Draft EIR/S should have considered the following classes of projects:

1. The many agricultural land conversions that have been funded by the Wildlife Conservation Board in the past and that are currently proposed;
2. The land retirement and temporary idling funded through Farm Bill (Conservation Title) Programs;

3. United States Fish and Wildlife Service National Wildlife Refuges and proposed expansions of these refuges;
4. Agricultural land conversions funded through the CALFED Ecosystem Restoration Program both before and after the ROD;
5. All of the private and public agricultural land acquisitions and conversions associated with the Sacramento River Conservation Area;
6. Habitat Conservation Plans/Natural Community Conservation Plans, both approved and in negotiation, because these plans usually convert farmland to wildlife reserves as mitigation for urban development (Kern County, Placer County, Yolo County, Solano County, San Joaquin County);
7. Agricultural land conversions funded by the Central Valley Project Improvement Act Restoration Program;
8. Acquisitions of "B3" water through the Central Valley Project Improvement Act;
9. Metropolitan Water Agency's northern water acquisition program;
10. Levee setback programs for river meander that are retiring agricultural lands (Sacramento-San Joaquin Rivers Comprehensive Plan, CALFED);
11. Urban sprawl;
12. The incremental pumping associated with the Napa Proposition;
13. The changes in project operations associated with the new Central Valley Project Operating Criteria and Procedures ("OCAP").

c. THE DRAFT EIR/S INSUFFICIENTLY CONSIDERS IMPACTS TO THE HUMAN FOOD SUPPLY

The Draft EIR/S does not discuss the EWA's potential impact to our state's supply of food and fiber. The CEQA Guidelines require an agency to make a "mandatory finding[] of significance" for an environmental impact where "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." 14 Cal. Code Regs. § 15065.

Because CALFED and the EWA will result in a reduction in the human food and fiber supply, the impact is by definition significant. The food supply analysis in the Final CALFED Bay-Delta Programmatic Environmental Impact Report/ Environmental Impact Statement ("CALFED EIR/S") cannot be relied on because it also failed to adequately consider the program's effects on the food supply. In the Final CALFED EIR/S Response to Comments, CALFED asserted that "there is currently a sufficient surplus in the national food system that the market would allow replacement" of certain crops such as feed corn, alfalfa, wheat, pears and almonds. But no analysis or substantial evidence was offered in support of these conclusions in the CALFED EIR/S and no reference is made to rice which is the food crop targeted by the Draft EIR/S. In a legally defensible analysis, the lead agencies also must consider the importance of rice to many minority communities and their unwillingness to replace this traditional staple of their diet. For this reason, rice may not be a crop that can be replaced in the food supply, assuming that "replacement value" is even an appropriate consideration.

Finally neither document, the Final CALFED EIR/S nor the Draft EIR/S, discusses the program's impacts on the state's supply of fiber, e.g., cotton. California is known for its high quality cotton, as we grow nearly all of our nation's Pima cotton and we are the only state that grows the San Joaquin Acala variety. These varieties are among the highest quality cottons in the world, competing with Egyptian cotton in the world markets. As clothing is a fundamental need of all people, the impacts to the state's supply of fiber should have been considered.

d. THE DRAFT EIR/S INSUFFICIENTLY CONSIDERS GROWTH INDUCING IMPACTS

The Draft EIR/S fails to recognize that idling farmland has growth inducing impacts because it will weaken the viability of the farms and ranches in the communities where idling occurs. *See*, indirect impacts section, above, for discussion of impacts of loss of agricultural infrastructure.

At the same time, we completely disagree with the statement in the Draft EIR/S that more stable crop production would have the opposite effect and actually *cause* urban development. (p. 3-3.) No cite was given in the environmental document to support this claim, and we are completely unfamiliar with any study that would support such a statement.

The lead agency must never assume that growth in an area is necessarily beneficial or of little significance environmentally, but must make its judgment in this regard only after open-minded analysis. 14 Cal. Code Regs. § 15126.2(d). CEQA requires agencies to “[d]iscuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment.” 14 Cal. Code of Regs. §§ 15126.2(d) and 15126(d); Cal Pub. Res. Code § 21100(b)(5).

More stable crop production, in fact, would not be growth inducing. It is well documented that a stable agricultural economy protects open spaces from urban sprawl; in fact, “smart growth” advocates regularly promote a strong agricultural resource base as one of the tools to fight sprawl. The basic premise is that farmland and open space is less likely to be sold for development if it supports other uses that relieve the need to sell to urban speculators. *See*, <http://www.farmland.org/>, *see also*, *Fact Sheet, Why Save Farmland*, American Farmland Trust, May 2002 (attached).

e. THE DRAFT EIR/S INSUFFICIENTLY CONSIDERS A REASONABLE RANGE OF ALTERNATIVES

The Draft EIR/S only includes three alternatives: the Fixed Alternative (which is apparently the EWA under its current operation), the Flexible Alternative (which greatly expands the EWA), and the No-Action Alternative. This is not a full range of

alternatives, and there are other alternatives that should have been considered that would have satisfied the objectives of the EWA while producing fewer impacts.

The Draft EIR/S did not consider at least two obviously feasible alternatives:

1. The Draft EIR/s should have considered a greatly reduced EWA that only provides assets to offset pumping reductions that result from a “red light” jeopardy determination at the pumps. This proposed alternative would mitigate some of the program’s potential impacts, thus possibly making it a more environmentally benign alternative, while still meeting the program’s objectives.
2. The Draft EIR/S should also have considered a modified Fixed Alternative that included a discussion of how the operation principles could be modified to more efficiently utilize the current EWA assets.

CEQA requires agencies to consider in every EIR a reasonable range of alternatives to the proposed action. *See e.g., Laurel Heights Improvements Ass’n v. Regents of University of California* 47 Cal.3d. 376, 400 (Cal. 1988). The California Legislature has expressly declared that “it is the policy of this state to...[r]equire governmental agencies at all levels...to consider alternatives to proposed actions affecting the environment.” Cal. Pub. Res. Code § 210001(g). NEPA similarly requires agencies to include a discussion of “alternatives to the proposed action” in their EISs. See 42 U.S.C. § 4332(2)(C)(iii). NEPA also requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.” See 42 U.S.C. § 4332(2)(E). Judicial review of the range of alternatives considered by an agency is an inquiry into whether the agency has set forth all those alternatives necessary to permit a “reasoned choice.” 14 Cal. Code Regs. § 15126.6(f). “The statutory requirements for consideration of alternatives must be judged against the rule of reason.” *Citizens of Goleta Valley*, 52 Cal.3d. at 565. *See also Save Lake Washington v. Frank*, 641 F.2d. 1330, 1334 (9th Cir. 1981) (applying the same principles in the analogous context of NEPA); *Life of Land v. Brinegar*, 485 F.2d. 460, 472 (9th Cir. 1973) (same.)⁵

On a related issue, the preferred Flexible Alternative should not be selected because it does not satisfy the project’s stated water delivery “reliability” objective⁶; or in the alternative, its satisfaction of this objective is so minimal that the Flexible Alternative should not be selected. The Draft EIR/S does not even speak of assurances to water users. The public and the decision-makers cannot determine how “reliably” water will be

⁵ Recognizing that CEQA was modeled on the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, the California Supreme Court has “consistently treated judicial and administrative interpretation of the latter enactment as persuasive authority in interpreting CEQA.” *Wildlife Alive v. Chickering*, 18 Cal.3d. 190, 201.

⁶ *See*, p. 1-9.

delivered until the conditions that will likely be placed on the granting of assurances are revealed. The absence of a biological opinion, or at least sufficient detail in the Agency Species Implementation Plan (“ASIP”)⁷, is a glaring inadequacy of the Draft EIR/S.

At the public hearing in Sacramento, agency staff explained that under the Flexible Alternative assurances would be provided based on a year-to-year determination of how much water and funding would be required each year to make the account fully operational. If this is how the account will operate under the Flexible Alternative, the reliability provided by the Flexible Alternative will be greatly reduced from the current operation of the EWA because the terms of the “deal” change each year and are completely at the fishery agencies’ discretion.

f. THE DRAFT EIR/S INSUFFICIENTLY CONSIDERS MITIGATION

Under CEQA, lead agencies must adopt feasible mitigation measures (or feasible environmentally superior alternatives) in order to substantially lessen or avoid otherwise significant adverse environmental impacts. Pub. Res. Code §§ 21002, 21081(a); Cal. Code Regs. §§ 15002(a)(3), 15021(a)(2), 15091(a)(1). NEPA also requires agencies to include in EISs a discussion of mitigation measures. See 42 U.S.C. § 4332(2)(C) (requiring discussion of “any adverse environmental effects which cannot be avoided.”) The CEQ regulations require agencies to include in EIS/S “appropriate mitigation measures not already included in the proposed action or alternatives.” 40 C.F.R. § 1502.14(f). See also 40 C.F.R. § 1502.16(h) (requiring discussion of “[m]eans to mitigate adverse environmental impacts (if not fully covered under 1502.14(f))”).

The mitigation proposed in the Agricultural Land Resource Section is insufficient because many feasible mitigation measures were never considered. First, the 20 percent limit on agricultural land idling that is included within the agricultural economic and social impact sections should be included within the agricultural land section too. This measure is unquestionably feasible because it is offered to mitigate for other impacts of this plan. Second, if the lead agencies were properly adhering to the ROD⁸, the CALFED EIR/S would be incorporated by reference in its entirety, which necessarily includes the Agricultural Land and Water Section. However, the Draft EIR/S makes no reference to the agricultural resource mitigation measures itemized in the CALFED EIR/S. See CALFED EIR/S pp. 7.1-29 to 7.1-30. As the EWA is a CALFED program, these measures must be a part of the EWA’s mitigation plan. At the very least, these are clearly feasible measures that should have been considered in the Draft EIR/S. While the measures included in the final CALFED EIR/S are insufficient to mitigate the

⁷ Even though there is no provision for an “ASIP” within the Endangered Species Act, CALFED is apparently using this document as one of the initial steps in the Endangered Species Act Section 7 consultation process. If the final biological opinion is not circulated with the Draft EIR/S; then at the very least, the supporting ESA documentation that is provided should explain any likely conditions for the granting of assurances.

⁸ Even when lead agencies insist on implementing a flawed program in contravention of law while litigation is pending, they have to implement the program in accordance with the Record of Decision they adopted.

impacts of the CALFED program, they are at least a step above the single measure that is offered in the Draft EIR/S. Both environmental documents, however, suffer from the same shortcoming, which is the failure to include an implementation plan.

Finally, there are many mitigation measures that were not considered in either document that are inherently feasible, thus requiring review in the Draft EIR/S. These inherently feasible measures include the following:

1. Protect agricultural land and associated water rights of equivalent production potential for the duration of the water transfer at a predetermined ratio of at least 1:1 and/or protect an equivalent percentage of agricultural land and associated water rights of equivalent production potential within the same county or irrigation district of the transfer for the duration of the transfer.
2. Agreements with the regulatory agencies that land idled by the EWA will not be considered reverted to habitat or its natural state for Endangered Species Act and Clean Water Act purposes. The environmental baseline will not be increased, thereby increasing environmental regulation when the land is put back into production.
3. A mitigation fee paid to an infrastructure security bank that will make funds available to packing plants, processing plants and other farm infrastructure that is impacted by a loss in tonnage as a result of EWA crop idling. For example, a fee could be charged to the account for every acre-foot of water that is acquired by the EWA due to crop idling. A strong farm infrastructure will protect the environment from a changes in land and water use.

g. THE PROPOSED EXPANSION OF THE EWA IS LIKELY TO SIGNIFICANTLY AFFECT THOSE SPECIES THAT RELY ON AGRICULTURAL LANDS AS AN IMPORTANT STOP ON THE PACIFIC FLYWAY

By taking rice land out of production, the 10 to 20 million waterbirds (including migrants) that depend on the Central Valley will be significantly affected. (Source: California Rice Commission). Sixty percent of the waterfowl on the Pacific Flyway winter in the Central Valley, with rice fields providing habitat to nearly 70 percent of the migrant shorebirds during their journey south. (*Id.*) Without rice farming, wetland habitats in the Central Valley would be reduced by as much as 45 percent. (*Id.*) A loss of this magnitude would have a disastrous effect on waterfowl, and a host of other wetland-dependant species. We are not suggesting that the EWA under any of the alternatives would take all of the rice land in the valley out of production, but the Draft EIR/S should have considered the direct, indirect and cumulative impacts that idling rice lands would have on the birds that use these lands as an important stop on the Pacific Flyway, particularly under the Flexible Alternative. (See attached, list of species that depend on rice lands that the Draft EIR/S failed to consider.)

II. THE DRAFT EIR/S WILL HAVE TO BE RECIRCULATED BEFORE THE FINAL IS ISSUED

The Draft EIR/S is missing important information that is necessary for meaningful analysis of the proposal. In order to provide this information to the public and the decision-makers, the Draft EIR/S must be recirculated.

The lead agencies' failure to provide sufficient information about the EWA proposal for years 4-7 will require the inclusion of significant new information in the next draft. In order to ensure meaningful public participation in the CEQA process, CEQA requires that the EIR be recirculated if the lead agency adds "significant new information" to the document subsequent to the close of the public comment period, but prior to certification. Cal Pub. Res. Code § 21092.1. This lack of information is depriving the public of meaningful participation. *Laurel Heights II*, 6 Cal. 4th 1129; see also 14 Cal. Code Regs. 15088.5; *Mira Monte Homeowners Ass'n v. County of Ventura*, 165 Cal. App. 3d. 357, 365 (1985) ("the failure to prepare a subsequent or supplemental EIR [based on new information] deprived the public, who relied on the EIR's representations, of meaningful participation"; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4th 99, 128-131 (2001) (new information concerning the source of offsetting groundwater pumping requires recirculation of EIR); *City of Santee v County of San Diego*, 214 Cal. App. 3d. at 1451-55 (new information regarding time limit for transportation project requires recirculation").

NEPA also requires agencies to supplement a draft EIS when "a draft statement is so inadequate as to preclude meaningful analysis" or if: (1) "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns;" or (2) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §§ 1502.9(a), (c)(1).

a. THE DRAFT EIR/S DOES NOT SUFFICIENTLY EXPLAIN THE OPERATION OF THE EWA UNDER THE FLEXIBLE ALTERNATIVE, THUS THE PLAN IS LACKING INFORMATION THAT IS VITAL FOR INFORMED DECISION-MAKING AND PUBLIC COMMENT

There is no biological opinion attached to the Draft EIR/S and the action-specific implementation plan ("ASIP") does not provide any information about how or if assurances will be provided to the water users. The public needs to know if "assurances" that no uncompensated water will be diverted for fishery purposes are a part of the alternatives. If assurances are a part of the plan, the public has the right to know the following: 1. How much water must be acquired by what date, 2. Whether there is a minimum funding requirement for the EWA and the ERP before the EWA is considered

fully operational and assurances approved, 3. Are there other undisclosed requirements that must be met before the assurances will be approved, 4. To what use will EWA water be dedicated and how much water will be dedicated to each use. This information is vital as, without it, the public and the decision-makers do not know to what extent the various alternatives satisfy the project's objectives, which include water supply reliability. This information is similarly important to determine how much water would have to be acquired before the Tier III threshold is met and possibly exceeded.

b. THE DRAFT EIR/S DOES NOT PROVIDE SUFFICIENT INFORMATION TO SUPPORT THE ASSUMPTION THAT THE EWA IS BENEFITING PROTECTED FISH SPECIES

The EWA science panel has met each year since the EWA became operational in 2000, yet the Draft EIR/S makes no mention of these workshops or the scientific community's questions regarding any benefits that protected fish species have enjoyed as a result of the operation of the EWA. Clearly, there is a dispute within the scientific community regarding whether the EWA has benefited any protected fish species and this dispute should be reflected in the environmental document. Similarly, unsupported statements attesting to how the fishery will benefit from the EWA appear throughout the Draft EIR/S. These statements must be qualified or further explained because the inherent assumption that the fishery has benefited from the EWA is not necessarily true.

The Draft EIR/S must include a discussion regarding the extent to which the EWA is having a positive population effect on protected salmon species, and why the EWA should continue if the populations of protected salmon species are not increasing as a result of its operation. This discussion took place at this year's EWA science workshop with a presentation by Sheila Greene, thus her work should be discussed in the environmental document because it directly relates to a controversy about the operation of the EWA. The lead agencies and the public will not be fully informed if Ms. Greene's work is not discussed because it directly relates to whether the operation of the EWA should be altered and whether the EWA should be expanded. See, *Central Valley Chinook Genetic Characterization in the Delta*, EWA Workshop July 2003, Sheila Greene (attached.)

Similarly, the EWA must include a discussion regarding the extent to which the EWA is relieving any indirect effects of the operation of the project pumps on protected salmon species. Specifically, the lead agencies and the public cannot have an informed discussion about whether the operation of the EWA should be modified and the size of the account increased without addressing Brian Manly's work in the Draft EIR/S. (See, "Use and Appropriateness of the Available Statistical Tools in Assessing and Quantifying Fish Mortality in the Delta", by Brian Manly, Western EcoSystems Technology, Inc., Cheyenne, Wyoming (which has been presented at an EWA Workshop)) (attached.)

If the agencies agree that the EWA has little effect on protected fish populations, but want to continue with the EWA because of a perceived benefit of avoiding ESA "take" prohibitions, then the agencies need to explain in the Draft EIR/S why avoiding

“take” has no significant effect on protected fish populations. If there is no population effect, then there may be a problem with the “take” criteria.

As far as delta smelt are concerned, there is also rigorous scientific debate as to whether delta smelt have in fact already been recovered since population counts satisfied the recovery criteria this year. At the same time, delta smelt researchers are on the brink of completing two models that will result in new information about how the operation of the EWA and the project pumps affect delta smelt and how they should be operated to support the species. For these reasons, the EWA should not be substantially modified as proposed in the Flexible Alternative until the more complex IBM and Matrix models are operational. If the lead agencies decide to implement the Flexible Alternative despite these facts, then the Draft EIR/S must explain the scientific justification supporting the decision to change the operation of the EWA at a time when delta smelt populations are achieving important milestones.

III. FARM BUREAU WAS IMPROPERLY CITED AS A SOURCE

A proper source for the information listed below should be identified and any reference to Farm Bureau should be removed, or the information should be dropped from the analysis in its entirety. In fact, the errors in citation are so egregious that all cites should be checked for accuracy.

1. Air Quality Chapter, Table 8-4, p. 8-16: Farm Bureau is cited as a source for Table 8-4. The cite to the Farm Bureau must be changed because the figures quoted in the article were not generated or endorsed by the Farm Bureau, being the exclusive opinion of the sources quoted in the article. The cite refers to an Ag Alert news article that reported in 1999 that the Sacramento Regional Air Basin wanted to lower oxides of nitrogen levels by exchanging old agricultural water pumps for newer lower-polluting units. The Farm Bureau publication was merely reporting comments made by others about the plan. Moreover, the table presented in the Draft EIR/S does not appear anywhere in the news article and the data included in the article cannot be reasonably inferred from its text. Regardless, news articles should not be used as the basis for decision-making documents that are supposed to be based on science.
2. Agricultural Social Issues Chapter, p. 12-22, “Central Valley Land Use Report”: The cite refers to an Ag Alert article about the release of a report from the Agricultural Task Force for Resource Conservation and Economic Growth in the Central Valley. Again, it is inappropriate to quote a news article, especially when the article is merely announcing the release of a report authored by another entity. Farm Bureau was a member of the task force that released the underlying report; however, it was the task force and not Farm Bureau that drafted and released the report.

IV. THE DRAFT EIR/S LACKS INFORMATION AND HAS VARIOUS OTHER INSUFFICIENCIES

Other specific comments on the Draft EIR/S are as follows:

1. Adoption of the Flexible Alternative will improperly expand the purpose of the EWA as identified in the ROD if it is used to purchase water exclusively for in-stream flows and/or water quality management, or if the water is released at a time when it cannot be used to off-set pumping restrictions at the project pumps. The ROD identified the CALFED Environmental Water Program ("EWP") as the water purchase mechanism for in-stream flows, not the EWA. If EWA water is used exclusively for in-stream flows and/or water quality management, there may be insufficient water when it is required to offset pumping reductions, and Tier III and possibly mandatory cut backs will not be avoided.
2. The Farm Bureau requests clarification as to the total amount of water that is included within the Flexible Alternative. When the Draft EIR/S compares Flexible and Fixed Alternatives, it states that the Fixed Alternative includes a purchase of 185,000 acre-feet and the Flexible Alternative includes a purchase of up to 600,000 acre-feet. The document also says that the variable assets will still be a part of both plans. Does this mean that 195,000 acre-feet of variable assets are in addition to the 600,000 acre-feet purchase proposed in the Flexible Alternative? Is the 200,000 acre-feet purchase that was supposed to occur in the first year of the account's operation additive, thereby making the ultimate total acquisition under the Flexible Alternative 795,000 acre-feet in certain years?
3. The Draft EIR/S states that one of the reasons to support the Flexible Alternative is that there may be expanded or new water storage projects in the future. Unless these projects are coming on-line in the next three years, these projects are not a rational justification for an expanded EWA. (See p. 2-15.)
4. The Draft EIR/S must provide analysis as to how feasible it is for rice farmers to switch to crops that have lower water requirements to support the statement made on p. 2-46. Which crops have available infrastructure, appropriate soils and other relevant inputs, thereby making them viable alternatives to rice production?
5. The statement in the noise section prematurely assumes that there will be a reduction in noise when land is idled. As the EWA could have growth inducing impacts, agricultural land could be replaced with urban development, thereby bringing the validity of this statement into question.

(See above comments addressing the program's growth inducing impacts.)


6. The Draft EIR/S states there are conservation measures in the Multi-species Conservation Service ("MSCS") that will be mitigating impacts of the EWA. Which measures are mitigating which impacts? (p. 9-109.)
7. Does the Draft EIR/S purportedly analyze the impacts from all of the transfers in Table 2-5? Will the lead agencies undertake additional review if a transfer that it not included on this table is proposed even if the amount of water acquired is not more than 600,000 acre-feet?
8. The Draft EIR/S should have considered impacts to water users caused by giving the EWA preference at Banks Pumping Plant. (p. 2-50.)
9. The Draft EIR/S should have undertaken a more thorough analysis of the potential increases in water acquisition costs.
10. The documents on p. 3-15 are improperly incorporated by reference because the Draft EIR/S does not state where these documents are available for public review, presumably because they have not been made available to the public. Further, the Draft EIR/S should also have briefly summarized the incorporated material and described the relationship between the incorporated material and the Draft EIR/S. Cal Code of Regs. §§ 15150(b) and (c).
11. The statements made pp. 9-255 to 9- 259 suggest that the Flexible Alternative will reduce average annual fish salvage by about 136,000 delta smelt, 1.1 million salmon, 29,000 steelhead, 1 million splittail and 9 million striped bass. These statements are misleading and should be clarified because the numbers are estimated total reductions for the entire 15-year modeling period and not annual reductions.
12. The models used in Chapter 9 to analyze the EWA's fishery implications use data from years 1979-1993. Does the analysis in the Draft EIR/s take into account the fishery restrictions that have been implemented since 1992, i.e., Central Valley Project Improvement Act ("CVPIA") B2, new biological opinions, etc. These restrictions already have increased the amount of water available to offset fishery impacts caused by the pumps, thus the EWA may have less of an impact.
13. The Draft EIR/S should not consider changes in X2 and changes in delta outflow as two separate benefits of the EWA because these are different aspects of the same thing and not separate benefits.
14. On p. 9-54 there is a discussion of the non-existent entrapment zone that was once erroneously associated with X2. To avoid further propagation of

errors, the discussion of the fictitious "entrapment zone" must be removed from the Draft EIR/S.

15. All discussions of QWEST and "reverse flows" should be removed from the Draft EIR/S because we now know that the reverse flow concept is entirely irrelevant, providing no indication of changes in habitat conditions and species abundance. See pp. 9-26, 9-95 to 9-96, and Table 9-4.
16. All discussions of the E/I ratio should be excluded because it is not a reliable indicator of ecosystem conditions or species abundance. The only appropriate place to discuss the E/I ratio is in relation to project operation requirements. See pp. 9-95 to 9-96.

The Farm Bureau looks forward to a satisfactory resolution of our concerns and a successful project. If you have any further questions, please do not hesitate to contact me at (916) 561-5667.

Sincerely,



Becky Sheehan

BDS:sm

Enclosures

cc:

Congressman Richard Pombo
Congressman Ken Calvert
Judge Craig Manson
Bennett Raley
Commissioner John Keys
Senator Diane Feinstein
Bill Pauli, President
George Gomes, Executive Director
Jason Baldwin, Madera County Farm Bureau Manager
Ned Coe
Gary Sack
Art Dove
John Dedo