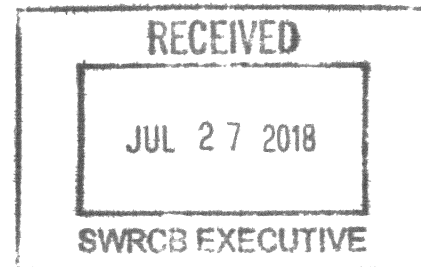




Consisting of 240,000 acres on the Westside of the San Joaquin Valley

July 27, 2018



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VIA ELECTRONIC MAIL & HAND-DELIVERED

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Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

Dear Ms. Townsend:

These comments are submitted on behalf of the San Joaquin River Exchange Contractors Water Authority "SJRECWA" and its members Central California Irrigation District "CCID", Firebaugh Canal Water District "FCWD", San Luis Canal Company "SLCC" and Columbia Canal Company "CCC" to provide these comments on the proposed amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the "Bay-Delta Plan") and the supporting proposed final Substitute Environmental Document ("Final SED"). As described in the Notice of Public Meeting dated July 6, 2018, the proposed amendments to the Bay-Delta Plan include new and revised flow objectives for the Lower San Joaquin River ("LSJR") and its tributaries as well as a program of implementation for these objectives ("Proposed Final Amendments").

We do not understand or accept the limitations placed upon the comments. In a letter of July 19, 2018, the SWRCB Executive Director purported to limit comments to "double underlined" or "double strike outs" on Appendix K. This is not in conformance with the purposes of CEQA, the rules and regulations related to CEQA or case law. (see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412; *Laurel Heights Improvement Ass'n v. Regents of University of California* (1993) 6 Cal.4th 1112). We will comment to the full extent of CEQA and its requirements as previously we have commented and again comment. We do not waive any objection by making these comments. We further incorporate herein each

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 2

comment and assertion made by other public agencies that the SWRCB is violating both CEQA and the Clean Water Act and Porter Cologne Act and procedural and substantive due process and constitutional takings and compensation requirements by proceeding in this manner. We also incorporate herein as if set fourth in full the contents and assertions of our letter of July 25, 2018, which is attached hereto as attachment two.

We attach a separate statement of authorities applying to the “purported double underling” changes and explaining why they are both inadequate notice without sufficient time to consider improperly divide the project description and purport to make delegation authority to the Executive Director which is not authorized under law or regulations. How can you with a straight face suggest that at least 30 days notice was given when you are purporting to bifurcate, twist and separate the comment process, four days before your third claimed “cut off date” and injecting brand new theories that the Executive Director may without hearing and the receipt of evidence change the Water Quality Control Plan? The Clean Water Act requires hearings and due process in adoption and amendments. How can those requirements be omitted and bypassed by delegation of authority to one individual?

1. *Introduction*

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

Unfortunately, staff of the State Water Board has completely ignored our comments. Staff continues to advocate for an unimpaired-flow approach, now proposing flow objectives of 40 percent of unimpaired flows for all of the major San Joaquin River tributaries. Staff ignores the fact that leading scientists from the University of California, Davis and throughout the world are increasingly focused on non-flow measures such as the re-activation of floodplains as the key to improving conditions for fish within a managed water system such as California’s Central Valley.

In deciding whether to make changes to the Bay-Delta Plan, the State Water Board must consider whether the proposed changes would be reasonable, “considering all demands being

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 3

made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” Water Code § 13000. The amendments proposed here are neither reasonable nor supported by substantial evidence.

The comment process requires the comments to be considered at the time as the Project. It is not permissible to prevent comments being considered and the Board may not simply determine that it will not hear or read comments because it is “tired” and has spent years. The public process is not to be altered in a fashion that the decision maker does not allow the full project to be known, then changes are made or proposed, then the comments are so restricted that the process is rendered without meaning. That has happened here, whether by design or happenstance.

We urge the members of the State Water Board to consider the very significant water-supply costs and very small fish-population benefits that would result from implementation of the current staff proposal. A flow-only approach has not worked in the past and it will not work in the future. We urge the members of the State Water Board to be creative and bold: reject the Proposed Final Amendments and direct staff to prepare a new proposal that promotes the protection of fish and the maximum utilization of the state’s precious water resources.

2. *Unimpaired flow approach fails to balance all water uses.*

Your Proposed Final Amendments and Final SED fail to engage in this comprehensive assessment and balancing of all water uses as envisioned in and required by Porter-Cologne. (Water Code § 13000 (Requiring consideration “of all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.”); Water Code § 13241 (Requiring consideration of various factors, including “past, present, and probable future beneficial uses of water”, “environmental characteristics”, “water quality conditions” and “economic considerations”).) Failure to balance all water uses as envisioned in and required by Porter-Cologne is counter to established case law. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778 (“While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay–Delta, including municipal, industrial, and agricultural uses.”).)

Your Proposed Final Amendments and Final SED unlawfully focuses exclusively on the “needs” of aquatic resources in the Delta and its tributaries, relegating all other beneficial uses to utilize whatever volume of water remains. Providing for the reasonable

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 4

protection of all beneficial uses cannot be done by focusing on the needs of one subset of beneficial uses. Nor can you ensure the reasonable protection of all other beneficial uses by *per se* relegating those uses to a junior priority position that can only utilize water that remains *after* invocation of the unimpaired flow factor. A holistic assessment of the needs of all beneficial uses is essential to understanding the tradeoffs, unintended consequences and effects of any modified water quality objectives. This holistic assessment must be done to ensure that all beneficial uses are afforded reasonable protection.

3. *The Unimpaired Flow Approach is Not Supported by the Best Available Science.*

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

To establish *flow objectives* during the February-June period and a program of implementation for the reasonable protection of fish and wildlife beneficial uses in the LSJR Watershed, including the three eastside, salmon-bearing tributaries (the Stanislaus, Tuolumne, and Merced Rivers).

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

As recently as December 2016, a peer-reviewed study on the utility of pulse flows in salmonid recovery on the Stanislaus River concluded that flows alone only go so far to benefit fisheries. Although managed pulse flows resulted in immediate increases in daily passage, that response was brief and not sustained over the long term. Matthew L Peterson, Environmental Factors Associated with the Upstream Migration of Fall-Run Chinook Salmon in a Regulated River, 37 *American Journal of Fisheries Management* 78-93, 89 (2016). While pulse flows may be a useful tool for restoring and maintaining fish habitat in certain

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 5

instances they are certainly not the defining factor in preserving fish populations. Moreover, the Peterson study indicates that, at least as to the Stanislaus River, there were certain thresholds in timing and magnitude of discharges beyond which pulse flows provided no additional benefit. *Id.* at 91.

The Peterson study's results are consistent with the observations and data provided by NCWA and others to the SWRCB at its workshops in 2012, and with the scientific community's evolving thinking regarding the benefit of unimpaired flows to Delta fish populations. As NCWA observed in its comments on the draft Scientific Basis Report for Phase 2 of the Bay-Delta Plan the Final SED relies on outdated material and is grossly lacking in empirical support. It is especially troubling to NCWA/SVWU that these concerns and data have been repeatedly presented to the SWRCB since 2012, and yet the Revised Draft SED still fails to remedy these errors. Here, the issue "goes beyond a disagreement of qualified experts over the reasoned conclusions as to what the data reveals." *Berkeley Keep Jets Over the Bay v. Board of Port Comm'rs of the City of Oakland*, 91 Cal. App. 4th 1344, 1355 (2001). The Final SED fails to acknowledge "the opinions of responsible agencies and experts who cast doubt on its analysis, and it fails to appropriately support its conclusions with scientific or objective data. "These violations of CEQA constitute an abuse of discretion." *Id.* See also *California Hotel and Motel Ass'n v. Industrial Welfare Comm.*, 25 Cal. 3d 200, 213 n.30 (1979) ("good judges customarily tread lightly when they are impressed with the care, conscientiousness, and balance of the administrators, but they penetrate more deeply . . . when the administrative performance seems to them to have been slovenly.")

Revisions to the Bay-Delta Plan that rely on outdated data, disregard the best available scientific evidence and fail to meaningfully respond to comments during the environmental review process are wholly inconsistent with the State Water Board's mandate and its own mission statement. An SED, if adopted, must be supported by substantial evidence. See Water Code §13330 (challenge to SWRCB decision by means of writ of mandate); Gov't Code §1094.5 (administrative mandamus challenges based on whether there is substantial evidence to support the agency's decision); *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 573 (1995) (substantial evidence review for quasi-legislative administrative decisions); *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 763 (2006) (To be substantial, evidence "must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' "). The current Final SED fails to meet this standard.

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 6

4. *The State Water Board Should Not Adopt the Proposed Narrative Objective.*

The narrative element of the LSJR Proposed Final Amendments is framed in terms of “maintaining viable native migratory San Joaquin River fish populations.” (SED at ES-12).

It is impossible for the State Water Board or anyone else to determine how such an objective would be implemented, and thus it is impossible for the State Water Board to evaluate its impacts, as required by the Porter-Cologne Water Quality Act (Water Code § 13241) and the California Environmental Quality Act. Because the State Water Board cannot determine the potential impacts of such implementation or satisfy these legal requirements, it should not adopt the narrative objective.

5. *By Proposing to Amend the Wrong Water Quality Control Plan, the SWRCB Fails to Undertake the Statutorily Mandated Balancing of the Public Interest on the Affected Streams.*

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

The Proposed Final Amendments would amend the Bay-Delta Plan to add new water quality objectives for the tributaries to the San Joaquin River, which are not within the legal Delta and are not within the waters protected by the Bay-Delta Plan. When the State Water Board considers amending the Bay-Delta Plan, it must consider how the proposed new objectives would affect the past, present and future beneficial uses of water in the Bay-Delta, the economy of the Bay-Delta, and the housing of the Bay-Delta. In the present instance all of the impacts of the new objectives would occur in the upstream areas outside of the legal Delta. If the State Water Board adopts these water quality objectives, it would effectively be superseding the existing water quality objectives the Central Valley Regional Board set for those streams, *without undertaking the statutorily mandated analysis of the competing uses*

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 7

for this water. See Water Code §§ 13170, 13240-13244. This effectively would obviate the statute's required public-interest balancing.

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

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

During the Fall 2012 State Water Board workshops on Phase 2 of the Comprehensive Review of the Bay-Delta Plan, NCWA and others presented substantial evidence demonstrating that preserving and restoring fishery resources requires *both* flow and non-flow measures (e.g., habitat restoration measures). That testimony established that reliance on simplistic statistical correlations between flows and fish populations grossly misapprehends the management challenges of the Delta. *See, e.g., ICF, DRAFT Bay-Delta Plan Workshops Summary Report*, pp. 6, 9, 20 (Dr. Wim Kimmerer), 24 (Dr. Cliff Dahm) (Jan. 2013).) Water Code section 13241(c) requires the Board, in weighing a proposed water quality objective such as those at issue here, to consider the “water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” In the context of fishery flows, “all factors” necessarily encompasses non-flow measures such as predator control, flood plain management and improvement of spawning and rearing habitat.

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

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

Empirical data indicates that an unimpaired flow regime would not be the panacea that the Final SED suggests. Since the adoption of Water Right Decision No. 1641 (revised), more than 1.3 million acre-feet per year of additional outflow has been dedicated to fisheries

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 8

maintenance.¹ If flow truly were the limiting factor in fisheries' recovery, there would have been attendant increases in fish populations over that time period. Instead, there have been observable declines.

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

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

Id. Given the lack of evidence that the unimpaired flow approach will truly benefit fish populations, the potential costs imposed upon consumptive uses are disproportionately high. Indeed, the Final SED estimates that the fisheries benefits from the proposed water quality objections would be the return of only an additional 1,100 fish. That benefit would come at a cost of 300,000 acre-feet/year, or sufficient water to irrigate 100,000 acres or provide water to approximately 1.5 million people.

8. *The Most Recent Amendments Are Without Authority. This Plan Is A Despotic Forced Relocation Policy.*

The most recent amendments propose authority on the part of a committee, the Executive Director, (if one SMT member approves Appendix K or certain changes if all SMT members agree) a veto right if California Department of Fish and Wildlife (or it is California Department of Fish and Game with nomenclature remains throughout the plan language) does

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

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 9

not agree. There is no assurance that public hearings, due process or any real decisions will be made by the SWRCB. Apparently, delegation is a way to avoid SWRCB Board Members involvement in changes in the plan which is of course counter to law. There is simply no authority for this sort of approach. If the “plan” is to be what certain individuals think on a given date, the SWRCB nominated to make the decision by the highest authority in Californian are not making the decisions or adopting the plan. We are sorry that this adds to your workload but the public good requires that you and your staff stop complaining about the years of consideration and make the best decision now. You are required by Constitution to meet evidentiary requirements, conduct hearings and there is not authority for the delegations of authority you propose.

No authority allows for SWRCB board members to delegate authority to the Executive Director or an unelected committee of SWRCB and CDFW staff members for the development or amendment of water quality control standards. The Legislature vested authority in the SWRCB members to formulate and effectuate water quality control standards, not staff or new committees, and the legislature conditioned the SWRCB’s authority on compliance with notice and hearing requirements- the basic procedural safeguards that preserve democratic accountability in administrative government. (Water Code § 13147 (Requiring noticed hearings for water quality control plans).) Such hearing and notice protections will be violated by the current proposal to delegate authority to develop and implement water quality control standards to the Executive Director and esoteric committees.

Notably, the legislature expressly granted the SWRCB the power to create a committee of individual regional board members to “assist the [SWRCB] in carrying out its responsibilities in water quality control”, but the legislature granted the SWRCB no comparable authority to create and vest in new committees and its Executive Director the power to develop and carry out water quality control standards. (Water Code § 13171.)

The substantive magnitude of the proposed unimpaired flow requirements is a forced relocation policy for rural Californians. SWRCB staff has asked the unelected SWRCB members to dry up lands, hollow out towns, and to shatter rural livelihoods and ways of life, all without compensation or evidentiary hearings in which facts are distinguished from fiction, reason is distinguished from scripture, and science is distinguished from voodoo dogma. And now this plan is proposed to be formulated and carried out by individuals who are neither appointed or elected and who will apply their subjective views without adherence to the elementary procedural safeguards that distinguish the objective application of justice by a representative government from the subjective application of individual preferences without the consent of those governed, i.e.- the distinction between democracy and dictatorship; rule of law from rule by men. The echoes of forced relocation policies, from Tibet to Cambodia, are growing louder.

Ms. Jeanine Townsend, Clerk of the Board, SWRCB

Re: *Comments on the Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/San Joaquin Delta Estuary and Supporting Environmental Document (Lower San Joaquin River)*

July 27, 2018

Page 10

9. *Conclusion*

For the foregoing reasons, SJRECWA urges the SWRCB to revise and recirculate the Final Proposed Amendments and the Final SED so that the State Water Board's action will be consistent with the Porter-Cologne Water Quality Control Act, CEQA, the Delta Reform Act, and the best available science.

Thank you for the opportunity to submit these comments.

Very truly yours,



Steve Chedester, Executive Director
San Joaquin River Exchange Contactors Water
Authority
Central California Irrigation District
San Luis Canal Company
Firebaugh Canal Water District
Columbia Canal Company