



September 8, 2022

Division of Water Rights Mail Room
Attn: San Joaquin Unit
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Transmitted via email to: LSJR-SD-Comments@waterboards.ca.gov

RE: Comments regarding Notice of Preparation and California Environmental Quality Act Scoping Meeting for Proposed Regulation to Implement Lower San Joaquin River Flows and South Delta Salinity Objectives in the Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta

Dear Chair Esquivel, Members of the Board, and Staff:

On behalf of the Natural Resources Defense Council, Restore the Delta, the Bay Institute, Northern California Council Fly Fishers International, Tuolumne River Trust, San Francisco Baykeeper, Merced River Conservation Committee, Tuolumne River Conservancy, Sierra Club California, Defenders of Wildlife, and Golden State Salmon Association, we are writing to provide comments in response to the Notice of Preparation for a proposed regulation to implement Lower San Joaquin River Flows and South Delta Salinity Objectives in the Bay-Delta Water Quality Control Plan (“NOP”). As discussed in more detail below, NRDC strongly supports the Board’s adoption of regulations that fully implement the Lower San Joaquin River flows objectives in the Bay-Delta Plan, including the adoption of an emergency regulation to fully implement those flow objectives in 2023.

The Bay-Delta Plan requires the Board to “fully implement” the Lower San Joaquin River flow objectives “[b]y 2022,” and state law likewise requires the Board to fully implement the water quality control plan. Bay-Delta Plan at 24; Cal. Water Code §§ 13147, 13247; *see also* Cal. Water Code § 13050(j). As the Court of Appeal held in 2006, rejecting arguments that the Board

could only partially implement the water quality control plan, “Thus, the Board cannot—as it attempted to do here—make a de facto amendment to a water quality objective in a water quality control plan by simply refusing to take the action that it has identified as necessary to achieve that objective.” *In re State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 726-730, 732 (2006). Adoption of regulations, including emergency regulations, appears to be the fastest way for the Board to comply with its legal obligation to fully implement the Bay-Delta Plan “by 2022.”¹

NRDC supports the adoption of a permanent regulation that would apply to all water rights holders and claimants in order to fully implement the Lower San Joaquin River flow objectives in the Bay-Delta Plan. Under Article X, section 2 of the State Constitution and the Public Trust doctrine, all water rights in California, including pre-1914 appropriative water rights and riparian water rights, are subject to the Board’s authority to prevent waste and unreasonable use and to protect the Public Trust, and the Courts have upheld the Board’s authority to adopt regulations that limit water diversions by pre-1914 water rights holders and riparian water rights holders in order to protect fish and wildlife. *Light v. State Water Resources Control Board*, 226 Cal. App. 4th 1463, 1487-88 (2014); *Stanford Vina Ranch Irrigation Company v. State Water Resources Control Board*, 50 Cal. App. 5th 976, 1002-1003, 1005-1007 (2020). The Board should explicitly cite Article X, section 2 of the State Constitution and the Public Trust doctrine as the authority for the proposed regulations that would generally prohibit water diversions that result in violations of the Lower San Joaquin River flow objectives in the Bay-Delta Plan.

Moreover, the Board’s adoption of emergency curtailment regulations on the Scott and Shasta Rivers, Mill and Deer Creeks, and the Russian River provide several templates for the Board to consider as it develops permanent regulations to fully implement the Lower San Joaquin River flow objectives. *See, e.g.*, Cal. Code Regs., tit. 23, § 875; *id.* § 876.5. These emergency regulations generally follow the rule of priority, with an important exception to allow water diversions that are necessary for human health and safety. *Id.* § 878.1. As with those regulations, NRDC supports inclusion in this regulation of a limited exception to allow water diversions that are necessary for human health and safety.

As the NOP recognizes, *see* NOP at 5, all of the alternatives considered by the Board under the California Environmental Quality Act (“CEQA”) (except for the No Action alternative) must fully implement the water quality control plan, including the Lower San Joaquin River flow objectives and the program of implementation.² However, because the regulation adopted by the

¹ In order to avoid duplicative environmental review and avoid further delays in implementation, we agree that the Board should tier from the 2018 Substitute Environmental Document.

² However, consistent with the NOP and the Bay-Delta Plan, the Board must continue to include conditions requiring compliance with the Lower San Joaquin River flow objectives of the Bay-Delta Plan in all relevant water quality certifications under section 401 of the Clean Water Act. Due to the preclusive effect of the Federal Power Act and the Board’s legal obligation to fully implement the water quality control plan, all of the alternatives considered by the Board under CEQA must include conditioning relevant water quality certifications under section 401 of the

Board must “fully implement” the Lower San Joaquin River flow objectives, certain provisions in those emergency regulations cited above would not be appropriate in this proceeding, particularly the approval of local cooperative solutions that do not meet the specific flow requirements in the regulation. *See* Cal. Code Regs., tit. 23, § 875(f).

Similarly, none of the proposals for a voluntary agreement would “fully implement” the Lower San Joaquin River flow objectives in the Bay-Delta Plan, particularly the minimum required 30-50% range of unimpaired flow for February to June. Based on data from the Board’s 2018 Final Substitute Environmental Document, the State’s proposed voluntary agreement would result in instream flows on the Stanislaus, Tuolumne, and Merced Rivers that are less than the minimum 30% of unimpaired flow on an annual basis, let alone the requirement of a minimum of 30% of unimpaired flow during the months of February to June:

Increase in San Joaquin Tributary Flows (Stanislaus, Tuolumne, Merced River) Under 2018 Bay-Delta Water Quality Control Plan Versus Proposed Voluntary Agreement					
	Wet	Above Normal	Below Normal	Dry	Critical
Increased Feb-June Flows Required by 2018 Bay-Delta Water Quality Control Plan (40% Unimpaired Flow)	146	429	426	246	283
<i>Increased Feb-June Flows Required by 30% of Unimpaired Flow (Previously rejected by SWRCB)</i>	137	226	218	140	170
VA Proposal (annual flows)	0	122	181	156	48

Data compiled from SWRCB 2018 (Final SED, Table ES-14)

In addition, in 2018 the Board’s analysis demonstrated that the proposed Tuolumne River Management Plan would result in instream flows that are far less than the minimum unimpaired flows from February to June.³ As a result, the Board cannot consider any of the proposed voluntary agreements as an implementation mechanism in this proceeding.

In addition, the regulation and alternatives must fully implement the Lower San Joaquin River flow objectives during drought conditions. State law requires the Board to fully implement the water quality control plan. Cal. Water Code §§ 13147, 13247; *see also* Cal. Water Code § 13050(j). The Plan already adapts to droughts and dry conditions because it requires a percentage of unimpaired flow, so as there is less unimpaired flow overall, there will be less

Clean Water Act, to ensure that the hydropower licenses on the Tuolumne and Merced River require compliance with the Bay-Delta Plan.

³ State Water Board, Responses to Oral Comment Received at the August 21-22, 2018 State Water Resources Control Board Meeting, available online at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/docs/comment_responses.pdf.

instream flow for the environment during droughts and dry years. The Plan does not provide different objectives during drought conditions, and the final substitute environmental document did not analyze the environmental effects of the use of temporary urgency change petitions to weaken or modify implementation of these flow objectives. Thus, the proposed regulation and alternatives must fully implement the flow objectives during drought conditions, including the minimum flow requirements at Vernalis.

On the other hand, carryover storage requirements and similar measures are part of the Program of Implementation for the Bay-Delta Plan. *See* Bay-Delta Plan at 24. Therefore, the proposed regulation and any alternatives considered by the Board must include reservoir carryover storage or similar requirements to help ensure that providing flows to meet the flow objectives will not have significant adverse temperature or other impacts on fish and wildlife. The Board is legally obligated to implement this measure as part of its obligation to “fully implement” the Lower San Joaquin River flow objectives. *Id.* One of the alternative forms of regulations considered by the Board should include a prohibition on water diversions that would reduce reservoir storage below the carryover storage targets that were analyzed in the substitute environmental document. This will both help protect fish and wildlife from redirected environmental impacts and help ensure minimum water supplies during droughts and dry years, including for human health and safety.

With respect to the specific alternatives to be considered, NRDC recommends that the Board consider one or more alternatives that assigns responsibility to water rights claimants on the Tuolumne River that does not follow the terms of various agreements between the San Francisco Public Utilities District, Turlock Irrigation District, and Modesto Irrigation District, including the Fourth Agreement. This could include using the Board’s authority to prevent waste and unreasonable use of water to ensure priority of water for human health and safety, or compensated water transfers like those in Decision 1600, Water Rights Order 88-20, and Revised Water Rights Order 2002-0013, as discussed in the 2016 comments submitted by the Bay Institute et al. on the revised draft SED.

Finally, as discussed in detail in the August 15, 2022 petition for emergency rulemaking submitted by NRDC, the Bay Institute, Golden State Salmon Association, San Francisco Baykeeper, and the Tuolumne River Trust, the Board should adopt an emergency regulation to implement the Lower San Joaquin River flow objectives in 2023. The Board is in violation of its mandatory duty to “fully implement” the flow objectives under the Bay-Delta Plan “[b]y 2022,” and since 2012 Reclamation has repeatedly failed to implement its Vernalis flow obligations under D-1641, except in very wet years. As a result, flows in the San Joaquin River at Vernalis in recent years have failed to comply with either the 2018 amendments to the Bay-Delta Plan or the 2006 Bay-Delta Plan and D-1641. *See, e.g.,* Letter from State Water Resources Control Board to the U.S. Bureau of Reclamation dated March 7, 2022, available online at:

<https://www.waterboards.ca.gov/drought/tucp/docs/2022/20220307-letter-swrcb.pdf>.⁴ The Board has not taken enforcement action against Reclamation despite the violations of D-1641 Vernalis flows in many years since 2012, despite the fact that the Board has also concluded that full implementation of the Lower San Joaquin River flow objectives is necessary to provide reasonable protection of fish and wildlife. *See, e.g.*, State Water Resources Control Board, In the Matter of Turlock Irrigation District and Modesto Irrigation District Don Pedro Hydroelectric Relicensing Project and La Grange Relicensing Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14851, Water Quality Certification for Federal Permit or License, January 15, 2021, at 13, 19, 22, and 25, available online at: https://www.waterboards.ca.gov/docs/dplg_fwqc_complete_20210105.pdf; Bay-Delta Plan at 10, 23.

Adoption of an emergency regulation could enable the Board to implement the Lower San Joaquin River flow objectives in the Bay-Delta Plan in 2023, providing reasonable protection to fish and wildlife before a final regulation can be considered and adopted by the Board. In addition, the process of developing and implementing the emergency regulation would inform the Board's consideration of a permanent regulation, improving the final regulation.

Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Barbara Barrigan-Parrilla
Restore the Delta



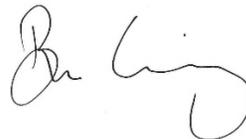
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⁴ This letter and all other citations to documents on specific agency webpages are incorporated by reference.

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