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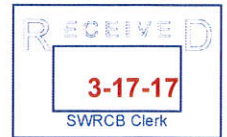
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March 17, 2017

Via email and U.S. Post

commentletters@waterboards.ca.gov



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814-0100

Re: Comments of NCRA, PCFFA, IFR and CalSPA on 2016 Bay-Delta Plan Amendment & SED

Ms. Townsend:

I. INTRODUCTION

On behalf of the North Coast Rivers Alliance (NCRA), Pacific Coast Federation of Fishermen's Associations (PCFFA), Institute for Fisheries Resources (IFR) and the California Sportfishing Protection Alliance (CalSPA), we submit these comments on the proposed Amendment to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Plan Amendment") and Supporting Draft Revised Substitute Environmental Document ("Draft SED"). The Plan Amendment proposes to establish San Joaquin River flow objectives to be measured on the Stanislaus, Tuolumne, and Merced Rivers, and to alter the Southern Delta salinity objectives and change their point of compliance. Draft SED ES-1, ES-21, ES-50.

We agree with the Draft SED's statement that "[t]he Bay-Delta is in ecological crisis" (Draft SED ES-8) – an impending catastrophe caused by excessive diversions from the Delta and its tributaries – but the Plan Amendment fails to remedy this crisis. Instead, it jeopardizes the survival of the very imperiled species that it purports to protect because it *fails to restore the flows essential to their recovery*. In doing so, it rewards improvident investors who have chosen to plant highly water-intensive crops in an arid region with over-appropriated water resources. Accordingly, we ask the Board to adopt the long-overdue water quality reforms that are needed to restore these rivers' ecological integrity and historically abundant fish and wildlife.

II. THE FLOW OBJECTIVES MUST PROVIDE SUFFICIENT WATER FOR FISHERIES TO SURVIVE AND FLOURISH

A. The Recommended Alternative Will Not Provide Sufficient Flows; LSJR Alternative 4 Is Preferable

The recommended flow alternative, Lower San Joaquin River (“LSJR”) Alternative 3, sets the baseline flow at 40% of unimpaired flow but allows flows to dip as low as 30% (and rise only to 50%) of unimpaired flows with so-called “adaptive management” adjustments. The LSJR Alternative 3 Plan Amendment, as presented in Draft SED Appendix K, does not allow for adjustments above 50% of unimpaired flow. *Id.* at 30. Thus, despite its claimed flexibility in response to evolving scientific data, and the needs of fish populations in the impacted rivers, the Plan Amendment would not allow additional unimpaired flows to protect fish *even if data show that increased flows are necessary to maintain a viable fishery. Id.*

Further, *all* members of the Stanislaus, Tuolumne and Merced Working Group (“STM Working Group”) would have to agree before the Executive Director may adjust the unimpaired flow percentage for a year. *Id.* The STM Working Group includes water users whose interests do not include fish protection. *Id.* at 32. While other flow adjustments may occur without full STM Working Group approval,¹ no adaptive management changes can occur without at least one member’s recommendation. *Id.* at 30–31. For this reason, the protective qualities ascribed to LSJR Alternative 3’s potential for increased flows above 40% of unimpaired flow may not in fact prevent harm to fish. *See also* Draft SED 20-73 (adaptive management could alter available benefits to fish and fishery dependent economies).

When examining the potential water temperature benefits of various flow regimes, the Draft SED indicates that benefits to salmonid smoltification on the Stanislaus and Merced Rivers can *only* occur with flows at 50% of unimpaired flow *and higher*, during April and May. Draft SED 19-20. And most of the temperature benefits in the Lower San Joaquin River occur when March flows are at least 60% of unimpaired flow. *Id.* Further, the National Marine Fisheries Service (“NMFS”) has testified that requiring at least 60% of unimpaired flow “appears to provide the best biological and measurable benefits for fish and increase the chances of success and survival.” NMFS Presentation (Jan 3, 2017), Slide 3. For these reasons among others, both the Draft SED’s analysis of flow impacts on fish and NMFS’s January 3, 2017, testimony to this Board (“Board”) show that LSJR Alternative 3 will not be sufficient to achieve fishery recovery *because it fails to provide adequate flows to protect the fish that rely on the Delta for survival.*

¹ For example, LSJR Alternative 3 would allow flows to drop below the unimpaired flow range between February and June in order to increase flows later in the year, provided the unimpaired flow is over 30%. Draft SED Appendix K-30. The Executive Director may order this change “on an annual basis if the change is recommended by one or more members of the STM Working Group.” *Id.* at 31.

While the proposed Plan Amendment states generally that “[t]he salmonid biological goals for this program of implementation will be specific to the LSJR and its tributaries and will contribute to meeting the overall goals for each population, including the salmon doubling objective established in state and federal law,” it fails to set appropriate standards and compliance deadlines for attaining the salmon doubling standard. Draft SED Appendix K-33, *see also* Appendix K-17 (“Water quality conditions shall be maintained, together with other measures in the watershed, sufficient to achieve a doubling of natural production of chinook salmon from the average production of 1967-1991, consistent with the provisions of state and federal law”). Instead, the Draft SED looked to the “USFWS/USBR flow recommendations . . . for salmon population doubling and increasing salmon population by 53 percent.” Draft SED 3-28. The Draft SED compared the flow recommendations extracted from the CVPIA’s 2005 Anadromous Fish Restoration Program with the flows modeled at Vernalis for LSJR Alternatives. Draft SED 3-28 to 3-30. On the basis of those fixed monthly flows alone, the Draft SED dismissed any other alternative that sought to achieve the fish doubling standard. *Id.* But this refusal to consider more protective options based on unstudied assumptions is directly contrary to CEQA’s mandate. “CEQA does not permit a lead agency to omit any discussion, analysis or even mention of any alternatives that feasibly might reduce the environmental impact of a project on the unanalyzed theory that such an alternative might not prove to be environmentally superior to the project.” *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305. LSJR Alternative 3’s failure to establish a clear attainment deadline and implementation path to achieve fish doubling falls far short of the Plan’s salmon doubling standard. Only LSJR Alternative 4 has flows sufficient to protect fish and, if augmented with clear attainment deadlines, the potential to attain the fish doubling objective.

While the higher flows of LSJR Alternative 4 are more likely to provide the temperature benefits necessary for fish (*see e.g.*, Draft SED 19-20), the Draft SED does not consider this a sufficient reason to make it the recommended alternative, on the theory that LSJR Alternative 3 has less impacts. Yet LSJR Alternative 3 has significant and unavoidable impacts in the same resource areas as those of LSJR Alternative 4: groundwater, recreational resources and aesthetics, agricultural resources, service providers, and energy and greenhouse gases. Draft SED 18-5.

The Draft SED’s discussion of agricultural resource impacts declines to tease out how many of those impacts could be further mitigated through changes in farming techniques. Draft SED 11-50, 11-55. The Draft SED discloses that it left that issue unaddressed because the Board does not believe it has authority to order such mitigation as part of the plan amendment. Draft SED 11-50. That excuse doesn’t hold water. Whether or not the Board has that authority, CEQA requires analysis of these unexamined mitigation measures. It is settled law that the environmental document must identify feasible mitigation measures regardless of whether such mitigation falls within the Board’s – or some other agency’s – authority. *City of Marina v. Board of Trustees* (2006) 39 Cal.4th 355, 366; *Habitat and Watershed Caretakers, supra*, 213 Cal.App.4th at 1304-1305. The Draft SED’s failure to address ways in which impacts to agriculture may be reduced through improved irrigation practices allows the document to

overstate the potential harms to agriculture, and improperly skews the analysis in favor of LSJR Alternative 3's needlessly less-protective flow regime. CEQA forbids this omission of potentially feasible mitigation measures *Id.*

B. Ill-Conceived Adaptive Management Fails Fish and the Industries that Depend Upon Them

"Adaptive management," as practiced in the Delta, has been a disaster for fish. It is little more than a euphemism for water to be diverted for agricultural interests at the expense of fish. Between repeated temporary "urgency" change petitions, fuzzy annual water forecasting, and other "adaptive decisionmaking," the protective measures that should be enforced to prevent the collapse of fish species are repeatedly and routinely weakened or ignored altogether. The Plan Amendment goal of "allow[ing] adaptive implementation of flows that will afford maximum flexibility in establishing beneficial habitat conditions for native fishes, addressing scientific uncertainty and changing conditions, developing scientific information that will inform future management of flows, and meeting biological goals, while still reasonably protecting the fish and wildlife beneficial uses" continues this troubling trend of substituting nice-sounding verbiage for actual protection.

The amorphous and abuse-inviting adaptive implementation component of the Plan Amendment does not provide sufficiently specific and enforceable parameters to prevent decisions that will undermine the health of the Delta. Absent firm standards and stringent enforcement, adaptive management will continue to operate as the elephant-under-the-rug exception that swallows the protections of any plan amendment the Board adopts.

As discussed above, LSJR Alternative 3's adaptive management component relies heavily upon the STM Working Group to "do the right thing" for fish. As conceived, the STM Working Group includes water users and resource agency representatives. Draft SED Appendix K-32. While the STM Working Group ostensibly includes the Department of Fish and Wildlife, NMFS and the U.S. Fish and Wildlife Service ("USFWS"), two of these agencies may be unable to participate. NMFS has informed the Board that it lacks the resources needed to do so. NMFS Presentation, Slide 8. Likewise, USFWS has hinted that it is not sure how much time it can devote to participating. Testimony of Mr. Ratcliff (Jan 3, 2017), 121:20-22. If the federal resource agencies tasked with protecting and managing the fisheries most impacted by changes in flow cannot participate in the adaptive management process, the risks of ill-considered adaptive decisionmaking become even higher. The Draft SED clearly establishes both that LSJR Alternative 4, and not LSJR Alternative 3, should be adopted by the Board, *and* that the adaptive implementation approach addressed in the Draft SED must be substantially revised to prevent mischief.

III. SALINITY OBJECTIVES MUST NOT BE RELAXED

The Draft SED indicates that any salinity objective more stringent than the 2006 Delta Plan's 0.7 deciSiemens per meter ("dS/m")² objective for measuring salinity (via electrical conductivity) from April 1 to August 30 is infeasible. Draft SED 3-38. The recommended alternative – South Delta Water Quality ("SDWQ") Alternative 3 – for salinity would *relax* this standard to 1.0 dS/m year round, and the other alternative studied in the Draft SED (SDWQ Alternative 4) would eviscerate this standard even further.³

Despite the plan to *relax* these standards, the Draft SED claims that the proposed changes "will not result in a lowering of the water quality in the Stanislaus, Tuolumne, and Merced Rivers, the [Lower San Joaquin River], and the southern Delta." Draft SED 23-7. Why? Because despite the existing standard's adoption in 1978, the Board has continually kicked the compliance deadline down the road. *See* Draft SED 23-5 through 23-6. Now, nearly 40 years later, the Draft SED claims that relaxing the standard does not violate state and federal antidegradation policies because the current standard is *so often exceeded that relaxing it will not alter the water quality!* This repeated, shameless relaxation of the existing standard strikes at the heart of the *anti*-degradation requirements, which exist to restore and maintain water quality, not allow its repeated degradation.⁴

The Draft SED examines its proposed relaxation of salinity standards *only* through the lens of its impacts to agricultural users, ignoring all other beneficial users of water. The Draft SED does not seriously consider whether less protective salinity standards would impact other water dependent resources. Indeed, while the Draft SED indicates that recreationally important species exist in the southern Delta, it assumes that the change in salinity standards would have no impact on them. But there is no factual basis for this assumption. To the contrary, previous scientific reviews have concluded that greater salinity levels harm fish. For example, prodded by a federal court order secured by a broad coalition of environmental organizations, in 1995 the

² The existing objective can also be expressed as 0.7 millimhos per centimeter ("mmhos/cm").

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⁴ The Clean Water Act's anti-degradation standard is codified in 40 C.F.R. § 131.12 (48 Fed. Reg. 51405 (Nov. 8, 1983) as amended 80 Fed. Reg. 51047 (Aug. 31, 2015)). Pursuant to the Porter-Cologne Act's mandate that state water quality standards be no less stringent than the Clean Water Act's (Water Code § 13377), this Board adopted California's Anti-Degradation Policy in Resolution No. 68-16. *Asociation de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App. 1255, 1278-1286 (citing Res. No. 68-16 and this Board's Guidance Memorandum (Feb. 16, 1995) at 4-6).

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Environmental Protection Agency adopted a salinity standard of 0.44 dS/m at Vernalis. *See* 60 F.R. 4664, at 4696 (Jan. 24, 1995); *see also* 40 C.F.R. 131.37. This federal standard was established primarily to protect recreational beneficial uses including the sport fishery, and remains in place today. Yet the Draft SED does not even acknowledge this existing standard, let alone the science behind it. Nor does the Draft SED address whether other special status or recreational species would benefit from this more stringent salinity requirement. Instead, the Draft SED assumes that any change in the salinity standard “would not affect aquatic biological resources,” because the existing environment is *already* so degraded. Draft SED 7-1. That logic turns water quality protection on its head.

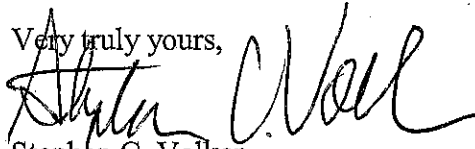
The Draft SED does not provide a detailed analysis of how ongoing operations of the Central Valley Project and State Water Project – ostensibly part of the baseline condition – impact salinity in the southern Delta, including its assimilative capacity. Draft SED ES-50, 23-7; Draft SED Appendix K-42–Appendix K-46. Instead, this essential analysis is impermissibly deferred until *after* the Plan Amendment is implemented. Rather than address these impacts *before* amending the plan, SDWQ Alternatives 2 and 3 merely propose that a “Comprehensive Operations Plan” someday be prepared for these water projects. *Id.* Included in this plan-to-adopt-a-plan is a requirement that “DWR and USBR” must “recommend specific alternative compliance locations in, and monitoring protocols for, the three river segments” that are identified in the Draft SED as the compliance locations for the Plan Amendment. Draft SED ES-50; Draft SED Appendix K-43. For all we know, the future studies required by the Plan Amendment will show that the relaxed standard increases salinity and harms fish in southern Delta reaches.

This Board’s approve *first*, study *second* approach precludes informed decisionmaking regarding the appropriateness of the Plan Amendment. Worse, it ignores the indisputable need for addressing *now* the degraded salinity conditions throughout the waters that the Plan Amendment would govern.

IV. CONCLUSION

For the reasons stated above, the Board’s Plan Amendment must be returned to the drawing board. It lacks the specific, protective and enforceable standards needed to restore the Delta’s beleaguered fisheries. The dewatered proposal that has been put forward must accordingly be withdrawn.

Very truly yours,


Stephan C. Volker

Attorney for North Coast Rivers Alliance, Pacific Coast
Federation of Fisherman’s Associations, Institute for
Fisheries Resources and the California Sportfishing
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Environmental Protection Agency adopted a salinity standard of 0.44 dS/m at Vernalis. *See* 60 F.R. 4664, at 4696 (Jan. 24, 1995); *see also* 40 C.F.R. 131.37. This federal standard was established primarily to protect recreational beneficial uses including the sport fishery, and remains in place today. Yet the Draft SED does not even acknowledge this existing standard, let alone the science behind it. Nor does the Draft SED address whether other special status or recreational species would benefit from this more stringent salinity requirement. Instead, the Draft SED assumes that any change in the salinity standard “would not affect aquatic biological resources,” because the existing environment is *already* so degraded. Draft SED 7-1. That logic turns water quality protection on its head.

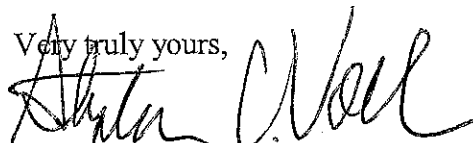
The Draft SED does not provide a detailed analysis of how ongoing operations of the Central Valley Project and State Water Project – ostensibly part of the baseline condition – impact salinity in the southern Delta, including its assimilative capacity. Draft SED ES-50, 23-7; Draft SED Appendix K-42–Appendix K-46. Instead, this essential analysis is impermissibly deferred until *after* the Plan Amendment is implemented. Rather than address these impacts *before* amending the plan, SDWQ Alternatives 2 and 3 merely propose that a “Comprehensive Operations Plan” someday be prepared for these water projects. *Id.* Included in this plan-to-adopt-a-plan is a requirement that “DWR and USBR” must “recommend specific alternative compliance locations in, and monitoring protocols for, the three river segments” that are identified in the Draft SED as the compliance locations for the Plan Amendment. Draft SED ES-50; Draft SED Appendix K-43. For all we know, the future studies required by the Plan Amendment will show that the relaxed standard increases salinity and harms fish in southern Delta reaches.

This Board’s approve *first*, study *second* approach precludes informed decisionmaking regarding the appropriateness of the Plan Amendment. Worse, it ignores the indisputable need for addressing *now* the degraded salinity conditions throughout the waters that the Plan Amendment would govern.

IV. CONCLUSION

For the reasons stated above, the Board’s Plan Amendment must be returned to the drawing board. It lacks the specific, protective and enforceable standards needed to restore the Delta’s beleaguered fisheries. The dewatered proposal that has been put forward must accordingly be withdrawn.

Very truly yours,



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