



July 27, 2018

**VIA ELECTRONIC MAIL ONLY**

State Water Resources Control Board  
 Attn: Jeanine Townsend, Clerk to the Board  
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Re: Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments

Dear Members of the State Water Resources Control Board:

The public water agencies that are signatories to this letter (“South of Delta CVP Contractors”)<sup>1</sup> are significantly disappointed with the proposal for the Phase 1 updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Phase 1 Bay-Delta Plan Updates”). The Phase 1 Bay-Delta Plan Updates are not supported by policy, science, or the law.<sup>2</sup>

The approach taken to protect water quality for the beneficial use of water by San Joaquin River watershed fish populations (often referred to as the “San Joaquin River flow objectives”) is crude. It assumes that, in the highly altered San Joaquin River watershed, dedication of more water will result in increases in the year-to-year abundance

<sup>1</sup> Signatories to this letter include the San Luis & Delta-Mendota Water Authority and member agencies Byron-Bethany Irrigation District, Central California Irrigation District, Del Puerto Water District, Firebaugh Canal Water District, Henry Miller Reclamation District 2131, James Irrigation District, Mercy Springs Water District, Pacheco Water District, Panoche Water District, San Benito County Water District, San Luis Water District, Tranquillity Irrigation District, Westlands Water District and West Stanislaus Irrigation District.

<sup>2</sup> South of Delta CVP Contractors have submitted extensive comments on previous drafts of the Phase 1 Bay-Delta Plan Updates. Those comments remain relevant to the latest iteration of the revised objectives and are incorporated herein by reference.

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of fish. That assumption is not supported by credible science. The State Water Resources Control Board (“State Water Board”) would demand the dedication of more water without first establishing biological or environmental objectives – no less objectives that are biologically specific, measurable, achievable, relevant, and timely (“S.M.A.R.T”). For each component of flow that would be required, there is no description of the desired outcomes for species across relevant viability parameters that are S.M.A.R.T. And, there is no description of the physical, chemical, and biological conditions necessary to support biological objectives or how the proposed flow standard would enhance those conditions for the beneficial use by San Joaquin River watershed fish populations. Flow is not an appropriate parameter for a water quality objective. Rather, it is a tool, amongst other non-flow measures, that can be used to implement an objective. As the State Water Board has done in all other circumstances, it must *first* establish S.M.A.R.T. biological goals, *next* set scientifically supported water quality objectives to meet those goals, and *finally* consider the comprehensive approach (water quality, water rights, and other actions) necessary to achieve those objectives.<sup>3</sup>

In addition, the proposed Program of Implementation inexplicably imposes new requirements – minimum storage requirements for the reservoirs on tributaries to the San Joaquin River and a requirement that flows are protected “through Delta.” It also directly and “as applied” prematurely assigns responsibility to water right holders. The addition of new requirements and assignment of responsibility, which will affect vested property interests, are not supported by the facts or the law. Prior to imposing responsibility on water right holders, basic principles of due process - which arise from the Constitution and cannot be overridden by statute – require that the water right holders be given notice and an opportunity to be heard in a quasi-judicial proceeding before their water rights can be modified. The proposed Program of Implementation has other flaws as well, including its inclusion of an “assimilative capacity” component in the southern Delta salinity objective, and its treatment of dissolved oxygen.

Finally, the final Substitute Environmental Document (“Final SED”) does not consider a reasonable range of alternatives – as a result of the focus on flow, alternatives that consider objectives for water quality constituents or characteristics (e.g., temperature and turbidity) are ignored. The Final SED ignores significant impacts by assuming the impacts of reduced surface water will be offset by groundwater pumping and by ignoring impacts to areas south of the Delta, including those served by the South of Delta CVP Contractors. Also, the Final SED unlawfully segments analysis of impacts from Phase 1 and Phase 2 and ignores the cumulative impacts of the full update to the Bay-Delta Plan.

South of Delta CVP Contractors respectfully request the State Water Board decline to adopt the Phase 1 Bay-Delta Plan Updates in their current form, and instead conform

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<sup>3</sup> In contrast, the Program of Implementation in the Phase 1 Bay-Delta Plan Updates indicates that the State Water Board will set S.M.A.R.T. biological goals in the future, after adoption of the Phase 1 Bay-Delta Plan Updates. (Appendix K, pp. 30, 32, 33.)

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the Phase 1 Bay-Delta Plan Updates, as well as the Phase 2 documents currently being prepared, to these comments, attachments, and referenced materials. Going forward, South of Delta CVP Contractors urge the State Water Board to make significant changes in its approach to and framework for the Phase 2 updates.

1. **The Approach Taken To Protect Water Quality For The Beneficial Use Of Water By San Joaquin River Watershed Fish Populations And In The Proposed Program Of Implementation Ignores The Separate Functions Of The State Water Board And Two Of The Most Important Cases Decided On Bay-Delta Water Quality Planning**

A. **The Law Is Well Established – The State Water Board Cannot Conflate Its Water Quality And Water Rights Authority**

The State Water Board performs dual functions – a legislative function of developing and amending water quality control plans and an adjudicatory function of allocating water rights. Different standards and processes apply to each. The State Water Board commits serious error when it blends the two functions, as it would if it were to follow the proposed approach to protect water quality for the beneficial use by San Joaquin River watershed fish populations and in the Program of Implementation. The law is clear, “[i]n performing its regulatory function of ensuring water quality by establishing water quality objectives, the [State Water] Board acts in a legislative capacity. The Water Quality Control Plan itself is thus a quasi-legislative document.” (*U.S. v. SWRCB* (1986) [*Racanelli*] 182 Cal.App.3d 82, 112.) In contrast, “in undertaking to allocate water rights, the [State Water] Board performs an adjudicatory function.” (*Id.* at 113.)

When the State Water Board performs an adjudicatory function, it must follow procedures to ensure due process. An “adjudicative proceeding” means an “evidentiary hearing for determination of facts pursuant to which the State [Water] Board or a Regional Board formulates and issues a decision.” (Cal. Code Regs., tit. 23, § 648, subd. (a); Gov. Code, § 11405.20.) All “adjudicative proceedings” before the State Water Board are governed by Title 23 of the California Code of Regulations, section 648 et seq., chapter 4.5 of the Administrative Procedure Act. (Gov. Code, § 11400 et seq.), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648, subd. (b).) Those regulations and statutory provisions provide procedural protections for the party or parties whose water rights may be modified by an adjudicative proceeding.

The courts have cautioned the State Water Board against blending its dual functions and have voided State Water Board action when it does blend its functions. In *Racanelli*, which involved Decision 1485, the Court of Appeal explained:

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We think the procedure followed – combining the water quality and water rights functions in a single proceeding – was unwise. The Legislature issued no mandate that the combined functions be performed in a single proceeding. The fundamental defect inherent in such a procedure is dramatically demonstrated: The Board set only such water quality objectives as could be enforced against the [CVP and SWP] . . . [I]n order to fulfill adequately its water quality planning obligations, we believe the Board cannot ignore other actions which could be taken to achieve Delta water quality, such as remedial actions to curtail excess diversions and pollution by other water users.

(*Racanelli*, 182 Cal.App.3d at 119-20.)

*State Water Resources Control Board Cases* (2006) [“*SWRCB Cases*”] 136 Cal.App.4th 674, provides a second example of the defect in mixing the State Water Board’s legislative and adjudicatory functions. There, the Court of Appeal considered challenges to Decision 1641, a water rights decision that, among other things, assigned partial responsibility for implementing objectives adopted in the 1995 Bay-Delta Plan. The program of implementation in the 1995 Bay-Delta Plan stated that the Vernalis pulse flow objective would be implemented through a subsequent water rights proceeding, although it did not provide for its sequential implementation. (*SWRCB Cases*, 136 Cal.App.4th at 727-28.) In Decision 1641, however, the State Water Board adopted a proposal for staged implementation. In rejecting this approach, the Court of Appeal explained that the State Water Board could not, in effect, amend the 1995 Bay-Delta Plan through the water rights proceeding:

[T]he Board could not properly adopt the San Joaquin River Agreement’s alternate flow regime, even on a temporary basis, in the water rights proceeding under the guise of a ‘staged implementation’ of the objectives in the 1995 Bay-Delta Plan, because that ‘staged implementation’ fundamentally altered those objectives, and such an alteration could be accomplished only through a properly noticed and conducted regulatory proceeding.

(*Id.* at 729.)

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**B. Notwithstanding The Law, The Phase 1 Bay-Delta Plan Updates Unlawfully Assign Implementation Responsibility To Water Rights Holders**

If the State Water Board accepts the recommendations of staff, the updated Bay-Delta Plan will provide:

Most of the objectives in this ongoing plan are being, and will continue to be, implemented by assigning responsibilities to water right holders because the parameters to be controlled are primarily impacted by flows and diversions. This plan, however, is not to be construed as establishing the responsibilities of water right holders. Nor is this plan to be construed as establishing the quantities of water that any particular water right holder or group of water right holders may be required to release or forego to meet the objectives in this plan. The State Water Board will consider, in a future water rights proceeding or proceedings, the nature and extent of water right holders' responsibilities to meet these objectives.

(Appendix K, p. 4.) Those are important statements, as they reflect the law established by *Racanelli* and the *SWRCB Cases*. Unfortunately, the Phase 1 Bay-Delta Plan Updates do not adhere to those statements and thus the law.

Instead, the approach taken to protect the beneficial use of water by San Joaquin River watershed fish populations unlawfully assigns responsibility to water right holders in the present quasi-legislative proceeding. Under the approach, compliance would be measured at specific locations on the Stanislaus, Tuolumne and Merced Rivers. By setting the compliance locations upstream, there is no way to implement the objectives other than condition specific water rights – those held by Oakdale Irrigation District, South San Joaquin Irrigation District, Modesto Irrigation District, Merced Irrigation District, Tuolumne Irrigation District, and the City and County of San Francisco.

Further, the proposed Program of Implementation explicitly assigns to the United States Bureau of Reclamation (“Reclamation”) and California Department of Water Resources (“DWR”) responsibility for southern Delta salinity objectives.<sup>4</sup>

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<sup>4</sup> The assignment of responsibility to the CVP is inexplicable, in addition to the legal defect, because the levels of salinity in the south Delta are due to multiple factors, only some of which are attributable to the CVP. The Phase 1 Bay-Delta Plan Updates concede this point, stating: “Salinity problems in the southern Delta primarily result from low flows, tidal action, diversions by the CVP, SWP and local water users, agricultural return flows, poor circulation, and channel capacity.” (Appendix K, p. 46.) Further, as South of Delta CVP Contractors have explained in prior comments, in many circumstances, the CVP improves water quality in the southern Delta because it brings fresher water from the Sacramento River into the south Delta.

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“USBR shall be required to continue to comply with these salinity levels, as a condition of its water rights.” (Appendix K, p. 42.)

“As part of implementing the salinity water quality objective for the interior southern Delta, the State Water Board will amend DWR’s and USBR’s water rights to continue to require implementation of the interior southern Delta salinity water quality objectives consistent with this plan.” (Appendix K, p. 42.)

“DWR’s and USBR’s water rights shall be conditioned to require development of information that will be used to determine the appropriate locations and methods to assess attainment of the salinity objective in the interior southern Delta...” (Appendix K, p. 43.)

“Prior to State Water Board approval of the Monitoring and Reporting Plan, compliance of the salinity objective for the interior southern Delta will be assessed at stations C-6, C-8, and P-12, which USBR and DWR shall be required to continue to operate as a condition of their water rights.” (Appendix K, p. 43.)

“DWR’s and USBR’s water rights shall be conditioned to require continued operations of the agricultural barriers at Grant Line Canal, Middle River, and Old River at Tracy....” (Appendix K, p. 45.)

In response to comments, the Phase 1 Bay-Delta Plan Updates explain why the State Water Board staff believe the State Water Board can assign responsibility to water right holders in a water quality control plan:

Some commenters stated water right conditions cannot be determined in a program of implementation as part of a water quality control plan proceeding, but must instead be established through an adjudicatory proceeding, which affords due process. However, these commenters are incorrect. Water Code section 13242 requires a program of implementation for achieving water quality objectives, which must include a description of the nature of actions that are necessary to achieve the objectives. (Wat. Code, § 13242, subd. (a).) Consistent with this requirement, the proposed

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implementation program for the plan amendments sets forth the actions necessary to achieve the salinity objectives; specifically, it states that through water right actions, USBR and DWR would be required to continue complying with salinity requirements as conditions of their water rights. The State Water Board has been granted a “‘broad,’ ‘open-ended,’ and ‘expansive’ authority to undertake comprehensive planning and allocation of water resources.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 449.) This includes the authority to enact rules and regulations that condition water rights. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1484-1487 [the Board’s broad adjudicatory and regulatory authority is coincident with that of the Legislature and includes the power to enact regulations governing the reasonable use of water] citing *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585.) Moreover, it has long been established that a legislative act, like a regulation or rulemaking, such as the proposed plan amendments, can dictate the outcome that would otherwise be decided in a later evidentiary hearing. (See, e.g., *U.S. v. Storer Broadcasting* (1956) 351 U.S. 192.)

(Master Response 3.3, p. 15.) That response is not a legally supportable excuse, for at least two reasons.

First, a statute such as Water Code section 13242 cannot sanction or excuse a violation of the Constitutional right to due process. If section 13242 required the State Water Board to deny water rights holders due process, which it does not, it would be void. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.) Second, while section 13242, subdivision (a) does require a “description of the nature of actions which are necessary to achieve the objective,” the Program of Implementation can meet that requirement simply by stating that “modification of water rights” is one such action. Nothing in section 13242, subdivision (a) requires the State Water Board to call out a particular water right holder in the Program of Implementation. Moreover, if the State Water Board were to adopt the staff’s recommendation, it would prejudge the outcome of the adjudicatory process demanded by basic principles of due process. It would be reminiscent of numerous lines from western movies, to the effect, “we will give you a fair trial, and then hang you.”

In sum, the State Water Board must take care not to mix its legislative and adjudicatory functions. Stating in the Phase 1 Bay-Delta Plan Updates that objectives will be met by modifying specific water rights preordains the outcome of any subsequent

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water rights proceeding. The “guiding principle” in any water right proceeding commenced to implement a water quality control plan is that the State Water Board's power to act in such a water rights proceeding “is constrained by the terms of the plan it is implementing.” (*SWRCB Cases*, 136 Cal.App.4th at 729.) By identifying modification of specific water rights as the means to meet objectives, the State Water Board assures that is what it must order at the conclusion of any water rights proceedings. The Phase 1 Bay-Delta Plan Updates mix the State Water Board's legislative and adjudicatory functions, and would thus deprive water right holders of their Constitutionally afforded due process, rendering the Phase 1 Bay-Delta Plan Updates unlawful.

## **2. Flow Is Not An Appropriate Water Quality Parameter**

South of Delta CVP Contractors explained in prior comments that adoption of the proposed objectives intended to protect the beneficial use of water by San Joaquin River watershed fish populations would be unlawful because flow is not a proper water quality objective parameter. The Porter-Cologne Act defines “water quality objectives” as “limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.” (Wat. Code, § 13050, subd. (h).) Examples of such constituents or characteristics include ammonia, bacteria, chemical constituents, color, pH, sediment, suspended materials, temperature, toxicity, turbidity. It is appropriate for the State Water Board to set water quality objectives targeting these specific constituents and characteristics, but not flow.

The flow-based approach taken in the Phase 1 Bay-Delta Plan Updates runs counter to scientific recommendations as well, including those made by the United States Environmental Protection Agency. (See U.S. E.P.A. April 25, 2012 comments [“The WQCP should contain standards that, to the greatest extent possible, address conditions or parameters that directly affect beneficial uses and are measurable in the field. For example, salinity or temperature may directly affect the aquatic resource and are readily measurable”]; U.S. E.P.A. August 17, 2012 comments [“The Board should connect percent unimpaired flows (UIF) to the physical or chemical variables that directly affect beneficial uses and are measurable in the field. For example, salinity or temperature may directly affect the aquatic resource (e.g., fish, invertebrate, algae) and are readily measurable”].) The Phase 1 Bay-Delta Plan Updates do not accept these recommendations. The proposal offers no meaningful explanation why the parameters for the objectives are flow-based.

In Chapter 19 of the Final SED, there is the suggestion that a flow-based approach is being taken because flow is the “master variable.” A principal scientific article cited in the Final SED to explain the benefits of the flow-based approach describes flow as the “master variable” because it influences many environmental factors that affect fish, including water quality constituents or characteristics such as temperature and water

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chemistry. (Final SED, Ch. 19, p.19-5.) If that is the reason for the approach, it does not justify specifying flow as a water quality objective. Water quality objectives are “the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area,” (Water Code section 13050(h)), which historically have been factors like: ammonia, bacteria, chemical constituents, color, pH, sediment, suspended materials, temperature, toxicity, or turbidity. As such, the concept of flow as the “master variable” should be used for water quality implementation, not as a water quality objective itself.

Indeed, identical to the Delta Stewardship Council’s Independent Science Board’s criticisms of the unimpaired flow approach presented for Phase 2, the Phase 1 Bay-Delta Plan Updates continue to be devoid of explanations of:

- a) how the fixed annual quantity of water would be used, with and without successful agreements among basin water managers and
- b) how the annual water volumes would be calculated (by basin and/or by tributary).

(ISB Comment letter, p. 2.) And, “[t]he ‘unimpaired flows’ label seems to better describe the basis for annual volume calculation, rather than the perhaps more ecologically important issue of how the volume would be managed.” (*Ibid.*)

Text throughout the Phase 1 Bay-Delta Plan Updates discusses how fish populations may be impacted by water quality constituents and characteristics. (See, e.g., Appendix K, pp. 28, 31, 39, 41, 45, 46.) Nowhere, however, do the Phase 1 Bay-Delta Plan Updates adequately explain why it does not establish objectives for the underlying biological mechanisms, the water quality constituents and characteristics needed to provide reasonable protection for beneficial uses. Instead, the Phase 1 Bay-Delta Plan Updates conclude:

It is consistent with state and federal water quality law for the plan amendments to include a narrative inflow objective that represents water quality conditions from the SJR Watershed to the Delta that will support fish and wildlife beneficial uses.

(Master Response 1.2, p. 5.) This conclusory statement does not justify use of flow as an appropriate parameter for a water quality objective, or how flow may be considered a “water quality constituent or characteristic.” Instead, the Phase 1 Bay-Delta Plan Updates inexplicitly defer consideration of water quality constituents and characteristics to the Stanislaus, Tuolumne, and Merced Working Group. (Appendix K, p. 32.)

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**3. The Dedication Of Water Required By The Phase 1 Bay-Delta Plan Updates Would Be A Waste And Unreasonable Use Of Water And A Violation Of Article X, Section 2, Of The California Constitution And The Delta Reform Act**

The State Water Board has discretion when establishing water quality objectives. That discretion, however, has limits. The limits include the California Constitution and state policy established when the Delta Reform Act became law.

The California Constitution declares that the water resources of the State must "be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use . . . of water be prevented . . ." (Cal. Constitution Art. 10, § 2; see Wat. Code, § 100 [same].) The prohibition against waste or unreasonable use derives from statewide considerations of transcendent importance, among which is the increasing need to conserve scarce water resources to accommodate increasing demands for new consumptive uses as California's population and economy continued to grow, *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 140, and "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443, 446.)

Through the Delta Reform Act, Water Code, section 85000 et seq., California established "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem" as the water policy priorities for the Delta. (Wat. Code, § 85054.) And yet, the Phase 1 Bay-Delta Plan Updates would give priority to protecting, restoring, or enhancing the Delta ecosystem over a more reliable water supply for California by annually dedicating hundreds-of-thousands of acre-feet of water to instream flow, in the mere hope that the action would benefit fish. This annual dedication would have the concomitant impact on the people and economy of the San Joaquin Valley and beyond, and it would amount to an unreasonable use of water, a violation of Article X, Section 2, of the California Constitution, and a violation of California's co-equal goals.

The proposed objectives intended to protect the beneficial use of water by San Joaquin River watershed fish populations will result in the waste and unreasonable use of water because they are unlikely to provide any meaningful benefits to desirable fish species due to diminished and disrupted habitats in the Bay-Delta watershed such as lost floodplains, the proliferation of invasive species, shifts in the food-webs, and increases in pollutants, among other changes. Water dedicated to meet the objectives will be sent on a doomed mission, because many of the ecosystem functions necessary for that water to protect or enhance fish abundance are not present, or because non-flow factors will interfere with those functions. In exchange for uncertain benefit for fish species and contrary to the goal of providing a more reliable water supply for California, implementing the objectives will deprive existing beneficial uses of much needed water, harming the farms, communities, and environment of the San Joaquin Valley and the Silicon Valley.

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It is unreasonable and contrary to the Delta Reform Act to inflict such harm on other beneficial uses, with little or no predictable benefit for fish, simply based on the assumption that the other elements needed to realize the benefits of the flows for fish will someday materialize.

**4. If The State Water Board Wants To Set Flow As A Water Quality Objective, It Must First, and Through a Separate Effort, Follow Formal Rulemaking Procedures**

The use of flow as a parameter for a water quality objective runs afoul of the California Administrative Procedure Act, California Government Code §§ 11340 *et seq.* (“APA”). A “regulation” within the meaning of the APA includes “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure” (Gov. Code, § 11342.600). Under the APA, a promulgating agency “must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law. . .” (*County of Butte v. Cal. Emergency Medical Services Authority, Inc.* (2010) 187 Cal.App.4th 1175, 1200 [internal quotations and citations omitted].) The State Water Board has not done that here.

In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court explained that a regulation is subject to the APA if it has two principal identifying characteristics: (1) “the agency must intend its rule to apply generally, rather than in a specific case;” (2) “the rule must ‘implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.’” (Citing Gov. Code, § 11342, subd. (g).) The State Water Board staff’s interpretation of “water quality objective” to include flow meets these criteria. Yet, the State Water Board has never complied with the requirements of the APA to formally adopt its expanded definition of water quality objectives. Accordingly, a water quality objective defined by flow would be based on an underground regulation, and hence invalid. (*Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765 [citing *Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217].)

South of Delta CVP Contractors have previously raised this point in comment letters. However, the State Water Board staff’s response to this comment is inadequate. The response to this comment directs one to refer to Master Response 1.2 and 2.1. (Final Amendments and SED (July 6, 2018), Table 4.1-Responses to Comments at Ltr. No. 1270, Cmt. No. 20.)

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Master Response 1.2 states:

Pursuant to Government Code section 11353, however, the State Water Board must submit the regulatory provisions of water quality control plan amendments to OAL for approval before the amendments become effective.

(Master Response 1.2, p. 8.) This response misses the point of South of Delta CVP Contractors' comment. That the State Water Board plans to submit its specific revised water quality objectives to the OAL for approval is irrelevant to South of Delta CVP Contractors' comment. Notably, Master Response 2.1 does not even mention the APA, and hence is nonresponsive as well.

In sum, even if the State Water Board's interpretation of "water quality objective" as including flow were a permissible reading of the statute, its failure to comply with the APA renders it an underground regulation, and hence any flow-based objectives are invalid.

**5. The Proposed Compliance Locations For The Southern Delta Salinity Objective Are Not Justified**

The compliance location for the southern Delta salinity objectives has been modified in a way that is not justifiable. Whereas under D-1641, the southern Delta salinity objectives required compliance at specific compliance points, now, the proposed compliance locations extend to the entire reach of the water course – "San Joaquin from Vernalis to Brandt Bridge -and- Middle River from Old River to Victoria Canal -and- Old River/Grant Line Canal from Head of Old River to West Canal." (Appendix K, Table 1, p. 23, emphasis not included.) This change would make compliance very difficult, if not impossible. The proposed Program of Implementation explains the rationale for this change as follows: "so that compliance with the southern Delta salinity objective can be better determined in a Delta environment subject to alternating tidal flows." (Appendix K, p. 43.) This explanation ignores the potential for Delta water users along the three water course segments to discharge in a manner that will cause exceedances. This practical difficulty is problematic for the additional reason that it is not tied to the protection of the beneficial uses that are protected by the southern Delta salinity objectives – agriculture. If a discharge causes a spike in salinity at a point along the specified reach, but there are no agricultural diversions for a long stretch of the water course, then there may be no adverse impact on agricultural beneficial use.

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**6. The Proposed Program Of Implementation Would Impermissibly Add New Requirements To The Bay-Delta Plan**

**A. New Carryover Storage Targets**

The proposed Program of Implementation includes a new carry-over storage requirement:

When implementing the LSJR flow objectives, the State Water Board will include minimum reservoir carryover storage targets or other requirements to help ensure that providing flows to meet the flow objectives will not have significant adverse temperature or other impacts on fish and wildlife or, if feasible, on other beneficial uses.

(Appendix K, p. 28.) This requirement conflates the State Water Board's water quality and water rights authorities. It falls outside of what is permissible for a water quality control plan. It is a condition that must be considered in a water right proceeding that affords potentially affected water right holders a level of due process that is not provided in the quasi-legislative water quality control planning process. The carryover storage provision should be removed.

**B. New Requirement To Protect Flows "Through Delta"**

The proposed Program of Implementation provides:

The State Water Board will exercise its water right and water quality authority to help ensure that the flows required to meet the LSJR flow objectives are used for their intended purpose and are not diverted for other purposes. . . .

Although the lowest downstream compliance location for the LSJR flow objectives is at Vernalis, the objectives are intended to protect migratory LSJR fish in a larger area, including within the Delta, where fish that migrate to or from the LSJR watershed depend on adequate flows from the LSJR and its salmon-bearing tributaries.

(Appendix K, pp. 28-29.) The Phase 1 Bay-Delta Plan Updates provide no cited scientific support for these statements, which would effectively change the scope of the water quality objectives without the due process afforded in quasi-legislative water quality control planning and fail to consider the environmental impacts of limiting the beneficial use of water.

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The Phase 1 Bay-Delta Plan Updates concede there is no cited scientific support for the new requirement to protect unimpaired flows through the Delta. In response to comments, for example, the State Water Board explains why it has segmented its analysis of the new objectives intended to protect the beneficial use of water by San Joaquin River watershed fish populations from its analysis of new objectives in the Sacramento River and Delta. (See, e.g., Master Response 1.2, p. 17 [explaining that it is appropriate to segment because “[t]he environmental conditions in the LSJR are different than those in the Sacramento River and Delta tributaries”].) Nowhere has the State Water Board noticed the scope of Phase 1 to include establishing San Joaquin River objectives for the protection of fish outside of the San Joaquin River basin – “to a larger area, including within the Delta.”

Further, the above-quoted statement prejudices the outcome of Phase 2, which as described in the July 6, 2018 “Summary of Proposed Amendments to the Bay-Delta Water Quality Control Plan” will be the place the State Water Board considers whether protection of San Joaquin River flows – what Delta flows – are needed:

[U]pdating flow requirements for the Sacramento River, its tributaries, and the Delta and its tributaries, including the Calaveras, Cosumnes, and Mokelumne Rivers, *Delta outflow objectives*, Delta interior flow objectives, and cold water habitat objectives.

(Emphasis added.)

**7. The Proposed Program Of Implementation Would Unlawfully Require Reclamation To Operate To Provide A Water Quality Beyond That Needed To Protect Beneficial Uses And Unjustifiably Increases The Burden To Meet the Southern Delta Salinity Objective**

The best available science indicates that agriculture in the southern Delta will be reasonably protected from adverse impacts of salinity by setting the southern Delta salinity objectives at 1.0 EC at all times of the year.<sup>5</sup> As such, the southern Delta salinity objectives in Table 2, including the objective measures in the San Joaquin River at Vernalis, California, would be set at 1.0 EC during all months of the year.<sup>6</sup> (Appendix K, p. 15.) The changes to the Program of Implementation, nonetheless, would require Reclamation to operate the Central Valley Project to maintain a different water quality in

<sup>5</sup> The 2010 report prepared by Dr. Glenn J. Hoffman, title “Salt Tolerance of Crops in the Southern Sacramento-San Joaquin Delta”, suggests that a higher EC might be possible without unreasonable impacts to crops grown in the southern Delta.

<sup>6</sup> While Table 2 indicates that salinity at Vernalis is set at 1.0, in the narrative of the Phase 1 Bay-Delta Plan Updates, there are statements that appear to contradict Table 2. At page 42, for example, the text states: “...D-1641 imposes conditions on USBR’s water rights requiring implementation of EC levels of 0.7 mmhos/cm from April through August and 1.0 mmhos/cm from September through March . . . As part of implementing the salinity water quality objective for the interior southern Delta, USBR shall be required to continue to comply with these salinity levels, as a condition of its water rights. . . .”

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the San Joaquin River at Vernalis, California. The proposed Program of Implementation would require Reclamation to operate to maintain 0.7 EC at that location. (Appendix K, pp. 43, 45.) The reason for the difference is to allow for water quality degradation to occur in the interior southern Delta. (Appendix K, p. 45 [requiring DWR's and Reclamation's water rights to be conditioned "to address the impacts of SWP and CVP export operations on water levels and flow conditions that might affect southern Delta salinity conditions, including the *assimilative capacity for local sources of salinity in the southern Delta*" (emphasis added)].) It is not reasonable or appropriate to impose an obligation on Reclamation to mitigate for water quality degradation not attributed to the CVP.

As noted above, the salinity concentrations in the southern Delta are due to multiple factors. The Phase 1 Bay-Delta Plan Updates recognize this long-standing fact: "Salinity problems in the southern Delta primarily result from low flows, tidal action, diversions by the CVP, SWP and local water users, agricultural return flows, poor circulation, and channel capacity." (Appendix K, p. 45.)<sup>7</sup> Nowhere do the Phase 1 Bay-Delta Plan Updates explain why the State Water Board staff believe it is appropriate for the State Water Board to assign responsibility to Reclamation to overachieve the water quality required in the San Joaquin River at Vernalis, California to allow for discharges by in-Delta water users that add salinity.

**8. If Implemented, The Working Group Established In The Proposed Program Of Implementation Must Include Representatives Of South Of Delta CVP Contractors**

The proposed Program of Implementation, as currently drafted, includes the establishment of a Stanislaus, Tuolumne and Merced Working Group ("STM Working Group"). (Appendix K, p. 32.) The proposed composition of the STM Working Group is described in the proposed Program of Implementation as follows:

The State Water Board will seek participation in the STM Working Group by the following entities who have expertise in LSJR, Stanislaus, Tuolumne, and Merced Rivers fisheries management, hydrology, operations, and monitoring and assessment needs: the DFW; NMFS; USFWS; and water

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<sup>7</sup> On page 45 of Appendix K, it states: "As early as the 1991 Bay-Delta Plan, the State Water Board recognized the need to meet the salinity objectives largely through regulation of water flow. This Bay-Delta Plan continues Revised Decision 1641's obligations on the CVP and SWP to meet the salinity water quality objectives." The first sentence is not accurate. Nowhere has the State Water Board stated that the salinity objectives would be implemented "largely through regulation of water flow." The second sentence is misleading. The sentence suggests that the State Water Board assigned full responsibility for salinity objectives to Reclamation and DWR. That suggestion is misleading at best. In the 2006 Bay-Delta Plan, the State Water Board explained: "The salinity objectives at Vernalis can be attained by releasing dilution water from New Melones and other sources, completing a drain to remove the salts generated by agricultural drainage and municipal discharges from the San Joaquin Valley, and conducting measures in the San Joaquin Valley such as the measures discussed below for controlling salinity in the interior southern Delta. The salinity objectives for the interior southern Delta can be implemented by measures that include state regulatory actions, state funding of projects and studies, regulation of water diversions, pollutant discharge controls, improvements in water circulation, and long term implementation of best management practices to control saline discharges." (2006 Bay-Delta Plan, p. 28.)

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users on the Stanislaus, Tuolumne, and Merced Rivers. The STM Working Group will also include State Water Board staff and may include any other persons or entities the Executive Director determines to have appropriate expertise. Subgroups of the STM Working Group may be formed as appropriate and State Water Board staff may also initiate activities in coordination with members of the STM Working Group.

(*Ibid.*, emphasis not included.) The proposed Program of Implementation gives the STM Working Group significant responsibility. For example, “the State Water Board will seek recommendations from the STM Working Group on biological goals; procedures for implementing the adaptive methods described above; annual adaptive operations plans; and the SJRMEP....” (*Ibid.*) If the State Water Board’s Executive Director agrees with the STM Working Group, he or she can adopt its recommendations. If the Executive Director disagrees with the Working Group, its recommendations will be presented to the full State Water Board, at which point the recommendation(s) could be adopted. Through adoption by the State Water Board, the STM Working Group’s recommendations regarding biological goals, adaptive method implementation procedures, annual adaptive operations plans, and the SJRMEP have the potential to impact South of Delta CVP contractors. In light of the STM Working Group’s significant responsibility and the potential impacts its recommendations, South of Delta CVP Contractor representatives should be included in the STM Working Group. (*Ibid.* [“The STM Working Group . . . may include any other persons or entities the Executive Director determines to have appropriate expertise.”].)

#### **9. The Discussion Of Measures Required To Implement The Dissolved Oxygen Objectives Needs Updating**

The proposed Program of Implementation does not reflect the best available information regarding dissolved oxygen in the San Joaquin River. It should but fails to acknowledge that the Dissolved Oxygen Aeration Facility at the Port of Stockton, first implemented in 2012, has been highly successful in preventing exceedances of the Dissolved Oxygen Objectives (“DO Objectives”), and has done so at a relatively reasonable price and without immitigable adverse impacts on fish, wildlife, water quality and other resources. (See Appendix K, pp. 54-55.)

Further, the proposed Program of Implementation continues to assign responsibility to the San Luis & Delta-Mendota Water Authority (and other parties) for meeting the DO Objectives, based on an estimated contribution of nutrients to the San Joaquin River through drainage discharges. There is not a sufficient justification for this approach because the connection between what is discharged and the actual cause of

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the low dissolved oxygen is subject to speculation. There is particular uncertainty regarding the rate of algae growth, time of travel, and contribution of nutrients. Lacking a way to calculate the impacts to the Delta at Stockton, the result of reductions in algae and nutrients cannot be determined. In addition, the fact that nutrient contribution is an ever-changing (decreasing) number, whereas the allocation of responsibility is fixed provides an additional reason for reexamining responsibility for the DO Objectives. Finally, the TMDL fails to take into account that San Joaquin River flow has been diverted by other parties who are not held accountable for the effect of low flow/low dissolved oxygen when the river reaches the Deep Water Ship Channel. As the Central Valley Regional Water Board continues to implement the recently adopted dissolved oxygen TMDL, it should continue to seek out and receive information that would better inform assignment of responsibility.

## **10. The Final SED Ignores Significant Impacts**

### **A. The Final SED Does Not Consider The Impacts Of Carryover Storage Targets**

The fundamental flaws identified in the Draft SED and recirculated draft SED remain pervasive in the Final SED, which fails to correct these deficiencies and instead relies and builds upon them, in violation of CEQA. As one example, Appendix K of the Final SED provides:

When implementing the LSJR flow objectives, the State Water Board will include minimum reservoir carryover storage targets or other requirements to help ensure that providing flows to meet the flow objectives will not have significant adverse temperature or other impacts on fish and wildlife or, if feasible, on other beneficial uses.

(Appendix K, p. 28.)

By deferring its duty to identify these “minimum reservoir carryover storage targets or other requirements” as key elements of the proposed plan amendments and failing to analyze the impacts of those measures in the Final SED, the State Water Board once again fails to provide information minimally necessary to meet CEQA’s basic requirements. (Pub. Resources Code, § 21061; CEQA Guidelines, §§ 15002(a), 15124(b), 15126.4, 15126.6; see *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215 [the State Water Board’s fundamental CEQA duties include analysis and disclosure of adverse environmental effects, mitigation of those effects through feasible measures or alternatives, and justification of the proposed action based on specific and clearly articulated balancing of environmental, economic, social, or other conditions].) The Final SED violates CEQA because it lacks supported analysis and evidence in support of its assumptions and conclusions regarding anticipated effects and outcomes likely to result

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from implementation of the plan amendments. (CEQA Guidelines, § 15384; *Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 943-45.) Instead, the Final SED again defers identification of key elements of the plan amendments and continues to assume that whenever they are finally developed, these “targets” will result in long-term environmental benefits without any performance criteria by which to measure whether and to what degree any such benefits occur, and *at what cost* to the environment and economy. This approach violates CEQA. (*POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681.)

### **B. The Final SED Does Not Adequately Consider The Impacts Of The San Joaquin River Flow Objectives On Water Supply**

At a minimum, the conclusions in the Final SED must be supported by substantial evidence. (CEQA Guidelines, § 15091(b).) Without the requisite substantial evidence, however, the Final SED significantly discounts the shortage in supply that water users will suffer.<sup>8</sup> As discussed in Section 6.B above, the Phase 1 Bay-Delta Plan Updates suggest that increased flows associated with the proposed San Joaquin River flow objectives will be protected as they flow through the Delta. (Appendix K, pp. 28-29.) This “protection” would result in the reduction of southern Delta pumping and therefore the water supply for many South of Delta CVP Contractors. However, the analysis in the Final SED shows increases in CVP and SWP southern Delta pumping caused by changes in San Joaquin River flows. The Final SED explains the reason for this inconsistency as follows:

To estimate the possible effects on exports, analysis related to exports and outflow assumes the State Water Board will not change the export constraints to protect any increased flows downstream of Vernalis because the LSJR Alternatives . . . would not affect export regulations.

(Final SED, Ch. 5, p. 5-60.) This assumption is unfounded and is inconsistent with the State Water Board’s stated intent to “protect” increased flows into the Delta as outflow. The analysis in the Final SED ignores impacts from protecting inflow, and therefore unlawfully fails to analyze the overall impact of the San Joaquin River flow objectives to southern Delta pumping, in violation of CEQA. (CEQA Guidelines, §§ 15126 – 15126.4, 15130, 15131(b).)

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<sup>8</sup> The degree to which impacts to specific water users are underestimated are described, for example, in the March 17, 2017 comments of Santa Clara Valley Water District, a member agency of the San Luis & Delta-Mendota Water Authority. Santa Clara Valley Water District’s updated comments, submitted also on July 27, 2018, provide further analysis of potential impacts from the reduction in supplies to San Francisco’s regional system from the Phase 1 Bay-Delta Plan Updates. The comments submitted by the City of Tracy also highlight significant impacts from the Phase 1 Bay-Delta Plan Updates. With 70% of Tracy’s source water being supplied by the South San Joaquin Irrigation District, Tracy faces a decrease in supply, which in turn may require reliance on lower quality groundwater, with concomitant effects on Tracy’s ability to meet the proposed salinity objective (as a discharger).

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The Final SED also concludes, again without substantial evidence, that significant adverse impacts caused by large reductions in surface water available to existing water users will be offset by groundwater pumping. Such assumptions of increased groundwater pumping are unrealistic and not supported by any analysis consistent with implementation of the Sustainable Groundwater Management Act (“SGMA”). The Final SED recognizes that the new objectives will lead to increased groundwater pumping yet fails to identify environmental impacts associated with increased reliance on groundwater such as agricultural land fallowing, water supply and water quality impacts, air quality impacts, and economic hardship not only on agencies that rely on water from the Stanislaus, Tuolumne, and Merced Rivers, but also on South of Delta CVP Contractors. Those impacts are not adequately disclosed and mitigated in the Final SED. (CEQA Guidelines, §§ 15126 – 15126.4, 15130, 15131(b).)

**i. Impacts Are Ignored Because Of The Unjustified Assumption That Reductions In Water Supply Will Be Offset With Groundwater Pumping**

The assessment of impacts caused by the proposed objectives intended to protect the beneficial use of water by San Joaquin River watershed fish populations assumes that impacts will be offset by groundwater pumping within the areas currently served by agencies that rely on water from the Stanislaus, Tuolumne and Merced Rivers. The Eastern San Joaquin (Basin Number 5-22.01) and Merced (Basin Number 5-22.04) groundwater basins are categorized as “basins subject to critical conditions of overdraft” in Bulletin 118 Interim Update 2016 (Bulletin 118). Reductions in surface water deliveries for agriculture would likely increase groundwater pumping and cause overdraft conditions to worsen. Although the Phase 1 Bay-Delta Plan Updates (e.g., Table ES-4) report that the mean annual groundwater pumping is expected to increase by 105,000 acre-feet, the findings failed to quantify the cumulative lowering of groundwater levels resulting from increased groundwater pumping and loss of recharge from agricultural irrigation and deep percolation. At a minimum, a reasonable good faith effort to assess and disclose these effects would have included the State Water Board’s consultation with each Groundwater Sustainability Agency managing the preparation of Groundwater Sustainability Plans (“GSP”) in these basins to determine the cumulative groundwater impacts associated with the proposed amendments. The Final SED does not reflect that any such consultation occurred. Concluding statements in the Final SED that “groundwater pumping would continue to offset some of the surface water supply deficits” thus have no basis, considering that implementation of the SGMA will restrict groundwater pumping in the Eastern San Joaquin and Merced groundwater basins.

The Final SED does not justify the data on groundwater use, for example in Tables ES-5 and ES-7 – “Annual Average Applied Water Demand, Groundwater Pumping, and Unmet Demand.” (Final SED, Exec. Summary, pp. ES-26, ES-27.) Those tables present data based on 2009 and 2014 levels of groundwater pumping. The Final SED does not

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explain how those data accurately forecast unmet demand under future SGMA GSP pumping restrictions. Basins that are currently in overdraft conditions (e.g., Eastern San Joaquin and Merced) will likely implement management measures that increase surface water supply, or reduce groundwater pumping, or some combination thereof. Since implementation of the new objectives for the beneficial use by San Joaquin River watershed fish populations will reduce surface water supplies to agricultural users, the GSPs will likely give greater emphasis to measures that reduce groundwater pumping than they otherwise would have. That will increase the unmet water demand to levels much greater than those reported in Tables ES-5 and ES-7. Again, there is no information that suggests the State Water Board consulted with each GSA to accurately forecast the unmet water demand and resulting environmental, social, and economic impacts associated with the new objectives the beneficial use by San Joaquin River watershed fish populations.

The Modesto (Basin Number 5-022.02) and Turlock (Basin Number 5-022.03) groundwater basins are not currently designated as basins subject to critical conditions of overdraft in Bulletin 118, but the reduction in surface water deliveries for agriculture that will result from the new objectives intended to protect the beneficial use of water by San Joaquin River watershed fish populations will increase groundwater pumping. Once again, the Final SED does not reflect a consultation with each GSA managing the preparation of GSPs in these basins to support a reasonable forecast in groundwater pumping, and to determine whether the reasonably foreseeable increase in groundwater use would exceed sustainable yields.

Reference to the July 27, 2018 comment letter submitted by Santa Clara Valley Water District reveals that the reasonably likely impacts of the Final SED to several cities in northern Santa Clara County will be reduction in Hetch-Hetchy deliveries (sourced mainly from the Tuolumne River) followed by increased dry-year pumping from the Santa Clara Sub-basin. Inevitably, groundwater depletions in the Santa Clara sub-basin will call for additional supplies applied to groundwater recharge; such incremental supplies are not identified, and their impacts are not analyzed, in the Final SED.

As a result of the deficiencies noted above, the Final SED fails to reflect a reasonable, good faith effort at full disclosure; it lacks adequate analysis of environmental impacts, including degraded groundwater quality, land subsidence, and lowering of groundwater levels, all of which are considered undesirable results in SGMA and could lead to findings of significant impact in a substitute environmental document.

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**ii. Impacts To Areas South Of The Delta Resulting From Reduced Supplies Available For Release Programs, Transfers, And Exchanges Are Ignored**

The Delta-Mendota (Basin Number 5-22.07), Kings (Basin Number 5-22.08), Westside (Basin Number 5-22.09), Tulare Lake (Basin Number 5-22.12), and Kern County (Basin Number 5-22.14) basins can be expected to be negatively impacted by the proposed objectives intended to protect the beneficial use of water by San Joaquin River watershed fish populations. South of Delta CVP Contractors that overlay these basins historically receive water from the Stanislaus River that is available as a consequence of voluntary programs implemented by the Oakdale and South San Joaquin Irrigation Districts ("OID and SSJID"). At times, OID and SSJID have released water during the April-May "pulse flow" and October-November "attraction flow" periods for the benefit of fisheries on the Stanislaus River. The water supply of South of Delta CVP Contractors has benefit because of those releases. The additional water available to them has helped to offset groundwater pumping. In addition to this program, Merced Irrigation District has transferred water to South of Delta CVP Contractors. These programs will likely be curtailed, and may end entirely, if the proposed objectives are adopted. That could reduce supplies available to South of Delta CVP Contractors by up to 50,000 acre-feet annually, if not more. The environmental impacts of those reduced supplies are not considered in the Final SED.

**C. The Final SED Unlawfully Segments Analyses Of Impacts From Phase 1 And Phase 2 And Ignores The Cumulative Impacts Of The Full Update To The Bay-Delta Plan**

The State Water Board currently is considering updates to the Bay-Delta Plan in two proceedings that address different watersheds, sometimes referred to as Phases 1 and 2 of the Bay-Delta Plan Update. While these proceedings may be construed to have "independent utility" for purposes of environmental review, approaching these proceedings as independent actions does not excuse the State Water Board from good faith evaluation and full disclosure of impacts. The State Water Board must thoroughly evaluate and fully disclose, both individually and in combination, impacts on resources including but not limited to surface water supply, hydrology and water quality, groundwater sustainability and subsidence, fallowing or conversion of agricultural resources, air quality impacts, and impacts to fish and wildlife, particularly where certain species may be adversely affected as a result of the plan updates' dedication of water resources to other species.

In response to comments regarding these reasonably foreseeable and predictably devastating impacts, the Final SED states:

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Moreover, in Chapter 17, Cumulative Impacts, Growth-Inducing Effects, and Irreversible Commitment of Resources, the SED evaluates the potential cumulative environmental effects associated with the LSJR flow and SDWQ objectives together with other projects and programs that could cause related impacts, including the Sacramento/Delta watershed update to the Bay-Delta Plan (Phase II). A cumulative impact from several projects is “the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonable foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” (Cal. Code Regs., tit. 14, § 15355, subd. (b).) Chapter 17 recognizes that the environmental impacts of the export/inflow objectives and reverse flow objectives for Old and Middle River, in combination with the plan amendments in this proceeding, could have cumulative effects on surface hydrology, water quality, aquatic biological resources, agricultural resources, and service providers. Thus, *to the extent feasible and without engaging in unnecessary speculation*, the potential cumulative environmental effects of the different proceedings are evaluated in the SED.

(Final SED, Master Response 1.2, pp. 19-20 [italics added].)

The Final SED violates CEQA because the cumulative environmental impacts of the Phase 1 and Phase 2 Bay-Delta Plan updates are not the least bit speculative; not only are they reasonably foreseeable, they are predictable, readily susceptible to analysis and quantification, and are certain to be severe. As such, the environmental impacts of Phases 1 and 2 are subject to the standards of disclosure and mitigation applicable to all reasonably foreseeable environmental effects. (CEQA Guidelines, §§ 15126 – 15126.4.) The Final SED violates CEQA because its superficial treatment of significant environmental impacts fails to comply with these standards.

**D. Because Of Its Myopic Focus On Flow, The Final SED Fails To Consider A Reasonable Range Of (Non-Flow) Alternatives**

In prior comments, South of Delta CVP Contractors noted, contrary to the requirement of law, the draft SED and draft recirculated SED do not consider a reasonable range of alternatives to protect water quality for the beneficial use of water by San Joaquin River watershed fish populations. This failing is not corrected in the Final SED. In the response to comments, State Water Board staff provides reference to Table 2.4-1,

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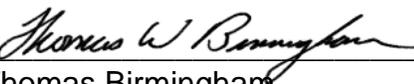
Summary of Inability of Non-Flow Measures Alone to Achieve the Purposes and Goals of the Plan Amendments, and to Master Responses 2.4, 3.1, and 5.2. (Final SED, Table 4.1-Responses to Comments at Ltr. No. 1270, Cmt. No. 7.) But neither Table 2.4-1 nor the referenced Master Responses adequately excuse the legal defect. The table and responses suggest that implementing non-flow measures alone would not meet identified purposes and goals of the plan amendments, including “[m]aintain[ing] inflow conditions . . .,” “[p]rovid[ing] flows that more closely mimic the natural hydrographic conditions . . .,” “[p]rovid[ing] flows in a quantity necessary to achieve functions essential to native fishes . . .,” and “[a]llow[ing] adaptive implementation of flows that will afford maximum flexibility in establishing beneficial habitat conditions for native fishes . . .” (Master Response 2.4, p. 18.) This misses the point. The purposes and goals, *because they are narrowly focused on flow*, result in an inadequate range of alternatives. As a result of the focus on flow, alternatives that are based on establishing parameters for water quality constituents or characteristics (e.g. temperature and turbidity) are improperly ignored.

## 11. Conclusion

South of Delta CVP Contractors appreciate this opportunity to provide the State Water Board with comments on the Phase 1 Bay-Delta Plan Updates. While we are discouraged by the latest proposal, the hope of South of Delta CVP Contractors is that in providing these comments, the State Water Board will conform the Phase 1 Bay-Delta Plan Updates, as well as the Phase 2 documents currently being prepared, in order to ensure that the amended Bay-Delta Plan is consistent with policy, science, and law.

Sincerely,

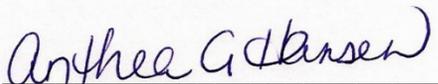
By:   
 \_\_\_\_\_  
 Frances C. Mizuno  
 Interim Executive Director  
 San Luis & Delta-Mendota Water Authority

By:   
 \_\_\_\_\_  
 Thomas Birmingham  
 General Manager  
 Westlands Water District

By:   
 \_\_\_\_\_  
 Rick Gilmore  
 General Manager  
 Byron-Bethany Irrigation District

By:   
 \_\_\_\_\_  
 Chris White  
 General Manager  
 Central California Irrigation District

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By:   
Anthea Hansen  
General Manager  
Del Puerto Water District

By:   
Jeff Bryant  
General Manager  
Firebaugh Canal Water District

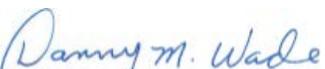
By:   
John Wiersma  
General Manager  
Henry Miller Reclamation District 2131

By:   
Steven Stadler  
General Manager  
James Irrigation District

By:   
Ara Azhderian  
General Manager  
Mercy Springs Water District, Pacheco  
Water District, and Panoche Water District

By:   
Jeff Cattaneo  
District Manager/Engineer  
San Benito County Water District

By:   
Lon Martin  
General Manager  
San Luis Water District

By:   
Danny Wade  
General Manager  
Tranquillity Irrigation District

By:   
Robert Pierce  
General Manager  
West Stanislaus Irrigation District

**From:** Whitman, Terri <TWhitman@kmtg.com>  
**Sent:** Friday, July 27, 2018 11:28 AM  
**To:** 'LSJR-SD-Comments@waterboards.ca.gov'; WQCP1Comments  
**Subject:** FW: Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments  
**Attachments:** 2018-07-27 Ltr to SWRCB re Bay-Delta Plan Comments.pdf

**Categories:** Red Category

Please find attached a comment letter regarding the Revisions to Proposed Bay-Delta Plan Amendments.

### Terri Whitman

*Assistant to Daniel J. O'Hanlon, Eric N. Robinson, Rebecca L. Harms and Holly Roberson*



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**From:** Whitman, Terri  
**Sent:** Friday, July 27, 2018 11:14 AM  
**To:** 'LSJR-SDComments@waterboards.ca.gov' <LSJR-SDComments@waterboards.ca.gov>  
**Cc:** O'Hanlon, Daniel <dohanlon@kmtg.com>; 'jrubin@westlandswater.org' <jrubin@westlandswater.org>; 'tbirmingham@westlandswater.org' <tbirmingham@westlandswater.org>; rebecca.akroyd@sldmwa.org; 'frances.mizuno@sldmwa.org' <frances.mizuno@sldmwa.org>  
**Subject:** Comment Letter – Revisions to Proposed Bay-Delta Plan Amendments

Please find attached a comment letter regarding the Revisions to Proposed Bay-Delta Plan Amendments.

### Terri Whitman

*Assistant to Daniel J. O'Hanlon, Eric N. Robinson, Rebecca L. Harms and Holly Roberson*



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