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July 27, 2018

State Water Resources Control Board
 Attn: Jeanine Townsend, Clerk to the Board
 1001 I Street, 24th Floor
 Sacramento, CA 95814
 Email: LSJR-SD-Comments@waterboards.ca.gov

Re: Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments

Dear Ms. Townsend:

The following are the comments submitted on behalf of the *San Joaquin Tributaries Authority* (SJTA) in response to the State Water Board's July 6, 2018, *Notice of Public Meeting and Consideration of Adoption of Proposed Amendments to the Water Quality Control Plan*.

On July 6, 2018, the State Water Resources Control Board ("State Water Board" or "Board" or "SWRCB") released its proposed final amendments to the Bay-Delta Plan ("Proposed Final Amendments" or "Appendix K"), as well the supporting proposed final Substitute Environmental Document ("Final SED"). A review of the Proposed Final Amendments reveals that the Board has changed the proposed project in numerous ways, including by adding a new objective, revising the numeric unimpaired flow objective, purporting to incorporate new beneficial uses from the Central Valley Regional Board's basin plan for the Sacramento/San Joaquin Rivers, adding a new method for calculating unimpaired flow, and modifying the program of implementation. None of these changes have been analyzed in the Final SED. Instead, in an obvious attempt to avoid recirculation of the substitute environmental document, the Board released the Final SED with only minor changes, and then embedded substantial new information and environmental analysis in a 22-chapter Master Response to comments.

The State Water Board spent approximately sixteen (16) months developing the Proposed Final Amendments and generating the new information and analysis that is contained in the Master Response to comments. Despite this lengthy process and the significant amount of new information that has been released, the Board has restricted the public comment period on Appendix K to a mere twenty-one (21) days. In addition, the Board stated it will not accept written comments on the Final SED, despite the inclusion of new information and environmental analysis in its Master Response.

The Proposed Final Amendments and the Final SED are intended as capstones to the Board's near decade-long process of updating the Bay-Delta Plan. With this in mind – and in light of the proposed changes to the project and the new information and analysis presented in the Master

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Response to comments – the San Joaquin Tributaries Authority (“SJTA”) requested that the Board recirculate the Final SED to allow for review and public comment, or alternatively, grant an additional 30 days to comment on the Proposed Final Amendments and Final SED. The Board hastily denied this request, erroneously asserting that the newly developed narrative objective in the Proposed Final Amendments (released July 6, 2018) was, in fact, analyzed in the previous version of the substitute environmental document released nearly two years earlier in September 2016. The Board did not address the SJTA’s claim that the Master Response included significant new information and analysis warranting recirculation of the Final SED. Instead, the Board suggested that it had been generous in previously granting the public six months to comment on the September 2016 version of the seriously-flawed substitute environmental document, and thus no additional time to comment on the new information was warranted.

Under protest, and without waiving any legal claims that the Board has violated, among other things, its obligation to recirculate the substitute environmental document under California Code of Regulations, title 23, section 3779(e), the SJTA submits the following written comments and urges the Board not to adopt the Proposed Final Amendment or the Final SED.

I.

The Proposed Final Amendments and Final SED Contain Significant New Information and Analysis Requiring Recirculation of Both Documents for Public Review and Comment

The State Water Board’s refusal to recirculate the Final SED for public review and comment, and its concomitant refusal to accept additional written comments on the Final SED, violate the Board’s obligation to provide an opportunity for public comment on a substitute environmental document supporting the adoption of an exempt regulatory program such as the SWRCB’s water quality control plan for the Bay-Delta.

California Code of Regulations, title 23, section 3779(e) provides that the State Water Board must allow for additional public comment on a substitute environmental document “if recirculation would be required for an environmental impact report [EIR] pursuant to California Code of Regulations, title 14, [CEQA Guidelines] section 15088.5.” (Cal. Code Regs., tit., 14, § 3779[e].) Under *CEQA Guidelines*, section 15088.5, a lead agency must recirculate an EIR “when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review . . . but before certification.” Thus, when a lead agency (i.e., the Board) adds “significant new information” to an EIR/SED, “the agency must issue new notice and must ‘recirculate’ the revised EIR/[SED]” for “additional commentary and consultation.” (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130 – 131, citing to Pub. Resources Code, § 21092.1, *CEQA Guidelines*, section 15088.5 subd. (a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112.) This requirement exists to provide the

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revised documents “the same critical evaluation that occurs in the draft stage” so that the public is not “denied an opportunity to test, assess, and evaluate the data and make an informed judgement as to the validity of the conclusions to be drawn therefrom.” (*Save our Peninsula, supra*, 87 Cal.App.4th at 131, quoting *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 822.)

The term “information” is broadly defined, and “can include changes in the project or environmental setting as well as additional data or other information.” (*CEQA Guidelines*, § 15088.5[a].) New information is “significant” if the SED has been “changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect . . . that the project’s proponents have declined to implement.” (*CEQA Guidelines*, § 15088.5[a].)

Here, the Board significantly changed the proposed project by adding a new narrative objective to the Proposed Final Amendments. (Appx. K, p. 18, Table 3.) This new narrative objective requires that “[f]lows provided to meet these numeric objectives [on the Stanislaus, Tuolumne, Merced and San Joaquin Rivers from February through June] be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses *at other times of the year*” (hereafter “New Narrative Objective”). (Appx. K, p. 18, Table 3 [emphasis supplied].) The meaning of the phrase “other times of the year” is ambiguous, at best. For instance, the New Narrative Objective could be read to require that the February-June flows be managed and used during those 5 months in such a way that avoids causing adverse impacts to fish and wildlife at other times of the year; or, it could be read to require that February-June flows be managed and used during other times of the year to avoid causing significant adverse impacts to fish and wildlife. In addition, it could mean that if the February-June flow are not managed properly, additional flows could be required to protect fish and wildlife. Irrespective of the interpretation, the New Narrative Objective and the potential adverse impacts to the physical environment that may result therefrom have not been identified nor analyzed in the Final SED. Indeed, the Final SED remains largely unchanged from the version released in September 2016 (apart from the significant new analysis in the Master Response to comments), and the New Narrative Objective was not developed by the Board until *after* that document was completed. Standing alone, this change to the project constitutes significant new information requiring recirculation insofar as it creates a new objective that must supersede, abdicate to, or otherwise coexist with the other objectives in a way that has never been described or analyzed by the Board. The potentially-regulated community has been given no information, nor explanation, as to how it must comply with the New Narrative Objective while also adhering to the other objectives, including the numeric unimpaired flow objective.

The State Water Board also changed the numeric objective from a range of unimpaired flow (30% to 50%) to requiring exactly 40% unimpaired flow with an adaptive range between 30% to 50%. (Appx. K, p. 18.) As the SJTA noted in its initial response to comments submitted in March 2017, the Board never actually analyzed how the project would impact the environment if 40% unimpaired flow was maintained based upon a 7-day running average from February through June. Instead, the Board

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provided the results of its iterative analysis in which the unimpaired flows were treated as a block (or budget) of water and released at all times of the year on a schedule that did not in any way mimic a percentage of unimpaired flow. In that sense, the Board has never analyzed the newly proposed objective which will require exactly 40% unimpaired flow from February through June based upon a minimum 7-day running average. In any event, this change to the unimpaired flow objective from a range of 30%-50% to exactly 40% with an adaptive range of 30%-50% fundamentally changes the project insofar as compliance can no longer be achieved at the outset by adhering to the low-end of the range, i.e., 30%.

In addition, encompassed within the Final SED are the Board's responses to public comments regarding the September 2016 version of the SED, including the Board's 22-chapter Master Response to comments. In these responses, as demonstrated by the following examples, the Board again provides extensive, significant, and new information. For example, in response to comments that the Board's water quality analysis was lackluster, the Board provided new analysis concerning the likely environmental impacts of the proposed project on methylmercury content and the potential for harmful algal blooms. (Master Response 1.1: General Comments, at pgs. 65 – 68.)

In response to comments that the September 2016 draft SED failed to adequately evaluate groundwater dependent ecosystems (GDEs), the Board provided additional, new environmental analysis on the proposed project's likely impacts on previously undiscussed GDEs, such as Oak Woodlands and Blue Oak Woodlands. (Master Response 3.4: at pgs. 24 – 25.) Likewise, in response to public comments questioning the necessity of flow requirements in June, the Board provided new, extensive analysis and modeling on the presence of fish in the Merced, Tuolumne, Stanislaus, and San Joaquin rivers during June as well as the historical and anticipated future temperature impacts (for the month of June) that the proposed project would have on each river. (Master Response 3.1: at pgs. 15 – 36.)

Recirculation for a formal review and public comment following the addition of "significant new information" ensures that the public is not "deprive[d] of a meaningful opportunity to comment" prior to the Board certifying and adopting the Proposed Final Amendments and Final SED. (*See CEQA Guidelines*, § 15088.5 subd. (a).) Here, the Board's actions are unlawful because, despite the addition of extensive significant revisions and new information, the Final SED and Proposed Final Amendments were not recirculated – thus depriving the public of a meaningful opportunity to review and comment. Offering a 21-day comment period solely limited to changes in Appendix K does not satisfy the Board's legal obligations. Instead, the Board is required to recirculate the Final SED and Proposed Final Amendments for a formal review and public comment period. (*CEQA Guideline*, § 15088.5(a); Pub. Resources Code, § 21092.1; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors*, *supra*, 87 Cal.App.4th at 130 – 131.)

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II.

Comments on Changes to Appendix K

A. Changes to “Purpose and Application of the Water Quality Control Plan”

The State Water Board made several material changes to the section of the Bay-Delta Plan entitled “Purpose and Application of the Water Quality Control Plan.” For instance, on Page 4, the State Water Board struck the following phrase: “For the geographic area of the Bay-Delta Estuary . . .” (Appx. K, p. 4.) In the same paragraph, the Board added the following sentence: “This plan protects the beneficial uses of the Bay-Delta Estuary and **tributary watersheds.**” (Appx. K, p. 4 [emphasis added].) The Board also added the following sentence: “This plan establishes water quality objectives for which implementation can be fully accomplished only if the State Water Board assigns some measure of responsibility to water rights holders and water users to mitigate for the effects on the designated beneficial uses of their diversions and use of water.” (Appx. K, p. 4.) These changes are addressed in turn below.

- i. “This plan protects the beneficial uses of the Bay-Delta Estuary and tributary watersheds”

Historically, the Bay-Delta Plan focused exclusively on the Sacramento/San Joaquin Delta, and the San Francisco Bay Estuary. The Delta has been defined as a “bounded area [that is] roughly triangular, with Sacramento at the north, Vernalis at the south and Pittsburg at the west.” (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 107, citing Wat. Code, § 12220.) The San Francisco Bay Estuary has been defined as “the largest estuary on the west coast of the United States, where fresh waters from California’s Central Valley mix with the saline waters of the Pacific Ocean (San Francisco Bay Basin (Region 2) Water Quality Control Plan: May 4, 2017 Update, at p. 1-1.) Figure 1 in Appendix K depicts the limited geographical reach of both waterbodies.

All previous versions of the State Water Board’s Bay-Delta Plans have focused on protecting beneficial uses within the Bay-Delta Estuary itself:

- From the 1978 Plan: The Sacramento-San Joaquin Delta is a, “roughly triangular area of about 738,000 acres extending from Chipps Island near Pittsburg on the west to Sacramento on the north and to the Vernalis Gauging Station on the South. The Delta generally is comprised of those waterways above the confluence of the Sacramento and San Joaquin Rivers which are influenced by tidal action, and about 510,000 acres of agricultural lands which derive their water supply from these waterways. The total surface area of these waterways is over 48,000 acres with an aggregate navigable length of 550 miles.”

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“The beneficial uses in the Delta and Suisun Marsh have been classified historically under three broad categories: Fish and Wildlife, Agriculture, and Municipal and Industrial [and] [t]hese categories of use have been maintained in this plan.”

(Water Quality Control Plan, Sacramento-San Joaquin Delta and Suisun Marsh, August 1978, at p. I-3, p. III-1.)

- From the 1991 Plan: “The San Francisco Bay and Sacramento-San Joaquin Delta Estuary (Bay-Delta Estuary) includes the Sacramento-San Joaquin Delta (Delta), Suisun Marsh and the embayments upstream of the Golden Gate. The Delta and Suisun Marsh are located where California’s two major river systems, the Sacramento and San Joaquin rivers, converge to flow westward to where they meet incoming seawater tides flowing through the San Francisco Bay.”

“The beneficial uses **of Bay-Delta water** are presented here in summary form. . .”

(Water Quality Control Plan, Sacramento-San Joaquin Delta Estuary, May 1991, at p. 1-1, p. 4-1.)

- From the 1995 Plan: “The purpose of this plan is to establish water quality control measures which contribute to the protection of beneficial uses in the Bay-Delta Estuary.”

“This chapter sets forth the **beneficial uses established for the Bay-Delta Estuary which are to be protected by this plan**”

(Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 95-1 WR, May 1995, p. 3, 12.)

- From the 2006 Plan: The beneficial uses “are carried over in this plan from earlier plans, including the 1995 Plan.”

(Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, December 13, 2006.)

The Bay-Delta depends on inflow from the Sacramento and San Joaquin River basins. It is an estuary. Inflow to the Bay-Delta is an important component of the Bay-Delta Plan. To ensure beneficial uses were reasonably protected in prior Bay-Delta Plans, the State Water Board set inflow requirements at Vernalis and Rio Vista, which are within the Delta.

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The revisions to the Bay-Delta Plan in Phase I diverge from this historical practice. The entire focus in Phase I is on three watersheds in the San Joaquin River basin: Merced, Tuolumne and Stanislaus Rivers. The one small concession to past Bay-Delta Plans is a minimum flow objective at Vernalis, which requires flows no lower than the base flow value of 1,000 cfs with an allowed adaptive management range between 800 – 1,200 cfs.

The addition of the aforementioned sentence to Appendix K referencing the tributary watersheds solidifies the Board's shift in focus from the Bay-Delta to three specific tributaries to the San Joaquin River (as it pertains to Phase I). This shift in focus, and the overall phasing of the revisions to the Bay-Delta Plan, form the basis of several arguments previously articulated by the SJTA. These arguments include, among other things, (1) that Phase I and Phase II of the Bay-Delta update constitute a single project for purposes of environmental review, and therefore the Board unlawfully segmented the environmental review by not drafting a comprehensive substitute environmental document for both phases, (2) that the Board violated the due process rights of the SJTA member agencies by targeting the Stanislaus, Tuolumne and Merced Rivers to the exclusion of other water users in the San Joaquin River watershed during Phase I, and (3) that the Board failed to consider all available water resources and all statutorily required factors when setting the Phase I objectives in violation of the Porter-Cologne Act.

In addition to these arguments, the newly proposed sentence indicating that the Bay-Delta Plan is intended to protect the beneficial uses of the Bay-Delta Estuary and the tributary watersheds warrants the following comments.

First, the sentence should read "some" tributary watersheds. The Final SED provides the following description of the San Joaquin River watershed, additional water resources which are not included in Phase 1 are highlighted in bold:

"The San Joaquin Valley spans two basins: the SJR basin and the Tulare Lake Basin. These two basins are distinct drainage areas separated by a low divide . . . The divide lies between the SJR to the north, part of which is in the plan area and extended plan area, and Kings River to the south, which is not in the plan area or extended plan area. (Final SED, p. 2-2.)

"The SJR Basin drains approximately 15,500 square miles of the Sierra Nevada and the southern portion of the Central Valley of California. . . . The **Upper SJR** and the LSJR tributaries drain large areas of high-elevation watershed that supply snowmelt and runoff. . . . **Other SJR tributaries** on the east side of the SJR Basin **include the Chowchilla and Fresno Rivers**. . . . **A few small tributaries to the west**. . . contribute little flow to the LSJR." (Final SED, p. 2-2.)

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“At the foot of the mountains (in the foothills), the SJR is impounded by **Friant Dam, which forms Millerton Lake**. The SJR reaches the valley floor near Fresno. Infrequent flood waters from **the Kings River flow into the SJR** at Mendota Pool reservoir via the Fresno Slough. The river then flows north-northwest, and three eastside tributaries (Stanislaus, Tuolumne, and Merced rivers) enter it before it flows into the southern Delta at Vernalis.” (Final SED, p. 2.2)

Notably, in previous Bay-Delta Plans, the State Water Board looked at all of the water resources in the San Joaquin River Basin by placing the flow requirement at Vernalis. In the proposed project, the Board has instead targeted the Stanislaus, Tuolumne and Merced Rivers to the exclusion of all the other water resources in the San Joaquin River basin. The project should be amended by, among other things, expanding the plan area to cover the entire Bay-Delta Estuary so that all water users within the Bay-Delta watershed are required to contribute to the protection of beneficial uses in the Bay-Delta Estuary in accordance with water right priority and other applicable laws.

Second, the suggestion that the “plan protects the beneficial uses of the Bay-Delta Estuary” is not supported by the analysis in the Final SED. (Appx. K, p. 4.) To begin, the final SED only examines three tributaries, and thus, it is incorrect to assert that “tributary watersheds” in general have been protected, as many have been left out of the plan area. In addition, given the amount of water required by the Phase I proposed objectives, one would expect a strong nexus between the required flows and the beneficial uses to be protected in the Bay-Delta. However, as explained below, the Final SED fails to show any such nexus, and recent scientific studies demonstrate that there is no such nexus.

The SJTA has previously commented on the disconnect between the proposed project and the protection of fish and wildlife in the Delta. The narrative objective requires the maintenance of “inflow conditions from the San Joaquin River watershed to the Delta at Vernalis sufficient to support and maintain the natural production of viable native San Joaquin River watershed fish populations migrating through the Delta.” (hereafter “Inflow Narrative Objective”)¹ (Appx. K, p. 18.) However, as noted in previous comments, there are only three species of fish that migrate from the San Joaquin River watershed through the Delta: fall-run Chinook salmon, *O. mykiss*, and Pacific Lamprey. The Final SED provides no information or analysis as to how or whether the Pacific Lamprey will be protected by the proposed 40% unimpaired flow objective, nor as to how the Inflow Narrative Objective might otherwise be attained with respect the Pacific Lamprey. Similarly, the Final SED provides no independent analysis for *O. mykiss*, and instead uses fall-run Chinook salmon as a proxy

¹ In previous comments, the SJTA referred to this objective as the “Narrative Objective.” However, to avoid confusion with the New Narrative Objective, the objective is referred to herein as the “Inflow Narrative Objective.”

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for *O. mykiss*, even though the biology and life-history of the two species are totally different.² The State Water Board provides no analysis as to how the objectives are protective of these species.³

Furthermore, recent scientific studies demonstrate that the proposed objectives which focus exclusively on flow (whether unimpaired flow or inflow to the Delta) will not necessarily protect fishery resources in the Bay-Delta as the Board asserts in the newly proposed sentence set forth above. The recent study by Buchanan, *et al*, titled “Survival of Juvenile Fall-Run Chinook Salmon through the San Joaquin River Delta, California, 2010 – 2015” (a copy of which is attached and incorporated herein as Attachment 1), clearly shows that higher flows do not equate to an increase in salmon smolt production or survival through the Delta, or an increase in escapement. As noted in the report, it appears the best way for a salmon smolt to survive the Delta is to be salvaged at the export facilities.

ii. Assignment of Responsibility to Water Right Holders to Mitigate for the Effects of their Diversions

The Board has added a sentence stating, “This plan establishes water quality objectives for which implementation can be fully accomplished **only if** the State Water Board assigns some measure of responsibility to water right holders and water users **to mitigate** for the effects on the designated beneficial uses of **their diversions and use of water.**” (Appx. K, p. 4.) By adding this sentence, the Board is stating that the SJTA member agencies (who are the prime targets of the proposed Phase I objectives) are responsible for causing adverse effects to fish and wildlife beneficial uses of water, and therefore the Board must hold those agencies accountable for mitigating those adverse effects by assigning the SJTA member agencies responsibility for implementing the Phase I objectives. This statement – taken together with the Board’s decision to create substantial flow objectives with compliance points on just three tributaries to the San Joaquin River – demonstrates (1) that the Board is conducting an unlawful adjudication of water rights through its quasi-legislative water quality control plan process, and (2) that the Board is disregarding the rules of water right priority.

First, the SJTA previously commented that the Board is conducting an unlawful adjudication of the water rights of the SJTA member agencies by only targeting certain sections of certain tributaries in the San Joaquin River watershed with the Phase I objectives. This new sentence in Appendix K confirms that unlawful action. Under the Porter-Cologne Act, the Board is required to set water quality objectives that provide a reasonable level of protection for beneficial uses considering, among other things, all other beneficial uses of water. (Wat. Code, § 13000, 13241.) More specifically, as relevant

² For instance, *O. mykiss* do not use floodplain habitat (Comment Letter – 2016 Bay-Delta Plan Amendment & SED Oakdale Irrigation District and South San Joaquin Irrigation District ERRATA to OI’s/SSJID’s Joint Comment Letter, at pgs. 38 – 39.). *O. mykiss* over-summer in the rivers, Fall-run Chinook salmon do use floodplain habitat and do not over-summer. *O. mykiss* migrate out earlier than Fall-run Chinook salmon. (*Id.*)

³ The Clean Water Act requires the reasonable protection of the most sensitive species. (*Natural Resources Defense Council v. United States EPA* (1993) 16 F.3d 1395, 1404, quoting 40 C.R.F. Section 131.11 [“[S]tates must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.”]) The State Water Board’s analysis has no species analysis, nor any analysis how the other fourteen beneficial uses will be reasonably protected.

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to the fish and wildlife objectives being amended as part of Phase 1, the Board must, in revising those objectives, ensure a reasonable level of protection considering all other beneficial uses of water, including municipal and agricultural uses. However, the aforementioned statement reveals that the Board's aim is *not* to set objectives for fish and wildlife protection at a reasonable level considering all other beneficial uses, but rather to *target* and *punish* certain water users by forcing them to “mitigate” for the perceived effects of “their diversions and use of water.” (Appx. K, p. 4.) The courts have already directed the Board that this type of narrow approach is unlawful and a violation of the Porter-Cologne Act because, among other things, it fails to properly take into account all available water resources. (see *United States v. State Water Resources Control Bd.*, (1986) 182 Cal.App.3d 82, 179 - 180 [holding that the Board's “without project” standard was unlawful because it considered only the water use of the Delta parties and the customers served by the projects and ignored water use by upstream users].)⁴ For this reason alone, the Board should decline to adopt the Proposed Final Amendments.

Second, there is no support for the Board's statement that it can protect the identified beneficial uses “only if” it assigns responsibility for meeting the newly developed objectives to certain water right holders in the San Joaquin River watershed. (Appx. K, p. 4.) As admitted by the State Water Board in its document entitled, “July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan” (hereafter “Framework Document;” discussed in further detail below in Section F), the Board has been derelict in enforcing its past water quality control plans, and in adjudicating complaints of unauthorized Delta diversions filed by water rights users. Specifically, the Framework Document states,

“However, unauthorized diversion of the Projects' previously-stored water may compromise the Projects' abilities to meet requirements and contract obligation. While DWR and Reclamation's direct diversions from the watershed are amongst the most junior diversions in the watershed, their diversions of previously stored water are not junior to other diverters. The proposed program of implementation calls for the State Water Board to curtail the unauthorized diversions of DWR and Reclamation's previously stored water to the extent that users do not have a contractual or other right to that water in order to provide for implementation of the inflow-based Delta outflow objective while ensuring that the Projects' water supplies needed for cold water

⁴ *United States v. State Water Resources Control Bd.*, (1986) 182 Cal.App.3d 82, 179 -180 [In developing Water Quality Objectives, the Board, “is directed to consider not only the availability of unappropriated water but also *all* competing demands for water in determining what is a reasonable level of water quality protection. In addition, the Board must consider “past, present, and probable future beneficial uses of water” as well as “[water] quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” (*Id.*, at 179 – 180) (internal citations omitted).) The Court admonished the Board's “without project standards” because they considered only the water use of the Delta parties and the customers served by the projects and ignored water use by upstream users. (*Id.*, at 180).]

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habitat, inflows, and other purposes are not diminished by unauthorized diversions of water.” (Framework Document, p. 27.)

Having identified that there are unauthorized diversions in the Delta, the State Water Board must first determine the scope and extent of those illegal diversions before requiring senior water right holders (including those in the San Joaquin River watershed) to release more water. This issue cannot be divorced from Phase I. The Framework Document explicitly states that the new “Inflow-Based Delta Outflow Objective” for Phase II will be as follows: “The inflows required above, including for the Sacramento/Delta tributaries **and San Joaquin River** are required as outflows with adjustments for downstream natural depletions and accretions.” (Framework Document, p. 17 [emphasis supplied].) Simply put, the Board must first determine the extent and severity of the illegal diversions in the Delta, and then devise a plan for stopping those diversions before it can determine the amount that upstream lawful diverters (such as those on the tributaries to the San Joaquin) are required to contribute to an inflow-based Delta outflow objective. For this reason, the Board erred by developing the Phase I objectives independently of the Phase II objectives, specifically the inflow-based outflow objective, and has now further erred by effectively proclaiming (in the new sentence set forth above) that the SJTA member agencies, as senior lawful water right holders, must be the first to mitigate for adverse effects to fish and wildlife beneficial uses in the Delta.

Attached to these comments is the Complaint filed by the State Water Project Contractors (SWPC) with the State Water Board claiming unlawful diversions in the Delta. (See “State Water Contractors’ Complaint Against Unlawful Diversion of State Water Project Stored Water Supplies,” dated June 16, 2015, a copy of which is attached hereto and incorporated herein as Attachment 2.) The State Water Board has never acted on the Complaint. In addition to the issue raised above by the SWPC, the Complaint raises the critical issue of when, if ever, water released or bypassed to meet a water quality objective can be diverted by other users.

On a related issue, the Delta Watermaster issued a report in December 2017 regarding diversions in the Delta. (A copy of the report is attached and incorporated herein as Attachment 3.) The Delta Watermaster report clearly shows that landowners in the South Delta are claiming both pre-1914 appropriative rights and riparian rights. Given the decision in *Millview County Water District v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, such water right claims are suspect. Diversions are occurring on the San Joaquin River and in the South Delta of riparian and appropriative water when such right does not exist. Once again, before senior water is released – and before senior water right holders can (or should) be held responsible for implementing water quality objectives to mitigate for adverse impacts caused by illegal diversions - the State Water Board must put an end to illegal diversions in the Delta.

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B. Changes to Chapter II: Beneficial Uses

State Water Board added a provision to Chapter II, Beneficial Uses, which provides as follows: “The fish and wildlife beneficial uses designated in the ‘Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin’ for the Stanislaus River, Tuolumne River, Merced River and San Joaquin River from the mouth of Merced River to Vernalis **remain in effect and this plan includes measures to protect those uses.**” (Appx. K, p. 10 [emphasis supplied].)

This proposed change demonstrates that the Board *does not* intend for the beneficial uses identified Bay-Delta Plan to supersede the beneficial uses in the Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin (“SR/SJR Basin Plan”). This change creates several substantive issues.

The regional water boards are primarily responsible for formulating and adopting water quality control plans covering the state’s separate planning basins. (Wat. Code, § 13240; *United States v. State Water Resources Control Bd.*, (1986) 182 Cal.App.3d 82, 109.) The State Water Board is empowered to formulate its own water quality control plans, but those plans will “supersede any regional water quality control plans for the same waters to the extent of any conflict.” (Wat. Code, § 13170.)

There is a conflict between the fish and wildlife beneficial uses identified in the proposed Bay-Delta Plan and those identified in the SR/SJR Basin Plan. Specifically, the SR/SJR Basin Plan identifies the following two beneficial uses related to fish and wildlife protection that are not included in the Bay-Delta Plan: (1) “Preservation of Biological Habitats of Special Significance (BIOL),” and (2) “Aquaculture (AQUA).” (SR/SJR Basin WQCP, II-2.00.) By operation of law, the beneficial uses identified in the Bay-Delta Plan supersede those identified in the SR/SJR Basin Plan to the extent of any conflict, thereby eliminating any beneficial uses from the SR/SJR Basin Plan that are not included in the Bay-Delta Plan insofar as the plans overlap geographically. (Wat. Code, § 13170.) The Board’s pronouncement in the Bay-Delta Plan that the beneficial uses in the SR/SJR Basin Plan remain in effect is erroneous and contrary to law; the law declares that the State Water Board’s Bay-Delta Plan supersedes the Central Valley Regional Board’s SR/SJR Basin Plan to the extent of any conflict. The effect of the statute is that the beneficial uses of BIOL and AQUA are eliminated from the SR/SJR Basin Plan to the extent of the geographic overlap of the two plans. If the Board had desired for these two beneficial uses to remain in effect, it should have identified them in the Bay-Delta Plan so as to eliminate the conflict between the two plans, rather than proclaiming – in contradiction of Water Code section 13170 – that the beneficial uses for the SR/SJR Basin Plan are to remain in effect.

If the Board takes the position that it resolved this conflict by proclaiming that the beneficial uses in the SR/SJR Basin Plan are to remain in effect and coexist with the beneficial uses in the Bay-Delta Plan, then the Board will have created an even greater conflict to the extent that certain beneficial uses are identified in both plans but are defined differently and thus cannot coexist. For instance, both plans identify “Warm Freshwater Habitat (WARM)” as a beneficial use. However, the Bay-Delta Plan defines this beneficial use as follows: “[u]ses of water that support warm water

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ecosystems including . . . preservation of aquatic habitats, vegetation, fish, or wildlife, including invertebrates.” (Appx. K., 11.) The SR/SJR Basin Plan defines this beneficial use differently by adding the word “enhancement” to the definition: “[u]ses of water that support warm water ecosystems including . . . preservation **or enhancement** of aquatic habitats, vegetation, fish, or wildlife, including invertebrates.” (SR/SJR Basin WQCP, II-2.00 [emphasis supplied].) If the Board takes the position that it did not intend for the beneficial uses in the Bay-Delta Plan to supersede the beneficial uses in the SR/SJR Basin Plan (but rather that the beneficial uses from both plans should coexist), then the result will be two different definitions for the same beneficial use (WARM) on the same waterways. Specifically, there will be a conflict as to whether the goal for warm water fisheries is simply preservation, or preservation and enhancement. This is not a matter of semantics; the Bay-Delta Plan’s beneficial use for cold water fisheries (COLD) includes both “preservation” and “enhancement” (Appx. K, p. 11), thereby demonstrating that the State Water Board is familiar with (and uses) both terms, but intentionally left “enhancement” out of the definition for warm water fisheries. In other words, the Board’s statement in the Bay-Delta Plan that the beneficial uses from the SR/SJR Basin Plan are to “remain in effect” does not resolve conflicts between the two plans, but rather creates conflicts because some of the beneficial uses are defined differently.

C. Changes to Chapter III: Water Quality Objectives

i. Objectives to Protect Beneficial Uses in the SR/SJR Basin Plan

As an initial matter, the Board added a provision stating that the water quality objectives in the Bay-Delta Plan “provide reasonable protection of fish and wildlife beneficial uses designated in the ‘Water Quality Control Plan for the Sacramento River and San Joaquin River Basin’ for the Stanislaus River, Tuolumne River, Merced River, and the San Joaquin River from the mouth of the Merced River to Vernalis, as well as those presumed to exist under the Clean Water Act.” (Appx. K, p. 13.)

Based on this statement, it is apparent that the Board intends for the new objectives in the Bay-Delta Plan, including the 40% UIF objective, to provide protection for the fish and wildlife beneficial uses identified in the SR/SJR Basin Plan. There are several issues created by the Board’s statement that the objectives in Table 3 (including the 40% UIF objective) “provide reasonable protection of [the] fish and wildlife beneficial uses” designated in the SR/SJR Basin Plan.

First, the Board never analyzed, nor purported to analyze, whether the new objectives provided a reasonable level of protection for the BIOL and AQUA beneficial uses in the SR/SJR Basin Plan. Those uses are not identified in Appendix K, nor in the Final SED. Additionally, as noted in the SJTA’s initial comments submitted on March 17, 2017, the Board improperly used changes in temperature, floodplain inundation, and production of fall run Chinook salmon as proxies for assessing whether the new objectives provided a reasonable level of protection for the identified beneficial uses, and thus the analysis in the Final SED cannot be used to extrapolate protection of BIOL or AQUA beneficial uses.

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Second, the Bay-Delta Plan does not specify whether the *objectives* in the SR/SJR Basin Plan are to remain in effect, unlike how the Board did specify that *beneficial uses* remained in effect (see Section B, above). The Board never analyzed whether the new objectives in the Bay-Delta Plan would conflict with the objectives in the SR/SJR Basin Plan. As particularly relevant here, the SR/SJR Basin Plan contains specific dissolved oxygen objectives such that the objectives in the SR/SJR basin Plan would be superseded pursuant to Water Code section 13170 for the Merced River (all year) and the Tuolumne River (Oct. 15 – June 15). (SR/SJR Basin Plan, p. III-5.00, Table III-2.) Since flow directly affects the amount of dissolved oxygen in the water, a potential conflict exists between these dissolved oxygen requirements on the Tuolumne and the Merced, and the unimpaired flow requirements under the Bay-Delta Plan on those same rivers. In the absence of any analysis as to whether there is a conflict between the dissolved oxygen objectives in the SR/SJR Basin Plan and the unimpaired flow requirements in the Bay-Delta Plan, it remains unknown – both to the Board and the public – whether the dissolved oxygen objectives are superseded by operation of law. (Water Code § 13170.)

Third, the Board has failed to articulate how the Bay-Delta Plan update (and its use of temperature as a guide for developing unimpaired flow requirements) will interact with the Central Valley Regional Board’s process for developing a Total Maximum Daily Load (TMDL) for temperature on the Stanislaus, Tuolumne, Merced and San Joaquin Rivers, all of which have been identified as temperature impaired on California’s 303(d) List for the Clean Water Act. In addition, there is no evaluation of how the Proposed Final Amendments would, or would not, affect existing TMDLs, or the Central Valley Regional Board’s reservoir mercury program.

Finally, the Board’s proposed revisions violate notice requirements. In 2009, the State Water Board issued a “Notice of Preparation and of Scoping Meeting for Environmental Documentation for the Update and Implementation of the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary: Southern Delta Salinity and San Joaquin River Flows” (hereafter the “2009 NOP”). In the 2009 NOP, the Board indicated it would be updating and changing the Bay-Delta Plan. The Board did not advise the public that it would be updating, revising, or otherwise making changes to the SR/SJR Basin Plan through the development of conflicting, and thus superseding, objectives and beneficial uses.

ii. New Narrative Objective

The Proposed Final Amendments include a New Narrative Objective requiring as follows: “Flows provided to meet these numeric objectives [on the Stanislaus, Tuolumne, Merced and San Joaquin Rivers from February through June] shall be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year.” (Appx. K, p. 18.)

The New Narrative Objective has not been studied or evaluated. Contrary to the assertion in Eileen Sobeck’s letter of July 19, 2018 denying the SJTA’s request for recirculation and time extension, the flow objectives and program of implementation were *not* fully analyzed in the Final SED. The New Narrative Objective had not been developed when the Board released the draft SED in

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September 2016, and the Board admittedly did not add analysis to the Final SED (apart from the additional analysis contained in the Master Response to comments which did not address the New Narrative Objective, and which the public has been directed not to comment on.)

This New Narrative Objective significantly expands the scope of the Board's project by proposing a year-round regulation. Previously, the objectives proposed by the Board were explicitly limited to the February through June time period. Now, the New Narrative Objective requires year-round management of flows to ensure that the other objectives that purportedly protect fish and wildlife beneficial uses do not adversely affect those same beneficial uses.

The New Narrative Objective also creates significant confusion as to whether flow shifting is required under the 40% unimpaired flow objective. The New Narrative Objective states, "Flows provided to meet these numeric objectives shall be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year." (Appx. K, p. 18.) In the Master Response to comments, the Board stated, "[a]lthough no specific flow shifting is required, some shifting will be needed to avoid significant adverse temperature impacts on fish in the summer and fall, especially at unimpaired flows at the high end of the 30 to 50 percent range." (Master Response 2.2, p. 9.) On the one hand, the Board explicitly states that flow shifting is not required. On the other hand, the Board states that if flow shifting is not employed, the 40% unimpaired flow objective will cause significant adverse temperature impacts on fish in the summer and fall, which would be a direct violation of the new narrative requiring flows to be managed in order to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year. This contradiction is one of the many reasons why further analysis and explanation of the New Narrative Objective is necessary.

For similar reasons, it is unclear whether the New Narrative Objective effectively requires carryover storage, reservoir refill requirements, 50% unimpaired flow (as opposed to 40% percent), minimum flows required by other agencies/laws (such as FERC licenses and Reasonable and Prudent Alternatives developed in compliance with the Endangered Species Act), and/or other operational constraints and mitigation measures that were added to the modeling in the Final SED during the Board's iterative process to find an operational plan that did not cause harm to fish and wildlife beneficial uses.

The New Narrative Objective also violates the State Water Board's duty to weigh and balance competing beneficial uses. The New Narrative Objective only requires the avoidance of significant adverse impacts to fish and wildlife beneficial uses, without consideration of other beneficial uses, in violation of the Porter-Cologne Act. (Water Code §§ 13000, 13241.) There is no analysis in the Final SED of the impacts that the New Narrative Objective might have on other beneficial uses of water and/or how those impacts might be mitigated.

Simply put, the New Narrative Objective was haphazardly inserted into the Proposed Final Amendments to create an ill-defined "catch-all" objective that would allow the Board to assert that the

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numerous modeling constraints and mitigation measures that were added to the 40% unimpaired flow objective are, in fact, part of the project. In other words, the Board created a *post hoc* and sweeping narrative objective in an effort to conform the project to the modeling that was already performed. This type of action violates the Board's obligations under Porter-Cologne to set objectives that provide a reasonable level of protection considering all other beneficial uses of water, and the Board's obligation under CEQA to analyze the environmental impacts of its project and to consider alternatives and mitigation.

iii. Revisions to the 30%-50% Unimpaired Flow Objective

The Board revised its objective requiring a range of 30% to 50% unimpaired flow to a new objective requiring exactly 40% unimpaired flow, with an adaptive range between 30% and 50%.

The Final SED does not contain any analysis as to how this newly revised objective for unimpaired flow relates to the New Narrative Objective. Specifically, the Board has not explained which of these objectives is controlling over the other in the case of a conflict between the two.

In the Master Response to comments, the State Water Board provided the results for implementing a 40% unimpaired flow requirement, without carryover storage. (Master Response 3.2, p. 56-59.) The results, which are provided for "illustrative purposes only," are confined to the Stanislaus River during the 1990-1991 critical drought period. (Master Response 3.2, p. 56.) The Board did not disclose whether this modeling run includes flow shifting and/or any of the other modeling parameters that were added to the 40% unimpaired flow requirement as part of the Board's iterative analysis process.

The results of the analysis are bleak. Without the carryover storage requirement (which is still not included as an objective), New Melones reservoir is lower than baseline conditions in the years 1990-1993. More importantly, the results show a 600,000+ drop in storage between 40% UIF with carryover storage as compared to 40% UIF without carryover storage. In addition, the modeling shows that without carryover storage there is "a higher frequency and higher magnitude of temperatures greater than the USEPA spawning and incubation criterion when compared to baseline [conditions]." (Master Response 3.2, p. 58.) In other words, from a reservoir storage perspective, and from an instream temperature management perspective, the 40% unimpaired flow requirement (without carryover storage) is worse than the baseline condition. Nevertheless, the Board has not included any carryover storage requirements as objectives in the plan. In short, although the Board states that 40% unimpaired flow without carryover storage is not a viable alternative (Master Response 3.2, p. 56), it is, in fact, the only project that the Board has established through the proposed objectives.

To the extent that the Board intends to impose carryover storage requirements through the program of implementation, such an act would be unlawful. As the SJTA noted in its initial comments, water quality control plans must be designed to protect beneficial uses of water through a three-step process: (1) designation of beneficial uses, (2) establishment of objectives to provide reasonable

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protection for those beneficial uses, and (3) creation of a program of implementation that describes the actions necessary to achieve those objectives. (Wat. Code, § 13000, 13050[j]; 13241, 13242.) Although all three steps are mandatory, only one step requires the Board weigh and balance the impacts of its decision on other beneficial uses of water; that critical step is the establishment of objectives. With respect to the proposed carryover storage requirements, the Board has deviated from this three-step process by skipping the second step, i.e., the critical balancing step. As the program of implementation explicitly states, the carryover storage requirements are not objectives, but will be imposed by the Board “to help ensure that providing flows to meet the flow objectives **will not have significant adverse temperature or other impacts on fish and wildlife or, if feasible, on other beneficial uses.**” (Appx. K, p. 28.) In other words, the purpose of the carryover storage requirement is *not* to achieve a weighed-and-balanced objective (as it must be under the Water Code), but rather to directly protect fish and wildlife beneficial uses and, if feasible, other beneficial uses. Because the stated purpose of the carryover storage requirement is to directly protect beneficial uses, it was required to be developed - if it all - as a weighed-and-balanced objective. The failure to do so, and the plan to impose such requirements as part of a program of implementation, violates the Porter-Cologne Act insofar as the critical weighing and balancing step is skipped.

Furthermore, as repeatedly stated in the Final SED, the analysis therein is from a programmatic level. Part of the Board’s rationale for conducting a programmatic analysis, instead of a project level analysis, was that the objectives only required a range of flows, and specific implementation of an exact unimpaired flow percentage (and other requirements) would be analyzed later in a project-specific document. Changing the objective to require exactly 40% unimpaired flow at the outset undercuts the Board’s original rationale. The 40% unimpaired flow requirement *may* be adaptively managed, but it is not required to be.

In sum, the objectives require 40% unimpaired flow. Carryover storage requirements to protect beneficial uses (which have not been developed as objectives through a weighing and balancing process wherein different levels of carryover storage are analyzed and assessed) cannot be required through the program of implementation. Although the Board has changed the unimpaired flow objective to require exactly 40% unimpaired flow (which may be adaptively managed within a 30% to 50% range), the Board continues to maintain that strict compliance with the 40% unimpaired flow requirement is not the actual project. This issue of what exactly will be required of the regulated community must be resolved before the Board adopts the plan.

iv. Addition of the term “Full Natural Flow”

The proposed changes include a new explanation for determining compliance with the 40% unimpaired flow requirement. This explanation includes a new term (“full natural flow”) that is not defined anywhere in the Bay-Delta Plan. Specifically, footnote 14 to Table 3 states, “Compliance with the percent of unimpaired flow from February through June in each river is determined by dividing the 7-day average observed flow at the compliance stations by the 7-day average calculated Full-Natural-

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Flow at the FNF stations.” (Appx. K, p. 20.) The Board does not explain where the FNF stations are located, nor how FNF is (or should be) calculated.

Assuming the Board intends to use the “Daily Full Natural Flows” reported by the Department of Water Resources (DWR) on the California Data Exchange Center website, it should be noted that the numbers reported on that site are admittedly inaccurate and subject to constant change. In fact, DWR states,

“Daily Full Natural Flow (FNF) calculations are based on less data than is available at the completion of each month. The sum of daily FNF reported here will not exactly match the calculated monthly FNF reported on the seasonal and water year reports. Due to the lag between the effect of upstream operations and downstream flow measurements, calculated FNF will fluctuate from day to day.” (Attachment 4 [screen capture from: cde.water.ca.gov/cgi-progs/snowsurvey_ro/FNF].)

As an example of this inaccuracy, FNF is occasionally reported as a negative number. (Attachment 4, [see e.g. “Trinity at Clair Engle,” July 3, 2018: -250.]) In addition, the reported FNF numbers are often several days behind the current date, which will further complicate computations of the 7-day running average.

In sum, the Board has inserted a new term, and an entirely new calculation, into the Bay-Delta Plan without defining the term or explaining the calculation. Further explanation of these new components is necessary.

D. Changes to Chapter IV: Program of Implementation

In the latest version of proposed changes, the Board removed a sentence which read, “The required percentage of unimpaired flow is in addition to flows in the LSJR from sources other than the LSJR Tributaries.” (Appx. K, p. 29.) This sentence first appeared in the 2012 proposed revisions, and then again in the 2016 proposed revisions. In response to the 2016 proposed revisions, the SJTA commented that the sentence was unclear and/or ambiguous.

In its response to comments, the Board stated that the sentence was removed because it was “unnecessary and created confusion.” (Master Response 2.1, p. 51.) The Board then suggested that the sentence was intended to convey the concept that “flows would be protected.” (Master Response 2.1, p. 51-52.) If that is the case, then presumably the Board meant that flows other than those on the Stanislaus, Tuolumne and Merced would be protected from diversions, since the sentence explicitly references “flows in the LSJR from sources other than the LSJR Tributaries.” (Appx K., p. 29.)

The Board stated in its response to comments that the concept of protecting flows is already captured in the following statement from the program of implementation: “The State Water Board will

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exercise its water right and water quality authority to help ensure that the flows required to meet the LSJR flow objectives are used for their intended purpose and are not diverted for other purposes.” (Master Response, 2.1, p. 52.) This sentence suggests that the Board will take some unspecified action to protect flows from the tributaries from being diverted, whereas the eliminated sentence suggests (as the Board has now explained) that flows other than those from the tributaries will be protected. In other words, contrary to the Board’s suggestion, these sentences do not seem to convey the same concept. As such, it is unclear what the Board intended to accomplish by eliminating the sentence.

In sum, the Board’s removal of the sentence, combined with its cursory explanation for the removal, only adds to the confusion regarding this issue.

E. The State Water Board continues to misapply the Delta Reform Act

In 2009, the legislature passed the Delta Reform Act. (Wat. Code, § 85000 *et seq.*) One of the purposes of the Delta Reform Act (“DRA”) was “to establish an accelerated process to determine **instream flow needs of the Delta** for the purposes of facilitating the planning decisions that are required to achieve the objectives of the [newly required] Delta Plan.” (Wat. Code, § 85086[b][emphasis supplied].) The term “Delta,” as used in the preceding sentence and throughout the DRA, refers to the Sacramento-San Joaquin Delta as defined in Water Code Section 12220 (i.e., the legal Delta: a roughly triangular area between Sacramento, Vernalis and Pittsburg) and the Suisun Marsh. (Wat. Code, § 85058.) The term “Delta Plan” refers to “the comprehensive, long-term management plan for the Delta” that would be developed by the newly created Delta Stewardship Council. (Wat. Code, 85059.)

The legislature created a straightforward process for determining the Delta’s instream flow needs. First, the legislature directed the Board, pursuant to its public trust obligations, to “develop **new flow criteria for the Delta Ecosystem** necessary to protect public trust resources.” (Wat. Code, § 85086[c][1][emphasis supplied].) In performing this task, the Board was to “use the best available scientific information.” (Wat. Code, 85086[c][1].) This new flow criteria developed pursuant to Section 85086(c)(1) was to be used to inform the planning decisions for two processes: (1) the newly required Delta Plan to be developed by the Delta Stewardship Council, and (2) the Bay Delta Conservation Plan, which is now known as California WaterFix and California EcoRestore. (Wat. Code, § 85086[c][1].) In terms of practical applications, the DRA states that any approval of the WaterFix Project (or similar Delta tunnel project) must include “*appropriate* Delta flow criteria” that is informed by the analysis conducted as part of developing the new flow criteria for the Delta Ecosystem. (Wat. Code, § 85086[c][2].) The DRA makes no mention of using the newly developed Delta flow criteria for the Board’s water quality control plan process.

The DRA directed the Board to provide the legislature with a “prioritized schedule and estimate of costs to complete instream flow studies for the Delta and for high priority rivers and streams in the

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Delta watershed, not otherwise covered by Section 85086.” (Wat. Code, 85087.) The State Water Board completed the “Prioritized Schedule and Estimate of Costs” in 2010 and submitted it to the Legislature. A copy of that schedule is attached hereto and incorporated herein as Attachment 5. The State Water Board identified the San Joaquin, Tuolumne and Merced rivers as high priority rivers, not otherwise covered by Section 85086. For these rivers, the State Water Board was to conduct and complete instream flow studies. The State Water Board was then to consult with DFW on those instream flow needs.

The Delta Stewardship Council’s Final Delta Plan (2013), a copy of which is attached hereto and incorporated herein as Attachment 6, also directed the Board adopt, and as soon as reasonably possible, implement flow objectives for high-priority tributaries in the Delta watershed that are necessary to achieve the coequal goals.” (2013 Delta Plan, Executive Summary, p. ES-23.)

To fulfill its obligations under the Delta Plan, the Board created Phase 4 of the Bay-Delta WQCP update process. (Attachment 7, incorporated herein [“Phase 4 of Bay-Delta Effort: Overview and Background – Method to Develop Flow Criteria for Priority Tributaries to the Bay-Delta Workshop,” March 19, 2014].) Consistent with the Board’s obligation to protect public trust resources, and in accordance with the adjudicatory nature of public trust proceedings, the Board initially stated that it would fulfill its obligations under the Delta Plan in Phase 4 through the adjudicatory process of the “conditioning of water rights and other measures as appropriate.” (Attachment 8, p. 2 [Notice of Public Workshop: Method to Develop Flow Criteria for Priority Tributaries to the Bay-Delta].)

Now, in the Final SED, Phase 4 - and the adjudicatory process that would have accompanied it - has been removed. (Final SED, ES-2.) Instead, the Board has rolled Phase 4, and the adjudicatory public trust proceeding process for implementing instream flows on high-priority streams, into Phase 1. As stated in Appendix K,

“The 2018 update of the San Joaquin River flow objectives implements the Delta Stewardship Council’s Delta Plan recommendation for the State Water Board to adopt, and as soon as reasonably possible, implement flow objectives for high priority tributaries in the Delta watershed that are necessary to achieve the co-equal goals.” (Appendix K, Revised Water Quality Control Plan, at p. 6 [emphasis supplied].)

In sum, the Board’s new plan is to subvert the quasi-adjudicatory public trust proceeding process for Phase 4 by incorporating that process into the quasi-legislative water quality control plan update for Phase 1. To the extent the Board is using the quasi-legislative Phase 1 process to accomplish the quasi-adjudicatory actions that had been outlined for Phase 4, such action is improper and unlawful. The SJTA has made a Public Records Act Request for documentation as to why Phase 4 was eliminated.

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Furthermore, it should be noted that the Delta Flow Criteria Report that was developed pursuant to the DRA (Wat. Code, § 85086) has no flow criteria for any of the tributaries in the Bay-Delta watershed. (Attachment 9 - 2010 Delta Flow Criteria Report, at pp. 119, 133.) This report was only to be used for the purpose of developing “appropriate Delta flow criteria” for subsequent approval of the California WaterFix project, if such approval is granted by the Board. (Wat. Code, § 85086[c][2].) The report was never intended to be used for the Water Quality Control Plan. In addition, the Report’s recommended flow criteria of 60% unimpaired flow at Vernalis was based upon the entire San Joaquin River basin, not just the three tributaries targeted by the Board in Phase 1.

Finally, in developing the 2010 Delta Flow Criteria Report, it should be noted that the Board failed to fulfill its obligation of using the best available scientific information. As defined in the Delta Plan, best available scientific information is “developed through a process that meets the criteria of (1) relevance, (2) inclusiveness, (3) objectivity, (4) transparency and openness, (5) timeliness, and (6) peer review.” (Attachment 10, 2013 Delta Plan: Chapter 2, at p. 35) (internal citation omitted.) Further, best available science requires using the “best information and data to assist management and policy decisions.” (*Id.*) (internal citation omitted.) The State Water Board’s Delta Flow Criteria Report fails miserably on this front. The DFCR relies on overly simplistic flow recommendations (*See e.g.*, Rio Vista: 75% of 14-day average unimpaired flow; Net Delta Outflows: 75% of 14-day average unimpaired flow; Vernalis: 60% of 14-day average unimpaired flow; Vernalis: 10-day minimum pulse flow of 3,600 cfs in late October) to conclude that more flow equals more fish.⁵ In fact, when one looks at the flow objectives proposed for Vernalis, it is almost a linear regression. The SJTA incorporates the attached testimony of Mr. Doug Demko as to why more flow does not equal more fish and will certainly not obtain the salmon “doubling goal.” (Attachment 11, [Testimony of Doug Demko, SJTA Rebuttal Testimony: California WaterFix Exhibit 402].) Specifically, the DFCR did not address reservoir storage, water temperature, year types, or other uses. (Testimony of Doug Demko, SJTA Rebuttal Testimony: California WaterFix Exhibit 402, at pgs. 13 – 21.)

The Delta Flow Criteria Report’s overly simplistic analysis was that if 5,000 cfs was maintained for one-hundred and fifty days at Vernalis, then at a “threshold,⁶” public trust resources would be protected. The SJTA also incorporates the testimony of Mr. Daniel Steiner from the California WaterFix proceeding to demonstrate that the 5,000 cfs threshold will not be attained. (Attachment 12, [Testimony of Daniel B. Steiner, SJTA Rebuttal Testimony: California WaterFix Exhibit 401].)

⁵ Flow Recommendations are listed in Tables 20 – 23 on pages 131 – 134 of the 2010 Delta Flow Criteria Report.

⁶ Threshold is defined as, “a level, point, or value above which something is true or will take place and below which it is not or will not.” (“threshold.” *Merriam-Webster.com*. Merriam-Webster, 2018. Web. 23 July 2018.)

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F. Comments on the Framework Document

On the same day that the Board released the Proposed Final Amendments and Final SED, it also released a document entitled, “July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan” (“Framework Document”). The Framework Document reveals several substantive and procedural issues with the Board’s phased Bay-Delta Update Process.

As relevant here, the Framework Document states that a new “Inflow-Based Delta Outflow Objective” will be presented in Phase 2. (Framework Document, p. 17-18.) Specifically, the proposed objective will be as follows: “The inflows required above, including for the Sacramento/Delta tributaries **and San Joaquin River** are required as outflows with adjustments for downstream natural depletions and accretions.” (Framework Document, p. 17 [emphasis supplied].) The reference to San Joaquin River flows as part of the Inflow-Based Delta Outflow Objective demonstrates a significant and problematic overlap between the Phase 1 and Phase 2 processes.

First, the State Water Board never provided the required notice to the public and regulated community that the flows required from the Stanislaus, Tuolumne and Merced Rivers as part of Phase 1 would also be required for contributions to Delta outflow as part of Phase 2.

Second, the Board’s determination that the Phase 1 flows from the Stanislaus, Tuolumne and Merced Rivers will be used for Delta outflow is a *de facto* adjudication of the water rights of the SJTA member agencies who have been targeted in Phase 1. Currently, Phase 1 requires that substantial flows be provided on the Stanislaus, Tuolumne and Merced Rivers, with compliance points on each of those rivers near their respective confluences with the San Joaquin River. There is an additional flow requirement at Vernalis, but it is far less substantial than the tributary-requirements from a flow perspective. As such, if the flows provided by the SJTA member agencies on the tributaries are properly protected (potentially through a Water Code Section 1707 designation), then those flows could be recaptured and/or transferred to other parties, provided that the less substantial flow requirement at Vernalis was being attained. However, if the Board adopts a new Inflow-Based Delta Outflow objective that effectively requires flows from the Stanislaus, Tuolumne and Merced Rivers to reach and remain in the Delta, the Board will have eliminated (at least to an extent) the ability of SJTA member agencies (and/or any other water users required to implement the Phase I objective) to recapture and/or transfer water after it has satisfied the specific objectives on the tributaries. In other words, the Inflow-Based Delta Outflow objective would strip water right holders of their ability to put water to beneficial use after it has satisfied a water quality objective by effectively requiring that the water remain untouched as outflow.

Third, the inclusion of Phase 1 flows into the Phase 2 process as part of the proposed Inflow-Based Delta Outflow objective bolsters the SJTA’s prior argument that the Board has unlawfully divided its update of the Bay-Delta Plan objectives into two phases. Specifically, by setting objectives in the San Joaquin River watershed without considering, concurrently, whether and to what extent such flows were needed for Delta outflow given the amount of water being provided by the Sacramento

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River watershed, the Board has improperly restricted its consideration of available water resources in setting its objectives. For instance, the Board never considered, and never will consider under the phased review process, how to balance flows from the San Joaquin River watershed with flows from the Sacramento River watershed in such a way as to reasonably protect beneficial uses in the Delta; no balancing or shifting of flows between the rivers can be considered when the objectives for the two watersheds are developed and adapted separately. As pointed out by Justice Racanelli in *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d 82, the Board made a similar error when it used the “without project” standard in the 1978 Bay-Delta Plan because that standard ignored upstream water users. In addition, by setting the objectives for the San Joaquin River watershed separately from the Inflow-Based Delta Outflow objective, the Board has violated CEQA by failing to consider all reasonable alternatives and mitigation measures. For instance, the Board failed to consider whether higher flows from the Sacramento River watershed could offset lower flows from the San Joaquin River watershed while accomplished the same, or a similar, goal.

Fourth, the SJTA attaches and incorporates as Attachment 13 the testimony from Dr. Susan Paulsen (Testimony of Dr. Susan Paulsen, SJTA Testimony: California WaterFix Exhibit SJTA-304 Errata) for the California WaterFix Change Petition hearing. Dr. Paulsen’s testimony, unrefuted by any party or resource agency, demonstrates that very little San Joaquin River flow reaches the Bay, and thus does not contribute to Delta outflow. The water from the San Joaquin River is either consumed in the South Delta or exported. In other words, the concept that flows from the San Joaquin River can contribute to flushing migratory fish through the Delta and into the ocean (as posited in the Narrative Objective in Appendix K) is unsubstantiated. The State Water Board provides no data or analysis in Phase 1, Phase 2, or the Framework Document (a copy of which is attached and incorporated herein as Attachment 14) of how flow objectives on the Merced, Tuolumne, and Stanislaus rivers will reasonably protect beneficial uses “through the Delta.”

In addition, to the extent that the “scientific” underpinning for the Phase I document was the State Water Board Delta Flow Criteria Report, 2010 (Attachment 9), it should be noted that the document has no flow criteria for fall-run Chinook salmon. The Delta Flow Criteria Report states unequivocally: “No specific Delta outflow criteria are recommended for Chinook salmon.” (2010 Delta Flow Criteria Report, at p. 53.)

Fifth, the proposed Inflow-Based Outflow Objective will violate the rules of water right priority. If the State Water Board is looking for more outflow, then the first threshold analysis is how much additional (over baseline) water needs to be bypassed from the CVP and SWP facilities to meet the increased outflow. If there is a shortage of inflow from the CVP/SWP, then the State Water Board’s next step would be to reduce exports of bypassed flow, so outflow is met. If export reductions do not result in meeting the outflow requirement, then and only then could the State Water Board look to more senior water right holders (such as those on the Stanislaus, Tuolumne and Merced Rivers) to meet this outflow objective. The State Water Board has not done this analysis. Senior water right holders are not going to bypass water that they could divert under their senior rights solely for the benefit of the CVP/SWP, the most junior diversion in the Delta.

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On this point, the Phase I document states exports will increase by 76,000 acre-feet average annually. However, as shown in Table 5-21 from the Final SED, this average masks the significant impacts. (Final SED: Chapter 5, Table 5-21, at p. 5-78.) The Final SED points out that up to 301,000 acre-feet of additional water released to meet the tributary flow objectives, which the SWRCB assumes will make it out into the Delta, is diverted by the exporters.⁷ (*Id.*) This information confirms Dr. Paulsen's testimony (Attachment 13) that increased flow in the San Joaquin River does not equate to Delta Outflow because it is all diverted or consumed in the South Delta. If the San Joaquin River is being required to meet Delta Outflow, then the State Water Board analysis must include in Phase I how exports are going to be reduced or shut off before senior water is made available to meet the objective.

Sixth, proposed Inflow-Based Delta Outflow objective ignores the County of Origin Law (Wat. Code, § 10500-10506), Watershed Protection Statute (Wat. Code, § 11460-11465), and the Delta Protection Act (Wat. Code, § 1220-12205). The CVP and SWP are responsible for salinity control in the Delta. The CVP/SWP have to meet this requirement before exporting water. It appears through the Framework Document that the State Water Board is looking to increase Delta outflow. The State Water Board, in the Framework Document, states:

“The current Bay-Delta Plan is implemented by a limited subset of water users, on a limited subset of streams, for only parts of the year. Implementation of the current Bay-Delta Plan has failed to protect fish and wildlife that require protection throughout the watershed and throughout the year. The current Bay-Delta Plan requirements, as implemented, result in overburdening some streams to the detriment of all beneficial uses in that stream while at the same time failing to protect beneficial uses in other streams and the watershed.” (Attachment 14, p. 5.)

There is a logical flaw in this statement. Even if one stream relied upon by the CVP/SWP is overburdened (although the Board does not identify any), it does not follow that non-CVP/SWP streams do not have sufficient flow to protect beneficial uses.

Finally, the State Water Board has totally failed to address how exports will occur, if at all, when senior water right holders are foregoing diversions to meet Delta Outflow. This means there is no “excess” water in the system subject to diversion by the CVP/SWP because the senior water rights have not been fulfilled.

⁷ There is no analysis of how Delta diversions would increase.

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III.

Responses to Comments

In Master Response 3.1: Fish Protection, the State Water Board attempts to rectify the SalSim model runs. (Responses to Comments, Master Response 3.1: Fish Protection, at pgs. 63 – 68.)⁸ However, the Board still failed to address the fact that the flow objectives only pertain to February through June, but the SalSim model shows the greatest increase in number of adults when a significant portion of the February-June water is shifted to the fall (September-December). Specifically, the model run called SB40%MaxFS shows the greatest increase when 25% of the February-June 40% unimpaired flows are shifted to the months of September-December. The same pattern holds true in the Board's revised model run in which the focus was limited to the 7-year period of 1998-2004: SB40%UF case (moderate flow shifting) showed an increase of 2,059 adults over baseline, whereas SB40%MaxFS case (maximum flow shifting) showed an increase of 7,637 adults over baseline. (Master Response 3.1, p. 64.) This would suggest that providing more (and cooler) water in the fall would lead to greater protection of fish. However, the Board has eschewed this approach in setting its objectives and has failed to explain its rationale for doing so in the Master Response to comments.

Second, in the Master Response to comments, the Board stands by the general proposition that more flow equals more fish, citing to additional studies. (Master Response 3.1, p. 68.) However, in doing so, the Board fails to acknowledge that the results from SalSim undercut this premise. Specifically, the SalSim results show that average annual production under 40% unimpaired flow is 12,476, while average annual production at 50% unimpaired flow is 12,239 (approximately 200 fewer fish), and average annual production at 60% unimpaired flow is even lower at 12,111 fish (more than 300 fewer fish). By the State Water Board's own analysis, this would not be reasonably protective of beneficial uses.

In Master Response 3.2, the Board states: "Reservoirs such as New Melones that are large enough to contain multiple times the volume of typical annual runoff are specifically designed to store a significant portion of water from year to year, and over multiple years, to ensure some degree of water supply reliability in the Central Valley's highly variable climate." (Master Response 3.2, p. 48.) This explanation continues to ignore the fact that a 40% unimpaired flow requirement will eliminate the ability to store water and operate the reservoirs as they were designed to operate.

Furthermore, to the extent Board states in the Master Response to comments that operating the reservoirs with rigid adherence to the 40% unimpaired flow requirement is not rational (even though that is exactly what the objectives require), the Board fails to fully acknowledge that the operations

⁸ The Delta Flow Criteria Report is based in large part on DFW Exhibit #3, which was DFW's analysis using SalSim. DFW's model asserted that its recommended flow standards, which called for total flows at Vernalis of 7,000 cfs (in critical dry and dry years), 8,500 cfs (in below normal years), 10,000 cfs (in above normal years), and 15,000 cfs (in wet years) would result in, on average, 200,000 more San Joaquin River Fall-run Chinook salmon smolts at Chipps Island. (See, *Flows Needed in the Delta to Restore Anadromous Salmonid Passage from the San Joaquin River at Vernalis to Chipps Island* [DFG Exhibit 3], at pgs. 34 – 35.)

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depicted in its modeling (with carryover storage, flow shifting, etc.) relied on a level of foresight that does not exist in real world operations.

IV.

Conclusion

For the foregoing reasons, the State Water Board should decline to adopt the Final SED and the Proposed Final Amendments to the Bay-Delta Plan.

Very truly yours,



Tim O'Laughlin

TO/llw

Attachments

cc: *San Joaquin Tributaries Authority*

From: Tim Wasiewski <tw@olaughlinparis.com>
Sent: Friday, July 27, 2018 12:01 PM
To: LSJR-SD-Comments@waterboards.ca.gov; WQCP1Comments
Subject: Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments
Attachments: 2018.07.27 (FINAL) SED COMMENTS (w-out attachments).pdf

Categories: Red Category

Ms. Townsend –

Please find attached comments submitted on behalf of the *San Joaquin Tributaries Authority*. Should you have any questions, do not hesitate to contact our office directly.

Attachments are being sent under separate cover due to rejection for size limitation

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