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March 17, 2017



VIA EMAIL

Jeanine Townsend,
Clerk to the Board State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814-0100
commentletters@waterboards.ca.gov

Re: Comment Letter – 2016 Bay-Delta Plan Amendment & SED

Dear Ms. Townsend:

We submit these comments on the September 15, 2016 Draft Revised Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“SED”) on behalf of E. & J. Gallo Winery and Gallo Vineyards, Inc. (collectively, “Gallo”).

Gallo is particularly concerned about the significant changes to water flow requirements for the Stanislaus, Tuolumne, and Merced Rivers included in the proposed changes to the Bay-Delta Plan.¹ The proposed flow regime will have a substantial adverse effect on Gallo and other water rights holders for the Lower San Joaquin River (“LSJR”) and its three eastside tributaries that will result in devastating financial impacts across the region. The State Water Resources Control Board’s (“State Water Board”) SED substantially underestimates the potential impacts of the proposed flow requirements to the businesses and residents of the extended San Joaquin Valley and fails to even address the substantial obligation the state will bear to compensate the vested water rights holders for the proposed taking. Gallo believes the current proposal would unlawfully establish flow requirements and joins in the comments provided by the Merced Irrigation District, the San Joaquin Tributaries Authority, and other parties that detail shared legal and technical concerns regarding, in particular, the negative impacts the proposed revisions to the Bay-Delta Plan will cause to users of water from the Stanislaus, Tuolumne, and Merced Rivers. In addition, Gallo submits the following.

¹ The “Bay-Delta Plan” as used in this letter refers to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.

I. BACKGROUND

A. Gallo Depends on the Affected Rivers

Gallo holds riparian and appropriative water rights to the Merced River that date back to the 1800s. Gallo's water rights were confirmed in the so-called "Cowell Agreement" with the Merced Irrigation District, dated as of January 27, 1928, which resolved litigation relating to various water rights. Gallo, and the other Cowell Agreement parties' water rights are among the most senior on the Merced River.

Gallo also holds significant investments throughout the region, including the Livingston Winery in Merced County within the Merced Subbasin, the largest winery in the world. Gallo is also heavily invested along the other tributaries of the LSJR and its related subbasins. The most prominent example of this is in Modesto, Gallo's global headquarters with approximately 3500 employees where Gallo has a significant bottling facility, warehousing and distribution center, and glass plant. Additionally, many of Gallo's wine grapes are grown by Gallo and independent growers throughout the San Joaquin Valley dependent on the LSJR and its eastside tributaries and the related groundwater subbasins. Gallo relies upon water from the LSJR and the Stanislaus, Tuolumne, and Merced Rivers, directly or indirectly, for its businesses, a major economic driver in the greater San Joaquin Valley.

B. The Proposed Amendments to the Bay-Delta Plan

The proposed revised Water Quality Control Plan ("WQCP") establishes new flow objectives on the LSJR and its three eastside tributaries for the protection of fish and wildlife, along with new salinity objectives for the protection of agricultural uses in the southern Delta. Although not entirely clear, it appears the intended amendments to the WQCP include the following.

- **Flow Objectives:** The proposed amendments impose an obligation to maintain, from February through June, 30-50% of unimpaired flow, inclusive, from the Merced River, as well as a minimum base flow value between 800 and 1,200 cfs, inclusive, at Vernalis maintained at all times during February through June of each year. These objectives shall be implemented by requiring 40% of unimpaired flow, based on a minimum 7-day running average, from each of the Stanislaus, Tuolumne, and Merced Rivers. (SED, Appx. K at p. 29). The LSJR base flow objective for February through June is to be implemented by requiring a minimum base flow of 1,000 cfs, based on a minimum 7-day running average, at Vernalis at all times. (*Id.*) When the percentage of unimpaired requirement is insufficient to meet the minimum base flow requirement, the Merced River shall provide 24% of the additional total outflow needed to achieve and maintain the required base flow at Vernalis. (*Id.*) The plan also calls for increased salinity

objectives – changing from seasonal objectives to a 1.0 dS/m year-round objective – and additional compliance locations on the Stanislaus, Tuolumne and Merced Rivers.

- **Adaptive Management**: The proposed amendments include adaptive implementation strategies, such as adjusting the unimpaired flow requirement within a range of 30-50% and/or allowing a delay until after June of the release of a portion of the unimpaired flow release. However, implementation of any such measures is subject to approval by the State Water Board, and the SED notes that such adaptive strategies may not reduce intended benefits to fish and wildlife. The proposed amendments also call for biological goals for LSJR salmonids and other species as appropriate, to be identified within 180 days after the approval of the Bay-Delta Plan amendments. These biological goals are to be used to inform any adaptive measures. (*Id.* at 33-34.)
- **Implementation Strategy**: The State Water Board intends to implement the February through June flow objectives by 2022 through water right actions or water quality actions, such as Federal Energy Regulatory Commission (“FERC”) relicensing proceedings. (*Id.* at p. 28). The State Water Board also intends to create a Stanislaus, Tuolumne, and Merced Working Group (STM Working Group) comprised of representatives of the California Department of Fish and Wildlife, National Oceanic and Atmospheric Administration Fisheries, United States Fish and Wildlife Service, State Water Board staff, and water users on the Stanislaus, Tuolumne, and Merced Rivers. (*Id.* at 32.) The SED calls for the STM Working Group to assist with implementation, monitoring, and assessment activities for the unimpaired flow objectives and with developing biological goals to help evaluate the effectiveness of the unimpaired flow objectives and adaptive implementation actions. (SED, Ch. 18 at 18-2.)

C. Historical Average Flows on the Merced River as Identified in the SED

The SED identifies the historical average of unimpaired flows on the Merced River at New Exchequer Dam, for water years 2000 through 2009, as 884 TAF/y, 23% more than the median runoff, representing approximately 15% of the unimpaired flow at Vernalis. (SED, Ch. 2 at 2-14, 2-16.) However, the SED also reports the average historical releases for the same period as 403 TAF/y. (SED, Ch. 2 at 2-14.) The reported distribution of annual unimpaired flow from 1984 through 2009 ranged from 410 TAF to 1,746 TAF, with a median runoff of 721 TAF. (SED, Ch. 2 at 2-16.) The peak reported runoff in that period was from March through June and the minimum flows were from August through November. (*Id.*)

The SED reports that Crocker-Huffman Dam releases averaged approximately 45% of the unimpaired flow, but the high average was due to flood control releases; the releases were usually less than 40% of the unimpaired flow. The historical releases reported at Stevenson from 1984 through 2009 were typically between 5 TAF and 30 TAF. (SED, Ch. 2 at 2-16.) The annual river flow volume ranged from 102 TAF to 1,167 TAF, with a median historical annual river flow of 398 TAF, and an average historical flow of 452 TAF. Although the average historical flow was approximately 48% of the average unimpaired flow, the majority of the flow occurred in the wet years due to flood control releases. (*Id.*)

D. Merced River: Current Water Diversion and Use

As noted above, Gallo and the other Cowell Agreement diverters are among the most senior water right holders on the Merced River that likely will be directly and substantially impacted by the proposed flow and salinity requirements.² In addition to the Cowell Agreement Diverters, the Merced Irrigation District and other users also divert water from the Merced River. (*See* SED, Ch. 2 at 2-11.)

The SED reports that there are 105 post-1914 appropriative water rights with a combined value of approximately 5.5 MAF. (*Id.*) One hundred one of those are non-power water rights that total approximately 1.04 MAF, of which approximately 98% of the water authorized for non-power diversion is held by Merced Irrigation District. (*Id.*)

The Cowell Agreement requires Merced Irrigation District to bypass and release water in the summer so that the riparian and pre-1914 downstream users, including Gallo, experience the same hydrologic conditions that were in place prior to the construction of the New Exchequer Dam. (*Id.* at 2-12.) Additionally, flows released from the Crocker-Huffman Dam to the Merced River must satisfy FERC requirements, a Davis-Grunsky Contract between the State of California and Merced Irrigation District, and the Cowell Agreement. Flood control release limits established by the U.S. Army Corps of Engineers requires combined Dry Creek and Merced River flows to not exceed 6,000 cfs, (*Id.* at 2-13.)

E. Anticipated Impacts Identified in the SED

The SED concludes that implementation of the proposed increased unimpaired flow requirements will have significant and unavoidable impacts on resources that require water for uses other than fish and wildlife, including agricultural resources, service providers, and energy and greenhouse gases. (SED, Ch. 18 at 18-14, 18-17.) The change in annual water supply due to reduced diversion under each of the alternative scenarios, without adaptive implementation, would range from 2 to 32 percent on the Stanislaus River, 2 to 35 percent on the Tuolumne River, and 6 to 32 percent on the Merced River. (SED, Ch. 20 at 20-4, 20-5, 20-13.) According to the SED, because water supplies and related conditions in the watershed are highly variable from year to year, diversion reductions could be higher or lower depending on the hydraulic condition in any given year. (*Id.* at 20-13.)

The SED also notes that implementation of the increased unimpaired flow requirements

² Although Gallo recognizes that the State Water Board intends to implement the flow obligations through water right hearings and Section 401 proceedings in Phase 3 of the updates to the Bay-Delta Plan, the level and rates of the proposed unimpaired flow obligations will require regulation and curtailment of existing water rights for the LSJR and its three eastside tributaries. Accordingly, adoption of the proposed flow obligations would prospectively adversely affect those water rights.

will have significant and unavoidable impacts on groundwater resources. (*Id.* at 18-14, 18-16.) The State Water Board anticipates that groundwater will be pumped to replace lost surface water diversions, with an expected higher magnitude of pumping in the Extended Merced Subbasin. (*Id.* at 18-16.) The SED anticipates that the average annual groundwater balance would be reduced by the equivalent of more than one inch across the Extended Merced Subbasin, producing a measurable decrease in groundwater elevations and a substantial depletion of groundwater supplies or substantial interference with groundwater recharge in this subbasin. (*Id.* at 9-3 through 9-6.) Notably, the Department of Water Resources has already designated the Merced Subbasin as critically overdrafted.³

II. LEGAL ISSUES

A. The Proposed Flow Directives Would Violate Due Process

The proposed flow obligations will necessarily infringe on the water rights of Gallo and other users of water from the LSJ, Stanislaus, Tuolumne and Merced Rivers. Although the State Water Board intends to implement the proposed flow obligations in Phase 3 of its updates to the Bay-Delta Plan, the decision to impose such substantial unimpaired flow obligations will necessarily require regulation and curtailment of existing water rights. Imposing such extreme flow obligations, and doing so through the rulemaking process, deprives Gallo and other affected water right holders of their right to due process.

First, the proposed flow objectives cast far too wide a net to respond to the issue the State Water Board seeks to address, in violation of the substantive due process rights of the affected water right holders. Once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation. *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 110 (referred to herein as “*U.S. v. State Water Board*”) (citing *Ivanhoe Irrigation Dist. v. All Parties* (1957) 47 Cal.2d 597, 623). Accordingly, Gallo’s pre-1914 and riparian water rights are vested property rights that cannot be infringed upon or otherwise taken by governmental action without due process. *See Id.*; *see also U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 752-54. Although the State Water Board contends it “is considering amending the Bay-Delta Plan to establish new flow objectives on the LSJR and its three eastside tributaries to protect fish and wildlife beneficial uses” (SED at 1-8), it has not, and cannot, provide any evidence to demonstrate that the proposed flow obligations are even rationally related to the purported objective. Accordingly, this plan violates Gallo and all other affected water right holders’ substantive due process rights.

Second, the proposed imposition of flow objectives in this water quality proceeding would necessarily restrict and modify existing water rights without providing Gallo or any other

³ The Department of Water Resources’ Final List of Critically Overdrafted Basins, published in January 2017, is available at: http://www.water.ca.gov/groundwater/sgm/pdfs/COD_BasinsTable.pdf

affected water rights holders adequate notice and opportunity to be heard in violation of their rights to procedural due process. “Procedural due process requires that wherever vested property rights are involved there be due notice to the parties concerned, a right for such parties to appear and answer, and an adjudicative hearing on the facts, either before the administrative agency or a reviewing court.” California Jurisprudence 3rd, § 634 (citing *Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790 and *Robinson v. Bd. of Retirement* (1956) 140 Cal.App.2d 115). When property rights are at issue in an adjudicative proceeding, the State Water Board is required to comply with Government Code section 11425.10, which provides due process protections such as directed notice, an opportunity to be heard, the ability to present and rebut evidence, and the right to cross examine. Water Code, § 648(b). This provision does not apply when the State Water Board acts in a legislative capacity, which is why the State Water Board is prohibited from performing adjudicatory functions during the quasi-legislative process. *See U.S. v. State Water Board*, 182 Cal.App.3d at 115. By imposing flow obligations that *necessarily* result in the modification of existing water rights, the State Water Board is performing adjudicatory actions under the guise of legislative process. *See Id.* at 115-118. The imposition of the proposed flow obligations would also constitute a regulatory taking of vested property rights from the affected water rights holders. The proposed imposition of such flow obligations and the resulting taking without providing Gallo and the other affected water right holders adequate notice and an opportunity to be heard would violate their right to due process.

Third, the proposed amendments – particularly with respect to the proposed unrestricted flow obligations and adaptive measures – are so unclear as to how they will be implemented against water rights holders, including Gallo, as to constitute a violation of each affected water right holder’s right to due process. Due process precludes enforcement of a regulation based upon impermissible vagueness when the regulated party “could not reasonably understand that [their] contemplated conduct is proscribed.” *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 764. The proposed flow obligations do not make clear what or how the obligations will be imposed, or what or how any adaptive measures will be imposed. In addition to the lack of clarity in the regulations themselves, the SED also failed to clearly provide notice of what the amendments to the Bay-Delta Plan would involve, including that the project would include “adaptive implementation of unimpaired flows” and “non-flow measures” and that it would seek to regulate water outside of the Bay-Delta. The failure to provide clear notice of the scope of the project at the outset and the failure to clearly define the proposed obligations and clearly explain the regulations and how they will be imposed violates due process.

Fourth, the proposal to implement the flow objectives through the Section 401 process related to FERC hydropower licensing (SED, ES1-2; *see also* SED, Appx. K at p. 28) would violate the due process rights of any downstream water rights holders. Because the proposed flow requirements are so substantial that they will necessarily curtail water rights, the Section 401 process does not provide sufficient notice and opportunity to be heard to any downstream water right holders whose rights will be impacted.

B. The Proposed Amendments Exceed State Water Board Authority

By imposing the proposed unrestricted flow obligations, the proposal would prospectively restrict and reduce the rights of those who hold riparian and appropriative water rights to the LSJR and its three eastside tributaries. The State Water Board generally lacks authority to limit, regulate, or curtail riparian or pre-1914 appropriative water rights. *See e.g., Cal. Farm Bureau Fed. v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429. The State Water Board's authority over pre-1914 water rights is generally limited to resolving disputes among water right holders and regulating "to prevent illegal diversions and to prevent waste or unreasonable use of water." *See Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404. As there is no conflict among the affected water right holders – except to the extent the State Water Board's imposition of unimpaired flow obligations will require curtailments that will likely create conflicts – and the State Water Board has made no findings or even allegations of waste or unreasonable use by the affected riparian and pre-1914 water right holders, the State Water Board does not have the authority or jurisdiction to infringe upon those riparian and pre-1914 water rights, particularly not in the context of a water quality control project.

The State Water Board also lacks authority to alter water right priorities through its development of a water quality control plan or otherwise. One of the fundamental tenants of California's appropriative water rights system is the rule of priority: the first in time, first in right. *See e.g., El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 943; *U.S. v. State Water Board*, 182 Cal.App.3d at 101-102. Under California's appropriative water right system, the senior appropriator is entitled to fulfill its needs before a junior appropriator is entitled to use any water. *Id.* "Although the rule of priority is not absolute, the Board is obligated to protect water right priorities unless doing so will result in the unreasonable use of water, harm to values protected by the public trust doctrine, or the violation of some other equally important principle or interest." *El Dorado Irr. Dist.*, 142 Cal.App.4th at 944. Adoption and implementation of the proposed flow requirements will likely require altering existing water rights. The State Water Board does not have the authority or jurisdiction to make such decisions affecting individual water rights, including those riparian and pre-1914 appropriative water rights held by Gallo, in the context of these regulatory proceedings.

Nor does the State Water Board generally have the authority to change the priorities among the uses of water. The California Water Code explicitly identifies the domestic use of water as the "highest use of water and the next highest use is for irrigation." Water Code § 1254. Although the State Water Board is entitled to consider the amount of water that must be maintained in the source for the protection of beneficial uses of water, including the protection of fish and wildlife resources, the State Water Board must also consider the State's order of priorities among uses. *See Nat'l Audubon v. Sup. Ct.* (1983) 33 Cal.3d 419, 443-444. The proposed flow and salinity requirements improperly favor the interest of a subordinate water use – for the benefit of fish – over higher priority users – domestic use and irrigation.

It also appears the proposed flow obligations would improperly require water right holders to store and release water for the benefit of fish to the detriment of water rights holders downstream from the affected dams. The Board does not, and cannot, offer any basis for its jurisdiction to impose such obligations.

C. The Proposed Amendments Do Not Comply with Water Quality Planning Requirements

In establishing a water quality plan pursuant to the authority provided under the Porter-Cologne Water Quality Control Act (Water Code §§ 1300, *et seq.*), the State Water Board must consider the beneficial uses to be protected, water quality objectives, and a program of implementation for achieving those objectives. Water Code § 13050(j). The State Water Board is further required to consider: (a) all beneficial uses of the water at issue, (b) environmental quality of the hydrographic unit at issue, (c) water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area, (d) economic considerations, (e) the need for developing housing in the region, and (f) the need to develop and use recycled water. Water Code § 13241; *see also City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 176-177. Ultimately, the State Water Board must provide reasonable protection to beneficial uses of the subject water, while taking into consideration all of the demands made upon the water. *See* Water Code §§ 13000, 13241.

The proposal does not comply with these requirements. For example, in seeking to impose the new flow obligations, the proposal fails to adequately consider and weigh the impact of the plan on all beneficial uses of water. In particular, the proposal does not adequately consider the domestic and agricultural uses of the water by the affected riparian and pre-1914 appropriative water right holders. Instead, it prioritizes water quality objectives for the benefit of fish above all other beneficial uses. The proposal also fails to sufficiently consider whether the desired beneficial water conditions could reasonably be achieved through the proposed plan. The proposal does not sufficiently describe and demonstrate: the purported benefits of the plan, how much water is actually necessary to meet the purported objectives, and whether there is any causal connection between increased flows and increased fish populations. Additionally, the proposal fails to adequately consider the economic impact of the project, which would necessarily result in substantial curtailment of water rights. The taking of vested water rights will have a tremendous economic impact on the affected water right holders, causing substantial domestic and agricultural losses that were not adequately considered. Ultimately, the proposal fails to balance the competing uses of water and fails to include the necessary factual findings to support its conclusions.

If the State Water Board adopts the proposed plan it would further exceed its jurisdiction and its authority under the Porter-Cologne Act by attempting to regulate waters outside of the geographical boundaries of the San Francisco Bay and the Bay-Delta Estuary. A water quality control plan is limited to a specified area. Water Code § 13050(j). The Bay-Delta Plan is,

therefore, meant to be limited to the waters within the San Francisco Bay and the Bay-Delta Estuary. To the extent the proposed plan improperly seeks to regulate the tributary watersheds, the State Water Board is exceeding its authority.

D. The SED Does Not Comply with CEQA

A SED is the functional equivalent of an Environmental Impact Report (EIR). *City of Arcadia v. SWRCB* (2006) 135 Cal.App.4th 1392, 1421-1422; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 113. In preparing the SED, the State Water Board must still provide sufficient environmental analysis to comply with CEQA. *See City of Arcadia*, 135 Cal.App.4th at 1421-1422; *Environmental Protection Information Center v. Johnson* (1985) 170 Cal.App.3d 604, 620; *see also* 23 CCR § 3777. The SED at issue here does not meet this standard.

The purpose of a SED or an EIR is “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment.” Public Resources Code § 21061. This is necessary to provide the public and government agencies the information needed to make informed decisions in order to allow for protection “not only the environment but also informed self-government.” *In re Bay-Delta* (2008) 43 Cal. 4th 1143, 1162-63. Accordingly, a SED must provide sufficient detail to allow those who did not participate in the preparation of the document to understand and meaningfully consider the issues raised by the proposed project. *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405.

The SED is legally insufficient. It appears the State Water Board is attempting to simply adopt and implement this project, including imposing substantial new flow obligations on the LSJR and its eastside tributaries, without full disclosure of the details or meaningful public review and participation. The SED fails to comply with CEQA’s procedural and substantive requirements including, but not limited to, the following.

- The SED does not clearly define the project, the geographic scope of the project, the purpose and goals of the project, or the impacts of the project.
- The SED does not include a clear description of the range of flow obligations, the range of adaptive management options, and how they will be implemented.
- The SED does not provide a clear description of the phases by which the project will be implemented.
- The SED uses an improper, inaccurate, and misleading baseline. The baseline should be determined at the time the environmental analysis is commenced. The SED improperly sets the baseline in 2009 and fails to consider the impacts of the five-year drought. The baseline also fails to use accurate assumptions and inputs.

- The SED does not sufficiently identify and analyze the impacts of the project, including, in part, the impact of the reduction in surface water supply resulting from the increased unimpaired flow obligations, the impact of the increased flows on the environment, and the impact of the increase in utilization of groundwater resources.
- The SED does not include substantial evidence to support the findings and conclusions contained therein.
- The SED does not claim or demonstrate that the actions of any of the affected water right holders have negatively impacted the water quality in the Delta, LSJR, or the Stanislaus, Tuolumne, or Merced Rivers.
- The SED does not include evidence to demonstrate that the project elements will actually improve water quality or meet any of the identified “objectives.”
- The SED fails to include sufficient analysis of the cumulative impacts and related projects (e.g., SGMA, WaterFix).
- The SED fails to adequately address the areas of controversy. It does not address the main points of disagreement and instead appears to indicate that any issues have been addressed or resolved. This is incorrect.
- The SED fails to identify, propose, discuss, and consider potential measures and programs to mitigate the significant environmental impacts that will result from implementation of the project.
- The SED fails to include responses to comments raised in response to the 2012 draft of the SED.
- The SED does not reflect the required consultation with responsible agencies, including the California Department of Water Resources, California Department of Fish & Game, FERC, Bureau of Reclamation, Department of the Interior, and the U.S. Fish & Wildlife Service occurred.
- The SED does not sufficiently identify or analyze the reasonably foreseeable methods of compliance.
- The SED fails to consider a reasonable range of alternatives and does not adequately assess the “no project” alternative.

Additionally, the assertion in the SED that it only provides an assessment of environmental effects at the programmatic level (SED, at ES-2), is insufficient. It is not clear when specific impacts, including impacts to Gallo and other users of the Stanislaus, Tuolumne, and Merced Rivers, will be evaluated, if at all. A lead agency cannot split a single project into segments to avoid full review of the entire project. *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171. When a project will be implemented in phases, the SED or EIR must still discuss and analyze the significant environmental effects of the entire project, including all components necessary to a project – even those that will be approved by another

agency. *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428. A programmatic approach does not excuse a lead agency from providing a full and clear description and analysis of a project; the lead agency cannot tier a project in order to defer identification and analysis of significant environmental impacts. *See Id.* It seems the programmatic approach is being used here to obscure and delay or avoid addressing the negative impacts of the project.

In sum, it appears the State Water Board improperly decided on a particular course of action and then prepared the SED to support that decision, rather than using the environmental review process to analyze the options.

E. The Project Violates Article X, Section 2 of the California Constitution

Article X, Section 2 of the California State Constitution requires water resources of the state be put to “beneficial use to the fullest extent of which they are capable.” It provides, in relevant part, that: the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Accordingly, in carrying out its authority, the State Water Board must always evaluate and seek to ensure the reasonable, beneficial use of water and avoid waste and unreasonable use. *See Id.*; *see also, U.S. v. SWRCB*, at 129. In order to determine whether a use of water is “reasonable,” the State Water Board must consider, in part: (1) the quantity of water needed for the beneficial use served (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241); (2) a comparison of other potential uses (*Imperial Irr. Dist. v. SWRCB* (1990) 225 Cal.App.3d 548, 570-571); and (3) local environmental conditions (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567). Ultimately, a determination “of reasonable use depends upon the totality of the circumstances presented.” *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.

The SED fails to carry out this analysis, and the proposed flow requirements do not appear capable of achieving the stated intended beneficial purposes. In fact, the SED acknowledges that the increased flow requirements for each of the tributaries to the LSJR will *not* satisfy the objectives of the WQCP, explaining that flows must be “coordinated to achieve beneficial results in the LSJR related to the protection of fish and wildlife beneficial uses.” SED, Appx. K at p. 31. The proposed plan does not, however, call for such coordination. Accordingly, the SED fails to demonstrate that the flow obligations on each river alone are capable of achieving the stated intended beneficial purposes.

The SED also fails to compare any benefits from the proposed use with other beneficial uses for the subject water, including the domestic and irrigation purposes the water at issue has served for more than a century. The SED also fails to consider the project's negative impacts on the water supply generally, including ground and surface water, and how that will impact other beneficial uses of water.

Additionally, the SED does not consider the possibility that increased flows may cause adverse effects to the environment and the species that it is designed to benefit. For example, there is no discussion as to whether increased flows may benefit and increase the population of non-native predator species, and whether and to what degree that would negatively impact the species the Bay-Delta Plan is designed to assist.

F. The Project Will Necessarily Contradict the Objectives of SGMA

Imposition of the proposed flow requirements would preclude local agencies from sustainably managing groundwater in the critically overdrafted Merced Basin and other basins affected by the plan without severely restricting water use for domestic and irrigation purposes, which would devastate the local economies. The SED anticipates the substantial reduction in available surface water will likely be offset and mitigated through increased pumping and use of groundwater. SED, at 9-26, 9-27, 9-32, 18-51. The SED acknowledges this will reduce the ability to recharge groundwater resources. *Id.* This is contrary to state water policy and SGMA's requirement for sustainable groundwater management – particularly in basins such as Merced, which are in critical overdraft. Although the SED acknowledges that groundwater use is generally higher in dry years, it fails to analyze the impact of the recent drought on groundwater levels in the subject area or the project's impacts on the ability to satisfy SGMA's objectives and mandates.

G. The Project Does Not Comply with the Administrative Procedure Act

The Administrative Procedures Act (APA) requires, in relevant part, that: regulations be drafted with sufficient clarity to ensure they are easily understood by those affected by the regulations (Govt. Code §§ 11346.2(A)(1), 11349(c), 11349.1) and that the State Water Board consider the potential for adverse economic impact on California business enterprises and individuals (Govt. Code § 1346.3). As discussed above, the proposed amendments to the Bay-Delta Plan, in particular the newly proposed flow regime, is not drafted with sufficient clarity. Additionally, the proposal does not sufficiently consider the substantial adverse economic impacts the unrestricted flow obligations would cause those who hold water rights to the LSJR and the three eastside tributaries.

H. The SED is Based on Flawed Technical Analysis

Gallo joins in the technical issues raised by the Merced Irrigation District and other parties, and notes in particular its concern about the SED's assumptions regarding Merced River

water use by Cowell Agreement diverters and riparian water right holders.

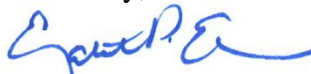
The SED's Water Supply Effects ("WSE") model relies upon two time-series of diversions from the Merced River to represent different groups of water users. The first, CalSim II variable D562, is used to represent diversions by those whose rights are defined in the Cowell Agreement. Although water use pursuant to the rights outlined in the Cowell Agreement varies subject to factors including the level of inflow into Lake McClure, variable D562 reflects a constant annual demand of 94,000 AF in the same pattern each year. This is inaccurate. As the WSE model does not even reasonably reflect the actual use by the Cowell Agreement diverters, it should be corrected to better represent flows in the Merced River, particularly during dry years.

The second time-series of diversions from the Merced River, CalSim II variable D566, is a simulated output used in the WSE model to represent riparian diversions. CalSim II variable D566 incorrectly reflects no diversions for one or more months at a time during irrigation season, when demand actually exists. Because the WSE model relies on demonstrably inaccurate information, it should be corrected to reflect actual riparian demands.

III. CONCLUSION

For the reasons outlined above and in the comments submitted by the Merced Irrigation District, the San Joaquin Tributaries Association, and other parties challenging the SED as inadequate, Gallo believes the project, including in particular the substantial unimpaired flow obligations it imposes, must be reconsidered. The State Water Board can and should find a better means by which to balance all beneficial uses of water with substantially less detriment to the groundwater resources and domestic and agricultural surface water rights and supplies upon which the regional population and economy rely.

Sincerely,



Elizabeth P. Ewens