

**MINASIAN, MEITH,  
SOARES, SEXTON &  
COOPER, LLP**

ATTORNEYS AT LAW  
A Partnership Including Professional Corporations

1681 BIRD STREET  
P.O. BOX 1679  
OROVILLE, CALIFORNIA 95965-1679

Writer's e-mail: [pminasian@minasianlaw.com](mailto:pminasian@minasianlaw.com)

PAUL R. MINASIAN, INC.  
JEFFREY A. MEITH  
M. ANTHONY SOARES  
DUSTIN C. COOPER  
EMILY E. LaMOE  
ANDREW J. McCLURE  
JACKSON A. MINASIAN

WILLIAM H. SPRUANCE,  
Retired

MICHAEL V. SEXTON,  
Retired

TELEPHONE:  
(530) 533-2885

FACSIMILE:  
(530) 533-0197



November 9, 2017

By Email: [Bay-Delta@waterboards.ca.gov](mailto:Bay-Delta@waterboards.ca.gov)

State Water Resources Control Board:

Felicia Marcus, Chair  
Steven Moore, Vice Chair  
Dorene D'Adamo  
Tam M. Doduc  
E. Joaquin Esquivel

**Re: Phase II Bay-Delta Plan Input**

**Comment letter of San Joaquin River Exchange Contractors Water Authority and Members: Central California Irrigation District, Firebaugh Canal Water District, San Luis Canal Company, and Columbia Canal Company.**

Dear Board Members:

We urge the State Water Resources Control Board staff and Board Members to consider that the existing Bay-Delta Water Quality Control Plan's ("Bay-Delta Plan") instream flow requirements were *reduced* approximately a dozen times by revised TUCP orders during the 2014-2015 drought. Those orders were in most instances reflections of the thought that the operational flexibility available from water system improvements (storage, temperature) should be devoted solely to enhancing species abundance through the axiom of "more water and colder water is better." It is illogical that SWRCB staff would now maneuver to substantially *increase* the Bay-Delta Plan instream flow requirements on the basis that this sole tool will resolve and improve fishery conditions. As part of their effort, SWRCB staff has requested responses to eleven categories of questions concerning development of the program for implementation for the Phase II update of the Bay-Delta Plan.

To: Board Members, State Water Resources Control Board  
Re: Phase II Bay-Delta Plan Input  
Comment letter of San Joaquin River Exchange Contractors Water Authority  
Date: November 9, 2017

Page 2

---

Those questions presume that you, as the State Water Board members, will adopt the proposed new objectives in the final Scientific Basis Report and therefore the only concern is how to implement these new objectives. Yet the Scientific Basis Report, like the draft version, is a flawed, outcome-driven document, as demonstrated by the comments to the Draft Scientific Basis Report submitted December 16, 2016 by NCWA and others, and which are incorporated herein as if set forth in full. The current approach is so flawed that it risks decades of uncertainty and dispute. It is critical that you as State Board Members intervene.

A Nobel Prize was awarded to two Israeli researchers – Daniel Kahneman and Amos Tversky – for a decision-making process alteration procedure, and the description of that discovery in the recent Michael Lewis book entitled *The Undoing Project*, establish the tendency of human decision-makers to make choices based on the wrong criteria. Because they are human, decision-makers focus upon one recent attention-grabbing factor or characteristic, resulting in devastating mistakes. In our present situation, an attempt to find a solution to a perceived problem has resulted in only one factor being considered: “More and colder water administered in a ‘natural way’.”

Instead, the Israelis’ award-winning human factors research in considering the decision-making process concludes that a decision-maker should accept the randomness of the conditions and characteristics and not attempt to drive a solution by going back to one perceived condition or factor that receives the focus of attention. In this case, the decision makers are being driven to recreate natural flow conditions and disregard all other factors and effects by “harkening back to the good old days” of water flows. The present Scientific Report and the direction of the 11 questions is a classic example of not applying what the Nobel Institute and established practice tells us is flawed decision-making process.

We encourage you to reassess your duty to ensure reasonable protection of *all* beneficial uses of water (not just fishery needs through instream flows) and to start fresh with an examination of how greater instream flows would impact other beneficial uses and communities, and how fishery numbers could be improved without aimlessly dumping more water into the ocean. Such an examination should include consideration of how new instream flow requirements would impact the unemployment rates of small communities such as Mendota or Firebaugh, California, whether the construction of a new fish hatchery at Shasta would substantially increase salmon return numbers, and the

To: Board Members, State Water Resources Control Board  
Re: Phase II Bay-Delta Plan Input  
Comment letter of San Joaquin River Exchange Contractors Water Authority  
Date: November 9, 2017

Page 3

---

impacts to groundwater levels of confiscating the surface water of countless communities. The issues and impacts of an updated Bay-Delta Plan cannot be examined in a vacuum. You must intervene and start fresh.

**1. Ensuring Reasonable Protection of All Beneficial Uses Requires a Holistic Analysis to Understand the Tradeoffs, Unintended Consequences and the Effects of Modified Water Quality Objectives. The Scientific Basis Report Fails Entirely In this Regard.**

State policy expressed in the Porter-Cologne Water Quality Control Act establishes your duty to regulate water quality “to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (Water Code § 13000.) You are required to “ensure the reasonable protection of beneficial uses and the prevention of nuisance” through consideration of various factors, including “past, present, and probable future beneficial uses of water”, “environmental characteristics”, “water quality conditions” and “economic considerations”. (Water Code § 13241.)

Determining what is reasonable cannot be done in a vacuum; reasonableness depends on an examination of all water uses and all demands for water. When uses are in conflict, careful balancing is required to ensure that the conflicting beneficial uses are all afforded reasonable protection. Your staff’s Scientific Basis Report fails to engage in this comprehensive assessment and balancing of all water uses as envisioned in and required by Porter-Cologne. It focuses exclusively on the “needs” of aquatic resources in the Delta and its tributaries, relegating all other beneficial uses to utilize whatever volume of water remains. The Report states that “the use of a percent of Unimpaired Flow approach assigns a percent of the available water to fish and wildlife, and leaves the remainder for other uses.” (Final Scientific Basis Report, p. 5-7.) Providing for the reasonable protection of all beneficial uses cannot be done by focusing on the needs of one subset of beneficial uses. Nor can you ensure the reasonable protection of all other beneficial uses by *per se* relegating those uses to a junior priority position that can only utilize water that remains *after* invocation of the Unimpaired Flow factor. A holistic assessment of the needs of all beneficial uses is essential to understanding the tradeoffs, unintended consequences and effects of any modified water quality objectives. This holistic

To: Board Members, State Water Resources Control Board  
Re: Phase II Bay-Delta Plan Input  
Comment letter of San Joaquin River Exchange Contractors Water Authority  
Date: November 9, 2017

Page 4

---

assessment must be done to ensure that all beneficial uses are afforded reasonable protection.

In 2010, as required by the Sacramento-San Joaquin Delta Reform Act of 2009, the State Water Board adopted a flow report, the purpose of which was to inform (not predetermine) planning decisions for the Delta Plan and Bay Delta Conservation Plan/WaterFix. The report was expressly conditioned on the flow criteria necessary to protect public trust resources and nothing more. It did not consider or assess the needs and reasonable protection of other beneficial uses. You expressly conditioned the 2010 flow report as follows:

We know, however, that there are many other important beneficial uses that these waters support such as municipal and agricultural water supply and recreational uses. The State Water Board is required by law to establish flow and other objectives that ensure the reasonable protection of beneficial uses. In order for any flow objective to be reasonable, the State Water Board must consider and balance all competing uses of water in its decision-making. More broadly, the State Water Board will factor in relevant water quality, water rights, and habitat needs as it considers potential changes to its Bay-Delta objectives. Any attempts to portray the recommendations contained in this report as an indicator of future State Water Board decision-making ignores this critical multi-dimensional balancing requirement and misrepresents current efforts to analyze the water supply, economic, and hydropower effects of a broad range of alternatives. This report represents only one of many factors that will need to be balanced by the State Water Board as it updates the Bay-Delta Water Quality Control Plan.

(2010 Flow Report, p. 1, “Note to Readers”.) Your staff has failed to heed your own admonishment. The Scientific Basis Report advocates for an Unimpaired Flow requirement of between 35% and 75%, the same upper range expressed in the 2010 Flow Report. However, the Scientific Basis Report advocates for this same Unimpaired Flow approach without engaging in *any* of the necessary “multi-dimensional balancing”.

To: Board Members, State Water Resources Control Board  
Re: Phase II Bay-Delta Plan Input  
Comment letter of San Joaquin River Exchange Contractors Water Authority  
Date: November 9, 2017

Page 5

---

Adding to this violation and simplistic approach, your staff is now seeking input on how to implement the proposals in the Scientific Basis Report again without any of the necessary information, tradeoffs, or impacts to all other beneficial uses.

The Scientific Basis Report provides the same limited utility as the 2010 Flow Report because it focuses exclusively on one beneficial use (instream fishery) and does not assess the needs or ensure the reasonable protection of all other beneficial uses. The only difference between the two documents is that your 2010 Flow Report was at least up-front and honest in its description of the lack of any necessary “multi-dimensional balancing”.

**2. An Unimpaired Flows Approach Does Not Comport with the Law, Negatively and Unreasonably Impacts Nearly Every Other Beneficial Use of Water, and Will Result in Decades of Protracted Dispute. Adopting a New Approach to the Delta Plan Update is Essential.**

The current Unimpaired Flow approach would cause significant negative impacts throughout the state and to nearly every other beneficial use of water. We join in and incorporate as our own the statement made by water users throughout the State dated November 9, 2017 calling for abandonment of the unimpaired flows approach and the comments made by Northern California Water Association and others dated November 9, 2017. In addition to the negative impacts, the proposed instream flows would not achieve their goal of helping fish. More instream flow for the sake of instream flow has not worked in the past and will not work in the future to stabilize or restore the fishery. We support a critical reassessment of decisions in the last 20 years that resulted in the dedication of millions of acre-feet of water to instream flows annually. It may be possible to use that same water in a manner that more directly and concretely benefits the fishery, and we welcome an accurate investigation on how to do so.

To: Board Members, State Water Resources Control Board  
Re: Phase II Bay-Delta Plan Input  
Comment letter of San Joaquin River Exchange Contractors Water Authority  
Date: November 9, 2017

Page 6

---

## **Conclusion**

Your leadership is needed to pause and reset the path we are on. A textbook example of the dangerous and irrational human decision-making process described by Nobel Prize winners Kahneman and Tversky and the New York Times bestseller *The Undoing Project* are before us. Your “eye” is being turned in the wrong direction, and a little discipline and acceptance that there is not one simplistic factor or tool to consider, and acceptance of the limit of our perceptions, will result in a better solution. If a new Bay-Delta Plan is needed, the process cannot ignore all non-fishery beneficial uses such as municipal, industrial, agriculture, hydropower, and recreation. The process must ensure the reasonable protection of *all* beneficial uses, and it must also honor your duty to all people and communities of California. We urge you as State Board Members to intervene and start fresh.

Very truly yours,

MINASIAN, MEITH,  
SOARES, SEXTON & COOPER, LLP

By:   
JACKSON A. MINASIAN

JAM:dd

cc: San Joaquin River Exchange Contractors Water Authority & Members  
SJREC\Bay Delta.SJREC Comment letter to Phase II Bay Delta.wpd