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July 27, 2018

VIA ELECTRONIC MAIL

State Water Resources Control Board
Attn: Ms. Jeanine Townsend
1001 I. Street, 24th Floor
Sacramento, California 95814
Email: LSJR-SD-Comments@waterboards.ca.gov

Re: Comments on Proposed Phase I Bay Delta Plan Amendments and Final Substitute Environmental Document

Dear Ms. Townsend:

Stockton East Water District (District) reviewed the State Water Resources Control Board (State Water Board) proposal to amend the Bay-Delta Plan (Proposed Final Amendments) and the Final Substitute Environmental Document (Final SED) released on July 6, 2018. The Notice accompanying these documents states the State Water Board will accept comments only on the Proposed Final Amendments found in Appendix K and only provides 21 days to review both these Proposed Final Amendments and the Final SED. The Proposed Final Amendments and Final SED span thousands of pages. The State's failure to provide sufficient time to adequately evaluate and review these very critical documents is unacceptable. Furthermore, prohibiting comments on much substantial new information and analysis found in the over 3,600 pages in the Responses to Comments portion of the Final SED effectively defeats the California Environmental Quality Act's (CEQA) overarching informational gathering purpose.

The State Water Board is aware of the ramifications for the entire Central Valley of approving the Proposed Final Amendments. Hundreds of thousands of written comments were submitted by the affected parties. You heard grave concerns voiced by thousands of people attending various workshops held throughout the Central Valley. Your staff and consultants took over 16 months to prepare responses to those comments, but then supplied the public with just 21 days to react. This appears to be a strategy to truncate public participation in this critically important policy question.

The capricious nature of this process is best illustrated by the Proposed Final Amendments and Final SED's apparent disregard of the scientific reports submitted over the past 10 years that demonstrate that "flow" alone will not achieve the desired results. If "flow" alone was sufficient, as the Proposed Final Amendments and Final SED presumes, then the

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Stanislaus River fishery should have been fully protected, restored and enhanced because on an average annual basis 53.9 percent of the unimpaired flow was released over the 1995-2016 time period. This real world test proves that “flow” is not the whole or even a partial solution. Neither the Proposed Final Amendments nor the Final SED provide an explanation for disregarding a decade of scientific information reaching conclusions contrary to the Proposed Final Amendments and Final SED. The Proposed Final Amendments and Final SED conclusions are void of reason, sound policy, balance and science.

The Proposed Final Amendments and the Final SED Must be Recirculated for Public Review and Comment

Numerous water agencies requested recirculation of the Proposed Final Amendments and the Final SED because a significant amount of new information and analysis was incorporated into the documents. State Water Board staff summarily denied the request. As the State Water Board knows, “[p]ublic participation is an essential part of the CEQA process.” CEQA Guideline §15201. “We believe that the apparent inaccuracy in some case law results from the fact that environmental review is not supposed to be segregated from project approval. ‘[p]ublic participation is an ‘essential part of the CEQA process.’ (*Laurel Heights II, supra*, 6 Cal.4th at p. 1123.)” *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1200. Processing a CEQA document with insufficient public participation is an abuse of discretion as a matter of law.

In this instance, the Final SED relies upon an incorrect statement applying an incorrect standard to determine whether recirculation is required. In particular, the analysis wrongly claims that the document’s revisions do not amount to “any new significant environmental impacts or substantial increase in the severity of an environmental impact that was not previously analyzed in the Recirculated SED.” SED at page 1-9. This inappropriate standard is essentially a truncated version of the standard for preparing a supplement to an EIR (see CEQA Guideline §15162(a)(1)-(3)). Unfortunately for the State Board staff it is an inapt standard to decide whether the Final SED requires recirculation to assure public participation. “With the addition of the fourth category of ‘triggering information’ to the list, we recognize that ‘significance’ for purposes of section 21092.1 cannot be defined *exclusively* in terms of the grounds for recirculation found in section 21166, from which the first three categories are drawn. The different circumstances governed by these statutes mandate this conclusion. *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1130 (italics in original).

Contrary to a truncated and improper standard applied by the Final SED authors, recirculation is generally required whenever additional new information deprives the public of a meaningful opportunity to comment on substantial adverse project impacts or feasible mitigation measures or alternatives that are not adopted. CEQA Guideline §15088.5(a). *Laurel*

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Heights Improvement Association v. Regents of the University of California (1993) 6 Cal.4th 1112. Here the revisions, individually and cumulatively, exceed the standard of clarifying or insignificant modifications that dispense with recirculation. CEQA Guideline §15088.5(b). For example, the State Water Board adds a new narrative objective to the Proposed Final Amendments. (Appendix K, pg. 18, Table 3.) This new narrative objective requires “[f]lows provided to meet these numeric objectives be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year.” (*Id.*) What does this statement mean? How will this be determined? Where in the Final SED is there an evaluation of the potential significant adverse impacts associated with the implementation of the narrative objective? This new narrative objective expands the requirements to effectively make this new objective a year-round requirement, not simply February through June. Parties subject to this new significant change in requirements in the Proposed Final Amendments must be afforded an opportunity to review and comment. Otherwise public participation, which is essential to the CEQA process, is dispensed with in the most heavy-handed and summary fashion.

Another significant basis supporting recirculation is the adding over 3,600 pages in the Response to Comments in the Final SED. To put this into an absurd context, CEQA explains that “the text of draft EIRs should normally be less than **150 pages** and for proposals unusual in scope or complexity should normally be less than **300 pages.**” CEQA Guideline Section 15141. Hence the response to comments is ten times more complex than a normal complex EIR. This fact alone should dictate recirculation. Both Master Responses and Responses to specific letters and testimony will be included as part of the Final SED and part of the administrative record for the proceeding. The Master Responses contain significant new information, new analysis and new modeling in an attempt to justify the findings in the Final SED. It is patently unfair to allow the State Water Board to essentially stack the administrative record with new and un-reviewed information, analysis and modeling at the end of the process in an effort to expressly deny the public an opportunity to test, examine and comment on this new information. This significant new evidence in the Final SED by its nature necessitates recirculation. Failing to recirculate the Final SED deprives the public of a meaningful opportunity to review and comment and is an abuse of discretion as a matter of law.

The Response to Comments Contained in the Final SED Violates CEQA by Failing to Provide a Well-Reasoned Good Faith Analysis to the Comments

While the State Water Board stated that they would not entertain any comments on the Responses to Comments, in reviewing the Response to Comments it is abundantly clear that the State Board staff have failed to comply with even the minimum requirements of CEQA in responding to the comments. It is well understood that an agency must provide a detailed, well-reasoned good faith analysis to comments (CEQA Guideline §15088(c)) and the response to comments become an “integral part” of an EIR’s substantive analysis of the environmental

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issues. *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, 516-17. The rule is understood to mean: "Conclusory statements unsupported by factual information" constitute a legally deficient and inadequate response to comments." CEQA Guidelines §15088(c); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348. Hence, and of acute relevance here, conclusory responses to comments by other agencies criticizing the data and methodology used to assess impacts and evaluate mitigation measures renders an EIR legally deficient. *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367, 1371.

Indeed, *Berkeley Keep Jets Over the Bay Committee* explicitly criticizes the Oakland Port's failure to address seriously and in detail different opinions expressed by other public agencies about the information and conclusions presented in a draft EIR:

...the information provided was either incomplete or misleading. The dispute in this regard goes beyond a disagreement of qualified experts over the reasoned conclusions as to what the data reveals. **The EIR failed to acknowledge the opinions of responsible agencies and experts who cast substantial doubt on the adequacy of the EIR's analysis of this subject. The conclusory and evasive nature of the response to comments is pervasive, with the EIR failing to support its many conclusory statements by scientific or objective data. These violations of CEQA constitute an abuse of discretion.**

Id. at 1371 (emphasis added). *Berkeley Keep Jets Over the Bay Committee* expresses a well understood CEQA principle and relied on prior controlling legal authority: "Where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.*" *Cleary v. County of Stanislaus* (1981) 118 Cal. App. 3d 348, 357 (original italics.). See also, *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal. App. 5th 214 227-228 [The opinion of the air district regarding air pollution impacts is given great weight by the appellate court in disposing of a claim that an EIR is legally deficient.]

Moreover, whenever a public agency comment disagrees with or criticizes the EIR, a final EIR must acknowledge the conflicting opinions and explain why suggestions made in the comments have been rejected by supporting its statements with relevant data. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 940-41. In short, the response to comments is an integrated part of the Final SED and particular attention and detail must be addressed to comments provided by other public agencies.

In this instance, the response to comments failed to meet minimum requirements as supplied by the CEQA Guidelines and controlling legal precedents by ignoring very significant

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modeling information presented by the State Water Board's sister agency – California Department of Water Resources. By way of example, the Master Responses notes the following:

“Some commenters argued that water quality degradation due to salinity in the southern Delta is caused by in-Delta discharge of high salinity agricultural return flow and that DWR and USBR cannot control it. These commenters reference a recent ICF report, *Evaluation of Salinity Patterns and Effects of Tidal Flows and Temporary Barriers in South Delta Channels* (ICF 2016) to show that DWR and USBR are not responsible for the salinity degradation...**while informative, is not dispositive**. Commenters also pointed to the Delta Simulation Model 2 (DSM2) results produced by DWR and USBR which suggest that SWP and CVP Delta operations cannot control salinity at the interior Delta compliance points. **These results are also informative, but not dispositive**. [Master Responses 3.3, pg. 14-15, bolding added].

The summary dismissal by the State Board staff of analysis performed by USBR and DWR fails to meet the test in *Berkeley Keep Jets Over the Bay Committee* that comments disclosing new and conflicting data must be fully evaluated in the Final SED. There must be **good faith, reasoned analysis** in response to those comments. The bald conclusion by the State Water Board that the conflicting analysis “are informative, but not dispositive” does not constitute a good faith and reasoned analysis and as such violates the requirements of CEQA and constitutes an abuse of discretion. This is but one of thousands of examples of how the Response to Comments in the Final SED does not comply with CEQA, the CEQA Guidelines and controlling legal authority.

Comments on Changes to Appendix K

The State Water Board made various significant changes to Appendix K in the Proposed Final Amendments that are neither justified in the law nor supported by any analysis in the Final SED.

Section B: Purpose and Application of the Water Quality Control Plan: The State Water Board adds the following sentence: “This plan establishes water quality objectives for which implementation can be fully accomplished only if the State Water Board assigns some measure of responsibility to water rights holders and water users to mitigate for the effects on the designated beneficial uses of their diversions and use of water.” (Appendix K, pg. 4.) In the Master Responses 2.1, it notes that this change is a non-substantive change to improve the clarity, update and correct text in the document. (Master Responses 2.1, pgs. 4 and 50). This statement is unsupported. This insertion asserts that diversions by water right holders are causing harm to the fishery resources and that harm must be mitigated. There is no support in

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law, science, the Proposed Final Amendments or the Final SED to justify this statement. This sentence should be deleted.

Table 3 Water Quality Objectives for Fish and Wildlife Beneficial Uses: The State Water Board adds the following sentence: "Flows provided to meet these numeric objectives be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year." (Appendix K, pg. 18, Table 3.). As discussed above, the Final SED is devoid of any analysis of the significant adverse effect of this new requirement. This language effectively is creating a year round requirement, but it is unclear how it will be met. Who makes the determination of how to prevent significant adverse impacts to fish and wildlife at other times of the year? Where is the balancing among competing beneficial uses? Because the Final SED provides no rationale for this requirement and no analysis of the significant adverse environmental effects of its implementation, we request this sentence be deleted.

Table 3 Water Quality Objectives for Fish and Wildlife Beneficial Uses – Footnote 14: The State Water Board added Footnote 14 to Table 3 adding: "Compliance with the percent of unimpaired flow from February through June in each river is determined by dividing the 7-day average observed flow at the compliance stations by the 7-day average calculated Full-Natural-Flow at the FNF stations." (Appendix K, pg. 20.) The Master Responses 2.1, pg. 28 explains that the stations are effectively located at the rim dams. These are DWR's stations that DWR openly admits are highly unreliable and fluctuate daily, weekly and monthly. The State Water Board notes that "the daily unimpaired flows are not always available for short-term decision-making or reliable for 7-day average calculations. The unimpaired flow estimates rely on variable and limited data that do not necessarily reflect actual unimpaired flow on a specific day." (Master Response 2.0, pg. 28). The State Water Board acknowledges that the stations are unreliable, and should not tie compliance to these stations. Footnote 14 should be deleted.

We appreciate the opportunity to comment and look forward to working with your staff on an additional revised and recirculated SED.

Very truly yours,



KARNA E. HARRIGFELD
Attorney-at-Law

KEH:lac

cc: Mr. Scot A. Moody

From: Laura Cummings <LCummings@herumcrabtree.com>
Sent: Friday, July 27, 2018 11:01 AM
To: LSJR-SD-Comments@waterboards.ca.gov; WQCP1Comments
Cc: Karna Harrigfeld
Subject: Comment Letter - Revisions to Proposed Bay-Delta Plan Amendments
Attachments: SEWD - Comment Letter - Revisions to Proposed Bay-Delta Plan Amendments.pdf

Importance: High

Categories: Red Category

Good morning Ms. Townsend:

Attached please find Ms. Harrigfeld's Comment Letter regarding the above-referenced matter, prepared on behalf of our client Stockton East Water District.

Sincerely,

Laura Cummings

Legal Assistant to
Steven A. Herum
Jeanne M. Zolezzi
Karna E. Harrigfeld

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