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

May 25, 2023

Division of Water Rights Mail Room
Attn: San Joaquin Unit
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Subject: NOP Comment Letter – Tuolumne River Voluntary Agreement

Dear Chair Esquivel and Members of the Board:

This letter originates from lands of the Lisjan Ohlones in the East Bay, of Yokut lands in the Stockton area, and Miwok lands of the Delta further north. These lands represent the great connections of the San Francisco Bay with the Delta estuary.

Restore the Delta (RTD) is a grassroots campaign of residents and organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries, communities, and family farming can thrive there together again; so that water quality is protected for all communities, particularly environmental justice communities; and so that Delta environmental justice communities are protected from flood and drought impacts resulting from climate change while gaining improved public access to clean waterways. Ultimately our goal is to connect communities to our area rivers and to empower communities to become the guardians of the estuary through participation in government planning and waterway monitoring. RTD advocates for local Delta stakeholders to ensure that they have a direct impact on water management decisions affecting the well-being of their communities, and water sustainability policies for all Californians.

RTD understands that the proposed Tuolumne River Voluntary Agreement (TVA) is intended by its term-sheet agreement signatories to become part of the 2018 Bay Delta Plan's plan of implementation. It seeks to represent a voluntary basis from major water right holders of the Tuolumne River (that is, the City and County of San Francisco, Turlock Irrigation District, and Modesto Irrigation District) for providing flows and riparian and other river habitat restoration intended to recovery natural salmon production and abundance in support of achieving flow objectives in the Bay Delta Plan. This letter provides our comments on the Notice of Preparation (NOP) of a tiered environmental document (TED) on the proposed TVA (TVA TED).

RTD also incorporates by reference here the comment letter led by Natural Resources Defense Council, to which RTD is also a signatory.

General Comments

RTD is disappointed that the Board decided to proceed with preparing this proposed TVA TED. We think it is only half-, rather than fully-baked. Devoting valuable Board staff time to this TVA TED takes resources away from production of Phase 2 of the Bay Delta Plan that addresses Sacramento River, Delta, and Delta water facilities' operational objectives.

The NOP acknowledges that the TVA “does not fully conform to the current provisions of the Bay-Delta Plan,” yet implies that the Bay-Delta Plan will be made to conform with the TVA once the latter is evaluated and approved. We find this deeply concerning: “To consider the proposed voluntary agreement, the State Water Board will need to also consider modifications to the Bay-Delta Plan and prepare a staff report to support those possible changes....”¹ The NOP leaves to the imagination what changes the Board anticipates making to a water quality control plan they approved in just 2018, while having delayed its revision already for nearly a decade to that point. In a less topsy-turvy world, the proposed TVA should be evaluated for its conformance with Bay-Delta Plan flow objectives, not the other way around as the NOP strongly implies.

In its NOP, the Board has asked that we provide input in areas “that should be evaluated, alternatives that avoid significant impacts, and appropriate mitigation measures.” CEQA allows and encourages the public to do much more than this, such as commenting on the full array of potential issue areas the TED should address, including the project description. Seeing that the Board has decided to proceed with the consideration of the proposed TVA, we provide the following suggestions for the proposed TED and supporting documents.

- I. **The Project Description should include complete phasing information concerning provision of flows that comply with and conform to already-adopted 2018 Bay-Delta Plan flow objectives, as well as information on the location and areal extent of habitat restoration actions intended to benefit salmon production and abundance in the Tuolumne River, Lower San Joaquin River, and the Delta.**

At this time, the March 29, 2022 term sheet information demonstrates an agreement by the TVA's signatories, rather than an actual, bona fide voluntary agreement from which implementation actions would follow.

As noted above, the TVA represents an unfinished product touted as the basis for likely significant amendments to the 2018 Bay-Delta Plan that, we fear, will reverse the course that 2018 plan version set. This course moved California toward recovery and doubling of natural salmon populations, increased flows over those occurring at the time of adoption, and improved survivability of young salmon traversing the Delta on their way to the Pacific Ocean fishery where they serve as prey species for many marine mammals (including killer whales) and provide livelihoods for commercial and sport fishing interests. The production of salmon is the production of food no less than is the production of almonds. The example of the TVA represents a course reversal to undermine further the prospect of recovering salmon populations in the Central Valley watershed.

If the proposed TVA is to modify the Bay-Delta Plan's flow objectives for the Tuolumne River, the project description of the TVA TED will need to clearly state how and to what extent this occurs, and the rest of the TVA TED will need to ripple such modifications throughout a variety

¹ *Notice of Preparation of Environmental Documentation and Scoping Meeting, Possible Amendment of the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary to incorporate Tuolumne River Voluntary Agreement*, issued by the State Water Resources Control Board, April 11, 2023, page 2. Accessible at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/notice-noptuolumneva-041123.pdf.

of TVA TED issue areas, or the environmental document will be legally inadequate under CEQA.

II. The proposed TVA TED’s methodological baseline should be set at the level of the adopted Bay-Delta Plan flow objective of 40 percent of unimpaired flow, so that the TVA’s reliance on existing in-stream flow rules can be shown to be a clear reduction to Tuolumne River flows and therefore a significant and unavoidable impact of the proposed TVA.

The proposed TVA term sheet indicates that “baseline” is not 2018 Bay-Delta Table 3 flow objectives for fish and wildlife, but existing in-stream flow rules that now govern operation of the Tuolumne River. States the TVA, “In coordination with the SWB and other VA Parties, CDWR and the U.S. Bureau of Reclamation will develop accounting procedures to assure that flows and habitat restoration provided under the VAs are additional contributions above baseline conditions as defined in Section 4 of this Term Sheet.” These flow rules were derived and applied to benefit hydropower operations of Hetch Hetchy and New Don Pedro hydropower plants, not production of natural salmon populations. In Section 4.1 (p.5 of the VA term sheet) it further states: “The VA flows described in Appendix 1 will be additive to the Delta outflows required by Revised Water Rights Decision 1641...and resulting from the 2019 Biological Opinions, although the 2019 Biological Opinions may be modified, including to resolve litigation concerning those opinions.” Revised D-1641 are still in place within the 2018 Bay-Delta Plan; however, the 2018 plan introduced upstream flow objectives for the Tuolumne, Merced, and Stanislaus Rivers, using an initial flow objective of 40 percent of unimpaired flow. Prior to introduction of the upstream flow objectives, the above-mentioned instream flow rules were in effect; and since implementation of the upstream flow objectives was delayed until just recently, they have been employed for purposes of constructing, for example, the proposed TVA. The 2018 Bay Delta Plan’s 40 percent of unimpaired flow objective is far more aggressive, and is far more responsive to the best available science that indicates salmon will need more flow to recover and achieve doubling of their natural populations than is provided at present under existing in stream flow rules or by Revised D-1641.²

III. The TED must include an assessment of impacts on environmental justice communities and a community engagement plan.

The NOP outlined “a list of potential environmental effects that are planned to be evaluated in the draft SED.” Missing from the list is impacts to environmental justice (“EJ”) communities. RTD has repeatedly advocated for the involvement and consideration of EJ communities, and it is discouraging to see that it was not considered by default an area of interest to evaluate. While RTD received notice of the TVA TED, from the inception of the Voluntary Agreements, EJ communities have been excluded from VA negotiations. Our concerns are treated as a mere afterthought. Our exclusion resulted in a lost opportunity to advocate for flow objectives that would be protective of the fisheries, communities, and wildlife. As a result, the VAs do not address the concerns of all stakeholders.³

² See TVA, March 29, 2022, Appendix 4, “Monitoring” section. See also PDF page 31 for the Tuolumne River Term Sheet which states that the listed flow contributions on this page are “additive to average January-June minimum instream flow requirements on the Lower Tuolumne River, as set forth in the current FERC licenses for the Don Pedro Project and measured...downstream of La Grange Dam.” It is these instream flow rules that are much lower than the adopted 2018 Bay-Delta Plan flow objectives for the Tuolumne River.

³ While RTD was invited to participate in VA governance discussions in May 2022, we declined to join these talks because so many of the major decisions about VAs had already been taken without us and other environmental justice community groups at the table.

EJ communities live with the direct impact resulting from decisions being made on how water from the Delta and tributaries is being distributed. Environmental justice communities have historically been excluded from the decision-making process and left to deal with the consequences of poor water management. Proposed VAs does not address the water disparities and risk exacerbating existing environmental issues. Without properly enforced regulations, existing inequities will continue to be greater. Voluntary agreements promote negotiation among stakeholders however Delta communities cannot afford to negotiate the health of the estuary.

In the TVA TED, we will be expecting an assessment of impacts on environmental justice communities that evaluates water quality, air quality, public health, access to recreation, and assesses the cumulative impact of environmental burdens already faced by EJ communities. The document's setting must show the location and composition of environmental justice communities along the Tuolumne River, the lower San Joaquin River, and the Delta. It should evaluate downstream disproportionate impacts of the TVA on lower San Joaquin River and Delta EJ communities and what those impacts are. If the 40 percent of unimpaired flow objective is to be repealed and replaced with existing instream flow rules, the EJ and public health analyses must evaluate what effects should be expected with a reduction of flows to the lower San Joaquin and Delta portions of the river basin, including the spread and formation of harmful algal blooms.

In May 2021, the California Department of Water Resources (DWR) produced an Environmental Justice study, "Your Delta, Your Voice," that models a potentially meaningful analysis of EJ issues for TVA TED. We urge the Board that the methodology of DWR's study be replicated for the disadvantaged communities along the Tuolumne and lower San Joaquin Rivers for the TVA TED to generate comparable data on these communities with those identified for the Delta in DWR's study. DWR incorporated their study in the Delta Conveyance Project EIR but failed to reference it. RTD would be disappointed if it was once again overlooked in the preparation of TVA TED.

RTD will also be expecting a community engagement plan. The plan should include public education, outreach, and meaningful participation that does not use a "check-the-box" method that the Board has been heavily critiqued for using. We suggest local organizations be funded to partner with the Board to carry out these efforts.

IV. SED must employ a comprehensive approach that accounts for climate change and includes a climate change adaptation plan.

The Tuolumne River Basin is a tributary to the San Joaquin River, one of the two great rivers that feed the Delta in the Bay-Delta Watershed. Tuolumne River flows become flows for the San Joaquin River. Any proposed projects or regulations within the Tuolumne River Basin will impact the water quality in the Delta and if not, sufficient measures are taken, it can cause inadvertent harm. The TVA TED must account for impacts within the Bay-Delta watershed. Proper management of the Tuolumne River would allow it to supply the Delta with fresh water flows improving drinking water quality for eastern Contra Costa County, providing flows that prevent HABs formation, and improving San Joaquin River water quality.

Additionally, climate change is threatening the natural environment, wildlife, and California water supply. Weather patterns have become more extreme and unpredictable making it a challenge to plan mitigation. With improper management of the water supply within the Bay-Delta Watershed and the effects of climate, there will be less water flow in the coming years than what

the current TVA accounts for. The TVA needs to be able to change with worsening conditions due to climate change. The TVA also needs to build a sustainable water management plan for a resilient water system.

V. The SED should use the best available science in its analysis of effects on fish, water quality, and the environment, not just the science produced by signatories' preferred biologists and consultants.

Currently proposed flows in the TVA would be lower than flows enforced under the approved 2018 Bay-Delta Plan. As drafted, they will not support the fish, restore water quality, or support a healthy environment. The choice of baseline flows we discussed earlier will be at the center of our evaluation as to whether the hydrology/water quality chapter of the TVA TED will be adequate, as well as other sections of the TVA TED that rely on findings and model output from hydrology/water quality modeling based on the TVA.

It is our view that flows and habitat restoration go together in the effort to recover and double natural salmon production in the San Joaquin River Basin, and specifically the Tuolumne River. RTD will be looking for the TVA TED to allocate adequate flows supportive of the restoration of fish populations and the downstream Delta estuary. The TVA TED must acknowledge that habitat for fish is not a substitute for adequate flows because flows are a habitat for fish. It is like providing a human with food but no water. Habitat restoration and water are life for fish like food and water is life to humans. We cannot survive without one or the other and neither can fish.

VI. The TVA TED should recognize the current state of the Tuolumne River Basin, Bay Delta Watershed, and respective communities.

We are years into the Delta's pelagic organism decline with multiple native species listed as endangered and near extinction, and other species experiencing continuing declines in abundance and productivity. There is a proliferation of harmful algal blooms (HABs) threatening public health caused by poor water quality. The TVA is proposed for an ecosystem that is in critical condition and cannot afford mistakes. The TVA TED must include a comprehensive understanding of the following:

1. Native species and their current condition. If the population is in poor or critical condition, understand the causes for their condition.
2. Location of environmental justice communities within the Tuolumne River Basin and Bay-Delta, and relevant environmental burdens they face already.
3. Federal and State projects that are supported by flows coming from the Tuolumne River Basin and benefit in relation to the proposed Tuolumne Voluntary Agreements.

The TVA TED must account for the current state of the system and prioritize the restoration of the Tuolumne River Basin and subsequently contribute to the enhancement of the Bay-Delta estuary.

Thank you for considering our views. Please contact us if you have any questions regarding these comments.

Sincerely,

RE: NOP Comment Letter – Tuolumne River Voluntary Agreement



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