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Westlands Water District



September 9, 2022

VIA EMAIL

State Water Resources Control Board
Division of Water Rights
Attn: San Joaquin Unit
1001 I Street, 2nd Floor
Sacramento, CA 95814
EMAIL: LSJR-SD-Comments@waterboards.ca.gov

Re: Comment Letter – 2018 Bay-Delta Implementation NOP

Dear Members of the State Water Resources Control Board:

The San Luis & Delta-Mendota Water Authority (“Water Authority”), along with member agency Westlands Water District; the San Joaquin River Exchange Contractors Water Authority; and the Grassland Basin Drainers, a subset of Water Authority member agencies; appreciates the opportunity to comment in response to the Revised Notice of Preparation and California Environmental Quality Act Scoping Meeting (“NOP”) regarding a proposed regulation to implement lower San Joaquin River flows and southern Delta salinity objectives in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta (“Bay-Delta Plan”).

The Water Authority is a public agency formed in 1992 as a joint powers authority, and has twenty-seven member agencies. Twenty-five of the Water Authority’s member agencies contract with the United States for the delivery of water from the federal Central Valley Project (“CVP”). Most of the Water Authority’s member agencies depend upon the CVP as the principal source of water they provide to users within their service areas. That water supply serves approximately 1.2 million acres of agricultural lands within areas of San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, San Benito, and Santa Clara Counties, a portion of the water supply for over 2 million people, including in urban areas within Santa Clara County referred to as the “Silicon Valley,” and millions of waterfowl that depend upon approximately 135,000 acres of managed wetlands and other critical habitat within the largest contiguous wetland in the western United States. The operations of the CVP are therefore of vital interest and importance to the Water Authority, its member agencies, and the people, farms, businesses, communities, and wildlife-refuges they serve.

1

The Water Authority offers the following comments in response to the NOP.

1. The NOP (1) Inappropriately Assumes the State Water Board Will Prepare a Regulation to Implement Phase 1 Objectives, and (2) Does Not Define the Project Well Enough to Allow for Meaningful Input

The State Water Board should rescind and issue a new notice of preparation for two primary reasons.

First, the NOP includes an unprecedented policy decision that the State Water Board will employ a regulation to assign responsibility for implementation of the lower San Joaquin River flows and southern Delta salinity objectives (NOP, p. 3). This policy decision has significant implications for the entire process and is not based on prior direction from the State Water Board. As such, the assignment of responsibility through the adoption of a regulation is a decision more appropriately made by the State Water Board after allowing for comment by interested parties, and is not one that has been or should be delegated to staff and announced through a NOP.

In prior documents related to Phase 1 of the Water Quality Control Plan update, the State Water Board indicated that it had not yet decided whether it would implement objectives through a water right proceeding or through regulation. (See, e.g., Bay-Delta Plan (Dec. 18, 2018), Program of Implementation, p. 22 [“The State Water Board will exercise its quasi-legislative or adjudicative powers involving water rights and water quality to require implementation of the water quality objectives.... The State Water Board may implement the objectives by conducting water right proceedings, which may include adopting regulations, conducting adjudicative proceedings, or both....”].) This indication of indecision did not provide the public with an adequate opportunity to provide comment on the various mechanisms nor did it allow the State Water Board time and information to adequately consider the implications of the various paths.

Not since *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 97 (*Racanelli*) has the State Water Board attempted to assign responsibility for implementation of water quality objectives through a quasi-legislative action. Pursuant to *Racanelli*, the State Water Board has assigned responsibility for implementing water quality objectives after conducting water right proceedings to ensure that the decision on how the State Water Board will assign responsibility is made in a manner consistent with the requirements of due process. *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463 and *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, previously cited by the State Water Board in support of actions to adopt regulations in the waste and unreasonable use/drought context, do not provide support for what the State Water Board is proposing to do in the present context. Neither case involves water quality control planning authority.

Further, even if the State Water Board had authority to assign responsibility through the adoption of a regulation, the decision to proceed in this manner should only be made with adequate notice and only after State Water Board staff and the public have an opportunity to present the advantages and disadvantages of the different approaches. The transparency requested should

not result in material delay. A new notice of preparation could (and should) describe the project – generally, what are the objectives and what are the parameters for implementation – making clear that a decision on the manner for assigning responsibility would be made after State Water Board deliberation.

Second, missing from the NOP may be significant components of the manner in which the State Water Board may “allocate responsibility to water rights holders and claimants for implementing the Bay-Delta Plan LSJR flow and southern Delta salinity components of the 2018 Bay-Delta Plan.” (NOP, p. 4.) For the San Joaquin River flow objectives, will the State Water Board consider allocation pursuant to water right priority? Will the State Water Board consider minimum storage requirements? And, for the southern Delta salinity objectives, will implementation account for all causes that affect the concentration of salts in the south Delta? Will the State Water Board allocate responsibility for meeting the objectives based on relative contributions to the salt concentration? Without a complete description of the Project, it is not reasonably possible to assess potential environmental issues, reasonable alternatives, and mitigation. When the State Water Board staff issues the new notice of preparation, staff must supplement the description of the Project.

2. In Its Development of Alternatives, the State Water Board Should Consider an Alternative That Minimizes the Use of Flow and Relies on External Efforts That Will Maximize Non-Flow Measures to Protect Beneficial Uses

Lower San Joaquin River Flow Objective¹

The environmental impact report for implementation of the Phase 1 objectives (“EIR”) must consider a reasonable range of alternatives to the proposed implementation of the Phase 1 objectives; the State Water Board has an obligation to consider alternatives that could feasibly attain most of the project objectives and would avoid or substantially lessen significant adverse changes to the physical environment and related social and economic impacts. (Pub. Res. Code § 21002.1; 14 Cal. Code Regs. § 15126.6(a).)

The current approach is “flow-centric.” Flow is only one tool, however, and, as the State Water Board has acknowledged, “resource protection cannot be achieved solely through flows – habitat restoration also is needed. One cannot substitute for the other; both flow improvements and habitat restoration are essential to protecting public trust resources.” (Development of Flow

¹ The use of an unimpaired flow objective is extremely problematic. Implementation of an unimpaired flow approach would have significant negative impacts throughout California in part because it relies upon flow, assuming it, as the “master variable,” will address multiple factors that affect the beneficial use of water for fish and wildlife. Those other factors are not addressed directly.

Criteria for the Sacramento-San Joaquin Delta Ecosystem (SWRCB 2010)², pg. 7; see also Making the Most of Water for the Environmental: A Functional Flows Approach for California's Rivers (PPIC 2020)³.) A range of alternatives that only addresses flow does not seem like a reasonable range of alternatives. Accordingly, the Water Authority urges the State Water Board to include alternatives that explore low flow and non-flow approaches that rely on non-flow measures occurring, or that will occur, to improve water quality throughout the watershed. Such alternatives should include only the minimum amount of flow needed and utilize, when appropriate, strategic re-managed flows.

Moreover, the program of implementation compels the State Water Board to consider alternatives with low and non-flow approaches paired with actions that implement non-flow measures. The program of implementation states that with respect to the lower San Joaquin River flow objectives, "The State Water Board also recognizes that Recommended Actions, including non-flow measures, such as habitat restoration, *must* also be part of efforts to comprehensively address Delta aquatic ecosystem needs as a whole." (Bay-Delta Plan (Dec. 18, 2018), Program of Implementation, p. 24, italics added.) Given the import of non-flow measures, the Water Authority believes it is necessary for the State Board to consider alternatives that analyze limited or re-managed flow, coupled with non-flow measures such as, among other actions, increasing the amount of habitat or reducing the number of non-native species.

Southern Delta Salinity Objective

As explained above, the State Water Board has an obligation to consider a range of alternatives. With respect to the southern Delta Salinity Objective, the State Water Board must consider alternatives that account for the multiple factors that influence salinity concentrations in the southern Delta. Such factors include: San Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local water users; municipal and agricultural return flows; and channel capacity.

The State Water Board should ensure the Bay-Delta Plan conforms to the State policy that the activities and factors that may affect water quality "shall be regulated 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, beneficial and detrimental, economic and social, tangible and intangible.*" (Water Code, § 13000, italics added.)

² Available at

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

³ Available at <https://www.ppic.org/wp-content/uploads/making-the-most-of-water-for-the-environment-a-functional-flows-approach-for-californias-rivers.pdf>.

3. The EIR Must Include an Appropriate Baseline

Lower San Joaquin River Flow Objective

The EIR should incorporate an appropriate baseline of existing environmental conditions that accurately accounts for the existing altered Bay-Delta ecosystem. An appropriate baseline is crucial for an accurate assessment of the potential effects or benefits of the lower San Joaquin River flow objective approach given such alterations to the ecosystem (for example, spring-run Chinook and steelhead can no longer access a large portion of their historical habitat, which is located above existing reservoirs, and fall-run Chinook in the San Joaquin River inhabit only a small portion of their historical habitat).

Southern Delta Salinity Objective

The EIR must include an appropriate baseline of environmental conditions which reflects existing conditions. Important reductions in the salt load have been made over the last 20 years or so. (See, e.g., California Regional Water Quality Control Board Central Valley Region Order R5-2019-0077.) In addition, a number of regulatory programs and orders for salinity management are currently being implemented by the Central Valley Regional Water Quality Control Board. These include the CV-SALTS and Irrigated Lands Regulatory Programs (ILRP), the Total Maximum Daily Loads (TMDL) for salinity in the lower San Joaquin River, and recent orders including the 2019 Waste Discharge Requirements (WDR's) for the Grassland Bypass Project. Many such programs and orders have been incorporated into the Water Quality Control Plan for the Sacramento and San Joaquin River Basins (Central Valley Basin Plan). The SWRCB should ensure that the proposed implementation of salinity objectives in the Bay-Delta Plan is consistent with the implementation of salinity objectives in the Central Valley Basin Plan.

An accurate and complete description of the salinity conditions will ensure the environmental analysis is proper, but also will provide information that should assist the State Water Board in deciding how it will allocate responsibility for implementing the southern Delta salinity objectives.

4. The EIR Must Analyze Impacts on Communities South of the Delta

The NOP correctly indicates the areas of potential environmental effects includes "areas receiving water exported from the LSJR and Bay-Delta." The CVP service areas are a critical component of the environment potentially affected by implementation of the lower San Joaquin River flow objectives and southern Delta salinity objectives. The quantity of CVP water available to communities and lands south of the Delta directly affect the people who live and work in this region. As reflected by the last 30 plus years, when CVP water is limited, those people suffer, manifested in many ways, including:

- A. Operations and maintenance costs will increase for communities throughout the CVP service area, as reducing the amount of water using the various facilities increases the O&M costs for those that do receive water.

- B. Reductions in surface water supply decrease the amount of groundwater recharge, thereby increasing the concentration of subsurface water quality impairments that could impact drinking water quality and reliability.
- C. Reduced employee hours, lost wages and jobs, loss of tax revenue to fund municipal services such as fire and police protection, and the resulting reduction in staffing at the local government level, thereby contributing to family disruption and dislocation;
- D. Adverse impacts to local schools from the relocation of farming-dependent families, lost school revenues, and additional social costs for schools, food shortages and increased demand for public services such as food banks, and an increased incidence of crime;
- E. Loss of crops, including the destruction of permanent crops, which increases the amount of fallowed land that diminishes air quality due to dust and particulate matter;
- F. Increased groundwater pumping, resulting in decreased irrigation water quality and impacts to crops from increased soil salinity, groundwater overdraft resulting in land subsidence and associated impacts to infrastructure, increased energy usage and associated environmental impacts related to increased pumping, and depletion of groundwater reserves; and
- G. Loss of water supply for wildlife refuges south of the Delta served by the CVP, with adverse effects on migratory birds and other sensitive wildlife.

Some of the economic and societal impacts above have been analyzed in recent studies published by Dr. David Sunding⁴ and Dr. Michael Shires⁵, which indicate that socioeconomically disadvantaged communities in the San Joaquin Valley disproportionately bear the burden of reduced surface water deliveries. Given the Board's commitment to racial equity, as advanced by the adoption of the State Water Board's Racial Equity Resolution No. 2021-0050, it would be appropriate to analyze, identify, and disclose these impacts in the EIR in not only a singular socioeconomic lens, but also to disclose the effects of these outcomes through the lens of racial equity.

In addition, there may be specific impacts from implementation of the lower San Joaquin River flow objective that require analysis, such as carryover storage imposed on water projects on the Stanislaus, Tuolumne, and Merced Rivers (including impacts to release programs, transfers, and exchanges), and the effect of any loss of water supply on farms and communities (including increased land fallowing and reduced employment, land value, crop production, air quality, urban

⁴ Sunding, David. "Blueprint Economic Impact Analysis: Phase One Results". Roland-Host, David, University of California, Berkeley, February 15, 2020, https://waterblueprintca.com/wp-content/uploads/2021/09/Blueprint.EIA_.PhaseOne.2.28-v41.pdf

⁵ Shires, Michael A. "The Economic Impact of the Westlands Water District on the Local and Regional Economy: 2022 Update". March 16, 2022, <https://wwd.ca.gov/wp-content/uploads/2022/03/economic-impact-report-2022-update.pdf>



water supply, etc.), and effects on the environment (including reduced refuge deliveries affecting Pacific Flyway, increased pumping in groundwater basins that may receive significantly less imported water, reduced hydropower generation, etc.). The EIR should consider the effect of changes in available surface water on groundwater.

Further, the EIR cannot ignore Phase 2 of the Bay-Delta Plan update. The EIR must consider the effects of implementation of the lower San Joaquin River flow and southern Delta salinity objectives in the context of potential updates or supplements to the remainder of the Bay-Delta Plan water quality objectives.

5. In Its Assessment of Potential Environmental Impacts, the State Water Board Should Not Rely on the 2018 SED

Finally, the NOP states that “the State Water Board anticipates that the EIR will tier from the SED supporting the 2018 update to the Bay-Delta Plan and provide the analysis to support a State Water Board decision regarding adoption of regulations that allocate responsibility for implementing the LSJR flow and southern Delta salinity components of the Bay-Delta Plan.” (NOP, p. 5.) However, the 2018 SED is the subject of litigation from multiple challenges for failure to comply with CEQA in the pending *State Water Board Cases*, Judicial Council Coordinated Proceeding No. 5013. Challengers have identified inadequate analysis as one of the many deficiencies of the 2018 SED. The key concerns raised in the litigation regarding the analysis in the 2018 SED include:

- A. The 2018 SED fails to evaluate the significant or potentially significant impacts of the Phase 1 Plan Amendments on water supply and improperly defers evaluation of impacts of the Phase 1 Amendments, including impacts during dry and successive dry years, impacts resulting from later revisions to flow requirements, and the reasonably foreseeable impacts of less water supply for other beneficial uses.
- B. The 2018 SED does not compare the Phase 1 Plan Amendments to an accurate baseline of existing conditions, including, but not limited to, current flow requirements.
- C. The 2018 SED project description is not accurate or complete; nor is it stable, but rather is subject to change because, in part, it does not define parameters or describe the range of possible flow patterns the Executive Director may order in the future; it does not adequately articulate the biological goals or performance criteria such actions are intended to meet.

Given these and other deficiencies in the 2018 SED, the EIR should not rely on the 2018 SED and should instead provide an independent analysis of environmental impacts.

The Water Authority appreciates this opportunity to submit these comments. If you have any questions regarding these comments, please contact any of the signatories to this letter.

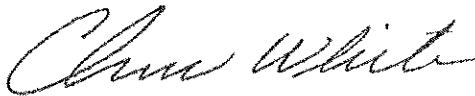
Sincerely,



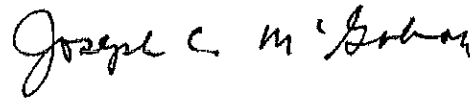
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