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



March 17, 2017

State Water Resources Control Board  
1001 I Street  
P.O. Box 100  
Sacramento, California 95812-0100

[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Re: Substitute Environmental Document – San Joaquin River and Southern  
Delta Flow Standards and Water Quality Control Plan Amendments

Ladies and Gentlemen:

These comments to the Substitute Environmental Document (SED) are submitted on behalf of the San Joaquin River Exchange Contractors Water Authority.

**I. The Substitute Environmental Document (SED) Is Not in Conformance with the Requirements of CEQA Requiring That All Reasonable Alternatives and Mitigation Measures Be Examined as to Their Environmental Impacts. The SED Does Not Consider Alternatives Other than Flow and Expansion of Flood Plain Space to Provide for Enhancement of Fish and Natural Species Populations.**

The consideration of reasonable alternatives requires that the SWRCB quantify the benefits and detriments of alternatives such as fish hatcheries, killing of predator populations and use of anadromous fish transportation methods other than increasing and releasing of flows. Because that has not occurred, this SED is deficient and must be revised.

CEQA requires that a reasonable range of alternatives be considered and only alternatives which are not reasonable may be disregarded. *CEQA Guidelines* §15126.6(b). The CEQA document must explain in its text why alternatives were ruled out or discarded. That discussion must include an explanation of why the alternatives (1) failed to meet most of the basic project objectives, (2) were infeasible, or (3) caused

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significant environmental impacts which exceeded or caused greater environmental harm than the project impacts. *CEQA Guidelines* §15126.6(c). The discussion of alternatives in the Aquatic Resource Section (and other sections of the SED) contains no such analysis or consideration.

Here, no alternatives such as new fish hatcheries, transportation of juvenile anadromous fish from fish hatcheries through and to areas of the Sacramento San Joaquin Delta, killing of predators, or development of hatcheries for other desired species are considered or discussed. The flooding of floodplain lands for creation of food and habitat for anadromous fish is treated as the chosen device with the only alternative being the amounts of flow and floodplain to be inundated. In all other aspects of management of the human environment, human habitat and feeding patterns are in the CEQA process considered to be changeable and subject to being manipulated, and yet anadromous and warm water fish species are not subject to the same examination of alternatives.

Fish hatchery development and operation, transportation of anadromous species through areas where detrimental conditions exist, and maximization of fish populations through predator control and fishing limits have been used for decades, and yet there is no mention of the quantification or comparison of the impacts of those alternatives or consideration of the potential reduction of significant environmental impacts from such alternatives. On pages 3-19, the SWRCB assumes without explanation that only flow alternatives to enhance fishery resources are to be considered. CEQA includes no such limitation of a CEQA study to the “usual” or “preferred” mechanisms.

Such a prejudice, prejudgment and crafting of the document to exclude alternatives not favored by the SWRCB staff and consultant authors is not permitted under CEQA. The SED document itself must explain factually why alternative measures for fish survival or the means of increasing the numbers of surviving and returning fish would be infeasible or increase adverse environmental impacts. It must explain why predator removal would not quantitatively increase salmon and steelhead survival in the same numbers as increased flows or floodplain inundation. The presented SED and its appendices do not provide any evidence that these alternatives unrealistic or that the comparative environmental benefits and detriments of alternative measures are barred from consideration. The test of whether alternatives are to be examined is to determine if a given alternative is realistically possible. *Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal App.3rd 893, 910. As an example, the chapters “Aquatic Resources” and “Evaluation of Other Indirect and Additional Actions” do not include any discussions of why such alternatives were not

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addressed or were rejected in closed-door proceedings, or how determining whether fish hatcheries and predator removal would, with less water, accomplish more benefit for the “preferred fishery or aquatic species.”

If the SED authors believe the information to provide a comparison of alternatives, such as survival, return rates or comparative costs, other than flow alternatives for fishery propagation and to compare survival, would be too costly to develop, the SED must at least describe what information exists and explain why it would be too costly or unrealistic to provide for comparisons and to quantify the benefits and detriments of non-flow alternatives in terms of surviving juveniles or returning adults. *CEQA Guidelines* §15126.6(c). There is no such explanation in this SED, despite the fact that the flow alternatives are admitted to create extensive groundwater overdraft, to significantly and adversely affect the human environment, and – in a disorderly fashion – cause thousands of acres of productive agricultural deep wells to run dry. The alternative of simply buying up farm land which is dependent on groundwater to avoid those environmental consequences and implementing a coordinated flow project designed to prevent overall increased and diverse environmental impacts is not even considered. CEQA was developed for and is required to stop such tunnel vision decisionmaking.

In regard to predator removal in Chapter 16, the insufficiency of the SED can be clearly seen. After a long discussion of changing habitat conditions to deter or reduce predator success, it is concluded that direct removal programs are unclear in their ability to rebuild populations (p. 16-190) and that “Pilot Programs” would be required. On page 191 of Chapter 16, the authors attempt to explain why no quantification of the potential increased survival from direct predator control measures is included, and why a vague narrative discussion in three separate locations is sufficient, the third area being Attachment C which is not even mentioned. Alternatives must be comparable and sufficient quantifications included to understand the comparative environmental impact detriments and benefits. No such facts are included in this document.

Attachment C is a purported Scientific Basis for alternative flows, yet it includes no data to examine if additional flows and additional floodplain inundation benefits could be multiplied if instead of increasing flows, financial resources were placed into hatchery development on the Tuolumne and Stanislaus Rivers and a means of transportation to occur to avoid predation despite decades of studies. For 11 years, the Vernalis Adaptive Management Program (“VAMP”) attempted to quantify the losses to predation and the benefits or detriments of pulse flows or higher flows. The results of those studies are claimed to be inconclusive, yet the same device of “more water flow” is assumed to be

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preferable. If that is the case, how many more adult salmon will result from increasing groundwater overdraft by one acre-foot per overlying acre? How much hatchery and juvenile transportation capacity would have to be employed to obtain the same adult return increase?

CEQA requires clear analytic consideration of alternatives. CEQA is not satisfied if the authors' prejudices that "natural is better" persuades every conclusion. Because flow is important (Appendix C, pp. 3-39, 40), it is impermissible not to examine the benefits and detriments of alternative projects and methods.

Other commenters will cite to survival estimates from predation versus survival if less predators are present and studies of transportation of juveniles from hatcheries and costs of those efforts. The California DF&W should have written those alternative comparisons but did not. That information is incorporated herein to demonstrate how the inadequacy of this process can be remedied and a proper lead agency be designated.

**II. The Failure to Designate the Proper Lead Agency and the Failure to Properly Describe the Multiple "Projects" Included as One Project Results in a Violation of CEQA. The California Department of Fish and Wildlife Is the Proper Lead Agency for Any Project to Improve the Numbers of Fish and Wildlife Species and the SWRCB Is the Proper Lead Agency for the Proper Uses of Water. The SWRCB Views its Role in this CEQA Document as That of the California DF&W to Attempt to Develop and Order Implementation of a Fishery Enhancement Project Which is a Separate Project that must be Designed, Financed and Adopted by California First Before Water Flow and Quality Standards are Incorporated and the Result Is an Inadequate Consideration of Impacts and Alternatives.**

The proper lead agency is "the public agency which has the principal responsibility for carrying out or approving a project." *CEQA Guidelines* §15367.

The choice of the proper lead agency is not simply formalistic. It is to insure that the Project is properly understood and appraised by the party who is best able to approve, disapprove or change the project by adopting alternatives. The SWRCB is not outfitted to determine how or whether to have a project to protect or enhance fishery numbers. The SWRCB is not the proper lead Agency for a project which is primarily to decide whether a broad and expensive plan to increase fish numbers should be preferred to existing urban

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and agricultural uses of water. That is, instead, a “project” to be designed by California DF&W, and presented to the California legislature for approval and funding, and only then presented to the SWRCB to answer the question of how to provide for the flow and water quality directions in regard to flow requirements to accomplish the California DF&W or federally-encouraged project.

In *Laurel Heights Improvement Associations v. Regents of the University of California* (1988) 47 Cal.3<sup>rd</sup> 376, 406 the Supreme Court made clear that the lead Agency itself must develop alternatives. This requirement confirms that the wrong agency has been chosen. Here, what expertise does the SWRCB or its consultants have to determine alternatives or mitigation measures related to fish numbers or habitat, hatcheries or predation? The SWRCB cannot fund or staff fish hatcheries and cannot change fishing programs or establish predator removal programs as an example, under CEQA, once the decision is made by California DF&W as to whether predators should be removed or numbers of juvenile salmon should be increased without hatcheries and that plan has been approved and funded by the Legislature, the issue of the amounts of flow required and how to provide those flows and water quality can be properly resolved by the SWRCB and alternative water quality and flow conditions adopted.

The present, incorrect, designation of the SWRCB as lead Agency is only because some interests believe that the orders of the SWRCB regarding water are without need for public funding or compensation of property owners...the allocation and dedication of water flows are believed to be free because it is claimed the SWRCB Water Quality Control Plan is simply a matter of withdrawing water from lawful users without compensation or relocation benefits.

In fact, that assumption and approach that the SWRCB can make such orders without payment is not the correct and the further evidence for reorganizing these proceedings with California DF&W as lead Agency emerges. Public trust uses of water which withdraw water from proper users have long been held to require reasonable compensation for improvements and investments made in reliance on the allocation of water. In *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, the United States Supreme Court on page 455 states that if the public trust doctrine is utilized to return water to natural uses or public land to natural uses, that the State “...ought to pay” for any “...expenses incurred in improvement made under such a grant” when the State wishes to resume possession of the public trust assets or property. In *Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 533-34, the California Supreme Court confirmed that the exercise of a public trust reservation to reclaim water or property for what is considered a

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preferred use required the payment of damages or compensation for the loss of value because of the reasonable reliance of private parties in installing and constructing improvements in reliance upon the use of those resources.

The proper lead Agency role under CEQA when multiple projects are proposed may be to coordinate with other public agencies in the role of a responsible Agency, but the SWRCB cannot and does not become the proper lead Agency for a project to increase numbers of fish and natural flood plan habitat under its authority in regard to administration of water. The proper lead Agency is the Agency with the experience, funding and authority to implement the project. SWRCB meets none of these requirements. The effect of the choice of the wrong lead Agency is an insufficient SED. *Planning & Conservation League v. DWR* (2000) (3<sup>rd</sup> Dist. Ct. of Appeal) 83 Cal. App. 4<sup>th</sup> 892.

Here, because the only tool assumed available to the SWRCB is water flows, the only alternative considered to provide for a viable desired fishery or natural resources project was water flows. However, that is not factually or legally correct.

If there is a public desire for increased numbers of anadromous or other fish, or even preservation of current populations, the California DF&W is the proper Agency to provide for the examination of that proposed project, to present the environmental effects and economic and social costs of that project since the SWRCB has no funding authority for such measures or plans. Once the “project” envisioned by the proper lead Agency, California DF&W has been outlined, alternatives considered, and funding provided, and the project approved by the California Legislature, application to the SWRCB would then be made by California DF&W to provide for amendment of the Water Quality Control Plan flows on the San Joaquin tributaries to provide for those ideal flows and the SWRCB would perform its SED as to the alternatives, mitigation measures and No Project alternatives.

The *CEQA Guidelines* provide for the use of staged EIR’s “where a number of discretionary approvals from government agencies and one of the approvals will occur more than two years before construction will begin.” *CEQA Guidelines* §15167(a). Here, that two-stage process has been ignored in order to avoid compensation of the parties that hold the rights to water and who claim property interests in the water. The SWRCB has been induced to serve as the lead Agency designee under CEQA for a fishery improvement project or preservation project utilizing regulatory powers in a fashion that two independent projects are disguised and merged into one despite the fact that the

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SWRCB has no ability to appraise alternatives or mitigation measures may not order alternatives or fund anything. . . it can only order water to be taken away from current users. This CEQA SED violates CEQA.

In *A Local & Regional Monitor v. City of Los Angeles* (2nd Dist 1993) 16 Cal.App.4th 630, the Court discussed the relationship between two projects with a separation in time and a programmatic approach and how to properly maintain a project-specific approach for each project. Here, a somewhat different problem has developed. The SWRCB is trying to design a fishery enhancement project utilizing only one tool – water. It is not an expert in regard to fisheries, does not wish to review and judge alternatives other than “more water flows” and has authority only over water use and applications. *CEQA Guidelines* section 15051(b)1 states: “the lead agency will normally be the agency with the general governmental powers . . .” The SWRCB has no expertise over the measures most directly to be decided in a fishery protection plan. If society wishes water to be withdrawn from current uses, the California DF&W should design the plan and present it to the legislature after CEQA has been complied with, the legislature can fund it and then the SWRCB can adjudge how best to conform with water quality control plan and water rights granted to that new project plan.

Whether characterized as an improper project description or a designation of the wrong lead Agency, CEQA can only be properly analyzed if Department of Fish and Wildlife explains the alternatives and impacts of the fishery and natural resource project it envisions, and after funding and approval by the Legislature, then the SWRCB determines the proper use of water resources, if any, to implement that Project. The SWRCB has no funding to carry forward fishery enhancement or modification projects, cannot consider ordering the development or operations of hatchery a or artificial transportation or predator removal processes or control fishing regulations, yet is asked to write a sufficient SED to examine those alternatives.

Section 21104.2 of the Public Resources Code requires that state agencies consult with CF&W and obtain written findings on the impact of a project on the continued existence of any endangered species. Here, the converse is occurring. If CDF&W has a plan for protecting endangered species with water flows, after a CEQA study considering alternatives and mitigation measures, it should adopt that plan and submit it to the Legislature to implement the funding for that plan. Only then should the SWRCB determine if the water elements (as contrasted with the physical changes such as hatchery construction or predator removal) are consistent with the SWRCB duties regarding water control plan provisions.

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The Office of Planning and Research is the proper Agency to determine the lead Agency for a fishery improvement project (*CEQA Guidelines* §15053(a)) and no submission of the question of the proper lead Agency role has occurred by either the SWRCB or California DF&W. The case of *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Park District* (4<sup>th</sup> Dist 1990) 28 Cal.App.4th 419 described an analogous circumstance in which a local park and recreation district attempted to serve as lead Agency on a project in which the principal goals of the project were to establish a duck hunting season on a lake operated by the Park District. The Park District's CEQA process was set aside because although they clearly owned and controlled the water body, the proper order was that the lead Agency – California DF&W – should determine the program for duck hunting, then the Park District should consider its regulation of uses or reject all duck hunting use. Similarly here, if public resources and private resources are to be devoted to increasing numbers and survivability of fish and other species, the “project” should first be subject to review for the best means of accomplishing that, and only then should the SWRCB be involved other than in a consultative role as a responsible Agency. The SWRCB must restrict its involvement to determining whether the water should be taken from public agencies and private individuals when it knows what the fishery plan to be adopted actually is, in which case the authority to exercise condemnation powers will likely apply in some instances, and the legislature will have approved the funding plan.

In this instance, in order to provide due process, the SWRCB “project” would involve not only the adoption of a water quality control plan, but also an individual proceeding to withdraw water use from granted water rights and a CEQA examination of the effects and alternative ways of altering each affected post-1914 water right to conform to the plan adopted by the California DF&W as required in *National Audobon v. SWRCB* (1983) 33 Cal. 3d 419. With the clear budgetary responsibility for payment of any recoverable costs from the State established – as opposed to the general excuse that the Water Quality Control Plan must be complied with regardless of cost or impact – CEQA would be complied with in the proper order.

The importance of this lead Agency designation and order, and the error that results when the proper lead agency is not chosen and the proper description of the two projects is not adopted was discussed in *City of Sacramento v. SWRCB* (3<sup>rd</sup> Dist. 1992) 2 Cal.App.4th 960. The SWRCB (Regional Board) had moved forward as a lead Agency in regard to rice (pesticide and herbicide plans), while Department of Food and Agriculture had the broader authority to consider the environmental impacts of use of the chemicals on all environmental and human resources . . . not just water. The Regional Board



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limited to water issues did not have the broad authority and view of alternatives that the Department of Food and Agriculture held. The Court held that the CEQA compliance was flawed because the wrong lead Agency had proceeded to examine the issues regarding rice culture discharges to water first.

This is typical of the tunnel vision which develops when one Agency attempts to examine environmental impacts and alternatives without the full panoply of alternatives available to it, or under its authority, for mitigation such as, in this instance, money for hatcheries, predator removal, transportation of anadromous fish, fishing regulations and similar authorities. The myth that there will “be no cost” if the SWRCB simply adopts a different use of water in a water quality control plan is similarly part of the fundamental defect at work here.

**III. The Project Description Is Wrong. The Use of the Wrong Project Description Has the Effect of Barring the Consideration of Reasonable Alternatives, Mitigation Measures, and Correctly Describing the Environmental Effects of the Project for Comparison to the Alternatives.**

The requirement that a CEQA Project description be properly described and finite is well known. However, in this case the combination of a truncated description of the project as only one to determine water quality and flows leads to an inadequate SED. Rather than considering fishery improvement measures and a project for those purposes, and after designing that project the assumption occurs in this SED that only through greater flows may a fishery project be implemented, leads to the clearest violation of CEQA imaginable . . . no alternatives or mitigation measures for a fishery improvement plan are really discussed, compared or considered here other than differences in the flow rates and quantities of water.

“A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision makers balance the proposed benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e. the “no project” alternative) and weigh other alternatives in the balance.”

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*Dusek v. Anaheim Redevelopment Agency* (4<sup>th</sup> Dist 1986) 173 Cal.App.3d 1029, 1041.

Although a SWRCB project is supposed to be open for comment and consideration of change, because this CEQA process is portrayed as a project to determine flow rates and quantities, only water is considered when the real project is one to increase fish numbers and change fishery conditions. No tools other than water are considered because the project description and choice of lead Agency are both wrong. In *County of Inyo v. City of Los Angeles* (3<sup>rd</sup> Dist 1981) 124 Cal.App.3d 1, 6, the Court rejected an EIR that described the purpose of the project and then removed from consideration the matters necessary for or possibly essential for achievement of the purpose. Here, the proposed project is described as a project to determine flows and water quality but the project is really to enhance fishery numbers, species and resources. Because of the description that the issues to be considered is water flows, “no alternatives” means that fish population numbers can be achieved with non-flow measures are not even discussed by the SWRCB SED.

In some instances, the Courts have treated the lack of an accurate project description as related to piecemealing. *Santiago Water District v. County of Orange* (4<sup>th</sup> Dist. 1981) 118 Cal.App.3d 818, 829-830 (EIR for mining operation did not properly include construction and use of water delivery facilities), or in other instances the project description does not allow a sufficient description of the environmental setting to satisfy CEQA. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (9<sup>th</sup> District 1994) 27 Cal.App.4th 713, 722-729. Regardless, the environmental setting is described in such a fashion that the goal is to establish greater numbers of fish and provide for greater fish survivability, but none of the alternative tools are examined. Only flows can accomplish this project according to the SED. Greater numbers or even ultimate survival of fish is CDF&W authority and is really outside of the SWRCB authority to even quantify or estimate as to which tools might be most effective and have the least environmental impact and costs. The true project must be first examined and then the consideration of whether the project will be achieved and then funded and authorized by the legislature with water flows determined after each of those steps has occurred. Only in that way can the alternative means of providing for the fishery project to be free of tunnel vision effects and for CEQA to be satisfied.

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### **Conclusion**

The San Joaquin River Exchange Contractors incorporate herein the comments and request for change in the SED or objections to its contents or to absences of materials made by any other party or entity for the purposes of exhaustion of administrative remedies. These comments or objections are incorporated herein as if set forth in full to provide the SWRCB with a full opportunity to respond to the objections and to satisfy Public Resource Code section 21177(A) if the corrections are not made to fully comply with the legal requirements by the SWRCB.

Respectfully submitted,

MINASIAN, MEITH, SOARES,  
SEXTON & COOPER, LLP

*- dictated but not read;  
sent in writer's absence to avoid delay -*

By: /s/ Paul R. Minasian / lmj  
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SJRECWaterFix-SJREC's SED Comments.3.17.17.wpd