

# ST49 SWRCB



State Water Resources Control Board

February 2, 2012

Ms. Terry Macaulay  
Deputy Executive Officer  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Dear Ms. Macaulay:

## COMMENTS ON THE DRAFT DELTA PLAN PROGRAM ENVIRONMENTAL IMPACT REPORT

State Water Resources Control Board (State Water Board), Central Valley Regional Water Quality Control Board (Central Valley Water Board), and San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) (collectively Water Boards) staff has reviewed the draft Delta Plan (Plan) Environmental Impact Report (DEIR). Our comments and suggestions are presented as follows:

- General Comments
- Impacts Analysis and Mitigation Measures
- Regulatory Framework

In addition, staff has comments on the Fifth Draft Delta Plan that are summarized following the DEIR comments.

### General Comments

1. Water Board staff supports the improved integration of monitoring, reporting, and assessment efforts called for in WQ R7. In addition, staff supports the encouragement of project proponents to consult with the Water Boards early in the development of their actions, as proposed in WQ R10. Staff also supports the inclusion of Suisun Marsh in ER R1 as a high priority area for ecosystem restoration.

## **Response to comment ST49-1**

Comment is noted.

## **Response to comment ST49-2**

Comment noted.

ST49-1

ST49-2

- 2. A brief reference to Clean Water Act 303(d) listed water bodies is made in Section 1.1.2 and Table D-2 of Appendix D (Regulatory Framework), and a more detailed discussion regarding some constituents and parameters is provided under Section 3.3.3.2 (Water Resources).

Please use the 2010 Clean Water Act 303(d) list for impaired water bodies, which can be located at:

[http://www.waterboards.ca.gov/water\\_issues/programs/tmdl/integrated2010.shtml](http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml).

ST49-3

The Final EIR should provide a comprehensive list of all water bodies located within, and downstream of, the project area, which are included on the 2010 Clean Water Act 303(d) list for impaired water bodies, and the constituent(s) or parameter(s) each water body or water body segment is listed for, and Total Maximum Daily Loads (TMDL), should they be under development, developed and approved, or forecasted for development.

- 3. A brief reference to National Pollution Discharge Elimination System (NPDES) permits is made in Section 1.1.2 of Appendix D (Regulatory Framework), and again under Sections 3.3.4.2.2 and 3.4.4.6.1, and Mitigation Measure 3-1(Water Resources). It would be helpful to clarify throughout the Final EIR which specific NPDES permit is being discussed, and to provide the correct citation/reference. In addition, please see our comment in the Regulatory Framework section relating to NPDES.

ST49-4

- 4. The DEIR refers to Suisun Marsh in a number of different ways, but defines it in terms of the Delta Act. The Delta Act refers to a definition of Suisun Marsh as the area defined in Section 29101 and protected by Division 19 (commencing with Section 29000). That definition includes subtidal areas located in Suisun Bay and the Carquinez Strait. It would be helpful to more clearly define which recommendations in the Delta Plan apply to which habitat types included in the definition of Suisun Marsh.

ST49-5

- 5. Section 1.2, Overview and Use of the Delta Plan, Section 2A, Proposed Project and Alternatives, and Section 2B, Introduction to Resources Sections describes the Delta Plan's design to guide other federal, state and local agencies to use some or all of the analysis presented in this Programmatic EIR for purposes of project review and permitting to regulate future individual projects tiering from the Final EIR. Below is some suggested language that would help clarify this relationship for future individual project proponents.

ST49-6

*It is anticipated that future individual projects will require permits or other discretionary actions by state and local agencies other than the Delta Stewardship Council. These agencies, acting as responsible agencies, could*

### **Response to comment ST49-3**

The comment references subsection 3.3.2.2 and Table D-2 of the Draft Program EIR. The Delta Plan's degree of influence on future undefined projects, is unclear; however. The Delta Stewardship Council's review of consistency of covered actions with the Delta Plan, including confirmation of consistency with existing regulations, will be focused on the Delta and Suisun Marsh, as described in subsection 2.1.2, Covered Actions, of the Draft Program EIR and as required by the Delta Reform Act. As described in Section 2B of the Draft Program EIR, the Delta Stewardship Council does not propose or contemplate directly authorizing construction or operation of any physical activities. Rather, through the Delta Plan, the Delta Stewardship Council seeks to influence the actions, activities, and/or projects of other agencies – the details of which are under the jurisdiction and authority of the individual agencies that will propose them in the future. Therefore, the Draft Program EIR Existing Conditions descriptions provides more water quality details in the Delta and Suisun Marsh than the information provided about other portions of the Study Area. In response to this comment, the data in Table D-2 related to the most recent Clean Water Act 303(d) list of impaired water bodies and TMDLs has been expanded to include a list of 303(d) impaired water bodies in the Delta and Suisun Marsh. Table D-2 includes information to indicate which TMDLs have been adopted and which are under development. The description of TMDLs in areas located outside of the Delta that use Delta water, including those under development, are discussed in subsections 3.3.5.3.2 and 3.3.5.4.2 of the Draft Program EIR.

### **Response to comment ST49-4**

Please refer to response to comment ST49-3. The Delta Plan's degree of influence on future undefined projects is unclear. For these reasons, this EIR does not evaluate discharges pursuant to specific National Pollution Discharge Elimination System permits.

### **Response to comment ST49-5**

As described in Section 2.2.2.1, Overview of the Delta Ecosystem Restoration, the proposed Delta Plan would encourage increased and elevation-appropriate ecosystem restoration in the Delta and Suisun Marsh in accordance with the Department of Fish and Game Ecosystem

Restoration Program, which contains general recommendations for habitat based upon existing elevations.

***Response to comment ST49-6***

As described in subsection 1.4, Overview of the Delta Plan Environmental Impact Report, of the Draft Program EIR, the Delta Plan Program EIR is a program-level EIR due to the broad, program level of the Delta Plan. Future environmental documents would be completed by other agencies when they propose to implement projects that are subject to consistency reviews by the Council, or projects which are encouraged or otherwise influenced by the Delta Plan. Hence, this program EIR is not intended to provide project-level clearance for any specific project.

*rely on or tier off this Programmatic EIR in order to comply with the California Environmental Quality Act. Future individual projects must be examined on a project specific basis, in light of the Programmatic EIR, to determine whether additional environmental documentation is necessary.*

*If a responsible agency determines that, in compliance with the California Environmental Quality Act Guidelines §15162, no new effects would occur and no new mitigation would be required, the agency can rely on this existing Programmatic EIR to comply with the California Environmental Quality Act. In the event that it is determined that a future individual project would result in new or substantially greater impacts, including site-specific impacts, the agency may require the preparation of a subsequent environmental document which can be tiered from this Programmatic EIR.*

**Impact Analysis and Mitigation Measures**

There is, in general, insufficient discussion of the potential environmental impacts of various project elements. For example, the impacts associated with construction of a wetland or building a new reservoir is described in numerous places throughout the DEIR. In the detailed comments below, State Water Board staff has identified several sections where more discussion of the potential environmental impacts of aspects of the project would be appropriate.

- 6. CEQA Guidelines section 15126.4 states that mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. Most of the DEIR's text on mitigation measures lacks a description of how the identified mitigation measures will be made legally binding.
- 7. Staff recommends that the DEIR included more information on the potential cumulative effects of implementing multiple project elements. For example, the San Joaquin River Restoration Program and the deepening of the San Joaquin Deep Water Ship Channel are identified in the draft Delta Plan as potential projects. Both are likely to individually decrease the oxygen content of the Stockton Deep Water Ship Channel and contribute to the existing dissolved oxygen impairment. There may also be interactive and cumulative impacts. Cumulative impacts related to low dissolved oxygen should be fully identified and evaluated. Likewise, the Delta Plan contemplates restoring about 60,000 acres of wetlands in the Bay-Delta, increasing upstream storage (Sites and Temperance Reservoirs), changing Delta hydrology (more San Joaquin water with higher methyl mercury and less Sacramento River water with lower methyl mercury concentrations) and changing water residence time in the Delta. All of these actions are likely to individually affect methyl mercury production and accumulation in Delta fish. This is a second example of cumulative



ST49-6

ST49-7

ST49-8

ST49-9

ST49-10

**Response to comment ST49-7**

Please see Master Response 2.

**Response to comment ST49-8**

Pursuant to Policy G P1, all applicable feasible mitigation measures identified in this EIR must be adopted for/included in all covered actions, as demonstrated through the certification process. In addition, each lead agency's project-specific environmental review must be conducted in compliance with CEQA. Please see Master Response 4.

**Response to comment ST49-9**

As described in subsection 3.4.3.2.1, 3.4.3.3.1, and 3.4.3.4.1 of the DEIR, implementation of many of the projects encouraged under the proposed Delta Plan, including dredging projects, could result in significant adverse water quality impacts that would not be mitigable to a less than significant level.

**Response to comment ST49-10**

Please refer to the response to comment ST49-9. The impacts of storage projects, floodplain modification, wetlands restoration, and water quality projects are analyzed in EIR Sections 3 through 21.

impacts from implementing multiple projects. The apparent conflicts between construction of new storage facilities, modifications of flood plains and wetland restoration; and methylmercury reduction should be discussed and potential alternatives and mitigation should be identified. Recommendations on when one issue may take priority over the another would be useful. When one issue takes precedent over another, potential mitigation measures (e.g., fish buy-back programs) should be fully examined for feasibility and overall benefit.

ST49-10

- 8. Regarding the Water Resources and Biological Resources chapters, in general, the focus of the impacts analysis in on construction andthe mitigation measures are primarily centered on erosion control during construction. There is minimal discussion of the other potential environmental impacts of the project . taff recommends that these sections be expanded to discuss the potential for habitat restoration activities and water resource management activities to produce conditions that would enhance production of methylmercury or make sediment-bound contaminants (such as pesticides) more available.

These potential impacts would occur during construction and after construction during project operation (i.e., after the wetland has been constructed and is functioning as designed). Increased concentrations of methylmercury and pesticides are water quality issues that could adversely impact invertebrates, fish, wildlife and humans that consume fish. The EIR should include a discussion of measures that could be implemented to mitigate the potential for project features to enhance production of methylmercury or release sediment-bound contaminants.

ST49-11

Additionally, the EIR should describe the basis for the determination, "insignificant with mitigation." This discussion should include the list of specific mitigation measures that will be implemented to ensure that water quality impacts will be insignificant once mitigated.

**Specific Comments on Section 3, Water Resources**

- 9. P. 3-10, lines 39-40: Should state that the DO objective of 6 mg/L only applies from 1 September – 30 November. The objective is 5 mg/L during other times of the year.

ST49-12

- 10. P. 3-10, lines 41-43 and in section 3.4 Impacts Analysis of Project and Alternatives: The statement that "*loadings from the Stockton Regional Wastewater Control Facility has the greatest effect in reducing DO...*" is not correct. The staff report and TMDL Control Plan for low dissolved oxygen in the Stockton Deep Water Ship Channel identifies three coequal factors. The DO problem can be corrected by adjusting any one of the three factors. These three factors are upstream river flows into the channel, loads of oxidizable organic material from both the upper basin and from the

ST49-13

**Response to comment ST49-11**

In response to this comment, please see text change(s) in Section 5 of the FEIR.

**Response to comment ST49-12**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

**Response to comment ST49-13**

Comment noted; the requested change would not affect the evaluation of impacts and determination of significance.

city of Stockton and the depth and configuration of the Ship Channel. The discussion of the DO issue is germane to this project because the Delta Plan contemplates projects that may modify each of these three factors. The basin plan amendment for dissolved oxygen in the Stockton deep water ship channel can be viewed at:

[http://www.waterboards.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/san\\_joaquin\\_oxygen/basin\\_plan\\_amendment\\_5-2004/draft\\_final\\_staff\\_rpt.pdf](http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/san_joaquin_oxygen/basin_plan_amendment_5-2004/draft_final_staff_rpt.pdf)

Also, the 2005 citation should be to Van Niewenhuyse. The text should clarify that the cited study was performed before the Stockton Wastewater Treatment Plant (SWWTP) upgrade to tertiary treatment in the fall 2006. The SWWTP has since contributed far less oxygen demanding substances. However, there are still periodic violations of the water quality objectives for oxygen in the Stockton Deep Water Ship Channel.

11. P. 3-11, lines 6-15: The paragraph on selenium should be strengthened by including the following information: (1) There are two sources of selenium to the Bay-Delta: agricultural waste from the San Joaquin Valley and oil refinery waste. Historic oil refinery waste is likely the primary source of selenium to Suisun Bay, which is now present mostly in sediment. As a result, selenium from the San Joaquin Basin is now the more controllable source to the Bay-Delta. (2) The San Francisco Bay was listed because of high concentrations of selenium in several species of diving ducks and in sturgeon. (3) Selenium, like mercury, is a problem because it biomagnifies in food chains. Suisun Bay supports large populations of the introduced clam, *Protomocorbula amurensis*. The clam accumulates large concentrations of selenium and is extensively consumed by both sturgeon and diving ducks. Factors that increase the populations of the introduced clam or the bioavailability of selenium to the clam will worsen the water quality impairment.

12. P. 3-11, lines 16-25: The discussion on mercury should be updated to be consistent with the Delta Methyl Mercury TMDL adopted by the Central Valley Regional Water Quality Control Board on April 22, 2010 and approved by the USEPA on October 20, 2011, as follows:

- a. Describe the recently adopted methyl mercury tissue objectives for the Bay-Delta. These objectives can be converted to a water column value for methyl mercury. Include a similar description of the San Francisco Bay mercury TMDL since projects are likely to occur in Suisun Bay.
- b. Describe how TMDL implementation requirements apply to both the construction and operation of proposed projects being considered in the Delta Plan. This should include wetland restorations, flood conveyance, water management, and water storage facilities.
- c. Important documents to review include:

### **Response to comment ST49-14**

Comment noted; the requested change would not affect the evaluation of impacts and determination of significance.

### **Response to comment ST49-15**

Comment noted. The suggested measure would be implemented, as appropriate, as part of the permitting process required of a given project proponent.

- i. The TMDL document or resolution R5-2010-0043 available at [http://www.waterboards.ca.gov/centralvalley/board\\_decisions/adopted\\_orders/resolutions/r5-2010-0043\\_res.pdf](http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2010-0043_res.pdf)
- ii. Staff Report on Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Methyl Mercury and Total Mercury in the Sacramento-San Joaquin Delta Estuary available at [http://www.swrcb.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/delta\\_hg/april\\_2010\\_hq\\_tmdl\\_hearing/apr2010\\_bpa\\_staffrpt\\_final.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/delta_hg/april_2010_hq_tmdl_hearing/apr2010_bpa_staffrpt_final.pdf)
- iii. Potential mitigation measures could include requiring that project proponents design projects to minimize methyl mercury production, or maximize contaminant degradation before allowing off-sight movement.  
 Many water bodies in both the Sacramento and San Joaquin River Basins are also on the current 303(d) list because of elevated concentrations of mercury in fish. The Delta Plan lists several potential projects in these waters. The peer reviewed literature has determined that similar projects elsewhere have contributed to methyl mercury production and bioaccumulation in fish. Such projects include construction of new storage facilities, modifications of flood plains and wetland restoration actions. The DEIR should include a table or map identifying both the listed water bodies and all known or proposed projects in these waters that have the potential to increase methyl mercury levels in fish. The 2010 303(d) List is available at: [http://www.waterboards.ca.gov/water\\_issues/programs/tmdl/integrated2010.shtml](http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml)

ST49-15

13. P. 3-79, lines 2-42: The section titled "Effects of Project Operations" under Reliable Water Supply should include a paragraph specifically discussing the potential of any proposed project to cause or contribute to violations of methyl mercury tissue objectives after reviewing requirements for water management and water storage facilities included in the Delta Mercury Control Program in the Basin Plan for the Sacramento River and San Joaquin River. The review should include projects in both the Delta and upland watersheds. The DEIR should then evaluate whether the potential impacts are significant or not.

ST49-16

14. P. 3-80, Section 3.4.3.1.2: The DEIR considers impacts to groundwater supplies to be less than significant. However, revisions to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) could require increases in surface water flows. In response, surface water users may choose to pump groundwater instead of relying on surface water flows. The DEIR states there are critically over drafted groundwater basins in the region affected by the proposed Delta Plan. The DEIR should include a discussion and evaluation of these issues and should propose mitigation as appropriate.

ST49-17

### Response to comment ST49-16

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### Response to comment ST49-17

The proposed Delta Plan contains recommendations (WR R9, WR R10, and WR R11) to sustainably use groundwater and to reduce groundwater overdraft situations. As described in Section 2A of the Draft Program EIR and Section 2 of the RDEIR, it is anticipated that under the proposed Delta Plan, water users would develop other local and regional water supplies in accordance with Delta Plan policies and recommendations. The EIR recognizes that in some geographical areas, this could lead to retiring land from agricultural production, as described in Section 7, Agriculture and Forestry Resources.

15. Pages 3-83, Section titled, "Effects of Project Operations:" This section should include a paragraph specifically discussing the potential for any proposed project to cause or contribute to violations of methyl mercury tissue objectives after reviewing requirements in the Delta Mercury Control Program for wetland restoration, flood control and water management. The section should then evaluate whether the potential impacts are significant or not.

ST49-18

This section should also include a paragraph specifically discussing the potential for any proposed project to cause or contribute to violations of selenium tissue objectives in Suisun Bay. Impacts may occur two ways. First, increased salinity in the delta in late summer may allow more stable populations of the introduced clam in the western delta and eastern Suisun Bay, which can be expected to increase selenium availability to sturgeon and diving ducks. Some of these changes are described at: [http://www.mercurynews.com/science/ci\\_18903921](http://www.mercurynews.com/science/ci_18903921). Second, an impact of locating a new Delta conveyance system on the Sacramento River would be to increase the amount of San Joaquin River water that flows through the Delta to Suisun Bay (water that is now re-entrained at the State and Federal pumping facilities and used for agriculture in the San Joaquin Valley). This will increase the loads of selenium exported out of the San Joaquin Basin to Suisun Bay. The section should evaluate whether these impacts are significant.

ST49-19

16. P. 3-84, Section 3.4.3.2.2: The DEIR indicates that there are critically over drafted groundwater basins in the region affected by the proposed Delta Plan, in particular, the Eastern San Joaquin County groundwater basin. Section 1.3.2 of Appendix D of the DEIR indicates there are local groundwater ordinances, and specifically mentions San Joaquin County's groundwater ordinance. However, that ordinance requires that a permit be obtained for use of extracted groundwater outside the county boundaries, and does not apply to use of groundwater within county boundaries. Given the potential for increased groundwater pumping in a region that is already identified as critically over drafted, the DEIR should reevaluate the determination regarding groundwater impacts in the San Joaquin basin and propose mitigation measures as appropriate.

ST49-20

17. P. 3-89, lines 9-11: This paragraph should be reworded as follows: The EIR states, "The suggested mitigation involves the participation in an offset program to ensure no net increase in methyl mercury loading." Currently there is no offset program in place. As a result, this may not serve as adequate mitigation. In Phase 1, the Delta Mercury Control Program requires dischargers, either individually or collaboratively, to conduct control studies to evaluate existing control methods and, as needed, develop additional control methods that could be implemented to achieve methyl mercury load and waste load allocations. During Phase 2 of the Delta Mercury Control Program, dischargers shall implement methyl mercury control programs.

ST49-21

### **Response to comment ST49-18**

Please refer to response to comment ST49-11.

### **Response to comment ST49-19**

As described on page 3-84 of the DEIR, the potential water quality impacts of Delta ecosystem restoration were determined to be significant at a program level. This conclusion may change when specific information becomes available for future projects.

### **Response to comment ST49-20**

Please refer to the response to comment ST49-17.

### **Response to comment ST49-21**

Comment noted. Until offset programs are implemented, the ongoing Delta Mercury Control Program, established by the SWRCB and other agencies, requires dischargers to conduct control studies to evaluate existing control methods and develop, as needed, additional control methods to achieve methyl mercury load and waste load allocations in accordance with the TMDL; and subsequently, implement methyl mercury control programs.

18. P. 3-92, Section 3.4.3.6.1: Under Mitigation Measure 3-1, the EIR should provide an extended discussion on how the Proposed Project will not contribute to further impairment of any constituent and/or parameter listed on the Clean Water Act 303(d) list or TMDL, or discussed elsewhere in the document, either as a constituent of concern or found through general research of water quality problems and history within and downstream of the project site.

ST49-22

19. P. E-6, Table E-4: The information provided in Table E-4, intended to support discussions on water quality in Section 3 of the DEIR, is incomplete and inaccurate. This table states that the data presented reflect water quality in both Suisun Bay and Suisun Marsh and cites the San Francisco Bay Regional Monitoring Program (RMP) as the source of the data. By design, the RMP only collects data from Suisun Bay. The amount of data for the period 1999 to 2008 represents a total of about 45 to 50 data points for each constituent analyzed. The RMP does not collect data from Suisun Marsh. This table needs to be modified to reflect all the available Suisun Bay data and should accurately reflect the source and results of the Suisun Marsh data. A map of the sampling locations would be helpful.

ST49-23

**Appendix D, Regulatory Framework**

Following are some specific comments on Appendix D- Regulatory Framework. In addition, we provide suggested clarifying language and suggestions for additional sections in Appendix D that detail the Water Boards' regulatory framework under the Water Code, California Constitution, Clean Water Act and adopted plans and policies.

ST49-24

20. In general, text describing regulatory authority, jurisdiction or delegations should include reference to the appropriate sections of the Water Code, the California Code of Regulations, or the appropriate regulatory document.

21. P. D-1, Section 1.1.2 and P. D-10, Section 1.1.5: Since the project area (Delta) covers more than one Regional Board and the proposed project may involve changes to the appropriation of water, this section should not be limited to only a discussion of the Central Valley Regional Water Quality Control Board but should also include a discussion of the State Water Board and the San Francisco Bay Regional Water Board.

ST49-25

22. Water Quality Certification:  
On P. D-2, line 5 the document states that the State Water Board has delegated the specific responsibilities of the development and enforcement of water quality objectives and implementation plans to the Central Valley Regional Water Quality Control Board. This sentence should be corrected to state that the State Water

ST49-26

***Response to comment ST49-22***

Without specific details of future projects, it is not possible to develop quantitative thresholds of significance. Nevertheless, this EIR considers whether potential future actions that could be encouraged by the Delta Plan may cause significant adverse environmental effects. Hence, this EIR takes a conservative approach and assumes that most significant adverse impacts that have been identified for similar projects, following environmental review by other lead agencies, could and may be significant. In response to this comment, please see text change(s) in Section 5 of the FEIR.

***Response to comment ST49-23***

In response to this comment, Table E-4 of the Draft Program EIR has been modified to reflect the data presented in the cited sources.

***Response to comment ST49-24***

Comment noted.

***Response to comment ST49-25***

In response to this comment, please see text change(s) in Section 5 in this FEIR.

***Response to comment ST49-26***

In response to this comment, please see text change(s) in Section 5 in this FEIR.

Board has delegated specific responsibilities for the development and enforcement actions to the Central Valley and San Francisco Bay Regional Water Quality Control Boards. This section should be updated and the following information included in the discussion:

*The Federal Clean Water Act (33 U.S.C. §§ 1251-1387) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Section 101 of the Clean Water Act (33 U.S.C. § 1251 (g)) requires federal agencies to "co-operate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.*

*Section 401 of the Clean Water Act (33 U.S.C. §1341) requires every applicant for a federal license or permit which may result in a discharge into navigable waters to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313). Clean Water Act section 401 directs the agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the Clean Water Act and with any other appropriate requirement of state law. Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. The State Water Board Executive Director may issue a decision on a water quality certification application. (Cal. Code Regs., tit. 23, § 3838, subd. (a).) The California Regional Water Quality Control Boards have adopted, and the State Water Board has approved, water quality control plans (basin plans) for each watershed basin in the State. The basin plans designate the beneficial uses of waters within each watershed basin, and water quality objectives designed to protect those uses pursuant to Section 303 of the Clean Water Act. (33 U.S.C. § 1313.) The beneficial uses together with the water quality objectives that are contained in the basin plans constitute State water quality standards.*

ST49-26

*If a United States Army Corps of Engineers permit, or any other federal permit, is required for a future individual project due to the disturbance of waters of the United States (such as streams and wetlands), then a Water Quality Certification(s) must be obtained prior to initiation of project activities.*

*The California Regional Water Quality Control Boards have adopted, and the State Water Board has approved, water quality control plans (basin plans) for each watershed basin in the State. The basin plans designate the beneficial uses of waters within each watershed basin, and water quality objectives designed to protect those uses pursuant to Section 303 of the Clean Water Act. (33 U.S.C. § 1313.) The beneficial uses together with the water quality objectives that are contained in the basin plans constitute State water quality standards.*

**No comments**

- n/a -

*Section 401 water quality certifications are issued by the Regional Water Quality Control Boards, the State Water Resources Control Board's Division of Water Quality, and the State Water Board's Division of Water Rights. Each entity has certification authority as defined by the California Code of Regulations, §3855.*

- *The Division of Water Quality is responsible for issuing water quality certifications for projects which may fall under the jurisdiction of more than one regional board.*
- *The Division of Water Rights is responsible for issuing water quality certifications associated with one or more of the following:*
  1. *An appropriation of water;*
  2. *A hydroelectric facility, and the proposed activity requires a Federal Energy Regulatory Commission (FERC) license or amendment to a FERC license; or*
  3. *Any other diversion of water for domestic, irrigation, power, municipal, industrial, or other beneficial use.*
- *The Regional Boards are responsible for all other projects within their regions for which a discharge may occur.*

*Required items for issuance of a Clean Water Act Section 401 Water Quality Certification are based on Sections 3836 and 3856 of Title 23 of the California Code of Regulations.*

The Final EIR should clarify that (a) there are no waivers for Clean Water Act Section 401 Water Quality Certifications in the state of California; (b) a Clean Water Act Section 401 Water Quality Certification serves as both a certification, in part or in whole, of a federal permit, under Section 401 of the Clean Water Act, and as a Waste Discharge Requirement under the Porter-Cologne Water Quality Control Act; and (c) under Section 401 of the Clean Water Act, the state of California can review and approve, condition, or deny all federal permits that may result in a discharge to waters of the State, including wetlands.

23. P. D-2, Lines 34-38: Please list the NPDES permit(s) separately. For example, the General Permit for Storm Water Discharges Associated with Construction Activities, Construction General Permit Order No. 2009-009-DWQ and the Dewatering and other Low Threat Discharges to Surface Waters, Central Valley Regional Water Quality Control Board Order No. R5-2008-0085 (supersedes Order No. 5-00-175) are both NPDES permits. Each of these NPDES permits should be listed separately in Section 1.1.2 of Appendix D (Regulatory Framework), as these permits will be issued to, or apply to, future individual project proponents.

24. P. D-2, line 2: This section should include reference to the Porter-Cologne Act.

ST49-26

ST49-27

ST49-28

### **Response to comment ST49-27**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### **Response to comment ST49-28**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

25. P. D-3, Table D-1: Staff could not locate a specific discussion of the National Toxics Rule within the DEIR, except as a footnote to Table D-1 of Appendix D (Regulatory Framework). It may be useful to add some additional reference to the National Toxics Rule and its application.

ST49-29

26. P. D-3, Table D-1: There are a couple of errors in the table regarding the list of Water Quality Objectives (WQOs) applicable to Suisun Marsh, identified below:

a. For Mercury (Hg): the objectives listed in the DEIR are 0.025 and 2.1 ug/l (these are referenced as adopted from the San Francisco Bay Mercury TMDL). The objectives that apply to Suisun Bay and Carquinez Strait taken from the San Francisco Bay Mercury TMDL are 0.2 ppm in large fish (human health protection); 0.03 ppm in small fish (wildlife protection) and a 2.1 ug/L 1-hour avg. water column concentration. Objectives that apply to Suisun Marsh only are 0.025 ug/L 4-day avg.; 2.1 ug/L 1-hour avg. and 0.051 ug/L 30 day avg (CTR value) and are taken from the San Francisco Bay Basin Plan.

ST49-30

b. The water quality objectives listed for the San Francisco Bay Basin Plan in Table D-1 are a mixture of numbers from Table 3-3 in the Basin Plan (Marine objectives) and Table 3-6 (Agricultural Supply). This may cause some confusion because the objectives for San Francisco Bay usually reflect the most stringent conditions (marine or fresh). It is unlikely that the Agricultural Supply objectives will be useful and should not be included. It is difficult to differentiate which objectives are which without looking at the long list of footnotes. In addition, not all parameters in Table 3-6 are listed in Table D-1.

27. P. D-12, Section 1.2.4: This section is missing a discussion regarding the State Water Board's authorities under the California Constitution (article X, section 2) and Water Code section 100, which prohibit the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. The constitutional doctrine of reasonable use applies to all water users, regardless of the basis of the water right, which serves as a limitation on every water right and every method of diversion. Water Code section 275 directs the State Water Board to take all appropriate proceedings or actions to prevent waste or violations of the reasonable use standard.

ST49-31

28. P. D-12, line 191-194: The statement referring to the State Water Board's permitting authority over underground streams should be restated to read "subterranean streams flowing through known and definite channels".

ST49-32

### **Response to comment ST49-29**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### **Response to comment ST49-30**

In response to this comment, Table D-1 of the Draft Program EIR has been modified to reflect more recent data.

### **Response to comment ST49-31**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### **Response to comment ST49-32**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

29. P. D-13, line 253: The following sentence should include the word identified in italics, underline below:

"The SWRCB and the RWQCBs have *been* delegated federal authority to implement the requirements of the federal CWA in California, including issuing federal NPDES permits..."

ST49-33

30. P. D-14 lines 270-272: Please add the following additional text identified in italics and underline to the end of the sentence as follows:

"Freshwater criteria apply to waters of salinity less than 1 parts per thousand, seawater criteria are for water greater than 10 parts per thousand, and estuarine waters use the more stringent of the two possible criteria, *in absence of estuary-specific criteria.*"

ST49-34

31. P. D-14, Table D-2: Please update Table D-2 with the following corrections:

- a. The correct date for the San Joaquin River Diazinon and Chlorpyrifos TMDL is 2006 (not 2002). For your reference, current dates on completed TMDLs for the San Francisco Bay and Central Valley Regions can be found at: [http://www.waterboards.ca.gov/centralvalley/water\\_issues/tmdl/index.shtml](http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/index.shtml) and [http://www.waterboards.ca.gov/sanfranciscobay/water\\_issues/programs/TMDLs/](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/TMDLs/)
- b. In addition to Clear Lake, the San Francisco Bay Water Board is also working on a nutrient TMDL for Suisun Marsh.

ST49-35

31. P. D-15, Table D-2: Missing from this table is mention of the Bay Protection and Toxics Cleanup Program (Water Code section 13390 et. seq.). The Central Valley Water Board identified the following toxic hot spots. The Central Valley Water Board has since adopted TMDLs and Basin Plan control programs to address each of these hot spots:

- Mercury in the entire Delta and the Cache Creek watershed including Clear Lake
- Low dissolved oxygen concentrations in the San Joaquin River in the vicinity of the City of Stockton
- Diazinon from orchard dormant spray runoff in the entire Delta
- Diazinon and chlorpyrifos from urban stormwater runoff in Morrison Creek in the City of Sacramento and Mosher Slough, 5 Mile Slough, the Calaveras River, and Mormon Slough in the City of Sacramento
- Chlorpyrifos from irrigation tailwater in French Camp Slough, Duck Slough, Paradise Cut and Ulatris Creek.

ST49-36

### Response to comment ST49-33

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### Response to comment ST49-34

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### Response to comment ST49-35

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### Response to comment ST49-36

Table D-2 includes line items for mercury in Cache Creek and Delta; dissolved oxygen for San Joaquin River TMDL and Phase II under the "Stockton Deep Water Ship Channel" (now combined) and diazinon for the Delta under the "Sacramento-San Joaquin Delta. In response to this comment, Table D-2 of the Draft Program EIR has been amended to include line items for diazinon and chlorpyrifos for Morrison Creek, Mosher Slough, 5 Mile Slough, Calaveras River, Mormon Slough; and chlorpyrifos for irrigation tailwater in French Camp Slough, Duck Slough, Paradise Cut, and Ulatris Creek.

32. P. D-41, Section 3.1.2.4: There should be a parallel section in the State Regulatory Framework discussion or elsewhere in this Appendix that discusses the Regional Water Board's role in certifying compliance with section 401, a prerequisite in many cases to issuance of a 404 permit by the Army Corps of Engineers.

ST49-37

33. P. D-147, Section 15.1.3: As previously mentioned, every applicant for a federal license or permit which may result in a discharge into navigable waters must provide the licensing agency with certification that the project will be in compliance with Section 401 of the Clean Water Act. This includes hydropower projects under the jurisdiction of the Federal Energy Commission (FERC). See the discussion above regarding the State Water Board, Division of Water Rights' authority to issue water quality certification for these projects.

ST49-38

34. P. D-187, lines 6467-6468: Please replace this citation with the most recent version of the San Francisco Bay Basin Plan, dated 2010. For reference, the Water Quality Control Plan (Basin Plan) for the San Francisco Bay Basin can be found here: [http://www.swrcb.ca.gov/sanfranciscobay/basin\\_planning.shtml](http://www.swrcb.ca.gov/sanfranciscobay/basin_planning.shtml).

ST49-39

35. P. D-13, line 233: The Porter-Cologne Water Quality Control Act is briefly referenced under Section 1.2.8 of Appendix D in combination with a brief reference to the Water Quality Control Plans and Waste Discharge Requirements. State Water Board staff recommends that the Final EIR provide separate discussions of the Porter-Cologne Water Quality Control Act, Waste Discharge Requirements, and Water Quality Control Plans under Section 1.2 of Appendix D (Regulatory Framework) for the reader's clarification.

Water Board staff recommend the following text be added to Appendix D to describe the Water Boards' role under the Clean Water Act:

a. Porter-Cologne Water Quality Control Act (2011 version)

*The Porter-Cologne Water Quality Control Act (Act) established the State Water Board and divided the state into nine regions, each overseen by a regional board. The nine regional boards have the primary responsibility for the coordination and control of water quality within their respective jurisdictional boundaries. Under the Porter-Cologne Water Quality Control Act, water quality objectives are limits or levels of water quality constituents or characteristics established for the purpose of protecting beneficial uses.*

ST49-40

*The Act requires the Regional Water Quality Control Boards to establish water quality objectives while acknowledging that water quality may be changed to some degree without unreasonably affecting beneficial uses. Designated beneficial uses, together with the corresponding water quality objectives, and an antidegradation policy also constitute water quality standards under the federal*

**Response to comment ST49-37**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

**Response to comment ST49-38**

Please refer to response to comment ST49-37.

**Response to comment ST49-39**

The reference list in subsection 21.0, References, has been amended to include the 2010 San Francisco Bay Basin Plan.

**Response to comment ST49-40**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

Clean Water Act. Therefore, the water quality objectives provide requirements for water quality control.

b. Waste Discharge Requirements

If the United States Army Corps of Engineers determines that only non-jurisdictional waters of the State (i.e., "non-federal" waters of the State) are present in the Proposed Project area, the Proposed Project will require a Waste Discharge Requirement permit(s) to be issued by Central Valley Water Board. Under the California Porter-Cologne Water Quality Control Act, discharges to all waters of the State, including all wetlands and other waters of the State including, but not limited to, isolated wetlands, are subject to State regulation.

For more information on the WDR processes, visit the Central Valley Water Board website at:

[http://www.waterboards.ca.gov/centralvalley/water\\_issues/water\\_quality\\_certification/](http://www.waterboards.ca.gov/centralvalley/water_issues/water_quality_certification/)

c. Water Quality Control Plans

Please see the discussion below for more details.

d. Construction Storm Water General Permit

Dischargers whose project disturb one or more acres of soil or where projects disturb less than one acre but are part of a larger common plan of development that in total disturbs one or more acres, are required to obtain coverage under the General Permit for Storm Water Discharges Associated with Construction Activities, Construction General Permit Order No. 2009-009-DWQ. Construction activity subject to this permit includes clearing, grading, grubbing, disturbances to the ground, such as stockpiling, or excavation, but does not include regular maintenance activities performed to restore the original line, grade, or capacity of the facility. The Construction General Permit requires the development and implementation of a Storm Water Pollution Prevention Plan.

ST49-40

For more information on the Construction General Permit, visit the State Water Resources Control Board website at:

[http://www.waterboards.ca.gov/water\\_issues/programs/stormwater/constpermits.shtml](http://www.waterboards.ca.gov/water_issues/programs/stormwater/constpermits.shtml)

e. Dewatering and other low threat discharges to surface waters

Individuals, public agencies, private businesses, and other legal entities discharging relatively pollutant-free wastewaters that pose little or no threat to the quality of surface waters, for 4 months or less in duration or have an average dry weather flow less than 0.25 million gallons per day, may obtain authorization under this General Order to discharge.

**No comments**

- n/a -

For more information on the Dewatering and Other Low Threat Discharges to Surface Waters Permit, visit the State Water Resources Control Board website at:

[http://www.swrcb.ca.gov/centralvalley/board\\_decisions/adopted\\_orders/general\\_orders/r5-2008-0081.pdf](http://www.swrcb.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/r5-2008-0081.pdf)

ST49-40

As applicable to future individual projects, the Final EIR should provide a discussion on Central Valley Regional Water Quality Control Board Order No. R5-2008-0082 (NPDES Permit No. CAG995002, which expires in June 2013) or any subsequent revised order.

37. Water Board staff recommend the following text be added to Appendix D, Regulatory Framework to describe the plans and policies of the Water Boards.

- a. Central Valley Salinity Alternatives for Long-Term Sustainability (CV-SALTS): Although salinity was described in some subsections of the document, Water Board staff suggests including a concise summary of the Central Valley Salinity Alternatives for Long-Term Sustainability program in Section 1.2 of Appendix D (Regulatory Framework) and as applicable in Section 3 (Water Resources) of the EIR. The following paragraphs are provided for your consideration.

*In 2006, the Central Valley Regional Water Quality Control Board, the State Water Resources Control Board, and stakeholders began a joint effort to address salinity and nitrate problems in California's Central Valley and adopt long-term solutions that will lead to enhanced water quality and economic sustainability. This effort is referred to as the CV-SALTS Initiative.*

*The goal of CV-SALTS is to develop a comprehensive region-wide Salt and Nitrate Management Plan (SNMP) describing a water quality protection strategy that will be implemented through a mix of voluntary and regulatory efforts. The SNMP may include recommendations for numeric water quality objectives, beneficial use designation refinements, and/or other refinements, enhancements, or basin plan revisions. The Salt and Nitrate Management Plan and will serve as the basis for amendments to the three Basin Plans that cover the Central Valley Region (Sacramento River and San Joaquin River Basin Plan, the Tulare Lake Basin Plan and the Sacramento/San Joaquin Rivers Bay-Delta Plan). The basin plan "amendments" will likely establish a comprehensive implementation plan to achieve water quality objectives for salinity (including nitrate) in the Region's surface waters and groundwater; and the Salt and Nitrate Management Plan may include recommendations for numeric water quality objectives, beneficial use designation refinements, and/or other refinements, enhancements, or basin plan revisions.*

ST49-41

For more information on CV-SALTS, please visit our website at:

## Response to comment ST49-41

In response to this comment, please see text change(s) in Section 5 in this FEIR.

[http://www.swrcb.ca.gov/rwqcb5/water\\_issues/salinity/](http://www.swrcb.ca.gov/rwqcb5/water_issues/salinity/)

- b. Statement of Policy With Respect to Maintaining High Quality of Waters in California (State Water Board Resolution 68-16: We could not locate a discussion of the State Antidegradation Policy (Statement of Policy with Respect to Maintaining High Quality of Waters in California, per State Water Board Resolution 68-16) within the DEIR. The following paragraphs are provided for your consideration.

*A key policy of California's water quality program is the State's Antidegradation Policy. This policy, formally known as the Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16), restricts degradation of surface and ground waters. In particular, this policy protects water bodies where existing quality is higher than necessary for the protection of beneficial uses. Under the Antidegradation Policy, any actions that can adversely affect water quality in all surface and ground waters must:*

*(1) Meet Waste Discharge Requirements which will result in the best practicable treatment or control of the discharge necessary to assure that a pollution or nuisance will not occur and the highest water quality consistent with maximum benefit to the people of the State will be maintained; (2) Not unreasonably affect present and anticipated beneficial use of the water; and (3) Not result in water quality less than that prescribed in water quality plans and policies.*

*The State Antidegradation Policy meets the federal requirement that states adopt an antidegradation policy consistent with 40 Code of Federal Regulations section 131.12.*

For more information on this policy, please visit our website at:  
[http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/1968/rs68\\_016.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1968/rs68_016.pdf).

- c. San Francisco Bay Regional Water Quality Control Board, San Francisco Bay Basin Water Quality Control Plan; Central Valley Regional Water Quality Control Board, Sacramento-San Joaquin River Water Quality Control Plan, and Tulare Lake Water Quality Control Plan (Basin Plans):

*The Regional Water Quality Control Boards are required to formulate and adopt Basin Plans for all areas under their jurisdiction under Section 13240 of the Porter-Cologne Water Quality Control Act. Each Basin Plan must contain water quality objectives to ensure the reasonable protection of beneficial uses, as well as a program of implementation for achieving water quality objectives with the Basin Plans. Federal regulations require each state to*

ST49-41

ST49-42

ST49-43

## **Response to comment ST49-42**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

## **Response to comment ST49-43**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

*adopt water quality standards to protect the public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. In California, the beneficial uses, water quality objectives, and the Antidegradation Policy are the State's water quality standards. Water quality standards are also contained in the National Toxics Rule, 40 Code of Federal Regulation Section 131.36, and the California Toxics Rule, 40 Code of Federal Regulation Section 131.38.*

*The Basin Plans are subject to modification as necessary, considering applicable laws, policies, technologies, water quality conditions and priorities. Basin Plans are updated and revised periodically as required, using Basin Plan amendments. Once a Basin Plan amendment is adopted in noticed public hearings, it must be approved by the State Water Resources Control Board, Office of Administrative Law and in some cases, the United States Environmental Protection Agency. Basin Plan amendments only become effective after they have been approved by the Office of Administrative Law and in some cases, the United States Environmental Protection Agency. Every three (3) years, a review of the Basin Plan is completed that assesses the appropriateness of existing standards and evaluates and prioritizes Basin Planning issues.*

For more information on the Water Quality Control Plan for the San Francisco Bay Basin, please see:  
[http://www.waterboards.ca.gov/sanfranciscobay/basin\\_planning.shtml#2010basinplan](http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml#2010basinplan)

For more information on the Water Quality Control Plan for the Sacramento and San Joaquin River Basins, please see:  
[http://www.waterboards.ca.gov/centralvalley/water\\_issues/basin\\_plans/index.shtml](http://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/index.shtml).

For more information on the Water Quality Control Plan for the Tulare Lake Basin, please see:  
[http://www.waterboards.ca.gov/centralvalley/water\\_issues/basin\\_plans/](http://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/)

- d. Policy for Implementing Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California : A discussion on the Policy for Implementing Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California should be incorporated into Table D-1 and Section 1.2.9 of Appendix D (Regulatory Framework) of the Final EIR for the reader's clarification, as follows:

*The Policy for Implementing Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California is referred to as the State Implementation Policy.*

## **Response to comment ST49-44**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

ST49-43

ST49-44

*This state policy for water quality control, adopted by the State Water Resources Control Board on March 2, 2000 and effective by May 22, 2000, applies to discharges of toxic pollutants into the inland surface waters, enclosed bays, and estuaries of California subject to regulation under the State's Porter-Cologne Water Quality Control Act (Division 7 of the Water Code) and the federal Clean Water Act. Such regulation may occur through the issuance of National Pollutant Discharge Elimination System permits, or other relevant regulatory approaches.*

*This Policy establishes: (1) implementation provisions for priority pollutant criteria promulgated by the United States Environmental Protection Agency through the National Toxics Rule (40 CFR 131.36) (promulgated on December 22, 1992 and amended on May 4, 1995) and through the California Toxics Rule (40 CFR 131.38) (promulgated on May 18, 2000 and amended on February 13, 2001), and for priority pollutant objectives established by Regional Water Quality Control Boards in their water quality control plans; (2) monitoring requirements for 2,3,7,8-TCDD equivalents; and (3) chronic toxicity control provisions. In addition, this Policy includes special provisions for certain types of discharges and factors that could affect the application of other provisions in this Policy.*

For more information on the Policy for Implementing Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, please see: [http://www.swrcb.ca.gov/water\\_issues/programs/state\\_implementation\\_policy/](http://www.swrcb.ca.gov/water_issues/programs/state_implementation_policy/)

- e. Groundwater Quality Protection Strategy for the Central Valley: Water Board staff suggests that Appendix D mention the Groundwater Quality Protection Strategy being developed by the Central Valley Regional Board. The Groundwater Quality Protection Strategy is being developed to assure comprehensive, consistent, and coordinated protection of the beneficial uses of groundwater throughout the Central Valley, and to ensure a sustainable, high quality water supply for the Central Valley. Future projects proposed under the Delta Plan should be coordinated with any future groundwater management plans developed under the Groundwater Quality Protection Strategy.
- f. Water Board staff recommends that Appendix D, Regulatory Framework include text describing State Water Board's water rights authorities under the Water Code and the California Constitution. The following language is provided for your consideration:

ST49-44

ST49-45

ST49-46

### **Response to comment ST49-45**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

### **Response to comment ST49-46**

In response to this comment, please see text change(s) in Section 5 in this FEIR.

**No comments**

- n/a -

*To obtain a new appropriative water right, a person must file a water right application with the State Water Board to appropriate water and use it for a reasonable and beneficial purpose. In part, the water right application must identify the nature and amount of the proposed use, the proposed place of diversion, the type of the diversion works, the proposed place of use, and sufficient information to demonstrate a reasonable likelihood that the unappropriated water is available for the proposed appropriation. In acting on an application, the State Water Board must consider the relative benefit to be derived from all beneficial uses of water concerned, including the preservation and enhancement of fish and wildlife, and uses protected in a relevant water quality control plan. The State Water Board may impose terms and conditions that will best develop, conserve, and utilize in the public interest the water sought to be appropriated, protect fish and wildlife, and carry out water quality control plans. In issuing permits and licenses, or approving changes to those rights, the State Water Board may include terms and conditions to protect existing water rights, the public interest, and the public trust, and to ensure that water is put to beneficial use.*

*The California Constitution (article X, section 2) and Water Code section 100 prohibit the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. In determining the reasonableness of a particular use of water or method of diversion, other competing water demands and beneficial uses of water must be considered. A particular water use or method of diversion may be determined to be unreasonable based on its impact on fish, wildlife, or other instream beneficial uses. What constitutes a reasonable water use depends on the entire circumstances presented and varies as current conditions change. The State Water Board also has "an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect the public trust uses whenever feasible." The purpose of the public trust doctrine is to protect navigation, fishing, recreation, environmental values, and fish and wildlife habitat. Under the public trust doctrine, the State is the administrator of the public trust for the people of California. The State retains supervisory control over the navigable waters of the State and the lands underlying those waters.*

ST49-46

*The State's public trust responsibilities extend to protecting navigable waters from harm caused by a diversion of nonnavigable tributaries. Before the State Water Board approves an appropriative water right diversion, it must consider the effect of such diversions on public trust resources and avoid or minimize any harm to those resources where feasible. In applying the public trust doctrine, the State Water Board has the power to reconsider past water allocations even if the Board considered public trust impacts in its original water allocation decision. Thus, the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to*

ST49-46

*address diversions of surface water or groundwater that reduce instream flows and thus adversely affect fish, wildlife, or other instream beneficial uses.*

**Comments on Fifth Staff Draft Delta Plan**

Staff recommends the following changes to the Fifth Draft Delta Plan regarding Ecosystem Restoration Policy (ER P1). Staff recommends appending the language in ER P1 and the introduction to that policy in the *Update Delta Flow Requirements* section of the Delta Plan. These changes would provide additional background information and recognize the Department of Fish and Game's (DFG) important role in successfully implementing this policy by developing flow recommendations and conducting instream flow studies for high-priority tributaries in the Delta watershed. The following additions, shown in underline, are recommended to pages 85 and 86 of the August 2, 2011 draft, and also to other areas of the Delta Plan, as appropriate, that refer to the same policy.

The SWRCB is taking, or has recently taken, several other actions related to updating flow objectives for the Delta and its high-priority tributaries. In 2010, the SWRCB completed its report titled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (SWRCB 2010a)*. This report provides an assessment of the flows needed to protect the Delta and its ecological resources, but does not address other public trust considerations. While informing the broader flow-standard-setting process, the report also underscores the importance to California of resolving as soon as possible what those future flow regimes need to be. In addition, the SWRCB is coordinating with DWR in its preparation of environmental documentation for the Bay Delta Conservation Plan (BDCP) and may consider these environmental documents and other information developed for the BDCP in its proceedings to review flow requirements in the Delta. Also in 2010, the SWRCB completed a report titled *Instream Flow Studies for the Protection of Public Trust Resources: A Prioritized Schedule and Estimate of Costs (SWRCB 2010b)*. The SWRCB coordinated with DFG in developing these schedules, as required by Water Code Section 85087. DFG is required by the Public Resources Code (sections 10000-10005) to develop flow recommendations for watercourses and streams throughout the state for which minimum flow levels need to be established in order to assure the continued viability of fish and wildlife resources. These flow recommendations are considered by the SWRCB in regulatory actions related to appropriation of water and other planning activities.

ST49-47

**Problem Statement**

The State cannot effectively plan, finance, and build new conveyance and storage facilities to improve the reliability of water exports from the Delta watershed when future Bay-Delta Water Quality Control Plan objectives and flow requirements are not known.

**Policies**

ER P1 Development, implementation, and enforcement of new and updated flow requirements for the Delta and high-priority tributaries are key to the achievement of the

**Response to comment ST49-47**

This is a comment on the project, not on the EIR.

coequal goals. The State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan objectives and establish flows as follows:

- a) By June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals (28).
- b) By June 2, 2018, develop flow criteria for high-priority tributaries in the Delta watershed that are necessary to achieve the coequal goals (29).

ST49-47

Per 2009 legislation (SBX7 1) DFG is conducting instream flow studies for high-priority tributaries in the Delta watershed in order to develop flow recommendations. These flow recommendations will inform the SWRCB's development of flow criteria.

Prior to the establishment of revised flow objectives and criteria identified above, the existing Bay-Delta Water Quality Control Plan objectives shall be used to determine consistency with the Delta Plan.

In addition, the following change is recommended to the footnote on page 86:

SWRCB staff will work with the Delta Stewardship Council and DFG to determine priority streams. As an illustrative example, priority streams could include the Merced River, Tuolumne River, Stanislaus River, Lower San Joaquin River, Deer Creek (tributary to Sacramento River), Lower Butte Creek, Mill Creek (tributary to Sacramento River), Cosumnes River, and American River (SWRCB 2011a, SWRCB 2011b).

ST49-48

**Conclusion**

Water Board staff appreciates the opportunity to provide input on the Delta Plan DEIR. If you have any questions concerning these comments or would like to discuss any other issues associated with the Delta Plan, please contact the following staff. For questions regarding water quality, please contact Stephanie Fong with the Central Valley Regional Water Board at (916) 464-4822 or [sfong@waterboards.ca.gov](mailto:sfong@waterboards.ca.gov), or Naomi Feger with the San Francisco Bay Regional Water Board at (510) 622-2328 or [nfeger@waterboards.ca.gov](mailto:nfeger@waterboards.ca.gov). For all other issues, please contact me at (916) 445-5997 or [asnider@waterboards.ca.gov](mailto:asnider@waterboards.ca.gov).

ST49-49

Sincerely,

ORIGINAL SIGNED BY

Anne Snider, Environmental Scientist  
Division of Water Rights

**Response to comment ST49-48**

This is a comment on the project, not on the EIR.

**Response to comment ST49-49**

Comment noted.