July 27, 2018

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
P.O. Box 100
Sacramento, CA 95812-0100

Re: Bay-Delta Plan Amendments for Flow Objectives on Lower San Joaquin River

Dear Chair Marcus and Members of the Board:

The organizations listed below urge the Board to reject the proposed amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary relating to new and revised flow objectives for the Lower San Joaquin River and its tributaries – the Stanislaus, Tuolumne, and Merced Rivers – and the supporting proposed final Substitute Environmental Document (respectively, the “Flow Criteria” and the “SED”). Instead, the Board should direct its staff to engage the numerous stakeholders throughout the affected region in a renewed, vigorous, and realistic effort at voluntary settlement agreements that are intended to reconcile fish and wildlife objectives with the long-established and marvelously productive landscape of human water use and settlement on those rivers. In most cases, the undersigned organizations have already commented on the proposed Flow Criteria and the SED in its earlier draft rounds, from which the current proposed final documents depart little; the comments below are intended to underscore for the Board the magnitude of human impacts the Flow Criteria may have, to reiterate the legal issues which we believe the Board will have to defend if it adopts these documents, and to remind the Board that alternative pathways still exist for the achievement of fish and wildlife goals.

I. IMPACTS

The Board’s Lower San Joaquin River proposal is only the initial phase of a multi-phase process that would ultimately target even greater flows from the Sacramento Valley and Eastern Delta, yet the impact of the Flow Criteria alone would itself be large and unprecedented. By the SED’s own reckoning, 30- to 50-percent unimpaired standards on the three tributaries would reduce surface water diversions in the three affected watersheds by an average of 180,000 to
490,000 acre-feet a year, and up to 900,000 acre-feet in dry years.\textsuperscript{1} Cold water pool requirements would commandeer an additional 800,000 acre-feet of reservoir space through the summer through late September.\textsuperscript{2} Worse still, just as local districts prepare to meet the challenge of the Sustainable Groundwater Management Act (“SGMA”), a combination of reduced recharge and increased pumping would reduce groundwater supplies by an average 118,000 to 370,000 acre-feet a year.\textsuperscript{3}

On the Tuolumne River, the Turlock and Modesto Irrigation Districts calculate that the Board’s standards would cost an average $920 million a year in the Tuolumne River watershed,\textsuperscript{4} and as much as $1.6 billion a year in critical dry years like 2015.\textsuperscript{5} On the Merced, the Merced Irrigation District estimates impacts in the range of $751 million to $1.3 billion a year.\textsuperscript{6} Similarly, in the South San Joaquin and Oakdale irrigation district service areas on the Stanislaus River, permanent average annual regional economic losses have been estimated at $250 million a year.\textsuperscript{7} Well beyond the impacts to farms and water districts, shockwaves from the Board’s apparent direction on the Flow Criteria are sure to ripple outward to adversely affect businesses, local governments, and disadvantaged communities throughout the Northern San Joaquin Valley – and the de-watering of the region, in concert with the effect of SGMA, will ultimately have many as-yet unquantified effects. These include additional, significant losses relating to long-term investments in trees, vines, and farm equipment; loan carryovers, debt repayment and default issues; the devaluation of land and other real property; and the stranding of significant infrastructure capacity.

II. LEGAL ISSUES

This Board is thoroughly acquainted with Article X, Section 2 of the California Constitution, which was enacted by the people of this State in 1928 in direct recognition of the hydrologic conditions typical of California. That provision sets up our constitutional framework for the use of water, which requires that water resources are put to use to the fullest extent possible in ways which are not otherwise wasteful or unreasonable. As we have stated previously, by proposing the extraction of huge volumes of “unimpaired flows” from otherwise legal and beneficial water users, at enormous human cost and without any reasonable and commensurate

\textsuperscript{1} Derived from Table 5-20b (“Annual Cumulative Distributions of Percentage of Demand for Diversion Met for Baseline and LSJR Alternatives 2, 3, and 4 (20, 40, and 60 Percent Unimpaired Flow) for Irrigation Years 1922-2003”), Final Draft SED, Chapter 5, p. 5-77.
\textsuperscript{2} See Final Draft SED, Appendix F.1, pp. F.1-36 through F.1-38.
\textsuperscript{3} Derived from Table 9-12 (“Average Annual Net Change in Irrigation District Groundwater Balance with the LSJR Alternative per Subbasin Area”), Final Draft SED at 9-57.
\textsuperscript{4} See Turlock ID’s and Modesto ID’s April 2014 “Socioeconomics Study Report” for the Don Pedro Project (FERC License No. 2299) at 8-8 and 8-9, Table 8.3-1 (“Annual regional economic impacts from water supply shortages – crop production”) and Table 8.3-2 (“Annual regional economic impacts from water supply shortages – regional food & beverage processing dependent crop production in the District’s water service area”).
\textsuperscript{5} See FAQs at https://worthyourfight.org/resources/faqs (re: possible impacts of the SED to MID and TID).
\textsuperscript{6} See Economic Impacts of Reduced Water Availability to Merced Irrigation District, p. 5-12, Table 5-7 (“Regional Economic Impacts of the SWRCB’s Plan by Water-Year Type: Output, Jobs and Labor Income”).
\textsuperscript{7} See also Manteca Bulletin, December 6, 2016, “600 fish will cost 209 region $250 million.”
assurance of benefit to the environment, the Flow Criteria are in direct violation of the Constitution’s waste and unreasonable use prohibitions.

This point should be repeated: water used or taken from other water users in service of environmental ambitions must, like any other use of water, be reasonable in the face of the scarcity of the water resource, and the competing uses for that water. This is doubly so, given the societal price that is likely to be paid in service of the fact that the Flow Criteria are essentially an expedition in scientific uncertainty. We have highlighted before the tremendous scientific uncertainty attendant to the proposed Flow Criteria – an imprecise “turning of the flow knob”, without (and in spite of) more precisely-calibrated non-flow measures that are known to be efficacious in fisheries conservation, such as measures related to habitat, predation and food supply. It is simply not reasonable to fail to scrutinize and precisely target environmental water flows in a zero-sum system in which we ask other water users to do the same.

Aside from this legal vulnerability, we think the Board may also have to defend takings claims from affected water users, as reservoir space is forcibly re-allocated and long-vested water rights are constrained beyond constitutional thresholds. This is doubly so because the Flow Criteria – cloaked as regulation but functionally the same as an environmental water right – will invert water rights priorities, as senior water right holders are displaced by new “regulation”. Indeed, as we have previously emphasized, the Flow Criteria are an enormous overlay onto a system of long-vested water rights whose magnitude cannot be sustained, as a legal matter, by a history, precedent and legal firmament of human water use. This legal morass is to be avoided, as numerous examples of long and inconclusive water adjudication already prove across the American West.

III. ALTERNATIVE PATHWAYS

The Board should renew efforts at voluntary agreements with affected water users. It is our understanding that both the Turlock Irrigation District and the Modesto Irrigation District have advanced the Tuolumne River Management Plan, at the same time that the Merced Irrigation District has proposed the SAFE Plan. While stakeholders and regulators may disagree about the particulars of such plans, they should be seen – and embraced – as evidence that there are ways for water users and regulators to move into the future together on fishery issues, rather than opposite each other in courtrooms.

In the context of voluntary and creative solution-finding, the Board should also review its authority and commitment to more targeted “functional flow” solutions and non-flow measures which substitute, where possible, for the “unimpaired flows” approach. This comports with a concept our California Supreme Court has articulated in water cases, the “physical solution” doctrine, which seeks to achieve the same or better results in a conflict over water supply without high water costs to one party or another.

Again, the organizations listed below urge the Board to step back from the Flow Criteria at its August 21st meeting, and prevent a systemic collision between human water rights and
environmental flows. Until every opportunity has been exhausted for creative conservation and collaboration among stakeholders, a difficult and damaging regulatory path which is premised upon uncertain future fisheries successes should be avoided at all costs.

Very truly yours,

Christian Scheuring
Senior Counsel

cc: The Honorable Governor Edmund G. Brown Jr.
The Honorable Matt Rodriguez
The Honorable John Laird
The Honorable Karen Ross
Ms. Diana Dooley
Ms. Eileen Sobeck