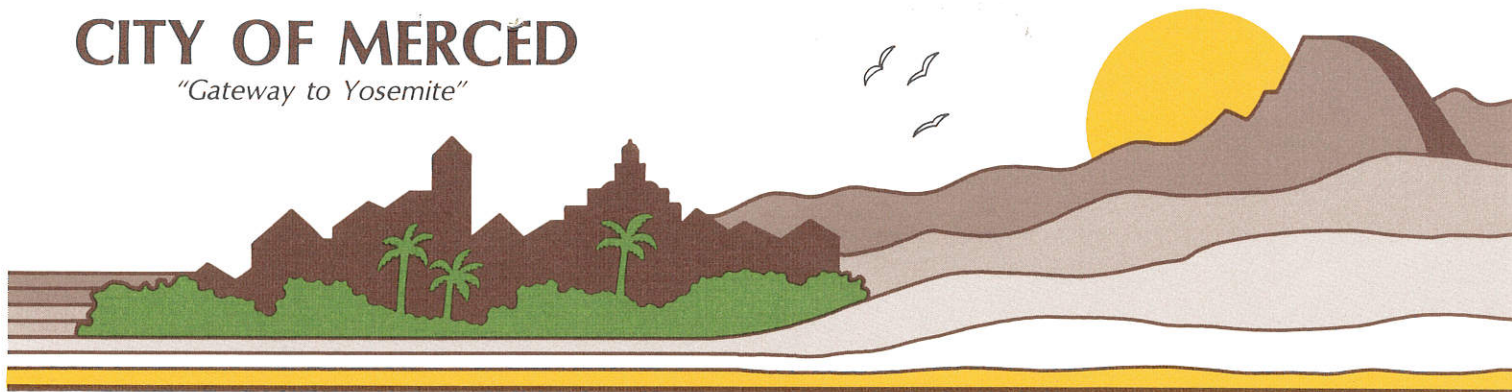


CITY OF MERCED

"Gateway to Yosemite"



Office of the City Attorney ♦ Telephone (209) 385-6868 ♦ Facsimile (209) 388-7907

March 8, 2017

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

Jeanine Townsend, Clerk to the Board
STATE WATER RESOURCES CONTROL BOARD
1001 I Street, 24th Floor
Sacramento, CA 95814-0100



Subject: Comment Letter – 2016 Bay-Delta Plan Amendment and SED

Dear Ms. Townsend:

Please accept this letter as the City of Merced's (the City) comments on the September 15, 2016 *Draft Revised Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, which is hereinafter referred to as "the SED."

By this letter, the City formally makes these comments part of the Administrative Record for this California Environmental Quality Act (CEQA) proceeding. The City has been working cooperatively with the Merced Irrigation District on this issue and other water related issues. As a result, the City is familiar with much of the work performed by the Merced Irrigation District that is related to the SED. Rather than resubmit the analysis and information being submitted by the Merced Irrigation District, the City makes reference to portions of the comments being submitted by the Merced Irrigation District and asks that the Board seriously consider those comments as well as those made herein.

This letter is organized as follows:

- Section 1 – Introduction and Summary of Comments
- Section 2 - The City's interest in the SED
- Section 3 – Background Information

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- Section 4 – Inadequacies of the Project Description and the SED’s Environmental Baseline
- Section 5 – Legal Issues
- Section 6 – CEQA Requirements
- Section 7 – Technical Defects and Economic Impact

1.0 INTRODUCTION AND SUMMARY

The City maintains that the Project as described in the SED is contrary to and in violation of a variety of laws, including applicable statutes, regulations and principles. The SED is also inadequate as an informational environmental review document, and violates basic and significant CEQA requirements. The Project also seriously underestimates negative impacts on the City, its residents and others, while the Project’s benefits are both questionable and minimal.

1.1 Legal Deficiencies

The City contends that the Project exceeds the jurisdiction of the State Water Board, conflicts with numerous statutes, regulations and policies of the State designed to protect water rights and the use of water pursuant to such established rights. The project also interferes with established water rights priorities, violates a number of other state and federal laws and policies, and is not supported by sufficient evidence, information, data and studies.

There is a lack of sufficient evidence that the remedies and measures sought to be imposed will alleviate the “crisis” and conditions described in the SED. The SED does not consider or address other factors and causes of alleged environmental damage, in addition to and instead of diversions by agricultural users. The Project will cause significant and unreasonable secondary impacts, and any relief and benefits associated with the Project will be insignificant in comparison to the amount of economic harm to the City, local region, and the State.

The Project also violates a number of California statutes, regulations and policies, including the water rights priority system, the SGMA, the Administrative Procedures Act, and the Porter-Cologne Act. The Project would also violate provisions of the State and Federal constitutions, including Article X, Section 2 of the California Constitution, and the federal constitutional right to due process, equal protection and separation of powers.

In addition, the Project is internally inconsistent, ambiguous, overstates the benefits of the Project, and would be impossible and impracticable to implement.

1.2 CEQA Violations

The SED does not comply with the requirements of CEQA, is inadequate as an informational document and therefore cannot support the adoption or implementation of the Project.

The SED does not provide a clear, understandable, or consistent description of the Project. The lack of a sufficiently clear description of the Project is a legal flaw that undermines the entire SED. It has made a clear understanding of exactly what the State Water Board intends to do impossible, and undercuts the public review and commenting process, which is the entire purpose of CEQA. The City questions whether the SED process is authorized and applicable to the present situation and the Project, and whether use of a Program level environmental review document is proper.

In addition, the SED is inadequate as an informational document, is in violation of the provisions of CEQA, and does not sufficiently support the SED, because the Project area is not properly defined. Further, the SED does not sufficiently disclose and review the impacts of the Project on the environment, including secondary Project impacts, and impacts on groundwater basins and on local communities and water right holders, insufficiently analyzes cumulative impacts, does not properly define baseline conditions, does not identify and propose adequate mitigation measures, is incomplete and confusing, and fails to consider a reasonable range of alternatives to the Project.

1.3 The Project Benefits Do Not Justify the Cost

The City is aware that the Merced Irrigation District has been involved in research and analysis of the Merced River System for many years and their research demonstrates the Project would have a minor benefit to juvenile salmonid habitat during the spring, but this benefit may well be offset by habitat degradation during the summer and fall. Importantly, their research indicates that the Project will not benefit fall-run Chinook salmon or steelhead habitat in the Merced River.

The Merced Irrigation District's research and conclusion that fall-run Chinook salmon production or escapement would not be notably improved under the SED's alternatives is supported by the fact that even the SED's modeling indicates that the Project would result in an average annual increase in production of only 1,103 adults in the San Joaquin River Basin, including only an estimated 457 more fish to the Merced River. In addition, even these estimates may be overstated because the State Water Board has not appropriately accounted for habitat conditions as well as predation and fish loss in the Bay-Delta. Even if the State Water Board's modeling estimates are reasonable, the estimated increase in escapement in the Merced River represents only about 0.2 percent of the Central Valley's average fall-run Chinook salmon escapement.

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The Merced Irrigation District's research also indicates that CV steelhead DPS critical habitat in the Merced River might be improved during the spring and early summer, but would be less suitable during the late summer and fall when conditions would be most limiting. However, given that steelhead do not occur in the Merced River, changes in habitat cannot be expected to affect the CV steelhead DPS.

The SED provides no evidence to support any habitat improvement in the Bay-Delta by additional flow releases from the Merced River. Factors besides flow appear to be controlling juvenile salmonid survival in the Delta. Without a clear understanding of the primary factors that are controlling the survival of juvenile salmonids in the San Joaquin River and Delta, there can be no confidence in the benefits claimed by the State Water Board.

Overall, the Project provides only minor and questionable benefits that are offset by overwhelming costs to the residents of the City, County of Merced and local region.

2.0 THE CITY'S INTEREST IN THE SED

The SED proposes substantive and significant changes to water flow requirements in the Merced River below the Merced Irrigation District's New Exchequer, McSwain and Crocker-Huffman Diversion dams during the months of February through June each year. These requirements will not only have a substantial adverse effect on the Merced Irrigation District's management of water in the Merced River, but also on the City's water system that is dependent on wells and the City's ability to comply with the mandates of the Sustainable Groundwater Management Act (SGMA). The City believes the impacts that will result from implementation of the SED will be widespread and devastating not only to the City and its over eighty thousand residents, but also to hundreds of thousands of other residents in the local region. The State Water Board has significantly and substantially underestimated these impacts. These impacts will be forced upon the City and the tens of thousands of people in our local community, other local communities, and the Merced Irrigation District and their customers. Further, the SED proposes changes to the operations of the Merced Irrigation District's reservoir facilities and hydroelectric project that will harm our local environment, the Merced River, and the local economy that is heavily dependent on agriculture.

3.0 BACKGROUND

3.1 The City is Dependent on Water from the Merced River

The City and its residents rely entirely on wells that pump water from the underlying Merced Groundwater Basin. The City lies within the Merced Irrigation District's service territory. The Merced Irrigation District provides high quality, affordable irrigation water to over 2,200 customers within this service territory. In addition, the Merced Irrigation

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District provides water to agricultural lands within its 420,000-acre Sphere of Influence in the eastern part of Merced County, mainly over the Merced Groundwater Basin, with a small portion north of the Merced River.

The Merced Groundwater Basin is sustained primarily by water flowing through the Merced River and distributed by the Merced Irrigation District from the Merced River to local farmers and other irrigation districts. Any significant reduction in the use or distribution of water from the Merced River will negatively affect both the amount and quality of water in the Merced Groundwater Basin that the City relies upon.

3.2 The Merced Irrigation District is in the process of relicensing Project 2179, which will require the State Water Board issue a Section 401 WQC

Since the City's water supply is impacted by the flows through the Merced River, and the flows through the Merced River are controlled largely by Merced Irrigation District facilities, the City has a direct interest on the Project's impact on the Merced Irrigation District. Consequently, the following background information relating to the Merced Irrigation District is of no small importance to the City, and is necessary background for an understanding of the flaws inherent in the SED.

In 2012, the Merced Irrigation District, filed with the FERC an Application for New License Major Project – Existing Dam for Project 2179. In compliance with the National Environmental Policy Act (NEPA), the FERC issued a Final Environmental Impact Statement (FEIS) in support of the relicensing. Necessary activities for relicensing that are yet to be completed include FERC's consultation with the United States Department of Commerce, National Oceanic Atmospheric and Administration, National Marine Fisheries Service (NMFS) and USFWS under Section 7 of the Endangered Species Act (ESA); Merced Irrigation District, as lead agency, completion of a CEQA document; and the State Water Board, as a responsible agency, issuance of a Clean Water Act (CWA) Section 401 water quality certification (WQC).

In 2014, FERC issued an order authorizing the Merced Irrigation District to continue to operate Project 2179 under the existing license terms and conditions until the FERC acts on the application for a new license. It is the City's understanding that FERC has not acted on the application. Also in 2014, the Merced Irrigation District submitted to the State Water Board a request for CWA Section 401 WQC. It is the City's understanding that this request was withdrawn and resubmitted in both May of 2015 and 2016.

3.3 History of Bay-Delta Plan

The State Water Board issued Decision 1379 in 1971 setting water quality objectives (WQO) purportedly applicable to the Central Valley Project (CVP) and the State Water

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Project (SWP); however, the decision was stayed due to litigation challenging the State Water Board's authority to impose conditions on permits held by a federal agency. Around the same time, the Regional Water Quality Control Boards (RWQCB) formulated plans for the 16 basins of the State, including the Bay-Delta.

In 1975, the State Water Board approved the Basin 5B Plan, setting WQOs for the Bay-Delta, and the Basin 2 plan, setting WQOs for the San Francisco Bay Basin.

The State Water Board held an 11-month evidentiary hearing in 1978, resulting in the adoption of the *Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh* (1978 Bay-Delta Plan) and Water Right Decision 1485, implementing the 1978 Bay-Delta Plan.

Several parties filed mandamus petitions seeking to invalidate the 1978 Bay-Delta Plan and Decision 1485, a trial court subsequently rejected the State Water Board's WQOs as inadequate and issued a writ of mandate directing the State Water Board to set aside the plan and the decision and directing the State Water Board to reconsider the plan.

On appeal, the court in *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, concluded "that the modification of the projects' permits in order to implement the water quality [objectives] was a proper exercise of the [State Water] Board's authority," but "in establishing only such water quality [objectives] as will protect Delta water users against the effects of project activities, the [State Water] Board misconceived the scope of its water quality planning function." (SWRCB Cases, at 699, quoting Justice Racanelli, at 98.) In reversing the trial court's judgment, the appellate court indicated that it expected "the renewed proceedings [would] be conducted in light of the principles and views expressed in [the court's] opinion," and leaving Decision 1485 in effect. (*Racanelli* at 120.)

In 1987, the State Water Board initiated proceedings to reexamine WQOs for the Bay-Delta estuary. This resulted in the 1991 Bay-Delta Plan with WQOs for salinity, dissolved oxygen, and temperature. However, the United States Environmental Protection Agency (USEPA) disapproved of the WQO in the 1991 Bay-Delta Plan for temperature and salinity to protect fish and wildlife beneficial uses, due to "their failure to protect estuarine habitat and other fish and wildlife beneficial uses." (State Water Resources Control Bd. Cases, *supra*, at 699-700, quoting 1995 Bay-Delta Plan, at pp. 5-6.)

In 1994, the State Water Board conducted a series of public workshops to review and revise the 1991 Bay-Delta Plan. These proceedings were followed by the creation of the 1995 Bay-Delta Plan. The 1995 Bay-Delta Plan contained, for the first time, a San Joaquin River flow objective for the protection of fish and wildlife (SJR Flow Objective).

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After additional litigation over the 1995 Bay-Delta Plan, and Revised Decision 1641 implementing the 1995 Plan, the State Water Board adopted an amended *Water Quality Control Plan for Salinity for San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (2006 Bay-Delta Plan). The current 2006 Bay-Delta Plan was adopted by the State Water Board by Resolution No. 2006-0098 on December 13, 2006. The State Water Board indicated that the 2006 Bay-Delta Plan was a water quality control plan (WQCP) established and periodically reviewed and modified by the State Water Board in accordance with applicable laws. The 2006 Bay-Delta Plan identified several issues that required additional review and water quality control planning. Two of the issues identified for further evaluation and prioritization were SJR flows and southern Delta salinity.

In July 2008, the State Water Board adopted the *Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, and began planning to review and amend the SJR flow and southern Delta salinity objectives and other aspects of the 2006 Bay-Delta Plan. The State Water Board began the amendment process in February 2009 by issuing a notice of preparation (NOP) of environmental documentation and scheduling a scoping meeting in March 2009 pursuant to the provisions of CEQA. In April 2011, the State Water Board issued a revised NOP and notice of an additional scoping meeting for June 2011. The State Water Board also held several other public meetings and workshops to receive information and conduct discussions regarding issues related to the plan amendment(s).

The State Water Board released a draft SED (2012 Draft SED) for the review and update of the SJR flow and southern Delta salinity objectives and associated program of implementation on December 31, 2012. After a public workshop and the receipt of public comments on the 2012 Draft SED in 2013, the State Water Board decided to revise and recirculate the SED.

This ultimately led to the current SED, released on September 15, 2016, which “makes substantial changes to the 2012 Draft SED in consideration of the large number of oral and written public comments received concerning that document, and in light of additional information, including information learned from the recent drought.” (State Water Board “Fact Sheet,” October 18, 2016.)

The current SED proposes significant changes and additions to the original 2006 Bay-Delta Plan. Notably, one of the additions is a Revised WQCP that establishes new flow objectives on the Lower San Joaquin River (LSJR) and the Merced, Tuolumne, and Stanislaus rivers, ostensibly for the protection of fish and wildlife beneficial uses, along with new water quality objectives for the protection of agricultural beneficial uses in the southern Delta.

The State Water Board has indicated that it is conducting a phased evaluation of the 2006 Bay-Delta Plan. Phase I will be a review and update of the current SJR flow and southern Delta salinity objectives and associated program of implementation. Phase II will consist of the review and potential modification to other parts of the 2006 Bay-Delta Plan, including Bay-Delta outflows, SWP and CVP export restrictions, and other requirements in the Bay-Delta to protect fish and wildlife beneficial uses. Phases I and II are to be independent of each other, with different water quality objectives and programs of implementation. In Phase III, the State Water Board is to conduct proceedings to assign responsibility for implementation of the WQOs established in Phase I and Phase II, including changes to water rights or other implementation actions.

4.0 INADEQUACIES OF THE PROJECT DESCRIPTION AND SED'S ENVIRONMENTAL BASELINE

4.1 The Project Description is Inadequate and Confusing

It is virtually impossible to pin down the specific “project” that is being reviewed and analyzed in the SED, particularly in connection with the Merced River.

The SED at page ES-1, indicates that the Project involves and includes efforts by the State Water Board to update two elements of the 2006 WQCP: (1) “San Joaquin River (SJR) flow objectives for the protection of fish and wildlife—the flow element of the proposed plan update would increase the required flows left in the rivers and would change the area currently protected by flow requirements by adding compliance locations on the Stanislaus, Tuolumne, and Merced Rivers, instead of only on the SJR at Vernalis,” and (2) “Southern Delta salinity objectives for the protection of agriculture—the southern Delta salinity element of the proposed plan update would increase salinity objectives while generally maintaining existing conditions and changing compliance locations.”

It is also stated at page ES-1 of the Executive Summary that: “[t]he State Water Board is also proposing to update the program of implementation to achieve these objectives, which will include monitoring and special studies to fill information needs and to evaluate the effectiveness of the new objectives and their implementation.” The State Water Board later states that “flow objectives” will be implemented, or “assigned” through “water right actions and water quality actions including Federal Energy Regulatory Commission (FERC) hydropower licensing processes.” (p. ES-2)

Subsequently, the State Water Board indicates that the Project reviewed in the SED “consists of the following proposed updates to the 2006 Bay-Delta Plan”:

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- The SJR flow objectives for the protection of fish and wildlife, and southern Delta salinity objectives for the protection of agriculture
- The program of implementation to implement these objectives, including requirements for the monitoring and special studies needed to determine the effectiveness of, and compliance with, the objectives and to identify needed future changes to the objectives” (ES-3.)

As a result of these varying descriptions of the Project, it is not clear whether the Project involves only flow objectives and Southern Delta salinity objectives, or flow objectives, Southern Delta salinity objectives, and the “program of implementation” of the flow and salinity objectives, including through water right, water quality and FERC proceedings, as well as “monitoring and special studies” to determine the effectiveness of the flow and salinity objectives.

Comments from the State Water Board regarding the SED have only added to the confusion over the description and scope of the Project. At the December 19, 2016 State Water Board hearing in Merced, California, regarding the SED, Chairperson Marcus disputed a statement that the State Water Board intends to implement the Project through the Section 401 processes. Chairperson Marcus stated, in part, “Just to clarify, I mean I don’t want to either argue with you, but I want you to understand that the recommendation that we try to coordinate with the 401 was to try to be helpful to folks. We would try to implement through Phase 3, which would be a full on water rights hearing.”

This statement directly contradicts the statements in the SED regarding implementation of the Project. It is not clear how the State Water Board intends to implement the Project, based on the comments from Chairperson Marcus. Is it going to be through the FERC relicensing and Section 401 processes applicable to the Merced Irrigation District or through an independent process via Phase 3? It is impossible to discern how, when, and through what process, the flow restrictions in the Project, as described in the SED, may be imposed.

It is also difficult to determine the specific “flow objectives” which comprise the Project. The Executive Summary states that the “flow proposal” is “expressed as a range from 30 to 50 percent of unimpaired flow (UIF), with a starting flow of 40 percent of UIF, for February–June for the Stanislaus, Tuolumne, and Merced Rivers through to the SJR near Vernalis.” (ES-4.) However, the Executive Summary also indicates the Project includes “[a]daptive implementation of unimpaired flows, which allows flows to be shifted in time and shaped in order to provide the greatest benefits to fish and wildlife,” (e.g. flow shifting) as well as potential “changes in flows between 30 and 50 percent of unimpaired flow in response to changed information or conditions,” and also potential “temporary

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change[s] in the implementation of the flow requirements” as a result of an “emergency.”
(*Id.*)

Consequently, it is unclear whether the State Water Board is proposing specific, fixed, flow restrictions; or general polices and principles that will be used in the future to set flow limits on the Rivers. The SED does nothing to clarify this confusion. For example, the SED does not state the location of the UIF measurement on the Merced River. Table 3 of Appendix K in the SED lists a percent of UIF between 30 and 50 percent and the Executive Summary Section ES5.3 states: “LSJR Alternative 3, with an initial unimpaired flow of 40 percent and an adaptive range of 30 to 50 percent, is the flow proposal recommended for adoption,” yet, the SED provides no information on how the total volume of UIF is to be calculated or how this adaptive management concept would be applied. As a result, it is effectively impossible to comment on the efficacy, environmental effects, or reasonableness of this adaptive management component.

SED Appendix K, page 28, also states: “When implementing the LSJR flow objectives, the State Water Board will include minimum reservoir carryover storage targets or other requirements to help ensure that providing flows to meet the flow objectives will not have adverse temperature or other impacts on fish and wildlife or, if feasible, other beneficial uses.” However, the alternatives described in SED Chapter 3 do not include any description of minimum reservoir carryover storage requirements. Yet, all of the analysis conducted by State Water Board staff includes a higher carryover storage target of 300,000 ac-ft in Lake McClure, an increase of 185,000 ac-ft from the current minimum pool requirement contain in the Merced Irrigation District’s existing FERC license, Article 44. The confusion on this issue was exacerbated by comments that were made at the January 3, 2017 State Water Board public hearing in Sacramento, when Mr. Les Grober stated that “Carryover storage is very much a part of the project.” Consequently, while the SED is unclear and provides no meaningful information on what the carryover storage requirement may be, it appears from Mr. Grober’s comments that a carryover storage requirement is part of the Project.

Further confusion is created on page ES-4 of the SED, which states that the Project includes “non-flow measures that are complementary to the flow proposal for the protection of fish and wildlife, and that are expected to improve habitat conditions or improve related science and management within the LSJR Watershed.” As a result, it is difficult to determine the scope and extent of the various non-flow measures that are reviewed in the SED and potentially considered as part of the Project.

This confusing and conflicting definition of the “project” reviewed in the SED is a violation of CEQA, and renders the entire SED invalid as an informational document. The deficiencies in the Project Description also make it effectively impossible to determine what project the City is to analyze in its review of the SED.

4.2 Problems with the Environmental Baseline

The SED uses a 2009 baseline, which does not take into account changed circumstances since 2009, and current conditions. This is contrary to CEQA principles and requirements, and results in a flawed environmental analysis.

Any environmental impact statement (EIR) “must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective.” (14 Cal. Code Regs. § 15125(a).) “This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.” (*Id.*) Establishment of the baseline is critical to a meaningful assessment of the environmental impacts of a project, because the significance of environmental impacts cannot be determined without setting the baseline. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99.)

The SED provides at page ES-51: “The environmental baseline for this SED is February 2009, the date that the Notice of Preparation for the SED was issued. The baseline reflects the physical conditions in 2009 as they existed under the 2006 Bay-Delta Plan.”

However, the current SED is significantly different from the SED released in December 2012 and referenced in the 2009 NOP. The current SED discusses and reviews an entirely new “project,” consisting of a new, separate, update to the 2006 Bay-Delta Plan. Since the State Water Board did not issue a new NOP for the current Project, baseline conditions should be determined and set as of September 2016, “at the time environmental analysis commenced.”

The State Water Board admits at page ES-6 of the SED that the current SED “contains substantial changes to the 2012 Draft SED.” It is further stated that substantial changes were made to the SED as a result of “the recent drought,” and “passage of the Sustainable Groundwater Management Act (SGMA) (Wat. Code §§ 10720 et seq.), which provide[s] for sustainable local groundwater management.” (*Id.*)

The failure to consider these changed conditions and account for them in the baseline used in the SED to determine the impacts of the Project effectively invalidates the environmental analysis and violates CEQA.

5.0 LEGAL ISSUES

5.1 The State Water Board's Authority And Jurisdiction To Modify Water Rights Through The Project, And The SED

It appears that the State Water Board intends to modify and restrict the Merced Irrigation District's established appropriative water rights through its adoption and implementation of the Project. The City understands that the Merced Irrigation District contends that the State Water Board does not have the authority or jurisdiction to do this by means of the Project and SED.

Since this is an issue of direct and obvious concern to the Merced Irrigation District, the City respectfully requests that the State Water Board review and consider the legal analysis provided by the Merced Irrigation District in their comments on this issue.

5.2 The Project Does Comply with the Requirements of a Water Quality Control Plan (WQCP)

Legal Authority for WQCP

The Porter-Cologne Water Quality Control Act (Water Code §§ 13000 et al.), established a statewide program for water quality control administered by nine regional boards and the State Water Board. The regional boards are primarily responsible for formulation and adoption of water quality control plans covering the State's 16 planning basins (§ 13240) subject to the Board's review and approval (§ 13245). However, the Board alone is responsible for setting statewide policy concerning water quality control (Water Code §§ 13140-13147; *Racanelli* at 109). The CWA requires states to develop water quality standards for all navigable waters including intrastate navigable waters. (33 U.S.C. 1313(a)(3)(A).)

The State Water Board may adopt water quality control plans for waters for which water quality standards are required by the Federal Water Pollution Control Act, more commonly referred to as the CWA, and acts amendatory or supplementary thereto. (Water Code § 13170.) In its capacity as the designated state water pollution control agency for purposes of the Federal Water Pollution Control Act (§ 13160), the Board is empowered to formulate its own water quality control plans ("WQCP"), which supersede conflicting regional basin plans. (§ 13170.)" (*United States v. State Water Resources Control Bd.*, supra, 182 Cal. App. 3d at p. 109.)

A "WQCP" consists of a designation or establishment of the waters within a specified area of all of the following: (1) Beneficial uses to be protected; (2) Water quality objectives ("WQO"); [and] (3) A program of implementation needed for achieving water quality objectives. (Water Code § 13050(j).) WQOs "means the limits or levels of water

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quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.” (Water Code § 13050(h).)

The State Water Board is required to act separately as to WQOs, in order to implement the actions described in the program of implementation. The program of implementation in every water quality control plan must “include, but not be limited to: (a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private. (b) A time schedule for the actions to be taken. (c) A description of surveillance to be undertaken to determine compliance with objectives.” (Water Code § 13242; *SWRCB Cases*, 136 Cal.App.4th at 697.)

Notably, the State Water Board may “not adopt any water quality control plan unless a public hearing is first held, after the giving of notice “ (Water Code § 13244.)

Under both the CWA and the Porter-Cologne Act, the focus of a water quality control plan “is the water bodies and the beneficial uses of those water bodies, not the potential sources of pollution for those water bodies.” (*City of Arcadia v. State Water Resources Control Bd.* (2011) 191 Cal.App.4th 156, 178.)

The State Water Board is required to consider the following when establishing water quality control objectives: (1) past, present, and probable future beneficial uses of water; (2) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (3) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (4) economic considerations; (5) the need for developing housing within the region; and (6) the need to develop and use recycled water. (Water Code § 13241; *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 176-177)

The State Water Board is required to consider all demands being made and to be made on regulated waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible. (Water Code § 13000; *Racanelli*, at 118.) The Board's paramount duty is to provide "reasonable protection" to beneficial uses, considering all the demands made upon the water. (§§ 13000, 13241.) (*Racanelli*, at 122, emphasis added.)

5.3 The State Water Board has not considered necessary factors for the water quality control plan

The City contends that the Project, and the SED, does not satisfy the requirements for a valid water quality plan. The State Water Board has not weighed and balanced the beneficial uses and related demands upon the water in connection with the Project, and

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the SED, pursuant to Water Code Section 13241. The SED does reflect any meaningful or actual consideration of the demands of other water users on the Merced River, not to mention the other tributaries to the SJR. There is no indication that the State Water Board considered factors and values related to the Merced Irrigation District's diversion and use of water, including the beneficial uses made by local communities such as the City, economic and social considerations that impact the City resulting from the Merced Irrigation District's diversion and use of water, or any of the other factors listed in Water Code Section 13241.

When developing water quality objectives, "the Board is directed to consider not only the availability of unappropriated water (Water Code § 174) but also *all* competing demands for water in determining what is a reasonable level of water quality protection (Water Code, § 13000)." (*Racanelli*, 182 Cal.App.3d at 118 [emphasis in original].) Similarly, the State Water Board must consider "[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." (Water Code, § 13241(c), emphasis added.)

The State Water Board has failed to adequately consider past, present, and probable future beneficial uses of water. (See Water Code § 13241(a)); failed to adequately consider environmental characteristics of the SJR and its tributaries, including the quality of water available in the SJR and its tributaries. (See Water Code § 13241(b)); failed to adequately consider economic considerations. (See Water Code § 13241(d)); failed to adequately consider the need for developing housing in the actual project area. (See Water Code § 13241(e)); failed to adequately consider the need to develop and use recycled water. (See Water Code § 13241(f)); and failed to adequately consider water pollution, water quality, and the availability of unappropriated water. (See Water Code § 174.)

In the SED, the State Water Board ignores and fails to address these issues, or assumes, with little or no explanation, that the Project will not adversely affect the City, the Merced Irrigation District, and other local communities or have any negative impacts on the factors listed in Water Code Section 13241.

If water quality objectives are not established in the manner required by law, they will be found to be invalid. (*Racanelli*, at 120.) Similarly, the court in *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, rejected a prior version of the Bay-Delta water quality standards because, among other things, the State Water Board failed to balance competing uses of water prior to limiting the use of water rights to achieve the water quality objectives, and failed to make necessary "factual findings to support its order".

In the present situation, the State Water Board has again failed to balance the interests and uses of the City, the Merced Irrigation District and other diverters of water against

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the purported benefits that would be obtained through the Project, and the flow restrictions in the Project. The State Water Board has only offered and relied on conclusory statements, instead of factual findings supported by substantial evidence. The State Water Board is repeating the same mistakes that led to prior Bay-Delta Plans being rejected by the courts in the above referenced decisions. The State Water Board has again offered an unsupported plan for achieving water quality objectives with the apparent hope that the parties will reach agreement on some sort of settlement to allow it to implement the Project.

Due to the State Water Board's failure to consider and account for the factors in Water Code Section 13241, the State Water Board's development and attempted implementation of the Project is arbitrary and capricious, and not supported by substantial evidence. An agency decision is "arbitrary or capricious" if there is no "rational connection between the facts found and the choice made." (*National Resources Defense Council, Inc. v. U.S. E.P.A.* 966 F.2d 1292, 1297 (9th Cir. 1992).)

The Narrative Objective proposed by the State Water Board reads as follows:

"Maintain 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 the natural production of viable native San Joaquin River watershed fish populations migrating through the Delta. Flow conditions that reasonably contribute toward maintaining viable native migratory San Joaquin River fish populations include, but may not be limited to, flows that mimic the natural hydrographic conditions to which native fish species are adapted, including the relative magnitude, duration, timing, and spatial extent of flows as they would naturally occur. Indicators of viability include abundance, spatial extent or distribution, genetic and life history diversity, migratory pathways, and productivity."

This lacks sufficient clarity. Government Code Section 11349 requires regulations to be drafted with sufficient clarity that the meaning of the regulation is easily understood by those persons 'directly affected' by them. (Gov. Code, § 11349(c).) In violation of 1 CCR section 16(a)(1) and (3), directly affected persons could interpret the Narrative Objective in several different ways and the Narrative Objective uses terms which do not have meanings generally familiar to those 'directly affected.' The phrase "support and maintain the natural production of viable native SJR watershed populations migrating through the Delta" is ambiguous, undefined, and could easily be interpreted in any number of ways.

The Narrative Objective is also impermissibly vague. Due process protections prohibit the enforcement of vague regulations like the Narrative Objective. (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755 (“*Cranston*”).) Similar to the clarity standard discussed above, due process precludes enforcement of a regulation based upon impermissible vagueness when the regulated party “could not reasonably understand that [their] contemplated conduct is proscribed.” (*Cranston*, at 764.) The ambiguous terms, such as “support,” “controllable measures,” and “viable native,” make the Narrative Objective so vague, the regulated community would not be able to understand what conduct they are to undertake or avoid.

5.4 The State Water Board fails to comply with the California Water Code with respect to the proposed implementation of the Project

The State Water Board is required to provide “(a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private. (b) A time schedule for the actions to be taken. (c) A description of surveillance to be undertaken to determine compliance with objectives.” (Water Code § 13242.)

In *Racanelli*, the court explained:

“Water quality objectives, we realize, may not always be readily enforceable. The statutory factors enumerated in section 13242, particularly the provisions for recommended action and time schedule, reflect the Legislature’s recognition that an implementing program may be a lengthy and complex process requiring action by entities over which the Board has little or no control and also requiring significant time intervals. Thus, we do not believe that difficulty in enforcement justifies a bypass of the legislative imperative to establish water quality objectives which, in the judgment of the Board, will ensure reasonable protection of beneficial uses.” (*Racanelli*, at 122.)

Difficulties or delays in implementing and enforcing the Project do not justify the State Water Board’s failure to follow required procedures, including a water rights hearing, prior to implementing the Project.

Further, the lack of a clear, reasonable or timely plan for implementation of the Project is a violation of Section 13242, and renders the Project invalid and unenforceable.

In *SWRCB Cases*, the court similarly invalidated a water quality plan where the State Water Board had attempted to avoid following required public procedures, including conducting water rights hearing, for the implementation of the plan. The court first explained:

“Contrary to State Water Contractors' assertion, the trial court's decision does not rest on ‘the assumption that water right decisions adopted by the ... Board must provide for full and immediate implementation of the water quality objectives set forth in any applicable water quality control plan.’ The trial court's decision rests on the conclusion (with which we agree) that when a water quality control plan calls for a particular flow objective to be achieved by allocating responsibility to meet that objective in a water rights proceeding, and the plan does not provide for any alternate, experimental flow objective to be met on an interim basis, the decision in that water rights proceeding must fully implement the flow objective provided for in the plan. The guiding principle is that the Board's power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing.” (136 Cal.App.4th at 729.)

The court further explained: “But the Board could not properly adopt the San Joaquin River Agreement's alternate flow regime, even on a temporary basis, in the water rights proceeding under the guise of a “staged implementation” of the objectives in the 1995 Bay-Delta Plan, because that “staged implementation” fundamentally altered those objectives, and such an alteration could be accomplished only through a properly noticed and conducted regulatory proceeding.” (*Id.*)

The court in *SWRCB Cases* later explained: “It has been noted that ‘the principal enforcement mechanism available to the Board [to enforce compliance with water quality control plans] is its regulation of water rights’ (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal. App. 3d at p. 125, italics omitted.) It would be strange if the Board, having determined in a water quality control plan that a water rights proceeding was necessary to achieve the water quality objectives in that plan, could simply decide not to take action in that proceeding and thereby refuse to enforce its own plan. Fortunately, the Legislature has not authorized the Board to do any such thing. Thus, the Board cannot - as it attempted to do here - make a de facto amendment to a water quality objective in a water quality control plan by simply refusing to take the action that it has identified as necessary to achieve that objective.” (*Id.*, at 732.)

Yet, the State Water Board is again attempting to avoid its obligation to adopt and implement a water quality plan through a properly noticed water rights hearing. Rather than follow the appropriate process the State Water Board, is apparently attempting to use an unauthorized and inapplicable procedure, the Section 401 WQC process, to implement a water quality plan and amend water rights, without proper public notice and scrutiny.

5.5 The State Water Board has failed to demonstrate that the Project will have the requisite impact on water quality

The State Water Board has failed to sufficiently address the “water quality conditions that could reasonably be achieved” as a result of the Project. (Water Code § 13241; *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 176-177.)

The Project includes a Narrative Objective and two numeric objectives, the latter of which call for 40 percent UIF from February through June on the three eastside tributaries, and a minimum flow of 800 to 1,200 cfs at Vernalis from February through June. (SED, at Appx. K, p. 18.) In spite of the quantitative objectives, the SED fails to disclose the amount of water necessary to meet the objectives. The SED purports to quantify the difference between the flows currently in the river, and the flows that would be in the river if the proposed objectives were satisfied. Specifically, the SED indicates that the long-term mean annual reduction in surface water supplies under the 40 percent UIF objective would be 293,000 ac-ft. (SED, at ES-21.) However, the SED never discloses the total amount of water necessary to satisfy the objectives.

The State Water Board has failed to quantify or justify the claimed water quality benefits that it hopes to achieve through the Project, and has failed to quantify and justify any benefit to water quality or to the environment and native fish populations. The State Water Board instead simply assumes that the Project will achieve some unknown and unquantified benefit to water quality, and fish populations.

This vague description of alleged water quality benefits that may result from the Project does not satisfy the requirements of Water Code Section 13241. The State Water Board’s conclusions and findings in support of the Project must be based on substantial evidence. The State Water Board’s lack of support for the benefits of the Project is particularly problematic because of the significant and dramatic negative impacts on the City’s, the Merced Irrigation District’s and other communities’ water supplies that would result from the Project.

It is undeniably clear that the Project will decrease the beneficial use of water for agriculture, domestic, municipal, and industrial uses, and will increase the water dedicated to the fish and wildlife beneficial uses. The SED, however, does not analyze how the Project will protect fish and wildlife beneficial uses. Instead, the SED “assumes” that a change in various metrics (e.g., reservoir surface elevation, reservoir storage, spawning habitat availability [WUA], frequency of floodplain inundation, water temperature [using the 7DADM metric]) of 10 percent or more along with professional judgment would be sufficient to result in a measurable or significant long-term response in fish populations. (SED, at Section 7.4.3, Impact AQUA-1 [p. 7-68], Impact AQUA-2 [p. 7-70], Impact AQUA-3 [p. 7-74], Impact AQUA-4 [p.7-103].)

The State Water Board cannot adequately consider the required factors (See Water Code §§ 174, 13000, and 13241) for development of a WQCP if it cannot identify or quantify the benefits it is allegedly conferring on fish and wildlife beneficial uses to the detriment of other established beneficial uses. The SED does not demonstrate a rational connection between the factors the State Water Board is required to consider when establishing water quality control objectives (See Water Code §§ 174, 13000, and 13241) and the Project.

The State Water Board has also failed to demonstrate there is a causal link or connection between increased flows and increased fish populations. Evidence and information from other stream systems, in fact, indicates that increased flows of water can have an adverse effect on fish populations. For example, the September 24, 2008 Biological Opinion (BO) for Russian River Water Supply, Flood Control Operations, and Channel Maintenance prepared by the United States Army Corps of Engineers concluded that increased flows of water in the Russian River channel could have an adverse impact on fish populations by making it difficult for young steelhead and coho salmon to grow and thrive.

The BO stated, for example, that proposed increased flows “will create excessively high current velocities that will greatly limit the value of 14 miles of Dry Creek and 34 miles of the upper Russian River as rearing habitat for steelhead.” (BO, p. xiv) The BO additionally explained that increased flows have “a clear effect on the availability of rearing habitat” for fish species, and that juvenile fish are “dependent on low velocity habitats.” (BO, pp. 228, 229.)

5.6 The State Water Board would violate the Porter-Cologne Act by regulating flows outside of the geographic region for the Bay-Delta Plan

The State Water Board additionally has violated the Porter-Cologne Act, by attempting to regulate waters outside of the geographical boundaries of the Bay-Delta Plan for the benefit of fish and wildlife resources, also outside of the geographical boundaries of the Bay-Delta Plan. (SED, The SED expressly states: “This Water Quality Control Plan covers the Bay-Delta Estuary **and tributary watersheds** (Bay-Delta Plan or Plan).” (SED, Appendix K, p. 1, emphasis added.)

The SED describes the “plan area” as the Stanislaus River watershed from New Melones Reservoir to the confluence of the SJR, the Tuolumne River watershed from New Don Pedro Reservoir to the confluence of the SJR, and the Merced River watershed from the Lake McClure to the confluence of the SJR, as well as the main stem of the SJR between its confluence with the Merced River downstream to Vernalis. (1-2.)

The narrative and numeric objectives of the SED also cover a broad geographic area that extends far beyond the three rivers that are identified as contributing resources for

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achieving the water quality objectives. Specifically, the Narrative Objective states that inflow conditions from the “San Joaquin River watershed to the Delta” should be maintained at sufficient levels to support and maintain the natural production of viable native SJR watershed fish populations “migrating through the Delta.” (SED, at Appx. K, p. 18.) Similarly, the program of implementation states, “[a]lthough the lowest downstream compliance location from the Lower San Joaquin River flow objective is at Vernalis, the objectives are intended to protect migratory Lower San Joaquin River fish in a larger area, including within the Delta . . .” (SED, at Appx. K, p. 28.)

A WQCP is defined by the waters within a specified area and the beneficial uses of those waters. (Water Code § 13050; *City of Arcadia v. State Water Resources Control Board* (2011) 191 Cal.App.4th 156, 178.)

The Bay-Delta Plan specifically regulates the waters within the San Francisco Bay and the Bay-Delta Estuary. (1978 Bay-Delta Plan, at I-3 [stating the purpose of the plan is to “protect beneficial uses of Delta water supplies.”]; 2006 Bay-Delta Plan, at 1.) This includes the waters of the San Francisco Bay, the San Pablo Bay, the Suisun Bay, the water bodies of the interior Delta, the Sacramento River from the Delta up to the confluence of the American River, and the Lower San Joaquin River from the Delta up to Vernalis. (2006 Bay-Delta Plan, at Figure 1.)

As the court in *Racanelli* explained, “[t]he Delta generally describes a large lowland area with a labyrinth of natural channels in and around the confluence of the Sacramento and San Joaquin rivers. The combined river water passes through the Delta into Suisun Bay and then into San Francisco Bay. In 1959, the legal boundaries of the Delta were fixed by the Legislature. (§ 12220.) The bounded area is roughly triangular, with Sacramento at the north, Vernalis at the south and Pittsburg at the west.” (*Racanelli*, at 107.)

The State Water Board does not have authority to expand the boundaries on its own, without new legislation. It cannot expand the Bay Delta Plan beyond the legal boundaries of the Delta, nor does the State Water Board refer or cite to any authority, which allows it to expand the reach of the Bay Delta Plan, or the Project, beyond the boundaries of the Delta. Only the Legislature has the authority to expand the boundaries of the Delta to include the “tributary watersheds” of the Delta.

Consequently, the State Water Board does not have authority or jurisdiction to implement the Project, or to regulate water quality through the Bay Delta Plan, within the Merced River, outside the boundaries of the Delta.

5.7 Section 401 and the Merced Irrigation District

The State Water Board states that the Project “flow objectives” will be implemented, or “assigned” through “water right actions and water quality actions including Federal

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Energy Regulatory Commission (FERC) hydropower licensing processes.” (ES-1, 2.) As described above, State Water Board Members have made contrary statements at public hearings on the SED.

The Revised Water Quality Control Plan (Appendix K to the draft SED) further explains that the State Water Board intends to use Section 401 WQCs in FERC relicensings as a major vehicle to implement the Project, including the new LSJR flow objectives. (App. K at pp. 28-31.) The State Water Board states that to coordinate with ongoing relicensings on the SJR tributaries, implementation of the LSJR objectives will be phased in through 2022. (*Id.* at 28 n.8.)

The State Water Board plans to implement through the Section 401 process not only flow requirements based on modeled UIFs at locations on each tributary, but also changes to existing minimum carryover storage requirements at FERC-licensed impoundments, and other “non-flow measures.” The SED’s Executive Summary indicates that the Project includes “non-flow measures that are complementary to the flow proposal for the protection of fish and wildlife, and that are expected to improve habitat conditions or improve related science and management within the LSJR Watershed.” (ES-4.) SED Appendix K, page 28, further states: “When implementing the LSJR flow objectives, the State Water Board will include minimum reservoir carryover storage targets or other requirements to help ensure that providing flows to meet the flow objectives will not have adverse temperature or other impacts on fish and wildlife or, if feasible, other beneficial uses.”

It is the City’s understanding that the Merced Irrigation District contends that implementation of the Project through the Section 401 process is not authorized by law, and that utilization of the Section 401 process to implement the State Water Board’s comprehensive water quality project would far exceed the limited authority granted to the State Water Board to issue a Section 401 WQC. The City respectfully asks the State Water Board to seriously consider the Merced Irrigation District’s position on this issue as addressed in their comments to the Board

5.8 The SED and Project Violate Additional Statutes, Authorities and Policies of the State

Protection of Reasonable Uses - State Constitution, Article X, Section 2

The Project violates Article X, Section 2, of the California Constitution, as the Project does not put water resources to “beneficial use to the fullest extent of which they are capable.”

Article X, Section 2 of the California Constitution states, in part:

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“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.”

The California Constitution therefore prohibits the waste or unreasonable method of use or unreasonable method of diversion of water. (Cal. Const., art. X, § 2.) As the court in *Racanelli* explained: “All water rights, including appropriative, are subject to the overriding constitutional limitation that water use must be reasonable. (Cal. Const., art. X, § 2; § 100; see also *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183 .) The Board is expressly commissioned to carry out that policy. (§ 1050.) To that end, the Board is empowered to institute necessary judicial, legislative or administrative proceedings to prevent waste or unreasonable use (§ 275; Cal. Admin. Code, tit. 23, § 764.11), including imposition of new permit terms (Cal. Admin. Code, tit. 23, § 761).” (*Racanelli* at 129.)

A WQO is improper if it requires the unreasonable use of water. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 762; *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 183.) The measure of what is a “reasonable use” is a question of fact, to be determined according to the circumstances of each particular case. (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.3d 132, 139; *Environmental Defense Fnd, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1268.)

In determining what a “reasonable” use is, the following considerations must be included in the Board’s analysis: (1) the quantity of water needed for the beneficial use served (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241); (2) a comparison of other potential uses (*Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570-571); and (3) local environmental conditions. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567.)

The Project requires parties on the Tuolumne, Merced, and Stanislaus rivers to limit and restrict diversions so as to provide for a flow of between 30 and 50 percent of UIF on each of those rivers. (SED, ES-4, 3-15.)

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The SED acknowledges that the increase in flows in the tributaries to the SJR alone will not satisfy the objectives of the WQCP. (SED, p. 19-3, 19-88) Although flows in each river may be adjusted slightly, the SED indicates that flows must be “coordinated to achieve beneficial results in the LSJR related to the protection of fish and wildlife beneficial uses.” (SED, Appendix K, p. 31.) If the increase in flows will not satisfy the beneficial uses, which are the objective of the Project, then the increase in flows, and transfer of water away from Merced Irrigation District and other users does not constitute a beneficial use of water because the water must “serve” (meet) the beneficial use.

The SED also concludes, and the administrative record supports the conclusion, that as a result of this required bypass there will be significant and unmitigated impacts to agriculture, water supply, groundwater, recreation, service providers, and greenhouse gas emissions. (SED, at 18-44 through 18-50) Yet, the State Water Board has not estimated, projected, or otherwise analyzed the level of protection that the flow requirements in the Project will provide to fish and wildlife beneficial uses.

Without doing this analysis, the State Water Board could not have accurately determined how much water is necessary to protect the beneficial use served by the LSJR Flow Objective – fish and wildlife. Without demonstrating the benefits the required flows will provide to fish and wildlife, the State Water Board has not properly balanced and compared the uncertain benefit to fish and wildlife beneficial uses with the known impacts to agriculture, water supply, groundwater, and recreation beneficial uses to ensure the water bypassed pursuant to the Project is used reasonably.

Thus, the establishment and implementation of the Project, necessarily results in the unreasonable use of water. The State Water Board has not balanced harm to the City, other local communities, the Central Valley economy, California agriculture, and domestic users, with the alleged benefits to fish and wildlife. (p. ES-4.) The State Water Board instead unreasonably favors one use of water over multiple previously established reasonable and beneficial uses.

In *Racanelli*, the court explained: The role of the Board in acting upon permit applications has been aptly described by this court as a “necessary balancing process” requiring “maximum flexibility” in considering competing demands of flows for instream purposes and diversions for agricultural, industrial, domestic and other consumptive uses to arrive at the public interest. (*Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 603 .).” (*Racanelli* at 126;)

The State Water Board has not made a proper, reasoned or sufficient inquiry into the benefits of the Project, the reasonable and beneficial uses of water by the Merced Irrigation District, the City and other local communities, and the overriding principles of the State constitution. The State Water Board has instead selected a single option for

addressing a perceived environmental problem, without sufficient legal and factual support, and attempted to impose the project on the parties without following required procedures.

5.9 The Project essentially mandates violation of SGMA

The City, the Merced Irrigation District and other local communities are actively working to comply with the Sustainable Groundwater Management Act (SGMA) as mandated by the State of California. The Project is contrary to the principles and goals set forth in SGMA, and effectively requires local communities and the Merced Irrigation District to violate the requirements, obligations and limitations set forth in SGMA.

The Project will result in a significant reduction in the supply of surface water available for diversion and use by the Merced Irrigation District and a number of other entities. The SED provides:

“Surface water diversion reductions on the Stanislaus, Tuolumne, and Merced Rivers are expected to be approximately 12%, 14% and 16%, respectively. Further, as a result of the substantial reduction of surface water supply on the rivers, it is expected that there would be a substantial depletion of groundwater supplies in the Modesto, Turlock, and Extended Merced Subbasins. These reductions would potentially require service providers to construct new or expanded water supply or wastewater treatment facilities, the construction of which could result in significant environmental effects.” (18-51.)

The SED states that the significant loss of surface water supplies will be offset and mitigated through the pumping and use of groundwater. (9-62 through 9-64.) The SED further states that the Project “could potentially substantially deplete groundwater supplies and interfere with groundwater recharge and affect groundwater quality in these subbasins. Therefore, impacts on groundwater resources would be potentially significant and unavoidable.” (9-64, emphasis added.)

Yet, the SED does nothing avoid the negative impacts to groundwater supplies. The SED does not indicate that the Project calls for or will result in any increased supply of groundwater, through recharge, spreading banking, or any other policy or program. The SED does not quantify or account for the available groundwater supplies that would offset the significant decrease in surface water supplies. Instead, the SED simply assumes that sufficient groundwater will be pumped out of already depleted Subbasins to offset and mitigate the loss of surface water supplies.

The State Water Board’s call for the increased use of groundwater to offset and mitigate impacts from the Project is directly contrary to SGMA’s call for sustainable groundwater

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management (See E-25 and 26 in SED). The Project, and the SED, do not mention or account for the fact that the Merced groundwater basin is already being over drafted, a fact that led to the SGMA mandate in the first place.

By utilizing a 2009 environmental baseline, the SED also does not account for or mention the increased use of groundwater during recent drought years, and the related depletion in local, and statewide, groundwater supplies. The SED's use of and reliance on groundwater and pumping information from 2009 is misleading and inaccurate. The SED should have considered the impact of the Project on current groundwater supplies, and the current availability of groundwater to mitigate the impacts of the Project.

The assumptions in the SED regarding reduction of negative impacts and sustainability (ES-29 in SED) are, therefore, not supported by substantial evidence. The assumptions are not supported by any current, credible or convincing evidence.

The Project's effectively requires increased pumping and use of groundwater that will result in unsustainable basins, increased overdraft conditions and increases in the use of groundwater, without any replacement water supply, all in violation of SGMA's requirements. Increased pumping of groundwater as a result of the Project will result in substantial, wide ranging and unavoidable negative impacts, including decreases in the quality of water in the basin, increased energy costs, subsidence and decreases in the quality of groundwater and consequent negative impacts on the City, its residents and all other local communities that rely on groundwater for their water supply.

SGMA provides: "It is the policy of the state that groundwater resources be managed sustainably for long-term reliability and multiple economic, social, and environmental benefits for current and future beneficial uses. Sustainable groundwater management is best achieved locally through the development, implementation, and updating of plans and programs based on the best available science. (Water Code § 113.)

SGMA further provides: "To enhance local management of groundwater consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution. It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater." (Water Code § 10720.1.)

SGMA also explains that the Legislature intended that SGMA would allow parties "[t]o manage groundwater basins through the actions of local governmental agencies to the greatest extent feasible, while minimizing state intervention to only when necessary to ensure that local agencies manage groundwater in a sustainable manner." (Water Code § 10720.1(h).)

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SGMA requires the preparation of a Groundwater Sustainability Plan (GSP) in a basin in a critical state of overdraft, as with the Merced basin, by 2020. (Water Code § 10727)

The Project effectively mandates violation of all of these policies and requirements. The Project would effectively make compliance impossible for the City, other local communities and the Merced Irrigation that will lose water supplies, and water rights, through the Project. The Project would instead call for and require the City, other local communities and the Merced Irrigation District to significantly increase production and use of groundwater, without any corresponding offset or increase in groundwater supply.

The SED should not deliberately avoid reviewing SGMA (See ES-28 in SED.) By failing to conduct the required water rights hearing, the State Water Board improperly attempts to avoid addressing and dealing with the effects and implications of SGMA on the Project. Via a water rights hearing the State Water Board could consider the role and effect of SGMA on the Project, and on the impact of the Project on SGMA requirements.

Since the legislature previously adopted SGMA, SGMA should take priority over the Project and the call for increased pumping to offset diminished surface water supplies. The Project will not be effective or enforceable unless and until it complies with SGMA's requirements.

5.10 The Proposed regulations are unintelligibly vague

The Project is unintelligibly vague and uncertain. The details and objectives of the Project, including the flow restrictions, and the State Water Board's apparent plan to implement the Project, are not clear and are subject to different interpretations, making compliance and enforcement difficult. The City and other parties, including, but not limited to the Merced Irrigation District, do not have a clear or consistent understanding of what they will have to do to comply with and implement the Project, nor can they determine how and to what extent they will have to limit and alter their future operations and management of water resources.

As a result the Project violates Government Code Section 11349, which requires regulations be drafted with sufficient clarity that the meaning of regulations are easily understood by those persons directly affected by them. (Govt. Code, § 11349(c).)

California regulations will violate the "clarity" requirement if:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or

- (3) the regulation uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons 'directly affected;' or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation. (1 CCR, § 16(a)(1)-(6).)

(1 CCR, § 16(a)(1)-(6).)

The Government Code defines a "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) Because the Project contains standards and limits adopted by the State Water Board to implement the Porter Cologne Act, the Project, and in particular the follow objectives, qualifies as a regulation and must comply with the Government Code requirements on clarity.

5.11 Lack of proper notice

The State Water Board is required to provide adequate public notice describing each proposed action to be taken. (23 CCR, §§ 647.2(b); 649.2; 649(b).) The State Water Board failed to properly give notice of the objectives and components of the Project. The original September 15, 2016 notice of availability for the revised SED provides:

"The proposed Plan Amendment would update the 2006 Bay-Delta Plan's San Joaquin River flow and southern Delta salinity water quality objectives and the program of implementation for those objectives. The proposed flow objectives would require increased flows from three eastside, salmon-bearing tributaries to the San Joaquin River: the Stanislaus, Tuolumne and Merced Rivers. The proposed Plan Amendment also includes non-regulatory updates." (p. 1.)

The State Water Board failed to give notice, however, that the Project included "adaptive implementation of unimpaired flows," and "non-flow measures." (ES-4.) The State Water Board also failed to give notice that the Project would attempt to expand the 2006 Bay-Delta Plan beyond the boundaries of the Bay-Delta, that the Project would be

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implemented through the FERC Section 401 certification process, or that the objectives, purpose and goals of the WQCP had changed.

The State Water Board additionally failed to give notice that it would seek to regulate water quality in the Bay-Delta outside of the February through June time period, as provided for in the prior versions of the Bay-Delta water quality plan. The September 15, 2016 notice of availability for the revised SED does not mention or indicate that the Project would expand the timing and scope of the 2006 Bay-Delta Plan.

5.12 The SED Improperly Delegates Authority to the Executive Director

The delegation of authority to the Executive Director to approve the Implementation Plan, and the program of implementation for the Project, directly violates State Water Resources Control Board Resolution No. 2012-0061 and 23 CCR § 5.

At Appendix K, the SED states:

“The LSJR flow objectives for February through June shall be implemented by requiring 40 percent of unimpaired flow, based on a minimum 7-day running average, from each of the Stanislaus, Tuolumne, and Merced Rivers. This required percentage of unimpaired flow, however, may be adjusted within the range allowed by the LSJR flow objectives through adaptive methods detailed below. The required percentage of unimpaired flow is in addition to flows in the LSJR from sources other than the LSJR Tributaries. The required percentage of unimpaired flow does not apply to an individual tributary during periods when flows from that tributary could cause or contribute to flooding or other related public safety concerns, as determined by the State Water Board or Executive Director through consultation with federal, state, and local agencies and other persons or entities with expertise in flood management.” (Appendix K, p.29)

The SED also provides:

“The Executive Director may approve changes to the compliance locations and gage station numbers set forth in Table 3 if information shows that another location and gage station more accurately represent the flows of the LSJR tributary at its confluence with the LSJR.” (Id.)

The SED further indicates that [t]he State Water Board will establish a STM Working Group to assist with the implementation, monitoring and effectiveness assessment of the February through June LSJR flow requirements” (Appendix K, p. 32.)

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Later in Appendix K, the SED states:

“The STM Working Group, or State Water Board staff as necessary, will, in consultation with the Delta Science Program, develop proposed procedures for allowing the adaptive adjustments to the February through June flow requirements discussed above. The State Water Board or Executive Director will consider approving procedures for allowing those adaptive adjustments within one year following the date of OAL’s approval of this amendment to the Bay-Delta Plan.” (Appendix K, p. 34.)

The adoption and/or modification of the adaptive management plan is a controversial matter, based on substantial public concern and involves significant policy considerations.

The Executive Officer of the State Water Board is prohibited from approving permits or other approvals, which are controversial matters, based on substantial public concern. (23 CCR § 5(a)(8).) The Executive Officer of the State Water Board is prohibited from approving permits or other approvals which involve significant policy considerations. (23 CCR § 5(a)(9).)

The Executive Officer of the State Water Board is prohibited from approving permits or other approvals requiring the preparation of an environmental impact report by the board. (23 CCR § 5(a)(10).)

The Executive Officer of the State Water Board is prohibited from adopting regulations. (State Water Resources Control Board, Resolution No. 2012-0061, at 1.) The Executive Officer of the State Water Board is prohibited from adopting state policy for water quality control. (*Id.*) The Executive Officer of the State Water Board is prohibited from adopting or approving WQCP or plan amendments. (*Id.*)

There is “a tight line between lawful and unlawful delegation of regulatory authority.” (*International Assn. of Plumbing etc. Officials v. California Building Stds. Com.* (1997) 55 Cal.App.4th 245, 253 [holding that model building codes developed by private parties cannot become binding regulations without agency review and approval].)

In *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245 232, the court found that the State Water Board had wrongfully delegated its authority to its staff. In that case, the State Water Board approved applications to appropriate water that did not “set forth the actual use or uses [to be made] of the impounded water.” (*Id.* at p. 261.) This court concluded that the Board “may not delegate the authority to determine the merits of an application ... to appropriate water, except as provided by statute.” (*Id.*)

Similarly, in *Light v. State Water Resources Control Bd.*, 226 Cal. App. 4th 1463, 1491, the court stated ‘the doctrine of unlawful delegation requires the Legislature or a regulatory agency to exercise the final say over whether any particular regulation becomes law.’”

Consequently, the State Water Board is not authorized to delegate its authority on these issues to the Executive Director.

5.11 Noncompliance with Federal Antidegradation Policy

Federal law requires states to develop and adopt statewide antidegradation policies, which protect and maintain “existing instream uses and the level of water quality necessary to protect existing uses.” (40 CFR § 131.12(a)(1).)

Under Federal law, “[w]here the quality of the waters [of the state] exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds:” (i) “allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located;” (ii) the State “assure[s] water quality adequate to protect existing uses fully;” and the State assures that “the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control” will be achieved. (40 CFR § 131.12(a)(2).)

The State Water Board adopted California’s antidegradation policy in Resolution No. 68-16. Under Resolution No. 68-16, “[w]henver the existing quality of water is better than the quality established in policies as of the date on which such policies become effective,” such existing water quality must be maintained until the regulating agency demonstrates: (i) “any change will be consistent with maximum benefit to the people of the State;” (ii) the policy “will not unreasonably affect present and anticipated beneficial use of such water;” and (iii) the policy “will not result in water quality less than that proscribed in the policies.”(State Water Resources Control Board Resolution No. 68-16(1).)

Through the Project, and in the SED, the State Water Board has failed to perform the necessary analysis to determine whether the proposed amendments to the WQCP will comport with federal antidegradation requirements and Resolution No. 68-16.

6.0 CEQA REQUIREMENTS

The State Water Board has not complied with the requirements of CEQA in connection with the SED, despite statements in the SED to the contrary.

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The SED states:

“In addition to other legal requirements, the State Water Board must comply with the requirements of CEQA when adopting water quality control plans (WQCP). The purpose of this SED, in part, is to provide an environmental analysis of the proposed amendments to the Bay-Delta Plan and the reasonably foreseeable methods of compliance with the amendments, as well as consideration of other factors. CEQA authorizes the Secretary of the Resources Agency to certify a regulatory program of a State agency as exempt from the requirements for preparing EIRs, negative declarations, and initial studies if certain conditions are met. (Pub. Resources Code, § 21080.5.) The State Water Board’s water quality control planning program is a certified regulatory program and thus, a SED may be prepared in lieu of an EIR. (*Ibid.*; Cal. Code Regs., tit. 14, § 15251, subd. (g).)” (SED 1-3.)

The SED also provides:

“When proposing to undertake or approve a discretionary project, state agencies must comply with the procedural and substantive requirements of the California Environmental Quality Act (CEQA). (Pub. Resources Code, § 21000 et seq.) CEQA applies to discretionary projects that may cause a direct or indirect physical change in the environment. The State Water Board is the lead agency under CEQA. This SED was prepared in compliance with CEQA and other laws to analyze the potential environmental impacts of adopting and implementing the proposed amendments to the Bay-Delta Plan associated with Phase I. Environmental impacts associated with Phase II will be evaluated in a separate environmental document.” (SED 1-3.)

The SED concludes with:

“This SED fulfills the requirements of CEQA and the State Water Board’s CEQA regulations (Cal. Code Regs., tit. 23, § 3775 et seq.) to analyze the environmental effects of the proposed regulatory activity, as well as requirements of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) and other applicable requirements as described in Section 1.4, *State Water Board Authorities*. This SED will inform the State Water Board’s consideration of the potential amendments to the 2006 Bay-Delta Plan described above.” (1-4.)

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Notwithstanding these statements, the SED does not fulfill the requirements of CEQA, as it does not adequately and clearly define or describe the proposed Project, nor does it sufficiently or properly analyze the impact of the Project on the environment. The SED is not an effective or valid substitute for an EIR. The SED fails as an effective and valid informational document.

The fundamental purpose of an EIR is “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment.” (Public Resources Code § 21061.) Full and candid disclosure, and an honest assessment of the environmental consequences of governmental action, is the foundation of the CEQA process. The foremost principle under CEQA is that the Legislature intended the act “to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions, thus protecting “not only the environment but also informed self-government.” (*In re Bay-Delta etc.*, (2008) 43 Cal. 4th 1143, 1162-63.) An EIR must effectively disclose to the public the analytic route the agency traveled from evidence to action. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405.) An EIR must contain facts and analysis, not just the agency’s bare conclusions or opinions. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.)

In contrast to the underlying purpose and principles of CEQA, the State Water Board has, throughout the SED, failed to provide all of the details of the Project, failed to adequately disclose or address the actual goals and purpose of the Project, and failed to conduct any real analysis of the Project’s impact on the environment.

The State Water Board is proposing to undertake a project that could have a significant negative impact on the Bay-Delta region, the environment and natural resources of the San Joaquin Valley, and the entire State. The State Water Board is essentially attempting to adopt and implement this significant project quickly, without full disclosure of the impacts and effects of the Project, and without meaningful public review or participation.

The failure to disclose complete and accurate information is particularly troubling because of the significant and wide-ranging impact the Project will have on water supplies, the environment and the economy of the City, the Central Valley, and the State.

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The Project would reallocate and transfer significant quantities of water supplies, dramatically change the economy of the San Joaquin Valley, and potentially affect the way of life for millions of Californians. The Project will deprive the region of valuable and necessary water supplies, jobs, agriculture, infrastructure and other assets, at the same time that the economy and environment of the region has been severely impacted by the drought, the prior economic downturn, climate change and political, environmental and economic uncertainty.

Despite these significant impacts, it appears that the State Water Board is focused not on accurately and completely disclosing the effects and details of the Project to the public, but on quickly and effectively implementing the Project with the least amount of resistance, review and analysis. The State Water Board is attempting to use the SED, and the CEQA process not to inform the public, but to quickly implement the Project without significant public review and consideration.

The State Water Board has not provided a clear and accurate analysis of the Project, and the impacts of the Project. The State Water Board does not accurately define and describe the Project, the geographic scope of the Project, or present, long term and cumulative impacts of the Project on the region's water supplies, environment, and economy. The State Water Board also claims that because the SED is a "programmatic" environmental document, it can avoid reviewing the impacts of the Project until some undefined and undetermined time period, without any assurance that it will ever complete the required environmental review and analysis.

It also appears that the State Water Board violated CEQA by committing itself to the Project and deciding on a definite course of action with regard to the Project, prior to preparation of the SED. The State Water Board has effectively precluded any meaningful consideration of alternatives to the Project in advance of and independent of the requirements of CEQA. That constitutes a clear and direct violation of CEQA, as explained in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

6.1 Reference to Merced Irrigation District's CEQA Analysis

The City is aware that the Merced Irrigation District is providing a more detailed analysis of the State Water Board's failure to comply with the mandates of CEQA. The City joins and supports the position of the Merced Irrigation District on this issue and respectfully requests that the State Water Board carefully review and consider the CEQA analysis being provided in the Merced Irrigation District's comment letter.

7.0 TECHNICAL DEFECTS AND ECONOMIC IMPACT

It is the City's understanding that the Merced Irrigation District has found serious defects in the SED due to numerous technical errors and omissions, and analysis that either is flawed or does not use the best available science. Meanwhile the Merced Irrigation District

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has previously provided, and will provide in its comment letter, an abundance of economic and scientific analysis that should be thoughtfully reviewed by the State Water Board.

One of the City's primary concerns is the economic impact and loss of jobs, and consequent social impacts, which will be caused by the proposed project. The Merced Irrigation District's analysis indicates that the SED grossly underestimates these impacts. The reduction in available water supplies reduces agricultural and hydropower output, employment, and labor income below baseline every year. In below normal, dry and critical water years, which occur 54% of the time, the total estimated annual economic output losses range between \$1 million (in above normal water-year types) to \$238 million (in dry years). While, full- and part-time jobs would not be impacted in wet and above normal water-year types; in all other water-year types the annual number of jobs lost is estimated to range between 597 and 984, with the subsequent reduction in labor income ranging between \$35 million and \$58 million. (See Merced Irrigation District's comment letter, Section 6.5) As the largest City in the service area of the Merced Irrigation District, much of this economic impact will be borne by the City and its residents. These considerations alone should give the Board more than sufficient cause to reconsider the proposed project and SED.

The City requests that the State Water Board seriously consider the human impact of the proposed project and SED on the citizens of the City of Merced and the entire San Joaquin Valley. The proposed project and SED as currently drafted will have very real and negative impact on thousands of individuals in the local region that should not be overlooked.

Sincerely,



Jeffrey S. Kaufman
Interim City Attorney