

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**



_____))
In the Matter of:))
))
Phase 1 (San Joaquin and Southern Delta Water Quality),))
Comprehensive Review of Water Quality Control Plan,))
San Francisco Bay/Sacramento-San Joaquin Delta Estuary))
_____)

COMMENTS OF AMERICAN RIVERS
ON PHASE 1 SUBSTITUTE ENVIRONMENTAL DOCUMENT
FOR BAY-DELTA WATER QUALITY CONTROL PLAN UPDATE

Dated: March 29, 2013

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Pursuant to the “Notice of Filing” (Dec. 31, 2012) as amended, American Rivers respectfully submits these comments on the Substitute Environmental Document (SED) for Phase 1 of the comprehensive review of the *San Francisco Bay-Sacramento/San Joaquin Delta Estuary Water Quality Control Plan* (2006). Our comments focus on the proposed changes to the existing flow objectives for fish and wildlife protection and the associated Program of Implementation for the lower San Joaquin.

I.
INTRODUCTION

1. Time is of the essence to complete the comprehensive review of the 2006 Bay-Delta Plan and, specifically, to revise the objectives and Program of Implementation to protect all beneficial uses. As the Legislature declared in 2009, the “...Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state’s management of Delta watershed resources.” Water Code § 85001(a).

2. This crisis has emerged despite decades of implementation of water quality and regulatory programs to protect the ecosystem and other beneficial uses. Indeed, by 1961, the Board recognized the emerging conflicts between water supply reliability and the Delta ecosystem. In addressing an impact of the export projects on salinity, it concluded:

“...[T]he Board will reserve jurisdiction for a reasonable period, not to exceed about three years subject to further extension, for the purpose of allowing the United States, the State of California, and the water users in the Delta, an opportunity to work out their problems by mutual agreement....

In taking the action outlined in the preceding paragraph the Board recognizes that in this proceeding it has no jurisdiction over the Department [of Water Resources] or the water users to require their participation in such negotiations. An additional problem exists in the case of the latter group due to a lack of representation of all of the parties now being benefited or to be benefited. The Board also recognizes that reservation of jurisdiction does not solve the problem and without participation in good faith by all parties such action by the Board is of little consequence. The Board does not believe that reservation of jurisdiction and postponement of the day of final decision will cause the problem to disappear or diminish. Neither does it believe that the problem can be legislated out of existence nor solved by the mere weight of further investigations and studies, of which there have been many in the past, some of which have been recited in this decision. The

time has arrived for the parties to meet at the conference table, recognizing that all have a responsibility and an urgent interest in an early solution.”

Decision 991, 1961 WL 6816 (1961) at 23.

3. Fifty-two years after Decision 991, all Delta stakeholders have an even more urgent interest in a speedy solution. Our comments are intended to help move the SED in a direction where a comprehensive update for the Bay-Delta Plan finally satisfies that public interest.

4. Many comments have framed this comprehensive review as water supply versus fish. Indeed, there is a physical basis for this conflict, as these Delta resources are managed today. There is also a historical basis. The State authorized many existing dams on the express view that significant harm to the ecosystem, including the destruction of fish species in a river, was an acceptable price of economic development. In 1951, the California Attorney General interpreted Fish and Game Code section 5937 to permit that result in the upper San Joaquin. Cal. Atty. Gen. Op. 50-89 (1951). In 1940, the Board’s predecessor approved that result for Mono Lake.

“It is indeed unfortunate that [Los Angeles’] proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it. The use to which the City proposes to put the water under its Applications ... is defined by the Water Commission Act as the highest to which water may be applied and to make available unappropriated water for this use the City has, by the condemnation proceedings described above, acquired the littoral and riparian rights on Mono Lake and its tributaries south of Mill Creek. This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.”

Division of Water Resources, Decisions 7053, 7055, 8042, and 8043 (1940), p. 26, quoted in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 at 428 (1983).

5. *National Audubon* and later cases overturned these interpretations of the public trust doctrine and related statutory laws. Today, a zero-sum approach would be an improper legal basis for the update to the 2006 Bay-Delta Plan. Instead, as discussed in paragraphs 7 – 10 below, this update must provide reasonable protection for both fish and water supply. It should help resolve the Delta crisis by significantly enhancing existing conditions for these beneficial uses.

II. **FISH OBJECTIVE**

6. Table 3 in Appendix K proposes a new narrative objective for fish protection in the lower San Joaquin. The “Parameter” is flow rates, and the “Value” (or goal) is to “[m]aintain

flow conditions ... to the Delta at Vernalis, together with other reasonably controllable measures..., sufficient to support and maintain the natural production of viable native San Joaquin River watershed fish populations migrating through the Delta.” SED App. K, p. 1. We have several comments on this proposed objective.

A. The Proposed Objective Should Attain the Highest Reasonable Protection of Fish and Wildlife.

7. The proposed objective is intended to “...support and maintain the natural production” of native fishes. This goal requires merely that such fishes continue to reproduce in the lower San Joaquin, including its tributaries. On its face, it would permit any level of natural production that avoids extinction in this area. This is far too low a bar.

8. A water quality plan is intended “...to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved...” Water Code § 13000. An objective must “...ensure the reasonable protection of beneficial uses...” Water Code § 13241. What is reasonable for the purpose of fish protection is guided by the Clean Water Act’s goal to “...restore the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). This goal “... refers to a condition in which the natural structure and function of ecosystems [are] maintained.” *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1294 (1st Cir. 1996).

9. Further, the proposed objective would be inconsistent with the public trust doctrine, to the extent it merely requires the avoidance of extinction of native fish in the Delta.

10. The public trust doctrine governs the Board’s water quality program, including its regulation of water rights for the purpose of compliance flow objectives. *U.S. v. State Water Resources Control Board (Racanelli Decision)*, 182 Cal. App. 3d 82, 149-150 (1986). That doctrine requires much more than the continued existence of fish in navigable waters. It obliges the Board, as trustee, to protect public trust uses (including fishing, navigation, commerce, and ecosystem) to the extent feasible.

“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.... As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation], *and to preserve, so far as consistent with the public interest, the uses protected by the trust.*”

Id. at 151 (emphasis added), quoting *National Audubon*, 33 Cal. 3d at 446-47.

11. The SED does not address whether a more protective goal for the proposed fish objective is reasonable or feasible to comply with the goal of Clean Water Act section 101(b) or the public trust doctrine. However, in adopting an objective (or any other plan element), the Board must have “...adequately considered all factors, [and] demonstrated a rational connection

between those factors, the choice made, and the purpose of the enabling statute.” *Racanelli Decision*, 182 Cal. App. 3d at 113.

12. The Board should revise the proposed objective to attain the highest reasonable protection of fish and wildlife in the lower San Joaquin, subject to the consideration of other demands and values as provided by Water Code section 13000 and other applicable law, including the public trust doctrine.

B. The Doubling Objective Should Continue to Apply to the Lower San Joaquin.

13. The SED does not expressly propose to modify the existing narrative objective for “Salmon Protection” in the 2006 plan. Since December 31, 2012, Board representatives have variously stated that the proposed objective would supplement or replace the existing objective. These are two very different outcomes.

14. The existing narrative objective states: “[w]ater quality conditions shall be maintained, together with other measures, sufficient to achieve a doubling of natural production of Chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law.”

15. That objective derives from Section 3406(b)(1) of the 1992 Central Valley Project Improvement Act (CVPIA), which provides:

“The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and directed to: (1) develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991; *Provided*, That this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c) of this title....”

Section 3403(a) defines anadromous fish as: “...those stocks of salmon (including steelhead), striped bass, sturgeon, and American shad that ascend the Sacramento and San Joaquin rivers and their tributaries and the Sacramento-San Joaquin Delta to reproduce after maturing in San Francisco Bay or the Pacific Ocean....”

16. American Rivers opposes deleting the doubling objective in the Bay-Delta Plan update. A more general objective about continued natural production, as applied, could be inconsistent with the requirements of federal and state laws cited in the 2006 plan. The SED does not explain why deleting the doubling objective would be reasonable or how it would advance the public interest, given that these other laws will still govern the Central Valley Project and other Delta facilities. We respectfully submit that the Delta would not benefit from additional inconsistency between regulatory programs.

17. Indeed, we recommend that the Board modify the doubling objective to be fully consistent with the CVPIA section 3406(b)(1). First, the existing objective is limited to Chinook salmon, while the statute applies to other native anadromous fish as well, including all salmon runs, steelhead, American shad, and sturgeon. Second, the objective calls for doubling, while the statute calls for not less than doubling. Lastly, the objective is framed as a snapshot in time, while the statute includes the goal of sustainability on a long-term basis.

18. It is a fact that the population of Chinook salmon has not doubled, 21 years after enactment of the CVPIA and 7 years after adoption of the 2006 Bay-Delta Plan. This reality is not a reason to delete the objective from the Bay-Delta Plan. Instead, it demonstrates that various regulatory programs have failed to reverse the negative trend for this fishery. It affirms why the Board should require improvements in existing programs necessary to achieve the objective.

C. The Board Should Establish Metrics for Compliance with the Objective.

19. The proposed objective states: “Indicators of viability include abundance, spatial extent or distribution, genetic and life history diversity, migratory pathways, and productivity.” SED App. K, p. 1. It does not provide metrics for those indicators – how much is enough. For example, abundance could mean one unit or twenty for a given native fish.

20. The Program of Implementation for this objective includes a San Joaquin River Monitoring and Evaluation Program (SJRMEP) to “...inform real-time adaptive management” of the flow rates. SED App. K, p. 11. The Board would assign responsibility for developing this program, and the program itself would be developed, through water rights, licensing, and other adjudicatory proceedings after adoption of the plan. *Id.*

21. The SED specifies certain elements of adaptive management, including the permissible range of flow rates and governance. SED App. K, pp. 3-5. However, Appendix K does not specify some of the necessary scientific elements of such adaptive management. These include: metrics for the narrative objective (as discussed in paragraphs 19 - 20), testable hypotheses how the flow rates will make progress towards the objective, the monitoring data and analyses which will be used to evaluate progress, and triggers for adaptive management.

22. In short, Appendix K anticipates that the metrics for the proposed objective, and necessary scientific elements of adaptive management, would be established through implementation, not the plan itself. This is legally insufficient. The Board may not modify the plan through actual implementation, including water rights proceedings for individual diverters. *State Water Resources Control Board Cases (Robie Decision)*, 138 Cal. App. 4th 674, 728-30 (2006). Such *de facto* modification of the plan through adjudicatory proceedings would not “...comply[] with the procedural requirements” for this legislative action. *Id.* at 735.

23. The Program of Implementation must include “a description of surveillance to be undertaken to determine compliance with the objectives.” Water Code § 13242(b). More generally, it must include a “description of the nature of actions which are necessary to achieve

the objectives....” Water Code § 13242(a). In this instance, since the Board is proposing adaptive management of flow rates, the program must describe the elements of such adaptive management with enough specificity that potentially affected entities, and any reviewing court, may understand how adaptive management would work and thus how it could affect their rights. “The guiding principle is that the Board’s power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing.” *Robie Decision*, 136 Cal. App. 4th at 729.

III. FLOW REQUIREMENTS

24. Appendix K would require the release of 35% of unimpaired flow from each of the Stanislaus, Tuolumne, and Merced Rivers, on a 14-day running average from February through June. That requirement would be subject to adaptive management and a base flow of 1,000 cfs. SED App. K, pp. 3-4.

25. Regulatory agencies and stakeholders made extensive oral comments in the March 20-21, 2013 hearing, and will submit written comments today, disputing the flow type (unimpaired versus regulated) and rate (35 versus X%) necessary to attain the fish objectives. Indeed, disputes about causes for negative trends for Delta fish started more than 140 years ago. See Arthur E. McEvoy, *The Fisherman’s Problem: Ecology and Law in the California Fisheries, 1850-1980* (1986). As the Board stated in WR Decision 1379 (1971): “The complex interplay between inflows, Delta uses, export diversions, waste disposal, irrigation return water, and tidal action, has made it difficult to predict future conditions in the Delta.” *Id.* at 46 (emphasis added). A controlled experiment cannot be conducted in the Delta, which is a commons affected by many stressors. Any cause-and-effect finding for this ecosystem relies on correlations and other statistical methods short of the confidence interval of a controlled experiment.¹

26. The Board must act, while mindful of this.

27. American Rivers agrees that “...more flow of a more natural pattern...” in the period February through June is necessary to attain the existing doubling objective or the

¹ Stakeholders also dispute the SED’s findings related to unavoidable impacts on agriculture, hydropower generation, and other developmental uses. We note that these findings, even once final, are not binding on any specific entity. As a quasi-legislative decision, the plan itself may not assign a compliance burden on any entity. That assignment may occur only through an adjudicatory proceeding supported by its own Environmental Impact Report or other document under the California Environmental Quality Act (CEQA). See paragraph 31, *infra*.

Thus, any findings made in this SED are general and, as applied to any entity, are subject to check in a subsequent adjudicatory proceeding for that entity. So, what happens if this SED finds that the change in agricultural income under a particular flow requirement is X% for the lower San Joaquin sub-basin, and the subsequent CEQA document shows that the change is a multiple of X% for a given entity? There are two permissible options. If the new impact is not significant under CEQA, the Board may continue in the adjudicatory proceeding. Or if the new impact is significant, it may reopen the plan and the applicable objective. One option is not available. The *Robie Decision* teaches that the Board may not use the adjudicatory proceeding to change the objective itself. See 136 Cal. App. 4th at 729.

proposed new objective. SED App. K, p. 3. We submitted extensive comments in the Delta Flow Criteria proceeding, stating our specific recommendations for such flow. *See* Exhibit AR-1 (Feb. 10, 2010). As demonstrated in technical comments filed today by Natural Resources Defense Council and The Bay Institute, 35% unimpaired flow during this period is very likely to be insufficient to achieve the fish objectives in the plan, and specifically, cause a significant upwards trend in population and distribution of the native fishes which use the Delta.

28. As the Board found in its *Delta Flow Criteria Report* (2010), flow is a master variable for the conditions and trends for native fisheries. The record for the 2006 Bay-Delta Plan and related proceedings shows that other stressors are significant. This reality requires “all hands on deck.” The most effective strategy will be: (i) an integrated package of flow and non-flow actions, (ii) timely performed, and (iii) subject to rigorous adaptive management (iv) based on testable hypotheses and effectiveness monitoring.

A. The Board Should Implement More Natural Flows in the Lower San Joaquin As Soon as Possible.

29. A more natural flow pattern is needed very soon in order to protect the native species in the Delta. The scientific record before the Board overwhelmingly demonstrates that most native Delta fisheries are in trouble and at serious risk of continued decline or extinction.

B. The Board Should Specify the Elements of Adaptive Management of the Flow Rate.

30. Appendix K provides that the flow rate would vary between 25 and 45% from any one tributary, based on an adaptive management program subject to governance by a Coordinated Operations Group (COG). SED App. K, pp. 4-5. It proposes to defer many of the necessary scientific elements of this program to subsequent water rights and other adjudicatory proceedings. As stated in paragraphs 19 - 20, the plan update must specify the necessary scientific elements of this monitoring program.

C. The Board Should Specify the Proceedings That Will Distribute the Flow Rate Among Water Rights.

31. The objectives in a water quality control plan are not self-implementing. After adopting a plan as a quasi-legislative decision, the Board must undertake separate and subsequent adjudicatory proceedings to amend water rights or otherwise assign the compliance obligation among facilities and activities. *Racanelli Decision*, 182 Cal. App. 3d at 112-13; *Robie Decision*, 136 Cal. App. 4th at 698, 733-34.

32. Appendix K anticipates implementation of the proposed narrative objective through “...water rights actions, Federal Energy Regulatory Commission (FERC), hydropower licensing processes, other water quality actions, or actions by other entities.” SED App. K, p. 2. It states that implementation will be phased “...in order to achieve full compliance with the narrative objective by no later than 2020.” *Id.*

33. That list, while inclusive, is not specific as to dates or other essential details. For example, will the Board conduct a water rights proceeding for the Tuolumne and Merced, or will it rely entirely on water quality certification of the hydropower projects on these tributaries to establish compliance obligations? If the latter, how will the Board address the non-licensed operations of these dams (e.g., diversions for water supply), and how will the Board address diversions by entities other than the licensees (such as the City of San Francisco, or riparian diverters)? Will the Board conduct a water rights proceeding on the Stanislaus, where the largest storage dam is not under FERC’s jurisdiction but other dams are? How will it coordinate that proceeding with its actions on the southern tributaries? Does the Board have a firm schedule when each of these proceedings will start and conclude? We recommend that the update include a table, GANT chart, or similar display of these proceedings.

34. The following table is intended to be illustrative of this form. The key feature is that the Board should describe, by tributary and then dam or diversion, the proceeding when it will assign the compliance obligation, and that any schedule should be firm, even if movable due to developments beyond the Board’s control.

Proceedings to Assign Compliance Obligation

| Tributary | Facility | Proceeding | Scope | Start Date | End Date |
|------------------|---------------------|--|--|---|---|
| Tuolumne | New Don Pedro | Relicensing | Power operations [unless the Board takes the view that the scope of the water quality certification includes all operations] | Feb. 2011 [when MID/TID filed Pre-Application Document] | April 2016 [We recommend that the Board commit to making a water quality certification decision before the expiration of the existing license.] |
| Tuolumne | La Grange Dam | [Board should specify whether it will address in relicensing or in a water rights proceeding.] | .... | .... | .... |
| Tuolumne | Hetch Hetchy System | [Board should specify.] | .... | .... | .... |
| Tuolumne | [Other facilities] | .... | .... | .... | .... |
| Merced | .... | .... | .... | .... | .... |
| Stanislaus | .... | .... | .... | .... | .... |

35. Appendix K acknowledges the risk that the proposed objective could result in “...redirected impacts to groundwater resources.” SED App. K, p. 3. It states that the Board

“...may take actions” to prevent or mitigate such impacts. *Id.* However, it does not specify any such actions. Indeed, while acknowledging the Board’s non-permitting authority to regulate groundwater to prevent waste and unreasonable use, the SED concludes that this is not a feasible mitigation measure because the Board does not receive funding for such enforcement. *See* SED, pp. 9-27 – 9-28. The SED does not identify any specific action the Board will take to prevent further depletion of groundwater resources. Instead, it finds that further overdraft is a significant and unavoidable consequence of the preferred alternative. *Id.* at 9-29.

36. We respectfully submit that this SED describes inaction, not the action necessary to protect water quality of groundwater resources in the course of implementing this plan update. This is legally insufficient under Water Code section 13242(a), particularly in light of forecasts that groundwater resources in the San Joaquin Basin will be depleted – not just overdrafted as today, but entirely gone – by the year 2100 under *status quo* regulation. *See, e.g.,* Stockholm Environmental Institute – U.S. Center, *The Last Drop: Climate Change and the Southwest Water Crisis* (Feb. 2011).

IV. NON-FLOW ACTIONS

37. Appendix K finds that flow rates alone will “...be insufficient to fully implement the narrative objective’s goal of protecting native LSJR fish populations.” SED App. K, p. 2. It further finds that “actions outside of [flows] and the Board’s direct regulatory authority must be part of a comprehensive program” for this purpose. *Id.* Indeed, the effectiveness of the flow rates to protect fish and wildlife “...is intimately linked to the successful implementation of these other actions.” *Id.* American Rivers agrees with these findings, which are supported by a library of science across the history of the Bay-Delta Plan.

A. The Plan Should Establish Accountability for Performance of Non-Flow Actions.

38. Appendix K states that the non-flow actions by other entities are “...under development.” SED App. K, p. 7. We agree with that characterization. The section in the Program of Implementation, “Actions by Other Entities,” includes three subsections.

39. In the subsection, “Major Planning and Restoration Activities,” the SED describes three plans under development by other agencies. These are: Delta Stewardship Council, Delta Plan; Department of Water Resources and U.S. Bureau of Reclamation, Bay Delta Conservation Plan (BDCP); and Reclamation, San Joaquin River Restoration Program (SJRRP). SED App. K, pp. 7-8. The SED generally states that the Board will coordinate with these planning agencies in these planning efforts. For example, it states that the Board “...will continue to coordinate adaptive management and future changes to the Bay-Delta Plan with the SJRRP to assure the protection of fish and wildlife.” SED App. K, p. 8.

40. The SED does not state with any specificity whether and how the Board will proactively cooperate in the development of these plans, to increase their effectiveness for the purpose of attaining the proposed or existing fish objectives. For example, while the Board has

and will use its water rights authority to condition the BDCP to protect fish (SED App. K, p. 8), that statement begs critical questions about coordination. What responsibilities will the Board have in preparing the environmental document for the BDCP? Will the Board review the BDCP (once submitted as a change petition) within or separate from the phases described in the Revised Scoping Notice (Jan. 24, 2012)? If separately, how will the Board coordinate the allocation of the water rights burdens as between the export projects and non-export diverters?

41. In the next subsection, entitled “Develop and Implement a Comprehensive Habitat Restoration Effort in the LSJR Basin,” Appendix K generally describes each action (“Improve Riparian Habitat”) and its value, acknowledges that other agencies may have relevant authorities, and recommends that they use those authorities. It does not state “who, what, when, and where” with any specificity. For example, the entirety of the action, “Improve Riparian Habitat,” is:

“Riparian habitat in the LSJR and Merced, Tuolumne, and Stanislaus Rivers has been degraded for over a hundred years by water supply, flood control, changes in land use, and resource extraction activities. In addition to improving seasonal floodplain habitat discussed above, riparian habitat below the floodplain should be restored to better protect fish and wildlife beneficial uses, including improvements to provide foraging, cover, and rearing habitat and to improve temperature conditions.”

SED App. K, p. 9.

42. Similarly, Appendix K describes an action, “Improve the Quantity, Quality, and Access to Suitable Riparian and Floodplain Habitat for the Benefit of Native Fish and Wildlife.” SED Appendix K, pp. 8-9. After reciting the undisputed benefit, it states: “[a]ctions should be taken by local, State, and federal agencies and others in the LSJR and Merced, Tuolumne and Stanislaus Rivers to improve the quality, quantity, and access to floodplain habitat in the LSJR and its major salmon bearing tributaries.” *Id.* This action is wholly untrackable and unenforceable. It does not specify a responsible entity, schedule, and actual locations, or identify any existing program, such as the Interior Department’s under CVPIA section 3406(c)(1):

“The Secretary shall, by not later than September 30, 1996: (1) develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento–San Joaquin Delta Estuary. Such plan shall be developed in cooperation with the California Department of Fish and Game and in coordination with the San Joaquin River Management Program under development by the State of California; shall comply with and contain any documents required by the National Environmental Policy Act and contain findings setting forth the basis for the Secretary’s decision to adopt and implement the plan as well as recommendations concerning the need for subsequent Congressional action, if any; and shall incorporate, among other relevant factors, the potential contributions of

tributary streams as well as the alternatives to be investigated under paragraph (2) of this subsection.”

43. In the last subsection, entitled “Regulatory, Planning, and Implementation Activities of Other Agencies,” Appendix K recommends that those other agencies should continue to use their authorities to undertake various activities. For example, for the action “Reduce the Impacts of Introduced Species on Native Species in the Bay-Delta Estuary,” the appendix states that:

“Actions are recommended for local, state and federal agencies to take corrective measures to reduce the impacts of introduced species and prevent the future introduction of non-natives species. Specifically, under the National Invasive Species Act of 1996 the DFG, USFWS, and NOAA fisheries should continue to pursue programs to determine the impacts of introduced species, on the native aquatic resources, and potential control measures. The DFG should also continue the efforts under Fish and Game Code section 6430-6439, concerning introduced species.”²

SED App. K, p. 10. None of these actions includes a schedule (including discussion of how that schedule relates to the Board’s phases for this comprehensive review) or any specific description of the anticipated results. The SED does not describe an effort or intent by the Board to enter into an agreement with each agency to establish such specifics. This generality is insufficient in three respects.

44. First, the Board must consider “[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” Water Code 13241(c); *see Racanelli Decision*, 182 Cal. App. 3d at 118. The SED, including Appendix K, does not forecast or analyze the probable impacts of these actions by other agencies.

45. Next, a Program of Implementation must include a “time table for the actions to be taken.” Water Code § 13244(b). This obligation encompasses all actions “...which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.” *Id.*, § 13244(a). With a few exceptions, none of the actions by other entities includes a schedule for performance.

46. Lastly, a Program of Implementation must include a “description of the surveillance to be undertaken to determine compliance with the objectives.” Water Code § 13244(c). Appendix K does not describe any monitoring of the effects of the actions of other agencies. Indeed, it does not specify the substance of a monitoring program for the objective as a whole. Instead, it defers to the future development of the SJRMEP, calling out generally that the monitoring program will include abundance and other metrics for natural reproduction. SED App. K, p. 11.

² We note that Fish and Game Code section 6439 has been repealed.

47. From 1978 to 2006, the Bay-Delta Plans have included similar actions. Across this period, we have been unable to locate any instance when the Board undertook and published a systematic analysis of the performance of the specific actions included in the prior program.

48. For example, Appendix K includes a proposed predation action (as described in paragraph 43) that is virtually identical to a 2006 counterpart, which read:

“...The National Invasive Species Act of 1996 established various programs intended to decrease the propagation of invasive species into waters of the U.S. and to prevent the spread of aquatic nuisance species. These programs include the Ballast Water Management Demonstration Program and the Aquatic Nuisance Species Program and allows for State Invasive Species Management Plans to be created independent of federal action. Under the National Invasive Species Act of 1996, the DFG, USFWS, and NOAA Fisheries should continue to pursue programs to determine the impacts of introduced species, including striped bass, on the native aquatic resources of the Estuary, and the potential benefits of control measures. The DFG should also continue its efforts under the Fish and Game Code sections 6430-6439, enacted in 1992, concerning introduced species.... Additionally, the California Fish and Game Commission should deny all requests for the introduction of new aquatic species into the watershed of the Bay-Delta Estuary unless it finds, based on strong, reliable evidence, that an introduction will not have deleterious effects on native species.”

2006 Bay-Delta Plan, p. 36. Seven years later, the SED does not describe the progress by these agencies to implement that action in the 2006 plan. What is the benefit of merely restating the action, without analysis of past performance or any direction for more effective performance in the future?

49. We are not asking for a bite of the moon, here. Many regulatory programs are subject to periodic performance reviews, and standard procedures exist for this purpose. *See, e.g., Reclamation, Central Valley Project Improvement Act: 10 Years of Progress. A Summary of Activities and Accomplishments in the Implementation of the Central Valley Project Improvement Act, 1993 – 2002*, available at http://www.usbr.gov/mp/cvpia/docs_reports/docs/cvpia_10yr_progress_final_summ_rpt.pdf. Indeed, annual reporting on accomplishments (and failures) of such programs is also commonplace. *See* CVPIA section 3408(f).

50. The Board should revise the section, “Action by other Agencies,” in the Program of Implementation, to establish the schedule, expected results, and other specifics required by Water Code section 13244 to establish accountability for performance. It should establish a procedure for an annual informational workshop where other agencies submit written reports, and discuss the consequences of their reports, for implementation of their responsibilities under the plan update.

B. The Plan Should Require Other Regulatory Agencies to Act.

51. Appendix K finds that actions “outside of the [Board’s] direct authority” will be necessary to achieve the proposed objective. SED Appendix K, p. 2 (emphasis added); *see also* p. 7. American Rivers agrees with this finding. We agree that the regulatory agencies discussed in “Actions by Other Agencies” are not subject to the Board’s authority over water rights and pollutant discharges. The question is: does the Board have any non-direct authority to compel performance of the actions by other agencies?

52. Appendix K states conclusively: “The State Water Board will use its authority, as needed and appropriate, to encourage and where appropriate, require that necessary actions by other entities are completed.” SED App. K, p. 7. It does not describe which authority.

53. The *Racanelli Decision* acknowledges that the Board does not have direct authority over other regulatory agencies, such as California Department of Fish and Wildlife or NOAA Fisheries, in their non-proprietary capacities.

“Water quality objectives, we realize, may not always be readily enforceable. The statutory factors enumerated in section 13242, particularly the provisions for recommended action and time schedule, reflect the Legislature’s recognition that an implementing program may be a lengthy and complex process requiring action by entities over which the Board has little or no control and also requiring significant time intervals.”

Racanelli Decision, 182 Cal. App. 3d at 122.

54. However, the Board has substantial if indirect authority.

“Section 13247 - part of the Porter–Cologne Act - provides that ‘[s]tate offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute....’”

Robie Decision, 136 Cal. App. 4th at 730 (italics in case). The *Racanelli Decision* concluded: “[b]oth state and federal acts require their public agency counterparts to comply with state water quality controls. (§ 13247; 33 U.S.C § 1323.)” *Racanelli Decision*, 182 Cal. App. 3d at 125. We note that the obligations of federal regulatory agencies arise once the U.S. Environmental Protection Agency has approved the plan under Clean Water Act section 303(c) and thus give it federal stature.

55. Once a plan specifies an action in a trackable form (who, what, when, and where), the responsible agency must perform that action – unless that would conflict with its authority. We believe that such conflict is avoidable or manageable, as long as the plan directs agencies to

use their existing authorities to achieve feasible results without predetermining the specific content of rules, policies, and programs.

56. That raises the question: what happens if an agency does not perform an action as specified in an approved plan? It is true, as the *Racanelli Decision* found, that the Board may not itself issue an administrative order against the agency:

“But the Legislature has thus far denied the Board explicit authority to enforce compliance, a recognized weakness in using water quality standards to control water purity. [Case citation omitted.] Enforcement authority - in the form of clear and direct orders, injunctive relief and civil penalties - is provided only for unauthorized discharge of pollutants. (§§ 13320, 13331, 13340, 13350, 13386.)”

Racanelli Decision, 182 Cal. App. 3d at 125. However, either the Board or a third party may seek judicial relief against the non-performing agency if the plan specifies the “when” of performance. *See, e.g.*, Clean Water Act section 505(a)(1), 33 U.S.C. § 1365(a)(1), which provides for a citizen’s suit against any person (including the United States) in violation of an “...order issued by the Administrator or a State with respect to [a water quality] standard or limitation....”

C. The Board Should Require Water Right Holders to Act.

57. Many of the non-flow actions listed in Appendix K may be performed at lands or facilities owned by water rights holders. In the adjudicatory proceedings to implement the plan, the Board may require these entities to undertake non-flow measures as a physical solution to resolve competing demands for water. Decision 1631 in the Mono Lake Cases held:

“In accordance with the ‘physical solution doctrine’ ..., a water diverter can be compelled to employ a physical solution through which competing water demands can be met and the constitutional goal of promoting maximum beneficial use of the State’s waters will be served. Thus, as part of a physical solution allowing for diversion of water for municipal use, [Los Angeles] can be required to undertake waterfowl habitat restoration measures. Waterfowl habitat restoration can serve to restore public trust uses while requiring a smaller commitment of water.”

Decision 1631, 1994 WL 758358 at 77, citing to *Peabody v. Vallejo*, 2 Cal. 2d 351, 383–84 (1935) and *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316 (1936). The Program of Implementation should specify how the Board will assign responsibilities to water rights holders to implement non-flow measures.

**V.
MONITORING PROGRAM**

58. A Program of Implementation must include a “description of the surveillance to be undertaken to determine compliance with the objectives.” Water Code § 13244(c). As stated

above, the SED proposes to require the development of a monitoring program, SJRMEP, through subsequent water rights, licensing, or other adjudicatory proceedings. We have several comments about this element of the plan update.

A. The Board Should Complete a Retrospective Analysis of Water Quality Monitoring Data to Evaluate the Effectiveness of the 2006 and Prior Plans.

59. Since 1971, the Board has required a comprehensive monitoring program as a condition of the water rights for the export projects, and as an element of the successive versions of the Water Quality Control Plan. For example, Decision 1379 (1971) provided:

“Despite extensive monitoring, particularly in the last two decades by state and federal agencies, there is still not enough information as desirable on which to base an intelligent management system....The Board as part of this decision is requiring that the Department [of Water Resources] and the Bureau [of Reclamation] conduct or cause to be conducted a comprehensive monitoring program including 32 monitoring stations strategically located throughout the Delta, at which some or all of the 23 parameters will be observed as enumerated in Tables 2, 3, and 4 of the Order.”

Decision 1379 (1971), p. 38 (emphasis added).

60. Similarly, Decision 1485 (1978) included a Condition 10 as an element of the Bay-Delta Plan. It provided:

“To develop a better understanding of the hydrodynamics, water quality, productivity and significant ecological interactions of the Delta and Suisun Marsh so that more accurate predictions of environmental impacts related to operations of the CVP and SWP can be made, permittees shall, independently or in cooperation with other agencies or individuals:

(a) Conduct special studies to meet specific needs and to take advantage of particular circumstances where the data obtained are of significant value. Such studies include, but are not limited to, fish population and zooplankton measurements, waterfowl food plant production measurements, intensive phytoplankton studies, tissue analysis of selected biota, photosynthesis rates, sediment profile and composition, and water velocity.

(b) Develop and improve water quality and biological predictive tools with emphasis on improving the understanding of flow/salinity/phytoplankton relationships in the western Delta, and on improving hydraulic characteristics in existing models to represent more closely true channel characteristics, for the following areas of the estuary:

i) Western Delta and Suisun Bay area, including Suisun Marsh.

ii) San Francisco Bay to Golden Gate Bridge.

iii) Interior Delta.

(c) Participate in research studies to determine:

i) Outflow needs in San Francisco Bay, including ecological benefits of unregulated outflows and salinity gradients established by them.

ii) The need for winter flows for long-term protection of striped bass and other aquatic organisms in the Delta.”

Decision 1485, 1978 WL 41190 at 10-11.

61. Fast forwarding from 1978, we note that the 2006 Bay-Delta Plan includes an Environmental Monitoring Program by the Board. *Id.* at 41- 44. It also specifies other studies by other agencies. *Id.* at 45 - 47. Collectively, these are intended to “...(1) evaluate the response of the aquatic habitat and organisms to the objectives; and (2) increase understanding of the large-scale characteristics and functions of the Estuary ecosystem to better predict system-wide responses to management options.” *Id.* at 41.

62. We are unable to determine whether and how the Board analyzed the monitoring data collected under the 2006 Bay-Delta Plan (and prior versions) to evaluate the effectiveness of the specified actions in managing those trends. For example, the *Staff Report for the Periodic Review of the 2006 Bay-Delta Plan* (2009) does not directly analyze the effectiveness of the existing Program of Implementation, while it does describe trends in water quality conditions as the basis for recommending review of objectives.

63. Water Code section 13242(c) requires surveillance of required and recommended actions, and that must include analysis of collected data. The Board should complete such analysis as part of the record for modifying existing objectives and Program of Implementation.

B. Appendix K Should Specify How the Proposed Monitoring Program Would be Used to Evaluate the Effectiveness of the New Program of Implementation.

64. As stated in paragraphs 19 – 23 above, we conclude that Appendix K improperly defers development of scientific elements of the monitoring program until subsequent adjudicatory proceedings. We will not repeat that comment.

VI.
PHASING OF THE COMPREHENSIVE REVIEW

65. The Notice of Preparation (2009) for the SED, and the Supplemental Notice (2012), each describe four phases of this comprehensive review. This sequencing appears to be discretionary and un-firm. For example, the Supplemental Notice states that the work “...could

be completed” in such phases. *Id.* at 4 (emphasis added). We have not located a firm schedule for the start and finish for each phase. More importantly, having reviewed these notices and the SED, we do not understand how phasing – and specifically, the respective scopes and schedules of the phases – will work together to produce a timely and effective update to the 2006 plan. We offer specific comments and questions below.

A. The Board Should Specify How it Will Complete Implementation of the Flow Rates for the San Joaquin Basin as a Whole.

66. As stated in paragraphs 31 – 36, Appendix K does not describe the scopes or anticipated schedules of the water rights and other proceedings to assign the compliance obligation for the proposed unimpaired flow rate, as between the dams in a given tributary.

67. Appendix K proposes a 1,000 cfs minimum flow at Vernalis for the period February through June. SED App. K, p. 1. It does not specify what proceedings will be used to allocate the compliance obligation for that flow rate, although it does specify the compliance obligation by tributary. *Id.* at 3 – 4. For example, while stating that the Tuolumne will provide 47% of that base flow, Appendix K does not state what proceedings will be used to assign that allocation as between Modesto and Turlock Irrigation Districts (which are subject to a water quality certification in the relicensing for New Don Pedro), City of San Francisco (which is not), and other diverters (which are not).

68. Appendix K proposes a 1,000 cfs minimum flow at Vernalis in October. SED App. K, p. 5. While stating that the compliance obligation will be assigned through “a water rights proceeding, FERC licensing proceeding, or other proceeding,” it does not provide any specificity as to schedule, or how the assignment will be managed by tributary given the different legal status of various diverters.

69. Appendix K anticipates that the Board may develop flow requirements for July through September and November through January, relying partly on information developed through water rights and licensing proceedings. SED App. K, p. 6. It does not specify a schedule for development of such requirements.

70. Appendix K omits the upper San Joaquin from the flow requirements, on the ground that Chinook salmon will be reintroduced, and flow will be provided, under the San Joaquin River Restoration Program (SJRRP). SED App. K, p. 3 n. 1. It anticipates that the next review of the Bay-Delta Plan will address “...the need for any additional flows” from the Upper San Joaquin. *Id.* While very supportive of the SJRRP, we do not understand how this treatment squares with the update’s flow requirements at Vernalis or downstream in the Delta. While it is true that “[f]lows necessary to support this reintroduction are being determined and provided through the SJRRP” (SED App. K at 3 n. 1) for purposes of the Endangered Species Act and Fish and Game Code section 5937, the Board has not reviewed the SJRRP for purposes of water quality compliance at Vernalis or downstream.

B. The Board Should Specify How it will Complete the Program of Implementation for Delta Outflow.

71. The Notice of Preparation, as supplemented, anticipates that the Board will address Delta outflow in Phase 2. Appendix K states the Board's intention that compliance with its flow requirements "...will serve to meet any responsibility to contribute the LSJR inflow component of the Delta outflow objective in this plan that would be otherwise imposed on that agency." SED App. K, p. 3.

72. We do not understand how that is workable. The SED does not contain any analysis that shows that 35% unimpaired flow will be a sufficient contribution to Delta outflow. Such analysis would be premature, since the Board has not reviewed or determined what the Delta outflow objective will be.

73. Appendix K proceeds to state that the "...Board may reconsider [its intention] and reallocate responsibility for implementing the Delta outflow objective in any subsequent proceeding, including a water rights proceeding." SED App. K, p. 3. We do not understand the Board's thinking on critical path questions. Is the Board's decision on Phase 1 final for the purpose of this comprehensive review, or is it reopenable in Phase 2 for the purpose of Delta outflow? When will Phase 3 (water rights and other adjudicatory proceedings) occur relative to Phase 1 or 2? Put differently, will those proceedings consider only the Phase 1 flow requirements or the Phase 2 requirements as well?

74. Last but not least, Appendix K does not address how Phase 1 (or other phases) will be coordinated with the Board's review of the change petition for BDCP, which will be the most significant proposal for modification of the export projects in many decades.

C. The Board Should Complete this Comprehensive Review in a Reasonable Period.

75. The Board published the Phase 1 SED on December 31, 2012, having started the comprehensive review in July 2008 when it published *Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*. See SED, pp. 1-4. Phase 2 will require its own SED.

76. We understand the phasing approach to mean that the plan update (Phases 1 and 2) will both be completed well after 2015. Phase 3 (adjudicatory proceedings to adjust water rights or otherwise apply the objective to individual) dams will occur at some unspecified dates. We do not understand how the resulting schedule squares with the Board's obligation under Clean Water Act section 303(c), 33 U.S.C. § 1313(c)(1), which provides:

"The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator."

77. EPA has interpreted this statute to require the submittal of revisions to existing water quality standards, or a decision not to revise, within that 3-year period.

“The 3-year period is measured from the date of the letter in which the State informs EPA that revised or new standards have been adopted for the affected waters and are being submitted for EPA review or, if no changes were made in the standards for those waters, from the date of the letter in which the State informs EPA that the standards were reviewed and no changes were made....”

The Water Quality Standards Regulation allows States to establish procedures for identifying and reviewing the standards on specific water bodies in detail.... States must reexamine any water body with standards not consistent with the section 101(a)(2) goals of the Act every 3 years, and if new information indicates that section 101(a)(2) goal uses are attainable, revise its standards to reflect those uses.”

EPA, *Water Quality Handbook* (1993), § 6.1.

78. The Board decided to proceed with revisions to the 2006 Bay-Delta Plan by July 2008. However, under the current phasing approach, the planning process would likely continue to 2015 or longer. We respectfully request that the Board reconsider whether it has legal authority to undertake a 9-year or longer proceeding to update the 2006 Bay-Delta Plan.

VII. **CONCLUSION**

American Rivers is grateful for the very hard work of Board staff and members to prepare the SED. We support the Board’s intention to amend the 2006 Bay-Delta Plan to provide better protection of native fish and other beneficial uses of the Delta. We support the direction of the proposed narrative objective and Program of Implementation.

We ask a simple question: is Appendix K more of the same, or is it the fundamental reorganization of water management as required by Water Code section 85001(a)? We respectfully conclude that it is not yet properly structured to contribute to an effective solution for the Delta crisis. We recommend that the Board convene an informational workshop once it (and commenters) have reviewed all public comments, in order to chart the best way forward to a timely and effective decision.

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Dated: March 29, 2013

Respectfully submitted,

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DECLARATION OF SERVICE

State Water Resources Control Board
Phase 1 Substitute Environmental Document,
Bay-Delta Water Quality Control Plan Update

I, Nicholas Niiro, declare that I today served the attached “Comments of American Rivers on Phase 1 Substitute Environmental Document for Bay-Delta Water Quality Control Plan Update,” by electronic mail to Jeanine Townsend at the State Water Resource Control Board (commentletters@waterboards.ca.gov).

Dated: March 29, 2013



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