

Common Response 1.5

Trinity River

Introduction

This introduction provides important context to this common response. A similar introduction is provided in each common response to ensure that the reader has the appropriate context when reviewing common responses. For ease of reference, a table of contents is included after this introduction to guide readers to specific subject areas.

Protecting the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta) watershed and its many beneficial uses of water is one of the State Water Resources Control Board's (State Water Board) primary responsibilities and top priorities. In response to declines of several native aquatic species since the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (Bay-Delta Plan or Plan) was last comprehensively updated, the State Water Board commenced a process to update the Bay-Delta Plan for the Sacramento River and its tributaries, Delta eastside tributaries (including the Calaveras, Cosumnes, and Mokelumne Rivers), and Delta for the reasonable protection of fish and wildlife beneficial uses, referred to as the Sacramento/Delta Update to the Bay-Delta Plan. The Bay-Delta Plan identifies beneficial uses of water to be protected in the Bay-Delta watershed, water quality objectives and program of implementation to achieve the reasonable protection of those beneficial uses, monitoring, evaluation, and special study provisions. The State Water Board's proposed action to update the Bay-Delta Plan is supported by a Staff Report/Substitute Environmental Document (Staff Report), which provides an evaluation of the environmental impacts and economic effects in support of consideration of different alternatives to update the Bay-Delta Plan to achieve reasonable protection of fish and wildlife beneficial uses in the Sacramento/Delta. The Staff Report is functionally equivalent to an Environmental Impact Report under the California Environmental Quality Act (CEQA) but also provides the additional analyses that support the State Water Board's consideration of the action under the Clean Water Act and Porter-Cologne Water Quality Control Act.

Development of the final Staff Report and final draft Bay-Delta Plan were informed by several opportunities for public comment over multiple years. This common response may address issues that were raised during any of those public comment periods. In September 2023, the State Water Board released the 2023 draft Staff Report evaluating different alternatives for the Sacramento/Delta Update to the Bay-Delta Plan for public review and comment. Following release of the 2023 draft Staff Report, the State Water Board released draft amendments to the Bay-Delta Plan in October 2024 (2024 draft Plan) for public review and comment that incorporated alternatives identified in the 2023 draft Staff Report with revisions based on public comments. The State Water Board released revised draft Plan updates in July 2025 (July 2025 revised draft Plan) but delayed public comment on that version of the Plan pending further updates, though some parties did submit public comments on the July 2025 draft that are part of the State Water Board's response to comments. In December 2025, the State Water Board released Chapter 13, *Revised Proposed Plan Amendments*, as a limited recirculation of the 2023 draft Staff Report (2025 partially recirculated draft Staff Report) together with the December 2025 revised draft Plan for public review and comment. These documents reflect the updated proposed project, referred to as the revised proposed Plan amendments, which brings together in the Bay-Delta Plan program of

implementation a voluntary agreement (VA) pathway that incorporates commitments identified in the Healthy Rivers and Landscapes (HRL) proposal and would apply to specified HRL water rights, and a regulatory pathway based on the proposed Plan amendments that would apply to other water rights and to any HRL water rights no longer covered under the VA pathway. In August 2026, the State Water Board released a final draft Bay-Delta Plan that included refinements to the revised proposed Plan amendments based on public comments received on the December 2025 revised draft Plan. At the same time, the State Water Board released this final Staff Report, including responses to comments previously received on the draft Staff Report. The final Staff Report informs the State Water Board's consideration of adoption of the Sacramento/Delta updates to the Bay-Delta Plan.

With respect to the CEQA impact conclusions, it is important that they be understood in the context of the overall nature of the proposed project, which is intended to be an environmental restoration action. CEQA only considers changes that could negatively impact the existing environment and does not recognize or offset negative changes with improvements that could result from an environmentally beneficial project. Here, the impacts that could potentially result from implementation of the restoration action occur in a system that has been highly altered, and the project would be expected to improve conditions for native fish and wildlife in the Sacramento/Delta watershed over time. However, the project will also result in changes in hydrology and changes in water supply that could result in some potentially significant adverse environmental impacts at certain times and locations that must be analyzed under CEQA. These potentially significant environmental impacts should be viewed in light of the overall purpose and goals of the Sacramento/Delta update to the Bay-Delta Plan.

The State Water Board reviewed and considered all comments and developed common responses to address recurring comments and common themes. This common response addresses comments about potential impacts to the Trinity River from the Bay-Delta Plan Update, and existing water quality issues in the Trinity River. The Trinity River is a major river in northwestern California and is a tributary to the Klamath River. The Trinity River and its tributaries originate in the Trinity Alps in northwestern California and runs through steep canyons of the Northern Coast Ranges to its confluence with the Klamath River at Weitchpec. The State Board received numerous public comments about potential impacts to the Trinity River from the Bay-Delta Plan Update, and regarding existing water quality issues in the Trinity River. Tribes, specifically the Yurok, Karuk, and Hoopa commented that the Trinity River ecosystem is integral to their culture and survival, and that current conditions on the Trinity and Klamath Rivers are dire for salmon populations. Commenters request that the State Water Board consider additional protection for the Trinity River, the largest tributary of the Klamath River, to bolster the success of hundreds of millions of dollars being spent by the State on removal of the Klamath Dams and by the federal government on the Trinity River Restoration Program (TRRP). This common response addresses, but is not limited to, the following topics:

- Overview
- How the Bay-Delta Plan update relates to the Trinity River
- Modeling
- Federal laws and regulatory requirements that apply to the Trinity River
- State laws and regulatory requirements that apply to the Trinity River, including Water Right Order 90-5
- Protection of the Trinity River generally

Table of Contents

Common Response 1.5 Trinity River	1
Introduction.....	1
Overview.....	4
How the Bay-Delta Plan Update Relates to the Trinity River	5
Modeling.....	7
Federal Laws that Apply to the Trinity River	8
State Law, including Order 90-5	8
Protection of the Trinity River Generally.....	11
References Cited.....	12

Overview

In 1955, the United States Congress passed, and President Eisenhower signed, the Trinity River Division Act, creating the Trinity River Division of the Central Valley Project and providing for construction of two dams and a reservoir on the Trinity River. In 1963, construction finished on Trinity Dam, which forms Trinity Reservoir, and the downstream Lewiston Dam, which diverts water from the Trinity River watershed through the Trinity Powerplant and to Whiskeytown Lake via the Clear Creek Tunnel. From Whiskeytown Lake, water is diverted into Keswick Reservoir and released into the Sacramento River. The Central Valley Project then diverts water from the Sacramento River, including Trinity River imports, and other tributaries in the southern Delta for use in the Central Valley, primarily for agricultural irrigation (*See San Luis & Delta-Mendota Water Authority v. Haugrud* (2017) 848 F.3d 1216, 1223 (*Haugrud*).) The Trinity River Division became fully operational in 1964, and for the next ten years the U.S. Bureau of Reclamation (Reclamation) diverted an average of 88 percent of Trinity River annual inflow to the Sacramento River Basin.

The Trinity River Division has affected the Trinity River environment and fish populations. (*Haugrud*, 848 F.3d 1216, 1223 [citing *Westlands Water Dist. v. U.S. Dep't. of Interior* (2004) 376 F.3d 853, 862] (*Westlands*).) By 1980, the United States Fish and Wildlife Service estimated that the Trinity River fish population suffered a reduction of 60% to 80%, and a fishery habitat loss of 80% to 90%. (*Westlands*, 376 F.3d at p. 862 [citing to Reclamation's December 19, 2000 Record of Decision (ROD)].)

The Trinity River watershed still supports native salmon and steelhead populations. Due to the changes in hydrology precipitated by the building of Trinity and Lewiston Dams, as well as diversions from Lewiston Dam for the Central Valley Project, the natural watershed has been disrupted, adversely affecting the salmon and steelhead populations. In 1981, the North Fork Trinity River, as well as the mainstem downstream of Lewiston Dam, were federally designated as Wild and Scenic Rivers. Since the 1990s, various restoration efforts, including flow requirements, have been implemented to provide protections for native fish population in the Trinity River watershed; these efforts have been administered largely through the TRRP that was established by the 2000 ROD. Also, Trinity Reservoir operations are currently being evaluated through an Endangered Species Act reconsultation process.

There are two tribes with reservations on and downstream of the Trinity River. The Hoopa Valley Reservation, home to the Hoopa Valley Tribe, is just upstream of the confluence of the Trinity and Klamath Rivers; it is a square bisected by the Trinity River—it extends 6 miles on either side of the bank of the Trinity River. The Yurok Reservation, home to the Yurok Tribe, is immediately downstream, stretching from the confluence of the two rivers to the mouth of the Klamath River where it flows into the Pacific Ocean. The Yurok Reservation encompasses what was originally established by executive order in 1855 as the Klamath River Reservation (what is today the lower portion of the entire Yurok Reservation) and part of the extended Hoopa Valley Reservation, (established by executive order in 1891, stretched from the mouth of the Klamath River to the confluence of the Trinity and Klamath Rivers). In 1988, Congress enacted the Hoopa-Yurok Settlement Act, partitioning the two reservations into the two present today.

Both the Yurok Tribe and the Hoopa Valley Tribe have reserved fishing rights on the Trinity and Klamath Rivers. In 1993, the Department of Interior, Office of the Solicitor quantified the tribes' fishing rights in the rivers as those rights "sufficient to support a moderate standard of living . . . limited to fifty percent of the harvest in any given year unless varied by agreement . . ." (USDOI

1993). The Department of the Interior further concluded that the United States, in establishing the reservations, did not intend to reserve for the tribes a right to the full amount of fish, to the exclusion of non-tribal fishing off the reservation, until the moderate living standard was satisfied. Instead, it defined the reserved right as having a “ceiling” to ensure that the fishery resources were shared; “the tribes are entitled to a sufficient quantity of fish to support a moderate standard of living, or 50% of the Klamath fisher harvest in any given year, whichever is less.”

There are two kinds of reserved water rights: *Winters* rights and *Winans* rights. *Winters* rights, so named for the United States Supreme Court case *Winters v. United States* (1908) 207 U.S. 564, are rights that attach to land that the federal government reserves for a federal purpose, such as creating an Indian reservation. The *Winters* doctrine holds that when the federal government reserves this land, it also implicitly reserves sufficient water to fulfill the purposes of the reservation. *Winans* rights, on the other hand, are reserved by a tribe, in a treaty, to continue tribal practices. (See *United States v. Winans* (1905) 198 U.S. 371.) Reasoning that a treaty is not a grant of new rights to Indians, but instead a reservation of pre-existing rights, the Supreme Court of the United States held that an 1859 treaty with the Yakima Indians, specifically the treaty’s inclusion of a right to fish at “usual and accustomed places” superseded subsequent land grants and state regulations.

There are no treaty-created reservations in the State of California, so there are no *Winans* rights in the state. However, there are a significant number of federally created reservations within the state, including the Hoopa Valley Reservation and the Yurok Reservation, and both have *Winters* rights to water on their respective rivers.

Please see Common Response 11.1, *Tribal Engagement and Tribal Beneficial Uses*, for a more detailed discussion of tribal reserved rights.

In 1991, the North Coast Regional Water Quality Control Board (North Coast Water Board) adopted a Basin Plan amendment (Resolution No. 91-61) that included temperature objectives for the mainstem Trinity River below Lewiston Dam to protect native fish species in the Trinity River watershed. For the reach between Lewiston Dam and Douglas City Bridge, the temperature objectives require that the daily average temperature of the water not exceed 60 degrees Fahrenheit between July 1st and September 14th and 56 degrees Fahrenheit between September 15th and October 1st. Between Lewiston Dam and the confluence with the North Fork Trinity River, the temperature objectives require that the daily average temperature of the water not exceed 56 degrees Fahrenheit between October 1st and December 31st.

How the Bay-Delta Plan Update Relates to the Trinity River

As explained above and in Section 2.2.1, *Sacramento River*, the Sacramento River receives imports from the Trinity River system through operations of a system of Central Valley Project dams, reservoirs, tunnels, and power plants. The Sacramento/Delta Update to the Bay-Delta Plan is focused on protection of fish and wildlife beneficial uses of water within the Sacramento River watershed and Delta. Accordingly, because the Trinity River watershed is outside of this watershed, the update to the Bay-Delta Plan is not intended to address protection of beneficial uses on the Trinity River. For these reasons, the Trinity River was not included in the plan area because the new

flow requirements would not apply to the Trinity River. The Trinity River watershed was also not included in the study area because it does not receive Sacramento/Delta supply, and therefore reductions in Sacramento/Delta supply would not affect the area. However, in response to public comment on this topic, the Trinity River has been added into the defined study area in the revised Staff Report. See a revised map of the study area in Chapter 1, *Executive Summary*.

The revised proposed Plan amendments contain provisions to ensure that implementation of the Bay-Delta Plan, including under the VA and regulatory pathways, does not result in redirected impacts to native fish and wildlife resources in the Trinity River watershed, including temperature and instream flow impacts. Reclamation will be required to report at least annually to confirm there are no redirected impacts to the Trinity River from implementation of the current updates to the Bay-Delta Plan. As part of the annual and periodic review processes, and more often if needed, the State Water Board will evaluate whether any additional actions are needed to address any redirected impacts to the Trinity River or to ensure that beneficial uses are protected on the Trinity River, in consultation with the North Coast Water Board.

Commenters requested that the Staff Report define likely impacts to the Trinity River and specify mitigation or remedies when and if they occur. Because the updates to the Bay-Delta Plan include requirements that there be no redirected impacts to the Trinity River, there are no expected impacts to the Trinity River that should be evaluated in the Staff Report. The Bay-Delta Plan is to be implemented by water right holders and diverters in the Bay-Delta watershed. The revised proposed Plan amendments do not rely on or allow for the use of any water from the Trinity River to implement either the VA or regulatory pathways. As described in the revised proposed Plan amendments, the State Water Board will develop an implementation methodology to determine when water is not available at water right holders' priorities of right to implement the regulatory pathway and ensure that the VA pathway is implemented consistent with water right priorities. That methodology will not provide for water being made available from the Trinity River for either pathway. HRL participants will also be required to identify the water rights from which they are making water available to provide flows under the VA pathway and those flows may not include flow contributions from the Trinity River. Further, neither pathway allows for redirected impacts to the Trinity River from actions to implement either the regulatory or VA pathways and the Plan includes provisions for ensuring that such impacts do not occur.

In their comments, the Sacramento River Settlement Contractors (SRSC) confirmed and expressed appreciation for the provision in the Bay-Delta Plan that no additional water will be allowed to be imported from the Trinity River system to the Sacramento River under the VA pathway as consistent with the HRL proposal. SRSC cited Reclamation's separate ongoing Endangered Species Act consultation and their expectation that Reclamation's future ROD for the Central Valley Project's (CVP) Trinity River Division will result in fewer imports from the Trinity River system into the Sacramento River system.

Some commenters expressed dissatisfaction with the Plan provision and argue that it does not guarantee that the Trinity River will be protected from adverse flow and temperature conditions. Adherence to the Plan provisions requiring that there not be redirected impacts to the Trinity River is a compliance issue. If the State Water Board determines that redirected impacts are occurring because of Bay-Delta Plan implementation, the State Water Board will address those compliance issues through its enforcement authorities and through the provisions in the Plan, including related to continuation, modification, or termination of the VA pathway. In addition, the State Water Board may conduct a separate proceeding to consider water quality protections on the Trinity River,

including flow and temperature protections. The revised proposed Plan amendments specifically identify that the State Water Board will consider such actions as part of its periodic review processes.

Modeling

Imports from the Trinity River to the Bay-Delta watershed are incorporated into the modeling in the Staff Report. Several comments stated that the modeling relies upon an inaccurate baseline that artificially inflates imports from the Trinity River to the Bay-Delta watershed by not including existing flow constraints and protections that apply on the Trinity River. These comments misconstrue how the Trinity River imports were incorporated into the modeling by assuming that the actual imports from the modeling period of record of 1922-2015 are used. Instead, the hydrology for this period is used applying current baseline regulatory requirements. Section 7.7.9 of the SacWAM (Sacramento Water Allocation Model) Documentation describes the baseline flow requirements on the Trinity below Lewiston, which includes the 2000 ROD for Reclamation's operations of the Trinity River Division and the 2017 Long-Term Plan to Protect Adult Salmon in the Lower Klamath River ROD, which documents Reclamation's operational framework for implementing disease-management flows, including fall flow augmentation from Trinity Reservoir. However, it does not include Humboldt County's entitlement for 50 thousand acre-feet (TAF) of water to be released from Trinity Reservoir into the Trinity River pursuant to the Trinity River Division Act because this provision has never been implemented. Information in Chapter 2, *Hydrology and Water Supply*, referenced by some commenters, presents background setting information explaining that water is imported to the Sacramento Watershed from the Trinity River. It is not intended to describe any modeling. Additional information regarding average imports from 2005-2021 following implementation of the Trinity ROD has been added to Chapter 2. This addition does not affect any of the analyses. SacWAM documentation for the Trinity ROD implementation, and Appendix A1, *Sacramento Water Allocation Model Methods and Results*, Table A1-134, shows that long-term average Trinity River imports as modeled are lower than that 1986–2021 average imports at 482 TAF/yr; the modeled imports are lower than the observed imports over this period because the Trinity ROD was signed in 2000, which reduced imports from the Trinity, and SacWAM assumes a fixed set of regulations over the entire period of simulation that includes the 2000 and 2017 Trinity and Klamath ROD requirements (for more information, see considerations for Staff Report baseline for the Trinity River in Common Response 6.2, *Baseline and No Project Alternative*).

Some commenters identified that the modeling in Chapter 9, *Proposed Voluntary Agreements*, showing effects of the VA pathway on Trinity River flows is more accurate than modeling of unimpaired flow scenarios included in Chapter 7, *Environmental Analysis*, that do not show an effect. The modeling for Chapter 9 did not include the constraint on Trinity River imports that is now included in the revised proposed Plan amendments. It was modeled this way because the VA proposal did not include such a constraint. In response to public comments, the provision was added to the revised proposed Plan amendments to prevent redirected impacts to the Trinity River for both regulatory and VA pathways and this provision is reflected in the updated modeling produced for Chapter 13, *Revised Proposed Plan Amendments*. The Chapter 13 modeling includes constraints on the Trinity River system so that new Bay-Delta Plan flow requirements would not result in more water diverted from the Trinity River due to implementation of the updates to the Bay-Delta Plan.

Federal Laws that Apply to the Trinity River

Numerous commenters cited existing federal laws that apply to Reclamation on the Trinity River. The CVPIA (Central Valley Project Improvement Act), section 3406, subdivision (b)(23) contains distinct mandates for the Trinity River, including programs for the restoration of Trinity River fisheries to pre-dam levels. In late 2000, federal lead agencies finalized their National Environmental Policy Act (NEPA) document and adopted a ROD directing Reclamation to restore the Trinity River fishery by releasing flows of up to 11,000 cubic feet per second from Lewiston Dam, floodplain infrastructure improvements, channel rehabilitation projects, fine and coarse sediment management, and watershed restoration. At the time, Trinity County was contemplating re-initiating a 1990 public trust petition before the State Water Board, independent of the federal government's separate actions. The County chose not to pursue its public trust petition, which proposed to make the flow commitments in the ROD an enforceable mandate under state water rights law.

The ROD is implemented through the TRRP, which is a multi-agency program managed with eight partners (including Reclamation, state and tribal resource agencies and Trinity County) on the Trinity Management Council (TMC), and other collaborators. Under the TRRP a variable flow schedule is provided based on water year type and input by the TRRP. The TRRP provides for increased flows starting in April and extending into summer before returning to baseflow conditions.

Commenters express concerns about Trinity River fish populations even after the TRRP restoration efforts. Specifically, commenters cite that after 23 years of restoration salmon populations remain far below pre-project levels and Trinity River temperatures remain too high, especially for spawning salmon. While the State Water Board appreciates commenters' concerns about protection of Trinity River fisheries (see further discussion below), the TRRP is a federal program, and the Bay-Delta Plan is not the appropriate state regulatory process to address any issues concerning the Trinity River. Implementation, compliance, and effectiveness of TRRP provisions on the Trinity River occurs within that construct, not the Bay-Delta Plan. The same is true for other federal laws concerning the Trinity River. However, the revised proposed Plan amendments do include provisions to evaluate as part of periodic review whether separate actions by the State Water Board or Regional Water Quality Control Board should be taken to protect beneficial uses on the Trinity River. In addition, the Plan amendments include provisions prohibiting redirected impacts to the Trinity River from implementation of the Bay-Delta Plan.

State Law, including Order 90-5

Numerous commenters raised issues specific to Water Right Order No. 90-5 (Order 90-5), including concerns with ongoing compliance and the adequacy of Order 90-5 requirements. Order 90-5 establishes water right requirements on Reclamation's operations of Keswick Dam, Shasta Dam, the Spring Creek Power Plant and the Trinity River Division related to temperature control in the Upper Sacramento River for the protection of fishery resources and requires monitoring and reporting to evaluate compliance with those requirements.

The construction and operations of Shasta Dam and related facilities substantially impact beneficial uses in the Upper Sacramento River, particularly winter-run Chinook salmon, which no longer have access to historic cold water habitat upstream of Shasta Dam and now depend on cold water

releases from Shasta from late spring through the fall for their survival. Prior to the issuance of Order 90-5, the Central Valley Regional Water Board had issued waste discharge requirements for temperature, turbidity and dissolved oxygen for the operations of Shasta Dam. While discharges from the tailrace of a dam, absent the addition of a pollutant, are not considered discharges of pollutants and therefore are not subject to federal National Pollutant Discharge Elimination System (NPDES) permitting, (*National Wildlife Federation v. Consumers Power Co.* (6th Cir. 1988) 862 F.2d 580; *National Wildlife Federation v. Gorsuch*, (D.C.Cir.1982) 693 F.2d 156), they may be considered a “discharge of waste” under the Porter-Cologne Act, and subject to waste discharge requirements (WDRs). (See, e.g., *Lake Madrone Water District v. SWRCB* (1989) 209 Cal.App.3d 163.) Though not common, a Regional Water Quality Control Board may issue WDRs or other orders to the owners and operators of dams and reservoirs that are not Federal Energy Regulatory Commission (FERC) licensed hydropower facilities.

In Order No. 89-18, the State Water Board determined that water quality issues on the Sacramento River could be better addressed under its water rights authority through the modification of Reclamation’s water right permits. The State Water Board committed to conducting a water right proceeding to consider whether Reclamation’s permits should be modified to establish temperature limitations or other conditions to maintain water quality in the upper Sacramento River. The State Water Board directed Division of Water Rights staff to, as part of that water right proceeding, consider Trinity River temperatures. (Water Quality Order No. 89-19, p. 17 (Order 89-19).) The State Water Board noted that Trinity River temperature concerns that were not the result of efforts to meet Sacramento River temperature requirements could also be considered as part of later proceedings. (*Ibid.*)

The subsequent water right proceeding that resulted in the issuance of Order 90-5 narrowly considered conditions to prevent and avoid adverse impacts to salmonid spawning and egg incubation in the Trinity River from temperature control actions to protect the upper Sacramento River fisheries. Below is the relevant excerpt from Order 90-5:

Permittee shall not operate its Trinity River Division for water temperature control on the Sacramento River in such a manner as to adversely affect salmonid spawning and egg incubation in the Trinity River. Adverse effects shall be deemed to occur when average daily water temperature exceeds 56°F at the Douglas City Bridge between September 15 and October 1, or at the confluence of the North Fork Trinity River between October 1 and December 31 due to factors which are (a) controllable by permittee and (b) are a result of modification of Trinity River operations for temperature control on the Sacramento River. If the temperatures in the Trinity River exceed 56°F at the specified locations during the specified periods, Permittee shall immediately file with the Chief of the Division of Water Rights a report containing project operational data sufficient to demonstrate that the exceedance was not due to modifications of Trinity River operations for water temperature control on the Sacramento River. If, within fifteen days, the Chief of the Division of Water Rights does not advise Permittee that it is violating this condition of its water right, Permittee shall be deemed not to have caused the exceedance in order to control temperature on the Sacramento River. This term is not to be construed as interfering with the U. S. Department of Interior Andrus Decision dated January 14, 1981 relative to Trinity River releases.

In its issuance of Order 90-5, the State Water Board reiterated its intention to conduct a water right proceeding to consider comprehensively whether Reclamation's Trinity River water rights should be modified to establish temperature limitations and other controls on water quality to protect the

fishery in the Trinity River. (Order 90-5, p. 31 [citing Order 89-18].) Those proceedings were delayed in part due to other efforts that were underway to protect the Trinity River including the 1992 CVPIA (establishing flow levels in the Trinity of 340 TAF annually) and development of the flow study and subsequent 2000 ROD that established a variable flow regime (flows from 368 TAF – 815 TAF annually), channel rehabilitation, and watershed restoration through the TRRP. Protracted litigation ensued, culminating in a Ninth Circuit Court of Appeals decision in *Westlands Water District v. United States* (2004) 376 F.3d 853. Efforts are currently underway to develop a new ROD for Trinity River operations; however, it is unclear when that process will be completed or what the outcome will be. As part of the periodic review process for the Bay-Delta Plan, the State Water Board will consider what, if any, actions have occurred related to the ongoing Endangered Species Act reconsultation effort and whether additional actions are needed by the State Water Board or Regional Water Quality Control Board to protect beneficial uses on the Trinity River.

Further, the existing Order 90-5 and North Coast Water Board Basin Plan remain in effect. The North Coast Water Board's Basin Plan covering the Trinity River contains temperature objectives at Lewiston Dam to Douglas City of 60-degree F from July 1-September 15, 56 degrees F from September 15-30, and 56 degrees F from Lewiston Dam to the North Fork from October 1-December 31.

Commenters raised concern with Reclamation's implementation of Order 90-5, including non-compliance with temperature requirements on both the Sacramento and Trinity Rivers. Comments on compliance with Order 90-5 are outside the scope of the Bay-Delta Plan updates. Order 90-5 exists independent of the Bay-Delta Plan updates for the Sacramento/Delta. While implementation of the cold water habitat objective as part of the regulatory pathway has the potential to overlap and eventually supersede Order 90-5 implementation, the VA pathway does not in any way modify Reclamation's obligations under Order 90-05. Interested parties should raise issues or concerns relating to implementation and compliance with Order 90-5 in that process. As discussed above, the State Water Board may also consider compliance issues in the future as part of the annual and periodic review process in determining whether any additional actions are needed to address any redirected impacts to the Trinity River or to ensure that beneficial uses are protected on the Trinity River more generally.

Note that the State's ability to enforce Clean Water Act and Water Code requirements is constrained by the United States Supreme Court's decision in *United States Department of Energy v. Ohio* (1992) 112 S. Ct. 1627 [holding that the U.S. has not waived sovereign immunity from liability for civil fines imposed by State for past violations of Clean Water Act]. (But see also Clean Water Act, section 13 (33 U.S.C. § 1323, subd. (a) [Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law].) Water Code Section 13308 allows regional water boards to issue orders establishing time schedules and civil penalties against dischargers, including federal agencies, that violate cleanup, abatement, or cease and desist orders. These penalties are designed to motivate compliance rather than punish past actions. The state board may exercise the powers of a regional board under this

section if the violation or threatened violation involves requirements prescribed by an order issued by the State Board. (Wat. Code, § 13308, subd. (d).)

Protection of the Trinity River Generally

Other comments expressed concerns that the 56 degree F temperature requirement in Order 90-5 is not adequately protective, citing salmonid mortality events in both the Sacramento and Trinity Rivers in recent drought years. Commenters expressed concerns that because Order 90-5 only requires that Reclamation not cause redirected impacts to the Trinity River from actions taken for Sacramento River temperature management, it does not prevent Reclamation from making water supply management decisions that leave Trinity Reservoir drawn down below levels necessary to provide cold water for compliance with Trinity River temperature objectives. Commenters, including tribes, assert that Reclamation's management of the Trinity River watershed has led to routine exceedances of temperature requirements that are a significant contributor to increased fish mortality and poor fish returns. Pacific Coast Federation of Fishermen's Associations (PCFFA) and Institute for Fisheries Resources (IFR) cite recommendations from National Oceanic and Atmospheric Administration (NOAA) Fisheries based on Coho salmon egg mortality data at the Trinity River Hatchery, including a water temperature objective of 50°F (daily average) and daily average maximum of 53.5°F at the North Fork Trinity River confluence after November 1st and increasing the minimum end-of-September carryover storage in Trinity Reservoir to 1.2 million acre-feet to preserve the cold water pool to accommodate water temperature management in the Trinity River the following water year.

The State Water Board acknowledges that Order 90-5 does not provide comprehensive water quality protection for the Trinity River. However, water quality objectives contained in the North Coast Water Board's Basin Plan still apply and have not been waived. Further, as discussed above, the Board has committed as part of the periodic review process to consider what if any additional actions are needed by the State Water Board or North Coast Water Board to protect Trinity River beneficial uses.

Numerous commenters assert that the Staff Report is legally inadequate because it does not consider impacts on Coho salmon survival in the Trinity River from continued CVP operations and exports and does not define biological outcomes and protection of fish and wildlife beneficial uses on the Trinity River. Comments from tribes, specifically the Yurok, Karuk, and Hoopa request additional analysis and protection for the Trinity River related to tribal considerations. These comments request a plan to protect the Trinity River pursuant to the Public Trust Doctrine, Porter-Cologne Act, the Clean Water Act, the Public Trust Doctrine and California Fish and Game Code § 5937. Other commenters also requested the State Water Board to analyze Trinity River operations in the Bay-Delta Plan. Comments from Western Area Power Administration (WAPA) request consideration of the benefits of Trinity diversions for CVP hydropower and their ability to lower temperatures in Whiskeytown and Keswick reservoirs, and to assist with Clear Creek restoration efforts.

The protection of fish and wildlife beneficial uses and associated cultural uses on the Trinity River is important. However, comments asking for additional evaluation and consideration of existing water quality problems on the Trinity River through the Bay-Delta Plan update are misplaced and ignore the purposes and goals of the project, which is to establish water quality control measures and flow requirements needed to provide reasonable protection of beneficial uses in the Bay-Delta

watershed, particularly for fish and wildlife beneficial uses in the Sacramento River watershed, Delta eastside tributaries, and Delta regions (Sacramento/Delta). Staff Report Section 7.1.3, *Purpose and Goals of the Sacramento/Delta Update to the Bay-Delta Plan*, lists the purposes and goals of the project. The Trinity River is not in the Bay-Delta watershed and therefore is not included in the plan area, and the new flow requirements would not apply to the Trinity River. There is no legal requirement that the Staff Report evaluate existing impacts to the Trinity River and develop or modify water quality objectives for the reasonable protection of beneficial uses in the Trinity River watershed. That would be an entirely separate process. That said, the State Water Board agrees that the Trinity River is important for restoration of salmon and steelhead populations in both the Trinity River and the Klamath River where significant efforts are under way to restore important salmon populations through the removal of four dams on the Klamath River and restoring access to over 420 miles of habitat for the first time in a century.

Reclamation is responsible for independent federal statutory obligations for the Trinity River and must comply with those obligations. The water quality objectives contained in the North Coast Water Board's Basin Plan remain in effect. The State Water Board will evaluate whether any additional actions are needed to address any redirected impacts to the Trinity River or to ensure that beneficial uses are protected on the Trinity River, in consultation with the North Coast Water Board. In any future proceeding on Trinity water quality, the State Water Board would consider recommendations from tribes and other interested parties on whether existing objectives on the Trinity River are adequately protective or whether new objectives are needed.

References Cited

U.S. Department of the Interior (USDOI). 1993. Memorandum from the Office of the Solicitor regarding fishing rights of the Yurok and Hoopa Valley Tribes. Opinion No. M-36979. October 4.