



January 10, 2025

State Water Resources Control Board

SacDeltaComments@waterboards.ca.gov via email

Re: Comment Letter—Draft Sacramento/Delta Bay-Delta Plan Updates

Dear State Water Resources Control Board:

By this letter, our public interest organizations comment on the State Water Resources Control Board (Board) October 25, 2024, draft of potential updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (Bay Delta Plan). These comments are submitted by Sierra Club California, AquAlliance, Center for Biological Diversity, California Water Impact Network, and the Planning and Conservation League.

Our organizations object to approval of the Voluntary Agreements. Our Table of Contents is on the next page.

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TABLE OF CONTENTS

INTRODUCTION	3
1. THE VOLUNTARY AGREEMENTS CANNOT BE ADOPTED IN LIEU OF REGULATORY ACTIONS BY THE WATER BOARD	3
A. Updating the Bay Delta Plan is a Quasi-Legislative Action	3
B. The Board Must be Rulemaking Because the Board Prepared a Substitute Environmental Document Instead of an EIR	7
2. THE VOLUNTARY AGREEMENTS WOULD NOT PROTECT THE ENDANGERED AND THREATENED FISH SPECIES	8
3. THE OCTOBER 2024 DRAFT BAY DELTA PLAN UPDATES FAIL TO PROVIDE THE FULL ENVIRONMENTAL DISCLOSURE REQUIRED BY CEQA	11
4. THE BOARD CANNOT COMPLY WITH CEQA BY BASING DECISIONS ON “PAPER WATER”	13
5. ADOPTION OF THE VOLUNTARY AGREEMENTS WOULD BE CONTRARY TO THE DELTA REFORM ACT, THE CALIFORNIA ENDANGERED SPECIES ACT, THE PUBLIC TRUST DOCTRINE, AND THE STATE CONSTITUTIONAL REQUIREMENT OF REASONABLE USE AND METHOD OF USE	15
6. THERE HAS BEEN SIGNIFICANT NEW INFORMATION ABOUT THE DECLINE OF THE DELTA ECOSYSTEM PUBLISHED AFTER THE COMMENT PERIOD CLOSED JANUARY 19, 2024 ON THE BOARD’S <i>STAFF REPORT/SED</i>	17
7. DECREASING FRESHWATER RUNOFF COUPLED WITH INCREASING SALINITY INTRUSION RESULTING FROM WORSENING CLIMATE CHANGE MAKE THE ADOPTION OF STRONG AND EFFECTIVE WATER QUALITY AND FLOW STANDARDS EVEN MORE IMPERATIVE	21
8. THE OUTCOME OF THE 2024 PRESIDENTIAL ELECTION SHOULD END ANY CONSIDERATION OF ADOPTION OF THE VOLUNTARY AGREEMENTS	22
CONCLUSION	26

INTRODUCTION

It is time for the Water Resources Control Board to adopt effective Bay Delta Plan standards such as the High Flow Alternative included in the Board’s September 28, 2023, *Staff Report/SED*. The Board’s *Staff Report/SED* tells the truth in stating “Native species in the Bay-Delta ecosystem are experiencing an ecological crisis” and that “Current Delta outflow requirements are far below protective levels.”

The Voluntary Agreements cannot be adopted in lieu of regulatory actions by the Board because the Bay Delta Plan is quasi-legislative. The Bay Delta Plan must consist of standards “ensuring water quality.” The Plan is not an adjudicative settlement process. The way to increase flows is to reduce exports. The reductions proposed in the Voluntary Agreements range from nothing to trivial by comparison to the *Staff Report/SED* High Flow Alternative and also the Proposed Plan amendments. As an example, in critical water years the Voluntary Agreements would not reduce annual exports at all. In contrast, the *Staff Report/SED* proposed Plan objective of 55% unimpaired flow would reduce exports to the San Joaquin Valley and Southern California by 563,000 thousand acre feet.

Unlike the High Flow Alternative and the proposed Plan amendments, the Voluntary Agreements do not reflect a serious effort to prevent the extinction of endangered and threatened fish species or to improve the “precarious” water conditions in the Delta.

1. THE VOLUNTARY AGREEMENTS CANNOT BE ADOPTED IN LIEU OF REGULATORY ACTIONS BY THE WATER BOARD

A. Updating the Bay Delta Plan is a Quasi-Legislative Action

The October 25, 2024, draft of potential updates to the Bay Delta Plan refers to Government Code § 11415.60 as authority for adopting the Voluntary Agreements (VAs.) (October 2024 Draft pp. 75-76, 78.) The October draft states, “The State Board will consider approval of Government Code section 11415.60 agreements, in lieu of an adjudicative water right proceeding, to implement flow, habitat, and other commitments

of parties to the Healthy Rivers and Landscapes Program.” (October 2024 Draft, p. 76.) The Board, however, cannot substitute an adjudicative settlement process for required rulemaking.

What is required of the Board in updating the Bay Delta Plan is to adopt a regulation, a standard of general application establishing flows including inflows and outflows sufficient to protect the endangered and threatened fish species and their habitat as well as water quality standards. On January 19, 2024, the U.S. Environmental Protection Agency (EPA) issued a Comment Letter (“EPA Letter”) to the Water Board on the Board’s September 28, 2023, Draft, *Staff Report/Substitute Environmental Document in Support of Potential Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary for the Sacramento River and its Tributaries, Delta Eastside Tributaries, and Delta*. (“*Staff Report/SED*.”

EPA’s letter said, “EPA notes that *water quality standards* for the waterbodies covered in this Staff Report were last updated in 1995, despite a Clean Water Act requirement that States consider and as appropriate, make such updates at least once every three years. CWA § 303(c)(1).” (EPA Letter at 1 fn. 1.) (Emphasis added.)

The Board’s *Staff Report/SED* said, “The Sacramento/Delta update to the Bay-Delta Plan is critically important to the health and survival of the Bay-Delta ecosystem. Native species in the Bay-Delta ecosystem *are experiencing an ecological crisis*.” (Ch. 7.12, Hydrology and Water Quality, 7.12.1 Surface Water, p. 7.12.1-1) (Emphasis added.) The *Staff Report/SED* adds,

There has been a substantial overall reduction in flows and significant changes in the timing and distribution of those flows, and species have been cut off from natal waters. These issues have led to severe declines, and in some cases extinctions, of native fish and other aquatic species. The overall health of the estuary for native species is in trouble, and expeditious action is needed on the watershed level to address the crisis, including actions by the State Water Board, fisheries agencies, water users, and others to address the array of issues affecting the watershed. (Ch. 7.12, p. 7.12.1-1.)

There is more from the *Staff Report/SED*,

Failing to take actions proposed by the proposed Plan amendments could result in the loss of Delta function beyond restoration of its original function and, therefore, would result in a significant irreversible environmental change. (Ch. 7.23, p. 7.23-69.)

The *Staff Report/SED* declared that “*Current Delta outflow requirements are far below protective levels.*” (Ch. 5, p. 5- 28)(Emphasis added.) The current inadequate outflow requirements are frequently waived as shown by the Board’s issuance of temporary urgency change orders in 2014, 2015, 2021, and 2022 at the request of DWR and the U.S. Bureau of Reclamation. The court pointed out in the *State Water Resources Control Board Cases* (2006) 136 Cal.App.4h 674, 730, that “[Water Code] Section 13247—part of the Porter–Cologne Act—provides that ‘[s]tate offices, departments, and boards, in carrying out activities which may affect water quality, *shall* comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute....’ (Italics added.)” Implementation of and compliance with established standards is not voluntary. The Board also said eight years ago that water quality objective waivers are “not sustainable for fish and wildlife and that changes to the drought planning and response process are needed to ensure that fish and wildlife are not unreasonably impacted in the future and to ensure that various species do not go extinct.” (Water Rights Order 2015-0043 at 39, January 19, 2016.)

The Board's October 25, 2024, draft Bay Delta Plan updates refer to Government Code §11415.60 ("Decision by settlement") at several places as authority for the voluntary agreements. (October 2024 draft, pp. 75-76, 78.) Government Code section 11415.60 states,

(a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting *an adjudicative proceeding*. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or

damage except to the extent provided in Section 1152 of the Evidence Code. Nothing in this subdivision makes inadmissible any public document created by a public agency

(b) A settlement may be made *before or after issuance of an agency pleading*, except that in an adjudicative proceeding to determine whether occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. *The terms of a settlement may not be contrary to statute or regulation*, except that the settlement may include sanctions the agency would otherwise lack power to impose. (Emphasis added.)

The flow and water quality standards must be established by a regulation, a standard of general application. Government Code § 11342.600 defines “regulation” as follows,

‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

As the courts say, the Administrative Procedure Act (APA) ”defines ‘regulation’ very broadly...” (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571; *Savient Pharmaceuticals, Inc. v. Department of Health Services* (2007) 146 Cal.App.4th 1457, 1470.)

On the other hand, an “‘Adjudicative proceeding’ means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.” (Government Code § 11405.20.)

“Unlike rulemaking, which typically announces ‘generally applicable legal principles’ and ‘governs only the future,’ adjudication involves ‘case-specific determinations’ that ‘immediately bind parties by retroactively applying law to their past actions.’” (*Electric Energy, Inc. v. Environmental Protection Agency* (D.C. Cir. 2024)

106 F.4th 31, 45.) As explained by a California court in *California Assn. of Sanitation Agencies v. State Water Resources Control Bd.* (2012) 208 Cal.App.4th 1438, 1453, “Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.’ [Citation.]”

The Board’s promulgation of water quality standards for the Delta is “a quasi-legislative action...” (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 150.) Moreover, “the Board’s obligation when setting such standards is to ‘establish such water quality objectives... as *in its judgment* will ensure the *reasonable* protection of beneficial uses....” (*Id.*) (Emphasis by the court.) “In performing its regulatory function of ensuring water quality by establishing water quality objectives, the Board acts in a legislative capacity. The Water Quality Control Plan is thus a quasi-legislative document.” (*Id.* 182 Cal.App.3d at 112.) “[W]ater quality control plans... are quasi-legislative.” (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 697) (Case about the Board’s 1995 Bay Delta Plan.) The Board cannot substitute an adjudicatory settlement process for the required rulemaking and standard-setting.

B. The Board Must be Rulemaking Because the Board Prepared a Substitute Environmental Document (SED) Instead of an EIR

The SED part of the Board’s *Staff Report/SED* refers to the Board having prepared a *substitute environmental document* instead of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA.) A substitute environmental document is allowed under CEQA in lieu of an EIR if the Secretary of the Resources Agency has certified the regulatory program. (Pub. Res. Code § 21080.5(a.) The Board’s water quality planning process has been certified by the Resources Secretary. CEQA Guideline § 15251(g.)¹

The Public Resources Code section 21080.5 allowance of a plan or other written documentation in lieu of an EIR,

¹ The CEQA Guidelines are codified at 14 Cal. Code Regs § 15000 et seq.

applies *only* to regulatory programs or portions thereof that involve either of the following:

- (1) The issuance to a person of a lease, permit, license, certificate, or other entitlement for use.
- (2) The adoption or approval of standards, rules, regulations, or plans for use in the regulatory program. (Pub. Res. Code § 21080.5(b) (Emphasis added.)

In order to be able to rely on a substitute environmental document in lieu of an EIR, the Board must be in the process of adopting “standards, rules, regulations, or plans for use in the [Board’s] regulatory program.” If the Board instead seeks to adopt the Voluntary Agreements it will have to prepare an EIR before doing so.

So, the Board needs to act by establishing a regulation setting flow and water quality standards. Voluntary Agreements cannot set the standards in this rule making process. Government Code § 11415.60 is only applicable to adjudicative settlement proceedings. It is not applicable to rulemaking.

2. THE VOLUNTARY AGREEMENTS WOULD NOT PROTECT THE

The National Marine Fisheries Service (NMFS) January 19, 2024, comment letter on the Water Board’s *Staff Report/SED* establishes the inadequacies of the Voluntary Agreements. (NMFS letter pp. 4-6.) The NMFS pointed out that only a small percentage of the required funding for “currently-identified habitat restoration projects” would be provided by the VA parties. Substantial funding—\$740 million hoped to be provided by state and federal agencies— “has not been secured.” (*Id.* p. 4.)

The NMFS also explained,

The VAs [voluntary agreements] propose that, in the eighth year of implementation, the Board would consider the reports, analyses, information, and data from the VA Science Program, as well as recommendations from the VA Governance Committee and the Delta Independent Science Board, to decide the future of the VA Program. *This proposed timeframe for assessing the effectiveness of the VAs is concerning, given the dire status of native fish species within the Sacramento River Basin and Delta and the urgency in improving conditions for these species to prevent further declines.* (*Id.* p. 4)(Emphasis added.)

The NMFS pointed out that the Voluntary Agreements flow assets would not be deployed during the years when ESA-listed species are at highest risk of extinction--critical water years. (*Id.*) Also, “In addition, the potential benefits of the proposed VA flow assets are further reduced in some watersheds by limiting the frequency of deployment. For example, the description of the American River states, “These flows would be deployed in three out of eight years of the VA in the above year types.” (NMFS letter pp. 4-5.) This is not sufficient to provide necessary protection to ESA-listed species.

The NMFS said, “Based on the information in the Staff Report, we are highly uncertain that the VAs as currently proposed will provide for the reasonable protection of fish and wildlife beneficial uses through restoration of the Delta ecosystem over time.” (NMFS letter p. 5.)

The NMFS pointed out that the Water Board’s *Staff Report/SED* modeling showed that the flow commitments in the VA Term Sheet are nonbinding and “would not provide a significant difference in average flow relative to the baseline (Alt1).” (NMFS letter p. 5.)

Also, habitat restoration actions required in any event “should not be considered voluntary or new contributions to ecosystem lift.” (*Id.*) Finally,

While not directly compared within the Staff Report, assessment of the total flows that would be expected under the proposed VAs is much less (range of 1-43 percent, depending on location/source and water year type) than what would occur under the Proposed Plan Amendments alternative. (*Id.* p. 5.)

The EPA explained in its January 19, 2024, Comment Letter on the *Staff Report/SED*,

Clearly, flow is a critically important driver of the health of the Bay-Delta watershed. However, the VA [Voluntary Agreement] alternatives, as currently proposed, do not provide flow to ensure year-round protection or protection in critical dry years. Rather, flow assets provided by the proposed VAs are concentrated January through June, with priority in April and May, during Dry, Below Normal, and Above Normal water years (Staff Report p. 9-5). As noted in the Staff Report, one or more life stages of native estuarine and anadromous fish,

including threatened and endangered Chinook salmon and steelhead, require access to habitats across the entire watershed at all times of the year (Staff Report Table 3.4-1 and footnote 4). For this reason, it is important that the State Water Board include provisions to ensure adequate flow is available for year-round protection of designated uses in its Bay-Delta Plan amendments. Native salmonids are particularly at-risk during drought conditions. However, potential VA flow assets are not required for critical dry years on most tributaries, the Sacramento River, and the Delta (Staff Report Table 9.3-1). Further, the Staff Report indicates that during critical dry years the proposed VA alternative will result in a decrease of flows from baseline (Tables 9.5-2 to 9.5-5). (EPA Comment Letter pp. 6-7.)

The Voluntary Agreements are insufficient to protect the endangered and threatened fish species. Those are the conclusions of the expert NMFS and the EPA.

Finally, the *Staff Report/SED* proposed objective of 55% unimpaired flow would result in a significant reduction in exports from the Sacramento/Delta supply in order to increase flows. In stark contrast, the VA commitments range from nothing to trivial by comparison. The differences are shown by comparing San Joaquin Valley export reductions in *Staff Report/SED* Ch. 6, Table 6.4-20, p. 6-74 and Southern California reductions in *Staff Report/SED* Ch. 6, Table 6-2-24, p. 6-79, with “Delta Foregone Exports” in the October 2024 Draft, Table 9, “VA Flow and Non-Flow Commitments” p. 8:

Critical Years:

VAs	no foregone exports
<i>Staff Report/SED</i>	563 TAF (thousand acre feet per year)

Dry Years:

VAs	125 TAF
<i>Staff Report/SED</i>	1,380 TAF

Below Normal Years

VAs	125 TAF
<i>Staff Report/SED</i>	1,165 TAF

Above Normal Years

VAs 175 TAF
Staff Report/SED 818 TAF

Wet Years

VAs no foregone exports
Staff Report/SED 361 TAF

The Voluntary Agreements do not reflect a serious effort to prevent the extinction of endangered and threatened fish species or to improve impaired Delta water quality. The Board should adopt the “High Flow Alternative (Alternative 3)” described in section 7.2.3.4 of the *Staff Report/SED*. (pp. 7.2-7 to 7.2-9.) If the Board does not adopt the High Flow Alternative, the proposed Plan amendments set forth in section 7.1 of the *Staff Report/SED* (pp. 7.1-1 to 7.1-52) would be a reasonable alternative in contrast to the Voluntary Agreements.

3. THE OCTOBER 2024 DRAFT BAY DELTA PLAN UPDATES FAIL TO

As pointed out in section 1 of these comments, the Board prepared a substitute environmental document in lieu of an EIR. However, “An agency operating pursuant to a certified regulatory program must comply with all of CEQA's other requirements.” (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 114; *Friends, Artists & Neighbors of Elkhorn Slough v. California Coastal Com.* (2021) 72 Cal.App.5th 666, 694.) Thus the “state agencies, operating under their own regulatory programs, generate a plan or other environmental review document that serves as a functional equivalent of an EIR. [Citations.]’ (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 113, 65 Cal.Rptr.2d 580, 939 P.2d 1280.)” (*Friends, Artists & Neighbors of Elkhorn Slough*, 72 Cal.App.5th at 693.)

A CEQA goal is “transparency in environmental decision-making.” (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136) “CEQA requires full environmental

disclosure...” (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88.) ““While foreseeing the unforeseeable is not possible, *an agency must use its best efforts to find out and disclose all that it reasonably can.*” (Guidelines, § 15144.)” (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal. 5th 918, 938) (Emphasis added.)

The Board’s October Draft has done the opposite of providing full environmental disclosure. The Board has not used its best efforts to find out and disclose all that it reasonably can about the inadequacy of the VAs. The October Draft fails to disclose critical information including the January 19, 2024, NMFS and EPA comment letters on the Staff Report/SED explaining the inadequacies of the VAs. Moreover, the Board’s own regulation, 23 Code Cal. Regs § 3777(b)(2) requires a Draft SED to include “An identification of any significant or potentially significant adverse environmental impacts of the proposed project;” Neither the *Draft SED* or the October Draft identify the significant or potentially significant adverse environmental impacts of adopting the Voluntary Agreements in lieu of effective water quality and flow standards.

The failure to include such critical information as the NMFS and EPA comment letters and the identification of significant or potentially significant adverse environmental impacts of adopting the inadequate Voluntary Agreements renders the substitute environmental documentation submitted for public review “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” (CEQA Guideline § 15088.5(a)(4.) As a result, a revised draft environmental document must be prepared and recirculated for public review. (*Id.*) As the court said in *Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1943, 1052,

Only at the stage when the draft EID is circulated can the public and outside agencies have the opportunity to analyze a proposal and submit comment. No such right exists upon issuance of a final EID unless the project is substantially modified or new information becomes available. (See Cal. Code Regs., tit. 14, § 15162.) To evaluate the draft EID in conjunction with the final EID in this case would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more detailed analysis to the final EID that is insulated from public review.

The Board's October Draft has failed to provide the full environmental disclosure required by CEQA.

4. THE BOARD CANNOT COMPLY WITH CEQA BY BASING

“[T]he future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (“paper water”) are insufficient bases for decisionmaking under CEQA.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432.) In its discussion, the California Supreme Court cited with approval (at 40 Cal.4th 412, 430) the decision in *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892. That decision explained,

The original long-term contracts between DWR and the water contractors were predicated on the state's contractual obligation to build out the SWP so as to deliver 4.23 maf of water to the contractors annually. Each of the contractors is allocated a percentage of the 4.23 maf in table A of the long-term contracts. The allocation is referred to as an entitlement. Therefore, cumulatively, the contractors are ‘entitled’ to 4.23 maf of water annually.

The SWP, however, has never been completed and the state cannot deliver 4.23 maf of water annually. The entitlements represent nothing more than hopes, expectations, water futures or, as the parties refer to them, “paper water.” Actual, reliable water supply from the SWP is more in the vicinity of 2 to 2.5 maf of water annually. Consequently, there is a huge gap between what is promised and what can be delivered. (83 Cal.App.4th 892, 908 fn. 5.)

The *Planning and Conservation League* case also explained in pertinent part,

Paper water always was an illusion. ‘Entitlements’ is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store, and deliver. (83 Cal.App.4th 892, 914 fn. 7.)

Now, the Board's *Staff Report/SED* has shown that because of the “paper water” problem, the Sacramento/Delta watershed is *over authorized for diversion by a total*

volume over 5 times the total annual average unimpaired outflow for the watershed. Specifically,

A review of the water right records in the Sacramento/Delta watershed included in the demand dataset shows that the total volume of water authorized for diversion in the Sacramento/Delta watershed exceeds the annual average unimpaired outflow from the Bay-Delta watershed. The total average unimpaired outflow from the Bay-Delta watershed is about 28.5 MAF [million acre-feet]/yr. The face value, or total volume of water authorized for diversion, of the active consumptive post-1914 appropriative water right records in the Sacramento/Delta watershed is approximately 159 MAF/yr (Table 2. 7-1a), *which is over five times the total annual average unimpaired outflow for the entire Bay-Delta watershed.* This total face value amount excludes statements of diversion and use (including riparian and pre-1914 appropriative claims), which are not assigned a face value amount, but account for many of the water right records in the Sacramento/Delta watershed. (*Staff Report/SED*, Ch. 2, p. 2-117)(Emphasis added.)

Current State Water Project (SWP) and Central Valley Project (CVP) authorized contract quantities have no basis in reality because they are not based on water quantities that actually exist.

The court explained in *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 141-142,

Nothing in the statutory scheme limits the Board's supervisory authority over appropriation permits to provide a level of water quality protection which exceeds the quality afforded by water rights.

Further, as discussed before, the Board has the separate and additional power to take whatever steps are necessary to prevent unreasonable use or methods of diversion. (Cal.Const., art. X, § 2; [other cites omitted.] That independent basis of authority vests jurisdiction in the Board to compel compliance with the water quality standards insofar as the projects' diversions and exports adversely affect water quality.

What the Board needs to do with updating the Bay Delta plan is establish water quality and flow standards sufficient to protect Delta water quality including the public health of Delta residents and users, and the endangered and threatened fish species and

their critical habitat. Also, the Board’s update must be based on real water actually available, not paper water.

5. ADOPTION OF THE VOLUNTARY AGREEMENTS WOULD BE CONTRARY TO THE DELTA REFORM ACT, THE CALIFORNIA ENDANGERED SPECIES ACT, THE PUBLIC TRUST DOCTRINE, AND THE STATE CONSTITUTIONAL REQUIREMENT OF REASONABLE USE AND METHOD OF USE

The California Supreme Court held in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936-937:

The Guidelines [CEQA Guidelines § 15126.6(f)(1)] specifically call for consideration of related regulatory regimes, like the Coastal Act, when discussing project alternatives. . . . Thus, the regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR’s analysis of feasible alternatives.

Here, regulatory limitations imposed by the Delta Reform Act and other related regulatory regimes must be central to the Board’s analysis of alternatives. The Voluntary Agreements are not a reasonable alternative under the Delta Reform Act and other related regulatory regimes.

The policy of the State of California is set forth in the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), Water Code section 85000 et seq. The established State policy is “to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved water supplies, conservation, and water use efficiency.” (Water Code § 85021, emphasis added.) Another policy established by the Act is to “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” (Water Code § 85020, subd. (c).)

The Delta Reform Act is not the only related regulatory regime setting objectives precluding the Voluntary Agreements. The California Supreme Court said in *Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 125, “[f]or example, CESA [the California Endangered Species Act] establishes a policy adding significant weight to the CEQA balancing scale on the side favoring protection of a listed species

over projects that might jeopardize them or their habitats. (Fish & G. Code, § 2053.)” Fish and Game Code section 2053 states “Legislative findings and declarations; alternative state agency projects” as follows:

(a) The Legislature further finds and declares that it is the policy of the state that public agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent *alternatives* available consistent with conserving the species or its habitat which would prevent jeopardy.

(b) Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent *alternatives shall be developed* by the department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible.

(Emphasis added.)

“In 1994, the federal EPA concluded that during the preceding 20 years, largely as a result of water diversions by the CVP and SWP, the Bay–Delta's fish and wildlife resources had ‘deteriorated drastically.’ (60 Fed.Reg. 4665 (Jan. 24, 1995).) The California Department of Fish and Game reached the same conclusion.” (*In re Bay Delta* (2008) 43 Cal.4th 1143, 1156.) CEQA establishes the policy of the state to “[p]revent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.” (Pub. Res. Code § 21001, subd. (c).) That precludes the virtually useless Voluntary Agreements in that regard from being adopted.

The Delta Reform Act mandates that “[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” (Water Code § 85023.)

With respect to the public trust doctrine, “no one has a vested right to use water in a manner harmful to the state’s waters.” (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106 (1986)). As the California Supreme Court determined in the Mono Lake case, “Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447.)

With respect to the reasonable use requirement, the California Constitution establishes that the right to water or the use or flow of water “does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water” (Cal. Const. art. X, § 2.) Reasonable use alternatives such as conservation, recycling, and drip irrigation have been ignored in the effort to enshrine existing exports by the Voluntary Agreements.

Pursuant to the Delta Reform Act, the Board must focus on reducing reliance on the Delta and restoring the Delta ecosystem. With those and other related regulatory regimes objectives in mind, the Voluntary Agreements are not a reasonable alternative under CEQA and other California laws. Exports must be reduced to increase flows.²

6. THERE HAS BEEN SIGNIFICANT NEW INFORMATION ABOUT THE DECLINE OF THE DELTA ECOSYSTEM PUBLISHED AFTER THE COMMENT PERIOD CLOSED JANUARY 19, 2024, ON THE BOARD’S STAFF REPORT/SED

The condition of the Delta ecosystem continues to worsen. The California Department of Fish and Wildlife (CDFW) found that Delta Smelt have become virtually

² In *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163-1167, the court held that failure to examine an alternative reducing exports was not unlawful because that alternative would not achieve the program objective of water supply reliability. That decision was handed down on June 5, 2008. The Delta Reform Act became effective February 3, 2010. The Court’s holding as to objectives has been superseded by the Legislature’s adoption of the Delta Reform Act setting forth California’s water policies and objectives. Related regulatory regimes must be central to analysis of alternatives. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936-937.)

extinct in Delta waters. **Exhibit 1** is the California Department of Fish and Wildlife Memorandum of January 25, 2024, reporting the 2023 Fall Midwater Trawl annual fish abundance and distribution summary. The summary reported at p. 2,

Delta Smelt (*Hypomesus transpacificus*)

No Delta Smelt were collected at any stations from September through December. The 2023 September-December index (0) is tied with 2018-2022 as the lowest index in FMWT history. An absence of Delta Smelt catch in the FMWT is consistent among other surveys in the estuary during this period. For example, the Enhanced Delta Smelt Monitoring (EDSM) survey of the U.S. Fish and Wildlife Service (USFWS) caught only 6 Delta Smelt among 16 sampling weeks (between 9/4 & 12/19) comprised of 2054 tows (U.S. Fish and Wildlife Service 2023).

As headlined by the Elk Grove News.Net on February 28, 2024, reporting the CDFW summary, “Beyond the brink of extinction – For the 6th year in a row, CDFW survey finds ZERO Delta Smelt.”

On July 30, 2024, the U.S. Fish and Wildlife Service listed Bay-Delta longfin smelt as an endangered species under the federal Endangered Species Act. The citation for the new listing is, *Endangered and Threatened Wildlife and Plants; Endangered Species Status for the San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt*, 89 Fed. Reg. 61209 (July 30, 2024.) This rule became effective August 29, 2024. Bay-Delta longfin smelt are added to the list of endangered and threatened wildlife at 50 CFR 17.11(h.) A copy of the Federal Register pages is attached as

Exhibit 2. The Service explained,

We consider reduced and altered freshwater flows resulting from human activities and impacts associated with current climate change conditions (increased magnitude and duration of drought and associated increased temperatures) as the main threat facing the Bay-Delta longfin smelt due to the importance of freshwater flows to maintaining the life-history functions and species needs of the DPS. However, because the Bay-Delta longfin smelt is an aquatic species and the needs of the species are closely tied to freshwater input into the estuary, the impact of many of the other threats identified above are influenced by the amount of freshwater inflow into the system (i.e., reduced freshwater inflows reduce food availability, increase water temperatures, and increase entrainment potential). (89 Fed.Reg. at 61039) (Emphasis added.)

Under the heading “Reduced and Altered Freshwater Flows,” the Service explained,

The *development of dams and water delivery infrastructure* built throughout the Sacramento and San Joaquin River basins for flood protection and water supply for agriculture and human consumption *has greatly impacted freshwater flows into the San Francisco Bay estuary* (Service 2024, section 3.1.1). The creation of this water storage and delivery system, where water is stored during the wet season and conveyed to farms and cities during the dry season, has resulted in one of the largest human-altered water systems in the world (Nichols et al. 1986, p. 569). Operation of this system has resulted in a broader, flatter hydrograph with less seasonal variability, thus changing the timing, magnitude, and duration of freshwater flows into the San Francisco Bay-Delta (Kimmerer 2004, p. 15; Andrews et al. 2017, p. 72; Gross et al. 2018, p. 8). *It is estimated that the Federal and State water projects annually reduce an average of about 5 million acre-feet (MAF) of freshwater into the San Francisco Bay Delta*, while other municipal or private reservoirs or diverters annually divert an additional 8 MAF of potential freshwater into the San Francisco Bay Delta (Hutton et al. 2017b, fig. 4, p. 2523). *The cumulative effect of this annual average of about 13 MAF of freshwater supplies has resulted in a long-term decline in freshwater inflow into the estuary during the period of February through June* relative to estimates of what flows would have been available absent water development (Gross et al. 2018, fig. 6, p. 12; Reis et al. 2019, fig. 3, p. 12). This situation has further increased the frequency of very low outflow years that, prior to water development, would have been very rare and associated only with extreme drought (Reis et al. 2019, fig. 3, p. 12).

From 1956 to the 1990s, water exports (water removed from the San Francisco Bay Delta as a result of State (State Water Project) and Federal (CVP) water projects) increased, rising from approximately 5 percent of the Delta freshwater inflow to approximately 30 percent of the Delta inflow (Cloern and Jassby 2012, total was either consumed upstream or diverted from the estuary (Cloern and Jassby 2012, p. 8). Water exports continue to the present day and are expected to continue in the future.

A reduction in freshwater flows into the estuary influences and impacts the location and function of the low-salinity zone (spawning and rearing habitat for longfin smelt). Freshwater inflow into the estuary and other co-linear indicators of wet versus dry conditions during the winter and spring have been statistically associated with recruitment of larvae to the juvenile life stage of BayDelta longfin smelt (Service 2024, section 3.1.1). Prior to large-scale water exports and reduced freshwater flows, the location of the low-salinity zone (as represented by the 2 percent bottom salinity position, known as X2) reached the ≤ 55 -km (≤ 34 -mi) point in the estuary (monthly averages from February through May) and about half of all years. More recently the position of X2 reaching at least the 55-km (34-mi) point occurred only very rarely as a result of wet year conditions (Gross et al.

2018, fig. 6, p. 12 and fig. 7, p. 13) (Service 2024, section 3.1.1). *In the case of conditions (salinity, turbidity, circulation patterns)), especially for early life stage fish, is directly linked to freshwater inflow to the estuary.* (89 Fed.Reg. at 61039-61040)(Emphasis added.)

As to current efforts to save the longfin smelt, Delta Smelt, and several salmonid species, the Service concluded, “However, despite efforts such as those identified above, the current condition of the estuary and continued threats facing the estuary and Bay-Delta longfin smelt, *such as reduced freshwater inflow*, severe declines in population size, and disruptions to the DPS’s [distinct population segment] food resources, have not been ameliorated.” (89 Fed.Reg. at 61046) (Emphasis added.) The Service concluded as to the threats starting with reduced freshwater flows, “These threats have put the Bay-Delta longfin smelt largely into a state of chronic population decline due to habitat loss (*reduction in freshwater flows into the estuary*), which is exacerbated by limited food resources and the impacts associated with climate change, thereby limiting its resiliency and ability to withstand catastrophic events (reduced redundancy). This decline in numbers of the Bay-Delta longfin smelt is also a reflection of the DPS’s ability to adapt to the ecosystem changes. (89 Fed.Reg. at 61046)(Emphasis added.

Reducing freshwater flows for CVP and SWP exports is worsening over time and is now reaching the level of a public health and environmental emergency in the Delta. On July 9, 2024, the Water Board posted a “danger” advisory “after testing of water samples collected from multiple locations of Discovery Bay in Contra Costa County confirmed the presence of harmful algal blooms, according to the State Water Resources Control Board and Central Valley Regional Water Quality Control Board. HABs can pose a threat to people and pets, and the advisory urges people to avoid swimming, boating and other activities to keep pets out of the water until further notice.” (Water Boards News Advisory, **Exhibit 3.**) The “danger” advisory also explained,

Cyanobacteria, a group of organisms that form HABs, can produce potent toxins. Health risks are associated with HABs, as they produce dermatotoxins that can cause itching skin and rashes, as well as gastrointestinal distress, headaches, agitation and weakness, or abnormal breathing if HAB material is swallowed while swimming. Dogs and children are most susceptible to exposure because of

their smaller body size, increased potential to swallow water while swimming and tendency to stay in the water longer. If you suspect exposure, wash your children and dog immediately. (*Id.*)

Conditions in the watershed and the Delta continue to worsen. That worsening ranges from the habitat for endangered and threatened fish species to the health of Delta residents and users threatened by harmful algal blooms. The Board needs to adopt and enforce strong standards to improve Delta water quality and increase Delta flows.

7. DECREASING FRESHWATER RUNOFF COUPLED WITH INCREASING SALINITY INTRUSION RESULTING FROM WORSENING CLIMATE CHANGE MAKE THE ADOPTION OF STRONG AND EFFECTIVE WATER QUALITY AND FLOW STANDARDS EVEN MORE IMPERATIVE

Climate change is continuing to worsen conditions for water quality and endangered and threatened fish species. According to the Board's *Staff Report/SED*, "Air and water temperatures will likely be higher, and evapotranspiration will be greater. The amount of precipitation that falls as snow in the mountains will decrease, and sea level rise will likely affect salinity intrusion in the Delta." (Ch. 2, p. 2-115.) Moreover, "Climate change has increased the probability of temperature and precipitation conditions that historically have led to drought in California (Diffenbaugh et al. 2015.)" (*Id.*) "Climate change can exacerbate stressors, particularly through increased water temperatures, changing patterns of runoff, and salinity intrusion (Knowles and Cayan 2002, 2004). In the Bay-Delta, climate change impacts are predicted to include higher ambient temperatures, increase salinity intrusion, and reduced water supply reliability." (*Staff Report/SED* Ch. 4, p. 4-35.) "Climate change may alter the magnitude and timing of future unimpaired flow. Reduced snowfall will also diminish the volume of water held in the snowpack and the inter-annual water carry-over capability of the system, negatively affecting the state's water supply reliability and maintenance of cold water habitat below reservoirs for salmonids (DSC 2013: Mirchi et al. 2013.)" (*Id.* pp. 4-35 to 4-36.) "Warmer water temperature because of less runoff from snowmelt in spring and

summer may directly affect the lifecycle of many fish species. Increased water temperature will negatively affect cold water -dependent fish species, including salmonids and smelt species, and will likely increase the range of endangered species (Healey et al. 2008; Villamanga and Murphy 2010).” (*Id.* p. 4-36.)

“In 2017, the State Water Board adopted a resolution requiring a comprehensive response to climate change in all State Water Board actions, including drinking water regulation, water quality protection, water rights administration, and financial assistance (Resolution No. 2017-0012.) ... The 2017 resolution directs the State Water Board and encourages regional water boards to update their policies, plans, and permits to enhance ecosystem resilience and prepare for and adapt to the impacts of climate change (SWRCB 2017a).” (*Id.* p. 4-37.)

The Board’s 2017 resolution has not been carried out. More recent information shows how climate change continues to worsen conditions. “We are not in an era of global warming; but as UN Secretary General Guterres says, ‘global boiling.’” (State of the Cryosphere 2023 Report, *Two Degrees is Too High* International Cryosphere Climate Report, p. v., November 16, 2023.)

With the worsening of threats facing endangered and threatened fish species and the health of Delta residents and users, the Board must adopt strong water quality and flow standards. In stark contrast to what is required, the Voluntary Agreements seem likely to end the task of protecting endangered and threatened fish species by driving them into extinction.

The October 25, 2024, draft of potential updates to the Bay Delta Plan preceded the 2024 presidential election. Donald Trump, the president from January 2017 to January 2021 won the election on November 5 and will return to the presidency for another 4 years in January 2025.

DWR operates the State Water Project (SWP) in coordination with the federal Central Valley Project (CVP) under the Coordinated Operation Agreement (COA) between the federal government and the State of California.

Starting in 2018, during the previous Trump Administration, the federal government through the president, Department of Interior, and U.S. Bureau of Reclamation, adopted new policies to maximize CVP exports regardless of the environmental consequences and California state environmental policies.

The new anti-California federal policy was established by various actions including the Secretary of the Interior August 17, 2018, memorandum on “California Water Infrastructure” to other Interior officers. A copy of that document is **Exhibit 4** to this comment letter. Among other things, the hostility to California’s environmental laws and regulations was reflected in the claim, “The State of California is now proposing additional unacceptable restrictions that further reduce the Department’s ability to deliver water to Federal contractors.” (Secretary of the Interior Memorandum p. 1.) The Interior Memorandum also included direction to prepare within 15 days an initial plan of action for options for “maximizing water supply deliveries;” (*Id.*) The Interior Memorandum called for “streamlining the Endangered Species Act consultation and National Environmental Policy Act processes to more expeditiously modify long-term Central Valley Project operations;” and “preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people;” (*Id.* p.2.)

On October 19, 2018, former president Trump issued a Memorandum entitled “Promoting the Reliable Supply and Delivery of Water in the West.” The Memorandum was published in the Federal Register at 83 Fed.Reg. 53961, and a copy is **Exhibit 5** to this comment letter. Section 1 of the Memorandum called on the Secretary of the Interior and the Secretary of Commerce to “work together to minimize unnecessary regulatory burdens and foster more efficient decision-making so that water projects are better able to meet the demands of their authorized purposes.” Section 2(a)(ii) of the Memorandum called for identifying “regulations and procedures that potentially burden” major water infrastructure projects in California “and develop a proposed plan, for consideration by

the Secretaries, to appropriately suspend, revise, or rescind any regulations or procedures that unduly burden the project beyond the degree necessary to protect the public interest or otherwise comply with the law.”

The federal government under former president Trump initiated lawsuits against the Board challenging the Board’s flow requirements and seeking to divert more water for the CVP. (*United States of America v. State Water Resources Control Board*, filed March 28, 2019, in the Superior Court for the County of Sacramento.) The Trump Administration also replaced the National Marine Fisheries Service biologists who had concluded in a 1123-page biological opinion on July 1, 2019, that Reclamation’s plan would likely jeopardize listed salmon and steelhead, and would be likely to destroy or adversely modify critical habitat, with political appointees who on October 21, 2019, concluded Reclamation’s plan was *not* likely to jeopardize or adversely modify critical habitat. On February 20, 2020, California agencies and the State Attorney General filed suit in the Northern District of California contending the political appointee biological opinions were unlawful under the Endangered Species Act and National Environmental Policy Act. (*The California Natural Resources Agency et al. v. Wilbur Ross et al.*, Case No. 20-cv-01299.)

President-elect Trump continues his attack on California’s efforts to protect freshwater flows and endangered and threatened fish species. Commenting on the terrible fires in the Los Angeles area two days ago, “He criticized Gov. Gavin Newsom in a social media post Wednesday morning. Trump has previously criticized California politicians for not pumping more water from the north of the state to the south and allowing more ‘water flow’ to make the land ‘damp.’” (San Francisco Chronicle, p. A8, *Hydrants going dry compounds struggles*, by Chase DiFelicianonio, January 10, 2025.) “Trump also criticized state-mandated restrictions on water flow in parts of the state to protect endangered Delta smelt, which Trump called an ‘essentially worthless fish’ in his Wednesday post.” (*Id.*, p. A9, *Tensions between Newsom, Trump reignite*, by Sophia Bollag, January 10, 2025.)

To make it clear, the San Francisco Chronicle included an article by reporter Kurtis Alexander on November 12, 2024, entitled “The Trump-California water wars are about to begin. Here is what’s at stake.”

What is at stake is, will the Water Board act to improve Delta water quality and flows in accordance with the changed reality in the federal government starting in January 2025? The goal of the new federal Administration will be to maximize water exports regardless of the environmental consequences, threatened extinction of endangered and threatened fish species, and water quality threats including harmful algal blooms to the health of Delta residents and users.

As the court said in *AquAlliance v. U.S. Bureau of Reclamation* (E.D. Cal. 2018) 287 F.Supp.3d 969, 1036-1037, “Here, the record suggests that the present condition of the Delta is already precarious, due in part to reduced Delta outflows. AR 151608 (SWRCB Report indicating that current Delta flows are insufficient to support public trust resources, which include fish and wildlife).” The Delta is already in precarious condition. The Delta now faces worsening threats including reduced flows by continually worsening climate change reducing snowpack and runoff, and the intent by the incoming Administration to maximize exports.

The Water Board’s *Staff Report/SED* for the Bay-Delta Plan update said, “*Current Delta outflow requirements are far below protective levels.*” (Ch. 5, p. 5-28)(Emphasis added.) An updated Bay Delta Plan including a regulatory pathway will be California’s most important line of defense protecting the watershed and Bay-Delta from reduced flows, climate change, and a new Administration devoted to maximizing water diversions for exports regardless of the consequences for California’s environment and for the health of Delta residents and users. The Voluntary Agreements pathway should be dropped from consideration. All federal agencies including the Bureau of Reclamation, EPA, National Marine Fisheries Service, and U.S. Fish and Wildlife Service will either be devoted to maximizing exports regardless of the environmental consequences or silenced from providing accurate environmental analyses.

The new reality is that the Water Board is going to be one of the *only* expert agencies—along with the California Department of Fish and Wildlife and the Delta Independent Science Board--capable of providing honest and accurate disclosure and analysis of the environmental consequences of freshwater diversions for exports until 2029 or later.

CONCLUSION

The Water Board should adopt the High Flow Alternative or at least adopt the proposed Plan amendments. The Voluntary Agreements (VAs) cannot substitute for regulatory actions by the Board. The VAs are not a serious effort to preserve endangered and threatened fish species, restore the Delta and the watershed, or protect the health of Delta residents and users.

The contact for this comment letter is E. Robert Wright, Counsel, Sierra Club California (916) 557-1104 or bwrightatty@gmail.com . We will do our best to answer any questions you may have.

Sincerely,



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/s/ **Caty Wagner**

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Exhibit List:

1. CDFW Memorandum (January 25, 2024)
2. Federal Register Pages (July 30, 2024)
3. Water Board Danger Advisory (July 9, 2024)
4. Secretary of the Interior Memorandum (August 17, 2018)
5. Presidential Memorandum (October 19, 2018)