



# Santa Clara Valley Water District

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**Item No.:** 2.7.

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## BOARD AGENDA MEMORANDUM

### **SUBJECT:**

Update on the State Water Resources Control Board's Amendments to the Bay-Delta Water Quality Control Plan.

### **RECOMMENDATION:**

- A. Receive an update on the State Water Resources Control Board's Amendments to the Bay-Delta Water Quality Control Plan; and
- B. Direct staff to participate in voluntary settlement agreement discussions.

### **SUMMARY:**

On July 6, 2018, the State Water Resources Control Board (State Water Board) released its third and final draft proposed amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) relating to water quality and flow objectives for the Lower San Joaquin River and its tributaries. This agenda item provides an overview of the Bay-Delta Plan; its purpose, history, and periodic review process. It also describes the currently proposed updates, including State Water Board and District staff assessments of the water supply and biological effects, public comments submitted by various entities, and future steps to implementation. The Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) are responsible for meeting most of the water quality and flow objectives in the current Bay-Delta Plan as terms and conditions in their water rights permits for the State Water Project (SWP) and the Central Valley Project (CVP). The currently proposed updates could have significant impacts on the District's and Santa Clara County's imported water supplies.

## **1. Overview of Bay-Delta Water Quality Control Plan**

### **1.1. Authority and Purpose**

The State and Regional Water Boards develop water quality control plans to meet their obligations under the Porter-Cologne Water Quality Control Act and federal Clean Water Act. A water quality control plan establishes the beneficial uses of water within a region, the water quality objectives to ensure the reasonable protection of those beneficial uses, and a program of implementation for achieving the water quality objectives. In determining what is the reasonable protection of a particular beneficial use, the State Water Board must consider and balance all

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competing uses of water in its decision-making. The Bay-Delta Plan identifies 17 beneficial uses in the Bay-Delta watershed including municipal and domestic supply, agricultural supply, groundwater recharge, recreation, and several fish and wildlife uses including habitat, spawning, early development, and migration. The water quality objectives in the Bay-Delta Plan include objectives for salinity, dissolved oxygen, various measures of flow, and gate operations.

The program of implementation describes the general nature of actions that are needed to achieve the objectives along with a schedule and measures of compliance. The actual assignment of responsibility for compliance with the objectives occurs in separate proceedings. For example, responsibilities can be assigned through amendments to water right holders' permits following lengthy quasi-judicial water rights proceedings. The State Water Board can also use its authority under the Clean Water Act section 401 water quality certification and other water quality authorities to implement the objectives through water quality proceedings.

Alternatively, the State Water Board has accepted, and often encourages water right and license holders to develop voluntary agreements to implement a combination of flow and non-flow actions that achieve the objectives in place of imposing the responsibility through a lengthy water right proceeding. The State Water Board acknowledges that habitat restoration and other non-flow measures can reduce the needs for flow; however, because the State Water Board only has authority over water quality and quantity, they cannot impose non-flow measures even when they might better achieve their objectives with less cost to water supplies. Voluntary agreements provide a mechanism by which the State Water Board has some authority to enforce implementation of non-flow measures in exchange for some relaxation of flow or water quality obligations.

The Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) are responsible for meeting most of the water quality and flow objectives in the current Bay-Delta Plan as terms and conditions in their water rights permits for the State Water Project (SWP) and the Central Valley Project (CVP).

## **1.2. History and Periodic Review**

The Porter-Cologne Act specifies that water quality control plans shall be periodically reviewed and may be revised. The Bay-Delta Plan was first adopted in 1978 and implemented through Decision 1485 (D-1485) which modified the terms and conditions of DWR's and Reclamation's water right permits. The Bay-Delta Plan was amended in 1991 and again in 1995. Decision 1641 (D-1641), adopted in 1999 and which incorporated several voluntary agreements, further modified the terms and conditions of DWR's and Reclamation's water right permits to implement the 1995 Bay-Delta Plan. In 2006 the State Water Board completed another review which resulted in relatively minor changes that did not require any changes to water right permits. Those changes were incorporated into an update of the Bay-Delta Plan, thereafter referred to as the 2006 Bay Delta Plan.

## **1.3. Current Status**

The condition of key fish species protected under the federal and State endangered species acts

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continue to decline and most agree the status quo is not sustainable. The Delta was once a vast marsh and floodplain dissected by meandering, branching channels and sloughs that provided a dynamic habitat for a rich diversity of fish, wildlife, and plants. Since the early 1900s, historic conditions in the Delta and its watershed have been modified by the dredging and reclamation of land for farming, by encroachment of urban development, and by changing flow patterns due to increased diversions upstream, within the Delta, and operation of the State and federal water projects. Today, less than 5 percent of the original wetlands remain and the rivers that once meandered through tree lined banks have been straightened, stripped of vegetation, and lined with large rocks. Changes to the landscape have resulted in losses of fish spawning and rearing habitat, fish migration corridors, and food web production.

Unscreened diversions, polluted runoff, urban wastewater discharges, changing flows and sediment loads, and other factors have also contributed to the degradation of the natural environment. The profound physical changes have also made it more hospitable to numerous invasive species such that a majority of the aquatic biomass in the Delta is non-native.

In response to the continuing decline of several native fish species, the State Water Board began another review and update of the Bay-Delta Plan in August 2008.

## **2. Current Phased Review and Update**

The State Water Board is currently engaged in a phased review and update of the 2006 Bay-Delta Plan. To inform the update, and pursuant to the 2009 Delta Reform Act, in August 2010 the State Water Board approved a staff technical report titled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (2010 Delta Flow Report). That report describes the flows the State Water Board believes are needed to protect aquatic resources in the Delta. One of the more controversial conclusions in the report is that “in order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows.” The controversy is described below in section 3.2.

Importantly, the report does not consider any other beneficial uses of water including human uses or aquatic resource needs outside of the Delta, such as upstream temperature control for endangered winter-run Chinook salmon. The purpose of the report was to inform planning decisions including the State Water Board’s phased update to the 2006 Bay-Delta Plan.

### **2.1. Phase 1**

Phase 1 began in August 2008 and is now nearly complete. It is focused on water quality objectives for the protection of southern Delta agriculture, San Joaquin River flow objectives for the protection of fish and wildlife, and the program of implementation for achieving those objectives. The State Water Board released a third and final Substitute Environmental Document and proposed amendments on July 6, 2018.

The proposed amendments would require 40 percent of unimpaired flows to remain in the three salmon bearing tributaries -- the Merced, Stanislaus and Tuolumne Rivers -- from February

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through June, within an adaptive range of 30-50 percent. They also require a base flow of 1,000 cubic feet per second (cfs) in the San Joaquin River that may be adjusted within an adaptive range of 800-1,200 cfs. The amendments describe the steps that would be required to move within the adaptive ranges. The amendments also allow for the required percent of unimpaired flow to be managed as a total volume of water and released on a pattern that differs from the unimpaired flow pattern if science indicates that would be more beneficial to fish and wildlife. A new working group that includes water users from the affected tributaries and State Water Board and fish and wildlife agency staff would provide recommendations for adaptive management, operations, and biological objectives for the flows.

The proposed amendments also relax the southern Delta salinity standard for the protection of agricultural uses based on a scientific report that evaluated the salinity tolerances of Delta crops.

The San Francisco Public Utilities Commission's (SFPUC) Hetch Hetchy Reservoir is on the Tuolumne River and the CVP's New Melones Reservoir is on the Stanislaus River; the flow requirements could impact water supplies from both. In addition, DWR and Reclamation are currently responsible for meeting the salinity standard, and while the State Water Board proposes to relax the standard, the proposed program of implementation still holds DWR and Reclamation responsible for meeting the current, more stringent level.

The program of implementation also states that the State Water Board will include minimum reservoir carryover targets to help ensure that meeting the proposed flow objectives will not have adverse temperature or other impacts on fish and wildlife. These carryover targets are not specified nor analyzed but could also negatively impact SFPUC and CVP water supplies.

District staff has been working with SFPUC, the State Water Contractors, and the San Luis & Delta-Mendota Water Authority to review and comment on the documents throughout the Phase 1 process. Collectively, the District and these agencies have submitted hundreds of pages of comments, analyses, and supporting materials, with the most recent comments submitted on July 27, 2018.

The State Water Board had scheduled a public hearing to consider adoption of the proposed changes to the Bay-Delta Plan for August 21-22, 2018. In response to a letter from Secretary for Natural Resources, John Laird, the State Water Board has agreed to postpone the final Water Board action to a future Water Board meeting (Attachment 8). The State Water Board still plans to hear comments on the staff-proposed action on August 21-22. District staff will provide an oral update on the hearing.

## **2.2. Phase 2**

Phase 2 began in 2012 and is not as far along as Phase 1. Phase 2 focuses on flow objectives for the Sacramento River and its tributaries, Delta outflow and interior flow objectives, and cold-water habitat objectives. On July 6, 2018 the State Water Board released what it is calling a framework for the Sacramento/Delta update. Essentially, the framework describes the changes the State Water Board intends to propose later this year when it releases its formal proposal and supporting environmental document for public comment.

According to the framework, the State Water Board intends to propose an inflow requirement for the Sacramento River and its salmon-bearing tributaries that ranges between 45-65 percent of unimpaired flows, with a starting point of 55 percent. Similar to the Phase 1 requirement, these flows can be managed as a total volume of water and released on a pattern that differs from unimpaired flows to provide maximum benefit to fish and wildlife.

The framework also describes a Delta outflow requirement that is linked to the inflows to ensure the increased inflows are not diverted before they can reach the bay and ocean.

A new objective for maintaining cold water habitat is also proposed. This objective does not identify specific temperatures or flow volumes, rather, it says in part to, “maintain stream flows and reservoir storage conditions...to protect cold water habitat for sensitive native fish species...” Implementation of this objective is left to reservoir owners/operators to develop strategies and plans in coordination with the State Water Board and fisheries agencies.

Finally, the framework incorporates several of the requirements for operation of the SWP and CVP that are already imposed by the U.S. Fish & Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Wildlife Service (collectively, “Fish and Wildlife Agencies”). These current requirements include Delta outflow in the fall of above normal and wet water year types above that required in the Bay-Delta Plan, provisions for Delta Cross Channel gate closures, Old and Middle River reverse flow limits, and export limits in April and May based on San Joaquin River inflows levels. While the framework says these requirements can be changed in the Bay-Delta Plan if the Fish and Wildlife Agencies modify their requirements, it also leaves open the possibility that they will not change them in response. Put another way, if the Fish and Wildlife Agencies refine their requirements in ways that provide equal environmental protections at a lesser water cost, the State Water Board may require a quasi-legislative water quality control plan update process to also change them.

### **2.3. Phase 3**

Phase 3 involves changes to water rights and other measures to implement the changes to the Bay-Delta Plan from Phases 1 and 2. This phase has not started; however, the State Water Board is encouraging efforts of various stakeholders to develop voluntary agreements that would implement the proposed updated Bay-Delta Plan objectives. These voluntary agreements would need to be supported by the California Department of Fish and Wildlife and could allow a combination of flow and non-flow measures to achieve comparable outcomes for fish and wildlife with less impact on other beneficial uses. There still is some uncertainty as to whether the State Water Board will accept voluntary settlements only as a means to move within the proposed adaptive ranges of unimpaired flows, or as a means to abandon that approach entirely. Until Phase 3 is complete, or voluntary settlements are agreed to, the actual impacts of the proposed changes on specific water right holders will not be known with any certainty. The proposed changes to the Bay-Delta Plan merely describe the objectives that need to be met, they do not specify which entities need to provide the water to meet them.

## **3. Assessments**

Despite the uncertainty regarding how the objectives might be implemented, the State Water Board, District staff, and other potentially affected water right holders have analyzed the potential effects on water supplies, as well as on potential benefits to fish and wildlife. This section describes those assessments.

### **3.1. *Water Supply Assessments***

According to the State Water Board's own analysis, the Phase 1 proposed amendments would on average reduce available supplies by 293 thousand acre-feet (TAF) per year from the targeted tributaries on the San Joaquin River. Most of the impacts would be felt in dry and critical years when the average annual reduction would increase to between 624-673 TAF.

These Phase 1 reductions could significantly impact San Francisco's Regional Water System which derives about 85 percent of its supply from the Hatch Hetchy watershed and which Santa Clara County relies on for 15 percent of its water supplies. The State Water Board analyzed impacts to Hetch Hetchy supplies and found that the average annual supplies could be reduced by up to 119 TAF each year during a repeat of the 1987-1992 drought. District staff's analysis of potential impacts to Santa Clara County in the context of the County's entire water supply portfolio indicates the proposed amendments could result in a 4 to 15 percent increase in the frequency of shortages and a 5 to 19 percent increase in the magnitude of those shortages. This increase in the frequency and magnitude of shortage would require additional supply development by the SFPUC and/or District to avoid increased demands on groundwater, increased risk of overdraft, and increased risk of the return of inelastic land subsidence. The cost and feasibility of those additional supplies, on top of those already determined to be needed as part of the District's Water Supply Master Plan analyses, has yet to be determined.

The Phase 1 reductions could also negatively impact the District's ability to supplement County water supplies with inbound transfers. In dry years, statewide demand exceeds available transfer supplies, and sellers face political pressure and environmental considerations which restrain transfers of water outside their region. Implementation of the proposed Phase 1 amendments will exacerbate this situation. Even in years when transfer supplies are more plentiful, conveyance capacity across the Delta can be limited. For example, in 2016 there was no conveyance capacity for new transfers of non-SWP/CVP water. Referring to the Phase 1 limitations, the San Luis & Delta-Mendota Water Authority identified several current voluntary release, transfer and exchange programs (some of which benefit the District) that would likely be curtailed. The Authority estimated that these curtailments would reduce supplies available to South of Delta CVP Contractors by up to 50 TAF annually.

In a letter dated June 27, 2018 (Attachment 1), the Commissioner of the Bureau of Reclamation states that the Phase 1 proposed amendments would reduce storage in New Melones Reservoir by 315 TAF on average, even with reductions in deliveries to CVP contractors. The letter also discussed potential significant impacts to power generation and recreation from these lower storage levels. The Commissioner requests a postponement of the State Water Board's adoption hearing to allow additional time for the Secretary of the Interior to determine whether the State's proposed amendments interfere with the congressionally authorized purposes of the CVP and

## New Melones Project.

Impacts of the proposed Phase 2 changes have the potential to be even more severe for the District and Santa Clara County. According to the State Water Board's own analysis, their Phase 2 proposal would reduce system-wide available supplies by 2 million acre-feet (MAF) per year on average. Since the State Board has not yet provided a detailed Phase 2 proposal, it is too early to establish how much of a supply reduction would be borne by South of Delta CVP and SWP contractors, including the District.

The cumulative impacts of the Phase 1 and Phase 2 reductions are clearly of concern.

While the cumulative impacts of the Phase 1 and Phase 2 reductions to the WaterFix project benefits have not yet been analyzed, staff's working assumption is that the proposed amendments would have a significant impact on water supplies with or without WaterFix. However, WaterFix provides an additional tool and greater operational flexibility to cope with these new regulations. Recall that one of the fundamental conclusions in staff's analysis of the WaterFix is that the project would help sustain District CVP and SWP supplies as overall exports decline over time. The proposed new regulations as applied to South of Delta exports would likely be consistent with staff's projected general decline in export supply, although perhaps to greater magnitude than the downward trend staff assumed. Thus, while the District would likely experience a reduction in imported water supplies under the State Water Board's proposals, the magnitude of those impacts would likely be even greater without the WaterFix.

### 3.2. *Biological Assessments*

The State Water Board cites a large body of literature on the importance of a natural flow regime to support its proposed approach of requiring a percentage of unimpaired flows, arguing that unimpaired flows "more closely mimic the natural hydrographic conditions to which native fish species are adapted, including the relative magnitude, duration, timing, and spatial extent of flows as they would naturally occur."

The counter argument is that while unimpaired flows might mimic natural hydrographic conditions in some river systems, as described in the literature cited by the State Water Board, they do not mimic the conditions to which native fish species are adapted in the highly modified Sacramento-San Joaquin River and Delta ecosystem, and more water efficient methods are available to attain equal or greater biological benefit. The State Water Contractors point out in their March 2017 comment letter to the State Water Board that:

*Best available science shows that unimpaired flow from the upstream San Joaquin River tributaries is not an appropriate measure for natural flow on the valley floor or in the Delta. For example, see recent supporting scientific work by Howes et al. (2015) on the evapotranspiration from natural vegetation that was present in the Delta and Central Valley, work by Fox et al. (2015) that quantifies the expected mix of vegetation in the Delta and Central Valley under natural or predevelopment conditions, and work by Huang (2016) that utilized the above-cited work to compare annual and seasonal unimpaired and natural Delta outflow estimates. Huang found, similar to Fox et al. (2015), that unimpaired outflow estimates are a very inaccurate proxy for natural outflow estimates, significantly overestimating natural flows, because natural flows were not subject to the confines of levees, dams, and other anthropogenic*

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*development and as such, spread over greater areas of the basin. Given that the best available science shows unimpaired flow to be an inappropriate indicator of natural flow on the valley floor or in the Delta, proposed flow standards should be justified based on flow function and not on purported benefits of unimpaired flows, which do not emulate natural conditions, nor provide the same functions.*  
(page 2)

Unimpaired flows in the Sacramento-San Joaquin River and Delta will create higher flows in leveed and rock-lined channels which merely increases the depth and velocity of the flow. However, native fish species adapted to a more natural flow pattern where storm and spring-melt flows spill out onto the riparian, floodplain and other natural landscapes and create increased spawning habitat, greater food resources, and shelter from predators that inhabit the major river corridors. A more water efficient method to achieve these historic conditions is with physical modifications that reduce the flow level at which floodplains are inundated, restore channel margin and riparian habitat, and other actions that focus on restoring the functions that historic flows provided.

The State Water Board's analysis of benefits to native fish populations from the proposed increased flows in February through June focuses on improved temperature and floodplain habitat. There is broad agreement that favorable temperature and floodplain habitat conditions are important for the survival and recovery of salmon and steelhead in the San Joaquin River and its tributaries. However, there is not agreement on the most appropriate methods to achieve those conditions.

Temperature. There is a tremendous amount of scientific literature that describes the required temperatures for various life stages of salmon and steelhead, such as for reproduction, development, and migration. The State Water Board's analysis estimated the percentage of time temperature criteria are met for each salmon life stage under unimpaired flows ranging from 20-60 percent and determined that higher flows do increase how often the criteria are met. However, this is not the most water efficient method to meet those criteria since it does not take into account year to year variability in water and air temperatures, nor the year to year variation in the movements and distribution of the fish requiring that cool water habitat. For example, the State Water Board's modeling shows that in February, the temperature criteria in the Stanislaus River are met nearly 100 percent of the time in the first 30 miles of river below the dam under current conditions. Additional flows, up to the maximum level modeled of 60 percent of unimpaired, makes only a small difference in meeting the criteria within the full 58 miles of river to the confluence with the San Joaquin. This finding suggests that applying the State Water Board's unimpaired flow approach to the Stanislaus River in February may not make much difference in temperatures for salmon, at potentially large water cost to other beneficial users. Applying this example to other San Joaquin River tributaries, if the objective is to provide suitable temperature habitat for salmon, a more refined reservoir release strategy could be developed that continues to meet the temperature targets and uses limited water supplies more efficiently.

Floodplain Inundation.

As with temperature conditions, there is a tremendous amount of scientific literature documenting the numerous benefits of floodplain habitat to salmon, steelhead and other native fish species.



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The State Water Board's analysis estimates the frequency and magnitude of floodplain inundation events in February through June under current conditions and with unimpaired flows ranging from 20-60 percent and, not surprisingly, determines that the higher flow levels result in more acreage of floodplain area being inundated more often, with the greatest benefits accruing in the April through June. However, a more water efficient method to achieve an increase in floodplain acreage is with physical modifications that reduce the flow level at which floodplains are inundated.

The State Water Board continues to propose this inefficient approach in its Phase 2 Framework for the Sacramento/Delta. Available science indicates that non-flow measures, such as habitat restoration and food production, predation control, reduction of invasive species, and reduction of contaminant loading into the Bay Delta are critical to restoring the environmental health of the Bay Delta.

#### **4. Public Comments on the Proposed Amendments**

According to State Water Board staff, the State Water Board has received over 1,400 unique comment letters from local, state, and federal agencies, the public, and elected officials since the first draft amendments were released in 2012. The State Water Board has not yet posted the most recent comment letters on the final draft amendments; however, staff provided the District Board with copies of those that it had received in the August 3, 2018 Board non-agenda packet. The cover letters accompanying those comments are provided here as Attachments 1-6. Since that time staff, has received a copy of the Tuolumne River Trust comment letter. It is provided as Attachment 7. The main points of those and the District's own comment letter are described below.

##### **4.1. District Comment Letter**

The District's July 27, 2018 written comments emphasized the District's long-standing commitment to environmental stewardship, both within Santa Clara County as well as within the Delta and its watershed. It also reiterated staff's concern with the approach the State Water Board continues to take in the proposed plan amendments, stressing that the unimpaired flow approach is not an efficient way to use limited resources. The District's comments included a technical analysis of how the proposed amendments would negatively impact Santa Clara County's water supplies, and provided strong support of the State Water Board's consideration of voluntary agreements to help achieve desired biological benefits. The District believes that a science-based, voluntary settlement approach that incorporates non-flow measures and optimizes the use of limited water supplies is the best path to protecting and improving the Delta ecosystem while balancing other beneficial uses.

##### **4.2. SFPUC Comment Letter**

The SFPUC comment letter focuses on describing the inadequacy of the State Water Board's analysis of significant impacts to the Bay Area from the proposed amendments. In addition, SFPUC previously provided an alternative proposal to meet fish and wildlife beneficial uses on the Tuolumne River that the State Water Board did not appear to consider in its final proposed

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amendments to the Bay-Delta Plan. Along the same lines as the District's comments, SFPUC proposes an alternative approach that includes non-flow measures and flows targeted at providing specific functions to increase salmon survival on the Tuolumne.

#### **4.3. *State Water Contractor (SWC) Comment Letter***

The SWC's July 27, 2018 written comments also encourage the State Water Board's consideration of voluntary agreements. In addition, the SWC raise concerns with the proposed program of implementation for the revisions to the southern Delta salinity objectives. The SWC concerns about the program of implementation include: 1) it appears to assign responsibility for achieving the salinity objectives to the SWP and CVP without going through an adjudicatory water rights proceeding, 2) it appears to assign responsibility for achieving the salinity objectives only to the SWP and CVP despite acknowledging that multiple factors contribute to salinity levels, and 3) it provides insufficient detail on how compliance will be measured.

The SWC's submitted detailed technical comments with the San Luis & Delta-Mendota Water Authority (SL&DMWA) on the first draft amendments in 2013, reiterated those comments in response to the second draft in 2017, and in 2018 requested for a third time that the State Water Board respond to those comments. Those comments included detailed technical information 1) supporting the assertion that the State Water Board's unimpaired flow approach neither mimics natural hydrographic conditions, nor supports and maintains viable native fish populations, and 2) describing the multiple sources of southern Delta salinity and opposing the assignment of responsibility for compliance with the objectives to only the SWP and CVP.

#### **4.4. *South of Delta CVP Contractor Comment Letter***

The comments submitted by the SL&DMWA and other South-of-Delta CVP contractors focus on several legal inadequacies in the State Water Board's approach including those identified by the SWC. Similar to the SFPUC and District comment letters, the South of Delta CVP Contractors describe some of the inadequacies of the State Water Board's analysis of impacts to water users from significant reductions in water supplies as a result of the proposed amendments. The South-of-Delta CVP Contractors also reiterate their earlier position that flow is not a proper water quality objective parameter as defined in the Porter-Cologne Act and that the State Water Board's proposed amendments would be a waste and unreasonable use of water and would violate the coequal goals of the Delta Reform Act. The South-of Delta CVP Contractors also criticize the State Water Board for determining required flow levels without first establishing the biological objectives they are trying to achieve.

#### **4.5. *California Department of Fish & Wildlife with Department of Water Resources Comment Letter***

The California Departments of Fish and Wildlife and Water Resources (CDFW-DWR) submitted a joint letter on July 27, 2018 which, similar to the District's letter, expresses their support for the "*State Water Board's purpose, in updating the [Bay-Delta Plan], to improve protection for anadromous and pelagic fish in the Delta watershed, where these species are in crisis.*" The CDFW-DWR letter also demonstrates their support for voluntary settlements by describing their collective efforts to negotiate with water agencies, conservation groups and other stakeholders to

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develop agreements which would include a combination of flow and non-flow measures to provide better outcomes. CDFW-DWR's stated intent is to continue their best efforts to conclude negotiations and submit complete agreements for State Water Board consideration in 2018. They plan to make a presentation on adaptive implementation and voluntary settlement agreements during the August 21-22 State Water Board meeting.

Importantly, CDFW-DWR also suggest edits to both the proposed water quality objectives and the program of implementation to make clear that the State Water Board can accept voluntary agreements as an alternative to the unimpaired flow approach, and not just as a means to move within the proposed adaptive range.

#### 4.6. *U.S. Department of Interior Comment Letter*

In a letter signed by the Commissioner, the U.S. Bureau of Reclamation (Reclamation) requests more time to determine whether the proposed amendments are consistent with the congressional directives for the CVP and New Melones Project (Project). The Commissioner points out that the State does not have discretion to impose regulatory constraints that interfere with congressionally authorized purposes of a Reclamation project, claiming that, "*The [State Water Board] amendments essentially elevate the Project's fish and wildlife purposes over the Project's irrigation and domestic purposes contrary to the prioritization scheme carefully established by Congress.*"

Similar to the District's and other's comments, the Commissioner criticizes the State Water Board for focusing only on flow and not considering other factors affecting the fish or alternative approaches to recovery. And, similar to SWC and South-of-Delta CVP contractors, the Commissioner expresses concerns with the program of implementation for the salinity objective.

#### 4.7. *Tuolumne River Trust Comment Letter*

The Tuolumne River Trust's comment letter expresses support for the State Water Board's unimpaired flow approach, though believes even higher flows should be required than those proposed by the State Water Board. The Tuolumne River Trust also criticizes the SFPUC's alternative proposal for focusing almost exclusively on non-flow measures, and not considering multiple life stages, among other flaws. The Tuolumne River Trust does share the South-of-Delta CVP Contractor's criticism that SMART objectives were not established at the outset and then conservation actions chosen to achieve those objectives. However, Tuolumne River Trust points this criticism at the SFPUC's alternative proposal, not at the State Water Board.

#### 4.8. *Comments by Conservation Organizations*

The State Water Board has not yet posted all the comments it received on the third and final draft amendments; however, numerous conservation organizations submitted comments on the previous draft, and many of those comments are likely still relevant to the final draft. Conservation organizations previously submitting letters include: American Fisheries Society-CA-NV Chapter, California Sportfishing Protection Alliance, Friends of the San Francisco Estuary, several chapters of the Audubon Society, Natural Resources Defense Council with The Bay Institute, San

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Francisco Baykeeper and Defenders of Wildlife, Sierra Club with many others, The Nature Conservancy, and San Francisco Estuary Partnership, among others.

It is not possible to summarize all of the comments submitted by conservation organizations in this agenda memo; however, like the District, they universally express concern regarding the health of fish populations and the environment. Many organizations express support for the unimpaired flow approach; however, many also request even greater flows for the environment than those proposed by the State Water Board. Several organizations express concern about the State Water Board's proposed adaptive approach, others support it. Some express concern with the lack of measurable and enforceable performance measures. Many acknowledge the benefits of non-flow measures, but many request non-flow measures in addition to the State Water Board's proposed flow requirements. Finally, while several of the organizations support development of voluntary settlement agreements, many believe updates to the Bay-Delta Plan are long overdue and several specifically request that the State Water Board not delay its decision to allow additional time for agreements to be reached.

All of the comments submitted on the 2016 draft amendments (the second draft) can be viewed at the following web page:

[<https://www.waterboards.ca.gov/public\\_notices/comments/2016\\_baydelta\\_plan\\_amendment/>](https://www.waterboards.ca.gov/public_notices/comments/2016_baydelta_plan_amendment/)

## **5. A Better Path Forward**

The District supports the ultimate goal of restoring the Bay-Delta ecosystem and appreciates the State Water Board's efforts to improve conditions for fish and wildlife through updates to the Bay-Delta Plan. However, District staff continue to have significant concerns over the State Water Board's approach and believe that a science-based, voluntary settlement approach that incorporates non-flow measures and optimizes the use of limited water supplies is the best path to protecting and improving the Delta ecosystem while balancing other beneficial uses. A singular focus on flow volumes is not likely to provide meaningful benefits to the Delta ecosystem and detracts from the collective ability to develop a comprehensive, holistic approach to environmental restoration and wise water management. Focus on increasing flows to meet unimpaired flow targets will reduce the flexibility to adapt to changing conditions. It will also drain financial and water resources that could be used to better address a suite of stressors, focusing first on those that are most harmful to the Delta ecosystem.

## **6. Next Steps**

### **6.1. Phase 1 Adoption Hearings**

The State Water Board is currently scheduled to hear final comments on the Phase 1 proposed amendments during a public meeting on August 21-22, 2018. Written comments were due on July 27 and the District, SFPUC, SWC, SLDMWA, Reclamation, DWR and California Department of Fish and Wildlife Service all submitted comments, copies of which were provided to the Board in a non-agenda packet on August 3, 2018. Oral comments will be accepted during the meeting, but likely limited to three minutes.

The California Natural Resources Agency, Reclamation and others requested a postponement of the State Water Board decision on the proposed amendments, originally scheduled for the August 21-22 State Water Board meeting. Reclamation's request was to allow more time for them to consider the legality of the State imposing new requirements on a federal project. Other requests were to allow additional time for voluntary settlement agreements to be developed. On August 15, the State Water Board granted that request. A new date for final Water Board action has not been provided.

#### **6.2. *Phase 2 Proposed Amendments and Draft Environmental Documents***

The State Water Board intends to release its Phase 2 proposed amendments and draft Substitute Environmental Document for public comment in late 2018. District staff will work with other water agencies to review and provide comments within the established comment period.

#### **6.3. *Voluntary Settlement Agreements***

Former Secretary of the Interior, Bruce Babbitt, has been hired by the Governor to help facilitate voluntary settlement agreements. Settlement discussions have been occurring since late-2016. Whatever agreements are reached amongst the affected parties will need to be approved by the State Water Board and State Department of Fish and Wildlife. The affected parties generally intend that agreements on a package, or packages, of actions will collectively provide a more robust approach to improving conditions for the Bay-Delta ecosystem by addressing all of the stressors in a way that uses the limited water resources more efficiently than the State Water Board's proposal.

#### **6.4. *Water Rights Hearings***

If voluntary settlements are not developed and approved as an acceptable means to achieve the State Water Board's objectives, then the State Water Board will likely move to impose additional terms and conditions in the permits of water right holders to achieve its objectives. Staff is not clear at this time how the State Water Board might choose to impose responsibility with respect to water right seniority and type (e.g. appropriative, riparian, pre-1914, etc.) and how these impositions may apply differently to historic "Settlement Contractors" on the Sacramento, San Joaquin and Feather Rivers than they may apply to other CVP/SWP contractors who are beneficiaries of the CVP and SWP water right permits. Any changes to water right permits would occur through lengthy, public, quasi-judicial water rights proceedings. Staff further anticipates that litigation by affected parties against the State Water Board might affect the ultimate outcome and the timing of any final actions.

#### **FINANCIAL IMPACT:**

There is no financial impact associated with this item.

#### **CEQA:**

The recommended action does not constitute a project under CEQA because it does not have a

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potential for resulting in direct or reasonably foreseeable indirect physical change in the environment.

**ATTACHMENTS:**

Attachment 1: Commissioner of Reclamation Comment Letter  
Attachment 2: District Comment Letter  
Attachment 3: SFPUC Comment Letter  
Attachment 4: SWC Comment Letter  
Attachment 5: CVP Contractor Comment Letter  
Attachment 6: CDFW-DWR Comment Letter  
Attachment 7: Tuolumne River Trust Comment Letter  
Attachment 8: State Water Board Reply  
Attachment 9: PowerPoint

**UNCLASSIFIED MANAGER:**

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