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March 19, 2013



VIA ELECTRONIC MAIL
commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95814-0100

Re: Comments on Draft Substitute Environmental Document – Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water Quality

Dear Ms. Townsend:

These comments are submitted on behalf of the Sacramento Valley Water Users (the "SVWU"). The SVWU appreciate this opportunity to provide these comments on the Draft Substitute Environmental Document – Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary (the "Bay-Delta WQCP"): San Joaquin River Flows and Southern Delta Water Quality (the "Draft SED") pursuant to the December 31, 2012 Notice of Filing for the Draft SED issued by the State Water Resources Control Board (the "SWRCB"), as extended by the January 17, 2013 Notice of Extension of Public Comment Period.

The SVWU collectively manage much of the water resources of the Sacramento Valley, serving millions of acres of irrigated farmlands, providing water to much of the Sacramento metropolitan region, and generating hydropower that is an important element of California's efforts to use natural resources in a sustainable manner. Consequently, the SVWU do not propose to comment on the details of the Draft SED as they apply in the San Joaquin Valley. Instead, the SVWU submit these comments to draw attention to those elements of the Draft SED that apply to California's overall management of its water resources.

1. *The SWRCB Should Not Allow Redirected Impacts from the San Joaquin Valley to the Sacramento Valley*

The SVWU reiterate our insistence that the proposed water quality objective and plan of implementation analyzed in the Draft SED not redirect any effects to the Sacramento Valley. Because of the complicated adaptive management scheme proposed in the Draft SED, the SVWU cannot determine whether implementation of that objective and plan would demand additional flows from the Sacramento Valley in order to meet Delta outflow requirements. The Draft SED states, however, that its implementation would enable *increased* Delta exports. Draft SED, pp. 5-89 to 5-92. If implementation of the proposed objectives and plan would demand more flows from the Sacramento Valley and also enable increased Delta exports, then it would violate the fundamental principles of the water right priority system and the area of origin statutes.

2. *The Draft SED Is Not Based on Sound Science*

The flow-only approach reflected in the Draft SED is not based on sound science. The Draft SED forthrightly admits, on page 3-1, that, for the San Joaquin River basin, the sole purpose is:

To establish *flow objectives* during the February-June period and a program of implementation for the reasonable protection of fish and wildlife beneficial uses in the LSJR watershed, including the three eastside, salmon-bearing tributaries (the Stanislaus, Tuolumne, and Merced Rivers).

Scientifically, this blunt declaration of the proposed flow-only approach runs directly contrary to the overwhelming scientific consensus – as reflected during the SWRCB’s fall 2012 workshops on Phase 2 of the Comprehensive Review of the Bay-Delta WQCP – that preserving and restoring fishery resources requires *both* flow and non-flow measures (e.g., habitat restoration).

Further, it appears that the basis for the Draft SED’s approach is a purported statistical correlation between certain levels of flow from the San Joaquin Basin and salmon populations. SWRCB, Draft SED, Appendix C, *Technical Report on the Scientific Basis for Alternative San Joaquin River Flow and Southern Delta Salinity Objectives*, 3-54 to 3-57, 3-60 to 3-63 (Dec. 2012). Yet, the testimony during the fall 2012 workshops established that the SWRCB should not rely on such bare correlations without a good understanding of any underlying biological cause. (See, e.g., ICF, *DRAFT Bay-Delta Plan Workshops Summary Report*, pp. 6, 9, 20 (Dr. Wim Kimmerer), 24 (Dr. Cliff Dahm) (Jan. 2013).) At the September 5, 2012 workshop session, Dr. Cliff Dahm, the former Lead Scientist of the Delta Science Program, summarized a point made by Dr. Wim Kimmerer as follows:

Beware of simple correlative relationships. They rarely tell the whole story.
That's an important take-home message.

(Workshop #1 Videos, 09/05/12, Video 2, at 38:45 (available on-line at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/comp_review_workshops.shtml.) Thus, the Draft SED's approach of focusing on increasing flow to the virtual exclusion of non-flow measures, therefore, does not meet the basic requirement that an update to the Bay-Delta WQCP be based on sound science.

3. *A "Flows-Only" Approach Violates Porter-Cologne*

A "flows-only" approach to updating the WQCP violates the Porter-Cologne Water Quality Control Act ("Porter-Cologne"). The proposed objectives and implementation plan would elevate one beneficial use (fishery protection) well above all of the other beneficial uses in the San Joaquin basin. This fact is best demonstrated by the Draft SED's proposal that the SWRCB simply declare the proposed objectives and implementation plan's serious impacts on the availability of water for consumptive use to be a significant and unavoidable impact of implementing fishery flows. Draft SED, pp. 5-89 to 5-92. Porter-Cologne does not allow such cavalier treatment of consumptive beneficial uses that long have been designated for the Merced, Tuolumne and Stanislaus Rivers. (See Water Code § 13241; Water Quality Control Plan for The Sacramento River Basin and The San Joaquin River Basin, p. II-8.00.). This is not consistent with Delta Reform Act, which requires that there be water supply reliability for both consumptive uses of water and the environment.

4. *The Burden of Providing Water for Fish Must be Allocated Via the Water-Right Priority System*

The Draft SED is not consistent with the fundamental nature of water rights in California. It is elementary California water law that, during times when there is insufficient water for all beneficial uses, the burden of meeting the shortfall must rest on those water users that have junior priorities. "[W]ater right priority has long been the central principle in California water law." See *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1243 (2000). Even when developing and implementing a physical solution, a court (or in this case, the SWRCB) must preserve water right priorities, absent a finding of waste or unreasonable use. *Id.* The adaptive management process outlined at pages 4-5 of Appendix K of the Draft SED, however, is devoid of any reference to or even recognition of the need to respect water rights. Consequently, this process, if implemented, would violate the water rights priority system as well as the Delta Reform Act, which, as noted above, requires that there be water supply reliability for both consumptive uses of water and the environment.

5. *The Draft SED Violates CEQA*

The approach of the Draft SED to implementing additional flows in the San Joaquin River basin – which is the centerpiece of the proposed action – violates the California Environmental Quality Act ("CEQA"). The California Supreme Court has declared that "[a]n accurate, stable and finite

project description is the *sine qua non* of an informative and legally sufficient EIR." *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Assn.* (1986) 42 Cal.3d 929, 938; see also *Planning & Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210, 234-235 (2009). The Draft SED must comply with this fundamental requirement to be functionally equivalent to an EIR. The Draft SED, however, calls for an adaptive management process that is too vague with regard to what standards are to be used (other than promoting fishery populations), and thus it is impossible to determine what effects the proposed objective and implementation plan may have on the environment. See Draft SED, Appendix K, at pp. 3-6. Consequently, the Draft SED fails to comply with the requirements of CEQA. The SWRCB should remedy this defect by better defining the "project" to be analyzed in the Draft SED and then recirculating the Draft SED for another round of public comments.

6. *Sister State Agencies Must Implement the Provisions of the Draft SED*

The Draft SED fails to comply with the requirement of Water Code section 13247. Appendix K contains a laundry list of measures that are needed to achieve the water quality objectives (Appendix K, pp. 7-11). However, Appendix K also says that the SWRCB will "encourage and where appropriate, require that necessary actions by other entities are completed." *Id.* at 7 (emphasis added). In the past, the SWRCB has similarly sought to encourage its sister agencies to assist in the effort to preserve public trust resources in the Bay-Delta Estuary, only to be largely ignored. This state of affairs is not consistent with the Legislature's intent in adopting Water Code section 13247, which requires: "State offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute, in which case they shall indicate to the regional boards in writing their authority for not complying with such plans." (emphasis added) Thus, the Draft SED should direct sister state agencies to implement the Program of Implementation contained in Appendix K, unless otherwise directed or authorized by statute. See *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 730, 732 (2006).

Thank you for the opportunity to submit these comments.

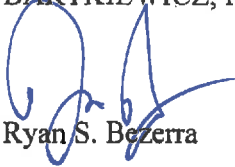
Very truly yours,

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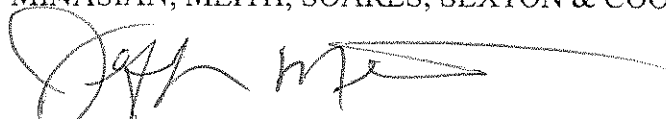
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MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP

A handwritten signature in black ink, appearing to read "Jeff Meith", with a long horizontal flourish extending to the right.

Jeffrey Meith

SOMACH, SIMMONS & DUNN

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