

April 14, 1999

**To:** Board of Directors (Executive Committee--Information)

**From:** General Manager \_\_\_\_\_  
 General Counsel \_\_\_\_\_

**Submitted by:** Debra C. Man, Chief \_\_\_\_\_  
 Planning and Resources

**Subject:** Status of State Water Resources Control Board Water Rights Hearings to Implement Water Quality Control Plan (**Conference with Legal Counsel—Existing Litigation; Parties: Water Right Holders in Bay-Delta Watershed; to be heard in closed session pursuant to Gov. Code § 54956.9(a); SWRCB Consideration of Alternatives to Implement Water Quality Objectives for the Bay/Delta Estuary and related matters**)

**RECOMMENDATION**

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For information only.

**EXECUTIVE SUMMARY**

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The State Water Resource Control Board has concluded Phases 1 through 7 of its process to develop and adopt a comprehensive water right decision allocating responsibilities for meeting the Bay/Delta flow requirements and water quality objectives contained in its May 1995 Water Quality Control Plan. The State Board is now considering whether to adopt interim orders regarding some or all of the issues raised in the first seven phases prior to commencing Phase 8. That phase will be the most controversial part of the process, in which the State Board will actually allocate flow responsibilities among individual water rights holders. The State Board already has adopted interim order, Order 98-9, which extends an earlier order (Order 95-6) conforming the Department of Water Resources' and United States Bureau of Reclamation's water rights permits to the December 1994 Bay/Delta Accord and subsequent May 1995 Water Quality Control Plan.

Metropolitan staff and other State Water Contractors are considering supporting State Board's modified "Term 91" approach in Phase 8. This approach would require non-project water users to reduce their water diversions, based on the seniority of their rights, during those times of the year when the projects are adding stored water to the natural river flow for flow-related requirements and export needs. This could result in additional water available to meet flow requirements and export needs and establish an important precedent for future proceedings.

The State Board has also set several hearing days in June (Phase 2B) to consider a petition by several San Joaquin River parties to change their water rights permits to implement the

San Joaquin River Agreement/Vernalis Adaptive Management Plan (VAMP). The petition would authorize these parties to release water for environmental purposes at Vernalis. In the meantime, the State Board authorized a temporary permit change so that the VAMP experiment can be implemented in 1999.

Pending a State Board's decision on various procedural issues, it is not clear when Phase 8 will begin. If the State Board decides to adopt interim orders, it is likely that Phase 8 would not begin for perhaps four months; if State Board declines to adopt interim orders, Phase 8 could commence in as little as six to eight weeks, although that is unlikely now that the State Board has scheduled Phase 2B.

## **DETAILED REPORT**

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Since July 1, 1998, the State Water Resources Control Board (State Board) has held proceedings to develop and adopt a comprehensive water right decision allocating responsibilities for meeting the flow requirements and water quality objectives in its May 1995 Water Quality Control Plan (WQCP). The State Board has established a phased process covering five major issues: (1) the extension of Water Rights Order 95-6, which conforms the projects' water rights permits to the Bay/Delta Accord and 1995 WQCP; (2) consideration of potential settlement agreements; (3) the petition by the Department of Water Resources (DWR) and the United States Bureau of Reclamation (Bureau) to combine their points of diversion to enhance operational flexibility in the southern Delta; (4) the Bureau's petition to consolidate and conform its places and purposes of use; and, finally (5) allocation of responsibility to meet Bay/Delta flow requirements.

Staff last updated your Board on the progress of the State Board's process in the General Manager's letter dated October 27, 1998. A copy of that letter is attached for background. Since that report, the State Board has concluded evidentiary hearings on phases 2A and 5 through 7.

**Adoption of Water Rights Order 98-9 (Extension of Order 95-6).** In addition, the State Board adopted a decision regarding Phase 1 on December 3, 1998. This decision, Water Right Order 98-9, is an interim order that continues the temporary terms and conditions set forth in Order 95-6 through the end of 1999. Order 95-6, adopted at the request of the DWR and the Bureau, temporarily amended DWR's and the Bureau's permits to conform them to the December 1994 Bay/Delta Accord and subsequent WQCP. Under Order 95-6, as now extended by Order 98-9, DWR voluntarily agreed to operate the State Water Project (SWP) and the Bureau the Central Valley Project (CVP) to meet Bay/Delta flow requirements and objectives pending resolution of State Board's water rights process or until December 31, 1999.

**Procedural Issues For Future Proceedings.** On January 28, 1999, the State Board held a workshop to discuss various procedural issues, including whether and how the State Board should adopt interim orders on Phases 2 through 7 prior to commencing Phase 8. Metropolitan, as part of the State Water Contractors (State Contractors), recommended that the State Board complete and certify its final environmental impact report (EIR) analyzing the impact of its proposed alternatives and adopt a decision or decisions as appropriate on Phases 2 through 7 prior to the commencement of Phase 8. DWR and many other water user interests urged a similar course of action. The State Board's decision on how to proceed and whether to issue interim orders is pending.

**Phase 2B; Implementation of the San Joaquin River Agreement/Vernalis Adaptive Management Plan (VAMP).** The State Board also set a number of June 1999 hearing dates to consider the petition of a number of San Joaquin River parties requesting a change in place and purpose of use in their water rights permits for the purposes of implementing the San Joaquin River Agreement/VAMP. Under that agreement, certain of the San Joaquin River parties will release additional water in the Spring to meet a pulse flow at Vernalis required by the Agreement/VAMP. The change in their water rights permits is required to authorize them to release water for use for environmental purposes at Vernalis. State Board has designated this process as Phase 2B of its water rights hearings because it is related to the request by many of the parties (including Metropolitan) that the State Board adopt the Agreement/VAMP as its implementation plan for meeting San Joaquin River flow requirements. In the meantime, on April 9, 1999, the State Board approved a temporary change in the San Joaquin River parties' permits to allow the VAMP experiment to be implemented in 1999.

**Phase 8.** The State Board's decision on the procedural issues also will outline the timing and process to be followed in Phase 8. Phase 8 is the heart--and most controversial part--of the State Board's allocation of responsibilities to meet the flow-dependent objectives. The State Board's draft EIR identifies several alternatives for implementing the flow-dependent objectives, which can be grouped into three fundamental approaches:

- Requiring the SWP and the CVP to continue sole responsibility for meeting the flow requirements and objectives.
- Assigning responsibility for meeting the flow objectives to water right holders based on the water right priority system. The SWP and CVP would be considered junior to most Central Valley water users; however, this approach would require non-project water users to reduce their water diversions based on the seniority of their rights during those times of the year when the SWP and the CVP are supplementing the system with storage releases. This is known as the modified "Term 91" approach.
- Allocating responsibility to water users that have storage facilities on tributaries to the Delta, with each tributary required to provide flows based on the tributary's proportionate share of Delta inflow, without regard to priorities. Within each tributary, the allocation would be based on priority.

In preparation for Phase 8, Metropolitan staff and other State Contractors are considering supporting the Term 91 approach. Analyses by the State Board, the projects and the State Contractors indicate that during late Spring and Summer in drier years the majority of the flow in the Sacramento River and San Joaquin River is made up of stored water being released by the projects to meet Bay/Delta flow requirements and export needs. Under the traditional water rights scheme, Delta and upstream water users have the right to divert and use only natural flow and not the supplemental flow added by the projects. The Term 91 approach would require Delta and upstream users to stop diverting this supplemental water. The analyses show that this process theoretically could result in a significant amount of water remaining in the rivers to help meet outflow requirements and export needs. However, the actual amount of water that the projects could gain through the Term 91 approach would be reduced by various contractual, practical, enforcement and other impediments. The State Board's Term 91 alternative analysis applies only to post-1914 water rights holders; the approach being considered by the State Contractors would also apply to pre-1914 appropriators and riparians. Regardless of the amount

of water actually gained by the projects, State Board's application of this approach to all Delta and upstream water users would be an important precedent to establish for future proceedings

Pending State Board's resolution of procedural issues, it is not clear when Phase 8 will begin. If the State Board decides to first finalize its EIR and to issue interim orders, it is likely that Phase 8 would not begin for perhaps four months. If the State Board declines to go through the process of adopting interim orders, Phase 8 could begin in as little as six to eight weeks, although that is now unlikely because of the State Board's recent addition of Phase 2B.

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**Attachment 10-21A**

**Attachment 10-21A**

**9-8**

October 27, 1998

**To:** Board of Directors (Water Planning and Resources Committee—Information)

**From:** General Manager \_\_\_\_\_

**Submitted by:** Debra C. Man, Chief \_\_\_\_\_  
Planning and Resources

**Subject:** Status of State Water Resources Control Board Water Rights Hearings to  
Implement Water Quality Control Plan

**RECOMMENDATION**

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For information only.

**EXECUTIVE SUMMARY**

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The State Water Resources Control Board (State Board) established flow, salinity and other environmental requirements in its May 1995 Water Quality Control Plan (WQCP) for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay/Delta). The WQCP requirements are not self-implementing and require further State Board action under its water rights administration authority. The Department of Water Resources (DWR) and The United States Bureau of Reclamation (USBR) have voluntarily agreed to operate the State Water Project (SWP) and Central Valley Project (CVP) to ensure that the WQCP objectives are met through the end of 1998. The State Board commenced an eight-phase hearing process on July 1, 1998, and to date, has nearly completed the first five phases.

In the final phase (Phase 8), the State Board will weigh evidence concerning the allocation of responsibility for meeting the WQCP objectives among all significant water right holders within the Bay/Delta watershed. This final phase, expected to begin in early 1999 will be contentious as the State Board considers alternatives that could broaden Bay/Delta protection responsibilities beyond the SWP and CVP. Metropolitan, in conjunction with the State Water Contractors, is participating in all hearing phases and preparing evidence for Phase 8.

**DETAILED REPORT**

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Background

The State Water Resources Control Board (State Board) established flow, salinity and other environmental requirements in its May 1995 Water Quality Control Plan (WQCP) for the San

Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay/Delta). The WCQP requirements are not self-implementing and require further State Board action under its water rights administration authority. The Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) have voluntarily agreed to operate the State Water Project (SWP) and the Central Valley Project (CVP) to ensure that the WQCP objectives are met through the end of 1998. The State Board commenced a hearing process on July 1, 1998 to receive evidence regarding the allocation of responsibility of meeting the WQCP objectives among all significant water right holders within the Bay/Delta watershed.

The State Board initially issued a Notice of Public Hearing, December 2, 1997, to commence the hearing process on March 9, 1998. However, at the urging of DWR, and USBR, and many parties interested in the proceedings, including Metropolitan, the State Board held Public Workshops in April to receive input on how the Bay-Delta water rights hearing should be structured, and how to incorporate negotiated settlement agreements such as the proposed San Joaquin River Agreement and potential agreements with Sacramento Valley water users. Since 1995, the export water interests have been meeting regularly with several upstream interests in an effort to reach settlements regarding the allocation of responsibility. Many of the parties, including Metropolitan, recommended that a phased hearing approach be considered so that the less-controversial issues could be presented first and, to the extent possible, ruled upon. We also recommended that the more adversarial issues, such as the responsibilities of the non-settling parties, be heard in the later phases of the process to provide as much time as possible for settlements to succeed.

#### Revised Notice of Public Hearing

The State Board issued a Revised Notice of Public Hearing on May 6, 1998 that included eight phases. The primary purpose of the hearing is to receive evidence on four subjects: (1) the extension of the interim changes in the water rights of the DWR and USBR under Water Right Order 95-6 (WR 95-6), (2) the allocation of responsibility for meeting the objectives in the WQCP, (3) the approval of a joint petition by the DWR and USBR to combine their points of diversion to enhance operational flexibility in the southern Delta, and (4) the approval of a petition by the USBR to change the places of use and purposes of use in its water right permits. The following table describes the eight phases as well as the State Board's progress and schedule.

Hearing Phase	Subject of Phase	SWRCB Progress/Schedule
Phase 1	Extension of Order WR-95-6. The State Water Project (SWP) and the Central Valley Project (CVP) are committed to voluntarily meeting the flow and water quality objectives through the end of 1998 under WR 95-6, a water rights decision based on the 1994 Bay/Delta Accord.	Completed July 1998. The State Board is expected to rule on an extension by the end of this year.
Phase 2	The San Joaquin River Agreement (SJRA). The purpose is to determine if the SJRA adequately protects the San Joaquin River and represents a fair allocation of responsibility for the San Joaquin parties.	Completed August 1998. Phase 2A was added to consider alternatives to the SJRA, and will follow Phase 5.
Phase 3	The Suisun Marsh Preservation Agreement. The purpose is to consider this agreement and alternatives for implementing the Suisun Marsh environmental objectives.	Completed August 1998.
Phase 4	Negotiated Settlement Agreements. The purpose is to consider agreements between parties regarding settlement of Bay/Delta responsibilities.	Completed September 1998.
Phase 5	South Delta Water Quality Objectives. Evidence will be heard regarding southern Delta issues and alternatives for meeting objectives.	Completed November 1998.
Phase 6	Joint Point of Diversion. Evidence will be presented on the petition of the DWR and the USBR to combine use of SWP and CVP points of diversion in the southern Delta for operational flexibility.	Begin Fall/Winter 1998.
Phase 7	USBR Consolidated Place of Use. The petition filed by the USBR to change the place of use and the purpose of use of certain water right permits will be considered.	Begin early 1999.
Phase 8	Responsibility of Non-Settling Water Right Holders. The purpose is to determine the responsibilities of the water right holders who are not parties to accepted agreements to meet Bay/Delta objectives.	Begin early 1999.

### Current Status of Hearing Process

To date the State Board has completed the first five phases of the hearing, and added a new Phase 2A. Following the completion of Phase 2 the State Board ruled that the SJRA merits further consideration and should be compared against other alternatives in a newly created Phase 2A, which will follow Phase 5. In addition to addressing alternatives to the SJRA, Phase 2A will address the responsibilities of the San Joaquin signatory parties.

Phase 4 discussed other proposed negotiated settlement agreements. These include completed stipulations between DWR and Yolo County, Solano County, and North Delta Water Agency. In addition, the settlement agreement between East Bay Municipal Utility District and the export interests was presented. The State Water Contractors, including Metropolitan, declared their support of these agreements. Currently, Metropolitan and other state and federal water contractors are engaged in promising discussions with Yuba County Water Agency (YCWA), DWR, and USBR that could result in a settlement. If it is reached soon, it is possible that other agreements with Sacramento Valley water users will follow and be presented prior to Phase 8. To the extent upstream responsibilities are resolved through these agreements, Phase 8 becomes more simplified and hopefully less contentious.

### Responsibility of Non-settling Parties

Water right holders that do not reach agreement with DWR and USBR will be subject to the State Board's last phase, Phase 8. The State Board issued a draft environmental impact report that identified seven alternatives for implementing the flow-dependent objectives of the WQCP. After hearing the evidence the State Board will select one of the alternatives (or modified alternatives) and issue a water right order to implement the WQCP. The alternatives are as follows:

- No Project Alternative:

The SWP and the CVP would be solely responsible for meeting the objectives required by D-1485, a 1978 State Board water rights decision. D-1485 imposes environmental requirements on the projects' water rights which are less stringent than the WQCP. The State Board is considering this alternative because WR 95-6 is an interim order which expires on December 31, 1998. The extension of this interim order is under consideration in Phase 1.

- SWP/CVP Solely Responsible:

Two alternatives assign the responsibility of meeting the WQCP flow objectives solely to the SWP and CVP (as the projects are currently doing voluntarily). Non-settling upstream water right holders are likely to support this approach.

- Water Rights Priority/Term 91:

Two alternatives assign responsibility for meeting the WQCP flow objectives to water right holders based on the water right priority system. Water right holders would share

responsibility to implement flow objectives; however, the export projects would be placed junior in priority. In one alternative, the Friant project is treated as an in-basin project, and in the other, it is treated as an export project. These alternatives would require water users to reduce their water use, based on the seniority of their water rights, during those times of the year when the SWP and the CVP are supplementing the system with storage releases. These alternatives could reallocate substantial amounts of water (hundreds of thousands of acre-feet at times) during drier years from upstream water right holders to help implement the WQCP. The export interests, including the State Water Contractors, are considering support for this type of approach.

- Watershed Alternative:

This alternative would allocate responsibility to water users that have storage on the tributaries to the Delta. Within each tributary, the allocation would be based on individual tributary's proportions of Delta inflow and average unimpaired flow. This approach is likely to be supported by environmental interests, but would be strongly opposed by upstream water right holders because it would represent a major departure from the historical water rights priority system as well as area-of -origin protections.

- San Joaquin Letter of Intent:

This alternative would have required the SWP and CVP to meet the 1995 WQCP flow objectives, but with a contribution from San Joaquin River users as per the "Letter of Intent among Export Interests and San Joaquin River Interests to Resolve San Joaquin River Issues Related to Protection of Bay/Delta Environmental Resources." The "Letter of Intent" evolved into the broadly supported SJRA, which is under consideration in phases 2 and 2A. The "Letter of Intent" is now obsolete.

### Hearing Preparation

Metropolitan filed its notice of intent to appear in the hearings on January 6, 1998. Metropolitan is participating both individually, and with the State Water Contractors, throughout each phase. Preparation of evidence and testimony for Phase 8 is underway, and staff will continue to update your Board on these important issues and seek authorization of action where appropriate.

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Attachment(s)