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Joaquin Esquivel, Chair  
State Water Resources Control Board  
P.O. Box 100  
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RE: DRAFT PROGRAM OF IMPLEMENTATION  
FOR THE SACRAMENTO/DELTA UPDATES  
TO THE BAY-DELTA WATER QUALITY CONTROL PLAN

Dear Chair Esquivel,

This letter is submitted as the comments of Friends of the River, San Francisco Baykeeper, California Sportfishing Protection Alliance, Defenders of Wildlife, the Winnemem Wintu Tribe, Golden State Salmon Association, Restore the Delta, Save California Salmon, the Northern California Council of Fly Fishers International, the California Indian Environmental Alliance, and the Tuolumne River Trust, regarding the State Water Resources Control Board's (State Water

Board's) October 2024 draft Program of Implementation (POI) for the Sacramento/Delta updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (Bay-Delta Plan). These comments are focused on the legal adequacy of the draft POI.

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## I. Legal Background

In adopting a water quality control plan, the Porter-Cologne Water Quality Control Act requires the State Water Board to “establish such water quality objectives . . . as in its judgment will ensure reasonable protection of beneficial uses.” Water Code § 13241. Once the Board has set objectives, it must then develop and adopt a Program of Implementation that will achieve those water quality objectives. Water Code §§ 13050(j), 13242, 13247; *In re SWRCB Cases* (2006), 136 Cal.App.4th 674, 726-729, 775, 778; *United States v. State Water Resources Control Bd.* (1986), 182 Cal.App.3d, 119. This requires “[a] description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private” and “[a] time schedule for the actions to be taken.” Water Code § 13242(a)-(b). Because the POI must achieve the Plan’s objectives, the Board may not consider other factors when establishing the POI—its obligation to the Plan’s objectives is absolute. *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010) 183 Cal.App.4th 1110, 1119-1120 (consideration of factors enumerated under Water Code § 13241 occurs only when establishing water quality objectives and not when establishing a POI).

Porter-Cologne also implements the federal Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.*, which prioritizes protection of fish and wildlife, 33 U.S.C. § 1251(a)(2), and requires states with water quality control plans to have standards in place for fish and wildlife protection, *see* 33 U.S.C. § 1313, and to submit changes in their water quality control plans for EPA review of their consistency with the Clean Water Act, *id.* § 1313(c). The Clean Water Act requires numeric water quality objectives, unless such criteria cannot be established. *See* 40 C.F.R. § 131.11(b).

Moreover, because a water quality control plan and the associated POI are a regulation, compliance with the California Administrative Procedures Act (“APA”) is required. *See State Water Resources Control Board v. Office of Admin. Law*, 12 Cal. App. 4th 698 (1993). The APA requires that regulations be clear, meaning they are “easily understood by those persons directly affected by them.” Office of Administrative Law, Decision of Disapproval of Regulatory Action, In re: State Water Resources Control Board, OAL File No. 2018-0823-02S, Oct. 12, 2018<sup>1</sup>; *see also* Cal. Code Regs., tit. 1, § 14; Cal. Gov. Code § 11349; and *see, e.g.*, Office of Administrative Law, Decision of Disapproval of Regulatory Action, In re: Department of Financial Protection and Innovation, OAL Matter 2023-1024-03, Dec. 15, 2023<sup>2</sup> (online at: <https://dfpi.ca.gov/wp-content/uploads/sites/337/2024/05/6.-OAL-Disapproval-Decision.pdf>). A regulation is presumed to violate the APA’s clarity standard if “the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning.” Cal. Code Regs., tit. 1, § 16(a)(1); *see* Cal. Gov. Code § 11349.

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<sup>1</sup> [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/documents/swddw\\_17\\_003/16\\_oaldec.pdf](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/swddw_17_003/16_oaldec.pdf)

<sup>2</sup> <https://dfpi.ca.gov/wp-content/uploads/sites/337/2024/05/6.-OAL-Disapproval-Decision.pdf>

Further under the APA, the Board's decision must not be "arbitrary, capricious, or lacking in evidentiary support." *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 113. This means that the Board must adequately consider all relevant factors and demonstrate a rational connection between those factors, the choice made, and the purposes of the enabling statute. *Id.*

## **II. Inclusion of the Voluntary Agreements in The POI Would Be Unlawful Because it Guarantees Water Quality Objectives Will Not Be Achieved**

### **A. The State Water Board Cannot Lawfully Adopt Different Water Quality Objectives for Different Stakeholders or Include Certain Water Quality Objectives Only in the Program of Implementation, as Proposed in the Draft POI**

The Draft POI proposes to establish multiple, conflicting water quality objectives in the Bay-Delta Plan, with different objectives applying to different stakeholders, depending upon whether those stakeholders participate in a so-called voluntary agreement. *See, e.g.*, Draft POI at 23, 50-51, 62. The Draft POI explains that the State Water Board has proposed to adopt a water quality objective generally requiring between 45 and 65 percent of unimpaired inflow, that this water quality objective would apply to all water rights holders on all salmon-bearing tributaries throughout the watershed, and that this would be implemented by requiring a year round average of 55 percent of unimpaired inflow.<sup>3</sup> *Id.* at 51. At the same time, however, the Draft POI explains that,

If the proposed 2022 Voluntary Agreements (VAs) proposal, referred to as the Healthy Rivers and Landscapes proposal, is incorporated into the Bay-Delta Plan, substantive provisions of the new Sacramento/Delta tributary inflow, inflow-based Delta outflow, cold water habitat, and narrative interior Delta flow objectives may either be incorporated in Chapter 4, Program of Implementation, or may remain as objectives in Table 3 but would not apply to VA parties during the term of the VAs.

*Id.* at 23. Similarly, the Draft POI identifies specific, quantitative reservoir carryover storage requirements for major dams to implement the coldwater habitat objective, including a requirement for 2 million acre-feet of storage at the end of September in Shasta Reservoir in dry and critically dry years. *Id.* at 59. However, the Draft POI unambiguously states that if the voluntary agreement is adopted, the cold water habitat objective would "not apply to VA parties

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<sup>3</sup> The adequacy of the Board's proposed 55 percent starting gate and the 45-65% range for the Delta inflow and outflow objectives in providing reasonable protection of designated fish and wildlife beneficial uses is not addressed in these comments. Our analyses of the effects of the proposed objectives, as well as of the proposed VAs, and our ongoing concerns regarding the adequacy of the regulatory objectives and the VAs are discussed in detail in the January 19, 2024, comments of SF Baykeeper et al regarding the September 2023 Draft Staff Report for the Sacramento-Delta Updates of the Bay-Delta Plan.

during the term of the VA.” *Id.* at 50; *see id.* at 58, 80. As a result, the parties to the Voluntary Agreement would not be subject to these quantitative reservoir storage requirements, and instead would simply have to submit a long-term temperature management strategy that lacks any quantifiable storage or temperature standards. *Id.*

The Draft POI and proposed incorporation of the VAs into the Bay-Delta Plan indicate explains that the State Water Board is contemplating the adoption of multiple, conflicting water quality objectives in the Bay-Delta Plan that would apply for the same purpose at the same place and time. To wit, the amount of flow that is described under the proposed 2022 Voluntary Agreement is far less than the amount of flow required under the Plan’s water quality objectives based on a percent of unimpaired flow. Similarly, the Voluntary Agreement fails to include water temperature protections that would be required under the regulatory pathway. Because the VA parties would be exempt from the Plan’s numeric water quality objectives, and because the VA parties account for a substantial proportion of the water diversions in the watershed (as well as operating most of the major dams and reservoirs in the watershed), and because the VAs would provide far less flow than the regulatory pathway would require, it is impossible for the regulatory pathway’s numeric water quality objectives to be “achieved” if the 2022 Voluntary Agreement is also incorporated into the Bay-Delta Plan.

For example, on the Sacramento River, the Draft POI proposes a required Delta inflow of 55 percent of unimpaired flow, within a range of 45 to 65 percent. Draft POI at 17. The State Water Board’s analysis indicates that a Delta inflow requirement of 55 percent of unimpaired flow on the Sacramento River would result in average increases in Sacramento River inflows to the Delta of 890,000 acre feet per year (measured at Freeport, average flows for January to June), and that water diversions in the Sacramento Basin would be reduced by an average of 606,000 acre feet per year to meet this requirement. *See* 2023 Draft Staff Report at 6-12, 6-59. However, the Draft POI also proposes a conflicting standard on the Sacramento River, based on the 2022 Voluntary Agreement, which would result in average annual Delta inflows below 45 percent on the Sacramento River; the State Water Board’s modeling indicates that Sacramento River inflow at Freeport would increase for the months of January to June by 200,000 acre feet and annually would increase by 119,000 acre feet per year on average, far less than the flows that would result from the Delta inflow objective of 55 percent of unimpaired flow on the Sacramento River. *See id.* at 9-25 to 9-26. Because it would result in much lower flows and because the vast majority of water diversions on the Sacramento River are parties to the 2022 Voluntary Agreement, the Draft POI’s inclusion of the 2022 Voluntary Agreement ensures that it is impossible to meet the Bay-Delta Plan’s requirement of 55 percent of unimpaired flow on the Sacramento River in many years.<sup>4</sup> The same is true for the Feather River and other tributaries subject to the Voluntary Agreement. *Compare* 2023 Draft Staff Report at 6-12 (Feather River inflows increase by

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<sup>4</sup> To view this in context, consider that while average unimpaired Delta outflow is 28.5 million acre-feet (MAF) of water (according to the Draft Sacramento-Delta Update Staff Report), the water rights and contract amounts associated with VA parties exceed 30 MAF, with 12.9 MAF associated with state and federal water project contractors and over 17.9 MAF associated with non-project water rights holders. (*See* eWRIMS database, active non-power rights).

460,000 acre feet per year on average for the months of January to June) with *id.* at 9-31 to 9-32 (Feather River inflow under the Voluntary Agreement increases by 69,000 acre feet per year for January to June and results in an average annual increase in Feather River flow of 27,000 acre feet per year). Similarly, the Draft POI proposes a minimum Shasta Dam carryover storage requirement of 2 million acre feet per year in Critical and Dry years, and 2.4 million acre feet in all other year types to implement the Bay-Delta Plan's proposed coldwater habitat objective, Draft POI at p. 59, but as discussed *infra*, the Draft POI would not apply to the parties to the Voluntary Agreement, resulting in Shasta carryover storage levels far below the minimum level established in the Draft POI. This approach of having multiple, conflicting regulations is contrary to law.

The Draft POI's approach of having multiple regulatory standards violates several provisions of the California Administrative Procedures Act ("APA"). First, the approach contemplated in the Draft POI violates the clarity standard of the APA and therefore would be unlawful because the regulation (the Bay-Delta Plan) can reasonably be interpreted to have more than one meaning for what reservoir storage, temperatures, Delta inflow or Delta outflow is required. In addition, other provisions of the Draft POI would violate the APA if adopted by the State Water Board, including: the numerous exceptions and exemptions from achieving water quality objectives proposed in the Draft POI, for which the Board lacks legal authority; vague and undefined terms, such as "drought"; proposing to allow approval of alternate plans in the future without defining an adequate regulatory standard by which the State Water Board would base its decisions; ambiguity as to whether the five year time frame for full implementation begins immediately upon approval or two years after approval, allowing seven years for full implementation; inadequately defined baseline / base conditions to which VA flows would be added.

The State Water Board may argue that the Draft POI proposes alternative compliance methods that are lawful under the APA, but the methods identified in the Draft POI fail to meet these standards. Our organizations do not object to alternative compliance methods in theory, when the regulation utilizes factually relevant and accurate metrics that are objectively evaluated to determine whether the alternative compliance pathway is applicable, but that is not the case here. In 2023 the Office of Administrative Law approved a regulation by the California Air Resources Board that included an alternative compliance method, which utilized specific, numeric criteria to evaluate whether the alternative compliance method could be utilized by a regulated entity. *See* Cal. Code Regs., tit. 13, §§ 2478.7(a)-(b) (The Executive Officer may approve an alternative compliance plan that supercedes other regulatory requirements provided that the alternative compliance plan "shall reduce [Particulate Matter], [Nitrous Oxide] and [Greenhouse Gas] emissions in California in amounts equivalent to or greater than the reductions that would have been achieved" under the regulatory requirements.).

In contrast to the specific, numeric, relevant metrics used in the Air Resources Board's regulation approved by OAL, the Draft POI proposes to evaluate whether parties to the voluntary agreement and other future agreements would be exempt from the Bay-Delta Plan's numeric objectives using a "comparable protection" test. *See* Draft POI at 54, 61, 62. The Draft POI does not identify the specific metrics or methods of analysis that would be used to evaluate

whether something provides “comparable protection,” instead leaving this as a discretionary determination that is plainly capable of multiple interpretations. The Office of Administrative Law rejected the State Water Board’s proposed drinking water regulations in 2018 because that regulation called for the State Water Board to exercise discretion but “failed to articulate a regulatory standard by which the Board is to make its decision.” Office of Administrative Law, Decision of Disapproval of Regulatory Action, In re: State Water Resources Control Board, OAL File No. 2018-0823-02S, Oct. 12, 2018 (online at:

[https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/documents/swddw\\_17\\_003/16\\_oaldec.pdf](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/swddw_17_003/16_oaldec.pdf)). This violates the APA.

Beyond the problem of conflicting water quality objectives, inclusion of the VAs in the Draft POI presupposes that the State Water Board has determined the relative proportionality of responsibility for achieving the Plan’s water quality objectives, including both narrative objectives (native fish viability and salmon protection) and numeric objectives (such as Delta inflow and Delta outflow). However, the State Water Board has never made such a determination or provided any such analysis; indeed, assigning responsibility for achieving water quality objectives – which water rights holders must be curtailed in what order, and to what extent, to achieve water quality objectives – is the function of a water rights proceeding after the Plan is adopted, rather than conflating the quasi-legislative and adjudicative steps of the process. The State Water Board’s conflation of its adjudicative and quasi-legislative authority has already been rejected by the courts. *See United States v. State Water Resources Control Bd.*, 182 Cal.App.3d at 117-118.

Finally, Porter-Cologne prohibits including water quality objectives in the POI. The Act explicitly distinguishes water quality objectives from the program of implementation. *Compare* Cal. Water Code § 13050(h) *with id.* at §§ 13050(j), 13241, 13242. While a water quality control plan must include both water quality objectives and a POI, the plain language of the statute makes clear that water quality objectives are different from the POI. *Id.* Thus, where the Draft POI contemplates that certain water quality objectives would only be included as part of the POI, *see* Draft POI at 23, such an approach is contrary to law, as is the failure to include numeric water quality objectives for water temperature or coldwater habitat.

**B. The Draft POI is Unlawful Because the Proposed Voluntary Agreement, Including Curtailment Methodology, Would Not Achieve the Plan’s Water Quality Objectives**

The Draft POI plainly violates State law because implementation of the proposed voluntary agreement would not “achieve” the Plan’s designated water quality objective based on a percentage of unimpaired flow, and the proposed curtailment methodology would exempt parties to the voluntary agreement from curtailment when water quality objectives are not being achieved.

On average, the amount of January-June Delta inflow and Delta outflow from the Sacramento Basin that would be required under the proposed 2022 Voluntary Agreement is 1.1 million acre-feet less than the amount of Delta inflow that would be required if the State Water Board adopted a water quality objective requiring 55 percent of unimpaired flow (and represent a much greater deficit if the upper end of the proposed adaptive range was required) and would on average even be less than the proposed 45% floor for adaptive management. Stated another way, implementation of the 2022 Voluntary Agreement would not result in achieving the Plan's water quality objective of 55 percent of unimpaired inflow (or even fall within the permitted range of flows for adaptive management) or meeting the Plan's inflow-based Delta outflow objective. The same is true with respect to the coldwater habitat objective; because the POI proposes to exempt the VA parties from the numeric criteria and the VA parties are responsible for such a large proportion of diversions, reservoir storage levels at the majority of reservoirs listed on Table 7 would not be required to "achieve" the specific quantified storage levels specified in the table (including Shasta, Whiskeytown, Oroville, and Folsom reservoirs).

Porter-Cologne defines a water quality objective as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area," Cal. Water Code § 13050(h), and the Act requires the State Water Board to establish water quality objectives that will ensure the reasonable protection of designated beneficial uses. Cal. Water Code § 13241. Nothing in the Act authorizes the State Water Board to adopt water quality objectives that do not protect beneficial uses – reasonable protection cannot be interpreted as allowing beneficial uses to risk being extinguished or substantially impaired – or that only apply to certain water rights holders with the result being that water quality objectives are not achieved.

In the Draft POI, the State Water Board suggests that time schedules and unspecified "flexibilities" authorize the Board to adopt a program of implementation in which water quality objectives are not "achieved." Draft POI at 29. Neither time schedules nor other alleged "flexibilities" authorize the Draft POI's approach of including multiple, conflicting objectives that would not be fully "achieved" and implemented.

First, as the Court of Appeal explained nearly two decades ago, rejecting a similar argument from the State Water Board, while Porter-Cologne authorizes the Board to include a time schedule for implementation, an adopted time schedule does not justify implementing a different water quality objective from the objective adopted in the water quality control plan. *In re State Water Board Cases*, 136 Cal.App.4th at 727. Instead, as the Court of Appeal explained, in order to implement the lower flows required by the Vernalis Adaptive Management Plan instead of the Plan's designated water quality objectives for Vernalis flow, the State Water Board must revise the Plan's water quality objectives. *Id.* at 729 and fn. 29. Similarly, the Court rejected the State Water Board's argument that it was not required to fully implement the Plan, including the designated water quality objectives, holding that state law requires implementation of water quality control plans. *Id.* at 729-734 (*citing* Cal. Water Code § 13247).



The State Water Board has explained that time schedules for implementation may be appropriate to allow a discharger to construct facilities or take other actions to treat waste discharges to a more stringent permit condition, including time to secure financing, and has adopted orders to only allow compliance schedules for NPDES permits for these purposes and that any schedule must be granted for the minimum amount of time necessary to achieve compliance. SWRCB Resolution 2008-0025 at ¶¶ 6, 9; Cal. Code Regs., tit. 23, § 2918. A time schedule contemplates full implementation and achievement of water quality objectives in the future, even if full achievement of the objectives is delayed to that future date.

In contrast, water quality variances or other exceptions do not “achieve” water quality objectives, and instead authorize violations of water quality objectives. The Legislature has only authorized water quality variances in limited circumstances, including with respect to waste discharge requirements. Cal. Water Code §§ 13149.2(d), 13173. However, nothing in sections 13240-13244 of Porter-Cologne authorizes the Board to grant exceptions, variances, or other measures in a water quality control plan that would not “achieve” the plan’s water quality objectives. Because the Legislature has authorized variances and exceptions to water quality objectives in certain limited circumstances, but has not done so here, the canons of statutory construction indicate that the Legislature has not authorized the State Water Board to grant variances that would not “achieve” designated water quality objectives in an adopted water quality control plan.<sup>5</sup>

In addition, the Draft POI’s proposed curtailment methodology is unlawful because it fails to “achieve” water quality objectives designated in the Plan. The Draft POI proposes that water diversions by a party to a voluntary agreement would not be curtailed even when designated water quality objectives in the Bay-Delta Plan were not being achieved. Draft POI at 64. In

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<sup>5</sup> The U.S. Environmental Protection Agency has authorized limited water quality variances pursuant to regulations adopted under the Clean Water Act. *See* 50 C.F.R. § 131.14. The State Water Board has adopted a statewide water quality variance policy that purports to authorize the state and regional boards “to adopt a water quality standards variance consistent with federal regulation.” *See* State Water Board Resolution 2018-0038 (Aug. 7, 2018). While such variances may be appropriate or valid for some NPDES permits issued under federal law, California law does not authorize variances that would not “achieve” water quality objectives as required by law. Moreover, the Draft POI neither cites the water quality variance policy as authority for these exceptions, nor does the document even attempt to demonstrate that the numerous proposed exceptions would meet the criteria that EPA has adopted to limit such variances. Indeed, the variance policy appears inapt here. For instance, EPA’s regulations require that a water quality variance be a water quality standard that is reviewed and approved by EPA, prohibits a variance from lowering currently attained water quality, requires a variance to meet the highest attainable water quality standard, requires the shortest term variance possible, and generally requires pollution control measures to minimize the variance. *See* 50 C.F.R. § 131.14. Similarly, the State policy generally applies to “one or more NPDES discharges” after review and approval by EPA. *See* State Water Resources Control Board, Part 3 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California, Bacteria Provisions and a Water Quality Standards Variance Policy, available online at: [https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2018/final\\_iswebe\\_bacteria\\_provisions.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/final_iswebe_bacteria_provisions.pdf).

other words, during a drought, parties to a voluntary agreement would not have to curtail water diversions to meet the tributary inflow and inflow-based-outflow water quality objectives, while water diversions by other water rights holders would be curtailed. There has been no modeling of the VA combined with the 55% of unimpaired alternative for non-VA parties; however, given the volume of water diversions by the parties to the voluntary agreements, particularly on certain rivers, even assuming that it was lawful to fully curtail water diversions by all other water rights holders, including those holding more senior water rights, the end result is that the water quality objectives in the Plan would not be achieved during droughts and other periods of shortage when the VA is in effect (e.g. non-Critical years).

### C. The Draft POI Unlawfully Carves Out Numerous Exceptions that Fail to “Achieve” Water Quality Objectives

In addition to exempting the VA parties from curtailments when water quality objectives are not being met and allowing for approval of a voluntary agreement that does not meet the Plan’s water quality objectives, the Draft POI also proposes numerous additional exceptions and exemptions that fail to “achieve” implementation of the Plan’s water quality objectives. Because these exemptions and exceptions are unlawful under State law, as discussed *supra*, the State Water Board must revise the Draft POI to eliminate these exceptions.

First, the Draft POI’s exceptions regarding human health and safety are vague and overbroad, and they would result in water quality objectives not being achieved. *See* Draft POI at 56. Indeed, the first sentence of this section makes clear that these “exceptions to curtailments” are not limited to the narrow issue of water supply for human health and safety, and instead that the State Water Board would develop additional exceptions from curtailment to address “other possible reasons.” *Id.* In contrast, the State Water Board’s emergency curtailment regulations have narrowly defined exceptions for human health and safety. *See* Cal. Code Regs., tit. 23, §§ 877.1(h), 878.1.<sup>6</sup>

These exceptions are unnecessary, overbroad, and inconsistent with the purpose of this rulemaking. One of the purposes of this regulatory update of the Bay-Delta Plan was to ensure that Delta water quality objectives would be met in future droughts and would protect fish and wildlife beneficial uses by ensuring that a broader range of water rights holders are obligated to meet these Delta inflow and outflow objectives. Currently, despite the voluntary commitment of the CVP and SWP to meet existing objectives, the State Water Board has routinely granted waivers of Delta inflow and outflow objectives over the past fifteen years, including every drought year and in non-drought water years. As the State Water Board explained in 2018,

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<sup>6</sup> However, during droughts over the past decade the State Water Board has repeatedly allowed the CVP and SWP to pump far more water from the Delta than was necessary for human health and safety while violating water quality objectives in the Delta, with the vast majority of that water being delivered to agricultural water districts in the San Joaquin Valley.

The current Bay-Delta Plan is implemented by a limited subset of water users, on a limited subset of streams, for only parts of the year. Implementation of the current Bay-Delta Plan has failed to protect fish and wildlife that require protection throughout the watershed and throughout the year. The current Bay-Delta Plan requirements, as implemented, result in overburdening some streams to the detriment of all beneficial uses in that stream while at the same time failing to protect beneficial uses in other streams and the watershed. The Bay-Delta Plan and its implementation require updating to address these and other issues.

State Water Board, July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan, available online at:  
[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/docs/sed/sac\\_delta\\_framework\\_070618%20.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf).

Indeed, in nearly all cases, water quality objectives can be achieved during drought conditions through curtailment regulations without adversely affecting human health and safety, and the State Water Board has not demonstrated that these exceptions are necessary to protect water quality or human health and safety. *See* Cal. Code Regs., tit. 1, § 10(b)(2) (requiring the agency to demonstrate why “each provision of the adopted regulation is required to carry out the described purpose of the regulation.”); Cal. Gov. Code 11349. While our organizations have not opposed the narrow exception for human health and safety in the emergency curtailment regulation, the proposed approach in the Draft POI is unlawful.

Second, the Draft POI proposes to waive implementation of existing Delta water quality objectives during critically dry years and droughts in the future. Draft POI at 65 (describing these existing objectives as “Base and Table 4 Delta Outflow Objectives” that are distinguished from the proposed “inflow-based Delta outflow objective”). Instead of requiring the CVP and SWP to better prepare for droughts (for instance, by storing more water in advance of drought), or requiring all water holders to curtail water diversions so that water quality objectives would be achieved, the Draft POI proposes to waive these requirements in critically dry water year types and in droughts.<sup>7</sup> This violates Porter Cologne command that the POI achieve the Plan’s water quality objectives. *See* Water Code §§ 13050(j), 13242. The Board has not demonstrated that this exception is necessary, particularly if water diversions by water rights holders other than the SWP and CVP are curtailed to help meet these objectives. Yet the Draft POI appears to reject requiring other water rights holders to meet these Delta outflow objectives, instead maintaining the current approach – which has failed to achieve water quality objectives – where the water rights of only the CVP and SWP are conditioned to meet these objectives. *See* Draft POI at 30, 63. While there is conflicting language in the Draft POI, the proposed curtailment methodology

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<sup>7</sup> In addition, the term “drought” is not defined, and there is no generally accepted meaning of this term, making the document capable of multiple interpretations. This term should be defined or deleted.

would only apply to tributary inflow and the inflow-based Delta outflow objective, and therefore would not apply to meeting the existing Delta inflow and outflow objectives: as a result, the POI indicates that other water rights holders would not be curtailed to achieve these objectives. The State Water Board should eliminate this proposed exception and clarify that all water rights would be subject to curtailment, following the rule of priority, to meet all Delta outflow objectives, including the existing Delta outflow objectives, except as necessary to address stream-specific water temperature requirements or to protect the Public Trust.<sup>8</sup>

Third, the Draft POI proposes exemptions that would not achieve Delta inflow or Delta outflow objectives, purportedly in order to maintain reservoir storage. Draft POI at 51-52. In particular, the second proposed exemption would authorize Delta inflow levels below the Plan's minimum 45 percent requirement, reducing Delta inflow to 35 percent of unimpaired flow (and thus reducing Delta outflow). *Id.* The Board has not demonstrated that such an exemption is necessary, because reducing water diversions and water deliveries would allow for meeting both cold water habitat and Delta inflow and outflow objectives, and the approach is contrary to law because the program of implementation would not "achieve" the water quality objectives. To the extent that the State Water Board determines that reservoir releases should be reduced when reservoir storage levels are below a certain threshold, these revised criteria must be included as a water quality objective in the Plan.

#### D. The Draft POI Unlawfully Allows for Future Voluntary Agreements or Instream Flow Requirements that do not Achieve the Plan's Objectives

The Draft POI also unlawfully proposes to allow the State Water Board to approve future voluntary agreements or instream flow requirements that do not achieve the Plan's water quality objectives. This approach is contrary to law; the State Water Board can approve future voluntary agreements or instream flow requirements that "achieve" the Plan's objectives, or the State Water Board can revise the Plan in a regulatory proceeding. But it cannot approve future measures that do not actually "achieve" water quality objectives. This violates Porter Cologne command that the POI achieve the Plan's water quality objectives. *See* Water Code §§ 13050(j), 13242.

For instance, the Draft POI proposes that the State Water Board could approve future "local cooperative agreements" that did not achieve the minimum 55 percent of unimpaired flow objective, based on a finding that "local cooperative solution is enforceable and is expected to provide comparable protection than default implementation for achieving the water quality objectives." Draft POI at 61; *see id.* at 60 (requiring "comparable benefits"). We recognize that alternative water management strategies may be identified in future that achieve water quality objectives using less water. However, neither "comparable protection" nor "comparable benefits"

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<sup>8</sup> These potential variations from the water rights priority rule are discussed in more detail in our separate December 24, 2024 comments regarding the most effective and efficient approach to implementing the numeric flow objectives.

constitute a clear regulatory standard that is consistent with the legal requirement that the Board fully implement the water quality control plan and achieve the water quality objectives. Cal. Water Code §§ 13240-41, 13247. The language must be revised to require the State Water Board to find that the local cooperative agreement would achieve the Plan's water quality objectives (including the narrative salmon protection objective, cold water habitat objective, Delta inflow objective, and inflow-based Delta outflow objective) before the State Water Board could approve it.<sup>9</sup>

Similarly, the Draft POI proposes that the State Water Board could approve future instream flow requirements that did not achieve the minimum numeric Delta inflow objective without amending the Bay-Delta Plan's objectives, based on a finding that the requirements would provide "comparable protection of fish and wildlife beneficial uses," even if it reduces Delta outflow. Draft POI at 54. This approach is plainly contrary to law; as discussed *infra*, "comparable protection" is not a valid legal standard and this approach would not "achieve" the Plan's water quality objectives as required by law, and the approach fails to even consider whether the instream flow requirement would achieve other plan objectives besides inflow (including coldwater habitat and narrative salmon protection) nor whether Delta inflow objectives alone are capable of achieving the Delta outflow conditions necessary to protect the estuarine habitat beneficial use. The State Water Board must revise this section to provide that future instream flow requirements could be approved if they achieve the Plan's water quality objectives, including Delta inflow and Delta outflow.

#### E. The Draft POI Fails to Achieve Water Quality Objectives Because the Voluntary Agreement Appears Unenforceable Against the Bureau of Reclamation

While Federal law provides the State Water Board with ample authority to regulate the Bureau of Reclamation's water rights, it does not appear that the State Water Board could force the federal government to comply with the terms of the proposed voluntary agreement. Given the incoming Trump Administration's stated opposition to California's environmental and water policies, the State Water Board cannot assume that the federal government would voluntarily comply. As a result, the Draft POI would not "achieve" water quality objectives as required by law.

Notwithstanding the general supremacy of federal law over state law, Congress has authorized the State of California to regulate the water rights of the Bureau of Reclamation, including the Central Valley Project, requiring the operation of the Central Valley Project to comply with state law. *See* Reclamation Act of 1902, § 8; *see also* Central Valley Projection Improvement Act, § 3406(b) ("CVPIA"). While there remains some ambiguity as to the scope of the State's

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<sup>9</sup> In contrast, the Plan recognizes that a voluntary agreement for the Lower San Joaquin River or its tributaries could be approved – provided that the flows under that voluntary agreement achieve the narrative and numeric water quality objectives for flows in the Lower San Joaquin River. Draft POI at 49-50. Otherwise, the Board would be required to modify the water quality objectives in the Plan before it could consider a voluntary agreement that would not achieve the Plan's objectives.

authority,<sup>10</sup> there is little question that the State's authority is strongest with respect to the regulation of water rights. Indeed, the CVPIA explicitly requires that the operations of the Central Valley Project meet "all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project." CVPIA § 3406(b).

However, the draft POI does not require that the State Water Board would adopt the proposed voluntary agreement as terms and conditions on applicable licenses and permits for the project. Instead, the Draft POI proposes that the State would enter into a settlement agreement with other parties in lieu of a water rights adjudicative proceeding. *See, e.g.*, Draft POI at 76. Importantly, however, the Draft POI does not mandate that these settlement terms would be established as conditions on the CVP's water rights licenses and permits.<sup>11</sup>

Even more troubling, not only does it appear that the Bureau of Reclamation's water rights would not be affected by this proceeding, but it appears that the Bureau of Reclamation would not be a party to the voluntary agreement or section 11415.60 agreements. *See, e.g.*, 2022 VA Term sheet § 7.2. ("It is anticipated that neither... the Bureau of Reclamation... [nor other parties] would be participating through a 11415.60 agreement."). Reclamation's statement in its Final EIS, approved in December 2024, that it would take actions "intended to supplement Delta outflow" per any VAs approved by the Water Board does not ensure that the Plan's objectives, even under the VAs, would be achieved, especially given the uncertainty over how long the existing Record of Decision will remain in effect.

Section 11415.60 agreements are limited to an adjudicatory proceeding, such as a water rights proceeding. There is no basis in law for using such an agreement to resolve the State Water Board's quasi-legislative proceeding to review and revise water quality objectives as part of updating the Bay-Delta Water Quality Control Plan. *See* Cal. Gov. Code §§ 11400 et seq. (Chapter 4.5. Administrative Adjudication: General Provisions). To the extent that this proposal was a settlement agreement to actually implement and "achieve" the Plan's water quality objectives, and those terms were memorialized in amended water rights terms and conditions, such an approach likely would not be controversial. However, that is not what is proposed. Instead, the State Water Board appears to be limiting the water quality objectives that the Board is considering in its quasi-legislative proceeding to establish water quality standards, based on the promise of an agreement as to what these contractors would provide in a future adjudicatory proceeding. Such an approach improperly commingles the Board's quasi-legislative and adjudicatory functions, fails to adequately consider all water uses, and is "seriously flawed by

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<sup>10</sup> For instance, in its lawsuit against the 2019 Trump Administration biological opinions, the State of California alleges that the Bureau of Reclamation is violating its legal duty to comply with the California Endangered Species Act.

<sup>11</sup> Nor is it clear that these specific flow and other requirements proposed in the VA are required by state law, since it is a "voluntary" agreement.

equating its water quality planning function with protection of existing water rights.” See also *United States v. State Water Resources Control Board*, 182 Cal.App. 3d at 118.

The Draft POI contemplates that the VAs will include a Memorandum of Understanding with the federal government. In such circumstances, it does not appear that the State Water Board could obtain injunctive relief from the courts to enforce the provisions of the VA against the federal government. The federal government’s sovereign immunity from suit in state court is the primary barrier. For example, the Tucker Act waives the United States’ sovereign immunity for claims of damages, but injunctive relief is generally unavailable under that law and would not be available under these circumstances. See, e.g., *Richardson v. Morris*, 409 U.S. 464, 465 (1973). And while Congress granted a very limited waiver of sovereign immunity for state Court proceedings to enforce or modify water rights (McCarran Amendment), the federal government generally has not waived sovereign immunity to be forced to appear in State Court. As a result, it appears unlikely that the State of California could enforce the terms of the voluntary agreement against the Bureau of Reclamation in state court. Similarly, the violation of an out of court settlement agreement does not create federal jurisdiction. See *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375 (1994). To the extent that the Federal Government only signs a Memorandum of Understanding, the State Water Board appears to have no authority to enforce the terms of the agreement.

This is particularly problematic given that: (1) the Bureau of Reclamation’s operations of the Central Valley Project dominate water use and diversions throughout the watershed; (2) most of the VA parties do not have adequate water rights to provide the water pledged under the VA; (3) the other VA parties lack contractual or other rights to compel the Bureau of Reclamation to operate in compliance with the VA. The Draft POI wholly fails to consider this important aspect of the problem.

For example, the Draft POI identifies certain water rights holders that would be subject to the Sacramento/Delta VA provisions of the Bay-Delta Plan. See Draft POI at 77. However, Table 8 omits the Bureau of Reclamation from the water rights holders and VA parties (it also omits the Department of Water Resources). Instead, Table 8 generally lists only the contractors of the CVP and SWP. *Id.*<sup>12</sup> However, most – if not all – of these parties lack water rights that are sufficient to guarantee the additional flow that is proposed under the VA, instead relying on contractual rights with DWR or USBR. For instance, the Sacramento River Settlement Contractors have contractually agreed to rely on water diversions from USBR during the months of April to

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<sup>12</sup> In contrast, Table 7 lists the Bureau of Reclamation’s water rights as being subject to the reservoir storage requirements. See Draft P. OI at 59. However, State Water Board staff have made clear that these provisions would not apply to the Bureau of Reclamation and to the VA parties. This conflicts with other language in the Draft POI that states, “Water rights not included in Table 8 are subject to the Sacramento/Delta inflow and cold water habitat provisions and inflow-based Delta outflow provisions, unless an exception applies.” Draft POI at 78. If the Bureau of Reclamation is not included in Table 8, then this sentence indicates the Bureau of Reclamation would have to comply with these other water quality objectives, notwithstanding the conflicting language in the Draft POI indicating that they would not.

October and not utilize any claimed water rights that pre-date the Settlement Contract. *See, e.g.*, Contract between the United States and Glenn-Colusa Irrigation District, Contract No. 14-06-200-855A-R-1, at ¶ 3(a)-(b). Neither the contract nor their claimed water rights provide any rights to store water. The same is largely true for other CVP and SWP contractors. These contractors lack water rights and/or legal authority to ensure that the Bureau of Reclamation would operate the CVP in such a manner that would otherwise comply with the Bay-Delta Plan.

As a result, the Draft POI appears unenforceable against the U.S. Bureau of Reclamation, and the Draft POI fails to ensure that the Plan's water quality objectives are "achieved."

### **III. The Draft POI's Time Schedule for Achieving Water Quality Objectives is Unnecessary, Unclear, and Fails to Provide Reasonable Protection of Fish and Wildlife**

While State law authorizes the State Water Board to incorporate a time schedule for achieving water quality objectives, Cal. Water Code § 13241, the Draft POI's proposed time schedule is unclear, the State Water Board has not demonstrated that the proposed time schedule in the Draft POI is necessary, and the proposed time schedule fails to provide reasonable protection of fish and wildlife.

First, the Draft POI fails to articulate a clear time schedule for achieving water quality objectives, instead proposing at least five years, and possibly seven or eight years, before full implementation of the Sacramento/Delta inflow objective and the inflow-based Delta outflow objective. Draft POI at 52, 62. In addition, the Draft POI proposes a time schedule for implementation of the cold-water habitat objective within one to two years "of implementation of the numeric provisions of the inflow objective." *Id.* at 58. These time schedules fail to meet the clarity standard of the APA.

Specifically, the Draft POI proposes that implementation of the inflow objective: "will begin within two years of adoption" of the Bay-Delta Plan; that the Executive Director may approve an additional one year extension of this two year time frame to begin implementation "for good cause"; that the Executive Director may approve incremental implementation of the objective; and that the objective will be "fully implemented within five years of initial implementation." *Id.* at 52; *see id.* at 62. This language is ambiguous and confusing, but it could reasonably be read to mean that full implementation of the objective will occur in year 8 – within 5 years of the 3-year period for initial implementation. Or it could be read to mean full implementation will occur in year 7 – within 5 years of the 2-year period for initial implementation. It also appears possible that this language means the objective will be fully implemented in year 5 – within 5 years of the State Water Board's approval of the Plan. Because this identical language for both



the Delta inflow and Delta outflow objectives is capable of multiple conflicting interpretations, they fail the clarity test of the APA and must be revised.<sup>13</sup>

Similarly, the time schedule for achieving the coldwater habitat objective is unclear. The Draft POI requires submission of implementation strategies to the Executive Director “within one year of implementation of the numeric provisions of the inflow objective,” requires implementation of the strategies upon approval by the Executive Director and authorizes the Executive Director a one year extension “for good cause.” Draft POI at 58. However, it is unclear if this language means that submission of the strategies is due within one year of full implementation of the numeric provisions of the inflow objective (which would be in year 7 or 8, making submission of the strategies due in year 8 or 9), within one of year of initial implementation (in year 2 or 3, making submission of the strategies due in year 3 or 4), or some other time. In addition, because the Draft POI does not include a schedule for the Executive Director’s approval of the strategies, the proposed time schedule in the Draft POI does not require that this objective be achieved. Moreover, to the extent the Board is attempting in the POI to delay implementation of the coldwater habitat objective until after the unimpaired flow objectives, this election is arbitrary at best and the Board offers no explanation for its choice.

In addition, the Draft POI does not clearly identify a time schedule for achieving the narrative salmon protection objective, *see* Draft POI at 68, nor does it identify a time schedule for achieving the narrative fish viability objective. However, in other places, the Draft POI suggests that the voluntary agreements would be evaluated to see whether they “contribute to meeting the narrative native fish viability objective and salmon protection objective by 2050.”<sup>14</sup> Draft POI at 102. In the absence of an explicit time schedule for achieving these objectives, the time schedule is immediate. *See: In re SWRCB Cases*, 136 Cal.App.4th at 703, 776. In addition, this section of the Draft POI also fails to comply with Porter-Cologne’s requirement that the program of implementation achieve the Bay-Delta Plan’s water quality objectives. Instead of evaluating whether the program of implementation is achieving the Plan’s numeric and narrative objectives, the Draft POI proposes to evaluate whether the voluntary agreement would “contribute” to meeting these objectives. Because the voluntary agreement provides far less than the proportional share of flow necessary to achieve the Delta inflow objective of 55 percent of unimpaired flow, it is impossible to achieve the Plan’s water quality objectives under the Draft POI. There is no basis for using “contribute” in this context, because the parties to the voluntary agreement do not provide the proportional flow necessary to achieve the Delta inflow objective of 55 percent of unimpaired flow, or the other narrative and numeric water quality objectives in the Plan.

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<sup>13</sup> It is also unclear what would constitute “good cause” for the Executive Director to grant an additional one-year delay, especially given that we are currently in year 15 of a process to update to a thirty year old plan.

<sup>14</sup> In addition, the State Water Board has not demonstrated that implementing the Program of Implementation, including the narrative and numeric water quality objectives, will achieve the Plan’s narrative salmon protection objective. The Draft POI makes clear that the “collective actions identified in the Bay-Delta Plan” will achieve the salmon protection objective. Draft POI at 68.

Beyond being unclear, the State Water Board has not demonstrated that the proposed time schedule is necessary. As discussed *supra*, time schedules are generally intended to authorize the financing and construction of facilities necessary to treat water pollution to meet updated water quality objectives, and time schedules should only be as long as the minimum amount of time necessary to meet the water quality objectives. *See* Cal. Code Regs., tit. 23, § 2918.

In contrast, the Draft POI does not provide any basis for the State Water Board to conclude this extensive time schedule is necessary to achieve the Plan's water quality objectives. The proponents of the voluntary agreements have repeatedly claimed that a voluntary agreement would be implemented much more quickly than a regulatory approach, yet they have already spent more than a decade preparing the VA, and the State Water Board has been evaluating and considering this VA since it was first submitted to the State Water Board in 2018 – more than six years ago. There is no justification for allowing the parties to the voluntary agreement more time to obtain the funding or other measures necessary to implement the water quality objectives by the time the State Water Board adopts a revised Bay-Delta Plan. We recognize that planning and physical construction of habitat restoration projects takes more time, and a more specific schedule for habitat restoration projects – with interim milestones by year – may be appropriate. But there is no rational basis for delaying implementation of the numeric, flow-based objectives in the Plan.

Finally, the proposed time schedules fail to provide reasonable protection of fish and wildlife. An implementation schedule lasting five, seven or eight years means that the Plan's water quality objectives are not required to be achieved until the final year(s) of the eight-year term of the proposed voluntary agreement and could potentially never be fully implemented during its term. The State Water Board has repeatedly found that existing water quality measures fail to provide reasonable protection of fish and wildlife, yet the Draft POI would maintain this unreasonable status quo for as long as 8 years, with no interim milestones or objectives specified in the Plan.

And to the extent that the Draft POI is interpreted to mean that the narrative salmon protection objective and/or narrative fish viability objectives in the Bay-Delta Plan are not achieved until the year 2050, such an approach would plainly violate state law and fails to provide reasonable protection of fish and wildlife. For instance, allowing the continued degradation of streamflow and water quality that fails to result in viable native fish populations violates the State Water Board's duty to conserve species listed under the California Endangered Species Act. Cal. Fish & Game Code §§ 2080. Maintaining non-viable fish populations – populations heading towards extinction – for several *more* decades plainly fails to provide reasonable protection of fish and wildlife.

The Draft POI's proposed time schedule is arbitrary, unclear, unnecessary, and fails to achieve the water quality objectives or provide reasonable protection of fish and wildlife, all in violation of Porter-Cologne.

#### **IV. The Draft POI Proposes to Unlawfully Limit Periodic and Triennial review of the Bay-Delta Plan and Effectively Proposes Unlawful Regulatory Assurances to Not Modify Water Quality Objectives During the Term of the VAs**

While state and federal law require the State Water Board to review and potentially revise the Bay-Delta Plan periodically (state law) or triennially (federal law), the Draft POI in several places proposes to limit the periodic / triennial review and attempts to provide regulatory assurances that would prevent full review and revision of the Plan before the end of the term of the voluntary agreement. Such an approach is unlawful.

As the Draft POI explains, state and federal law require the State Water Board to periodically review water quality control plans, and these state and federal reviews are typically combined. *See* Draft POI at 1 and fn. 1 (citing Cal. Water Code § 13240, 33 U.S.C. § 1313(c)).<sup>15</sup> In some places, the Draft POI appropriately explains that the periodic review will evaluate whether the objectives are being implemented, “and whether changes to the Bay-Delta Plan or its implementation are needed to achieve the objective.” Draft POI at 68; *see id.* at 123 (“The Bay-Delta Plan and its implementation measures will undergo annual and periodic reviews to assess and report on progress on implementation of the Bay-Delta Plan and any needed changes to the plan or its implementation to provide for the reasonable protection of beneficial uses.”).

However, the Draft POI also attempts to severely limit and bias these reviews and impose new procedural hurdles to limit or eliminate the State Water Board's authority to revise the Bay-Delta Plan, including the obligations of parties to the voluntary agreement, before the end of the eight-year term of the voluntary agreement. This is unlawful and inconsistent with the State Water Board's legal authority.

For instance, the Draft POI proposes that the voluntary agreements would remain in effect for at least 8 years, unless terminated by VA parties earlier. Draft POI at 103. However, the Draft POI only authorizes the Board to revise the objectives in the Bay-Delta Plan in a manner that would affect the obligations of the parties to the voluntary agreement if the State Water Board finds that either: (1) the parties to the voluntary agreement are failing to implement their commitments; or (2) the State Water Board concludes that continuing implementation of the voluntary agreement will not provide reasonable protection of beneficial uses or jeopardize the continued existence of native fishes. *Id.* at 106. This is not the correct legal standard. In adopting water quality

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<sup>15</sup> EPA's regulations specifically require that the triennial review include an evaluation of water quality objectives (called “standards” under the Clean Water Act), and “as appropriate, modifying and adopting standards.” 40 C.F.R. § 131.20(a); *see* EPA Handbook, Chapter 6 at 7-8.

objectives, the State Water Board has determined as a matter of law what constitutes reasonable protection of beneficial uses. Cal. Water Code § 13241 (“Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance”). The State Water Board’s periodic / triennial review must evaluate whether the Plan’s objectives are adequate to provide reasonable protection of beneficial uses. Moreover, the Draft POI eliminates the State Water Board’s obligation to consider the salmon protection objective when evaluating whether to modify, terminate, or continue the voluntary agreement. *See* Draft POI at 105 (only considering whether the voluntary agreement provides reasonable protection of fish and wildlife or would jeopardize the continued existence of native fish species).<sup>16</sup> There is no lawful basis for the State Water Board to provide any regulatory assurances that would limit its discretion to revise existing or add new water quality objectives as part of the periodic/triennial review before year eight of the voluntary agreement, as suggested by the Draft POI. *See Environmental Protection and Information Center v. Cal. Board of Forestry and Fire Protection*, 44 Cal.4th 459 (2008).

Notwithstanding language in the Draft POI indicating that periodic and triennial reviews are typically conducted concurrently, the Draft POI also indicates that the periodic review may not occur every three years, and it does not indicate how frequently such periodic reviews would occur. Draft POI at 124 (“Individual periodic review cycles may extend longer than three years”). As a result, the Draft POI does not require a periodic review before year 8, which could result in the State Water Board failing to review the Bay-Delta Plan as required by section 13240 for the duration of the proposed voluntary agreement.<sup>17</sup> Such an approach clearly violates federal law, and it is unreasonable under state law.

Similarly, the Draft POI imposes unnecessary and irrelevant procedural requirements for the State Water Board’s evaluation of whether to continue, modify, or terminate the voluntary agreements, and the Draft POI fails to utilize a lawful legal standard for that evaluation. These provisions likewise undermine and violate the State Water Board’s obligations for periodic and triennial review in several ways.

First, before considering whether to modify, terminate, or continue the voluntary agreement, the Draft POI requires the State Water Board to consider several specific factors including economic considerations, whether the parties fulfilled their commitments, and whether funding has been

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<sup>16</sup> The best available science -- as well as the analysis of the Bureau of Reclamation – demonstrates that adoption of the VAs as part of the water quality control plan will not reasonably protect fish and wildlife and would jeopardize the continued existence of native fish species. Given that the VAs cannot meet the standard the Board would purport to use, let alone the requirements of Porter Cologne, the Clean Water Act, and the state and federal Endangered Species Acts, adopting the VAs would be arbitrary on this basis alone.

<sup>17</sup> Annual reviews are generally limited to reviewing implementation of the Plan, *see, e.g.*, Draft POI at 123-124, but the annual meetings do not require an evaluation and potential modification of the Plan’s water quality objectives, as required by state and federal law. Thus, the annual meetings do not satisfy the State Water Board’s obligation to conduct periodic and/or triennial review of the Bay-Delta Plan and its water quality objectives.

available. Draft POI at 104. While state law requires the State Water Board to consider some of these factors – and several others – when revising water quality objectives, Cal. Water Code § 13241, there is no basis in law for the State Water Board to consider these factors in evaluating the implementation of the Plan. Because terminating the voluntary agreement is an implementation decision, not a modification of the Plan’s water quality objectives, there is no basis for requiring these evaluations before terminating the voluntary agreement. *See also San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010) 183 Cal.App.4th 1110, 1119-1120 (Water Code section 13241 factors only considered when establishing water quality objectives and not with respect to the program of implementation).

In addition, this section of the Draft POI also requires the State Water Board to consider “the VA parties’ synthesis of the most current science” before making any modifications to the voluntary agreements. Draft POI at 104. This improperly and unnecessarily privileges scientific information and interpretation from regulated entities with a vested interest in maximizing water diversions and that are not required to have any particular scientific expertise. However, the State Water Board’s obligation is to use the best available science, not the scientific information provided by any stakeholder or party. The State Water Board cannot rely on their scientific synthesis or give it any more weight than the information provided by other stakeholders. A similar problem exists with respect to the Draft POI’s proposal that the State Water Board would rely on an ecological outcomes analysis prepared by the VA parties in this evaluation. Draft POI at 101. Because of that inherent conflict of interest and given the State Water Board’s obligation for independent evaluation, the Draft POI must be revised to have State Water Board staff and truly independent reviewers prepare the ecological outcomes analysis.<sup>18</sup> Delegating to the VA parties the ecological outcomes analysis injures the public, constrains participation, and fails to ensure a complete, non-arbitrary, and sound record of decision-making. The VAs were adopted without input from Tribes, NGOs, and a wide swath of other parties—using the Program of Implementation to continue to shield a backroom deal from public scrutiny is inconsistent with the law, equity, due process, and justice.

Second, the proposed “Green Light / Yellow Light / Red Light” assessment uses an unlawful legal standard for evaluating the voluntary agreement and whether to continue, modify, or terminate the proposed voluntary agreement. The Draft POI proposes the following legal standard: that the State Water Board determine whether “continuing the VAs will contribute the VA parties’ responsibility toward attainment of the narrative ecosystem protection and salmon protection objectives by 2050.” Draft POI at 104. This is unlawful, because it:

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<sup>18</sup> The Draft POI also includes review by the Delta Independent Science Board of several reports, but a review by the Delta Independent Science Board does not satisfy the State Water Board’s obligations for independent scientific review as required by the Health and Safety Code.

- (a) Improperly assumes that the State Water Board has taken action to modify the time schedule for achieving salmon doubling to the year 2050, when no such time schedule currently exists for the narrative salmon protection objective, *see In re State Water Board Cases*, 136 Cal. App. 4th at 728-730, and there is no analysis of the effects of such a proposed change or whether such a change would violate the State's anti-degradation policy;
- (b) Improperly assumes that the State Water Board can lawfully allow for non-viable native fish populations for the next quarter century, notwithstanding the State Water Board's obligations under the California Endangered Species Act and Public Trust doctrine, as discussed *supra*, and the lack of an explicit time schedule for this narrative objective;<sup>19</sup>
- (c) Improperly assumes that the State Water Board has made an explicit division of responsibility for achieving the narrative viability and salmon protection objectives, assigning a specific proportion of that responsibility to the parties to the voluntary agreement and a specific proportion of that responsibility to non-parties to the voluntary agreement, when the administrative record lacks any such analysis; and,
- (d) Improperly prevents the State Water Board from modifying the water quality objectives in the Plan, and the proportional responsibility of the parties to the voluntary agreement, for achieving these water quality objectives.

The Draft POI proposes to limit the discretion and authority of the State Water Board to modify the Plan's water quality objectives in its next periodic / triennial review. Even if the State Water Board concludes that the Plan as a whole is failing to achieve the Plan's objectives, including viability, and/or is leading to the extinction of native fish species, the Draft POI would prevent the State Water Board from modifying or terminating the voluntary agreement. There is no statutory authority for the State Water Board to provide any such regulatory assurances, which as proposed herein, would prevent the State Water Board from exercising its statutory discretion to revise existing or add new water quality objectives as part of a periodic or triennial review of the Plan.

The Draft POI must be revised to eliminate these measures that prevent the State Water Board from conducting an independent review and potential modification of the voluntary agreement at any time and ensure that these reviews are unbiased and include truly independent scientific review.

## **V. The Draft POI Proposes Adaptive Implementation Measures That Fail to Achieve Water Quality Objectives**

The Draft POI's adaptive implementation measures unlawfully fail to achieve water quality objectives, instead allowing for unfettered flow shaping that would not provide reasonable

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<sup>19</sup> The Draft POI only references the year 2050 with respect to evaluation of the proposed voluntary agreement, not the water quality objectives themselves nor with respect to any other water rights holders.

protection of fish and wildlife. The State Water Board therefore must revise these measures to ensure that water quality objectives are achieved.

Flow shaping – decreasing flow during one period in order to augment flow in another period – will potentially have negative effects on beneficial uses during the periods when flow is restricted. With respect to the Delta inflow objective, the Draft POI proposes no limits on flow shaping, provided that the total annual volume is achieved. *See* Draft POI at 54. Despite strong evidence that numerous fish and wildlife species benefit from increased flows (and are harmed by decreased flows) in winter and/or spring months, corresponding to particular life stages, the Draft POI would allow all the Delta inflow and Delta outflow to occur during the summer or fall months, with no requirements that there be any Delta inflow or Delta outflow in the winter and spring months (except for that required by portions of D-1641). This contrasts with the adaptive implementation measures adopted by the State Water Board in 2018 regarding flow shaping for the Lower San Joaquin River flow objective, which at least imposed a limit on how much inflow could be shifted from the critical winter-spring months to other months, requiring minimum flows in those months to achieve the minimum flow range specified in the objective. *See id.* at 42-45.<sup>20</sup> Here, there is no monthly or seasonal limit proposed, and thus no standard to evaluate whether the objective is actually being achieved.

In addition, the Draft POI allows for adaptive implementation measures that worsen conditions for fish and wildlife, thereby failing to be consistent with the narrative fish viability or salmon protection objectives. The Draft POI does not require the State Water Board (or its Executive Director) to find that the adaptive implementation measure would achieve the Plan's narrative fish viability and salmon protection objectives – or make any findings at all – and it provides no standard for the State Water Board to determine whether a proposed adaptive implementation measure is consistent with the Plan's objectives. Similarly, the Draft POI does not even require that the adaptive implementation measure would benefit fish and wildlife, instead proposing that adaptive implementation “may be shaped for the benefit of fish and wildlife.” *Id.* at 54. This language plainly would allow for adaptive implementation and flow shaping that harms fish and wildlife, even if it would violate the narrative objectives. This is unlawful.

Similarly, the adaptive range for Delta inflows is biased and fails to require consideration and achievement of the Plan's water quality objectives. The Draft POI provides a range of 45-65 percent of unimpaired flow but allows for flows at the lower end of this range – or even below the lower limits of this range if there is a voluntary agreement – regardless of whether that voluntary agreement would achieve the narrative fish viability and salmon protection objectives. *See id.* at 55 (requiring only that the State Water Board find it would achieve the narrative inflow and coldwater habitat objectives). The State Water Board's consideration of the flow range

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<sup>20</sup> Litigation brought by San Francisco Baykeeper and a host of others over the adequacy and legality of the program of implementation adopted by the State Water Board in 2018 with respect to the Lower San Joaquin River Flows is pending in the California Courts of Appeal.

completely ignores the effects of that flow range on achieving the Plan's narrative fish viability objective, the narrative salmon protection objective, the Delta outflow objectives, and the fish and wildlife beneficial uses these objectives are intended to protect, even where the flow range would result in decreased Delta inflows on a tributary average compared to today.

Finally, the Draft POI proposes to unlawfully prevent the State Water Board from requiring Delta inflows greater than 55 percent of unimpaired flow until the State Water Board's next periodic review of the Plan (which, as discussed above, may not occur until year 8 or later), unless average flows are already greater than 55 percent. *Id.* Even if the State Water Board were to find that flows greater than 55 percent are necessary to provide reasonable protection of fish and wildlife, the State Water Board could not require increased Delta inflows until completing a periodic review of the Plan, including compliance with CEQA. This is an unlawful regulatory assurance, for which the State Water Board has no legal authority, which biases the consideration of the flow range towards the lower range, even when this results in decreased Delta inflow compared to today and/or fails to achieve the objectives and/or reasonably protect fish and wildlife beneficial uses.

The State Water Board must revise the Draft POI to ensure that adaptive implementation will achieve the Plan's water quality objectives, reasonably protect fish and wildlife beneficial uses, and does not provide unlawful regulatory assurances.

## **VI. The Coldwater Habitat Objective is Not Adequately Defined, and the Plan Must Identify Numeric Objectives for Delta Outflow and Coldwater Habitat**

The Draft POI demonstrates that the narrative coldwater habitat objective lacks an adequate definition under the APA, and the State Water Board must revise the Plan to identify quantitative objectives for inflow-based Delta outflow and coldwater habitat.

While the Draft POI requires the development of temperature management strategies and identifies default carryover storage requirements to help implement the coldwater habitat objective, Draft POI at 57-59, the document provides no clear standard for evaluating whether a temperature management plan (including alternative carryover storage requirements) will achieve the coldwater habitat objective or is consistent with the Plan. For instance, the Draft POI requires dam operators to "meet the carryover storage requirements below or alternate approved carryover storage levels," but the Draft POI provides no standard for evaluating what would constitute an adequate "alternative approved carryover storage level," nor why the identified requirements would be adequate. *Id.* at 57. Similarly, the Draft POI requires the temperature management plan to include "temperature targets and locations where those targets would be achieved," but does not specify what temperature standards would apply or how the State Water Board would evaluate whether those temperatures are consistent with the Plan's objectives and reasonably protects beneficial uses. *Id.* This violates the APA's clarity standard.



Moreover, the Draft POI does not require the State Water Board to evaluate whether the proposed temperature management plan, including carryover storage requirements, would achieve the Plan's narrative fish viability and salmon protection objectives. As currently drafted, the State Water Board could approve temperature management plans that do not achieve these narrative objectives, violating the State Water Board's legal duty to ensure that the program of implementation achieves the Plan's objectives. Similarly, the Draft POI does not require the State Water Board to evaluate whether the proposed temperature management plan would meet existing, numeric water temperature standards adopted by the State or regional water boards. And as discussed *supra*, it appears that the majority of dams listed in Table 7 could be exempt from these carryover storage requirements because the contractors of the CVP and SWP are proposing to participate in a voluntary agreement.

Finally, the federal Clean Water Act requires the State Water Board to adopt numeric water quality objectives, rather than narrative objectives, when – as here – it is feasible to include numeric objectives. 40 C.F.R. § 131.11(b) (allowing for narrative criteria to supplement numeric criteria or “where numerical criteria cannot be established”). The State of California and U.S. Environmental Protection Agency have a long history of identifying numeric temperature criteria, and the Draft POI demonstrates that numeric carryover storage requirements can be evaluated and established. Similarly, both the State and EPA have identified numeric Delta outflow and related Delta salinity criteria and objectives, demonstrating that numeric outflow criteria can be established. *See also* 40 C.F.R. § 131.37 (federally promulgated estuarine habitat criteria). Because numeric water quality objectives for Delta inflow, coldwater habitat, Interior Delta,<sup>21</sup> and Delta outflow can be established, the State Water Board must adopt numeric criteria for these objectives under the Clean Water Act.<sup>22</sup> The Plan's narrative objectives, including salmon protection and narrative fish viability objectives, define the future condition of fish and wildlife beneficial uses that the Plan's numeric objectives (e.g., the proposed range of 45 to 65% of unimpaired Delta inflow and outflow) are intended to achieve.<sup>23</sup> *See also* Draft POI at 68.

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<sup>21</sup> State and federal agencies have also identified specific criteria, including maximum limits on reverse flows in Old and Middle River and limits the opening of the Delta Cross Channel Gates, which address the Interior Delta objective. Because numeric criteria can be established, it is unlawful to solely include a narrative objective for the Interior Delta. In addition, state and federal regulations on CVP/SWP operations in the Delta are: only designed to protect endangered species and thus are not intended to protect fall run Chinook salmon, which are important for Tribal, recreational, and commercial beneficial uses; are not intended to ensure reasonable protection of fish and wildlife, but instead to provide the minimum protection necessary under the Endangered Species Act; not intended to achieve the narrative salmon protection objective.

<sup>22</sup> The U.S. Environmental Protection Agency has previously determined that all the objectives in the 1995 Bay Delta Water Quality Control Plan, including the Delta outflow objectives, were standards subject to federal review and approval under the Clean Water Act. *See* Letter from EPA Region 9 Administrator to the State Water Board dated September 26, 1995, available online at: [https://www.epa.gov/sites/default/files/2017-05/documents/wqcp1995usepaapproval\\_0.pdf](https://www.epa.gov/sites/default/files/2017-05/documents/wqcp1995usepaapproval_0.pdf). This document is incorporated by reference.

<sup>23</sup> Defining the desired future conditions is best accomplished by adopting numeric biocriteria (and there is sufficient information available to the Board to do so now in the Bay-Delta Plan). Absent biocriteria, the narrative objectives should be sufficiently detailed so as to enable the Board to determine whether they are being attained or not. In any

Here, narrative objectives can supplement, but cannot substitute for, numeric objectives, and the Program of Implementation must achieve both narrative and numeric objectives. Stated another way, the Bay-Delta Plan's numeric objectives must be sufficient, together with the other measures in the Plan (which must also be specific, clear, measurable and time-bound), to achieve the narrative salmon protection and native fish viability objectives within the time schedule identified in the Plan. Adoption of a Bay-Delta Plan that excludes numeric objectives for Delta inflow, coldwater habitat, and Delta outflow would be unlawful, as would adoption of a Bay-Delta Plan that includes a Program of Implementation that fails to achieve the numeric and narrative objectives.

## **VII. The Draft POI Proposes to Unreasonably Limit Tribal Beneficial Uses**

Our organizations support the comments of the Delta Tribal Environmental Coalition regarding the Draft POI's proposals regarding adoption and implementation of Tribal Beneficial Use objectives. The Draft POI includes confusing and unclear language regarding Tribal Beneficial Use objectives in the note to readers on page 11 of the Draft POI that should be revised (describing "formal" designation of such objectives, which is undefined, and lacks clarity as to the geographic scope of such designations). DTEC's letter identified the problems with the State Water Board's apparent approach and makes recommendations based on evidence from the Tribes about the ways the State Water Board must designate, identify, and protect Tribal Beneficial Uses. Ultimately, the Tribes are the ones who understand how and whether their uses of water are being protected. The updated Bay-Delta Plan and Program of Implementation must both recognize and live by that reality, to ensure that Tribal Beneficial Uses are adequately protected.

Unfortunately, the Draft POI suggests that the State Water Board plans to ignore whether Tribal and subsistence fishing beneficial uses are being reasonably protected in determining whether to require greater flows or other measures – even though the Draft POI admits that flow actions would help achieve these objectives. *See* Draft POI at 10. Instead, the Draft POI proposes that "Aquatic life beneficial uses identified in the Bay-Delta Plan form the basis for implementation actions related to flow, water project operations, and physical habitat restoration for the reasonable protection of fish and wildlife," states "activities within the CUL use may be directly supported by flow actions," and that flows designed to reasonably protect fish and wildlife will "benefit" subsistence fishing uses. *Id.* The Draft POI's unsupported assumptions that the protection of fish and wildlife beneficial uses will protect Tribal cultural and fishing beneficial uses lacks any evidence or explanation, let alone a rational one. It is also inconsistent with the evidence and information contained in DTEC's letter. The Draft POI must be revised to provide that the State Water Board shall consider these Tribal and subsistence beneficial uses when

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case, the numeric objectives may also be amended subsequently to encompass different values or a range of values if the narrative objectives or numeric biocriteria are not being attained or fish and wildlife beneficial uses are not being protected. *See* SF Baykeeper et al, January 19, 2024, comments on the September 2023 Draft Staff Report for the Sacramento-Delta updates of the Bay-Delta Plan.

evaluating the adequacy of numeric and narrative water quality objectives as well as adaptive implementation of those objectives.

On a different note, we also agree with the arguments made by DTEC in section I.B and also by Sierra Club et al in their comments, section I.A, that the Water Code does not provide the Board with the authority to adopt the VAs as described in the Draft POI. *See* Draft POI at pp. 75-78.

### VIII. Conclusion

For all the foregoing reasons, the Draft POI proposes an unlawful approach to implementing the Bay-Delta Water Quality Control Plan, and the State Water Board must significantly revise the proposal so that the Program of Implementation actually “achieves” the Plan’s water quality objectives in an enforceable and timely manner in order to ensure reasonable protection of fish and wildlife beneficial uses and tribal beneficial uses.

Thank you for consideration of our views. We would be happy to discuss this further with you at your convenience. We look forward to working with the Board to ensure the timely completion of a legally and scientifically defensible update of the Bay-Delta Plan.

Sincerely,



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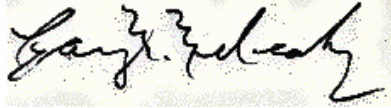
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