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November 6, 2017

via email and U.S. Post
Bay-Delta@waterboards.ca.gov

Chair Felicia Marcus
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Phase II Bay-Delta Plan Input

Dear Chairwoman Marcus:

On behalf of the Pacific Coast Federation of Fishermen's Associations, the Institute for Fisheries Resources, the San Francisco Crab Boat Owners Association and the North Coast Rivers Alliance (collectively "Conservation Groups"), we submit the following input regarding Phase II of the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Plan").

INTRODUCTION

It appears that the impetus for the Board's request for input regarding Phase II of the Bay Delta Plan process is the Board's expressed desire to expedite its review and approval of the Department of Water Resources' ("DWR's") Change Petition for the so-called California WaterFix. However, before this Board may evaluate the impacts of DWR's Change Petition on beneficial uses, this Board must give particular attention to protecting "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources." Water Code §§ 1243, 1243.5. In doing so, this Board must "take into account whenever it is in the public interest, the amounts of water needed to *remain in the source* for protection of beneficial uses" including the preservation and enhancement of fish and wildlife. Water Code § 1243.5 (emphasis added).

Pursuant to Water Code section 85086(c)(1), this Board has previously determined that the "best available science suggests that current [Delta] flows are insufficient to protect public trust resources." Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009, p. 2. This finding was compelled because, as this Board specifically determined, "[r]ecent Delta flows

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are *insufficient* to support native Delta fishes for today's habitats." *Id.* at p. 5 (emphasis added). Indeed, there is no question that the existing Bay-Delta Plan has failed to protect the fish that depend upon the Bay Delta for survival. *See e.g.* Final Scientific Basis Report for the Phase II Update of the Bay-Delta Plan ("Scientific Basis Report"), 5-1 ("Currently, the Bay-Delta Plan does not include adequate environmental flow and related requirements to provide for critical functions to protect beneficial uses within tributaries and in the Delta including appropriate migration, holding, spawning and rearing conditions"). The Scientific Basis Report makes clear that the imperiled species that rely upon the Delta require more inflows and outflows than existing conditions provide. For example, estuarine species require instead a range of 65% to 75% unimpaired flow for "substantial benefits" to occur. Scientific Basis Report 5-31.

The proposed Bay-Delta Plan update as currently described, including its emphasis on adaptive management, provides little help to the fish. By maintaining existing outflow objectives, the Board will allow the business-as-usual decline of migratory fish species to continue. Likewise, by considering 35% of unimpaired flow – which is expected to reflect current conditions – as an appropriate inflow objective, the Board fails the public trust resources it is tasked with protecting. As it did with the SED for the Phase I update to the Bay-Delta Plan, this Board has prioritized diverters at the expense of restoring the Bay-Delta's collapsing ecosystem.

This Board's questions regarding implementation of revised flow requirements beg the critical issues because they *presume* the *adequacy* of those flow requirements. Before the Board addresses how to best *implement* these flow requirements, it must first determine whether these flow requirements satisfy the threshold statutory mandate that they promote the preservation and enhancement of fish and wildlife resources. Any changes to the Bay-Delta Plan must restore natural flows to ensure restoration and protection of the Delta's ecosystem and its public trust and beneficial uses. By jumping to the question of how best to *implement* new and revised flow requirements, this Board unlawfully sidesteps the glaring reality that the flow requirements the Board is proposing to adopt are *inadequate* because they are insufficient to protect public trust resources. The Board cannot simply skip this crucial step by posing questions about the process of implementation and ignoring the underlying question of what requirements for restoration of natural flows are needed to restore the Delta's severely degraded environment.

Without waiving this fundamental objection to the Board's unlawful cart-before-the-horse process, Conservation Groups provide the following input in response to the Board's questions.

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What specific provisions should be included in the program of implementation to ensure the expeditious implementation of the inflow and cold water habitat objectives? (Question 1) AND How to measure compliance with existing outflow objectives and new inflow based outflow objects? (Question 3)

The Board must include numeric objectives that are sufficient to obtain the goals of its narrative objectives; narrative objectives that cannot be met by compliance with numeric objectives are unlikely to be effective. Any purported reliance upon adaptive management measures to comply with outflow objectives will predictably lead to non-compliance with numeric objectives and further decline of Delta-dependent species.

The Board's suggested reliance upon voluntary planning measures, with respect, is laughable. Voluntary – non-enforceable – measures cannot substitute for the required decisive action necessary to provide the necessary cold water habitat, inflows, *and outflows* that the currently-proposed voluntary measures are supposed to provide.

How to ensure that water released to meet objectives is protected through the system and not rediverted for other purposes? (Question 2)

Conservation Groups propose that when upstream senior water rights holders are required to reduce diversions to provide increased flows for public trust purposes, all direct diversions by all junior water rights holders should be curtailed. Thus, the State Water Project and Central Valley Project should be limited to rediversion of stored water released upstream, less estimated loss to groundwater and carriage water for exports.

How should the State Water Board structure adaptive management for the new objectives? (Question 7)

“Adaptive management,” as practiced in the Delta, has been a disaster for fish. It is little more than a euphemism for water to be exported for agricultural or urban interests at the expense of fish. Between repeated temporary “urgency” change petitions, fuzzy annual water forecasting, and other “adaptive decisionmaking,” the protective measures that should be enforced to prevent the collapse of the Delta’s beleaguered fish species are repeatedly and routinely weakened or ignored altogether. At its core, adaptive management amounts to locking the barn doors after the horses have already been stolen. Any adaptive management plan that allow water users to hold hostage necessary preventive actions to protect fish is designed to fail. So too is any plan that depends upon the participation of overstretched resources agencies. Management must be proactive, not adaptive. It must employ specific, effective and proactive – not reactive – measures to *prevent* harms from high temperatures, low flows, low dissolved oxygen, elevated

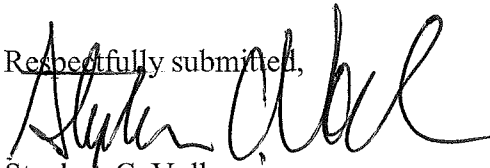
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salinity and other forms of water quality degradation. And, those measures must include clear and enforceable parameters for implementation.

CONCLUSION

For the reasons stated above, the Board must first adopt *adequate* flow standards and cold water habitat objectives that protect public trust resources and prevent the continued collapse of the Bay-Delta ecosystem. The Board's current approach of assuming that implementation measures can salvage inadequate water quality and flow requirements is akin to adjusting deck chairs on the *Titanic*. The board must instead adopt the specific, protective and enforceable standards needed to restore the Delta's beleaguered fisheries.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephan C. Volker", written over the typed name.

Stephan C. Volker
Attorney for Pacific Coast Federation of Fishermen's
Associations, Institute for Fisheries Resources and North
Coast Rivers Alliance