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Public Comment
2016 Bay-Delta Plan Amendment & SED
Deadline: 3/17/17 12:00 noon

Felicia Marcus, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov

Re: Comment Letter – Draft Revised SED in Support of Potential Changes to the Water Quality Control Plan for the Bay-Delta: San Joaquin River Flows and Southern Delta Water Quality

Dear Chair Marcus and Board Members:

Earth Law Center (ELC) welcomes the opportunity to provide these comments on the State Water Resources Control Board's (SWRCB) "Draft Revised Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the Bay-Delta"¹ (Draft Revised SED). Earth Law Center is a non-profit organization that advances legal rights for ecosystems and species to exist, thrive, and evolve, and particularly supports the development of water rights for waterways as critical to their long-term health and well-being.

As an overarching point, ELC has significant concern over the inability of the Draft Revised SED to protect Sacramento-San Joaquin Bay Delta ("Bay-Delta") water quality, particularly as it pertains to the protection of aquatic species and habitats. The importance of the extant effort, particularly in light of the multiple stressors already plaguing Delta health and the threats still to come, demand careful attention to full and accurate application of the law and facts in the decisionmaking task before us. Unfortunately, the Draft Revised SED fails to meet that challenge.

Specifically, ELC believes that the Draft Revised SED must be revised and recirculated for additional public review for the following reasons:

- California has a federal mandate under the Clean Water Act (CWA) to protect waterway beneficial uses, particularly "protection and propagation of fish, shellfish, and wildlife" (CWA Section 101(a)(2)). This mandate may properly impact individual water rights as needed to address "legitimate and necessary water quality considerations." Accordingly, the Draft Revised SED must specifically consider CWA compliance in developing and assessing alternative flow scenarios.
- State flow (and salinity) objectives must meet CWA requirements to fully protect – *not* "reasonably" protect – beneficial uses. If there are multiple use designations, the level

¹ "Recirculated Draft - Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay–Sacramento San Joaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water Quality" (Sept. 2016).

of quality necessary to support the most sensitive uses must be maintained. Uses cannot be balanced away, and application of the Section 13241 factors cannot result in beneficial use protection that is less than that mandated by the CWA.

- As a result of its flawed application of the law and facts, the Draft Revised SED includes a flow proposal (30 to 50% of unimpaired flow, with a starting flow of 40% of unimpaired flow, for February through June for the San Joaquin River and its tributaries) that will fail to protect existing beneficial uses. Indeed, the state by its own data is in danger of acting to eliminate existing beneficial use(s), in direct violation of the CWA.
- The CWA specifically allows for incidental impacts on water rights to occur as a result of actions necessary to address water quality concerns, a point decisively upheld by the U.S. Supreme Court. The state cannot avoid CWA based on a misunderstanding of the relationship between water quality and quantity under the law. The CWA must guide the state's development of criteria to protect beneficial uses impacted by flow.
- The Draft Revised SED also includes an overly broad "state of emergency change provision," which would likely be used to further weaken already inadequate flow requirements. This provision is contrary to the CWA, which does not appear to contain an emergency exception for a state to waive its duty to implement and enforce water quality standards. Additionally, with regards to droughts, we can no longer call them "emergencies" and then significantly weaken our ecosystem protections. Droughts have always occurred with regularity in California, and they will continue to increase in frequency and severity as climate change impacts worsen.

These points are discussed further below.

Ultimately, to be effective, the decisions of the SWRCB to protect aquatic life and habitats through improved flows should be enshrined in law through water rights for waterways, prioritized to ensure that flows are available when needed.² We must care for the waters that support us in order to ensure our collective, long-term well-being.

THE STATE WATER BOARD MUST SPECIFICALLY ADDRESS CLEAN WATER ACT MANDATES TO FULLY PROTECT BENEFICIAL USES

The Clean Water Act Requires Protection of Beneficial Uses through Science-Based Criteria that Address the Most Sensitive Uses

The Draft Revised SED's analysis avoids direct interaction with the Clean Water Act, choosing instead to rely on Porter-Cologne provisions such as Sections 13000 and 13241, which call only for the highest water quality that is "reasonable" in light of competing uses and other factors. However, as noted by the state Supreme Court, Porter-Cologne "cannot authorize what

² See Stanford Law School Environmental Law Clinic & Earth Law Center, California Water Governance for the 21st Century (2017), available at: <http://www.earthlawcenter.org/s/California-Water-Governance-for-the-21st-Century-2017.pdf>.

federal law forbids.”³ Under the federal Constitution's Supremacy Clause (Art. VI), a state law that conflicts with federal law, as the weaker Porter-Cologne provisions clash with CWA requirements, is “without effect.”⁴

The CWA was established to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵ To ensure that water quality improves, rather than degrades, the CWA requires state adoption of water quality standards that “shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.”⁶ The use of waterways for the “protection and propagation of fish, shellfish, and wildlife” was given special attention through the “fishable/swimmable” provision in CWA 101(a)(2). This provision effectively creates a rebuttable presumption that these uses are attainable unless a state or tribe “affirmatively demonstrates, with appropriate documentation, that such uses are not attainable”⁷ (though “existing uses” cannot be eliminated).⁸

In setting criteria to protect the beneficial uses, U.S. EPA regulations⁹ require states to “protect [*not* ‘reasonably’ protect] the designated use.” The EPA regulations add that:

[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. *For waters with multiple use designations, the criteria shall support the most sensitive use.*

(Emphasis added.) The regulations conclude that criteria may be based on U.S. EPA Guidance developed pursuant to CWA Section 304(a) or “[o]ther scientifically defensible methods,” including biomonitoring. In other words, *criteria must protect the most sensitive beneficial use and must be based on science.* Other considerations (such as cost) do not factor into the development of criteria.

The San Joaquin River Flow Objectives in the Draft SED Do Not Protect Fish and Aquatic Life as Required by the Clean Water Act

In its August 2010 flow criteria report, the Water Board found that “[t]he best available science suggests that current flows are insufficient to protect public trust resources,”¹⁰ and that

³ *City of Burbank v. State Water Resources Control Bd.*, 35 Cal.4th 613, 626, 108 P.3d 862 (2005).

⁴ *Id.*

⁵ CWA § 101(a); *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 704 (1994) (*PUD No. 1*). For most of the CWA’s implementation history, regulatory attention has been primarily focused on the chemical integrity of waterways, even though the letter of the law demonstrates that it was also written to address other elements of waterway health. Regulatory agencies have significantly increased their attention on biological integrity over the last 5-10 years. Physical integrity is now starting to reach the regulatory docket, particularly since the *PUD No. 1* Supreme Court decision, with more states adopting narrative flow criteria and taking other actions under the CWA to create more flows in waterways.

⁶ CWA § 303(c)(2)(A); *PUD No. 1* at 704.

⁷ See, e.g., U.S. EPA, “Water Quality Standards Academy, Key Concepts (Module 2.c),” available at: <http://water.epa.gov/learn/training/standardsacademy/mod2/page4.cfm>.

⁸ 40 CFR §§ 131.10(g), (h)(1).

⁹ 40 CFR § 131.11; see also 40 CFR § 131.6.

¹⁰ SWRCB, “Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem,” p. 2 (Aug. 3, 2010) (2010 Flow Report) available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

“[r]ecent Delta flows are insufficient to support native Delta fishes for today’s habitats.”¹¹ The Board concluded that:

In order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows. These criteria include... *60% of unimpaired San Joaquin River inflow from February through June.*¹²

By contrast with the scientifically-supported flow criteria that would protect the well-being of sensitive fish and other aquatic life, the Draft Revised SED recommends a flow objective for the San Joaquin River and its tributaries of 30 to 50% unimpaired flow, with a starting point of 40% unimpaired flow from February to June.¹³ The lower end of this range barely skirts current flows,¹⁴ which the Draft Revised SED acknowledges have been contributing to the overall decline in salmon and other fish populations.¹⁵ And the upper end of this range still falls well short of the 60% unimpaired San Joaquin River inflow recommended in the August 2010 flow criteria report.

The Water Board attempted to justify this figure its Executive Summary of the Draft Revised SED, stating that “[e]stablishing the percent of unimpaired flow reflects the SWRCB’s explicit *balancing of competing beneficial uses*—the allocation of water to environmental uses relative to other, primarily agricultural, uses.”¹⁶ As we have just seen, the CWA does not provide for “balancing” beneficial uses; instead, it mandates adoption of criteria that “support the most sensitive use” – in this case, the protection of fish and aquatic life. Rather than the 60% demanded by science, the Draft Revised SED’s inattention to CWA requirements has produced criteria far below that needed to protect sensitive beneficial uses, and so runs afoul of the CWA.

In addition to its inappropriate “balancing” of beneficial uses, the SWRCB appears to have also shaved the science-based 60% flow figure down to the flawed 30 to 50% flow range (with a starting point of 40%) through a misplaced reliance on Porter-Cologne and its Section 13241 factors,¹⁷ rather than protecting the most sensitive beneficial use as required by the CWA. As the Draft Revised SED states in the Executive Summary, “[t]he flow proposal would provide the flow

¹¹ *Id.* at p. 5.

¹² *Id.* (emphasis added).

¹³ The vague nature of the narrative standard further facilitates this lack of attention to the flows needed to protect beneficial uses. In particular, the narrative objective calls on the state to “[m]aintain flow conditions from the San Joaquin River Watershed to the Delta at Vernalis, together with other *reasonably controllable* measures in the San Joaquin River Watershed, sufficient to support and maintain” beneficial uses, focusing on flows that “*reasonably contribute*” to maintaining beneficial uses. Draft Revised SED, Executive Summary, p. ES-11. The continued, inappropriate focus on “reasonably” attainable flows will not support beneficial uses. By contrast, Tennessee’s narrative flow standard to protect fish and aquatic life is direct: “Stream or other waterbody flows shall support the fish and aquatic life criteria.” Tennessee Rule 1200-04-03-.03 – Criteria for Water Uses, available at: <http://tn.gov/sos/rules/1200/1200-04/1200-04-03.20110531.pdf>.

¹⁴ *See, e.g.*, Draft Revised SED, Executive Summary, p. ES-12. (“[H]istorical median February– June flows from 1984–2009 in the Stanislaus, Tuolumne, and Merced Rivers were, respectively, 40, 21, and 26% of unimpaired flow.”)

¹⁵ *See e.g.*, Draft Revised SED, p. ES-10 (“[t]he flow changes and physical habitat modification activities (e.g., gravel mining) have resulted in poor habitat conditions for native fishes and native LSJR fish populations (e.g., Chinook salmon and Central Valley steelhead) have declined.”).

¹⁶ Draft Revised SED, Executive Summary, p. ES-13 (emphasis added).

¹⁷ *See e.g.* Draft Revised SED, pp. ES-64, 5-52.

conditions necessary to reasonably protect fish and wildlife beneficial uses.”¹⁸ This deference to “reasonable” protection presumably arises from the following statement of policy under Porter-Cologne:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the *highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.¹⁹

This provision, while modern at its adoption in 1969, falls short of the mandates of the CWA, adopted three years later. Water Code Section 13241 similarly requires the adoption of objectives that will only ensure the “reasonable protection of beneficial uses.” The proof of the impacts is in the flow figures – 60% when consistent with the CWA (*i.e.*, based on science rather than also on economics and other factors),²⁰ and 30 to 50% (with a starting point of 40%) when the “balancing” and Section 13241 factors are applied.

As noted above, the state Supreme Court has found that Porter-Cologne “cannot authorize what federal law forbids.” The federal CWA dictates that criteria must be based on science, and that criteria must protect the most sensitive beneficial use. The state may consider other factors if it so chooses, but that analysis cannot result in criteria less protective than dictated by the CWA.²¹ If the state desires to take action that would impact such uses,²² it must complete an antidegradation analysis that clearly demonstrates the need for the change and justifies it with data. Pre-empting this process with state factors that throw in the towel on fish and wildlife protection before effort has even begun cannot be construed as consonant with the CWA.²³

Significant work remains for the state to craft a solution to the disappearance of fish populations and healthy aquatic habitat in the Lower San Joaquin River.

THE CLEAN WATER ACT ENCOMPASSES THE USE OF FLOW MODIFICATIONS TO PROTECT BENEFICIAL USES

The Draft Revised SED’s reliance on Porter-Cologne over the stricter requirements of the CWA perhaps can be attributed to a mistaken perception that the CWA does not address flows. This issue was decided to the contrary, however, by the U.S. Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*), which found the distinction between water quality and quantity under the CWA to be “artificial.”

In *PUD No. 1*, Supreme Court took up the question of whether Washington state had properly issued a CWA Section 401 certification imposing a minimum stream flow requirement to

¹⁸ Draft Revised SED, p. ES-4.

¹⁹ Calif. Water Code § 13000 (emphasis added).

²⁰ 2010 Flow Report, p. 2.

²¹ *City of Burbank*, 35 Cal.4th at 627-28.

²² Existing, “Tier 1” uses, however, cannot be degraded further. 40 CFR § 131.12(a)(1).

²³ It bears noting that this, of course, is true for the salinity objectives as well.

protect fish populations. The Supreme Court held that conditioning the certification on minimum stream flows was proper, as it was needed to enforce a designated use contained in a state water quality standard.²⁴ In reaching this decision, the court noted that “a project that does not comply with a designated use of the water does not comply with the applicable water quality standards,” and that Washington had properly determined that the project as proposed (*i.e.*, without the minimum flow conditions) would have been inconsistent with the applicable designated use of “[s]almonid [and other fish] migration, rearing, spawning, and harvesting.”²⁵

In responding to project proponents’ argument that the CWA only addresses water “quality” and excludes regulation of water “quantity,” the Supreme Court held that:

[t]his is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.²⁶

The Supreme Court specifically took note of CWA Sections 101(g) and 510(2), which address state authority over the allocation of water as between users. The Court found that these provisions “do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.” This conclusion is supported by the “except as expressly provided in this Act” language of Section 510(2), which conditions state water authority; and by the legislative history of Section 101(g), which allows for impacts to individual water rights as a result of state action under the CWA when “prompted by legitimate and necessary water quality considerations.”²⁷

Other states and U.S. EPA Regions have already embraced this direction and protected aquatic beneficial uses through actions that impact flows. For example, numerous states²⁸ have already adopted “instream flow water quality standards,” with Texas and New Mexico (among potentially others) examining them as well. In a letter to the state of Alabama, U.S. EPA Region 4 recommended that Alabama “utilize the ... CWA to develop instream flow water quality standards (WQS) for the protection of all designated uses and for application in all other purposes under the CWA.”²⁹ U.S. EPA Region 4 then concluded that “*Alabama should not set conditions which would be less stringent than or in conflict with the state WQSs under the CWA.*”³⁰ Additionally, shortly

²⁴ *PUD No. 1*, 511 U.S. at 723.

²⁵ *Id.* at 714.

²⁶ *Id.* at 719.

²⁷ *Id.* at 720 (“*See* 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 532 (1978) (“The requirements [of the Act] may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations”).” *See also* Memorandum from U.S. EPA Water and Waste Management and General Counsel to U.S. EPA Regional Administrators, “State Authority to Allocate Water Quantities – Section 101(g) of the Clean Water Act” (Nov. 7, 1978), available at: http://water.epa.gov/scitech/swguidance/standards/upload/1999_11_03_standards_waterquantities.pdf.

²⁸ At a minimum, the following states have adopted flow criteria: Tennessee, Kentucky, Vermont, New Hampshire, Rhode Island, New York, Virginia, and Missouri. Letter from U.S. EPA Region to Alabama Department of Environmental Management, pp. 10-12 (Nov. 19, 2012) (U.S. EPA Reg. 4 Letter) (attached).

²⁹ *Id.*, p. 9.

³⁰ At a minimum, the following states have adopted flow criteria: Tennessee, Kentucky, Vermont, New Hampshire,

after the *PUD No. 1* decision, U.S. EPA Region 1 issued a letter to the Rhode Island Department of Environmental Management reiterating the findings of *PUD No. 1* and recommending numerous options for the state to address flow issues through the CWA, including pointing out that “[f]ishery restoration/management plans can also be integrated into water quality standards.”³¹

In summary, the CWA Act demands the protection of beneficial uses through science-based criteria that protect the most sensitive uses fully. Flow criteria cannot be less stringent than or in conflict with state water quality standards under the CWA. The Draft Revised SED’s recommendation of 35 to 50% unimpaired flow will fail to reverse the longstanding degradation of fish and aquatic life and habitat uses, and is far less than the science-based 60% flow properly focused on protection of these sensitive uses. The state cannot avoid its responsibilities under the CWA by relying on state factors that balance away these beneficial uses.

THE BAY-DELTA PLAN’S STATE OF EMERGENCY CHANGE PROVISION IS ILLEGALLY BROAD

The Draft Revised SED attempts to weaken the obligation of the SWRCB to protect flows by including a “state of emergency change provision” that would permit the waiver of water quality standards under certain circumstances. The Draft Revised SED describes the state of emergency change provision as follows:

The current drought has highlighted the need for flexibility to adjust requirements in water rights that implement the current 2006 Bay-Delta Plan objectives during emergencies. [...] Under this emergency provision, the State Water Board, at its discretion or at the request of any affected responsible agency or person, may authorize a temporary change to the implementation of the LSJR flow objectives in a water right proceeding if the State Water Board determines that either (1) there is an emergency as defined by CEQA (Pub. Resources Code, § 21060.3), or (2) the Governor of the State of California or a local governing body has declared a state or local emergency pursuant to the California Emergency Services Act (Gov. Code, § 8550 et seq.). Before authorizing any temporary change, the State Water Board must find that measures will be taken to reasonably protect the beneficial use in light of the circumstances of the emergency.³²

This provision is concerning in that it seemingly disregards the state’s legal obligation to enforce adopted water quality standards – including flow standards – consistent with CWA mandates to fully protect aquatic life. The CWA does not itself appear to contain an emergency exception for a state to waive its duty to implement and enforce water quality standards, whether during a drought or similar circumstances. Additionally, the SWRCB’s proposed power to self-declare a state of emergency under CEQA in order to suspend Lower San Joaquin River flow objectives appears to be an attempt to circumvent the science-based process that determines water quality standards in the first place.

Rhode Island, New York, Virginia, and Missouri. Letter from U.S. EPA Region to Alabama Department of Environmental Management, pp. 10-12 (Nov. 19, 2012) (U.S. EPA Reg. 4 Letter) (emphasis in original).

³¹ Letter from U.S. EPA Region 1 to Rhode Island Department of Environmental Management (June 25, 1996) (U.S. EPA Region 1 Letter) (attached).

³² Draft Revised SED, Executive Summary, p. ES-19.

The CWA arose out of massive fish kills and other impacts of human misuse that afflicted our nation's waterways in the late 1960s. Paradoxically, the SWRCB is attempting to ignore the CWA's protections when they are needed most. Without full protection of the CWA, Delta fish populations face imminent extinction.

Even if the CWA did allow for such broad exceptions, ELC does not believe that a drought rises to the level of an "emergency" supporting waiver of CWA standards (as suggested by the Revised Draft SED). First, Government Code § 8558(b) defines "state of emergency" as:

the duly proclaimed existence of conditions of *disaster* or of *extreme peril* to the safety of persons and property within the state caused by such conditions as ... drought ... which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat.³³

Semi-arid California is accustomed to regular "drought" conditions, having experienced 10 multi-year drought sequences extending 41 total years over the last 100.³⁴ Further, Delta outflow has reached the equivalent of "super-critical dry" runoff conditions in 19 of 40 years since 1975 – *i.e.*, almost *half* of the last 40 years.³⁵ Thus, it seems unreasonable for California to indefinitely liken drought conditions, even outlier droughts, that go on for years and occur repeatedly to an "emergency" in general, or to conditions of "disaster" or "extreme peril" more specifically.

An additional issue is whether an "emergency" can duly be declared when it is in large part human-caused. For example, of those 19 years in which Delta outflow reached the "super-critical dry" threshold, only one year – 1977 – would have reached this extremely low level of flow without diversions exacerbating water shortages.³⁶ Were it not for over-diversion and water mismanagement in the Delta, it would be much harder to argue that a state of "emergency" exists.

Nor does drought seem to constitute an "emergency" as defined under the California Environmental Quality Act (CEQA). CEQA's definition of "emergency" is distinct from Government Code § 8558. Under CEQA, an "emergency" is defined as:

a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.³⁷

³³ Government Code § 8558(b) (emphasis added).

³⁴ See <http://mavensnotebook.com/2015/06/04/this-just-in-groups-sue-department-of-interior-bureau-of-reclamation-state-water-board-and-dwr-to-prevent-fishery-extinctions/>.

³⁵ See Gary Bobker, Protest Petition: Environmental and Public Interest Considerations Re The Bay Institute's Protest of January 23, 2015 TUCP and Objections to February 3, 2015 SWRCB Executive Director's Order (Feb. 13, 2015), p. 9, at:

www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/tbi_bobker021315.pdf.

³⁶ *Id.*

³⁷ California Public Resources Code § 21060.3.

A drought by definition is not a “sudden, unexpected occurrence,” particularly one that lasts multiple years. Additionally, such droughts may possibly become the “new normal” with climate change. Rather than being targeted towards protecting ecosystems – the entities in the greatest need of support during droughts – a temporary change to water quality standards due to a perceived “emergency” under CEQA during years-long droughts is largely targeted at economic consequences (such as support of large agricultural businesses) rather than actual, time-critical emergency *needs*.

In summary, the inclusion of the state of emergency change provision within the Draft Revised SED threatens numerous aquatic species with significant injury, including actual, imminent extinction if used improperly. The CWA does not include an applicable emergency exception for droughts, nor does state law allow for non-compliance with water quality control plans unless by statute, supported in writing (the legality of this is questionable, however, where it conflicts with CWA mandates to fully protect beneficial uses). This is particularly true in light of the years-long nature of California droughts over the last several decades.

CONCLUSIONS

The role and import of the federal Clean Water Act is noticeably muted in the Draft Revised SED. Instead of developing science-based criteria to protect sensitive aquatic life and habitat beneficial uses, the Draft Revised SED inappropriately relies on an array of weaker state law factors to water down the science-based criteria to recommendations that could worsen, rather than improve, the current, tenuous environmental health of the Delta. The state must redraft and recirculate an SED that fully complies with the clear CWA mandate to protect beneficial uses fully. It also must revise the state of emergency change provision to ensure that flow objectives are enforced when aquatic life and habitat needs them most – such as during regular periods of drought and other periods of water shortages.

The state cannot simply stand by while Delta health continues to spiral downward. The CWA provides the tools to begin to reverse this slide and must be used by the SWRCB. In addition, the Board should begin examination of the active use of water rights for waterways to ensure final flow commitments are met. The Delta’s aquatic life and habitats “should not be destroyed because the state mistakenly thought itself powerless to protect them.”³⁸ We urge the SWRCB to incorporate these comments into a revised project and SED that will advance the letter and intent of the CWA to ensure a thriving, biodiverse, flowing Delta.

Thank you for your attention to these comments.

Best regards,



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³⁸ *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 452 (1983).