



NCWA
Northern California Water Association

*To advance the economic, social and environmental sustainability of Northern California
by enhancing and preserving the water rights, supplies and water quality.*

July 27, 2018

VIA ELECTRONIC MAIL

LSJR-SD-COMMENTS@WATERBOARDS.CA.GOV

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

Re: Comments of Northern California Water Association and Sacramento Valley Water Users on Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)

Dear Ms. Townsend:

These comments are submitted on behalf of the Northern California Water Association and its members and the Sacramento Valley Water Users (collectively “NCWA/SVWU”). The entities joining in these comments are listed in Attachment 1. NCWA/SVWU appreciate the opportunity to provide these comments on the proposed amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the “Bay-Delta Plan”) and the proposed final Substitute Environmental Document (“Final SED”). As described in the Notice of Public Meeting dated July 6, 2018, the proposed amendments to the Bay-Delta Plan include new and revised flow objectives for the Lower San Joaquin River (“LSJR”) and its tributaries as well as a program of implementation for these objectives (“Proposed Final Amendments”).

1. *Introduction*

Although the members of NCWA/SVWU do not use water from the LSJR, we are participating in this regulatory process because the determinations made by the State Water Board relating to the LSJR may affect future determinations relating to the Sacramento River and its tributaries. NCWA submitted detailed comments on the draft SED for the proposed changes to the San Joaquin River flow objectives by comment letter dated March 17, 2017, noting that (i) the proposed unimpaired-flow approach is not supported by the best available science; (ii) the complex Delta systems require a coordinated approach to management that integrates flow and non-flow measures; and (iii) the proposed unimpaired-flow approach would have significant water-supply impacts and no significant benefits to fish populations.

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Unfortunately, our comments have been ignored. As has been the case throughout the duration of this San Joaquin basin process, the Final SED still proposes a flow-only approach based on percentages of unimpaired flow, with the proposal now being for flow objectives of 40 percent of unimpaired flows for all of the major San Joaquin River tributaries. This proposal ignores the fact that leading scientists from the University of California, Davis and throughout the world are increasingly focused on non-flow measures such as the re-activation of floodplains as the key to improving conditions for fish within a managed water system such as California's Central Valley. The refusal to consider this emerging scientific consensus is at best perplexing and at worst cause for concern that the results of this regulatory process were predetermined when the informational 2010 Delta Flow Criteria Report was adopted.

In deciding whether to make changes to the Bay-Delta Plan, the State Water Board must consider whether the proposed changes would be 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. The amendments proposed here are neither reasonable nor supported by substantial evidence. NCWA/SVWU have joined with water suppliers throughout the state in offering a new approach to the Bay-Delta that will improve fish populations while also protecting other beneficial uses of water (cities, farms, birds, snakes, recreation, etc.). We urge the members of the State Water Board to consider the very significant water-supply costs and very small fish-population benefits that would result from implementation of the current staff proposal. A flow-only approach has not worked in the past and it will not work in the future. We urge the members of the State Water Board to be creative and bold: reject the Proposed Final Amendments and direct staff to prepare a new proposal that promotes the protection of fish and the maximum utilization of the state's precious water resources.

2. *The Unimpaired Flow Approach Is Not Supported by the Best Available Science.*

The Final SED's approach of focusing on increasing flows and essentially ignoring non-flow measures does not satisfy the statutory requirement that an update to the Bay-Delta Plan be based on sound science. Health & Safety Code § 57004; Water Code § 85280(b)(4) (Delta Science Program directed to provide "the best possible unbiased scientific information to inform water and environmental decision making in the Delta"); *see State Water Board Strategic Plan 2008-2012*, at 7 ("We strive to earn the trust and respect of those we serve through commitment to truth, transparency, accountability, sound science in decision-making, fairness, and environmental justice."). Ignoring these requirements, the Final SED states that its "fundamental project purpose and goal" 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).

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Final SED at ES-8 (emphasis added). As to non-flow actions, the Final SED states that the State Water Board will “recommend” certain actions in the implementation plan part of the Water Quality Control Plan. Final SED at ES-19. “Increased flows, however, remain the principal means of compliance because science shows that additional flow is still needed, at a minimum, to reasonably protect fish and wildlife beneficial uses in the LSJR.” (*Id.*)

As recently as December 2016, a peer-reviewed study on the utility of pulse flows in salmonid recovery on the Stanislaus River concluded that flows alone only go so far to benefit fisheries. Although managed pulse flows resulted in immediate increases in daily passage, that response was brief and not sustained over the long term. Matthew L Peterson, Environmental Factors Associated with the Upstream Migration of Fall-Run Chinook Salmon in a Regulated River, *37 American Journal of Fisheries Management* 78–93, 89 (2016). While pulse flows may be a useful tool for restoring and maintaining fish habitat in certain instances, they are certainly not the defining factor in preserving fish populations. Moreover, the Peterson study indicates that, at least as to the Stanislaus River, there are certain thresholds in timing and magnitude of discharges beyond which pulse flows provided no additional benefit. *Id.* at 91.

The Peterson study’s conclusions are consistent with the observations and data provided by NCWA and others to the SWRCB at its workshops in 2012, and with the scientific community’s evolving thinking regarding the benefit of unimpaired flows to Delta fish populations. Like the draft Scientific Basis Report for Phase 2 of the Bay-Delta Plan, the Final SED relies on outdated material and lacks empirical support. It is especially troubling to NCWA/SVWU that the concerns outlined above and the supporting data have been repeatedly presented to the State Water Board since 2012 and yet the Final SED fails to remedy these errors, or even to respond substantively to the scientific evidence presented by NCWA/SVWU and other parties. Here, the issue “goes beyond a disagreement of qualified experts over the reasoned conclusions as to what the data reveals.” *Berkeley Keep Jets Over the Bay v. Board of Port Comm’rs of the City of Oakland*, 91 Cal. App. 4th 1344, 1371 (2001). The Final SED fails to “acknowledge the opinions of responsible agencies and experts who cast substantial doubt on the adequacy” of its analysis. *Id.* “These violations of CEQA constitute an abuse of discretion.” *Id.* See also *California Hotel and Motel Ass’n v. Industrial Welfare Comm.*, 25 Cal. 3d 200, 213 n.30 (1979) (“Whatever the formulas, good judges customarily tread lightly when they are impressed with the care, conscientiousness, and balance of the administrators, but they penetrate more deeply . . . when the administrative performance seems to them to have been slovenly.”)

3. *The State Water Board Should Not Adopt the Proposed Narrative Objective Because Doing So Would Be Inconsistent With the Board's Most Fundamental Obligations Under Porter-Cologne and CEQA.*

The narrative element of the LSJR Proposed Final Amendments is framed in terms of “maintaining viable native migratory San Joaquin River fish populations.” (SED at ES-12). It is impossible for the State Water Board or anyone else to determine how such an objective would be implemented, and thus it is impossible for the State Water Board to evaluate its impacts, as required by Porter-Cologne (Water Code § 13241) and CEQA.

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The most recent changes to the proposed narrative objective only emphasize this flaw. In those changes, the Final SED has an added paragraph, which 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.*" (Final SED, Appendix K, p. 18; emphasis added.) This text appears to have been added at this late hour because it is clear that implementing the proposed February-June unimpaired-flow objective potentially could result in serious water temperature impacts to salmon later in the year. This serious possibility is confirmed by the inclusion of language in the proposed program of implementation that implementation of the objective will include "minimum reservoir carryover storage targets or other requirements" to avoid "significant adverse temperature or other impacts on fish and wildlife." (Final SED, Appendix K, p. 28.) Nowhere, however, do any of the documents actually explain how any of this would occur.

It therefore is impossible for the State Water Board or anyone else to determine what the effects of the proposed narrative objective would be. The State Water Board cannot explain to the public what the results of adopting the proposed narrative objective would be. It cannot perform anything like the balancing of factors required by Porter-Cologne because it is impossible to know what the proposed objective would mean in reality. This proposed narrative objective's description is so vague that it provides the public with no information about what effects implementing the objective would have, beyond some very significant redirection of water from human use to outflow. Because the State Water Board cannot determine the potential impacts of implementing its proposed objective, it cannot satisfy its most basic obligations under Porter-Cologne and CEQA. As such, the State Water Board cannot adopt the narrative objective because to do so would be arbitrary and capricious.

4. *By Proposing to Amend the Wrong Water Quality Control Plan, the Proposed Final Amendments Fail to Undertake the Statutorily Mandated Balancing of the Public Interest on the Affected Streams.*

The Proposed Final Amendments apply to, and are intended to protect, the waters of the legal Delta. *See* Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary (May 1995) ("1995 Bay-Delta WQCP"), at pp. 1-7; Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Dec. 13, 2006) ("2006 Bay-Delta WQCP"), at pp. 1-3. The existing Bay-Delta Plan designates water quality objectives to be met at Vernalis, which is within the legal Delta. 2006 Bay-Delta WQCP, pp. 28-30, 53. However, the waters of the Merced, Tuolumne, and Stanislaus Rivers are not within the legal Delta. Water Code § 12220. The water quality objectives for these rivers are included in the Central Valley Basin Plan for the Sacramento River Basin and the San Joaquin River Basin with amendments approved in 2016. As required by law, the water quality objectives for these rivers were developed and adopted after a balancing of the competing uses of water. *See* Water Code § 13241 (requiring the boards to consider the water quality objective's impact on factors such as past, present and future beneficial uses of the water; economic considerations; and housing).

The Proposed Final Amendments would amend the Bay-Delta Plan to add new water quality objectives for the tributaries to the San Joaquin River, which are not within the legal Delta and are not within the waters protected by the Bay-Delta Plan. When the State Water Board considers amending the Bay-Delta Plan, it must consider how the proposed new objectives would affect the past, present and future

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beneficial uses of water in the Bay-Delta, the economy of the Bay-Delta, and the housing of the Bay-Delta. Impacts of the new objectives would occur in upstream areas outside of the legal Delta and have not been considered in the context of the Central Valley Basin Plan. If the State Water Board were to adopt these water quality objectives, it would effectively be superseding the existing water quality objectives which the Central Valley Regional Board set for those streams, *without undertaking the statutorily mandated analysis of the competing uses for this water*. See Water Code §§ 13170, 13240-13244. This effectively would obviate Porter Cologne's required public-interest balancing.

5. *Complex Delta Systems Require a Coordinated Approach to Management.*

NCWA and other commenters have repeatedly raised concerns about the flow-centric approach taken in prior drafts of the SED. The Final SED and Proposed Final Amendments do not adequately respond to NCWA's principal concern—namely that the use of unimpaired flow as the primary mechanism for achieving salmon recovery objectives would impose substantial impacts on water users without any marked benefit to fisheries and so fails to balance competing beneficial uses of water as required by Porter-Cologne.

During the Fall 2012 State Water Board workshops on Phase 2 of the Comprehensive Review of the Bay-Delta Plan, NCWA and others presented substantial evidence demonstrating that preserving and restoring fishery resources requires *both* flow and non-flow measures (e.g., habitat restoration measures). That testimony established that reliance on simplistic statistical correlations between flows and fish populations grossly misapprehends the management challenges of the Delta. See, e.g., ICF, *DRAFT Bay-Delta Plan Workshops Summary Report*, pp. 6, 9, 20 (Dr. Wim Kimmerer), 24 (Dr. Cliff Dahm) (Jan. 2013.)

Water Code section 13241(c) requires the State Water Board, in weighing a proposed water quality objective such as those at issue here, to consider the “water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” In the context of fishery flows, “all factors” necessarily encompasses non-flow measures such as predator control, flood plain management and improvement of spawning and rearing habitat. The fact that the State Water Board lacks authority to require the implementation of certain non-flow measures does not excuse the Board from assessing – as required by Porter-Cologne – what can be achieved through “coordinated control of all factors which affect water quality” in the Bay-Delta watershed.

6. *The Unimpaired Flow Approach Would Impose Significant Costs, Without Evidence of Significant Benefits.*

The Delta Reform Act sets out the co-equal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. Water Code section 85054. The Final SED describes a plan that would threaten the first of these goals without empirical evidence to support the achievement of the second. This unbalanced approach is inconsistent with the Legislature's mandate that water supply reliability and ecosystem restoration be treated as co-equal goals.

Empirical data indicates that an unimpaired flow regime would not be the panacea that the Final SED suggests. Since the adoption of Revised Water Right Decision No. 1641, and the 2008 and 2009

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salmon and Delta smelt biological opinions, more than 1.3 million acre-feet per year of additional outflow has been dedicated to fisheries protection.¹ If flow truly was the limiting factor in the recovery of fisheries, there would have been attendant increases in fish populations over that time period. Instead, there has been observable decline.

There is no empirical evidence to suggest that an unimpaired flow approach would significantly benefit fisheries, and substantial evidence indicates that it would not. In May 2014, a panel of experts directed by the Delta Stewardship Council to consider the relationship of flow to other stressors observed that some of the potential flow options identified for the Bay-Delta “would come at very large costs to water users. These costs are also rarely quantified during outflow discussions.” Delta Stewardship Council, *Workshop on Delta Outflows and Related Stressors Panel Summary Report*, p. 39 (attached as Exhibit D to NCWA March 17, 2017 comment letter). The panel’s report went on to state:

It is highly uncertain whether the collaborative adaptive management approach proposed by the Delta Science Program can resolve the extreme trade-offs that exist in the Bay-Delta [Adaptive Management] setting. Implementation of new flow criteria is going to be very challenging...a systems context for considering outflow criteria should also evaluate non-flow alternatives, such as predator control; to date, such consideration of other options has been relatively limited.

Id. Given the lack of evidence that the unimpaired flow approach will truly benefit fish populations, the potential costs imposed upon consumptive uses are disproportionately high. Indeed, the SalSim model results presented in the Final SED estimate that the proposed 40 percent unimpaired flow objective would yield a return of only an additional 1,103 fish. Final SED, Volume 1, Chapter 19, Table 19-32.² That benefit would come at a cost of nearly 300,000 acre-feet of water per year--sufficient water to irrigate 100,000 acres of land or provide water to approximately 1.5 million people. Final SED, Table ES-2 at ES-22.

7. *Conclusion*

For the foregoing reasons, NCWA/SVWU urge the SWRCB to revise and recirculate the Final Proposed Amendments and the Final SED so that the State Water Board’s action will be consistent with the Porter-Cologne, CEQA, the Delta Reform Act, and the best available science.

Thank you for the opportunity to submit these comments.

¹ Of the 1.3 million acre-feet, approximately 300,000 acre-feet can be attributed to D-1641 outflow and compliance; and an additional 1 million acre-feet is attributable to compliance with the Salmon and Smelt Biological Opinions. See MBK Engineers and HDR “Retrospective Analysis of Changed Central Valley Project and State Water Project Conditions Due to Changes in Delta Regulations,” January 2013, attached hereto as Exhibit C.

² Addressing comments submitted on the Draft SED, the State Water Board staff asserts in Master Comment 3.1 that the increase of 1,103 adult salmon reflected in Table 19-32 is inaccurate because it includes the entire 16-year simulation period. By excluding the first four and final five years from the simulation period and adding potential flow modifications under adaptive management, the State Water Board staff suggests that a range of 2,059 to 7,637 adult salmon is a more appropriate benefit representation. Final SED, Vol. 3, Master Response 3.1 at pages 63-64.

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Very truly yours,

NORTHERN CALIFORNIA WATER ASSOCIATION



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President

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/s/ Kevin M. O'Brien
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MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP

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/s/ Wesley A. Miliband
Wesley A. Miliband

PLACER COUNTY WATER AGENCY

/s/ Dan Kelly
Dan Kelly

Attachment 1

Northern California Water Association Members

Anderson-Cottonwood Irrigation District
 B&B Ranch
 Brophy Water District
 Browns Valley Irrigation District
 Butte County Board of Supervisors
 City of Colusa
 City of Redding
 Crain Orchards, Inc.
 Danna & Danna Inc.
 Edwards Ranch
 Feather Water District
 Fedora Farms
 G&K Farms, LLC.
 Garden Highway Mutual Water Co.
 Garner, Garner & Stoy
 Glenn Colusa Irrigation District
 Hallwood Irrigation District
 Henle Family Limited Partnership
 Hershey Land Row Crop, LLC.
 J.A. Driver
 Joint Water Districts Board
 Biggs-West Gridley Water District
 Butte Water District
 Richvale Irrigation District
 Sutter Extension Water District
 Knaggs Ranch
 Larry Pires Farms
 Lindauer River Ranch, Inc.
 Llano Seco Rancho
 M&T Ranch
 Maxwell Irrigation District
 Meridian Farms Water Co.
 Natomas Mutual Water Co.
 Oji Brothers Farms, Inc.

Pacific Farms & Orchards
 Pacific Gold Agriculture
 Paul Bertagna
 Pelger Mutual Water Company
 Placer County Water Agency
 Pleasant Grove-Verona Mutual Water Co.
 Plumas Mutual Water Co.
 Princeton-Codora-Glenn Irrigation Dist.
 Provident Irrigation District
 R. Gorrill Ranch Enterprises
 Ramirez Water District
 Reclamation District 1004
 Reclamation District 108
 Reclamation District 2035
 Richter Brothers, Inc.
 Rising Eagle Ranch
 River Garden Farms
 Riverview Land & Equipment, Inc.
 Shasta County Board of Supervisors
 South Sutter Water District
 South Yuba Water District
 Sutter Bypass-Butte Slough WUA
 Sutter County Board of Supervisors
 Sutter Mutual Water Company
 Sycamore Trust
 Taylor Brothers Farms
 Tehama Angus Ranch, Inc.
 Tehama County Board of Supervisors
 Thermalito Irrigation District
 Tudor Mutual Water Co.
 Tuttle Ranches
 Western Canal Water District
 William P. Lockett
 Yolo County Flood Control & WCD
 Yuba County Water Agency

Sacramento Valley Water Users (that are not NCWA Members)

Calaveras County Water District
 City of Folsom
 El Dorado County Water Agency
 El Dorado Water & Power Authority
 Paradise Irrigation District
 City of Roseville

City of Sacramento
 Sacramento County Water Agency
 Sacramento Municipal Utility District
 Sacramento Suburban Water District
 San Juan Water District
 South Feather Water and Power

From: Danyella Herrera <dherrera@norcalwater.org>
Sent: Friday, July 27, 2018 4:22 PM
To: LSJR-SD-Comments@waterboards.ca.gov; WQCP1Comments
Subject: RE: Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments
Attachments: Comment Ltr. 7.27.18 (R).pdf

Categories: Red Category

Attached is the revised letter due to a spacing issue that was on the bottom of page one. Thank you.

From: Danyella Herrera
Sent: Friday, July 27, 2018 9:59 AM
To: 'LSJR-SD-Comments@waterboards.ca.gov' <LSJR-SD-Comments@waterboards.ca.gov>
Subject: Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments

Please see the attached comment letter from NCWA.

Thank you,
[Danyella Herrera](#)
Northern California Water Association
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