

Comments by the Delta Tribal Environmental Coalition
Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and
Restore the Delta

**December 2025 Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-
San Joaquin Delta Watershed**

February 2, 2026

INTRODUCTION

Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta (collectively, the Delta Tribal Environmental Coalition, or “DTEC”) submit the following comments on the December 2025 Draft Water Quality Control Plan for the San Francisco Bay/Sacramento San Joaquin Delta Watershed (“Revised Draft Plan”) and partially recirculated Substitute Environmental Document (“SED”). DTEC reasserts and incorporates by reference its prior public comments submitted in this proceeding—DTEC’s January 19, 2024 comments on the 2023 Draft Staff Report and SED (“DTEC Comments on SED”) (Exhibit A hereto) and DTEC’s January 10, 2025 comments on the October 2024 Draft Water Quality Control Plan (“DTEC Comments on 2024 Draft Plan”) (Exhibit B hereto).¹ In addition, DTEC joins in the comments on the Revised Draft Plan and partially recirculated SED by Friends of the River, San Francisco Baykeeper, California Sportfishing Alliance, Golden State Salmon Association, Defenders of Wildlife, and Yosemite Rivers Alliance, et al. (“NGO Comments”). DTEC writes separately to express its continued objections to and concerns with the State Water Resource Control Board’s (“State Water Board” or “Board”) proposal for the Bay-Delta Plan update.

First, as discussed in the NGO Comments, DTEC objects to the Board’s proposal to remove numerical minimum instream flow criteria proposed in the October 2024 Draft Plan in favor of vague narrative criteria. The Clean Water Act and its implementing regulations require States to adopt water quality criteria in the form of specific “numerical values.” 40 C.F.R. § 131.11(b)(1); *see also, e.g.*, 33 U.S.C. § 1313(c)(2)(B). Only when “numerical criteria cannot be established” may a State instead establish narrative criteria to protect designated uses. 40 C.F.R. § 131.11(b)(2). As DTEC discussed at length in its January 19, 2024 comments on the Staff Report and SED, the Board’s then-proposed numerical inflow objective of 55 percent

¹ DTEC also incorporates by reference the exhibits and attachments submitted with DTEC’s Comments on the SED and DTEC’s Comments on the 2024 Draft Plan.

unimpaired flow with an adaptive range of 45 to 65 percent was incapable of meeting the Board’s legally mandated duties to reasonably protect beneficial uses and public trust criteria and base its water quality criteria on “sound scientific rationale.” Cal. Wat. Code § 13241; 40 C.F.R. § 131.11(a)(1). DTEC urged and continues to urge evaluation and adoption of an inflow objective of 65 percent with a reasonable adaptive range and management strategies to implement a functional flow regime capable of protecting public trust resources and non-consumptive beneficial uses of Delta flows. DTEC Comments on SED at 46.

Rather than seriously considering such an alternative, the Board has backslid in its Revised Draft Plan by removing numeric instream flow standards entirely for the Sacramento River/Delta (with the exception of limited numeric objectives for SWP and CVP export facilities) and substituting in vague narrative objectives, such as fish and wildlife biological objectives oriented around the maintenance of “viable native fish populations.” Revised Draft Plan at Table 3. Making the matter worse, the Board has made no attempt to meaningfully define “viability,” making it impossible to reliably evaluate whether this objective is being attained. The Board’s October 2024 Draft Bay-Delta Plan and prior Staff Report/SED clearly show that numerical criteria *could be established*. The Board’s failure to do so for the Bay-Delta is a clear violation of the Clean Water Act and Porter-Cologne Act.

Second, DTEC reasserts its fervent objections to the Board’s proposal to rely on negotiated agreements with water rights holders—the Voluntary Agreements (“VAs”)—to implement these vaguely defined water quality objectives. As again discussed at length in DTEC’s prior comments and reiterated below, the VAs are the result of exclusionary, backroom deals with water rights holders who acquired their rights through the dispossession, disenfranchisement, and exclusion of Native American Tribes and communities of color. The Board’s proposal to make these secretly negotiated agreements the centerpiece of Bay-Delta water quality control brings the State violence braided into its water rights system directly into its governance of water quality, ecological flows, and public uses of water. In addition to being incurably inequitable, the VAs are plainly unlawful: they lack the requisite sound scientific basis or statutory authorization, they result in a shifting and uncertain Plan, and their adoption unlawfully conflates the Board’s water quality and water rights obligations. They are also by design a flawed vehicle for watershed governance as they depend on the increasingly unreliable participation of the U.S. Bureau of Reclamation, whose withdrawal could collapse the entire implementation scheme.

Third, DTEC strongly supports the State Water Board’s proposal to integrate Tribal Beneficial Use protections into the Plan, including by formally designating the Tribal Tradition and Culture (CUL) use for the watershed. DTEC also appreciates the Board’s modification of the CUL definition to clarify that it encompasses fishing, gathering, and consumption of natural and aquatic resources, which are inseparable from the identity, culture, and lifeways of Delta Tribes.

Nonetheless, for the reasons elaborated in DTEC’s prior comments, DTEC remains discouraged by the Board’s decision not to designate T-SUB and SUB beneficial use designations for any portion of the watershed despite its own recognition of widespread evidence showing historical and continuing reliance on subsistence fishing practices by Delta Tribes and by many non-Tribal communities of color. *See* DTEC Comments on 2024 Draft Plan at 29-31. The failure to designate T-SUB or SUB leaves these uses unprotected and should be corrected with haste. In a similar vein, DTEC urges the Board to consider whether additional flow actions or other modifications to water quality objectives are necessary to protect CUL. For instance, a “viability” objective adopted for biological goals may be inadequate to protect the fish abundance necessary for maintenance of Tribal ceremony and subsistence fishing practices. DTEC also reiterates that the Board’s proposal to rely on the VAs for implementation of water quality objectives undercuts its commitments to dignify and protect TBUs and integrate Traditional Ecological Knowledge into water management; the two cannot be squared.

Fourth, DTEC reiterates its objections to the Board’s continued failure to meaningfully address the proliferation of Harmful Algal Blooms (HABs) in the Delta—a present and growing problem that poses a particular threat to the health, safety, and welfare of the Delta’s environmental justice communities, including to their ability to recreate in and enjoy the waterways in their own backyard. Plainly violating the Clean Water Act, the Board provides no justification for failing to adopt HABs standards recommend by the U.S. Environmental Protection Agency (EPA), which would create a reliable and science-based metric to evaluate and control the HABs problem. Additionally, the Board’s proposals for monitoring and mitigation of HABs continue to fall short.

Fifth, the Board’s piecemeal construction and evaluation of the Bay-Delta Plan continue to violate the California Environmental Quality Act (“CEQA”) and threaten the legal viability of this long-overdue update. Among other things, the Board’s reliance on uncertain and tenuous VAs, its fractured evaluation of an integrated Plan across multiple separate environmental documents, and its shifting baselines for evaluation mean that the Board has again failed to create an environmental review of the whole of the proposed action capable of informing decision-makers and the public of the environmental effects of the proposed Bay-Delta Plan update and assuring adequate mitigation. The Board’s failure to recirculate a complete SED evaluating the Bay-Delta Plan update in its entirety is both a painfully missed opportunity and a clear violation of the law.

These and other problems detailed below follow inexorably from the Board’s decision to move forward with this long-overdue update while investigation into its compliance with federal civil rights laws is still pending. As the Board is well aware, DTEC filed a civil rights complaint with the EPA related to the Board’s administration of Bay-Delta water quality standard setting on December 16, 2022, and the EPA accepted the complaint and opened an investigation on August

8, 2023. Shortly thereafter, the Board, EPA, and DTEC agreed to enter into a facilitated informal resolution process to pursue a negotiated resolution of the concerns documented in the complaint. This process resulted in a proposed resolution agreement developed by EPA and informed by the facilitations, which has been pending with the Board for well over a year. The Board’s decision to go forward with this update without acting on the agreement or otherwise attempting to resolve the investigation—including its decision to adopt the VAs, which are the direct subject of open charges of unlawful discrimination—is a breach of public trust and undermines faith in the Board’s assurances that racial equity and open public processes would be at the center of its decision-making.

The Board’s duty to ensure that its water quality control planning avoids disparately injuring disadvantaged communities and Tribes is not elective. As a recipient of federal funds, the Board has an enforceable obligation under Title VI of the federal Civil Rights Act of 1964 and its implementing regulations to ensure that its water quality control planning—including the timing of its actions, provisions for public participation, and substantive updates—comport with its duties to meaningfully involve impacted communities in its decision-making and avoid disparate injury to protected groups. 42 U.S.C. § 2000(d); 40 C.F.R. § 7.35(a)-(b); *see also* U.S. Const. amend. XIV 14, § 1. So too, as a State agency, the Board is bound by privately enforceable State laws that prevent it from unlawfully denying full and equal access to the benefits of its water quality planning programs and activities and to ensure that they do not unlawfully discriminate on the basis of race, color, ethnic group identification, or other protected grounds. Cal. Gov. Code §§ 11135, 11139. Both the State Legislature and the Board itself in its 2021 Racial Equity Resolution have recognized that the Water Boards’ “programs were established over a structural framework that perpetuated inequalities on the basis of race” and directed the Board to correct the role racism plays “in the allocation and protection of water resources.”² Assem. Bill 2108, § 1(d); *see* Cal. State Water Res. Control Bd., Resolution No. 2021-0050 (Nov. 16, 2021).

The Board has had every opportunity to pursue measures to unbraid racism from Bay-Delta water quality planning since it initiated this update nearly 20 years ago. In 2010, the Board completed a Legislatively mandated analysis of minimum instream flow criteria that would be needed to protected public trust rights and interests—including the fish populations integral to Tribal culture and identity and relied on by Tribes and many Delta ethnic minority communities

² Pursuant to Assembly Bill 2108, the Boad must provide a “concise, programmatic findings on potential environmental justice, tribal impact, and racial equity considerations related to the adoption” of the Bay-Delta Plan update, as well as identify measures within its authority to address impacts on disadvantaged communities and Tribes. Wat. Code § 13149.2. The Board has made no such findings here.

for subsistence.³ In 2017, it completed a scientific basis report evaluating numeric flow criteria up to 75% unimpaired flows to inform adoption of numeric objectives that would adequately protect the Delta’s degraded public trust resources and sustain beneficial uses.⁴ It has elicited and received numerous rounds of oral and written comments by DTEC, other Delta Tribes, Delta community representatives, and a range of stakeholders on flow controls needed to protect disadvantaged and vulnerable communities dependent on a healthy Delta. It participated in months of facilitated informal resolution sessions with DTEC to identify measures to meaningfully implement environmental justice in its Delta water quality control planning. And yet, despite all these efforts and despite decades of delay as conditions in the Delta have continued to deteriorate, the Board has chosen to once more sacrifice equitable, science-based regulation informed by Tribes, environmental justice communities, and the public for inequitable and politically expedient compromises with the few who claim to control the water resources of this state. The Board’s abdication of its stated commitments to racial equity, science, and civil rights law is heartbreaking and cannot withstand judicial scrutiny.

DTEC expands on these and other concerns with the Board’s proposed Revised Draft Plan and Partially Recirculated SED in the comments below.

DISCUSSION

I. The Board’s Failure to Adopt Numeric Flow Standards Violates the Clean Water Act, Porter-Cologne Act, and the Board’s Public Trust Duties and Betrays the State’s Racial Equity Commitments

³ State Water Res. Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (Aug. 3, 2010), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf; see, e.g., Fraser Shilling et al., *Contaminated Fish Consumption in California’s Central Valley Delta*, 110 Env’t Research 334 (May 2010), <https://www.sciencedirect.com/science/article/abs/pii/S001393511000023X?via%3Dihub> (reporting on heightened fish consumption and attendant mercury exposure by ethnic minority subsistence anglers in the Delta); Cal. Dept. of Water Resources, *Your Delta, Your Voice: Environmental Justice Community Survey* (May 2021), https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Public-Information/DCP_EJ-Survey-Report-5-28-2021_Final_508.pdf (finding that 90% of Disadvantaged Community respondents reported consuming fish from the Delta four or more times per week—a finding that the Department of Water Resources characterized as “remarkable”).

⁴ State Water Res. Control Bd., *Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries* (Oct. 4, 2017), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2022/201710-bdphaseII-sciencereport.pdf (hereinafter, “2017 Scientific Basis Report”).

DTEC joins in the discussion in the NGO Comments showing that the Board's proposal to adopt narrative criteria for Delta Inflow, Delta Outflow, Cold Water Habitat, and Interior Flows in lieu of numeric criteria plainly violates the Clean Water Act and Porter Cologne Act. DTEC adds the following comments to explain its opposition to the Board's proposal.

As discussed in the NGO Comments and above, both the Clean Water Act and Porter Cologne Act direct the Board to adopt numeric objectives where possible to provide clear and measurable levels or limits for water quality parameters to ensure protection of designated beneficial uses. Under the Clean Water Act, States must adopt numeric criteria based on EPA's section 304(a) guidance or other scientifically defensible methods. 40 C.F.R. § 131.11(b)(1); *see also, e.g.*, 33 U.S.C. § 1313(c)(2)(B). States may adopt "narrative criteria" *only* "when numerical criteria cannot be established or to supplement numerical criteria." 40 C.F.R. § 131.11(b)(2). Likewise, under the Porter Cologne Act, the Board must include criteria in its water quality control plan for the Bay-Delta comprising "limits or levels of water quality constituents or characteristics" for "the reasonable protection of beneficial uses of water." Wat. Code § 13050(h), (j).

Here, the record is clear that such numeric criteria *could be established*. In 2017, the Board released a scientific basis report evaluating a range of numeric unimpaired flow objectives, supplemented by narrative objectives, to "address the complexities of inflow needs and constraints in the watershed in a reasonable and protective manner." 2017 Scientific Basis Report at 1-18. In 2018, the Board set forth a framework for the Bay-Delta Plan update with a proposed numeric inflow objective of 55% unimpaired flows with an adaptive range between 45 and 65% and an analogous numerical inflow-based outflow objective.⁵ The Board's 2023 SED and October 2024 Draft Plan analyzed and proposed to codify these numeric objectives. Although DTEC and other commenters took issue with the specific numeric criteria the Board had proposed—urging, for instance, a 65% unimpaired flow objective with a narrower adaptive range (DTEC Comments on SED at 46)—they endorsed the Board's longstanding premise that numerical flow-based criteria are necessary to assure the continuity of beneficial uses in this imperiled ecosystem.

Rather than seriously grapple with comments on the appropriate numerical ranges, the Board now proposes to erase numerical flow criteria from the Plan's water quality standards altogether. This latest turn appears to be driven not by an evaluation of the science or the public interest but rather by political pressure to make the voluntary agreements a cornerstone of the Plan's implementation. In its comments on the October 2024 Draft Plan update, DTEC warned

⁵ State Water Res. Control Bd., July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan at 14-18 (July 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

the Board that its then-proposed “multiverse approach” to water quality control—which would set numerical objectives from which VA parties would be exempted, accompanied by a new narrative fish viability objective for the VA parties—could not pass legal muster. *See* DTEC Comments on October 2024 Draft Plan at 22-23. Seeming to recognize this problem, the Board has created another, equally serious one by shifting numerical objectives to the program of implementation, cabining their applicability to pre-2026 non-VA water rights, and supplanting the previous adaptive range with water supply adjustments that would allow even more diversion and export of water—allowing water levels to be drawn down to 35% of unimpaired flow in the driest of months, when the Board’s own science shows that 75% of unimpaired Sacramento River inflow and Delta outflow would be needed to preserve attributes of the system to which native fish are adapted. Delta Flow Criteria Report at 5. In doing so, the Board unlawfully dispenses with nearly two decades of its own research and public process aimed at deriving robust numerical criteria. It also leaves significant and unnecessary uncertainty around controls that would apply to potential new and modified water rights—such as the Delta Conveyance Project and Site Reservoir Project, both subject to pending water rights applications. In combination, the Board’s removal of measurable numerical criteria from the water quality standards with its uncertain and piecemeal approach to implementing those numerical criteria across different water rights destroys any assurances that the proposed Plan will improve the status quo, not to mention protect beneficial uses and public trust resources and interests as the law requires.

Making the matter worse, the Board has done nothing to define its vague “viability objective” for fish and wildlife beneficial uses, nor to assure consistency of this objective with the newly designated Tribal Beneficial Uses for Tribal Tradition and Culture (CUL) (which may depend on levels of abundance that significantly exceed what might be considered “viability”). At best, the Board has set forth a range of “indicators” of viability—“population abundance, spatial extent, distribution, structure, genetic and life history diversity, and productivity”—without providing any means to evaluate when viability is achieved or even whether progress toward it is being made. Without clear and measurable “limits or levels” (Wat. Code § 10350(h)), the Board makes “viability” a matter of unconstrained interpretation. In doing so, the Board makes it impossible to conduct the robust triennial reviews the Clean Water Act requires. 33 U.S.C. § 1313(c)(1); *see* Wat. Code § 13240.

The Board’s failure to adopt clear numerical criteria is particularly egregious as mounting stressors on both water supply and demand exacerbate existential threats to the Delta ecosystem and its imperiled fish and wildlife populations. On the one hand, climate change promises reduced and less reliable water supplies accompanied by changes to temperature and other parameters that increase stressors to native fish populations and exacerbate harmful algal blooms. On the other, the acceleration of artificial intelligence (AI) over the last five years and resulting explosion in demand for data storage and compute are posing new threats to water

supplies in water-strained locations like the Delta. In the Delta, three data center facilities are already supplying artificial intelligence services.⁶ The risks to water supplies and local communities posed by AI-driven data centers make robust water quality controls applicable to all existing and future water rights all the more necessary, particularly for the Delta’s most vulnerable communities.⁷

It is no secret why the Board erased numerical flow criteria from the Plan. This undisguised effort to salvage the VAs only opens the Board to a host of new legal problems. In addition to putting the Board in plain violation of the Clean Water Act and Porter-Cologne Act, it reveals to the extent to which the Board is willing to go to accommodate exclusionary and incurably inequitable negotiations with water rights holders in lieu of robust and measurable protections organized around the needs of the Delta ecosystem and communities dependent on it. At the same time, the Board’s erasure of numerical criteria betrays its “affirmative duty to take the public trust tin account in the planning and allocation of water resources” by jettisoning its own findings that more robust flow criteria that increase environmental flows are necessary for public trust resource protection. *Nat. Audubon Soc’y v. Superior Court*, 33 Cal.3d 419, 445 (1983); see Delta Flow Criteria Report at 4-5; *id.* at 5 (concluding that “[f]low and physical habitat interact in many ways, but they are not interchangeable”).

II. The Revised Draft Plan is the Result of an Exclusionary State-led Process, Which Flouts the State’s Commitments to Racial Equity and its Duties to Meaningfully Consult with Native American Tribes

As discussed at length in DTEC’s prior comments to the State Water Board, the voluntary agreements are the product of an inequitable and discriminatory process that excluded Native American Tribes, communities of color, and the general public. *See, e.g.*, DTEC Comments on SED at 86-88 (Ex. A); DTEC Comments on 2024 Draft Plan at 8-17 (Ex. B). The Revised Draft Plan now enshrines the voluntary agreement pathway as the primary, if not exclusive, way that water quality objectives will be defined and implemented. In doing so, the Board discriminates against communities of color and Tribes in the Delta, and it violates its statutory obligation to engage in government-to-government consultation with Tribes whose ancestral lands are affected by the project.

⁶ Restore the Delta, *The Environmental Justice Implications of Artificial Intelligence Infrastructure in the Sacramento-San Joaquin Delta* (Jan. 15, 2026), <https://restorethedelta.org/wp-content/uploads/Restore-the-Delta-AI-White-Paper.pdf>.

⁷ As explained in oral comments at public hearing, the Board’s failure to adopt straightforward regulatory controls also threatens Delta agriculture, a beneficial use that contributes \$4.6 billion annually and relies on adequate freshwater flows. Salinity intrusion, toxic algal blooms, and inadequate flows jeopardize the productivity and survival of Delta agriculture.

A. The Board's Adoption of a Voluntary Agreement Pathway Constitutes Unlawful Discrimination on the Basis of Race

The Board's continued reliance on private contract negotiation with water rights holders in lieu of a regulatory update developed through an open public process promises to deepen the racial discrimination that has defined the California water rights system since its inception. The State of California's history of state-sponsored genocide and racial discrimination in ownership of land and associated water rights is well documented. *See, e.g.*, Shingle Springs Band of Miwok Indians et al., Complaint under Title VI of the Civil Rights Act of 1964 at 13-18 (Dec. 16, 2022) ("Title VI Complaint"). In its 2021 Racial Equity Resolution, the State Water Board itself rightly recognized that "the Water Boards' programs were established over a structural framework that perpetuated inequities based on race." Resolution No. 2021-0050 ¶ 7. Such injustices include the "colonization, displacement, and genocide of Native American people" in California, as well as the duplicitous disregard of treaty promises with California Tribes, which "have contributed to the loss of water resources and watershed management practices that supported Native American peoples traditional food sources and ways of life" and resulted in the failure to recognize and protect Tribal water rights. *Id.* ¶ 7(b). These injustices include the "historical seizures of land from people of color" and the systematic exclusion of communities of color throughout California from property ownership, which have resulted in the dispossession of exclusion of "associated water rights." *Id.* ¶ 7(d).

The imprint of the State's long history of racial discrimination is plainly evident in today's water rights system. For instance, a recent analysis by Department of Water Rights employees titled "Who makes decisions about California's water?" determined that of nearly 14,000 water rights holders, an estimated 91% are white, as are approximately 86% of local water agency directors and 92% of agricultural water district directors.⁸ These same water rights holders who obtained their rights through the exclusion of Tribes and communities of color are the parties with whom the State negotiated, behind closed doors, for voluntary self-regulation of water flows and habitat measures. In this way, the State carries the discrimination that marred the development of the State's water rights system directly into water governance in the present.

As the Board is aware, its reliance on the voluntary agreements in lieu of a regulatory update is the subject of a pending federal civil rights investigation pursuant to the U.S. Environmental Protection Agency's August 8, 2023 decision to accept DTEC's Title VI Complaint and open an investigation into "[w]hether the California State Water Resources

⁸ See Ian James, "A foundation of Racism": California's antiquated water rights system faces new scrutiny, L.A. Times (Mar. 6, 2023), <https://www.latimes.com/environment/story/2023-03-06/is-californias-antiquated-water-rights-system-racist>; Megan Fidell & Paul Shipman, *Who makes decisions about California's Water?* (Jan. 9, 2023), <https://www.restorethedelta.org/wp-content/uploads/2023-Fidell-Who-Makes-Decisions-about-Californias-Water.pdf>.

Control Board’s administration of the water quality setting program with the respect to the Water Quality Control Plan for the [Bay-Delta Region], including timeliness of rulemaking and opportunities for public participation, subjects members of Native Tribes and Black, Asian and Latino residents of the Bay-Delta Region, particularly the South Stockton community, to discrimination based on race, color, and national origin.” U.S. EPA, Letter RE Acceptance of Administrative Complaint, EPA File No. 01RN0-23-R-9 (Aug. 8, 2023). Despite months of facilitated complaint resolution sessions and negotiations, the State Water Board has refused to enter into or even respond to an informal resolution agreement pending since November 2024. Its decision to ignore the civil rights process and the continued grievances of communities of color shut out of the voluntary agreement negotiations is further evidence of the State’s disregard for environmental equity.

As amply documented in the Title VI Complaint and by the State itself, communities of color in the Delta already suffer from disproportionate environmental burdens. *See* DTEC Comments on SED, Att. 1 (DTEC Title VI Complaint and Petition for Rulemaking). In particular, communities in South Stockton, such as those that border the Port of Stockton and the San Joaquin River, rank in the 99th and 100th percentiles for cumulative impacts statewide.⁹ These communities are also within the area selected for a Community Air Monitoring Plan and Community Emissions Reduction Program under Assembly Bill 617 due to their high cumulative exposure burden, significant number of sensitive receptors, and area-wide disadvantaged community designations.¹⁰ Immense environmental burdens facing these communities, including air pollution and water pollution, already threaten human health, worsen quality of life, and prevent Delta communities from safely enjoying the sloughs and waterways that surround them. *See, e.g.*, DTEC Comments on 2024 Draft Plan at 84-86. Increasing proliferation of harmful algal blooms in Stockton waterways, driven by low flows and warming temperatures, threatens to make these existing problems even more severe, further alienating residents from waterways, exacerbating threats to the unhoused and others at high risk of coming into contact with contaminated water, and contributing to the area’s heavy burden of particulate matter pollution.¹¹ Rather than reducing the environmental impacts to these already overburdened communities, the State Water Board has failed to adequately consider these disproportionate impacts to communities that already suffer from environmental injustice. Approval of the voluntary agreement pathway would perpetuate and exacerbate these disparate impacts to environmental justice communities in the Delta.

⁹ Cal. OEHHA, CalEnviroScreen 4.0, <https://experience.arcgis.com/experience/11d2f52282a54cee6184203/page/CalEnviroScreen-4.0>.

¹⁰ Cal. Air Resources Bd., Stockton Overview, <https://ww2.arb.ca.gov/capp/com/cip/stockton>.

¹¹ *See* Haley Plaas, et al., *Secondary Organic Aerosol Formation from Cyanobacterial-Derived Volatile Organic Compounds*, 7 ACS Earth & Space Chemistry 1798 (Sept. 6, 2023), <https://pubs.acs.org/doi/abs/10.1021/acsearthspacechem.3c00177>.

In deciding to move forward with the voluntary agreement pathway, the Board has chosen to forego an opportunity to create meaningful repair for communities subject to a long history of discrimination in water governance and to ensure that water quality going forward will be managed through sound science and exercise of Traditional Ecological Knowledge by the watershed's original stewards rather than politics and power. DTEC urges the State Water Board to let go of this misguided and discriminatory pathway.

B. The Board Violates Its Duty to Engage in Government-to-Government Consultation with Delta Tribes

While DTEC appreciates that the Revised Draft Plan now requires the State Water Board to develop a Tribal Engagement Plan to better consult with Tribes and better incorporate Tribal concerns and Traditional Ecological Knowledge ("TEK") in the future, *see* Revised Draft Plan at 118; *see, e.g., id.* at 93 (requiring participants in the voluntary agreements to "engage with California Native American Tribes"), a commitment to future meetings and "engagement" with Tribes does not cure the fact that the voluntary agreement pathway was developed through this exclusionary, discriminatory process, resulting in a Revised Draft Plan that fails to protect fish and wildlife and Tribal Beneficial Uses. Nor does it satisfy the State Water Board's obligation to meaningfully consult with Tribes under Assembly Bill ("AB") 52.

AB 52 was adopted to "establish a meaningful consultation process between California Native American Tribal Governments and lead agencies." Stats. 2014, Ch. 532, § 1(b)(2). As the Court of Appeal recently explained,

For purposes of Assem. Bill No. 52, "consultation" is defined by reference to section 65352.4 of the Government Code, which states that " 'consultation' means the meaningful and timely process of seeking, discussing and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement" and that "[c]onsultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty." (See § 21080.3.1, subd. (b) [referring to Gov. Code, § 65352.4].)

CEQA does not prescribe topics for consultation, but provides that "[i]f the . . . tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics." (§ 21080.3.2, subd. (a).) The statute further provides that "[t]he consultation may include discussion concerning the type of environmental review necessary, the significance of tribal cultural resources, the significance of the

project’s impacts on the tribal cultural resources, and, if necessary, project alternatives or the appropriate measures for preservation or mitigation that the . . . tribe may recommend to the lead agency.” (*Ibid.*) Thus consultation is not limited to an agency’s consideration of proposals by a tribe: as part of the consultation either party “may propose mitigation measures . . . capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource.” (*Ibid.*)

Koi Nation of Northern California v. City of Clearlake, 109 Cal. App.5th 815, 825-26 (2025). Consultation under AB 52 is not concluded—and the agency generally cannot approve the proposed project under CEQA—until either the Tribe and agency reach an agreement, or one of the parties “acting in good faith and after reasonable effort, concludes that reasonable agreement cannot be reached. Pub. Res. Code § 21080.3.2(b).

Native American Tribes have suffered for generations because of the mismanagement of water resources in the Bay-Delta, which has decimated salmon and other native fish and wildlife species that many Tribes hold sacred. The Draft Revised Plan proposes to incorporate Tribal Beneficial Uses and designate Tribal Traditional and Cultural beneficial uses in the Bay-Delta Plan, “specifically due to the cultural and spiritual importance of water and native fish and wildlife, particularly salmon, to Tribes.” *See* Recirculated SED at 13-34; *id.* at 13-2. As the State Water Board explained,

The designation of CUL within the Bay-Delta watershed is based on substantial evidence provided to the State Water Board through tribal outreach and engagement efforts. Tribal representatives shared through written and verbal testimony the significance of salmon within tribal culture, including in creation stories, as a centerpiece of traditional ceremonies and feasts (such as traditional salmon bakes), and the general correlation of Native American life ways with the timing and locations of northern California salmon runs. The State Water Board recognizes the centrality that vital fish populations have for cultural, spiritual, ceremonial, and traditional rights and lifeways of tribes in the Bay-Delta watershed. Salmonids utilize the watershed both temporally and spatially at various life stages, and the tribes’ cultural and spiritual use is centered on the connectivity between themselves and their ancestors with these species and the ecosystem that supports them.

Recirculated SED at 13-35; *see* Revised Draft Plan at 10-11.

As the State Water Board admits, native fish populations in the Bay-Delta, including native salmon runs, have declined precipitously since the Bay-Delta Plan was substantially

amended in 1995; according to the State Water Board, salmon runs have declined by 43 to 89 percent compared to the average annual natural (non-hatchery) salmon populations from 1967-1991. Draft SED at 3-22, 3-134. Most of these species, including all four salmon runs, are not currently viable. Reversing these declines and restoring healthy and abundant salmon runs—and other native fish and wildlife species—in the Bay-Delta watershed is critical to sustaining Tribal cultural, economic, and spiritual practices.

Despite this critical importance, there is no question that the State Water Board has not initiated, let alone completed, consultation with Native American Tribes under AB 52, even with respect to the designation of Tribal Beneficial Uses in the Revised Draft Plan. According to the State Water Board,

In early 2023, the Board sent letters requesting consultation on the Sacramento/Delta update with tribes located in the Bay-Delta and Trinity River watersheds. The Board is committed to ongoing engagement with tribes throughout the planning and implementation processes for the Bay-Delta Plan.

State Water Board, Notice of Availability and Opportunity for Public Comment, Hearing, and Staff Workshops on Draft Staff Report in Support of Potential Sacramento/Delta Updates to the Water Quality Control Plan for the San Francisco Bay/Sacrament-San Joaquin Delta Estuary at 2 (Sept. 28, 2023). The State Water Board’s January 13, 2023 letter requesting Tribal Consultation explained that, “[i]n 2022, the State Water Board also received Voluntary Agreement proposals for updating and implementing the Bay-Delta Plan from various water users in the watershed,” and it invited Tribes to consult on the “Sacramento/Delta update to the Bay-Delta Plan.” State Water Board, Request for Tribal Consultation Regarding Bay-Delta Plan at 2-3 (Jan. 13, 2023), available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/2023-01-13-swb-tribal-consultation-ltr.pdf.

Critically, however, the letter asserted that consultation would occur only under Executive Order B-10-11 and the State Water Board’s Tribal Consultation policy,

because the provisions of AB 52 do not apply to a certified regulatory program or a project with a Notice of Preparation filed before July 1, 2015. (The Revised Notice of Preparation for Sacramento/Delta Update to the Bay-Delta Plan was issued in 2012.) However, given the significant tribal interest in the Bay-Delta Plan, the State Water Board is moving forward with tribal consultations under the B-10-11 process to hear and learn from tribal perspectives on this project. Though this consultation period will focus on the Plan amendment for the Sacramento

River, Delta, and Delta Eastside Tributaries, the State Water Board welcomes feedback and discussion on the Bay-Delta Plan as a whole as well.

Id. at 3.¹² Contrary to the State Water Board’s conclusion, the obligation to consult with Tribes under AB 52 applies to this regulatory proceeding.

First, the State Water Board asserts that this project is exempt from formal consultation under AB 52 because AB 52 does not apply to certified regulatory programs, like the State Water Board’s. However, the text of AB 52 does not include any such exemption. Furthermore, while CEQA provides that certified regulatory programs are exempt from the requirements of Chapter 3 and Chapter 4 of Division 13 of the Public Resources Code, *see* Cal. Pub. Res. Code § 21080.5(c), the provisions of AB 52 are codified in Chapter 2.5 and Chapter 2.6 of Division 13 (and elsewhere in the Public Resources Code). Moreover, Courts have held that these provisions regarding certified regulatory programs are narrowly construed and do not exempt agencies from CEQA’s core policies and standards. *See, e.g., Pesticide Action Network of N. Am. v. Cal. Dept. of Pesticide Regul.*, 16 Cal. App. 5th 224 (2017).

Second, the State Water Board asserts that this project is exempt from formal consultation under AB 52 because the Notice of Preparation was issued in 2012. The State Water Board is correct that AB 52 provides that “This act shall apply only to a project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.” Stats. 2014, Ch. 532, Section 11(c). However, as discussed above, the State Water Board has violated CEQA because it has failed to issue a notice of preparation that accurately describes the proposed project, geographic scope of the project, and likely environmental effects. The State Water Board’s failure to issue a supplemental Notice of Preparation has deprived Native American Tribes their right to meaningful consultation under AB 52, as issuing an accurate, supplemental Notice of Preparation anytime after 2016 would have triggered the obligation to meaningfully consult with Native American Tribes under AB 52. Indeed, as discussed at length in DTEC’s prior comments and reiterated here, the Board did not begin Phase II environmental review until at least 2017, when it issued a Fact Sheet and Scientific Basis Report outlining recommendations for the Phase II update. State Water Board., *Fact Sheet: Phase II Update of the Bay-Delta Plan: Inflows to the Sacramento River and Delta and Tributaries, Delta Outflows, Cold Water Habitat and Interior Delta Flows 1* (2017), https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/201710_phaseI_I_factsheet.pdf. This while the Board points to 2012 as the starting point for Phase II amendments, the actual starting point was 2017—two years *after* AB 52 went into effect.

¹² Because the State Water Board’s letter requesting consultation explicitly stated that it was not requesting consultation under AB 52, no Tribe could have failed to timely respond to a request for consultation under AB 52.

Nor is consultation under AB 52 satisfied by a “process to hear and learn from tribal perspectives,” as described in the State Water Board’s January 2023 Tribal Consultation letter. As the Court of Appeal explains in *Koi Nation*, AB 52 requires meaningful and timely consultation that seeks agreement of the parties, not a “perfunctory” consultation. *Koi Nation*, 109 Cal.App.5th at 840. Here, despite the fact that the Plan clearly would affect Tribal resources, and despite the fact that Tribes have clearly identified significant adverse impacts to Tribal resources and informed the Board of such throughout the environmental review process, the State Water Board has not issued a letter requesting consultation with Tribes under AB 52, has not included a general summary of the information obtained during Tribal consultation in the CEQA document, and has not demonstrated that the State Water Board sought agreement with Tribes, as required by AB 52. *Id.* at 840-41.

In this proceeding, the State systematically excluded Tribes from the room where they cut the deal, and only after the deal was cut did the State Water Board invite Tribes for a listening session to inform how the Plan might be implemented or amended in the future, but not to meaningfully engage in an attempt to reach agreement on what constitutes adequate protection of Tribal Beneficial Uses or other beneficial uses in the Bay-Delta watershed. The State Water Board has failed to meaningfully consult with Native American Tribes under AB 52 in a timely manner regarding the Bay-Delta Plan. It must do so before adopting an updated Bay-Delta Plan.

III. The Board Continues to Fail to Ensure Meaningful Integration of TEK into the Bay Delta Plan’s Update and Evaluation

In the Revised Draft Bay-Delta Plan, the Board outlines steps it proposes to take to engage with Tribes and incorporate Traditional Ecological Knowledge in its Program of Implementation (“POI”) to implement the Plan’s water quality objectives. *See* Revised Plan at § 4.5.3. As discussed above, the Plan should not be adopted unless and until it is subject to adequate environmental review informed by meaningful government-to-government consultation with Tribes under AB 52. Notwithstanding that the Plan, as currently drafted, is not legally viable, this section examines the Board’s proposals for the integration of TEK and Tribal engagement in the Plan’s POI.

While DTEC is supportive of the Board’s general proposal to strengthen incorporation of TEK in the monitoring and evaluation of the Bay-Delta Plan update and to improve Tribal consultation going forward, DTEC reiterates its concerns from its January 2025 comments on the prior Draft Bay-Delta Plan that the Board’s proposals to do so remain overly vague and continue to lack a clear and actionable commitment to adequately engage Tribal Nations in the Bay-Delta Plan process. DTEC provides the following comments to assist the Board in realizing its commitments to incorporate adequate Tribal consultation and engagement as well as ensure adequate integration of TEK into the Plan’s implementation.

A. The Board Misunderstands TEK

Traditional Ecological Knowledge refers to the cumulative knowledge that Indigenous peoples have conserved and passed down for millennia, informed by their unique, evolving, and intimate relationships with their environments. TEK is an adaptive production of Indigenous Knowledge over time, which continues to adapt based on shifting contemporary contexts. Rather than a static and unchanging body of knowledge that can be “extracted from its society and fit into policy-relevant science,” TEK should be understood as “the living environmental governance of indigenous peoples” expressive of a “system of responsibilities.”¹³ While Indigenous Knowledge systems have been historically undermined in favor of Western Science, the two knowledge systems are far from mutually exclusive, with TEK oftentimes enriching Western Science. This knowledge-sharing is captured in the concept of two-eyed seeing developed by Mi’kmaw Elder Albert Marshall. Practitioners of two-eyed seeing strive to engage with Indigenous Knowledge systems and Western scientific knowledge systems so that Indigenous Knowledge systems are respected on their own terms and not subsumed by or assimilated into the dominant Western system.¹⁴ Indigenous peoples have already overcome drastic environmental and social challenges through Indigenous Knowledge systems. Consequently, if the Board adopts a two-eyed seeing approach to respecting the contributions of TEK and Indigenous Knowledge holders, Indigenous peoples will be uniquely well positioned to guide the Board in tackling the complex problems threatening the San Francisco Bay/Sacramento-San Joaquin Delta Watershed.

Likewise, inclusion of TEK in water governance requires political integration of Indigenous and non-Indigenous institutions such that Indigenous Knowledge holders are included on their own terms as active participants in watershed governance. *Id.* ¶ 63. That is, respect for and recognition of TEK is inseparable from the political integration of TEK practitioners in policy decision-making and evaluation.

B. Tribal Beneficial Uses (TBUs) are Inseparable from TEK

Tribal Beneficial Uses are directly informed by TEK and are, consequently, inseparable from TEK. Therefore, for the Board to incorporate and protect the Tribal Tradition and Culture

¹³ Kyle Powys Whyte, *On the Role of Traditional Ecological Knowledge as a Collaborative Concept: A Philosophical Study*, 2 ECOLOGICAL PROCESSES 7, at 5 (2013).

¹⁴ See, e.g., Deborah McGregor et al., *Toward Meaningful Research and Engagement: Indigenous knowledge systems and Great Lakes governance*, 49 J. Great Lakes Research S22 (2023); Deborah McGregor et al., *Indigenous Knowledge Systems in Environmental Governance in Canada*, 5 KULA: Knowledge Creation, Dissemination, and Preservation Studies 1, <https://kula.uvic.ca/index.php/kula/article/view/148>.

(CUL) designations it proposes to make in the Bay-Delta Plan, it must integrate TEK into its analysis. Incorporating TEK is necessary to realize the Board’s commitments to Tribal engagement and to ensure that water quality objectives are culturally appropriate and substantively protective of Tribal water uses. The Board’s current ill-defined commitment to consider future “additional flow-based water quality objectives or site-specific water rights requirements” on a subjective “if needed” basis to protect Tribal activities encompassed within CUL fails to outline how TEK would be used. Revised Bay-Delta Plan at 11. Without incorporating TEK, the Board will be unable to genuinely evaluate whether CUL is being protected and updated as needed.

Additionally, the Revised Plan’s failure to explicitly commit to designating the remaining TBUs—Tribal Subsistence Fishing (T-SUB) and Subsistence Fishing (SUB)—for the Bay-Delta watershed further exemplifies the absence of TEK in the Revised Bay-Delta Plan update. In failing to designate T-SUB and SUB, the Board chooses to ignore centuries of TEK that demonstrate the integral role subsistence fishing plays in the Delta. Using Winnemem Wintu TEK as his foundation, Tribal Knowledge holder and Government Liaison to the Winnemem Wintu Tribe Gary Mulcahy has testified that the survival of Indigenous peoples throughout the Delta would be comprised if they are unable to access Nur (*Chinook salmon*). See DTEC Comments on SED, Att. 1 (Title VI Complaint) at Ex. E, Att. B (Declaration of Gary Mulcahy). If TBUs, including T-SUB and SUB, are protected, with TEK guiding their designation, the benefits of a healthier Bay-Delta ecosystem will not only serve Tribes but will also extend to all Californians who rely on the water, species, and landscapes of this irreplaceable ecosystem.

C. Despite DTEC’s January 10, 2025 Comments, the Board Continues to Demonstrate Disregard for TEK

As a State agency, the State Water Board has an obligation to respect TEK in the same manner as Western Science and to take measurable and proactive steps to ensure that TEK informs the Bay Delta Plan. Notwithstanding this obligation, the Board’s discussion in section 4.5.3 continues to evidence a persistent failure to seriously commit to meaningfully integrating Tribes and the exercise of TEK into water governance in the Delta.

First, the Board fails to make a minimum commitment towards incorporating TEK, stating that “if the State Water Board develops specific policies and guidelines regarding incorporation of TEK, those policies and guidelines will be adhered to.” Revised Draft Plan at 118. By conditioning its adherence to TEK on the possible development of specific policies and guidelines in the future, the Board reveals the lack of respect it holds for TEK, and its lack of commitment towards implementing TEK in the Bay Delta planning process.

Second, while the Board proposes to conduct Tribal listening sessions and to create a Bay-Delta Tribal Advisory Group, both proposals are marred by a lack of clear timelines, a lack of clear selection processes, and a lack of clear financial commitments. For example, stating that the “composition, structure, and meeting frequency” of the Bay-Delta Tribal Advisory Group will be determined by undetermined members through an undetermined process on an undetermined timeline does not demonstrate a commitment by the Board to adequately engage Tribal Nations in the Bay-Delta planning process. The Board should outline clear steps as to how Tribal participants in both the Tribal listening sessions and the Tribal Advisory Group will be selected, who will choose said participants, when the Tribal Advisory Group will be formed, and when Tribal listening sessions and Tribal Advisory Group meeting will be held, taking care to schedule meetings in a manner that respects Tribal ceremonial schedules.

Third, the Board’s proposals fail to specify how the Tribal listening sessions and the Bay-Delta Tribal Advisory Group will be funded. Clear financial commitments from the Board to fund Tribal advisory groups are instrumental to their success. As a result, the Board should affirmatively commit to fully funding the Tribal listening sessions and Tribal Advisory Group, remedying previous instances in which Tribal participants were not compensated for their time or expertise and have had to shoulder the cost of their participation. The Bay Delta Plan Update planning process itself evidences this lack of compensation and financial support. For example, the State Water Board has failed to compensate Tribal Nations whose expertise it has relied on throughout this multi-year Bay Delta Plan Update process. Additionally, in the parallel Delta Conveyance Project proceeding, whose outcome will undoubtedly impact Bay Delta water quality, Tribes, such as the Shingle Springs Band of Miwok Indians, received no compensation from the Department of Water Resources for their consultation services.

In the Revised Plan, the Board’s commitments towards supporting the Tribal listening sessions and Tribal Advisory Group are vague and limited, with the Board stating that it will devote additional resources towards its Tribal engagement processes only as “additional resources . . . become available.” Revised Draft Bay-Delta Plan at 118. These ill-defined financial commitments persist despite the Revised Plan stating that “to ensure adherence to the CARE principles, the State Water Board will request tribal review by the Bay-Delta Tribal Advisory Group of any Bay-Delta Plan related documents incorporating TEK.” Revised Draft Bay-Delta Plan at 118. Although it predicates its adherence to the CARE principles on the Tribal Advisory Group’s services, the Board fails to outline any funding sources for the Tribal Advisory Group or provide any details regarding how members of the Tribal Advisory Group would be compensated for these services.

Adequate funding and compensation are necessary for the Board to follow through with its commitment to protecting TEK and other forms of Indigenous Knowledge through the CARE process and to integrating TEK and Tribal stakeholders into the Bay Delta Plan’s update process.

A commitment to adequately fund the Tribal listening sessions and the Tribal Advisory Group and to adequately compensate Tribal participants would thus help remedy some of the deficiencies in the Revised Plan's 4.5.3 Section. Consequently, the Board should set clear targets for securing resources, including the dates by which it plans to make resources available to Tribes, and should set out a clear and transparent compensation scheme for Tribal participants prior to creating the Tribal listening sessions and the Tribal Advisory Group.

Fourth, and similar to its failure to outline clear selection processes and funding sources for the Tribal listening sessions and Tribal Advisory Group, the Board fails to provide key details on the types of contracting mechanisms it plans to utilize to support Tribal engagement and outreach. The Board states that it will "utilize available contracting mechanisms to support outreach and engagement with tribes on Bay-Delta planning efforts." Revised Draft Plan at 118. This vague commitment fails to detail who the parties participating in these contract mechanisms would be—making it unclear whether and how the Board intends to contract with Tribes—, how these parties would be determined, and what funding sources would support these contracting mechanisms. Additional clarity regarding these contracting mechanisms is necessary if they are to genuinely support tribal outreach and engagement.

D. The Board's Proposal to Adopt the Exclusionary Voluntary Agreement Pathway Cannot be Reconciled with its Purported Commitment to Respect and Consider TEK.

The Board's continued reliance on exclusionary voluntary agreements ("VAs") runs directly counter to its purported commitments to integrate TEK into the Bay Delta Plan. As discussed above, the Board created these exclusionary VA agreements without informing implicated Tribal members and without conducting Tribal consultation. Through these exclusionary VAs, the Board made a decisive choice to reject TEK. If the Board continues advancing its proposal to implement exclusionary VAs, the Board's actions will constitute an informed and intentional effort on the Board's part to continue to subordinate adequate Tribal engagement, consultation, and the inclusion of TEK into the Bay-Delta Plan, regardless of what the Board may try to indicate.

IV. The Revised Draft Plan Violates Porter-Cologne and the Public Trust

A. The State Water Board Has Unlawfully Conflated its Water Rights and Water Quality Obligations

In its consideration of the proposed voluntary agreement pathway, the State Water Board has failed to proceed in the manner prescribed by law because it has conflated its water rights and water quality obligations in this proceeding. Fifty years ago, the Court of Appeal warned the

State Water Board that “the procedure followed—combining the water quality and water rights functions in a single proceeding—was unwise,” and the Court ruled that the State Water Board’s adopted water quality standards were unlawful because of those procedural errors. *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 119 (1986). The State Water Board has made a similar error in this proceeding, again “compromising its water quality role by defining its scope too narrowly.” *Id.* at 120.

The Court of Appeal struck down the 1978 Bay-Delta Water Quality Control Plan because the State Water Board’s consideration of water quality objectives to reasonably protect beneficial uses was unlawfully limited to considering the impacts caused by the Central Valley Project and State Water Project, without considering all the water rights and water diversions in the watershed. *Id.* at 119-120. As the Court explained, “in order to fulfill adequately its water quality planning obligations, we believe the Board cannot ignore other actions which could be taken to achieve Delta water quality, such as remedial actions to curtail excess diversions and pollution by other water users.” *Id.*

In this proceeding, the State Water Board has turned the water quality planning process on its head and, as it did fifty years ago, ignored other actions that could be taken to improve Delta water quality and actually protect fish and wildlife, fishing, recreation, Tribal, and other beneficial uses that depend on a healthy Bay-Delta watershed. Instead of determining what flows and water quality objectives are necessary to reasonably protect beneficial uses, and after adopting a Bay-Delta Plan then conducting a water rights proceeding to assign responsibility to achieve the water quality objectives, this proceeding has focused on the small amounts of water that rights holders and water contractors are willing to voluntarily give up,¹⁵ equating that voluntary agreement with reasonable protection of beneficial uses. That is true even as the water proposed under the voluntary agreement has continued to shrink, and even as some of the largest water users in the State contribute no water under the voluntary agreement or regulatory pathway.

For instance, the State Water Board has recognized that “multiple aquatic species in the Bay-Delta estuary are in crisis,” with populations of salmon and other native fish species having declined by 43 to 99 percent over the past several decades. Draft SED at 3-134. Under baseline conditions, multiple fish species, including winter-run Chinook salmon, spring-run Chinook salmon, fall-run Chinook salmon, Longfin Smelt, and Delta Smelt, are declining in abundance,

¹⁵ In addition, much of the water provided under the voluntary agreement would be paid for with hundreds of millions of dollars in taxpayer subsidies, despite the fact that this water belongs to the public, *see* Cal. Water Code § 102, and despite the fact that the State Water Board has a continuing duty under the Public Trust to reconsider prior water allocation decisions, *see National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983). It appears that much of the habitat restoration under the voluntary agreement likewise would be subsidized by taxpayers.

and as the State Water Board has repeatedly concluded, under baseline conditions fish and wildlife beneficial uses are not reasonably protected and the State has not met its obligations under the Public Trust. *See, e.g.*, Draft SED at 3-112 (“existing Bay-Delta Plan and BiOp flow requirements are not adequate to ensure Delta outflow conditions necessary for the reasonable protection of fish and wildlife beneficial uses.”) However, the State Water Board has simply assumed in the Recirculated SED that any improvement under the voluntary agreement compared to the degraded baseline conditions would constitute reasonable protection of fish and wildlife and would lead to viability. *See, e.g.*, Recirculated SED at 13-288 (analysis of water temperatures below Shasta Dam compares the voluntary agreement to baseline conditions, but it never evaluates whether the resulting water temperatures under the voluntary agreement are “suitable” for salmon and other native fish species). Similarly, the Recirculated SED explains that,

Under the VA pathway, flow-related ecological benefits and associated beneficial economic effects would also be expected to the extent that the VA pathway results in a more natural flow regime. However, the changes in streamflow under the VA pathway would be smaller than those under the starting point for the regulatory pathway (55 w/WSAs). **Subsequently, fish population improvements and fisheries-related ecological benefits resulting from a more natural flow regime could be smaller under the VA pathway compared to the starting point for the regulatory pathway**, for the term of the VA pathway, even with the additional flows provided by non-HRL water rights under the regulatory pathway added to the VA pathway, as described in Section 13.4.2. However, the VA pathway would also provide for non-flow habitat restoration measures on a portion of the Sacramento/Delta tributaries **that could result in fisheries-related ecological benefits** and associated beneficial economic effects.

Recirculated SED at 13-539. This is clear error; given that populations are declining under baseline conditions, in order to demonstrate that a species is viable the State Water Board must show that the improvements in population growth actually lead to positive population growth, not merely that the species is declining less quickly. For example, if natural production of fall-run Chinook salmon has been declining by 5 percent per year under baseline conditions, and the voluntary agreement improved natural production by 1 percent compared to baseline conditions, fall-run Chinook salmon are still declining by 4 percent per year, which is not a viable population.

Elsewhere, the State Water Board has simply claimed that the voluntary agreement is “expected to contribute toward the narrative objectives for salmon protection and fish viability.” *See, e.g.*, Recirculated SED at 13-205. However, the State Water Board never provides any analysis showing that the program of implementation as a whole will achieve the Plan’s fish

viability, salmon protection, and other objectives, as required by law. Cal. Water Code §§ 13050(j), 13242, 13247; *see In Re State Water Resources Control Board Cases*, 136 Cal.App.4th 674 (2006).

Indeed, with respect to certain proposed water quality objectives, even though the voluntary agreement would result in ecological conditions that are worse than baseline conditions, the State Water Board seems to find the voluntary agreement would still constitute reasonable protection. *See, e.g.*, Recirculated SED at 13-109 (voluntary agreement results in more negative OMR flows than under baseline conditions).

Similarly, the State Water Board has identified ecological flow thresholds that are important for salmon and other native fish species, but the State Water Board has never identified how frequently those flow thresholds must be exceeded in order to achieve viable fish populations, let alone achieve the higher abundances required to achieve the salmon doubling objective, or to sustain commercial and recreational fishing or Tribal beneficial uses. *See* Recirculated SED at 13-211. Yet even though the frequency of exceeding these flow thresholds under the voluntary agreement “would generally remain unchanged” as under the degraded baseline—and would actually reduce the frequency of meeting the flow threshold for longfin smelt—the State Water Board appears to find that the voluntary agreements would provide reasonable protection for fish and wildlife and other beneficial uses. *Id.*

Instead of determining what flows are needed to reasonably protect fish and wildlife and other beneficial uses, the State Water Board and other agencies have instead focused on how little water that water rights holders must give up under a voluntary agreement. And the amount of water proposed to increase Delta outflow under the voluntary agreement has repeatedly shrunk.

In 2017, the California Department of Fish and Wildlife proposed that 1.3 million acre feet of additional Delta outflow (beyond that which would result from the 2008/2009 biological opinions and Bay-Delta Plan) was necessary to protect fish and wildlife as part of a voluntary agreement.¹⁶ In 2018, the State’s Framework proposal stated that it would increase Delta outflow by 740,000 to 1.040 million acre feet per year on average. Cal. Nat. Res. Agency, Framework Proposal for Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan (Dec. 12, 2018), available at https://waterboards.ca.gov/bay_delta/docs/bay_delta/cnra_va_proposal_12122018.pdf. By 2019, the voluntary agreements proposed only 75,000 to 704,000 acre feet of new water per year, depending on water year type. Cal. Dept. of Fish and Wildlife and Cal. Dept. of Wat. Res.,

¹⁶ *See* Doug Obegi, *Honey, the VAs Shrunk the Delta Flows* (Apr. 11, 2022), <https://www.nrdc.org/bio/doug-obegi/honey-vas-shrunk-delta-flows>.

Complete Voluntary Agreement Package (Mar. 1, 2019), available at:
https://waterboards.ca.gov/bay_delta/docs/bay_delta/complete_va_package03012019.pdf.

Further, the amount of water proposed for Delta outflow under the voluntary agreements shrank further in the past few years, as a result of new, weakened federal biological opinions that increase CVP pumping in April and May, reducing Delta outflow. *See, e.g.*, Recirculated SED at 13-47. As a result of these changes, in the Recirculated SED, the State Water Board estimates that the voluntary agreement pathway would increase January to June Delta outflow on average by only 130,000 acre feet per year and would decrease July to December Delta outflow by 8,000 acre feet per year on average. *Id.* at 13-114.

Yet even as the volume of water proposed for Delta outflow under the voluntary agreements has shrunk, the State Water Board has continued to assert that the voluntary agreements would reasonably protect fish and wildlife and other beneficial uses.¹⁷ That is apparently true even though, as discussed above, adoption of the Revised Draft Plan does not ensure that Delta inflows and outflows actually are greater than the environmental baseline; new water diversions and the effects of climate change easily could result in less Delta outflow than under baseline conditions. Similarly, the State Water Board continues to assert that the Revised Draft Plan would reasonably protect fish and wildlife and other beneficial uses even though the Revised Draft Plan does not require the parties to the voluntary agreement to achieve “suitable” water temperatures and adequate carryover storage required by the Cold Water Habitat objective; instead, the State Water Board has exempted parties to the voluntary agreement from having to take any actions, like temperature management plans or carryover storage requirements, to implement the Cold Water Habitat objective, Revised Draft Plan at 51-52, 64. The Recirculated SED also demonstrates that Interior Delta Flows under the voluntary agreement are worse than under the degraded baseline conditions, *see* Recirculated SED at 13-109, yet the State Water Board still concludes the voluntary agreement pathway reasonably protects beneficial uses. The Revised Draft Plan likewise exempts several rivers from having to contribute any flow in many years and exempts other rivers from the Revised Draft Plan’s inflow-based outflow objective. *See id.* at 47 (requiring 0 percent of unimpaired flow on 3 rivers under certain reservoir storage

¹⁷ Indeed, in the Revised Draft Plan the State Water Board has dramatically weakened its regulatory proposal from the initial proposal in the 2023 staff report (55 percent of unimpaired flow); now, with the proposed water supply adjustments the State Water Board proposes to only require 35 percent of unimpaired flow in the driest third of years, 45 percent of unimpaired flow in the middle years, and 55 percent of flow in the wettest third of years. Like the voluntary agreement, this regulatory proposal fails to reasonably protect fish and wildlife and other beneficial uses, but because the State Water Board only analyzes the voluntary agreement and the 55w/WSA alternatives in the Recirculated SED, and because the State Water Board never directly compares the flows under the voluntary agreement with flows under the 55 percent or 65 to 75 percent of unimpaired flow, weakening the regulatory proposal in the Recirculated SED makes the voluntary agreement look less bad by comparison.

levels, and requiring at most 35 percent of unimpaired flow); *id.* at Table 9 fn. 1 (“Some or all of these flow commitments may not be accounted for as contributing to additive Delta outflows above base conditions as specified below and in Appendix B.1.”).

While the State Water Board admits that the parties to the voluntary agreements constitute the majority of water rights and water diversions in the watershed, the State Water Board has never modeled or analyzed how much water would be contributed under the proposed regulatory pathway (55w/WSA) if the voluntary agreement pathway is approved. Recirculated SED at 13-50. And some of the largest water rights holders in the watershed are required to contribute no water or funding towards achieving the Revised Draft Plan’s objectives, including the San Joaquin River Exchange Contractors (maximum contract amount of more than 875,000 acre feet per year) and the California Department of Water Resources’ Feather River Settlement Contractors (water districts that divert 1 million acre feet of water per year or more, including Western Canal Water District, Garden Highway Mutual Water Company, Joint Water Districts Board, Oswald Water District, Plumas Mutual Water Company, and Tudor Mutual Water Company). Meanwhile, rather than giving up water, South of Delta contractors of the Central Valley Project and State Water Project will **increase** water diversions under the Revised Draft Plan, with an average increase of 86,000 acre feet per year. *Id.* at 13-105 to 13-106.

In this proceeding, instead of determining how much water is needed to protect and restore the health of the Bay-Delta estuary and protect beneficial uses, the State Water Board has gutted the water quality objectives and program of implementation proposed in the Draft Plan in order to make the voluntary agreements fit—even as the voluntary agreement pathway shrinks, even as some of the biggest water users do not contribute any flow and other water districts increase water supply, and even as the modeling and analysis demonstrates that the Revised Draft Plan will likely result in less Delta outflow than today, worse Interior Delta Flow conditions, and worsened water temperatures below Shasta Dam and other reservoirs. The Revised Draft Plan woefully fails to protect and restore the health of the Bay-Delta estuary, its fish and wildlife, and the Tribes, communities, and jobs that depend on its health. The State Water Board has unlawfully constricted its determination of what flows and other measures are needed to achieve viable fish populations and achieve salmon doubling, limiting it to what the parties to the voluntary agreement are willing to offer.

While the State Water Board has the authority and obligation to balance reasonable protection of beneficial uses, it cannot adopt a water quality control plan that does not achieve the plan’s objectives. Cal. Water Code §§ 13050(j), 13242, 13247; *see In Re State Water Resources Control Board Cases*, 136 Cal.App.4th 674 (2006). It plainly has done so here, subverting its obligations with respect to water quality planning to considerations of water rights.

B. The Revised Draft Plan Fails to Reasonably Protect Beneficial Uses from Harmful Algal Blooms

Harmful algal blooms have proliferated in the Delta over the past several decades, due to the failure to adequately manage water quality, including flows, temperature, salinity, turbidity, and pollutants (particularly nutrients). Under baseline conditions, harmful algal blooms are increasing in frequency and extent. *See, e.g.*, Draft SED at 4-16 to 4-17. Yet the Revised Draft Plan fails to include water quality objectives that reduce or prevent harmful algal blooms in the Delta, even as the State Water Board and the U.S. Environmental Protection Agency recognize that such standards or objectives are necessary to protect beneficial uses. While the State Water Board proposes additional monitoring requirements and studies as mitigation measures, the Revised Draft Plan fails to adequately protect beneficial uses from harmful algal blooms, and instead adoption of the voluntary agreement is likely to contribute to the nuisances caused by harmful algal blooms.

In the Recirculated SED, the State Water Board admits that increased Delta outflow in the January to June period could lead to reduced HAB formation, and that decreased Delta outflow during the summer and fall could lead to increased frequency and size of harmful algal blooms. Recirculated SED at 13-356. Similarly, the document recognizes that changes in net flow in Delta channels can affect HABs, with lower net flows in the summer and fall months resulting in increased residence time that could increase the formation of harmful algal blooms. *Id.* at 13-354 to 13-355.

However, as discussed above, the Recirculated SED fails to adequately consider the effects of the likely changes in Delta outflows, interior Delta flows, and Delta water quality from the Revised Draft Plan on the formation and extent of harmful algal blooms, including the failure to accurately account for the effects of climate change on water temperatures and hydrology, failure to account for changes in turbidity and salinity on harmful algal blooms, and failure to accurately assess likely changes in Delta inflows and outflows under the proposed project.

Even ignoring the failure to adequately analyze effects on harmful algal blooms, the Recirculated SED demonstrates that the voluntary agreement and 55w/WSA scenarios are likely to increase the formation and extent of harmful algal blooms compared to the already degraded baseline conditions, and would not improve water quality conditions in a manner that is likely to reduce the frequency and extent of harmful algal blooms. For instance, the Recirculated SED asserts that the voluntary agreements would have small effects on harmful algal blooms because the voluntary agreements “would have only small effects of Delta outflow and exports during the warmer time of year when HABs and invasive aquatic plants are growing.” Recirculated SED at 13-356. However, the record shows that under the voluntary agreements, Delta outflow in the summer and fall months would be reduced compared to the baseline, as would summer/fall

South of Delta exports in most years and on average. *Id.* at 13-106, 13-114 to 13-115. In addition, the Recirculated SED indicates that the voluntary agreements would increase Delta outflow in the January to June period by only 130,000 acre-feet per year on average, an approximately 1.1 percent increase. *Id.* at 13-115. However, the Revised Draft Plan does not ensure or require that the voluntary agreements actually increase Delta outflow in the January to June period compared to baseline conditions, and winter-spring outflow under the voluntary agreements is likely be lower than baseline conditions if new water rights, such as Sites Reservoir or Delta Conveyance Project, are approved, which would increase the risk of harmful algal blooms.

Equally important, under baseline conditions harmful algal blooms are impairing beneficial uses, including recreation and Tribal Beneficial Uses, and the Recirculated SED fails to demonstrate that these uses will not be impaired under the Revised Draft Plan. For instance, the State Water Board admits that adoption of the Revised Draft Plan may cause significant adverse environmental impacts to recreation as a result of “increased frequency” of closures of Delta channels to recreation because of increased harmful algal blooms. Recirculated SED at 13-226. Similarly, the Recirculated SED admits that increased harmful algal blooms could impair Tribal and Cultural beneficial uses. *Id.* at 13-234. And the State Water Board also admits that,

While there are guidelines available that identify thresholds of cyanotoxins associated with adverse health impacts, there are no specific water quality objectives yet for these compounds to protect human health when contacting water or consuming fish or shellfish. Any water quality objectives or implementation measures that would be developed in the future for cyanotoxins are not necessarily the result of CUL designations. . . . **It is likely that water quality control measures for HABs are needed to protect other existing beneficial uses such as REC-1.**

Recirculated SED at 13-234 (emphasis added). Thus, under baseline conditions, harmful algal blooms are impairing other beneficial uses, and measures are required to improve baseline conditions to reduce the frequency and extent of harmful algal blooms.

Already, harmful algal blooms are causing substantial adverse effects to Delta communities. Beyond impairing contact and non-contact recreational beneficial uses, harmful algal blooms alienate communities from local waterways environment in their backyard. As discussed above, they pose particular risks to unhoused communities and other vulnerable members of the public at high risk of coming into contact with toxic blooms. They suppress Tribal ceremony, fish consumption, and other water-based practices essential to Tribal culture

and identity. And they aggravate risks to the public health by degrading water quality and contributing to degradation of air quality in overburdened areas.¹⁸

However, instead of proposing changes to water quality objectives in the Revised Draft Plan that would be adequate to protect other beneficial uses from the harmful effects of harmful algal blooms, as noted above, the State Water Board's proposed mitigation measures largely focus on expanded water quality monitoring for harmful algal blooms and requires certain scientific studies, which could be used in the future "during the periodic review process to determine whether changes are needed to the Bay-Delta Plan or its implementation to address HABs." Recirculated SED at 13-37 to 13-39. These mitigation measures would not address the flow and water quality conditions that cause the formation of harmful algal blooms, nor would these mitigation measures reduce or ameliorate the proliferation of harmful algal blooms in the Bay-Delta that impair beneficial uses.

Nor does the Revised Draft Plan include specific water quality criteria that are adequate to protect human health from harmful algal blooms. In 2019, the U.S. Environmental Protection Agency issued recommended criteria under section 304(a) of the Clean Water Act to protect human health for microcystins and cylindrospermopsin, identifying recommended concentrations that would protect swimming and other water-borne recreation. Evn't Protection Agency, Recommended Human Health Recreation Ambient Water Quality Criteria or Swimming Advisories for Microcystins and Cylindrospermopsin, 84 Fed. Regs. 26413 (2019). Under the Clean Water Act, the State Water Board must either adopt these EPA recommended criteria for HABs, or provide a reasonable explanation for not doing so that is consistent with the Clean Water Act. *See id.* at 26414; 40 CFR § 130.20(a). The Board has done neither.

The State Water Board can and must do better. It is simply unconscionable to adopt a voluntary agreement pathway that is likely to worsen the conditions that lead to harmful algal blooms compared to the already degraded baseline that fails to protect beneficial uses from the effects of harmful algal blooms. The State Water Board should establish a water quality objective, based on the best available science, that protects human health from harmful algal blooms, and it must revise the flow and other measures in the Revised Draft Plan that meaningfully reduces the frequency and extent of harmful algal blooms that impair other beneficial uses and threaten human health.

¹⁸ *See* Plaas, *supra*.

C. The Revised Draft Plan Fails to Reasonably Protect Tribal Beneficial Uses

Finally, while DTEC appreciates that the State Water Board proposes to designate Tribal Beneficial Uses in the Bay-Delta watershed, the Revised Draft Plan fails to reasonably protect Tribal Beneficial Uses.

The Revised Draft Plan recognizes the significance that salmon and other fish and wildlife have for “cultural, spiritual, ceremonial, and traditional rights and lifeways of Tribes in the Bay-Delta watershed.” Revised Draft Plan at 10. However, the State Water Board has defined the reasonable protection of Tribal Beneficial Uses to be the same as the reasonable protection of fish and wildlife uses, *id.*, and the Revised Draft Plan does not consider the designation of Tribal Beneficial Uses to justify additional measures to protect and restore native fish and wildlife in the Bay-Delta watershed. *See* Recirculated SED at 13-231 (“the CUL beneficial use does not itself authorize implementation actions aimed at protecting fish populations . . .”). Instead, the Revised Draft Plan simply states that, “Incorporating [Tribal Beneficial Uses] into the Bay-Delta Plan recognizes the tribes’ voices and participation in this process.” Revised Draft Plan at 10. Of course, as discussed *supra*, the State Water Board has failed to fulfill its obligations for meaningful consultation with Tribes under AB 52.

Preventing extinction of fish species and ensuring minimally viable populations of salmon and other fish and wildlife species are important goals, but doing so does not reasonably protect Tribal Beneficial Uses. Tribal cultural, spiritual, and subsistence practices depend on healthy and abundant populations of salmon and other fish species, supporting traditional harvests. Fish populations must be more abundant than merely viable to support Tribal harvests, and as the Recirculated SED admits, recreational and commercial fishing for salmon has been completely closed or severely restricted in recent years because of the failure to reasonably protect fish and wildlife. Recirculated SED at 13-535.

Yet the Revised Draft Plan determines that the voluntary agreement pathway would provide reasonable protection of fish and wildlife if it merely “contributes” to achieving the narrative fish viability objective. *See id.* at 64, 92, 95.¹⁹ Indeed, the newly proposed narrative

¹⁹ To the extent that the State Water Board asserts that the Revised Draft Plan includes a time schedule for achieving the narrative fish viability objective, and that achieving this objective is not required until the year 2050, *see* Revised Draft Plan at 95-96, such an approach plainly violates the federal Endangered Species Act as well as the State Water Board’s obligations under the California Endangered Species Act and Public Trust. The State Water Board has recognized that it is required to take action to conserve (help recover) species listed as threatened or endangered. State Water Board, Water Rights Decision 1644, at 27; Cal. Fish & Game Code § 2052. Allowing for fish populations to remain unviable until the year 2050 plainly would fail to

objectives for Delta outflow, Interior Delta Flows, and Delta inflows are limited to what is necessary to achieve viable fish populations, and do not require actions necessary to achieve healthy and abundant fish populations that support sustainable fisheries. Protecting Tribal Beneficial Uses requires more than merely viable fish populations, but the Revised Draft Plan does not require that the Plan achieve abundant fish populations, nor does it even ensure that viable fish populations are achieved; instead, the Revised Draft Plan requires merely that the voluntary agreements “contribute” to achieving viability. Because the Revised Draft Plan functionally equates reasonable protection of Tribal Beneficial Uses to “contributing” to achieving the fish viability objective, and wholly fails to consider the need for more abundant fish populations to sustain Tribal harvest, the State Water Board has failed to reasonably protect Tribal Beneficial Uses.

Equally important, the Recirculated SED fails to demonstrate that approval of the Revised Draft Plan will achieve the fish viability and salmon protection objectives. Under baseline conditions, fish and wildlife are not reasonably protected and are in “crisis.” Draft SED at 3-112, 3-134. Because the Revised Draft Plan equates fish and wildlife and Tribal Beneficial Uses, Tribal Beneficial Uses are also not reasonably protected under baseline conditions.

Yet as discussed herein and in other comment letters, the voluntary agreement pathway would at best maintain the degraded baseline, and it is likely to worsen conditions for fish and wildlife in the future, particularly in light of the effects of climate change and new water diversions. The Recirculated SED admits that Delta outflows under the voluntary agreements would largely achieve the same frequency of meeting ecological flow thresholds, and would actually reduce the frequency of achieving the Longfin Smelt flow threshold, *see* Recirculated SED at 13-211; would worsen Interior Delta flow conditions compared to the degraded baseline, *id.* at 13-109; would not require any measures to ensure suitable water temperatures below upstream dams, even though baseline water temperatures are not “suitable” for salmon in many years and on many rivers; and would actually worsen water temperatures for spawning salmon below Shasta Dam and other dams in the driest 10 percent of years when temperature control is already inadequate, *see id.* at Appendix H1b at H1b-28 (showing the voluntary agreement would increase water temperatures in the Sacramento River at Clear Creek in the months of October and November).

Nor does the State Water Board’s analysis show that habitat restoration would fully offset the reduced Delta outflows, increased Delta pumping and entrainment and loss of fish, and inadequate water temperature control below upstream reservoirs provided under the voluntary agreement. Instead, spawning habitat is generally not limiting fish populations, so habitat

provide reasonable protection for Tribal Beneficial Uses, which depend on abundant and sustainable fish populations.

restoration is unlikely to result in significant population level benefits; the voluntary agreement would not provide rearing habitat that would meet 25 percent of what is necessary to achieve the salmon doubling objective for the Sacramento and American Rivers, Recirculated SED at 13-208, nor would total instream and floodplain habitat meet 25 percent of what is needed to achieve the salmon doubling objective on the American, Feather, or Sacramento River (for fall-run Chinook salmon), *id.* at H1c-38; and the voluntary agreement generally would not meaningfully increase the frequency of meaningful floodplain inundation events on nearly all rivers in the watershed, *see id.* at Appendix H1c. As the Recirculated SED admits, there is scientific uncertainty about the effects of the proposed habitat restoration, which “**could** result in fisheries-related ecological benefits.” *See id.* at 13-218, 13-539 (emphasis added).

The administrative record demonstrates that the voluntary agreement fails to protect and restore native fish and wildlife and ensure these native fish populations are viable, abundant, and support sustainable fisheries. Instead of reasonably protecting fish and wildlife beneficial uses, the voluntary agreement pathway—which was the product of an incurably exclusionary and discriminatory backroom process—will primarily protect the parties to the voluntary agreements. The State Water Board must reject the voluntary agreement pathway and adopt a water quality control plan for the Bay-Delta that actually protects and restores healthy and abundant populations of fish and wildlife, and the Tribes and communities that depend on them.

V. The State Water Board Has Failed to Comply With CEQA

a. The Recirculated SED Fails to Consider the Whole of the Action

The State Water Board has violated CEQA because neither the Draft SED nor the Partially Recirculated SED analyzes the whole of the action as required by law. *See* Pub. Res. Code § 21065; Cal. Cod. Regs., tit. 14 (“CEQA Guidelines”) § 15378. Instead, the Board has created a fractured and inscrutable set of environmental review documents that: fail to evaluate a complete range of regulatory alternatives alongside the new proposed project using common metrics; fail to evaluate the newly proposed project as a whole; and fail to analyze the entirety of the integrate Bay-Delta Plan, including objectives and a program of implementation for the lower San Joaquin River and Sacramento/Delta.

First, in the Draft SED, the State Water Board analyzed the potential environmental effects of several alternative unimpaired flow scenarios. Crucially, however, the Draft SED was released before the State Water Board had released its draft Program of Implementation in October 2024, which is an essential component of a water quality control plan. Cal. Water Code § 13050(j). Indeed, the State Water Board explained in November 2023 that after considering public comments on the substitute environmental document, the State Water Board,

will develop and circulate draft proposed Sacramento/Delta changes to the Bay-Delta Plan, including the program of implementation, and will hold a public workshop to receive input. These draft Bay-Delta Plan amendments will include the specific draft regulatory text for the Sacramento/Delta updates to the Bay-Delta Plan itself and will be subject to a full public process.

State Water Board, Revised Notice of Availability and Opportunity for Public Comment, Hearing and Staff Workshops on Draft Staff Report at 5 (Nov. 14, 2023).

The Board has failed to provide the promised “full public process.” Since release of the Draft SED in 2023, the State Water Board issued and then iteratively modified a proposed program of implementation, including through the addition of provisions on water supply adjustments for existing and new water rights. None of this was analyzed in the SED. As a consequence, the public has never had the opportunity to comment on the potential environmental impacts of a complete draft Bay-Delta water quality control plan, including the program of implementation. The State Water Board’s provision of opportunity to comment on the program of implementation under the Porter-Cologne Act does not cure its failure to analyze and provide for public comment on the environmental effects of the Plan as a whole under CEQA. A complete analysis of the entire action is necessary to ensure that “environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.” *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, 47 Cal.3d at 396 (quoting *Bozung v. Local Agency Formation Comm’n*, 13 Cal.3d 263, 283-84 (1975)).

The Partially Recirculated SED does not satisfy the State Water Board’s CEQA obligations. Notably, the Recirculated SED only analyzes the effects of the currently proposed project; it fails to analyze the potential environmental effects of a reasonable range of alternatives, including alternatives that would provide for 55, 65, and 75 percent of unimpaired flow, respectively.²⁰ In addition, the Recirculated SED includes analyses that were never applied to the alternatives in the Draft SED, including considering how frequently certain alternatives would achieve “new flow thresholds” that were developed “[f]ollowing receipt of public comments on the 2023 Draft Staff Report. *See* Recirculated SED at 13-195 to 13-197; *compare* Draft SED at 7.6.2-38 (flow thresholds) *with* Recirculated SED at 13-204 (including new ecological flow thresholds). As the Recirculated SED admits, “Overall, these additional thresholds demonstrate that higher flows than those originally described in the 2023 Draft Staff Report confer benefits for outmigration survival or population growth rates.” Recirculated SED

²⁰ While some of the modeling in the appendices includes analyses of other alternatives, including 55 percent of unimpaired flow, the body of the Recirculated SED only analyses the voluntary agreement and 55w/WSA scenarios, and the appendices never analyze the 65 percent alternative from the Draft SED.

at 13-196. Yet despite recognizing that these flow thresholds demonstrate that higher flows are necessary to achieve fishery benefits, the State Water Board has failed to conduct this analysis for the 55 percent, 65 percent, and 75 percent alternatives analyzed in the Draft SED.

Equally important, the Recirculated SED demonstrates that changes to the Bureau of Reclamation's operation of the Central Valley Project significantly alter Delta inflows, Delta outflows, Cold Water Habitat, and Interior Delta flows that would result under the Revised Draft Plan. In particular, these changes reduce Delta outflows that would result under the voluntary agreement or the newly proposed regulatory pathway (55% unimpaired flow with water supply adjustments ("55w/WSA")) scenarios and result in more negative Old and Middle River ("OMR") flows under these scenarios. *See, e.g.*, Recirculated SED at 13-405. Again, the State Water Board has failed to analyze the effects of these changes on each of the alternatives analyzed in the SED, including the 55 percent and 65 percent unimpaired flow alternatives.

Changes to essential metrics between the Draft and Partially Recirculated SED further undercut the Board's attempt to provide a complete analysis by slotting in Chapter 13 rather than revising and recirculating the full SED. For instance, the Board has changed the environmental baseline between the Draft SED and Recirculated SED. *Compare* Draft SED at 7.6.2-37 (showing that under baseline conditions in the Draft SED, median X2 is located at 68 km) *with* Recirculated SED at 13-313 to 13-316 (showing that under baseline conditions in the Recirculated Draft SED, median X2 is located at 69 km). In other places, the Recirculated SED's analysis of flows under the voluntary agreements includes flows from the San Joaquin River, Tuolumne River, or lower San Joaquin River flow objectives (*e.g.*, Recirculated SED at 13-204) even though those flows were excluded from similar analysis in the Draft SED, biasing the analysis and making it appear that flows under the voluntary agreements perform better than the other unimpaired flow alternatives.

Because the State Water Board never analyzed the whole of the action—that is, a Bay-Delta Water Quality Control Plan that includes proposed beneficial uses to be protected, water quality objectives, a program of implementation (Cal. Water Code § 13050(j))—for a complete range of alternatives (including 55, 65, and 75 percent unimpaired flow alternatives), the State Water Board has violated CEQA.

Second, the new Chapter 13 fails to consider the environmental effects of the entire project: adoption of a voluntary agreement for specific water rights holders alongside a 55w/WSA flow scenario for all other water rights holders who are not part of the voluntary agreement. As the Recirculated SED admits,

The SacWAM modeling of the VA scenario is focused on the HRL flow commitments **and does not explicitly model the provision of additional flows**

from water right holders on the regulatory pathway that are not part of the VA pathway.

Recirculated SED at 13-50 (emphasis added). It is impossible for the State Water Board, let alone the public, to understand how Delta inflows and outflows resulting from adoption of the proposed project would compare to flows under the voluntary agreement pathway alone, even though this regulatory pathway is part of the proposed project.²¹

To comply with its duties under CEQA, the Board should have recirculated the entire SED with an updated evaluation of the project as a whole alongside a complete range of alternatives to provide decisionmakers and the public an informed view of the tradeoffs. Instead, differences in the analyses and baseline between the Draft SED and Partially Recirculated SED make it impossible to meaningfully compare alternatives. The Recirculated SED does not even attempt to compare the results of the proposed project with the unimpaired flow alternatives so that the public and decisionmakers can clearly see how the alternatives compare to each other and the proposed project.²² While the Partially Recirculated SED includes analyses comparing the voluntary agreements or 55w/WSA scenario with baseline, the Recirculated SED never compares these scenarios with the 55 percent of unimpaired flow, 65 percent of unimpaired flow, or 75 percent of unimpaired flow alternatives considered in the SED. As a result, the reader cannot easily—if at all—assess how the voluntary agreement pathway compares to the other alternatives.

Third, the Board has unlawfully piecemealed the environmental review of the entire Bay-Delta Plan update by segmenting environmental review of the lower San Joaquin/Southern Delta update from the Sacramento/Delta update. As the revised Plan itself admits, the two components form interrelated parts of an overall plan for an integrated watershed. *See, e.g.*, Revised Plan at 7 (“The most recent updates to the Bay-Delta Plan and the 2018 updates to the Bay-Delta plan are intended to work together to provide for the comprehensive update of the Bay-Delta Plan.”) And the two sets of objectives are inseparably intertwined in their function and environmental effects. *See, e.g.* Recirculated SED at 13-19 (“The required Delta outflow would be calculated by adding up the applicable required inflows from the Sacramento/Delta tributaries, including an equivalent amount of Sacramento River Valley Floor and Delta accretions, and required lower San Joaquin River flows making appropriate adjustments for natural losses.”). And although the 2009 and

²¹ In addition, the Recirculated SED does not model or analyze all the recent changes to the Bureau of Reclamation’s operations of the CVP resulting from the 2024 biological opinions, as well as from the changes imposed in 2025 as a result of the adoption of Action 5. *See* Recirculated SED at 13-48.

²² Similarly, the Draft SED fails to compare the analysis of the voluntary agreement alternative with the other alternatives, relegating the analysis of the voluntary agreement to a separate chapter, and it likewise never presents model results for all the alternatives in a single table, such as the frequency of achieving certain ecological flow thresholds.

2012 Notices of Preparation purported to phase environmental reviews, they identified updates to the “water quality objectives and the program of implementation in the Bay-Delta Plan” as the complete project under consideration. 2009 NOP at 3; *see also* 2012 NOP at 4 (notifying the public “that the State Water Board intends to prepare a SED for the comprehensive review of the 2009 Bay-Delta Plan, which will evaluate potential modifications to current, and establishment of new, objectives and the program of implementation for those objectives”). Yet the Board has never comprehensively analyzed the environmental effects of this entire interrelated action. Its failure to do so compromises informed decision-making and constitutes a classic violation of CEQA’s proscription on piecemeal environmental review. *See, e.g., Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4th 1214, 1229 (2007) (“[W]hen one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project.”)

The Board’s failure to provide a complete environmental review document that evaluates the entirety of the action and a reasonable range of alternatives using common metrics undercuts CEQA’s public information mandate and vitiates “informed self-government.” *Laurel Heights*, 47 Cal.3d at 392.

b. The State Water Board Has Violated CEQA Because the Notice of Preparation Fails to Accurately Describe the Proposed Project

The State Water Board further violates CEQA because neither its initial 2009 Notice of Preparation (“2009 NOP”) nor its Supplemental Notice of Preparation issued in 2012 (“2012 NOP”) accurately describes the proposed project, its geographic scope, and probable environmental effects. *See* CEQA Guidelines § 15082(a)(1). As discussed in Section III below, this CEQA violation is particularly damaging because the Board relies on it to avoid its obligations to conduct meaningful government-to-government consultation with Native American Tribes as required by Assembly Bill (AB) 52.

First, the proposed project in the Recirculated SED has changed dramatically from what was described in the 2009 NOP and 2012 NOP. In the 2009 NOP, the State Water Board described the project as a review and update of water quality objectives, including flow objectives, and the program of implementation, although the notice only sought comments concerning water quality objectives for South Delta Salinity and San Joaquin River flow objectives. 2009 NOP at 2. The 2012 NOP likewise explained that the proposed project is a review of potential changes to current objectives in the 2006 Bay-Delta Plan, potential adoption of new objectives, and modifications to the program of implementation for those objectives, focused on the comprehensive review of the Bay-Delta Plan, excluding South Delta salinity and San Joaquin River flow objectives. 2012 NOP at 2, 6. The 2012 NOP further explained that the 2009 staff report, which evaluated potential changes to the Bay-Delta Plan,

recommended further review of the following issues: (1) Delta outflow objectives, (2) export/inflow objectives, (3) Delta Cross Channel Gate closure objectives, (4) Suisun Marsh objectives; (5) potential new reverse flow objectives for Old and Middle Rivers; (6) potential new floodplain habitat flow objectives; (7) potential changes to the monitoring and special studies program; and (8) other potential changes to the program of implementation.

2012 NOP at 3. Similarly, the 2012 NOP explained that

Specifically, the State Water Board seeks input and information to support whether the water quality objectives and associated program of implementation discussed above should be modified or whether they should remain the same. In particular, the State Water Board seeks input and information to support whether Delta outflows, Delta inflows, and water project operational constraints should be increased, decreased, or remain the same.

Id. at 4.

Even as the State Water Board was holding public workshops on the Bay-Delta Water Quality Control Plan, the State of California was simultaneously engaging since at least 2016 in extensive confidential, nonpublic negotiations with water contractors and water rights holders over voluntary agreements for the Bay Delta Water Quality Control Plan. Those negotiations excluded all Native American Tribes, all environmental justice organizations, most conservation groups, and all members of the public. And the State required participants to sign nondisclosure agreements, furthering shrouding deliberations in secrecy. Those exclusionary negotiations led to a framework proposal for a voluntary agreement submitted by the California Natural Resources Agency to the State Water Resources Control Board in 2018, a voluntary agreement submitted by the California Department of Water Resources and California Department of Fish and Wildlife in March 2019, and a memorandum of understanding for the voluntary agreements submitted in 2022.

While the 2023 Draft SED included the voluntary agreements as an alternative in a standalone chapter, the Partially Recirculated SED makes the voluntary agreements the proposed project to be adopted as an adjudicatory settlement under section 11415.60 of the Government Code.²³ *See, e.g.*, Recirculated SED at 13-1 to 13-2, 13-20; Revised Draft Plan at 61. The

²³ As explained at length in DTEC's January 2025 comments on the prior Draft Bay-Delta Plan, the Legislature adopted Government Code section 11415.60 to codify implied agency dispute resolution. The State Water Board exceeds Legislative authorization by relying on this provision to allow water rights holders to contract around the regulatory update to water quality control

proposed project would thus provide for vague commitments to restore physical habitat in lieu of the measurable improvements in instream flow required by other alternatives in the Draft Revised Plan.

Moreover, in the Recirculated SED, the State Water Board admits that the majority of water rights holders in the Bay-Delta watershed are parties to the voluntary agreements, such that little or no additional flow would occur if the voluntary agreement pathway were adopted. The Recirculated SED does not even model whether additional flows by non-parties would occur if the voluntary agreement pathway is adopted:

The SacWAM modeling of the VA scenario is focused on the HRL flow commitments and does not explicitly model the provision of additional flows from water right holders on the regulatory pathway that are not part of the VA pathway. **The water rights identified in Appendix B.1 constitute the majority of the water diverted and used within the Sacramento/Delta watershed.** While some additional flows would be expected under the VA pathway from water rights not included in Appendix B.1 that are on the regulatory pathway the resulting flows and effects would fall between the results of the VA pathway and the regulatory pathway and **would be much closer to the VA pathway results.**

Recirculated SED at 13-50 (emphasis added). Thus, the Revised Draft Plan proposes that the voluntary agreement pathway effectively is the only action to define and implement the water quality objectives in the Plan.

However, neither the 2009 NOP nor the 2012 NOP notified the public and other agencies of these exclusionary negotiations over a proposed voluntary agreement, nor did either notice identify the voluntary agreement pathway that resulted from these exclusionary negotiations as the proposed project. To the contrary, the 2012 NOP explicitly states that, “The proposed Project does not include amendments to water rights and other measures to implement a revised Bay-Delta Plan. A separate Environmental Impact Report will be prepared for these actions.” 2012 NOP at 6. Despite this assurance, the proposed project now includes this voluntary agreement pathway to implement a revised Bay-Delta Plan and purports to analyze it through the SED, such that a separate Environmental Impact Report would not be prepared to analyze implementation of these measures.

The State Water Board has issued numerous notices under the Porter-Cologne Act notifying the public of the significant changes in the proposed project resulting from the consideration of voluntary agreements, including notices dated January 5, 2023, January 19, 2023, September 28, 2023, and March 8, 2024. Still, the State Water Board has failed to issue a

standards required by the Porter-Cologne Act and Clean Water Act. *See* DTEC Comments on Draft Bay-Delta Plan at 15-16 (Jan. 10, 2025).

supplemental Notice of Preparation to notify the public and agencies, despite the significant changes to the project that have occurred. Because the 2009 NOP and 2012 NOP fail to accurately inform the public and decision-makers regarding the description of the proposed project, including the contemplated adoption of a voluntary agreement pathway to implement the revised Bay-Delta Plan without a separate Environmental Impact Report, the State Water Board violates CEQA's noticing requirements. CEQA Guidelines § 15082.

Adding to the unlawful omission of voluntary agreements from the NOPs, the Board has made other significant changes to the defined scope of the project without issuing a revised NOP for the changed project. For instance, the Revised Draft Plan now includes a proposed Cold Water Habitat objective, which is intended to affect the operation of upstream reservoirs by ensuring that they retain sufficient cold water in storage and provide suitable water temperatures to protect salmon and other native fish species. Revised Draft Plan at 17. While DTEC strongly supports improved temperature management to protect and restore salmon and other native fish species, neither the 2009 NOP nor the 2012 NOP notified the public and responsible agencies that changes to reservoir operations and temperature management in the upper watershed were part of the proposed project. *See* 2012 NOP at 3, 4. Similarly, neither the 2009 NOP nor 2012 NOP notified the public that the proposed project would include physical habitat restoration—particularly habitat restoration in lieu of instream flow. Again, while DTEC supports habitat restoration and emphasizes the importance of including Tribes in habitat restoration measures to provide for respectful exercise of Tribal Ecological Knowledge to inform effective habitat restoration, DTEC strongly opposes substitution of habitat for flow—which lacks basis in both TEK and Western science. Neither Notice of Preparation notified the public that physical habitat restoration was being considered for inclusion as part of the proposed project.

Second, the geographic scope of the proposed project is also inconsistent with the Notices of Preparation issued by the State Water Board. The 2012 NOP described the project location as the Sacramento-San Joaquin Delta, and it explained that “[t]he area of potential environmental effects” encompassed the watershed of the Bay-Delta. 2012 NOP at 6. It further explained that “a separate SED is being prepared to address updates to the water quality objectives for . . . San Joaquin River flow objectives for the protection of fish and wildlife,” *id.*, and that the State Water Board was not soliciting public comments regarding San Joaquin River flow objectives in response to the notice of preparation, *id.* at 2.

In contrast, the proposed project now includes “flow and habitat restoration commitments to be provided within the following watersheds: the Sacramento River, Feather River, Bear River, Auburn Ravine, Yuba River, American River, Putah Creek, Mokelumne River, Friant area, and the Delta.” Revised Draft Plan at 64; *see* Recirculated SED at 13-20. In addition, the proposed project also includes the management of flow from the San Joaquin River; the voluntary agreement includes “San Joaquin River Restoration Program (SJRRP) flows of up to

50 TAF,” based on a proposed voluntary agreement with the Friant Water Authority. Revised Draft Plan at 71. Rather than simply causing effects throughout the watershed, the proposed project now specifically includes actions throughout the watershed, including flow and habitat restoration, that were not mentioned in the notices of preparation. And even though the 2012 NOP specifically did not include flows from the San Joaquin River and did not seek comments on management of San Joaquin River flow objectives, the proposed project now includes the management of flows from the San Joaquin River. As explained above, the State Water Board has plainly designed the two phases of the Bay-Delta Plan updated to comprise an interrelated whole, but it failed to plainly say so in its notices of preparation or to consider integral components in a single environmental review evaluated their combined effects.

Similarly, the Cold Water Habitat objective in the proposed Bay-Delta Plan now specifically requires implementation of actions to manage carryover storage at, and water temperature below, upstream reservoirs in the Sacramento, Feather, and other rivers, which is outside the geographic scope of the project location in the Notices of Preparation (the Sacramento-San Joaquin Delta). While the 2012 NOP included the Sacramento River and other parts of the watershed as part of the “area of potential environmental effects,” these areas were not included in the geographic scope of the project in the Notices of Preparation, whereas now the proposed project specifically includes actions in these upstream areas.

Because the project has changed substantially from that described in the Supplemental Notice of Preparation issued in 2012, the State Water Board must issue a revised Notice of Preparation to comply with CEQA. As discussed below, remedying this violation is critical to ensure meaningful consultation with Native American Tribes, as required by law.

c. The Partially Recirculated SED Fails to Accurately Assess the Effects of the Proposed Project and Alternatives on Harmful Algal Blooms, and the Proposed Mitigation Measures Fail to Reduce these Impacts to a Less Than Significant Level

In the Partially Recirculated SED, the State Water Board admits that adoption of the Revised Draft Plan may cause potentially significant environmental impacts because of the proliferation of harmful algal blooms in the Delta, which can threaten human health and safety. Recirculated SED at 13-356, 13-411. However, as discussed above, the State Water Board has failed to accurately and adequately assess the likely effects of the Revised Draft Plan on harmful algal blooms, and the impacts are likely to be much more significant than identified in the Partially Recirculated SED. Equally important, the mitigation measures proposed in the Bay-Delta Plan, which largely comprise increased HAB monitoring and special studies, fail to reduce the impacts from harmful algal blooms to a less than significant level.

For instance, the modeling and analyses used in the Draft SED and Recirculated SED fail to account for the effects of climate change, which is likely to exacerbate the frequency and extent of harmful algal blooms in the Delta because climate change is increasing air and water temperatures, and increasing the frequency and severity of drought conditions. Yet the State Water Board's modeling uses historic hydrology and climatology, *see* Draft SED, Appendix A1, at A1-1 to A1-2, even though climate change has already significantly affected hydrology and temperatures compared to what occurred decades ago during the modeling period. The Recirculated SED appears to lack any modeling of water temperatures in the Delta, and thus ignores the effects of climate change in increasing water temperatures and increasing the formation of harmful algal blooms in the Delta; similarly, the Recirculated SED appears to ignore potential changes in turbidity (water clarity) from changes in flow, even though it is well understood that decreased turbidity (increased water clarity) would likely increase the frequency and extent of harmful algal blooms. And the modeling fails to account for changes in instream flows that are resulting and will result from climate change compared to historic conditions. By contrast, other state and federal agencies do not use historic hydrological and meteorological data but instead use climate-transformed historic data to account for the effects of climate change that have already been observed, as well as those expected over the coming years.

Similarly, the modeling used in the Draft SED and Partially Recirculated SED fails to account for reasonably foreseeable reductions in Delta inflows and outflows compared to what was modeled in the documents. The Recirculated SED recognizes that reductions in Delta inflow and outflows, either during the January-June period or in the summer/fall months, would likely increase the frequency and extent of harmful algal blooms. Recirculated SED at 13-355 to 13-366. And yet, the Recirculated SED fails to accurately assess changes in flows that are likely to result if the Revised Draft Plan is adopted.

For instance, the modeling appears to completely ignore the use of Temporary Urgency Change Petitions, which have been used in numerous years over the past decade to weaken or waive water quality objectives in the Delta, particularly Delta inflow and outflow objectives. Thus, approving Temporary Urgency Changes under the voluntary agreement pathway likely would result in less Delta outflow than under baseline conditions, particularly during drier years, which would increase the frequency and extent of harmful algal blooms. The Revised Draft Plan and Recirculated SED fail to address this important aspect of the problem. Under the Revised Draft Plan, neither the voluntary agreement nor the regulatory pathway prohibits the use of Temporary Urgency Change Petitions to weaken or waive water quality objectives during future droughts. And as the State Water Board has recognized, the U.S. Bureau of Reclamation has already adopted plans to not merely continue to rely on the use of Temporary Urgency Change Petitions to weaken Delta outflow requirements in the coming years, but to do so "on a consistent and prolonged basis." *See* letter from State Water Board to the U.S. Bureau of Reclamation RE Action 5 Assumptions and Environmental Compliance at 2, 5, 7 (Nov. 10,

2025), available at <https://www.politico.com/f/?id=0000019a-eb2b-d516-affe-ffffdf990000>. Yet despite recognizing that the use of temporary urgency change petitions is a problem—particularly for the voluntary agreement pathway, given that it largely maintains the status quo—and despite recognizing that the Bureau of Reclamation plans to use Temporary Urgency Changes on a “consistent and prolonged basis,” the Recirculated SED wholly fails to consider this important aspect of the problem.

In addition, the modeling of Delta inflows and outflows fails to adequately account for future water diversions, like proposed Delta Conveyance Project and Sites Reservoir. The Recirculated SED admits that approval of these projects could “further reduce” Delta outflows. Recirculated SED at 15-406. Approval of these and other future water supply projects could reduce Delta outflows by hundreds of thousands of acre feet. *Id.* at 15-406 to 15-408. However, the Recirculated SED never actually models the likely Delta outflows that would occur if these and/or other projects are approved. It never models how much of the Delta outflow would be required under the proposed plan amendments and how much of the Delta outflow would be uncontrolled flows that could be diverted in the future with new infrastructure.²⁴ And it never demonstrates that Delta outflows would be greater than baseline conditions—which the document repeatedly concludes is what will result from adoption of the Revised Draft Plan—if these or other water supply projects are approved. In fact, if either or both of the Delta Conveyance and Sites Reservoir projects are approved, Delta outflows in the January to June period will almost certainly be reduced compared to the degraded baseline conditions.

As a result, the record fails to demonstrate that Delta outflows are likely to increase compared to the degraded baseline, despite the conclusions in the Recirculated SED, nor does the Revised Draft Plan require that Delta outflows increase compared to baseline conditions. Taken together, these flaws demonstrate that the State Water Board has failed to adequately consider and analyze the effect of the proposed project on the frequency and extent of harmful algal blooms.

Finally, while the Recirculated Draft admits that approval of the proposed project is likely to result in harmful algal blooms that cause a significant environmental impact to Recreation under CEQA, the proposed mitigation measures fail to reduce these impacts to a less than significant level. The proposed mitigation measures largely focus on expanded water quality monitoring for harmful algal blooms and requires certain scientific studies, which could be used in the future “during the periodic review process to determine whether changes are needed to the

²⁴ As discussed above, potential new waters include both water storage and conveyance projects like Sites Reservoir and the Delta Conveyance Project as well as major new sources of water demand, such as burgeoning AI-driven data centers. See *Restore the Delta, The Environmental Justice Implications of Artificial Intelligence Infrastructure in the Sacramento-San Joaquin Delta*, *supra*.

Bay-Delta Plan or its implementation to address HABs.” Recirculated SED at 13-37 to 13-39. While DTEC supports expanded monitoring and special studies regarding harmful algal blooms, these mitigation measures would not address the flow and water quality conditions that cause the formation of harmful algal blooms, nor would these mitigation measures reduce or ameliorate the proliferation of harmful algal blooms in the Bay-Delta that impair beneficial uses. Because the mitigation measures are not designed to and would not reduce the frequency or extent of harmful algal blooms, the State Water Board has failed adopt all feasible mitigation to reduce these impacts to a less than significant level as CEQA requires.

d. The State Water Board Has Failed to Adequately Consider and Mitigate Cumulative Impacts

While the State Water Board recognizes that future water supply projects like the Delta Conveyance Project and Sites Reservoir could “further reduce” Delta outflows, the Partially Recirculated SED fails to disclose that adoption of the Revised Draft Plan is likely to result in significant cumulative impacts, and the measures proposed to “reduce possible cumulative impacts” fail to reduce those impacts to a less than significant level. New water supply projects like the Delta Conveyance Project and Sites Reservoir could reduce Delta inflows and outflows compared to baseline conditions, and adversely affect Interior Delta Flows and Cold Water Habitat objectives, worsening conditions for fish and wildlife and other beneficial uses that depend on healthy fish populations, including Tribal Beneficial Uses.

The Recirculated SED asserts that other provisions of the Revised Draft Plan, particularly provisions that would defer what water supply adjustments apply to these and other water rights granted on or after December 31, 2025, would reduce this to a less than significant level. *See* Recirculated SED at 13-408 to 13-409; Revised Draft Plan at 46. However, neither these nor other measures in the Revised Draft Plan require that the Delta inflows, Delta outflows, or Interior Delta Flows identified in the Recirculated SED actually occur if new water supply projects are approved, nor does the Revised Draft Plan require that Delta inflows and Delta outflows be greater than baseline conditions if these future water supply projects are approved. For instance, the Recirculated SED asserts that these measures “would prevent Delta outflow levels from being reduced to levels close to the [Minimum Required Delta Outflow].” Recirculated SED at 13-213. However, the Minimum Required Delta Outflow would be millions of acre feet less Delta outflow than baseline conditions, and under the Minimum Required Delta Outflow nearly all of the ecological flow thresholds for fish are never achieved. *See id.* at 13-204.

Under baseline conditions, multiple fish species “are in crisis.” Draft SED at 3-134. Reducing Delta inflows and outflows below baseline conditions as a result of approval of the Revised Draft Plan and new water supply projects would constitute a significant cumulative

adverse environmental impact under CEQA, as the record demonstrates that further reducing Delta inflows and outflows is likely to further reduce the abundance and productivity of species listed under the California Endangered Species Act to less than self-sustaining levels. CEQA Guidelines § 15065(a)(1). The measures proposed in the Revised Draft Plan, including provisions regarding future permit conditions for new water supply projects, fail to ensure that the cumulative effect of the Revised Draft Plan is an increase in Delta inflows and Delta outflows compared to baseline conditions. Because the proposed measures fail to reduce this impact to a less than significant level, the State Water Board has violated CEQA.

e. The State Water Board Has Failed to Adequately Consider the Effects of the Trump Administration’s Lack of Support for the Voluntary Agreement

The Recirculated SED assumes that the U.S. Bureau of Reclamation will fully fund and implement the voluntary agreements. The Bureau of Reclamation is a necessary party to the voluntary agreements because it operates diversion facilities in the Delta and numerous upstream reservoirs covered under the Revised Draft Plan, it holds water rights that are essential to implement the voluntary agreement pathway, and it would need to contribute substantial funding to implement the voluntary agreements. Yet the U.S. Bureau of Reclamation has not committed to implement the voluntary agreements, it has proposed operations of the Central Valley Project that are inconsistent with the Revised Draft Plan, and Appendix A1 of the Revised Draft Plan does not include key Bureau of Reclamation water rights that would be necessary to implement the voluntary agreement pathway. As such, the State Water Board has failed to adequately consider whether the voluntary agreement pathway is financially, contractually, or operationally viable. It has also failed to evaluate the environmental impacts if the Department of Water Resources or other parties to the voluntary agreements were to seek to implement a revised proposal without the participation of the Bureau of Reclamation.

While the Recirculated SED *assumes* that the Bureau of Reclamation will participate in the voluntary agreements, the water rights included in Appendix B1 make participation ambiguous. For instance, numerous contractors to the Central Valley Project are proposed to participate in the voluntary agreements, including Sacramento River Settlement Contractors, Sacramento River water service contractors, American River water service contractors, and Central Valley Project contractors that receive water from the Delta. However, Appendix B1 excludes the water rights held by the U.S. Bureau of Reclamation on the Sacramento River. Revised Draft Plan, Appendix B1 at B1-84 to B1-94. In addition, Appendix B1 appears to erroneously include numerous claimed water rights on the Sacramento River that have been settled in exchange for contracts with the U.S. Bureau of Reclamation. *Id.* The contractors to the Central Valley Project generally lack sufficient control over the facilities and water diversions of the Central Valley Project to be able to compel the implementation of the voluntary agreements if

the Bureau of Reclamation refuses to participate. The State Water Board has failed to consider this important aspect of the problem.

Nor has the Bureau of Reclamation committed to participate in the voluntary agreements. Indeed, as part of adopting Action 5 in 2025, the Bureau of Reclamation eliminated requirements in the 2024 biological opinions to implement provisions of the voluntary agreement.²⁵ Recirculated SED at 13-48. Action 5 would also harm fish and wildlife in the Delta and conflict with the proposed voluntary agreements. As the State Water Board commented to the Bureau of Reclamation,

Action 5 assumes regular relaxations of D-1641 and significant changes to CVP 2024 LTO operations (described further below) that were not contemplated in the analyses performed by the State Water Board for the [voluntary agreement]. In addition, these changes would impact the accounting for the HRL in ways that have not been contemplated that would create significant complications.

State Water Res. Control Bd., Letter to Adam Nickels, Action Regional Director, U.S. Bureau of Reclamation, RE Action 5 Assumptions and Environmental Compliance (Nov. 10, 2025).²⁶ Indeed, under Action 5 the Bureau of Reclamation assumes expanded use of Temporary Urgency Change Petitions to waive water quality objectives, *id.* at 2, but the Recirculated SED fails to consider the effects of such waivers of water quality objectives as part of the voluntary agreement pathway.

Finally, the Recirculated SED never considers the environmental impacts of a voluntary agreement pathway that excludes the Bureau of Reclamation. Without the participation of the Bureau of Reclamation, it does not appear that flow commitments on the Sacramento River or American River, or the foregone exports in the Delta, would be reasonably certain to occur. However, the Recirculated SED never analyzes the effect of a voluntary agreement pathway that excludes the Bureau of Reclamation, including how the coordinated operations of the State Water Project and Central Valley Project would be accomplished. If, as expected, the Bureau of Reclamation refuses to commit to participating in the voluntary agreements, the State Water Board would need to go back to the drawing board, redoing its plan of implementation and recirculating a revised SED evaluating the environmental impacts of such a proposal to proceed without the Bureau of Reclamation.

²⁵ These problems also occur under Porter-Cologne, where the lack of participation of the Bureau of Reclamation would mean that the voluntary agreement would fail to achieve the Revised Draft Plan's objectives and would be inconsistent with the Program of Implementation.

²⁶ Available at <https://www.politico.com/f/?id=0000019a-eb2b-d516-affd-f990000>.

The significant uncertainty at the core of the proposed program of implementation—regarding how the VA pathway will work, to whom it will apply, how it will function in combination with the regulatory pathway, and to which present and future water rights the regulatory pathway applies—means that the Board has still failed to produce the “accurate, finite, and stable description” of its project that CEQA requires. *Washoe Meadows Cmnty. v. Dept. of Parks & Rec.*, 1 Cal.App.5th 277, 287 (2017). Instead, its unstable and shifting descriptions of the Project meant that “meaningful public participation is stultified,” and the public and the decisionmakers remain in the dark about what version of the proposed project will actually be implemented. *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 656 (2007). For these and the other reasons set forth in the DTEC’s Comments on the SED, the Board’s continued reliance on the VAs with all their uncertainties means that the Board has failed to describe and evaluate the stable project that CEQA requires. See DTEC Comments on SED at 99-101.

CONCLUSION

Thirty years after the current Bay-Delta water quality standards were developed, the Board is finally on the verge of updating standards that have proven incapable of meeting the needs of ecosystem and its communities, particularly in the face of an increasingly erratic climate and the long-overdue recognition of the racism and colonialism baked into water quality and water rights administration. DTEC welcomes the Board’s investment in achieving this long-delayed update. Yet it mourns the many missed opportunities reflected in the Board’s proposal to ensure that it would do consistent with science and the Board’s legal duties, respectful of the role of Traditional Ecological Knowledge in informing sound water governance, consistent with the Board’s commitments to racial equity, and capable of restoring an imperiled ecosystem resilient to the changing climate.

DTEC urges the Board to reconsider its investment in adopting the unlawful and inequitable VAs and to instead proceed with the straightforward adoption of numeric minimum instream flow standards that the science, TEK, and the public support. DTEC urges the Board to finally adopt HABs standard and address this scourge on the health and welfare of the region’s environmental justice communities with the urgency the situation demands. And it urges the Board to make real on its commitment to allow the Delta’s original stewards to reclaim their role in governing the Delta’s water resources in robust cooperation with the State and informed through millennial knowledge of effective watershed governance over changing conditions.

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EXHIBIT A

Comments by the Delta Tribal Environmental Coalition
*Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians,
Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta*

Sacramento/Delta Update to the Bay-Delta Plan
2023 Draft Staff Report and Substitute Environmental Document

January 19, 2024

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INTRODUCTION

Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta, collectively the Delta Tribal Environmental Coalition (“DTEC”), submit the following comments on the Board’s Draft Staff Report for the Phase II Update of the Bay-Delta Water Quality Control Plan (“Staff Report”).

As the Board has acknowledged, current water quality standards for the Bay-Delta fail to protect beneficial and public trust uses, including, among others, Tribal Beneficial Uses; safe recreational access, subsistence fishing, and a healthy environment for disadvantaged Delta communities; and restoration of historically vibrant fisheries. For over a decade, the Board has promised to update outdated 1995 water quality standards to restore Delta waterways and improve the health and integrity of the ecosystem. Although DTEC applauds the Board for moving toward an update after years of delay, the current draft Staff Report neither proposes meaningful water quality protections nor meaningfully advances efforts toward updating the Bay-Delta Plan with the urgency and scope that the ecological crisis in the Delta demands.

Among the many concerns with the draft Staff Report, DTEC’s comments point out that the Report’s environmental analysis does not comply with the California Environmental Quality Act, Public Resources Code section 21000 et seq. (“CEQA”), in multiple respects. The Staff Report, for instance, fails to clearly identify the Board’s proposal for updating the water quality standards, making it challenging for the public to understand and comment on the project, and it defers disclosure and analysis of regulatory text and implementation plans until an unknown future date, rendering actual changes to the damaging status quo illusory. In addition, the Board continues to equivocate on designating Tribal Beneficial Uses despite ample documentation that California Native American Tribes, including members of DTEC, have depended on Delta waterways for sustenance, ceremony, culture, and a broad range of essential uses since time immemorial.

With the Staff Report, the Board also continues its unwarranted delays in reviewing and updating Bay-Delta water quality standards to accommodate exclusionary negotiations of Voluntary Agreements (“VAs”). Despite widespread pushback and clear inconsistencies with legal requirements, the Board continues to advance the VAs as a substitute for minimum instream flow requirements. But the process leading to the creation of the VAs lacks fundamental legitimacy, and the VAs themselves ignore the best available science and are riddled with legal vulnerabilities. Ultimately, the VAs distract from the real work before the Board – updating water quality standards to protect public trust and beneficial uses. By endorsing the flawed VAs rather than updating the Bay-Delta Plan through a public and participatory process, the Board eschews its legal responsibilities and risks further injury to tribes, Delta communities, and Delta ecosystems.

To this end, we urge the Board to adopt the following recommendations:

- Recirculate the draft Staff Report and its Substitute Environmental Document (“SED”) to correct the numerous CEQA deficiencies, which include: the lack of a stable and complete project description; piecemealing of environmental review through the Board’s decision to defer disclosure and analysis of regulatory text and implementation plans; failure to properly identify and assess environmental impacts across the full project area, including the Trinity River and Klamath River Basin; failure to set forth a reasonable range of alternatives, including an alternative that

would be protective of public trust resources; and failure to adequately assess the significant environmental impacts of harmful algal blooms.

- Prior to recirculating the draft Staff Report and SED, engage in CEQA-mandated consultation with California Native American Tribes to ensure, among other things, adequate protection of tribal cultural resources.
- Conduct a public trust analysis as required by the legal settlement in *California Sportfishing Protection Alliance, et al. v. California State Water Resources Control Board and Thomas Howard*, Case Number RG15780498, and ample legal authorities.
- Designate Tribal Beneficial Uses on a watershed-wide basis and ensure that the update adequately protects Tribal Reserved Rights.
- Meaningfully incorporate Traditional Ecological Knowledge into water governance through partnership with Tribes rather than “documentation” and extraction of tribal knowledge.
- Provide a complete economic analysis that meaningfully discloses the significant benefits from improved instream flows.
- Adopt a surface water objective to manage the proliferation of harmful algal blooms impacting Delta tribes and communities.
- Adopt a 65 percent unimpaired flow objective with a reasonable adaptive range (permitting inflows/outflows to drop no lower than 60 percent unimpaired flow) together with management strategies that implement a functional flows approach, consistent with the best available science and Traditional Ecological Knowledge.
- Avoid further actions to accommodate the legally flawed Voluntary Agreements in this Bay-Delta Plan update.

Each of these and additional recommendations are discussed in detail below. Through this update, the Board has an opportunity to make good on its duties to update water quality standards in a public, inclusive fashion that realizes the Board’s legal obligations to protect beneficial uses and public trust resources as well as its commitment to centering equity, responding to climate change, and taking meaningful steps to repair the long history of assaults on tribal sovereignty, culture, and resources. So far, the Board has fallen short of these goals. DTEC offers these recommendations in the spirit of assisting the Board in realizing its legal obligations and commitments and restoring a thriving Bay-Delta ecosystem for the benefit of all Californians who rely on these waters and the species and unique ecosystems they sustain.

COMMENTING PARTIES

A. Shingle Springs Band of Miwok Indians

The Shingle Springs Band of Miwok Indians is an Indigenous tribe with ancestral homelands spanning seven counties in Northern California – Sacramento, El Dorado, Amador, Yolo, Placer, Sutter, and Yuba – and the watersheds of multiple Delta waterways, including the Sacramento River, American River, Feather River, Bear River, and Cosumnes River. The Tribe has stewarded and used resources from the Delta for sustenance, medicine, transportation, shelter, clothing, and ceremony, among other cultural, religious, and subsistence uses, since time immemorial.

The 600 present-day members of the Shingle Springs Band of Miwok Indians are descendants of the Miwok and Nisenan Indians who thrived in California's fertile Central Valley for thousands of years before contact with Europeans. The Tribe is also descended from ten native Hawaiians who were forcibly brought to Nisenan territory in 1839 by John Sutter, a Swiss land baron who enslaved hundreds of Indigenous people at his Sacramento Valley ranch. The Tribe's deep connection to Delta waterways was severed when its members were forced from their ancestral villages through colonization, disease, state-sponsored violence, and privatization of tribal land. In 1920, the Secretary of the Interior purchased the 160-acre Shingle Springs Rancheria east of Sacramento in El Dorado County and placed it into trust for the displaced Tribe. This landlocked Rancheria, disconnected from both waterways and roadways, was inaccessible to the Tribe for decades and is far from the waterways that traditionally sustained the Tribe and its way of life.

The Tribe's removal from ancestral waterways eroded its identity, traditional knowledge, and cultural practices. In recent years, the Tribe has been returning to Delta waterways, reclaiming its culture, and healing the alienation of many tribal members from the water. In 2017, the Tribe founded a Traditional Ecological Knowledge program to restore connections to cultural resources, spiritual practices, and traditional ways of life. The program has reeducated tribal members about who they are and where they are from by teaching them how to make regalia, food, clothing, shelter, and modes of transportation from the natural resources found along Delta waterways.

As part of the Traditional Ecological Knowledge program, the Tribe purchased a small tract of land in 2020 at its ancestral village site of Wallok, where the Feather River and the Sacramento River meet. The land is in present-day Verona, California, just north of Sacramento. Despite regaining this limited riparian access to ancestral waterways, the degraded condition of the Delta impedes the Tribe's long-sought reconnection and reeducation efforts. HABs increasingly prevent tribal members from accessing the water for fishing or ceremonial purposes. And traditional riparian resources like tule, a long grassy plant that tribal members use for everything from baskets to boats, either no longer exist or are unsuitable for use because of the polluted state of the water.

B. Winnemem Wintu Tribe

The Winnemem Wintu are an Indigenous tribe whose identity and existence are intertwined with the headwaters of the Bay-Delta. In the Winnemem language, "Winnemem Wintu" translates to "Middle Water People," reflecting the Tribe's identification with its ancestral homelands along the McCloud River lying between the Sacramento and Pit Rivers. Traditionally, the Winnemem Wintu's historical territory spanned the upper Sacramento River and McCloud River watersheds, which provide freshwater flows into the Bay-Delta. These waters have sustained the life and spirituality of the Tribe since time immemorial.

Winnemem Wintu culture and identity are inextricably connected with the Nur, or Chinook salmon, which once flourished in the Bay-Delta's waterways. In the Tribe's creation story, the Nur gave the Winnemem Wintu their voice, and the Tribe in turn promised to always speak for the Nur. The Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speaking for, caring for, and protecting the salmon, and the salmon giving themselves to the Winnemem for sustenance. Ceremonies, songs, dances, and prayers about the relationship between the Nur and the Winnemem Wintu are the fabric of Winnemem Wintu culture, religion, and spirituality.

Damming and diversion of Bay-Delta waters and poor water quality have contributed to the near extinction of Chinook salmon, thereby threatening the continued existence of the Winnemem Wintu as a People. This existential threat layers over centuries of state-supported campaigns and projects to remove the Winnemem Wintu from their historic homelands and divest them of their relationship to the water. These efforts culminated in construction of the Central Valley Project's Shasta Dam in the 1930s and 40s, which flooded over 90% of the Winnemem Wintu's historical village sites, sacred sites, burial sites, and cultural gathering sites while blocking the Nur from migrating into Bay-Delta headwaters to spawn. The continued reliance on Central Valley Project exports and degradation of Bay-Delta water quality impairs the ability of Chinook salmon to reestablish their natural migratory pathways into Winnemem Wintu homelands.

C. Buena Vista Rancheria of Me-Wuk Indians

The Buena Vista Rancheria of Me-Wuk Indians (BVR) is a federally recognized Indian tribe with ancestral homelands spanning six counties, including Sacramento, Amador, San Joaquin, El Dorado, Calaveras, as well as the northern part of Stanislaus County. The Tribe's ancestral lands stretch from the eastern bounds of the Sacramento and San Joaquin River Delta to the western slope of the northern Sierra Nevada mountains. Bay-Delta waters have sustained the Tribe since time immemorial. Significant tributaries and rivers that feed into the San Joaquin and Sacramento River Delta flow through Buena Vista Rancheria territory, including, among others, the Mokelumne, Consumnes, and San Joaquin Rivers.

For the Buena Vista Rancheria of Me-Wuk Indians, Ki-ku (Me-Wuk for water) is the foundation of the world. Me-Wuk and Yokut creation stories describe water as a relation, and tribal members trace family lines through water. Water is understood as connected to all things and a life force of its own. In addition to supporting ecosystems and subsistence uses, water is revered for the pivotal role it plays in the Tribe's spiritual, cultural, and traditional lifeways and practices. The Tribe's traditional village sites were located near waterways, and family lines are still understood to be connected to BVR ancestral land through relations to water and spaces near water.

Today, tribal members continue to rely on water for ceremonial practice and frequently access water from BVR's ancestral lands for ceremony. Water from the Sacred Springs of Buena Vista Peaks, for example, is used by tribal dancers who gather, bathe, and ingest water from the springs before ceremony. Water from these springs is also used for cleansing after tribal burials, in sweat lodges, as a disinfectant for illness, and for irrigating native plants as part of the Tribe's restoration projects. BVR culture, tradition, and ceremony express the sacred importance of water stewardship: water takes care of the BVR people, who must, in turn, take care of the water.

Buena Vista Rancheria of Me-Wuk Indians has survived generations of abuse, neglect, and destructive policies that aimed to destroy tribal existence and forcibly assimilate tribal identity – including the termination era of the 1950s. Today, BVR continues to face ongoing ecological and political threats to its tribal cultural existence. Decades of industrialization across the Mokelumne River and the central Delta around Stockton, including mining, damming, and agricultural development, have contaminated streambeds, disrupted natural flow regimes, and destroyed tribal villages and fishing sites. In recent years, the community has been particularly concerned about runoff from historic mine sites and Delta agricultural development, which continue to contaminate

their waters. Between 201 and 2021, for example, Tribal members were restricted from accessing ceremonial water from the Sacred Springs after e-coli was detected, most likely the result of upstream cattle grazing. In the larger system, Harmful Algal blooms (HABs), poor water quality, and restrictions have continually plagued the Tribe's ancestral waterways. Tribal Ceremonies in the Delta have been prevented due to low flows and HABs, which have, for example, exacerbated the health concerns about gathering and processing of Tule for the annual Tule Boat Races. Low flows have decimated populations of salmon, turtles, crayfish, and other species essential to tribal culture and identity and continue to threaten populations of tule, willow, cottonwood, and other riparian species necessary to the Tribe's cultural practices. Without access to safe, flowing water and all it sustains, the Tribe is severed from the very core of its identity as Me-Wuk and Yokut people.

D. Little Manila Rising

Little Manila Rising is a 501(c)(3) non-profit organization dedicated to bringing multifaceted equity to Stockton, California, a city of 320,000 residents on the eastern edge of the Delta along the San Joaquin River.¹ Stockton is one of the most diverse cities in America,² with a population 44% Hispanic, 21% Asian, 12% Black, and 19% non-Hispanic white.³ About a third of the city's residents live in South Stockton, a historically underserved and under-resourced area where many of the city's Black, Asian, and Latine communities reside.⁴

Little Manila Rising was founded in 1999 to advocate for the historic preservation and revitalization of South Stockton's Little Manila community. Once home to the largest population of Filipinos in the world outside the Philippines, Little Manila was decimated in the 1970s when the California state government, supported by Stockton city officials, constructed the Crosstown Freeway directly through the community, demolishing homes, and displacing residents.

Little Manila Rising continues to advocate for the interests of South Stockton residents through programs addressing education, environment, redevelopment, and public health.⁵ Little Manila Rising recognizes that the health and well-being of the communities it represents are tied to the health and resiliency of the Bay-Delta, and it has frequently engaged the State Water Board on the need to improve water quality standards. These improvements are a critical part of larger efforts to correct the effects of historical marginalization, institutionalized racism, and harmful public policy experienced by South Stockton residents.

E. Restore the Delta

Restore the Delta is a 501(c)(3) non-profit organization based in Stockton, whose mission is to ensure the health of the Bay-Delta so that fisheries, communities, and family farming can thrive there again. Restore the Delta works to protect water quality, improve access to clean waterways, and reduce flood and drought impacts resulting from climate change, particularly in communities of

¹ U.S. Census Bureau, *Quickfacts: Stockton City, California*, <https://www.census.gov/quickfacts/stocktoncitycalifornia> (last visited Nov. 17, 2022).

² Gaby Galvin, *America's Most Diverse City is Still Scarred by its Past*, U.S. News & World Rep. (Jan. 22, 2020), <https://www.usnews.com/news/cities/articles/2020-01-22/stockton-california-americas-most-diverse-city-is-still-scarred-by-its-past>.

³ U.S. Census Bureau, *supra* note 1.

⁴ Galvin, *supra* note 2; see also Michelle Anderson, *The Fight to Save the Town: Reimagining Divided America* 40-41 (2022).

⁵ See Little Manila Rising, *Programs*, <https://littlemanila.org/all-programs> (last visited Nov. 20, 2022).

color. To achieve this mission, Restore the Delta advocates for the interests of local and marginalized Delta stakeholders to ensure that they have a meaningful voice in water management decisions affecting the well-being of their communities.

Many of Restore the Delta's 75,000 members live in or near the Bay-Delta and have a strong personal interest in ensuring healthy freshwater flows to support a thriving ecosystem, safe recreation, safe and sustainable drinking water, and a clean environment. Restore the Delta has advocated before the State Water Board for improved Bay-Delta water quality standards and the restoration of instream flows for over fifteen years.

BACKGROUND ON STATE WATER RIGHTS SYSTEM AND ITS ONGOING TRANSFORMATION OF BAY-DELTA HYDROLOGY

The San Francisco Bay/Sacramento-San Joaquin Delta is a “critically important natural resource for California and the nation.”⁶ Formed by the convergence of California's two largest rivers – the Sacramento and the San Joaquin – the 75,000 square-mile Delta encompasses the “most valuable wetland ecosystem and estuary on the west coast of North and South America.”⁷ Nearly half the surface water in the state starts as rain or snow within the Delta's vast watershed.⁸ When allowed to remain in the system, this water flows through the Delta into the Suisun Marsh and Suisun Bay, emptying into the San Francisco Bay and out into the Pacific Ocean. A diverse range of migratory and resident fish, birds, and other valued wildlife and plants depend on these flows. For instance, two-thirds of California's salmon pass through Delta waters, and at least half of the state's Pacific Flyway migratory birds rely on the Delta's wetlands.⁹

The State of California has transformed the ecology and human tapestry of the Bay-Delta. The Bay-Delta estuary was once a place of natural abundance, teeming with fish and sustaining a broad array of wildlife that Native tribes carefully stewarded for thousands of years. Decades of state-sponsored violence against Native tribes dispossessed tribes of their land and access to Bay-Delta waterways and headwaters. Excessive diversion and export of Bay-Delta waters has led to flows that are insufficient to sustain the fish, plant, and animal species that have adapted to the Bay-Delta's unique estuarine environment.¹⁰ The result is a watershed in a state of ecological and human crisis. Waterways have grown stagnant, fish stocks are plummeting, and harmful algal blooms (HABs) are proliferating.

Anadromous fish are particularly at risk, with multiple native species listed as endangered and on the brink of extinction. For the first time in fifteen years, federal regulators imposed a complete closure in summer 2023 of California's commercial and

⁶ Cal. Wat. Code § 85002.

⁷ *Id.*

⁸ Env't Prot. Agency, *San Francisco Bay Delta: About the Watershed*, <https://www.epa.gov/sfbay-delta/about-watershed> (last visited January 17, 2024).

⁹ *Id.*

¹⁰ See Cal. Water Res. Control Bd., Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and Its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitats, and Interior Delta Flows, at 1-5 (2017) (“The best available science . . . indicates that [existing legal requirements in Revised Water Rights Decision 1641 and biological opinions addressing Delta smelt and salmonids] are insufficient to protect fish and wildlife”).

recreational salmon fisheries off the California coast.¹¹ The California Fish and Game Commission followed suit and enacted a full closure of California’s recreational fishing season in the Klamath River Basin and Central Valley rivers.¹² The closures directly respond to cratering populations of Chinook salmon, which have reached historic lows in abundance. White sturgeon have also experienced dramatic population declines in recent decades because of high levels of freshwater diversions, overharvesting, and persistent algal outbreaks.¹³

Low flows have also driven the increasing proliferation of HABs across the Bay-Delta, posing health risks to exposed humans and animals, including respiratory burdens when hazardous cyanotoxins aerosolize.¹⁴ Native tribes and disadvantaged communities of color in the Bay-Delta and its headwaters bear the brunt of environmental, socioeconomic, and cultural burdens continuing a perpetual cycle of discrimination. As the State Water Board has itself recognized, “[t]he overall health of the estuary is in trouble, and expeditious action is needed on the watershed level to address the crisis, including actions by [the State Water Board].”¹⁵

A. The Unjust Foundations of California’s Current System of Water Rights and Management

Indigenous Peoples have been inextricably linked to the health of the Bay-Delta watershed since time immemorial. For thousands of years, Native Californians have used and stewarded Bay-Delta waters, plants, fish species, and other wildlife.¹⁶ The Delta itself is estimated to have been home to over 10,000 Indigenous residents, comprising four distinct language groups and numerous tribes and communities.¹⁷ Many more tribes and tens of thousands more tribal members lived throughout the San Francisco Bay and Bay-Delta headwaters prior to colonization.¹⁸

Native Californians exercised Traditional Ecological Knowledge to enhance fish habitat, reduce pathogens, and tend to culturally essential species.¹⁹ Stewardship practices included controlled burning for riparian vegetation, food productivity, and sustainable harvest of ecologically important plant species.²⁰ The Shingle Springs Band of Miwok Indians, for example, stewarded and

¹¹ Cal. Dep’t of Fish and Wildlife, *Recreational Ocean, In-River Salmon Fisheries in California to Close for Remainder of 2023*, <https://wildlife.ca.gov/News/Archive/recreational-ocean-in-river-salmon-fisheries-in-california-to-close-for-remainder-of-2023#gsc.tab=0> (last visited Jan. 16, 2023).

¹² *Id.*

¹³ Attachment 2, San Francisco Baykeeper, et al., Petition to the State of California Game Commission to List The California White Sturgeon (*Acipenser transmontanus*) as Threatened under the California Endangered Species Act (CESA) (Nov. 29, 2023) at 5 [hereinafter “Attachment 2”].

¹⁴ See U.S. Ctr. for Disease Control and Prevention, *Facts about Cyanobacterial Blooms for Poison Center Professionals*, <https://www.cdc.gov/habs/materials/factsheet-cyanobacterial-habs.html> (last updated Nov. 28, 2022).

¹⁵ Cal. State Water Res. Control Bd., *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan 4* (2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

¹⁶ Cal. Delta Stewardship Council, Amended Delta Plan Chapter 4: Protect, Restore, and Enhance the Delta Ecosystem, pp. 4-8 to 4-9 (2022).

¹⁷ Zedler & Stevens, *Western and Traditional Ecological Knowledge in Ecocultural Restoration*, 16(3) San Francisco Estuary & Watershed Science, p. 3 (Oct. 2018) (quoting Whipple et al., *Sacramento-San Joaquin Delta historical ecology investigation: exploring pattern and process*, San Francisco Estuary Institute Aquatic Science Center (2012)).

¹⁸ *Id.*

¹⁹ Cal. Delta Stewardship Council, *Amended Delta Plan Chapter 4: Protect, Restore, and Enhance the Delta Ecosystem 4-8* (2022), <https://deltacouncil.ca.gov/pdf/delta-plan/2022-06-29-chapter-4-protect-restore-and-enhance-the-delta-ecosystem.pdf>

²⁰ *Delta Plan Chapter 4 Proposed Amendment* at p. 4-8.

utilized resources throughout Delta waterways, including fish, plants, roots, berries, and other traditional resources found along the rivers. With village sites at the confluence of the Sacramento and Feather rivers, the Tribe considers the Delta waterways its lifeblood, providing them with food, medicine, clothing, shelter, ceremony, and other cultural and spiritual uses.²¹ For millennia, Indigenous Peoples sustainably managed a healthy and vibrant Bay-Delta that supported essential subsistence and cultural practices.

From the mid-1800s, the nascent California state government undertook a brutal campaign to sever Indigenous Peoples' deep connections to Bay-Delta waters, carrying out a program of genocide that forcibly removed Native American tribes from their ancestral lands and The violent removal of Indigenous Peoples from their ancestral lands violated their inherent title to land that they occupied for thousands of years and the water rights that should be attached to that title.²³ As the State Water Board has acknowledged, "white supremacy led to the genocide and forced relocation of Native American people to facilitate white resettlement and the enslavement of Native American and Black people for white economic gain."²⁴ In an 1851 address to the Legislature, for instance, California's first governor proclaimed that "a war of extermination will continue to be waged between the two races until the Indian race becomes extinct."²⁵ The State then provided \$1.29 million in 1850s dollars to subsidize private and militia campaigns against California's Native population.²⁶

Both the State and Federal governments played a direct role in the "program of genocide" against Native tribes that divested tribal communities of their inherent rights to Delta waters.²⁷ In 1850, the newly formed California Legislature passed a law cruelly titled "Act for the Government and Protection of Indians," which removed tribes from their traditional lands, separated Indigenous children from their families, and created a system of indentured servitude as punishment for minor crimes.²⁸ That following year, Congress adopted the California Land Claims Act, which created a two-year window to claim property

²¹ Attachment 1, Shingle Springs Band of Miwok Indians, et al., Title VI Complaint and Petition for Rulemaking for Promulgation of Bay-Delta Water Quality Standards (Dec. 15, 2022), Exhibit E, Attachment A, Declaration of Malissa Tayaba ¶ 2 [hereinafter "Decl. of Malissa Tayaba"].

²² See generally Benjamin Madley, *An American Genocide: The United States and the Californian Indian Catastrophe, 1846-1873* at 23 (2017); see also Cal. State Water Res. Control Bd., Resolution No. 2021-0050: Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism 2 (2021),

https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2021/rs2021_0050.pdf.

²³ See generally *United States v. Adair* (9th Cir. 1983) 723 F.2d 1394, 1413 (recognizing that "uninterrupted use and occupation of land and water created in the Tribe aboriginal 'Indian title' to all of its vast holdings").

²⁴ State Water Resources Control Bd., Resolution No. 2021-0050, ¶ 7(a) (Nov. 16, 2021) (hereafter, "State Water Bd. Anti-Racism Resolution").

²⁵ Office of Governor Gavin Newsom, Executive Order N-15-19 (June 18, 2019), <https://tribalaffairs.ca.gov/wp-content/uploads/sites/10/2020/02/Executive-Order-N-15-19.pdf> (recognizing that "the State historically sanctioned over a century of depredations and prejudicial policies against California Native Americans").

²⁶ Press Release, Off. of Governor Gavin Newsom, *Governor Newsom Issues Apology to Native Americans for State's Historical Wrongdoings, Establishes Truth and Healing Council* (Jun. 18, 2019) (hereafter "Newsom Apology to Native Americans").

²⁷ Benjamin Madley, *An American Genocide: The United States and the Californian Indian Catastrophe, 1846-1873* at 14 (2017) (explaining that state and federal "lawmakers played a key role in th[e] genocide" against Native Californians "by stripping them of legal rights, by making anti-Indian crimes extremely difficult to prosecute, and by refusing to ratify treaties signed by federal agencies and California Indian leaders that could have restrained the violence").

²⁸ Act for the Government and Protection of Indians, 1850 Cal. Stat. 408.

derived from land grants by the Spanish or Mexican governments.²⁹ Because tribes were largely unaware of the Act and its implications, the California Lands Claim Act became another instrument to deny tribes their “legal interest in ... their aboriginal lands.”³⁰

Duplicitous treaty negotiations furthered this dispossession. Between 1851 and 1852, California tribes were compelled to sign 18 treaties with the federal government, ceding their ancestral lands – territory that was presumed to encompass the entire state of California.³¹ In exchange, treaty negotiators promised the tribes – including commenter Winnemem Wintu Tribe – reservations and the benefits that flow from them.

Implicit among these benefits are federal reserved water rights. Had the treaties been ratified, they would have guaranteed ample reserved water rights in perpetuity to signatory tribes. Pursuant to the U.S. Supreme Court’s decision in *Winters v. United States*, 207 U.S. 564 (1908), and its progeny, the federal government’s reservation of land in trust for a tribe implicitly reserves the quantum of water necessary to fulfill the purpose of that trust.³² These federal reserved rights have a priority date going back to the date of reservation, are exempt from appropriation under state law, and, unlike appropriative water rights recognized under state law, cannot be lost or yielded through non-use.³³

But the federal and state governments broke their promises. After lobbying by California legislators and business interests worried about the mineral estate that would be reserved to tribes by the treaties, the U.S. Senate refused to ratify them, instead placing the treaties under an injunction of secrecy for over 50 years.³⁴ Although many of the signatory tribes were unaware that the treaties had not been ratified and their inherent title to the lands remained intact, state and federal leaders nonetheless acted as if the lands had been ceded, opening them up for settlement by non-natives without establishing the guaranteed reservations.³⁵ When tribes who had left their ancestral lands for negotiated reservations returned after the Senate nullified the reservations, they found that their lands had been appropriated.³⁶ As a result of the government’s duplicity, “all the California Indians became landless.”³⁷

²⁹ California Land Claims Act, 9 Stat. 631 (1851); *See also* Paul Wallace Gates, *Land and Land Law in California* 25 n.1 (1991).

³⁰ Advisory Council on Cal. Indian Policy, *Historical Overview Report: Special Circumstances of California Indians* 5 (1997) [hereinafter “ACCIP”].

³¹ ACCIP, *supra* note 30, at 5.

³² *Winters v. United States* (1908) 207 U.S. 564 (recognizing that the United States implicitly reserves for tribes the amount of water necessary to fulfill the purpose of an Indian reservation when it withdraws land from the public domain to establish the reservation).

³³ *See, e.g., id.*, 207 U.S. at 577 (“The power of the Government to reserve the waters and exempt them from appropriate under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years”).

³⁴ ACCIP, *supra* note 30 at 5.

³⁵ ACCIP, *supra* note 30 at 5; *see also* Madley, *supra* note 22 at 211 (recounting that many Native Californians “had relocated to provisions reservations” in accordance with the treaty provisions).

³⁶ Madley, *supra* note 22, at 212.

³⁷ ACCIP, *supra* note 30 at 7.

Robbed of their treaty reservations, the tribes were denied corresponding federal water rights reserved to them by the broken treaties.³⁸ And robbed of their land through this duplicity, the tribes were denied access to the rights that attach to their prior, inherent title. Although at least 110 California tribes obtained federal recognition through subsequent instruments and over 300 individual Native American allotments have been set aside – all of which comes with enduring federal reserved rights – post-treaty reservation does not substitute for the water rights guaranteed to the tribes by legal instruments that they executed and relied upon. Further, over 80 tribes in California have not yet obtained federal recognition but hold just as deep and enduring an interest in the use and stewardship of water necessary to support tribal cultural, traditional, and spiritual practices.³⁹

California's hybrid water rights system emerged as yet another tool to further the dispossession and alienation of tribes. Early decisions by the California courts recognized two classes of surface water rights: riparian and appropriative. Riparian rights grant property owners the right to remove reasonable amounts of water from waterways that are contiguous to their land for use on their property. Riparian rights can only be acquired by owning property that touches a water source.⁴⁰ Appropriative rights grant individuals or entities the right to remove water from a waterway for use elsewhere. Under the appropriative rights regime, water belonged to the first (non-Indigenous) person to assert ownership, which entailed “simply diverting water and putting it to use.”⁴¹ Neither category of rights accommodates tribal claims based on millennia of water use and stewardship nor Native tribes' continuous occupation of land prior to colonization and displacement. As such, California's water rights regime has done inherent violence to tribal culture, identity, and ways of life. The State Water Board itself has recognized that “watersheds are now primarily managed through large-scale diversion of water for municipal, industrial, agricultural, and commercial beneficial uses to the detriment of traditional, local, and cultural uses and without compensation, recognition, or replacement.”⁴²

Racist State legislation and discriminatory policies have also excluded communities of color from possessing land and, by extension, water rights. In the early decades of California statehood, Asian immigrants made up the brunt of California's agricultural workforce. By 1880, Chinese immigrants worked across Delta regions as farm owner-operators, large- and small-scale tenants, and laborers.⁴³ The number of Japanese immigrants participating in California farm labor grew with the 1882 Federal Chinese

³⁸ See State Water Board Anti Racism Resolution at ¶ 7(b) (“Historical land seizures, broken promises related to federal treaty rights, and failures to recognize and protect federal reserved rights, have resulted in the loss of associated water rights and other natural resources of value, as well as cultural, spiritual, and subsistence traditions that Native American people have practiced since time immemorial.”)

³⁹ See State Water Res. Control Bd. *Draft Staff Report for the Phase II Update of the Bay-Delta Water Quality Control Plan* [hereinafter “Staff Report”] at 11-3 (recognizing that tribes without federal recognition “still have a significant interest in water management decisions that could support traditional practices or culturally significant species”).

⁴⁰ See *Lux v. Haggin* (1886) 69 Cal. 255, 391-92).

⁴¹ See *Irwin v. Phillips*, 5 Cal. 140, 146-47 (1855) (endorsing the principle of prior appropriation, or “first in time, first in right,” as establishing priority for appropriative rights).

⁴² Cal. State Water Res. Control Bd., *supra* note 22 at 3.

⁴³ Sucheng Chan, *Chinese Livelihood in Rural California: The Impact of Economic Change, 1860-1880*, 53(3) Pacific Historical R. 273, 293 (1984).

Exclusion Act, which barred Chinese immigrants from entering the country.⁴⁴ More than 5,000 Japanese Californians were listed as farm operators on the 1920 census.⁴⁵

Filipina/o workers and students “streamed into the United States” in the decades after the United States’ forced colonial occupation of the Philippines through the Philippine-American War.⁴⁶ Many Filipinos became farm laborers due to the agricultural industry’s demand for low-wage workers. “By the 1920s, San Joaquin County growers had become dependent on Filipino labor,” with “thousands of Filipinas/os in the 1920 and 1930s provid[ing] California growers with the cheap, immigrant labor they needed to harvest the ‘green gold’ growing from the fields and orchards of the Central Valley and Delta.”⁴⁷ By the late 1920s, Filipino workers were involved in the processing of every major crop grown in the Delta region. They comprised over 80% of the workforce cultivating and harvesting asparagus, one of the Delta’s signature crops.⁴⁸ Stockton also became “the center of a West Coast migratory circuit” for Filipina/o laborers, with thousands more Filipina/o workers staying in Stockton year-round to prune in the wintertime and pick asparagus in the spring and tomatoes and grapes in the summer and fall.⁴⁹

Even though Asian immigrants powered California’s agricultural industry, these communities were barred by law from owning farmland. Passed in 1913, the California Alien Land Law expressly prevented Asian immigrants from owning California farmlands.⁵⁰ A 1920 voter pamphlet supporting the expansion of the Alien Land Law stated that the statute’s “primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands.”⁵¹ With the expansion of this law to extend to the children of immigrants, the Legislature ensured these immigrant communities would not gain access to generational advancement.⁵²

Over the course of the 20th century, Asian immigrants, barred from property ownership and facing waves of anti-Asian violence, sought refuge in nearby cities. Those cities, segregated by racially restrictive covenants and redlining, forced Asian immigrants and other people of color into the most disinvested neighborhoods. South Stockton, where Coalition member Little Manila Rising is located, was one of these neighborhoods. Redlining maps produced by the government-sponsored Home Owners’ Loan Corporation designated much of South Stockton grade D, or red, deeming the areas hazardous for bank lending.⁵³ The maps described one South Stockton

⁴⁴ Chinese Exclusion Act (1882), <https://www.archives.gov/milestone-documents/chinese-exclusion-act#:~:text=In%20the%20spring%20of%201882,immigrating%20to%20the%20United%20States> (last updated Jan. 17, 2023).

⁴⁵ Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941* (1978) 38(1) J. of Econ. History 205, 206-07.

⁴⁶ Dawn Mabalon, *Little Manila is in the Heart: The Making of the Filipina/o American Community in Stockton, California* (2013) p. 5 [hereinafter, “Little Manila is in the Heart”].

⁴⁷ *Id.*

⁴⁸ *Id.*, p. 69.

⁴⁹ *Id.*, p. 5.

⁵⁰ California Law Prohibits Asian Immigrants from Owning Land, <https://calendar.eji.org/racial-injustice/may/3> (last visited Jan. 18, 2024).

⁵¹ *Fujii v. State*, 38 Cal. 2d 718, 735 (1952).

⁵² *Oyama v. California* (1948) 332 U.S. 633, 658-59 (conc. opn. of Murphy, J.).

⁵³ See Robert K. Nelson, et al., Mapping Inequality: Redlining in New Deal America: Stockton, CA, <https://dsl.richmond.edu/panorama/redlining/#loc=13/37.956/-121.337&city=stockton-ca> (last visited Dec. 14,

neighborhood with significant Asian and Black populations as “infested with subversive racial influences.”⁵⁴

The experiences of Asian immigrants are echoed in the stories of Black migrant workers who came to California farms in the late 1800s.⁵⁵ By 1950, there were over 40,000 Black Americans in the San Joaquin Valley.⁵⁶ The government responded to the presence of growing Black populations with racially restrictive covenants, redlining, and violence. These tactics forced Black farmworkers to move to settlements on the outskirts of Central Valley farmland. White inhabitants had previously abandoned these arid plots because of their lack of access to water.⁵⁷ The de jure and de facto segregation of this time shaped property ownership and neighborhoods as we know it today.

Mexican migrant workers, too, were outcasted by the government after they were exploited for their labor via the Bracero Program, which began in 1940.⁵⁸ The first 500 bracero workers were sent to Stockton to work on sugar beet farms.⁵⁹ This number grew to more than four million Mexicans working in California during the duration of the Bracero program, which ended in 1964.⁶⁰ After WWII ended, the federal government began heavily restricting immigration, setting strict quotas for the number of authorized immigrants. These restrictive immigration policies, in combination with the end of the Bracero Program, led to even greater numbers of unsanctioned migrations in the latter half of the 20th century.⁶¹ As more and more Mexican migrant workers began to settle in the U.S., they were often relegated to low-level, manual labor jobs, and settled near their workplaces.⁶² Their neighborhoods were gradually parsed out as segregated barrios or colonias, reinforced through exclusionary devices like racially restrictive covenants.⁶³ Colonias, which are unincorporated communities, still struggle with access to safe water and adequate infrastructure. There as many as 219 of these unincorporated areas in San Joaquin Valley today.⁶⁴

These decisions made by those in power decades and even centuries ago have left lasting marks on South Stockton and communities like it, creating multigenerational wounds that will never be fully repaired. The Board has acknowledged this in its Resolution No. 2021-0050,

2022); *see generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

⁵⁴ *See* Nelson, *supra* note 53.

⁵⁵ Michael Eissinger, *The Transplantation of African Americans and Cotton Culture to California’s Rural San Joaquin Valley During the Nineteenth and Twentieth Centuries* 8 (2009) (Master’s Thesis, Cal. State Univ., Fresno) [hereinafter *Transplantation of African Americans and Cotton Culture*].

⁵⁶ *Transplantation of African Americans and Cotton Culture* at 9 (citing the 1950 U.S. Census).

⁵⁷ Michael Eissinger, *Re-Collecting the Past: An Examination of Rural Historically African American Settlements across the San Joaquin Valley* 156 (2017) (Ph.D. dissertation, Univ. of Cal., Merced) [hereinafter *Re-Collecting the Past*].

⁵⁸ Cal. State Parks, *Latinos in Twentieth Century California: National Register of Historic Places Context Statement* 9 (2015), https://ohp.parks.ca.gov/pages/1054/files/latinosmpdf_illustrated.pdf.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 10.

⁶² *Id.* at 120.

⁶³ *Id.* 99.

⁶⁴ Rubin et. al, *Unincorporated Communities in the San Joaquin Valley: New Responses to Poverty, Inequity, and a System of Unresponsive Governance* (Nov. 27, 2007), available at: https://www.prrac.org/projects/fair_housing_commission/los_angeles/Colonias_CRLA_%20PolicyLink%20Framing%20Paper.pdf at 12.

The historical seizures of land from people of color have had, and continue to have, long-standing, oppressive impacts that extend beyond the loss of the land itself. These impacts include the loss of the associated water rights and other natural resources of value, lack of access to affordable and reliable governmental services, and forced relocation to areas with fewer or lower quality natural resources.⁶⁵

California's water rights system is built on these wildly unjust and inequitable foundations. And this history has clear throughlines to the present, as manifest in the skewed demographics of those who hold water rights, and power over water rights, today. This is made clear in a January 2023 analysis of the demographics of water rights holders and managers by Department of Water Resources ("DWR") staff, which seeks to unearth "who makes decisions about California's water."⁶⁶ The study authors coded nearly 14,000 individual rights holder by race and coded about 1500 directors of water agencies for race and gender, comparing each board to the race and gender of the service areas. The results, according to DWR staff, "were not surprising."⁶⁷ The Report concluded that:

At every level, the people who make decisions about California's water are more white and more male than the population of California. At the local agency level, boards of directors are 86% White and 79% male. At the individual level, 91% of small named water rights holders have last names that code as White.

The demographics of these water rights holders and managers reflect the history of exclusion, dispossession, and discrimination legislated into the foundations of the water rights system; they do not reflect the current makeup of California.⁶⁸

The Board has acknowledged the unjust foundation of California water rights and management; it should take the opportunity before it to begin rectifying these wrongs.

B. Transformation of the Bay-Delta and its Ecological Crisis

While the State waged a campaign of genocide and dispossession against Native tribes and legislated segregation for communities of color, it also facilitated the hydrological overhaul of the Bay-Delta to benefit nascent mining, agricultural, and industrial interests. These changes had dramatic effects on Bay-Delta ecosystems. The Bay-Delta's natural runoff patterns changed as hillsides were denuded for mining and logging while wetlands and floodplains were drained for conversion to agricultural production.⁶⁹ The peat soils that remained were compacted, oxidized, and

⁶⁵ State Water Res. Control Bd., Res. No. 2021-0050. Condemning racism, xenophobia, bigotry, and racial injustice and strengthening commitment to racial equity, diversity, inclusion, access, and anti-racism (2021).

⁶⁶ Megan Fidell and Paul Shipman, Cal. Dep't of Water Resources, *Who Makes Decisions About California's Water* (Jan. 9, 2023), available at <https://www.restorethedelta.org/wp-content/uploads/2023-Fidell-Who-Makes-Decisions-about-Californias-Water.pdf>.

⁶⁷ *Id.* at 1.

⁶⁸ According to the July 2023 census, only 34.7 percent of Californians identify as non-Latino/a/e White. See U.S. Census Bureau, Quick Facts California, <https://www.census.gov/quickfacts/fact/table/CA/PST045223> (last visited Jan. 13, 2024).

⁶⁹ The Bay Institute, San Francisco Bay: The Freshwater-Starved Estuary 8 (Sept. 2016), https://cawaterlibrary.net/wp-content/uploads/2016/09/Freshwater_Report.pdf.

eroded, thereby inducing large amounts of sediment to wash into Bay-Delta waterways.⁷⁰ Meanwhile, the construction of a vast network of tidal channels isolated individual waterways from each other and their adjacent habitats – preventing channels from naturally meandering over time, hastening flow velocities, and disrupting the natural interconnectedness of Bay-Delta.⁷¹ By the early 1900s, about 95% of native ecosystems and vegetation communities in the Delta had

1. State-authorized storage and diversion projects radically transformed Bay-Delta hydrology.

The diversion and export of water from the Bay-Delta has radically reduced freshwater flow volumes and altered natural flow cycles “at the expense of natural estuarine processes.”⁷³ In-Delta diversion began as early as 1869 with reclamation of Sherman Island and grew in the ensuing decades in proportion to reclaimed marshland areas.⁷⁴ By 1916, increasing upstream diversions linked to the explosion of rice cultivation in the Sacramento Valley initiated unprecedented salinity intrusion into the Delta.⁷⁵ Reduction in flows hastened in the 1920s as irrigated agriculture exploded, Bay Area cities grew, and the region experienced a decade of sustained drought.⁷⁶

The construction and operation of the massive Central Valley Project from the 1940s and 50s (including the Shasta Dam on the Sacramento River and Friant Dam on the San Joaquin River), followed by the State Water Project in the 1960s and 70s, furthered this radical alteration of the flow hydrology.⁷⁷ Together these projects are the single largest extractor of Bay-Delta freshwater and comprise the world’s largest water storage and conveyance system.⁷⁸

The construction of the Central Valley Project’s Trinity River Division (“TRD”) exemplifies the government’s audacious modification of California flow hydrology and its consequences for California tribes. The Trinity River is the largest tributary to the Klamath River, which empties directly into the Pacific Ocean at Requa, California, north of Eureka. The Trinity and Klamath Rivers “once teemed with bountiful runs of salmon and steelhead,” which have “defined the life and culture of the Hoopa Valley and Yurok Indian Tribes.”⁷⁹

⁷⁰ *Id.* at p. 9; Cal. State Water Res. Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* 25 (Aug. 3, 2010), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

⁷¹ Cal. Delta Stewardship Council, Amended Delta Plan Chapter 4: Protect, Restore, and Enhance the Delta Ecosystem 4-13 (2022), <https://deltacouncil.ca.gov/pdf/delta-plan/2022-06-29-chapter-4-protect-restore-and-enhance-the-delta-ecosystem.pdf>.

⁷² *Id.* at 4-12.

⁷³ *Id.* at 4-15.

⁷⁴ Contra Costa Water Dist., Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay, Technical Memorandum WR10-001 at A-10 (2010), https://cawaterlibrary.net/wp-content/uploads/2017/10/swrcb_ccwd2010.pdf.

⁷⁵ *Id.*

⁷⁶ The Bay Institute, *supra* note 69 at 9.

⁷⁷ *Id.*; see generally Tim Stroshane, Drought, Water Law, and the Origins of California’s Central Valley Project (2016).

⁷⁸ The Bay Institute, *supra* note 69.

⁷⁹ U.S. Dept. of Interior, Record of Decision: Trinity River Mainstem Fishery Restoration, Final Environmental Impact Statement/Environmental Impact (2000).

Both Tribes retain tribal fishing and hunting rights – secured to them in the establishment of their reservations along the Klamath River – that are immune from state regulation or interference.⁸⁰

Following adoption of the Trinity River Act of 1955,⁸¹ the U.S. Bureau of Reclamation led the construction of the TRD’s expansive new diversion and storage facilities that largely rerouted the natural flow of the Trinity River from the Klamath River watershed into the Bay-Delta, conveying it through the Clear Creek Tunnel into Whiskeytown Lake and on into the Sacramento River. As a result, the Trinity River is legally classified as part of the “Delta tributary watershed” despite lacking any natural hydrological connection to the Bay-Delta.⁸² The TRD’s Trinity and Lewiston Dams directly eliminated 109 miles of important salmonid habitat above Lewiston, California, and diversions to the Sacramento River have decimated the Trinity’s native fish populations and habitat.⁸³

The upshot of all these state and federal export projects is drastically reduced flows into and through the Bay-Delta. Around 31% of inflow is diverted before it ever reaches the Bay-Delta.⁸⁴ Some of this water is returned to Bay-Delta tributaries through wastewater effluent or agricultural return flows, though at degraded quality.⁸⁵ The State Water Project and Central Valley Project together export 5.1 million acre-feet (MAF) per year from the Bay-Delta, accounting for 24% of inflows.⁸⁶

The combined effects of upstream diversions and water exports have cut annual outflow from the Bay-Delta by half or more relative to unimpaired conditions.⁸⁷ In dry conditions, diversions and exports reduce annual flows by more than 65%.⁸⁸ In certain months, reduction in outflows exceeds 80%.⁸⁹ According to the State Water Board, under certain conditions, “flows are completely eliminated or significantly reduced at certain times in some streams in the [Bay-Delta] watershed, and a significant portion of the inflows that are provided to the [Bay-Delta] are exported without contributing to [Bay-Delta] outflows.”⁹⁰

This is so despite massive imports of water from the Trinity River. Between the inception of its full operation in 1964 and 2000, TRD exports of Trinity River water to the Sacramento River averaged 75% of the Trinity River’s natural flow, or roughly 988,000 acre-feet per year.⁹¹ In some

⁸⁰ *Id.*; see *Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, 461 (recognizing that Indians on the Klamath River Reservations “had fishing rights derived from Congress” and that “State qualifications of those traditional rights was precluded by force of the Supremacy Clause”).

⁸¹ Trinity River Act, Pub. L. No. 84-386, 69 Stat. 719 (1955).

⁸² Cal. Water Code § 78647.4(b).

⁸³ U.S. Dept. of Interior, *supra* note 79 at 1.

⁸⁴ Cal. Delta Stewardship Council, A More Reliable Water Supply for California 83 (2018), <https://deltacouncil.ca.gov/pdf/delta-plan/2018-04-26-amended-chapter-3.pdf>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 28 (reporting that outflows were reduced on average by 48% relative to unimpaired conditions between 1986 and 2005).

⁸⁸ Cal. Water Res. Control Bd., *supra* note 10 at 1-5.

⁸⁹ *Id.*

⁹⁰ Cal. State Water Res. Control Bd., July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan 6 (2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

⁹¹ U.S. Dept. of Interior, *supra* note 79 at 20.

years, exports to the Sacramento River basin reached as high as 90% of annual Trinity River inflow.⁹² Since 2000, Trinity River exports have been limited by a U.S. Department of Interior decision requiring variable annual instream flows for the Trinity River from the TRD ranging from 369,000 acre-feet in critically dry years to 815,000 acre-feet in extremely wet years.⁹³

2. The transformation of the Bay-Delta has led to a litany of ecological harms and social impacts.

Freshwater flow reductions have caused a cascade of ecological impacts in the Bay-Delta, including altered salinity levels, higher water temperatures, changes to water circulation patterns, increased concentration of pollutants, alteration of dissolved oxygen and other water quality parameters, disruption of fish migratory routes and nursery conditions, and habitat loss.⁹⁴ Poorly managed releases from upstream dams and reduced inflows coupled with diversion and export of water also alter peak, base, and pulse flows to which aquatic species are adapted.⁹⁵

Among these changes, reduced flows affect how far inland the low salinity zone between seawater and freshwater (referred to as “X2”) lies. When diversions reduce river flows, this X2 location shifts inland, raising overall salinity levels in the Bay-Delta.⁹⁶ Shifting the X2 location also reduces food availability for native fish.⁹⁷ For example, the National Marine Fisheries Service (“NMFS”) predicts that reduced Delta outflow and the X2 shift will suppress the Delta Smelt’s access to one of its preferred food sources, the copepod *Eurytemora affinis*.⁹⁸

Water diversions have also caused water temperatures in salmon natal streams to rise above levels required for their spawning and survival.⁹⁹ Full reservoirs tend to stratify into layers of warm water near the surface, with colder water toward the bottom.¹⁰⁰ When reservoirs lose water to diversions, they warm more quickly because of a higher surface area-to-volume ratio.¹⁰¹ Downstream, depleted rivers equilibrate more quickly with the surrounding air.¹⁰² Fish embryos are particularly at risk from warm water. As temperatures rise, embryos within eggs require more oxygen, but their ability to take in more is limited by the rate of diffusion across the egg surface.¹⁰³ Adults are also at risk from increased disease transmission and other stressors.¹⁰⁴ In 2021, many in the Bay-Delta did not survive long

⁹² *Id.*

⁹³ *Id.* at 2.

⁹⁴ See, e.g., Cal. State Water Res. Control Bd., *supra* note 90, at 6.

⁹⁵ *Id.*

⁹⁶ The Bay Institute, *supra* note 69, at iii-iv

⁹⁷ Letter from Justin Ly, U.S. Nat’l Oceanic and Atmospheric Admin., to Eileen Sobeck, Cal. State Water Res. Control Bd. (May 6, 2022),

https://www.waterboards.ca.gov/drought/sacramento_river/docs/exhibit-c-protest-shasta-tmp.pdf

⁹⁸ *Id.*

⁹⁹ The Bay Institute, *supra* note 69, at 47.

¹⁰⁰ See Yifan Cheng et. al., *Reservoirs Modify River Thermal Regime Sensitivity to Climate Change: A Case Study in the Southeastern United States*, 56 Water Res. Rsch. 1 (2020).

¹⁰¹ See *Id.*, at p. 11.

¹⁰² Env’t Prot. Agency, EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards 7 (2003),

<https://nepis.epa.gov/Exe/ZyPDF.cgi/P1004IUI.PDF?Dockey=P1004IUI.PDF>.

¹⁰³ Benjamin Martin et al., *The Biophysical Basis of Thermal Tolerance in Fish Eggs*, 287 Proc. Royal Soc’y B: Biological Sci. 1 (2020), <https://doi.org/10.1098/rspb.2020.1550>.

¹⁰⁴ Env’t Prot. Agency, *supra* note 102, at 5, 7.

enough to reproduce.¹⁰⁵ Meanwhile, on the Trinity River, water temperatures reach dangerous levels whenever Trinity Reservoir storage drops below 1.2 million acre-feet.¹⁰⁶ By the end of 2022, the reservoir had been below that level for nearly 18 straight months.¹⁰⁷

The changes to stream hydrology and water quality caused by reduced flows have caused fish populations to plummet, “with many species currently on the verge of extinction.”¹⁰⁸ According to the State Water Board, the best available science demonstrates that current flow conditions, if not corrected, will result in permanent impairment to the Bay-Delta’s native fish and wildlife populations as well as other public trust resources.¹⁰⁹

Among those at greatest risk are the six native Bay-Delta species listed as threatened or endangered under the federal or California Endangered Species Acts: Delta smelt, longfin smelt, green sturgeon, Central Valley steelhead, winter-run Chinook salmon, and spring-run Chinook salmon.¹¹⁰ For example, the San Joaquin basin experienced “an 85 percent net loss in returning adult fall-run Chinook salmon from 1985 to 2017.”¹¹¹ According to the State Water Board, “the magnitude of diversions out of the Sacramento, San Joaquin, and other rivers feeding into the Bay-Delta is a major factor in the ecosystem decline.”¹¹²

In 2023, the threat to California salmon fisheries reached new levels, with the formal closure of recreational and commercial ocean salmon fishing in *all regions* in California, in addition to the full-closure of California’s recreational salmon fishing season in the Klamath River Basin and Central Valley rivers.¹¹³ Closures have only happened *twice* before in California, in 2008 and 2009.¹¹⁴ As a whole, fall Chinook salmon returns to the Sacramento River have plummeted, with 2022 totals

¹⁰⁵ Scott Wilson, *California’s Disappearing Salmon*, Wash. Post (Sept. 13, 2021), [washingtonpost.com/nation/interactive/2021/california-disappearing-salmon/](https://www.washingtonpost.com/nation/interactive/2021/california-disappearing-salmon/) (“Of the estimated 16,000 spring-run Chinook that made the journey . . . about 14,500 have died, nearly all of them before spawning”).

¹⁰⁶ Ly, *supra* note 97.

¹⁰⁷ Cal. Dep’t of Water Res., Trinity Lake (CLE): Daily Data, <https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=CLE&d=&span=1month> (last visited Jan. 18, 2024).

¹⁰⁸ Cal. Water Res. Control Bd., *supra* note 10, at 1-5.

¹⁰⁹ *See id.* (“The best available science . . . indicates that [existing legal requirements in Revised Water Rights Decision 1641 and biological opinions addressing Delta smelt and salmonids] are insufficient to protect fish and wildlife”).

¹¹⁰ Cal. State Water Res. Control Bd., Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions 6 (2021), https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2021/20210601_swb_tuco.pdf.

¹¹¹ Cal. State Water Res. Control Bd., Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 1 (2018), https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf.

¹¹² *Id.*

¹¹³ Cal. Dept. of Fish and Wildlife, *Recreational Ocean, In-River Salmon Fisheries in California to Close for Remainder of 2023* (May 19, 2023), <https://wildlife.ca.gov/News/Archive/recreational-ocean-in-river-salmon-fisheries-in-california-to-close-for-remainder-of-2023#gsc.tab=0>; NOAA Fisheries, *Commerce Secretary Announces Fishery Disaster Determinations for California Salmon Fisheries* (Nov. 21, 2023), <https://www.fisheries.noaa.gov/feature-story/commerce-secretary-announces-fishery-disaster-determinations-california-salmon>.

¹¹⁴ CalMatters, No California salmon: Fishery to be shut down this year (March 15, 2023), <https://calmatters.org/environment/water/2023/03/california-salmon-fishery-shut-down/>.

only meeting half of the fishery’s minimum target.¹¹⁵ This total is the third lowest return on record for the past 41 years.¹¹⁶ Indeed, Chinook fishery populations have reached such low levels that in November 2023 the U.S. Secretary of Commerce determined that commercial fishery failures, caused by fishery resource disasters, occurred in the California Sacramento River Fall Chinook fishery and in the Klamath River Fall Chinook fishery.¹¹⁷

Delta smelt and longfin smelt have fared even worse. They are now “at such low levels that they are difficult to detect in the estuary.”¹¹⁸ In 2022, the California Department of Fish and Wildlife detected only sixteen Delta smelt in their historical spring range in the Sacramento-San Joaquin Delta and San Francisco Estuary.¹¹⁹ It has not detected *any* Delta smelt in autumn-time sampling since October 2017.¹²⁰

Native species not currently listed as threatened or endangered are also at risk of extirpation. For instance, annual recruitment of White Sturgeon – the largest freshwater fish species in North America – has steadily decreased since the early 1980s.¹²¹ “High levels of water diversion combined with adverse reservoir storage operations generate extremely altered hydrographs throughout the [San Francisco Bay Estuary] watershed – where California White Sturgeon spawn and rear – impairing successful reproduction.”¹²² The population is also vulnerable to algal blooms, which have already killed large numbers of adult California White Sturgeon and impede migration through the Delta to spawning grounds in the San Joaquin basin.¹²³ Mounting threats to California White Sturgeon survival spurred commenter Restore the Delta, together with the San Francisco Baykeeper, The Bay Institute, and the California Sportfishing Protection Alliance, to petition for listing of the species as threatened under both the California and Federal Endangered Species Acts; the petitions are currently pending.

Reliance on Trinity River diversions for Bay-Delta flows has caused similar fishery collapse on the Trinity and Klamath Rivers. During the first decade of Trinity River Division operations, diversions to the Central Valley averaged nearly 90% of the upper Trinity River basin inflow; fish populations plummeted by 60 to 80% and fish habitat by 80 to 90%.¹²⁴ During the first four weeks of spawning in November 2021, high temperatures of water released from Lewiston Dam destroyed approximately 75% of Coho salmon eggs at the Trinity River Hatchery and similar proportions of protected wild Coho salmon eggs; even lower Trinity Reservoir levels this year may raise fish mortality even higher.¹²⁵ On the Klamath River, runs of Chinook salmon have plunged. This past year saw only 22,000

¹¹⁵ Pacific Fishery Mgmt. Council, *Review of 2022 Ocean Salmon Fisheries*, Table B-1, (Feb. 2023).

¹¹⁶ *Id.*

¹¹⁷ NOAA Fisheries, *supra* note 113.

¹¹⁸ Cal. State Water Res. Control Bd., *supra* note 110, at 7-8.

¹¹⁹ Cal. Dept. of Fish and Wildlife, 20-mm survey Data – Length Frequency (2022)

<https://apps.wildlife.ca.gov/BD20mm/Main/LengthFrequency>.

¹²⁰ Cal. Dept. of Fish and Wildlife, 2022 Fall Midwater Trawl annual fish abundance and distribution summary, 2 (Dec. 29, 2022) <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentId=209101>.

¹²¹ Attachment 2, San Francisco Baykeeper, et al. (Nov. 29, 2023), *Petition to State of California Game Commission to List The California White Sturgeon (Acipenser transmontanus) as Threatened under the California Endangered Species Act (CESA)* at 5.

¹²² *Id.*

¹²³ Attachment 2.

¹²⁴ U.S. Dept of Interior, *supra* note 79, at 5.

¹²⁵ Ly, *supra* note 97.

spawning adult fall-run Chinook salmon, the fourth lowest return in 41 years.¹²⁶ As noted above, the collapse of Klamath River Chinook salmon populations spurred the California Fish and Game Commission to enact a full closure of California's 2023 recreational salmon fishing season in the Klamath River Basin and the U.S. Secretary of Commerce to determine that a commercial fishery failure due to a fishery resources disaster occurred in the 2023 ocean and inland salmon fisheries for Klamath River Fall Chinook.¹²⁷

Insufficient instream flows have also facilitated the spread of harmful algal blooms throughout the Bay-Delta, which drive loss of native fish and wildlife species and impair human health and connection to water. HABs are the rapid growth of algae or cyanobacteria,¹²⁸ which is caused by low freshwater flows, poor water circulation, and high-water temperatures, combined with excess nutrients from agricultural runoff and wastewater as well as bright sunlight.¹²⁹ Since their emergence in the Bay-Delta in 1999, HABs have become pervasive. In 2022 alone, the State Water Board confirmed 60 HAB incidents in the Bay-Delta.¹³⁰ Because the HAB count relies on voluntary public reporting, the actual number of incidents was likely much higher. By contrast, in 2023, there were fewer reported HABs incidents, likely due to the increased volume of Sacramento and San Joaquin River flows from unusually heavy rains.¹³¹

HABs cause a litany of harms to aquatic ecosystems and animals.¹³² The World Health Organization considers cyanobacterial toxins to be “among the most toxic naturally occurring compounds.”¹³³ HABs consume oxygen and prevent light from reaching underwater plants.¹³⁴ When the algal blooms die, their decomposition consumes even more dissolved oxygen.¹³⁵ Reduced oxygen and light lead to dead zones and reduce key food sources for fish and wildlife higher up the food chain.¹³⁶ HABs, which produce cyanotoxins, have also proven fatal to marine mammals, livestock, and pets.¹³⁷

¹²⁶ No California salmon: Fishery to be shut down this year, *supra* note 114.

¹²⁷ NOAA Fisheries, *supra* note 113.

¹²⁸ U.S. Ctr. for Disease Control and Prevention, Harmful Algal Bloom (HAB)-Associated Illness, <https://www.cdc.gov/habs/index.html>.

¹²⁹ See Jayme Smith et al., California Water Boards' Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring: Full Report with Appendices 1-3 (2021), https://ftp.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/1141_FHABStrategy_FullReport.pdf.

¹³⁰ Cal. Delta Stewardship Council, Harmful Algal Blooms, <https://viewperformance.deltacouncil.ca.gov/pm/harmful-algal-blooms> (last updated Dec. 2022).

¹³¹ Attachment 14, Spencer Fern, HABs Comments on the Draft Staff Report for the Phase II Update to the Bay-Delta Plan 1-2 (2023) [hereinafter “Attachment 14”].

¹³² U.S. Env't Prot. Agency, Cyanobacterial Harmful Algal Blooms (CyanoHABs) in Water Bodies, <https://epa.gov/cyanohabs> (last updated Apr. 26, 2022).

¹³³ Ingrid Chorus & Martin Welker, Introduction to Toxic Cyanobacteria in Water: A Guide to Their Public Health Consequences, Monitoring and Management 2 (Ingrid Chorus & Martin Welker eds., 2021).

¹³⁴ U.S. Env't Prot. Agency, The Effects: Dead Zones and Harmful Algal Blooms, <https://www.epa.gov/nutrientpollution/effects-dead-zones-and-harmful-algal-blooms> (last updated Jan. 31, 2022).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ U.S. Env't Prot. Agency, Health Effects from Cyanotoxins, <https://www.epa.gov/cyanohabs/health-effects-cyanotoxins> (last updated July 13, 2023); see also Melissa Miller et al., *Evidence for a Novel Marine Harmful Algal Bloom: Cyanotoxin (Microcystin) Transfer from Land to Sea Otters*, 5 PLoS One e12576 (2010), <https://doi.org/10.1371/journal.pone.001257>.

Cyanotoxins are similarly dangerous to people, who may be exposed by drinking, swimming, or bathing in affected waters, eating contaminated fish or shellfish, or inhaling aerosolized particles.¹³⁸ Symptoms of exposure to cyanotoxins can range from mild skin rashes to gastrointestinal and respiratory distress.¹³⁹ High levels of exposure can have other severe health consequences, including damage to the central nervous system and liver.¹⁴⁰ Recent research shows that HABs may pose air quality risks dangerous for human health. Researchers at the University of North Carolina found a link between HABs-produced volatile organic chemical compounds and the formation of secondary organic aerosols,¹⁴¹ which can contribute to the formation of the fine particulate matter pollution, PM_{2.5}.¹⁴² Inhaling PM 2.5 can lead to premature mortality, increased hospital admissions, asthma attacks, and respiratory symptoms.¹⁴³ This study is the first of its kind and demonstrates the need for further research into the respiratory effects of HABs. According to the Centers for Disease Control, “[t]here are no known antidotes to cyanotoxins or specific treatments for illnesses caused by cyanobacteria and their toxins.”¹⁴⁴

For these reasons, the State Water Board and the California Office of Environmental Health Hazard Assessment (“OEHHHA”) frequently warn that water bodies are dangerous to swim in because of HABs.¹⁴⁵ Such HAB-related advisories and closures have increased each year since 2015, and peak late-summer events have more than tripled in that time.¹⁴⁶ Nevertheless, warnings by local public health departments remain sporadic and often provide little notice for recreational and subsistence anglers.¹⁴⁷

3. Ongoing State efforts to expand storage and export of Delta flows threaten to continue a legacy of harm to ecosystems and communities.

Despite the widely recognized ecological crisis resulting from current storage and diversion infrastructure, the State is pursuing concerted efforts to expand this infrastructure to store and export increasing amounts of Delta water. This is so despite still pending efforts to update Bay-Delta water quality standards, which, once approved, could be incompatible with the proposed infrastructure projects.

¹³⁸ U.S. Ctr. for Disease Control and Prevention, *supra* note 14.

¹³⁹ U.S. Ctr. for Disease Control and Prevention, Avoid Harmful Algae and Cyanobacteria, <https://www.cdc.gov/habs/be-aware-habs.html> (last updated May 25, 2023).

¹⁴⁰ *Id.*

¹⁴¹ Attachment 6, Haley E. Plaas, et al., *Secondary Organic Aerosol Formation from Cyanobacterial-Derived Volatile Organic Compounds*, 7 ACS Earth and Space Chemistry 1592 (2023) at p. 1807 [hereinafter “Attachment 6”].

¹⁴² *Id.*, at p. 1799.

¹⁴³ Cal. Air. Res. Board, Inhalable Particulate Matter and Health (PM_{2.5} and PM₁₀) <https://ww2.arb.ca.gov/resources/inhalable-particulate-matter-and-health> (last visited Jan. 18, 2024).

¹⁴⁴ U.S. Ctr. for Disease Control and Prevention, *supra* note 14.

¹⁴⁵ Cal. State Water Res. Control Bd., HAB Reports Map, https://mywaterquality.ca.gov/habs/where/freshwater_events.html (last updated Oct. 21, 2022)

¹⁴⁶ U.S. Env’t Prot. Agency, Tracking CyanoHABs: Mapping Harmful Algal Blooms Reported in U.S. Fresh Waters, <https://storymaps.arcgis.com/stories/d4a87e6cdfd44d6ea7b97477969cb1dd> (last updated Jan. 8, 2024).

¹⁴⁷ Attachment 1, Exhibit E, Attachment E, Declaration of Barbara Barrigan-Parrilla ¶ 16 [hereinafter “Decl. of Barbara Barrigan-Parrilla”] (“Even when blue- green algal blooms are visibly present, it is very uncommon to see any noticing of public health hazards to warn residents and those fishing and recreating in and around these waterways of the health risks from HABs”).

Since the 1950s, the State has entertained successive efforts to build a massive new State Water Project conveyance system to siphon even more water from the northern Delta, sending it to farms and cities in the south. These proposals began with the California Water Plan, continued with a proposed Peripheral Canal in the following decades, and assumed new forms with successive proposals for an underground conveyance system in the past ten years.¹⁴⁸ Its most recent iteration, the Delta Conveyance Project, would construct a single 40-mile underground tunnel with two intake facilities along the Sacramento River near the community of Hood, conveying 6,000 cfs of Sacramento River flows underneath the Delta to the Bethany Reservoir for delivery to south of Delta export facilities.¹⁴⁹ On December 21, 2023 – on the precipice of federal holidays – the California Department of Water Resources approved the Delta Conveyance Project and certified its Final Environmental Impact Report (“EIR”).¹⁵⁰ Before the Delta Conveyance Project can go forward, the State Water Board will need to consider whether to approve a change in point of diversion to authorize the new north Delta intake tunnels, as well as Section 401 discharge certifications and Waste Discharge Requirements to assure conformity with water quality standards.

The U.S. Army Corps of Engineers also released a draft Environmental Impact Statement for the Delta Conveyance Project for public review and comment under the National Environmental Policy Act through March 16, 2023.¹⁵¹ In its comments to the Army Corps, the U.S. Environmental Protection Agency (“EPA”) warned that the “operation of the proposed project has the potential to cause or contribute to long-term exceedances of regulatory water quality standards” and reaffirmed that the project is a candidate for elevation to EPA Headquarters, Office of Water, pursuant to a 1992 Memorandum of Agreement between EPA and the Department of the Army implementing section 404(q) of the Clean Water Act.¹⁵² Once the State Water Board updates the Bay-Delta water quality standards – particularly if it does so in a manner that fulfills its legal obligations to protect beneficial uses and public trust resources – it may render the Delta Conveyance Project wholly incompatible with regulatory water quality standards, and render taxpayer resources and public time invested in reviewing the project obsolete.

Meanwhile, the State, together with the U.S. Bureau of Reclamation, is also pushing forward a plan to build an off-shore reservoir/water storage facility – the Sites Project – to divert and store 1.5 million acre-feet of water from the northern reaches of the Sacramento River at Red Bluff. The Site Project Authority – a State entity – and the Bureau of Reclamation released a Final EIR/Environmental Impact Statement for the Sites Project in November 2023, and the Sites Project Authority approved the project on November 17, 2023.¹⁵³ Signaling its investment in the Project

¹⁴⁸ John Hart, A Century of Delta Conveyance Plans, <https://cawaterlibrary.net/a-century-of-delta-conveyance-plans/> (last visited Dec. 14, 2022).

¹⁴⁹ Cal. Dept. of Water Res., Delta Conveyance Project: Draft Environmental Impact Report 3A-6 (2022), <https://cadwr.app.box.com/s/vm5r7atxcnbnbc0vvzldrhq514x4619y>.

¹⁵⁰ Cal. Dep’t of Water Res., Department of Water Resources Approves Delta Conveyance Project (Dec. 21, 2023), <https://water.ca.gov/News/News-Releases/2023/Dec-23/Department-of-Water-Resources-Approves-Delta-Conveyance-Project>.

¹⁵¹ U.S. Army Corps of Engineers, Delta Conveyance Project, <https://www.spk.usace.army.mil/Missions/Regulatory/Delta-Conveyance/#:~:text=The%20public%20draft%20Environmental%20Impact,document%20have%20been%20held%20virtually> (last visited Jan. 18, 2024).

¹⁵² Attachment 10, Letter from U.S. EPA, to Michael Jewell, U.S. Army Corps of Engineers (March 16, 2023) [hereinafter “Attachment 10”].

¹⁵³ Sites, Final Environmental Impact Report Final Environmental Impact Report/Environmental Impact Statement (Final EIR/EIS) (Nov. 2023), <https://sitesproject.org/final-environmental-impact-report/>.

regardless of environmental impacts and potential conflicts with pending water quality standard updates, the Newsom Administration certified the project for judicial streamlining under the newly adopted Senate Bill 149.¹⁵⁴ Meanwhile, the Sites Project Authority proceeded to apply for new appropriative water permits with the State Water Board, drawing protests from tribes, conservation organizations, fisheries associations, environmental justice advocates and others that the Project will jeopardize survival of native fish species and other public trust resources, impair tribal water rights, and obviate any meaningful consideration by the Board of protective water quality standard updates.¹⁵⁵ And it will further stress an over-appropriated system. Already, the total volume of water authorized for diversion is over five times the average unimpaired outflow of the Bay-Delta (28.5 MAF/year).¹⁵⁶

PROCEDURAL HISTORY OF BAY-DELTA WATER QUALITY STANDARD UPDATES

The Porter-Cologne Act charges the State Water Board with the coordination and control of water quality in the state.¹⁵⁷ The Board has the authority to allocate water rights¹⁵⁸ and to create water quality control plans to protect beneficial uses of water. For nearly 50 years, the Board has assumed primary authority for establishing and maintaining water quality standards for the Bay-Delta. Despite a statutory mandate to review the standards every three years, the Board has only done so a handful of times since 1978, leading the EPA to exercise oversight authority to formulate water quality standards in response to significant lapses by the Board.

In 1991, the Board first attempted to update water quality standards, but the EPA denied the Plan's revised fish and wildlife objectives because they failed to protect estuarine habitat, as well as other fish and wildlife beneficial uses.¹⁵⁹ The Board did not adopt the EPA's proposed standards, so the EPA promulgated its own final standards in 1995, which remain on the books today.¹⁶⁰ Later that year, the Board completed a review and revision of the 1978 and 1991 Bay-Delta Plans with its adoption of the 1995 Bay-Delta Plan.¹⁶¹

¹⁵⁴ Office of Governor Gavin Newsom, Governor Newsom Streamlines Major Water Storage Project (Nov. 6, 2023), <https://www.gov.ca.gov/2023/11/06/governor-newsom-streamlines-major-water-storage-project/#:~:text=WHAT%20YOU%20NEED%20TO%20KNOW,3%20million%20households%20yearly%20usage>.

¹⁵⁵ See generally Cal. Sportfishing Protection Alliance et al., Petition For Partial Assignment Of State-Filed Application A025517 To Application A025517x01, Petition For Release From Priority Of State-Filed Applications A025513, A022514, A022235, A023780, A023781, And Any Unassigned Portion Of State-Filed Application A025517 In Favor Of Application A025517x01 (Aug. 3, 2023), <https://www.friendsoftheriver.org/wp-content/uploads/2023/08/CSPA-FOR-et-al-Sites-Water-Rights-Protest-and-Exhibits.pdf>; see generally Water Climate Trust et al., Protest of Water Rights Application & Petitions from Sites Project Authority (Aug. 31, 2023), <https://acrobat.adobe.com/id/urn:aaid:sc:US:8e4f41c9-7f53-4fa5-8c63-2623a4370d67>.

¹⁵⁶ Staff Report at 2-117.

¹⁵⁷ Cal. Wat. Code § 13140.

¹⁵⁸ Cal. State Water Res. Control Bd., *The Water Rights Process*, available at https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html#:~:text=The%20Water%20Commission%20of,water%20Code%20provisions%20governing%20appropriation.

¹⁵⁹ Cal. State Water Res. Control Bd., Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 5 (May 1995), <https://www.epa.gov/sites/default/files/2014-12/documents/ca-sanfrancisco-bay.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Since 1995, the Board has only modified the Bay-Delta Plan as a whole once, in 2006.¹⁶² These modifications were minor, affecting only the program of implementation and leaving water quality standards, including flow objectives, untouched.¹⁶³ The Board recognized that the 2006 Plan was failing in 2008 and announced that it would review water quality standards through a two-part process.¹⁶⁴ Phase I would determine the salinity and flow objectives for the lower San Joaquin River and the Stanislaus, Merced, and Tuolumne Rivers, while Phase II would determine standards to protect native fish and wildlife in the Sacramento River, the Delta, and associated tributaries.¹⁶⁵

Phase I was initiated in 2009, and the Board approved the Phase I amendments nearly a decade later in 2018. These amendments included new and revised flow objectives for the Lower San Joaquin River in addition to a revised south Delta salinity water quality objective.¹⁶⁶ But the Board decided to defer development of the program of implementation for Phase I plan amendments to a future time, through “subsequent regulatory actions.”¹⁶⁷ As of the date of submittal of this comment, the Board is yet to release a proposed implementation plan for Phase I amendments.

In October 2017, the Board released a Fact Sheet and Scientific Basis Report outlining its recommendations for a Phase II update, assuring the public that it “plan[ned] to pursue expeditious completion of the update of the Bay-Delta Plan.”¹⁶⁸ By 2022, the Board had taken no further public action to update the Phase II water quality standards. On May 24, 2022, the Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Save California Salmon, Little Manila, and Restore the Delta submitted a Petition for Rulemaking to the Board, calling on it to expeditiously update Bay-Delta water quality standards, initiate tribal consultation under Assembly Bill 52, and formally designate Tribal Beneficial Uses (TBUs) for the Bay-Delta Plan.¹⁶⁹ After the Board denied the Petition on June 24, 2022,¹⁷⁰ Complainant-Petitioners submitted a Request for Reconsideration on August 22.¹⁷¹ The Board again denied the Request for Reconsideration on September 21, 2022.¹⁷²

¹⁶² Cal. State Water Res. Control Bd., Res. 2018-0059: Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and Final Substitute Environmental Document 1 (2018), https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/rs2018_0059.pdf

¹⁶³ *Id.*; see also Cal. State Water Res. Control Bd., *supra* note 70 at 18.

¹⁶⁴ See Cal. State Water Res. Control Bd., Res. No. 20008-0056: Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 1 (2008), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/docs/baydelta_workplan_final.pdf.

¹⁶⁵ See *id.*

¹⁶⁶ Cal. State Water Res. Control Bd., *supra* note 111 at 3.

¹⁶⁷ Cal. State Water Res. Control Bd., *supra* note 162 at 7.

¹⁶⁸ Cal. State Water Res. Control Bd., Fact Sheet: Phase II Update of the Bay-Delta Plan: Inflows to the Sacramento River and Delta and Tributaries, Delta Outflows, Cold Water Habitat and Interior Delta Flows 1 (2017), https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/201710_phaseII_fact_sheet.pdf; Cal. State Water Res. Control Bd., *supra* note 10.

¹⁶⁹ Attachment 1, Exhibit E, May 24, 2022 Petition for Rulemaking to State Water Resources Control Board [hereinafter “Exhibit E”].

¹⁷⁰ Attachment 1, Exhibit F, June 24, 2022 State Water Resources Control Board Letter Denying Request for Rulemaking [hereinafter “Exhibit F”].

¹⁷¹ Attachment 1, Exhibit G, August 22, 2022 Request for Reconsideration of Rulemaking Decision Denying Petition to State Water Resources Control Board [hereinafter “Exhibit G”].

¹⁷² Attachment 1, Exhibit H, September 21, 2022 State Water Res. Control. Bd. Letter Denying Request for Reconsideration [hereinafter “Exhibit H”].

On December 16, 2022, the Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Save California Salmon, Little Manila, and Restore the Delta, later joined by the Buena Vista Rancheria of Me-Wuk Indians, submitted a Title VI Civil Rights Complaint and Petition for Rulemaking to Promulgate Water Quality Standards for the San Francisco Bay/Sacramento-San Joaquin Delta to the U.S. EPA.¹⁷³ A range of organizations, including the NAACP Stockton Chapter, Catholic Charities Diocese for Stockton, Reinvent Stockton Foundation, Third City Coalition, and many others, wrote to the EPA in support. The EPA accepted the Title VI Complaint on August 8, 2023 and initiated an ongoing investigation into alleged discrimination by the Board, and the parties have entered into pending informal resolution agreement discussions to attempt a negotiated resolution of the Complaint’s allegations.¹⁷⁴ The Petition for Rulemaking, which asks the EPA to adopt federal water quality standards for the Bay-Delta that comply with the Clean Water Act, pursuant to its authority under section 303(c)(4)(B) of the Clean Water Act, 33 U.S.C. § 1313(c)(4)(B), remains under consideration by the EPA.

Almost fifteen years after initiating Bay-Delta Plan review and update and six years after promising expeditious release of proposed standards, the Board released its draft Staff Report and Substitute Environmental Document for Phase II updates on September 28, 2023. The Staff Report again severs regulatory review, deferring development and circulation of “draft regulatory text [for] proposed Sacramento/Delta changes to the Bay-Delta Plan, including the program of implementation” to an unspecified future point.¹⁷⁵

Meanwhile, the Board has made plain that it delayed updating Phase II Bay-Delta water quality standards to accommodate private negotiation of voluntary agreements for Bay-Delta flow measures.¹⁷⁶ On March 29, 2022, the California Natural Resources Agency released a Voluntary Memorandum of Understanding, signed by California state agencies, the U.S. Bureau of Reclamation, and a subset of Bay-Delta stakeholders – contractors, water districts, and water authorities – that export Bay-Delta freshwater flows.¹⁷⁷ The Memorandum calls on the State Water Board to include the Voluntary Agreements as a pathway in the Bay-Delta Plan’s program of implementation for salmon and fish viability objectives.¹⁷⁸ The draft Staff Report includes the Voluntary Agreements (VAs) as “a

¹⁷³ Attachment 1.

¹⁷⁴ U.S. Env’t Protection Agency, External Civil Rights Docket, 2014 – Present, EPA File #01RNO-23-R9, <https://www.epa.gov/external-civil-rights/external-civil-rights-docket-2014-present>.

¹⁷⁵ Staff Report at 1-4.

¹⁷⁶ See Cal. State Water Res. Control Bd., Proposals for Voluntary Agreements to Update and Implement the Bay-Delta Plan (2022), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/proposed_voluntary_agreements.html; see also, e.g., Cal. State Water Res. Control Bd., *supra* note 162 (encouraging stakeholders to reach voluntary agreements and recording its plan to to consider voluntary agreements as part of a plan to implement amended water quality standards).

¹⁷⁷ Cal. Nat. Res. Agency, Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions (2022), <https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/Voluntary-Agreement-Package-March-29-2022.pdf>.

¹⁷⁸ Cal. Nat. Res. Agency, Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions (2022) at 2-3, https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/emailitems/VoluntaryAgreementMOUtermSheet20220329_SIGNED-20220811.pdf.

possible pathway for updating and implementing the Bay-Delta Plan,” even though the State is yet to release final Voluntary Agreement terms and the scientific basis report is pending peer review.¹⁷⁹

Instead of timely updating the standards to protect beneficial uses, the Board has also adopted a pattern and practice of waiving outflow restrictions, salinity objectives, and temperature controls during increasingly frequent extreme drought conditions.¹⁸⁰ At the request of the California Department of Water Resources and U.S. Bureau of Reclamation, the Board issued temporary urgency change orders in 2014, 2015, 2021, 2022, and 2023.¹⁸¹ This pattern and practice contradicts the Board’s own statements that water quality objective waivers are “not sustainable for fish and wildlife and that changes to the drought planning and response process are needed to ensure that fish and wildlife are not unreasonably impacted in the future and to ensure that various species do not go extinct.”¹⁸²

THE STATE WATER BOARD’S LEGAL OBLIGATIONS TO SAFEGUARD BAY-DELTA WATER QUALITY

The California State Water Resources Control Board together with the nine regional water quality control boards are the principal state agencies “with primary responsibility for the coordination and control of water quality” in the state.¹⁸³ The State Water Board is directly responsible for setting, reviewing, and updating water quality standards for the Bay-Delta through the Bay-Delta Plan. Principle laws and state policies that govern the Board’s management of Bay-Delta water quality standards and flows are discussed below.

A. California Environmental Quality Act

The State Water Board’s water quality control planning is a certified regulatory program governed by the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq.¹⁸⁴ CEQA is a comprehensive scheme designed to provide long-term protection to the environment.¹⁸⁵ In enacting CEQA, the Legislature declared that all public agencies with authority over activities that may affect the environment must give prime consideration to preventing environmental damage when carrying out their duties.¹⁸⁶ When acting within the scope of its certified regulatory program, the Board is alleviated from CEQA’s requirements for preparing an EIR, negative declaration, and/or initial study to analyze the environmental impacts of projects it

¹⁷⁹ Staff Report at 1-3, 1-12.

¹⁸⁰ See State Water Res. Control Bd., State Water Project and Central Valley Project Temporary Urgency Change Petition, https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.html (last visited Nov. 16, 2022); Cal. State Water Res. Control Bd., Order Setting Terms and Conditions for Fishery Protection and Setting a Schedule for Completion of Tasks (1990) [hereinafter “Order 90-5”], https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1990/wro90-05.pdf.

¹⁸¹ Cal. State Water Res. Control Bd., State Water Project and Central Valley Project Temporary Urgency Change Petitions, <https://www.waterboards.ca.gov/drought/tucp/>.

¹⁸² Cal. State Water Res. Control Bd., Water Rights Order 2015-0043 at 39 (Jan. 19, 2016), https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2015/wro2015_0043.pdf.

¹⁸³ Cal. Wat. Code § 13001.

¹⁸⁴ Cal. Pub. Res. Code, § 21080.5, subd. (b)(2); Cal. Code Regs., tit. 23 § 3775 seq.

¹⁸⁵ Cal. Pub. Res. Code, § 21001.

¹⁸⁶ Pub. Res. Code, § 21000, subd. (g).

approves.¹⁸⁷ Instead, the State Water Board must prepare a Substitute Environmental Document (“SED”) to meet the requirements of CEQA.

While an SED need not comply with certain procedural elements required for an EIR, the SED must meet CEQA’s substantive mandates.¹⁸⁸ Such substantive requirements include a stable and certain description of the proposed activity, identification and analysis of potentially significant environmental impacts – including impacts to tribal cultural resources – and identification of reasonable alternatives and mitigation measures to avoid or minimize any such impacts.¹⁸⁹ Regulations governing the State Water Board’s water quality control planning also specifically require that any draft SED include, at a minimum, the following information:

- (A) An identification of the reasonably foreseeable methods of compliance with the project;
- (B) An analysis of any reasonably foreseeable significant adverse environmental impacts associated with those methods of compliance;
- (C) An analysis of reasonably foreseeable alternative methods of compliance that would have less significant adverse environmental impacts; and
- (D) An analysis of reasonably foreseeable mitigation measures that would minimize any unavoidable significant adverse environmental impacts of the reasonably foreseeable methods of compliance.¹⁹⁰

CEQA mandates comprehensive, public review of proposed projects and “broadly invokes the policy of permitting full public participation” throughout the review process.¹⁹¹ Consistent with CEQA’s information disclosure obligations, the SED’s analysis and supporting data must be sufficient to “enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.”¹⁹² CEQA thereby ensures “the integrity of the process of decision-making by precluding stubborn problems or serious criticism from being swept under the rug,”¹⁹³ and empowers the public to “respond accordingly to action with which it disagrees.”¹⁹⁴

B. Clean Water Act and Porter-Cologne Act

In addition to requirements under CEQA, the State Water Board’s amendments to the Bay-Delta Plan must be prepared in accordance the federal Clean Water Act, 33 U.S.C. section 1251 et seq., and applicable water quality planning provisions of California’s Porter-Cologne Water Quality Control Act, California Water Code section 13000 et seq. (“Porter-Cologne Act”). The Clean Water Act and Porter-Cologne Act together govern water quality standards in California.

The Clean Water Act aims to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to attain “water quality which provides for

¹⁸⁷ Pub. Res. Code, § 21080.5; Cal. Code Regs., tit. 14 §15251, subd. (g).

¹⁸⁸ See *Mountain Lion Foundation v. Fish and Game Comsn.* (1997) 16 Cal.4th 105, 113-114.

¹⁸⁹ Cal. Code Regs., tit. 23 § 3777 (a).

¹⁹⁰ Cal. Code Regs., tit. 23 § 3777 (b).

¹⁹¹ *Joy Rd. Area Forest & Watershed Assn v. Cal. Dep’t of Forestry & Fire Prot.*, 142 Cal.App.4th 656, 670 (2006).

¹⁹² *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 405 (1998).

¹⁹³ *Kings Cnty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 733 (1990).

¹⁹⁴ *Laurel Heights*, 47 Cal.3d at 392.

the protection and propagation of fish, shellfish, and wildlife.”¹⁹⁵ The Act requires each state to establish water quality standards for bodies of water within the states boundaries.¹⁹⁶ Each state must first designate uses of a particular body of water, and then designate water quality criteria sufficient to protect the designated uses, consisting of beneficial uses and scientifically-based criteria to protect those uses.¹⁹⁷ States must review the standards every three years, holding public hearings and, “as appropriate, modifying and adopting standards” to meet the Act’s objectives.¹⁹⁸ The U.S. Environmental Protection Agency then reviews any updated standards to ensure that they meet the requirements of the Clean Water Act, including ensuring that they are adequate “to protect the public health or welfare” and “enhance the quality of water.”¹⁹⁹ If a standard fails to meet the applicable criteria, the EPA exercises oversight authority to approve or disapprove any new or revised state standard and oversee appropriate corrective action.²⁰⁰ As noted above, the EPA has exercised this oversight authority to shape water quality standards in the Bay-Delta when confronted with significant lapses by the Board.

The Porter-Cologne Act implements the Clean Water Act in California.²⁰¹ The goal of the Porter-Cologne Act is “to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.”²⁰² Under the Porter-Cologne Act, regional water quality control boards have primary responsibility for formulating and adopting water quality control plans for their respective regions, which must conform to any state policy for water quality control. However, the State Water Board is also empowered to formulate its own water quality control plans – like the Bay-Delta Plan – which supersede any conflicting regional plans.²⁰³ The Porter-Cologne Act designates the State Water Board as the “state water pollution control agency” for purposes of the Clean Water Act.²⁰⁴ Like the Clean Water Act, the Porter-Cologne Act requires all state water quality control plans to be “periodically reviewed.”²⁰⁵

The Clean Water Act and Porter Cologne Act both mandate public participation in the review and update of water quality standards. For instance, the triennial review mandated by the Clean Water Act requires “public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.”²⁰⁶ Likewise, the Porter-Cologne Act requires a noticed public hearing prior to adoption of any water quality control plan.²⁰⁷

C. Tribal Consultation and Engagement in Water Governance

In furtherance of tribal sovereignty, the Legislature adopted Assembly Bill 52 (“AB 52”) in 2014, amending CEQA to mandate government-to-government consultations on CEQA projects

¹⁹⁵ 33 U.S.C. § 1251(a), (a)(2).

¹⁹⁶ 33 U.S.C. §§ 1313(a)-(c); 40 C.F.R. § 130.3.

¹⁹⁷ 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.6(c), 131.11.

¹⁹⁸ 33 U.S.C. § 1313.

¹⁹⁹ 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.5.

²⁰⁰ 33 U.S.C. § 1313(c)(3)-(4); *see also* 40 C.F.R. § 131.5.

²⁰¹ *City of Arcadia v. State Water Res. Control Bd.*, 135 Cal. App. 4th 1392, 1405 (2006).

²⁰² *City of Arcadia*, 135 Cal. App. 4th 1392, 1405 (2006).

²⁰³ Cal. Wat. Code, § 13170; *see also United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 109.

²⁰⁴ Cal. Wat. Code § 13160.

²⁰⁵ Cal. Wat. Code § 13240.

²⁰⁶ 33 U.S.C. § 1313(c)(1).

²⁰⁷ Cal. Wat. Code § 13244.

and formal tribal involvement in identification and protection of tribal cultural resources. Under AB 52, public agencies must consult with tribes traditionally and culturally affiliated with the geographic area affected by a project prior to project approval and “avoid damaging effects to any tribal cultural resource” whenever feasible.²⁰⁸ “Consultation” with a California Native American tribe means “the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement.”²⁰⁹ Consultation shall be conducted in a way that is mutually respectful of each party’s sovereignty and shall also recognize the tribes’ potential needs for confidentiality.²¹⁰

Tribal consultation is also a core policy priority in California. In 2011, Governor Brown issued Executive Order B-10-11 requiring government-to-government consultation on policies that may affect tribal communities.²¹¹ Governor Newsom extended these commitments in 2019 through Executive Order N-15-19, which formally apologized to California tribes for the “attempted destruction of tribal communities” and discriminatory laws and policies that “den[ie]d the existence of tribal government powers that persisted well into the twentieth century” and reaffirmed the state policy of government-to-government consultation with tribes on matters affecting tribal communities.²¹² The Executive Order also established a Truth and Healing Council to clarify the historical record of the relationship between the State and Native communities.²¹³

In furtherance of state policy, the State Water Board has memorialized its specific commitments to meaningfully consult with affected tribes as well as communities most directly impacted by state water quality management decisions.²¹⁴ In 2019, the State Water Board adopted a tribal consultation policy expanding upon AB 52’s statutory minimum requirements. The intent of the policy is to foster strong, effective, and respectful government-to-government dialogues between Water Board staff and both federally and non-federally recognized California Native American tribes.²¹⁵ Included within the Tribal Consultation Policy are guidelines and tools necessary for fostering and sustaining meaningful government-to-government relationships between the Water Boards and California Native American tribes. Best practices include consulting with one tribe at a time unless otherwise agreed upon and engaging in communication and consultation as early in the decision-making process as possible, before making any decision.²¹⁶

In November 2021, the State Water Board adopted a Racial Equity Resolution, which directed staff to develop a plan of action to advance racial equity within the Water

²⁰⁸ Cal. Pub. Res. Code 21080.3.1.

²⁰⁹ Cal. Gov. Code § 65352.4.

²¹⁰ *Id.*

²¹¹ Exec. Order B-10-11 (2011).

²¹² *Id.*

²¹³ Exec. Order N-15-19 (2019).

²¹⁴ See State Water Bd. Anti-Racism Resolution; Gov. Code, § 65040.12(e)(2)(D) (defining “environmental justice” to include “[a]t a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions”); see generally, e.g., Pub. Resources Code, § 21080.3.1 (codifying tribal consultation requirements under CEQA).

²¹⁵ State Water Bd. Tribal Consultation Policy, p. 3.

²¹⁶ *Id.* at p. 10.

Boards. The Resolution recognizes that “colonization, displacement, and genocide of Native American people in the United States have contributed to the loss of water resource and watershed management practices that supported Native American people’s traditional food sources and ways of life” and led to deprivation of inherent tribal water rights.²¹⁷ The Resolution also connects this historic state-sponsored violence and discrimination with present-day water quality management, acknowledging that the State’s watershed management practices privilege “large-scale diversion of water for municipal, industrial, agricultural, and commercial beneficial uses” to the detriment of tribes.²¹⁸ As one step toward repairing these historic and ongoing injustices, the State Water Board has committed to “improving communication, working relationships, and co-management practices with all California Native American tribes, including seeking input and consultation on the Water Boards’ rules, regulations, policies, and programs to advance decisions and policies that better protect California’s water resources.”²¹⁹

D. Public Trust and Reasonable Use Doctrines

In addition to these statutory obligations, the State Water Board has common law and constitutional responsibilities to safeguard public trust resources and assure the reasonable use of water in the state.

It is well-settled that the State, including when acting through the State Water Board, “has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”²²⁰ The range of resources protected by the public trust is expansive, encompassing tidelands, baylands, and navigable waters, as well as inland tributaries, non-navigable streams, and groundwaters hydrologically connected to other public trust resources.²²¹ So, too, public trust uses include “not just navigation, commerce, and fishing, but also the public right to hunt, bathe, and swim,” as well as the preservation of lands as open space or habitats to satisfy ecological, aesthetic, or spiritual values.²²²

Article X, Section 2 of the California Constitution codifies the doctrine of reasonable use, declaring that “the waste or unreasonable use or unreasonable method of use of water [is to] be prevented” and that “[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served.”²²³ The Legislature has also codified the Board’s authority and duty to realize this constitutional principle by limiting the use and diversion of water to what is reasonable.²²⁴ For instance, in furtherance of the State policy to prevent unreasonable use or diversion of water, section 275 of the Water Code requires the State Board to “take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste,

²¹⁷ State Water Bd. Anti-Racism Resolution ¶ 7(b).

²¹⁸ State Water Bd. Anti-Racism Resolution ¶ 7(b).

²¹⁹ *Id.* at p. 8, ¶ 7.

²²⁰ *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 446 (1983); *See also* Cal. Water Code § 1243.5.

²²¹ *See, e.g., S.F. Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 233; *Nat’l Audubon Society*, 33 Cal.3d at p. 437; *Env’tl. Law Found. v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844.

²²² *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60).

²²³ Cal. Const., art. X, § 2.

²²⁴ *See, e.g.,* Cal. Wat. Code §§ 100, 275, 1050, 1831, 85023.

unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”²²⁵

The Sacramento-San Joaquin Delta Reform Act of 2009 affirmed the application of the public trust and reasonable use doctrines to management of Bay-Delta waters, declaring that “the longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the [Bay-Delta].”²²⁶ The Act states that the waters of the Sacramento–San Joaquin River and Delta watershed shall achieve “co-equal goals” of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.”²²⁷

E. Civil Rights Obligations

Pursuant to, Title VI of the Civil Rights Act of 1964, California law, and its own Racial Equity Resolution, the State Water Board must assure that its actions do not exacerbate existing racial inequities in either purpose or practical effect. Title VI and the EPA’s implementing regulations prohibit entities that receive federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin.²²⁸ When any part of an agency is extended federal financial assistance, all of its operations are considered a “program or activity” subject to Title VI requirements.²²⁹ As a recipient of federal funds from the EPA,²³⁰ the State Water Board must adhere to these Title VI requirements with respect to all of its programmatic and regulatory activities, including regulation of Bay-Delta Plan water quality. The EPA must also ensure that its funds are not used to support discrimination on the basis of “race, color, or national origin.”²³¹ The State Water Board’s failure to adhere to Title VI requirements may result in termination or refusal of federal assistance and other measures necessary to obtain compliance.²³²

Agencies violate Title VI by carrying out activities that either have discriminatory intent, or create a disparate impact on protected groups, including tribes and other communities of color.²³³ The Delta Tribal Environmental Coalition’s Title VI civil rights complaint alleges that the State Water Board has discriminated against California tribes and communities of color in the Bay-Delta region by failing to update water quality standards and by intentionally excluding tribes and Black, Asian, and Latino residents from participating in policymaking processes. In particular, the Complaint alleges that out-of-date water quality standards have allowed a proliferation of harmful algal blooms, collapse of native fish species, and loss of native riparian vegetation. All of this results in particularly

²²⁵ Cal. Wat. Code § 275.

²²⁶ Cal. Wat. Code § 85023.

²²⁷ Cal. Wat. Code § 85020, 85054.

²²⁸ 42 U.S.C. § 2000d.

²²⁹ *Id.*

²³⁰ In fiscal year 2021, EPA awarded over \$252 million to the State Water Board – equaling 2.12% of EPA spending and the second highest obligated amount to grantees. *See* USA Spending, *FY 2021 Spending by Agency*, <https://www.usaspending.gov/explorer/agency> (last accessed May 22, 2022).

²³¹ 42 U.S.C. § 2000d; 40 C.F.R. Part 7.

²³² *See* 40 C.F.R. § 7.130.

²³³ 40 C.F.R. § 7.35(b).

severe impacts for Bay-Delta tribes throughout the Delta and communities of color in and around the South Stockton area. By accepting the Complaint for investigation, the EPA has determined that the allegations in the Complaint are sufficient to state a claim for discrimination in violation of Title VI and the EPA's implementing regulations and that the Complaint meets other conditions for EPA to exercise jurisdiction.

In addition to these federal requirements, California state law codifies the duties of public agencies to avoid racially discriminatory activities and redress existing racial inequities in land use and planning. California Government Code section 11135 contains parallel language to Title VI, prohibiting both intentional discrimination and discriminatory impact in programs administered by state agencies, including the State Water Board.²³⁴ Section 11135 applies to discrimination in environmental matters.²³⁵ Through more recent legislative enactments specific to environmental justice, the Legislature has also expressed its recognition of the need to address the “inequitable distribution of environmental benefits and burdens” resulting from “generations of injustice towards people of color, low-income residents, tribal communities, and other marginalized populations in California through discriminatory environmental and land use policies.”²³⁶

California law seeks to correct these disproportionate environmental burdens by advancing “environmental justice,” defined as the “fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”²³⁷ In particular, Senate Bill 2108, approved by the Governor in September 2022, recognizes that disadvantaged communities are disproportionately impacted by water quality pollution, which exacerbates persistent inequities, and that the State Water Board’s “programs were established over a structural framework that perpetuated inequities based on race.”²³⁸ The law directs the State and Regional Water Quality Control Boards to “address the connection between protecting and managing water resources and systemic and institutional racism,” including by conducting outreach to impacted communities as early as possible in planning and policy processes and to make findings on environmental justice, tribal impacts, and racial equity considerations when adopting or updating any water quality control plan.²³⁹

The State Water Board’s own Racial Equity Resolution affirms the Board’s commitment to making racial equity, diversity, inclusion, and environmental justice central to its work. The Racial Equity Resolution acknowledges the State’s role in entrenching racial inequity in water rights and water management, and it affirms the Board’s commitment to the “protection of public health and beneficial uses of waterbodies in all communities, and particularly Black, Indigenous, and people of color communities disproportionately burdened by environmental pollution.”²⁴⁰

DISCUSSION

²³⁴ Gov. Code, § 11135(a); *Darensburg v. Metropolitan Transportation Com.* (9th Cir. 2011) 636 F.3d 511, 519.

²³⁵ See *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal. App. 4th 1116, 1137 (conc. & dis. opn. of Rubin, J.)

²³⁶ Assem. Bill No. 1628, § 1 (2019).

²³⁷ Gov. Code § 65040.12(e).

²³⁸ Assem. Bill No. 2108 §1(a)

²³⁹ Assem. Bill No. 2108 §1(h)

²⁴⁰ State Water Bd. Anti-Racism Res., p. 7 ¶ 5.

I. This Staff Report falls well short of CEQA’s requirements for informed decision-making and environmental protection.

The Staff Report’s Substitute Environmental Document (SED) contains numerous deficiencies under CEQA and should be corrected and recirculated. These deficiencies include: 1) lack of a stable project description, 2) piecemeal environmental review, 3) failure to identify the project area properly, 4) failure to set forth a reasonable range of alternatives, and to adequately analyze the alternatives it does set forth, 5) failure to adequately assess the environment impact of harmful algal blooms, and 6) failure to engage in government-to-government consultation with tribes under AB 52.

The range and number of deficiencies in the SED is alarming. These deficiencies threaten to undermine one of the core tenets of CEQA: public participation. The SED fails to provide the public with a sufficiently clear and complete environmental review document to enable meaningful public involvement. These deficiencies also fail to provide the Board, the ultimate decision-maker, with a comprehensible document to make informed, reasoned decisions. Though DTEC commenters intimately understand the severity of the Bay-Delta crisis and the urgent need for protective water quality standards, the legal requirement for adequate environmental review cannot be cast aside. The SED must be compliant with the law, and we ask that the SED be recirculated to ensure that it is.

A. The SED lacks a stable project description and thereby impairs meaningful public involvement.

As a Substitute Environmental Document issued under the Board’s certified regulatory program,²⁴¹ the Staff Report is subject to CEQA’s broad policy goals and substantive standards intended to ensure meaningful public review of proposed agency actions and avoidance of significant adverse effects on the environment where feasible.²⁴² Among the core CEQA provisions applicable to certified regulatory program documents are those governing the contours of the CEQA “project” subject to environmental review.²⁴³ Like any CEQA environmental review document, an SED must set forth “an accurate, finite, and stable description” of the proposed project.²⁴⁴ This provision stems from one of the most significant parts of CEQA – meaningful public participation in environmental review of proposed agency action.²⁴⁵ The public and decision-makers must understand what a proposed project will actually entail to enable intelligent public participation and informed decision-making. By contrast, when a CEQA document “contains unstable or shifting descriptions of the project, meaningful public participation is stultified.”²⁴⁶

²⁴¹ Cal. Code Regs. Tit. 14 (« CEQA Guidelines ») § 15250.

²⁴² *Pesticide Action Network North America v. Dept. of Pesticide Regul.* (“PANNA”), 16 Cal.App.5th, 232, 241.

²⁴³ See CEQA Guidelines § 15250; *W. Placer Citizens of Ag. & Rural Env’t v. County of Placer*, 144 Cal.App.4th 890, 898 (“A description of the project is an indispensable element of a valid EIR.”)

²⁴⁴ *Washoe Meadows Cnty. v. Dept. of Parks & Recreation*, 17 Cal.App.5th 277, 287 (2017) (quoting *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d at 192-93 (explaining that an “accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR”)).

²⁴⁵ See CEQA Guidelines § 15201; *Washoe Meadows v. Dept. of Parks & Recreation* at 285 (“Informed public participation is essential to environmental review under CEQA.”).

²⁴⁶ *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 656 (2007).

Courts have long recognized that project descriptions that fail to set out the nature and scope of a project are “fundamentally inadequate and misleading.”²⁴⁷ This problem arises when a CEQA document sets forth inconsistent and shifting descriptions of the project being considered.²⁴⁸ It also arises when a CEQA document presents a range of project alternatives, deferring identification of the actual project until the close of public comment.²⁴⁹ “A description of a broad range of possible projects, rather than a preferred or actual project, presents the public with a moving target and requires the commenter to offer input on a wide range of alternatives that may not be in any way germane to the project ultimately approved.”²⁵⁰ Absent clear identification of the actual, preferred project, the public and decision-makers cannot weigh the costs and benefits of a proposed project with its alternatives, adequately assess mitigation measures, or properly assess a no project alternative.²⁵¹

The Court of Appeal’s 2017 decision in *Washoe Meadows Community v. Department of Parks & Recreation* is instructive. There, the agency prepared a draft EIR that set forth five different alternatives for addressing the Upper Truckee River’s contribution to discharge of sediment into Lake Tahoe, indicating that “following a period for public comment, one of the alternatives, or a variation thereof, would be selected as the project.”²⁵² The court held that a CEQA document that “states the eventual proposed project will be somewhere in a ‘reasonable range of alternatives’ is not describing a stable proposed project.” Instead, the EIR “functioned more as a scoping plan under CEQA Guidelines section 15083, which should be formulated prior to environmental review to identify the range of actions, alternatives, and effects to be analyzed.

The Staff Report suffers from precisely the project description errors that the Court of Appeal identified in *Washoe Meadows*. Rather than identify a clear, stable Project, the staff reports sets forth a range of five different options, expressly deferring selection of an alternative as the actual going-forward project until the close of public comment. Indeed, the Staff Report is explicit that it “does not identify the preferred proposal for moving forward with the update to the Bay-Delta Plan, and all alternatives and variations described in this draft Staff Report are available for consideration and adoption during the public planning process.”²⁵³ This disclaimer is reiterated throughout the Staff Report.²⁵⁴

Compounding the instability of the project description, the Staff Report has put forth *highly dissimilar* alternatives, which would constitute dramatically different projects. Under *Washoe Meadows*, presentation of “dramatically different projects” for public review and comment in a CEQA document is prejudicial error, as it “presents an obstacle to informed public participation.”²⁵⁵ Likewise, here, the Staff Report sets forth five alternatives, three of which are flow-based. These alternatives differ greatly in both method and goal. The VAs includes a combination of proposed flow and non-flow habitat restoration measures, and are proposed for an 8-year timeframe, whereas

²⁴⁷ *Washoe Meadows* at 287 (quoting *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (“*Treasure Island*”) 227 Cal.App.4th 1036, 1052 (2014)).

²⁴⁸ *Id.* (discussing *County of Inyo*, 71 Cal.App.3d 185).

²⁴⁹ See generally *Washoe Meadows*, 17 Cal.App.5th 217.

²⁵⁰ *Washoe Meadows* at 288.

²⁵¹ *Id.* at 287 (quoting *Treasure Island* at p. 1052).

²⁵² *Washoe Meadows* at 283.

²⁵³ Staff Report at 1-20.

²⁵⁴ Staff Report at 5-1; *id.* at 7-2-2; *id.* at 7-2-3.

²⁵⁵ *Washoe Meadows* at 288.

the other standards would persist until expressly amended.^{256,257} The VAs also set forth their own narrative salmon objective, which aims “to contribute” to the salmon doubling goal by 2050, and a vague narrative viability objective, which aims to maintain water quality conditions to support and maintain viable native fish populations.²⁵⁸ By contrast, the flow based alternatives – which include the proposed plan amendments, “low flow,” and “high flow” alternatives – employ different flow-based regimes to protect beneficial uses.²⁵⁹ These alternatives differ in their goals and method, as the VAs primarily rely on habitat restoration without inflow or outflow assurances, while the flow-based alternatives set varying numeric objectives for flows.

Even among the different flow-based alternatives, there are vast and underexplained differences. For instance, the proposed plan amendments contain an adaptive range, which is missing from the low and high flow alternatives. And taking only the proposed plan amendments, the Board would allow unimpaired flows to vary between 45 and 65% – a vast 20% range significant enough to create its own project instability, particularly as the Board has provided no explanation for how the range will be managed. With no clearly identified proposed project, the presentation of these very dissimilar, and internally unstable, alternatives sows confusion and presents the public “with a moving target,” impairing public participation and decision-making.²⁶⁰

The Board may believe that it is sufficient under CEQA that the SED review and solicit public comment on each of the alternatives. But the court in *Washoe Meadows* laid this argument to rest, explaining that “the problem with an agency’s failure to propose a stable project is not confined to ‘the informative quality of the EIR’s environmental forecasts.’”²⁶¹ Without a clear project description, the public cannot focus its attention on the Board’s actual proposal nor compare the environmental effects of the alternatives with the intended Board action. As a consequence, the SED, as in *Washoe Meadows*, is best understood as a much delayed initial scoping plan that formulates possible proposals for Board action: the Board will need to circulate an actual draft SED for public review and comment once it settles on its proposed project.

B. The Staff Report segments environmental review by deferring review of multiple integral parts of the Bay-Delta Plan update.

In addition to lacking a stable project description, the Staff Report lacks a complete one. Under CEQA, a “project” means the “whole of an action.”²⁶² This “broad interpretation of ‘project’ . . . is designed to provide the fullest possible protection of the environment within the reasonable scope of CEQA’s statutory language.”²⁶³ Consequently, CEQA prohibits “‘piecemeal’ review of the significant environmental impacts of a

²⁵⁶ Staff Report at 9-4.

²⁵⁷ *Id.* at 9-7.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 5-2.

²⁶⁰ *Washoe Meadows* at 288.

²⁶¹ *Id.*

²⁶² CEQA Guidelines § 15378(a).

²⁶³ *POET, LLC v. State Air Res. Bd.*, 12 Cal.App.5th 52, 73 (2017).

project.”²⁶⁴ That is, an agency cannot “[divvy] up a project into smaller pieces to avoid considering the environmental impacts of the entire project.”²⁶⁵

Yet the Board has done just this by piecemealing environmental review of the Bay-Delta Plan update. Most significantly, the Board has unlawfully piecemealed review of the Phase II standards by deferring development of regulatory text that includes the program of implementation to some untold future time.²⁶⁶ The program of implementation – a required component of any water quality control plan – is necessary “to achieve [flow, salinity, and water quality] objectives,”²⁶⁷ and will set forth the actual regulatory changes to the Bay-Delta Plan.²⁶⁸ Yet it was not included in the SED. The water quality standards and program of implementation are so interrelated that separating out the program of implementation prevents the public from understanding the actual nature of the water quality standard updates and their likely environmental consequences.

Pursuant to well-established CEQA substantive requirements, the water quality standards and program of implementation are clearly a single project for purposes of CEQA, the environmental impacts of which must be disclosed and reviewed in a single document. Under CEQA, a project “refers to the *underlying activity* which may be subject to approval and not the approval of that activity.”²⁶⁹ Multiple activities are part of the “whole of an action” and must be reviewed in a single CEQA document when the activities are “related to each other.”²⁷⁰ A sufficient relationship exists when activities further a common objective or when they are “related in (1) time, (2) physical location and (3) the entity undertaking the action.”²⁷¹

The Court of Appeal’s decision in *POET, LLC v. State Air Resources Bd.* is instructive. There plaintiffs contended that two sets of Low Carbon Fuel Standard regulations adopted several years apart constituted a single project for purposes of CEQA, which had been unlawfully severed by subjecting them to separate environmental reviews. The Court of Appeals agreed, holding that these two sets of regulations were sufficiently related to each other to constitute a single CEQA project because they shared “the same overall objective . . . [and] were adopted by the same entity . . . for the purpose of achieving that objective.” In addition, the regulations cover activity in the same geographical area – California. They address the same subject matter,” and they have a temporal connection “as is demonstrated by the fact the 2015 LCFS regulations replaced the original LCFS regulations, making them sequential.”²⁷²

Likewise, the Phase II water quality standards and their program of implementation have the same legal objective – to assure protection of beneficial uses in the Bay-Delta. They are both

²⁶⁴ *Banning Ranch Conservancy v. City of Newport Beach*, 211 Cal.App.4th 1209, 1222 (2012) (quoting *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmsrs.* 91 Cal.App.4th 1344, 1358 (2001)).

²⁶⁵ *Orinda Assn. v. Bd. of Supervisors*, 182 Cal.App.3d 1145, 1171 (1986) (quoting *Topanga Beach Renters Assn. v. Department of General Services* 58 Cal.App.3d 188, 195–196 (1976)).

²⁶⁶ Staff Report at 1-2 (“However, the specific changes to the Bay-Delta Plan, and specifically the program of implementation, have not been developed yet”).

²⁶⁷ Staff Report at 1-1.

²⁶⁸ *Id.*, at 1-2.

²⁶⁹ *POET, LLC* at 73 (quoting *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* 178 Cal.App.4th 1225, 1238 (2009)).

²⁷⁰ *POET, LLC* at 74.

²⁷¹ *POET, LLC* at 74.

²⁷² *POET, LLC* at 75.

undertaken by the Board to accomplish that unified objective; they apply to the same geographic area; and they are temporally connected, as the Board has promised that the program of implementation will sequentially follow the current SED. Indeed, the water quality standards and the program of implementation that puts them into effect together comprise the Phase II Bay-Delta Plan update. Under *POET*, it is evident that the SED and program of implementation are so related as to constitute the same CEQA project. In piecemealing their environmental review, the Board perpetuates further delay, confusion, and uncertainty. Without a complete document that explains what the Bay-Delta Plan's project actually is, the public is unable to understand the complete package they are being asked to comment on and its aggregate environmental effects, and they are denied the opportunity to understand whether any of the alternatives will actually achieve the objectives of the Bay-Delta Plan.

Indeed, Chair Esquivel himself stated as much at the December 11, 2023 Phase II public hearing, during which he informed the public that because the Staff Report lacks a program of implementation, the SED provides only a “crude[]” analysis of environmental impacts, many of which will ultimately “fall potentially outside the range of impacts [the Board has] identified as part of the draft staff report.”²⁷³ He thus cautioned that “[f]olks are trying to put the cart before the horse a bit in what you’re expecting from this document.”²⁷⁴ But this is precisely the problem: CEQA requires the Board to provide the public with a realistic account of reasonably foreseeable impacts through the SED and to make its decisions based on an informed and holistic account of the entire project’s anticipated effects. Without the disclosure and analysis of the program of implementation that will explain how standards are translated into actual modifications in flows, the Board is making its decisions in the dark, and the public cannot know that the Board “has, in fact, analyzed and considered the ecological implications of its action.”²⁷⁵

C. The SED fails to properly identify and analyze the project area.

Excluding the Trinity River from the SED’s project area violates CEQA, as the Trinity River is both legally classified as part of the Bay-Delta and is relied upon for inflows that all Project alternatives depend upon. CEQA requires that a lead agency accurately identify the project area and “discuss significant impacts that the proposed project will cause in the area that is affected by the project.”²⁷⁶ “If the description of the environmental setting is inaccurate, incomplete or misleading, the EIR does not comply with CEQA.”²⁷⁷ Failure to

²⁷³ See State Water Res. Control Bd., Public Hearing: Sacramento Delta Draft Staff Report at 4:32:18 (Dec. 11, 2023).

²⁷⁴ *Id.* at 4:32:50.

²⁷⁵ *Joy Rd.*, 142 Cal.App.4th at 670.

²⁷⁶ *Bakersfield Citizens for Local Control v. City of Bakersfield*, 125 Cal.App.4th 1184, 1216 (2004) (citing CEQA Guidelines § 1525.(a)); see CEQA Guidelines § 15124(a) (The lead agency must identify “the precise location and boundaries of the proposed project [which] shall be shown on a detailed map, preferably topographic.”); CEQA Guidelines § 16126.2(a) (requiring consideration of changes of the project to “the existing physical conditions in the affected area,” including discussion of “relevant specifics of the area, physical changes, alteration to ecological systems . . . and other aspects of the resource base such as water, historical resources, scenic quality, and public services.”); CEQA Guidelines § 15125(c) (“The EIR must demonstrate that the significant impacts of the proposed project were adequately investigate and discussed and it must permit the significant effects of the project to be considered in the full environmental context”).

²⁷⁷ *Cleveland Nat. Forest Found. v. San Diego Ass’n of Govts.*, 17 Cal.App.5th 413, 439 (2017); see also *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus*, 27 Cal.App.4th 713, 729 (1994) (“Without accurate and complete

disclose and analyze the entire affected project area in the environmental analysis misleads the public by understating the scope and potential gravity of environmental effects.²⁷⁸ As a consequence, the agency cannot define the area “so narrowly. . . that it necessarily eliminates a portion of the affected environmental setting.”²⁷⁹ The SED’s exclusion of the Trinity River and the Klamath River Basin from the Project area has done just that.

Through the Trinity River Division, the Central Valley Project reengineered the hydrology of the Trinity River – which naturally flows into the Klamath River before emptying into the Pacific Ocean – by modifying it to feed the Sacramento River through Whiskeytown Reservoir, a formerly distinct watershed. Recognizing that the Trinity River is now functionally part of the Bay-Delta and a major source of its flows, the State legally reclassified the Trinity River as part of the “Delta tributary watershed.”²⁸⁰ Indeed, the Staff Report relies on the Trinity River for Delta inflows under all Project alternatives,²⁸¹ and the Report is explicit that satisfying any of the instream flow regimes requires import of Trinity River water into the Sacramento.²⁸²

The SED’s exclusion of the Trinity River from the Project area makes the “description of the environmental setting of the project site and surrounding area . . . inaccurate, incomplete and misleading” and also “renders the identification of environmental impacts legally inadequate.”²⁸³ As a practical and legal component of the Bay-Delta watershed, the Trinity River must be included in the environmental analysis to assure consideration of all reasonably foreseeably environmental effects. The Board’s failure to include the Trinity River in its analysis carries enormous consequence for Klamath River Basin tribes, as the Report omits consideration of the alternatives’ potential to impair reserved rights and tribal cultural resources of Klamath River Basin tribes²⁸⁴ as well as Tribal Beneficial Uses protected by the North Coast Basin Plan.²⁸⁵

information pertaining to the setting of the project and surrounding uses, it cannot be that the FEIR adequately investigate and discussed the environmental impacts of the development project”).

²⁷⁸ See *King Cnty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 718, 721 (A “project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant.”); *San Joaquin Raptor*, 27 Cal.App.4th at 729 (inadequate description of environmental setting “renders the identification of environmental impacts legally inadequate and precludes a determination that substantial evidence supports the Board’s finding that the environmental impacts on wildlife and vegetation have been mitigated to insignificance”).

²⁷⁹ *Bakersfield Citizens*, 124 Cal.App.4th at 1216.

²⁸⁰ Cal. Wat. Code, § 78647.4(b).

²⁸¹ Staff Report at 7.2-2 (“Inflows from the Sacramento River, its tributaries, and Delta eastside tributaries (the Cosumnes, Mokelumne, and Calaveras Rivers) that would require 55 percent unimpaired flow, with an adaptive range from 45 percent to 65 percent unimpaired flow”).

²⁸² *Id.* at 2-20 (“The Sacramento River also receives imports from the Trinity River system through operations of the [Central Valley Project].”); p. 2-41 (“Trinity River flows are imported to the Sacramento River watershed through the Clear Creek Tunnel to Whiskeytown Reservoir.”), (62 percent of the volume of water in the Whiskeytown Reservoir is imported from the Trinity River.).

²⁸³ *San Joaquin Raptor*, 27 Cal.App.4th at 729.

²⁸⁴ See *Arnett v. Five Gill Nets* 48 Cal.App.3d 454, 461 (1975) (recognizing that Indians on the Klamath River Reservations “had fishing rights derived from Congress” and that “State qualifications of those traditional rights was precluded by force of the Supremacy Clause”); see also *Baley v. United States* 942 F.3d 1312, 1323 (Fed. Cir. 2019) (“Federal and California state courts have recognized that the right of the Yurok and Hoopa Valley Tribes to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes was reserved when the Hoopa Valley reservation was created”).

²⁸⁵ Cal. Reg’l Water Quality Control Bd., North Coast Region, Basin Plan (Chapter 2) 2-3 (2018), (Defines Native American Culture (CUL) as a beneficial use. “Uses of water that support the cultural and/or traditional rights of

D. The SED fails to set forth a reasonable range of alternatives or adequately analyze the alternatives it does consider.

i. The range of alternatives considered by the Board fails the rule of reason.

The alternatives considered by the Staff Report do not constitute a reasonable range of alternatives. The “consideration of alternatives is one of the hallmarks of CEQA analysis.”²⁸⁶ SEDs, like any environmental analysis governed by CEQA, must set forth a “range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project,” and it must “evaluate the comparative merits of the alternatives.”²⁸⁷ Under certified regulatory programs, “the public agency bears the burden of affirmatively demonstrating that, notwithstanding a project’s impact on the environment, the agency’s approval of the proposed project followed meaningful consideration of alternatives.”²⁸⁸ The required range of potentially feasible alternatives is governed by a “rule of reason” and must be sufficient to “foster informed decision-making and public participation.”²⁸⁹ The SED’s alternatives analysis falls well short of these requirements.

The SED considers three flow-based alternatives. The low flow alternative is described as a “new numeric inflow objective for the Sacramento/Delta tributaries [that] would require between 35 and 45 percent unimpaired flow.”²⁹⁰ The high flow alternative is described as a “new numeric inflow objective for the Sacramento/Delta tributaries [that] would require between 65 and 75 percent unimpaired flow.”²⁹¹ Unlike the proposed plan amendments, which set an inflow objective at 55 percent with an adaptive range of 45 to 65 percent, neither the low or high flow alternatives sets forth an specific inflow objective or an adaptive range.²⁹² And the Staff Report contains no explanation at all for if or how flows will be managed in the ten percent range set forth in the low and high flow alternatives to maximize benefits or avoid impacts.

The alternatives fail to provide the Board with a feasible alternative that would be environmentally protective; as a consequence, the SED does not “produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned.”²⁹³ The SED dismisses the low flow alternative out of hand because it self-evidently fails to protect beneficial uses.²⁹⁴ The proposed plan amendment alternative, which allows for flows as low as 45 percent of unimpaired flow, does not follow the Board’s own science that says flows of 65 percent or higher are generally needed to protect public

indigenous people such as subsistence fishing and shellfish gathering, basket weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses”).
https://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/180710/BPChapter2BeneficialUses.pdf.

²⁸⁶ *PANNA* at 603-04; see Pub. Res. Code § 21001(g) (declaring it the policy of the state to “[r]equire government agencies . . . to consider alternatives to proposed action affecting the environment”).

²⁸⁷ CEQA Guidelines § 15126.6.

²⁸⁸ *PANNA* at 603 (quoting *Mountain Lion*, 16 Cal.4th at 134).

²⁸⁹ CEQA Guidelines § 15126.6(a).

²⁹⁰ Staff Report at 7.2.-6

²⁹¹ Staff Report at 7.2.-7

²⁹² Staff Report at 7.2-6 to 7.2-7.

²⁹³ *Citizens of Goleta Valley v. Board of Supervisors* at 1178-1179 (quoting *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* 155 Cal.App.3d 738 (1984)).

²⁹⁴ Staff Report at 7.2-7.

trust resources, and it has far too broad an adaptive range to create a stable and certain project description. The high flow alternative, though closer to levels necessary to protect public trust resources, lacks an adaptive range at all that would be needed to avoid impacts to cold water pool and carryover storage in upstream reservoirs, rendering the high flow alternative a meaningless strawman.²⁹⁵ The Board provides no explanation at all for the inflow numbers around which the various alternatives were organized, or for its decision not to consider any alternatives between the proposed plan amendment and the high flow alternatives. Meanwhile, the VAs, as discussed below, are only conceptual and lack a basis in science.

To meet CEQA’s requirement to set forth a reasonable range of feasible alternatives that could avoid potential adverse effects, the Board should consider – and adopt – an alternative that would require 65 percent unimpaired flow but that also possesses an adaptive range that could allow flows as low as 60 percent if necessary to avoid adverse impacts to cold water species and carryover storage in exceptionally hot or dry years. The evidence, including the Staff Report’s own analysis, shows that the Bay-Delta ecosystem thrives as flows increase.²⁹⁶ One example of a species that thrives with flows of 65 percent and higher is the Chinook salmon. Table 3.14-4 in the Staff Report shows that the frequency of meeting a target of 20,000 cubic feet per second (“cfs”) at Rio Vista, which is needed to support the outmigration of juvenile Chinook salmon, increases as the inflow objective increases.²⁹⁷

Table 3.14-4. Frequency of Meeting Rio Vista Targets for Chinook Salmon Species

Species	Baseline	35	45	55	65	75
Fall-run	26	28	29	33	38	47
Winter-run	57	61	67	68	77	83

Table 1. Frequency of each flow scenario meeting the 20,000 cfs target at Rio Vista, the Delta spawning habitat for Chinook salmon.

These results align with the Board’s 2010 report, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (“Public Trust Flows Report”), which recommended 75 percent unimpaired Sacramento River inflows to increase juvenile salmon outmigration survival for fall-run Chinook salmon.²⁹⁸ This same report recommends 75 percent of unimpaired Delta outflow to promote increased abundance and improved productivity for longfin smelt and other estuarine species.²⁹⁹

²⁹⁵ See *id.* at 7.2-8 (“Although the required Delta inflows would be higher under the High Flow Alternative compared to the proposed Plan amendments and would provide ecosystem benefits, the beneficial environmental effects under the High Flow Alternative would be limited due to significant challenges in maintaining suitable water temperatures for cold water aquatic species and carryover storage for environmental and water supply purposes”).

²⁹⁶ Staff Report at p. 3-110 (“Generally, the higher the flows up to 100 percent of unimpaired flow (and higher in summer and fall) and the lower the X2 value, the greater the expected benefits are for native species and the ecosystem, provided that adequate supplies are maintained for cold water and flows at other times”).

²⁹⁷ *Id.* at 3-114.

²⁹⁸ Cal. State Water Res. Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* 114, 132 (Aug. 3, 2010), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

²⁹⁹ *Id.* at 99.

Likewise, the Staff Report’s outflow analysis shows that the necessary Delta outflows required for supporting beneficial uses are met more frequently as flow scenarios increase.³⁰⁰ And its analysis of the percent increases of population abundance indices for four native Bay-Delta species³⁰¹ explains that “more substantial benefits [would be expected] from 65 and 75 percent scenarios when compared with current conditions” while only “[m]odest benefits would be expected from the 55 scenario.”³⁰²

Without an alternative with a 65 percent inflow objective with a reasonable adaptive range, the SED cannot be said to be compliant with the governing “rule of reason.” While an SED need not propose alternatives that are “remote or speculative,”³⁰³ proposing an alternative that advances an inflow objective of 65 percent with a narrow adaptive range is neither. Missing such an alternative, the SED fails to identify environmentally preferable options or identify measures for the public and decisionmakers that could protect public trust resources and avoid adverse environmental impacts.

ii. The alternatives analysis misses the requisite level of detail required for meaningful decision-making and public participation.

The Staff Report also fails to advance a meaningful discussion of the alternatives it does set forth. The SED must describe the alternatives in sufficient detail to allow a meaningful “comparative analysis.”³⁰⁴ However, the alternatives analysis fails to provide the public and decisionmakers with the level of detail needed to comprehend and compare the alternatives.

These failures are particularly evident for the high flow alternative. As discussed above, Staff characterize the high flow alternative as having tradeoffs for upstream water temperature and cold water storage, but the Staff Report does not provide the requisite level of detail to allow the public to comprehend the significance of these concerns. For example, as shown in Table 6.3-10, which describes average losses in watershed storage across flow scenario, losses are most pronounced at a 75 percent unimpaired flow scenario. But the numbers reflect relatively small losses in storage overall, especially comparing 65 to 55 percent scenarios. Neither the Staff Report’s hydrology chapter nor its alternatives analysis explains what level of loss creates “significant challenges” for maintaining carryover storage.³⁰⁵ These missing details confuse and obscure the real environmental benefits and costs for the high flow alternative, making it difficult for the public to understand whether so-called “high flows” would actually compromise carryover storage.

³⁰⁰ Staff Report at 3-118, Table 3.14-6.

³⁰¹ *Id.* at 3-122 to 3-123, Table 3.14-7.

³⁰² Staff Report at 3-121.

³⁰³ CEQA Guidelines § 15126.6(f)(3), § 15145.

³⁰⁴ CEQA Portal Topic Paper, Alternatives, p. 7, “Under CEQA, alternatives do not need to be described or analyzed at the same level of detail as the proposed project (CEQA Guidelines Section 15126.6(d)). However, they need to be described in enough detail to allow a comparative analysis of the alternatives against the proposed project (*see Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979)).”

³⁰⁵ Staff Report at 7.2-8.

Table 6.3-10. Average End-of-September Watershed Total Storage for Baseline (thousand acre-feet) and Percent Difference from Baseline for the Flow Scenarios

Watershed	Baseline TAF	35 (%)	45 (%)	55 (%)	65 (%)	75 (%)
American	1,105	-1	-2	1	-5	-24
Bear	113	0	-1	-3	-12	-26
Cache	1,010	-1	-2	-3	-4	-5
Calaveras	103	3	-1	11	4	-22
Clear	234	0	0	0	0	-1
Cosumnes ^a	31	0	0	0	0	0
Feather	3,226	-3	-6	-8	-5	-10
Mokelumne	642	0	-3	-5	-9	-18
Putah	971	1	-4	2	-13	-14
Sacramento ^b	2,901	3	1	-3	-6	-4
Stony	134	-14	-19	-26	-34	-43
Yuba	872	8	5	2	-2	-18

^a The only reservoir represented in SacWAM in the Cosumnes watershed is Sly Park Reservoir, which does not show any change to operations in any of the scenarios.

^b Sacramento River watershed total storage in this context represents Shasta Lake and Keswick Reservoir storage, excluding storage in all other watersheds listed in the table.

Table 2. Baseline total average water storage compared across watersheds showing percent difference of baseline storage amounts from storage under the flow scenarios.

Other aspects of the alternative's analysis create further confusion. For example, the VA alternative is never compared with any of the flow alternatives. This comparison is critical, considering that the VAs and flow-based alternatives vary greatly in goal and method. Another area of confusion is that the low and high flow alternatives do not have a target inflow objective or adaptive range, but the proposed plan amendments do. The differences across alternatives make it difficult for the public to compare alternatives and their environmental consequences. The Staff Report must be revised to set forth an actually reasonable range of alternatives, and fully disclose the environmental benefits and costs of each, to provide the public and decisionmakers sufficient information to understand whether a feasible and environmentally superior alternative to the proposed plan amendments exists.

E. The SED fails to adequately assess the severity of Harmful Algal Blooms and consequently fails to propose sufficient mitigation strategies for HABs.

The draft SED does not adequately assess HABs as a significant environmental impact and fails to present adequate mitigation strategies for HABs. An SED must consider significant environmental impacts and measures to mitigate them to insignificance.³⁰⁶ Mitigation includes minimizing the degree or magnitude of the impact.³⁰⁷ The Staff Report largely ignores the primary driver of HABs – low flows. By ignoring the correlation of flows and HABs, the mitigation measures and alternatives fail to address the HABs problem.

While the Staff Report does discuss the impact of HABs on reservoir storage and exports,³⁰⁸ the Report includes no analysis of how low flows, like the flows proposed by most of the Report's

³⁰⁶ Cal. Code. Regs. Tit. 23 § 3777(b)(2).

³⁰⁷ CEQA Guidelines § 15370(b).

³⁰⁸ Staff Report, at 7.12.1-29 ("Low water levels at reservoirs could result in higher water temperatures at shallow locations in reservoirs, particularly in summer months, which could help drive algal bloom formation. (USEPA 2013)."); 7.12.1-92 ("lower reservoir storage could result in increased algal growth in export reservoirs, which could also affect drinking water quality").

alternatives, will exacerbate HABs. As acknowledged in the Staff Report, “low streamflow may be the most important factor for maintaining HABs, at least for *Microcystis*.”³⁰⁹ The effect of flow on HABs is well-documented and helps explain the correlation between the increased Sacramento River flows and less reported HABs incidents this past year.³¹⁰ Despite Staff’s acknowledgement of the clear correlation between flows and HABs, the Report contains no discussion of how increasing flows can be utilized as a mitigation strategy to manage HABs.

This oversight also leads the Board to prioritize water rights holders over Bay-Delta communities and tribes.³¹¹ As discussed above, HABs harm the health and welfare of communities that reside nearby and depend on the waterways, they impair tribal ceremony and cultural practice, they impair safe recreation, and they alienate Delta tribes and communities, in addition to their adverse impacts on native fish and wildlife. The Staff Report should have examined effects of the various flow scenarios (as well as the VAs) on HABs throughout the Bay-Delta, as well as the resulting implications for Delta environmental justice communities and tribes.

The Staff Report reflects the Board’s strategy of delay and postponement on developing a meaningful HABs strategy. The SED’s mitigation strategies largely focus on forming task forces and continual monitoring of the HABs situation.³¹² While these strategies are necessary and should be employed to develop additional research and monitoring on HABs, they are not enough. From 2016 to 2019, 11 lakes within California were closed for recreation because of HABs.³¹³ In Sacramento County alone, there have been 40 HABs reports since 2020, according to the Board’s HABs tracker.³¹⁴ According to the Delta Stewardship Council’s HABs tracker, 221 HABs incidents have been voluntarily reported since 2016.³¹⁵ Because of the lack of continuous monitoring, these numbers certainly capture only a sliver of the problem. However, one thing is certain – as climate change induces more drought and higher temperatures – there will be more and more HABs incidents unless adequate instream flows are prioritized. This will mean more polluted waterways, increased health risks, and foreclosed opportunities for communities and tribes to use these waterways for subsistence, recreation, and cultural, ceremonial, and religious practices.

³⁰⁹ *Id.* at 7.12.1-29; *See also* 7.12.1.38 (“Several studies indicate that low flows through the Delta are associated with increased HAB formation. HABs are more frequent and more severe in dry years”).

³¹⁰ Attachment 14, Spencer Fern, HABs Comments on the Draft Staff Report for the Phase II Update to the Bay-Delta Plan p. 1-2 (2023) [hereinafter “Attachment 14”].

³¹¹ *Id.*

³¹² Staff Report, at 7.12.1-117 (“The State Water Board will continue to monitor HABs under the Surface Water Ambient Monitoring Program (SWAMP).”), (“The regional water boards will continue to require monitoring through permitting for some nutrients...[and] will continue to identify waterbodies that are impaired by elevated levels of nutrients.”), (“State Water Board staff from the Division of Water Rights are coordinating with other staff within the regional water boards and other divisions within the State Water Board...to develop new special studies for HAB monitoring, identify gaps in long-term monitoring, and communicate the latest science on HABs and prevention and mitigation measures”).

³¹³ Staff Report. at 7.18-10.

³¹⁴ Attachment 14 at p. 7.

³¹⁵ Delta Stewardship Council, *Harmful Algal Blooms*, Incident Report of Harmful Algal Blooms in the Delta, <https://viewperformance.deltacouncil.ca.gov/pm/harmful-algal-blooms>.

F. The SED fails tribal consultation requirements.

i. The Board violates CEQA by failing to undertake tribal consultation and to identify and minimize impacts on tribal cultural resources.

The State Water Board failed to engage in meaningful government-to-government consultation with tribes and thereby neglected to identify and minimize impacts on tribal cultural resources as mandated by CEQA. Assembly Bill No. 52 (AB 52) amended CEQA to mandate early tribal consultation prior to and during CEQA review, and it positioned California Native American tribes as the experts on cultural resources within their own geographical areas.³¹⁶ Prior to adoption of AB 52, CEQA was ineffectual in directly addressing tribal concerns, and California Native American governments lacked a consistent, formal role in the environmental review process.³¹⁷ The California Legislature passed AB 52 on September 28, 2014 in response to these growing concerns and in recognition of California Native American tribal sovereignty and the unique relationship between tribal governments, California state and local governments, and other public agencies.³¹⁸ The primary goal of AB 52 is to assure the direct and meaningful involvement of California Native American tribes in decision-making processes that impact the sites, features, places, cultural landscapes, and other resources that have cultural significance to a tribal community. AB 52 is considered more robust than other historic and cultural resource protection statutes because it provides greater legal protections for resources and requires more stringent consultation requirements.³¹⁹ Additionally, rather than treating tribal members as members of the public and limiting their participation to comment writing or public hearings, AB 52 offers tribal governments a seat at the decision-making table with lead agencies from the inception of the planning process.³²⁰

AB 52 specifies that a project that may “cause a substantial adverse change in the significance of a tribal cultural resource” is a “project that may have a significant effect on the environment.”³²¹ To help determine whether a project may have such an effect, public agencies are required to consult with any California Native American tribe³²² that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project.³²³ Tribal consultation under AB 52 must begin prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project.³²⁴ Meaningful consultation between government agencies and tribal governments must be conducted in a manner that recognizes the cultural values of all parties involved and is respectful of each party’s sovereignty.³²⁵

³¹⁶Heather Dadashi, *CEQA Tribal Cultural Resource Protection: Gaps in the Law and Implementation*, 39:2 UCLA J. Env’t L. Pol’y 231 (2021).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Dadashi *supra* note 316 at 233 (citing Assemb. B. 52, c. 532, § 2, 2013–2014 Leg., Reg. Sess. (Cal. 2014))(discussing in Part II AB 52’s broad protections as compared to other statutes).

³²⁰ *Id.*

³²¹ Cal. Pub. Res. Code § 21084.2 (2021).

³²² A California Native American tribe is “a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission” (NAHC). This definition does not distinguish between federally recognized and non-federally recognized tribal groups and is therefore more inclusive than the federal definition of “Indian tribe.” Cal. Pub. Res. Code § 21073 (2021); 25 U.S.C. § 3001(7).

³²³ Cal. Pub. Res. Code § 21080.3.1(b) (2021).

³²⁴ Cal. Pub. Res. Code § 21080.3.1(b) (2021).

³²⁵ Cal. Gov’t Code § 65352.4 (2021).

“Consultation with tribes is considered the most effective way for lead agencies to determine if a project could result in significant environmental impacts to tribal cultural resources.”³²⁶

If a lead agency determines through consultation that a project may cause a substantial adverse change to tribal cultural resources, it must consider measures to mitigate that impact. The California Public Resources Code provides examples of mitigation measures that lead agencies may consider to avoid or minimize impacts to tribal cultural resources.³²⁷ Examples include: avoidance and preservation of the resources in place; treatment of the resource with culturally appropriate dignity; protection of the traditional use of the resource; protection of the confidentiality of the resource; and permanent conservation easements with culturally appropriate management. If mitigation measures are agreed upon with a tribe in accordance with Public Resources Code section 21082.3, the mitigation measures must be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program.³²⁹

In drafting the Staff Report, the State Water Board neglected AB 52 consultation altogether. Absent AB 52 compliance, lead agencies like the Board are under no affirmative duty to contact tribes for consultation or to identify and mitigate impacts to tribal cultural resources.³³⁰ After the Coalition petitioned the State Water Board to consult with tribes on the Phase II update under AB 52, the Board stated that it would begin outreach to tribes under Executive Order B-10-11 but believed that it had no duty to conduct AB 52 consultation.³³¹ The Board did not begin any outreach until January 2023, and has since held a handful of workshops, listening sessions, and meetings to receive tribal input on the Bay-Delta Plan update. While an important first step in, these meetings – which have come at the conclusion of the environmental review process – are no substitute for the legal consultation requirements set forth under CEQA and the Board’s own tribal consultation policies.³³² To the extent that the Board suggests that engagement with tribes under the vague mandates of Executive Order B-10-11 can substitute for government-to-government consultation under AB 52, it is clearly wrong.

The State Water Board should have engaged in AB 52 consultation with California Native American tribes traditionally and culturally affiliated with the geographic areas affected by the Bay-Delta Plan. This includes all tribes whose rights and interests will be affected by decisions about Delta water management: tribes within the Delta (such as Shingle Springs Band of Miwok Indians and Buena Vista Rancheria of Mi-Wuk Indians), in Delta headwaters (including Winnemem Wintu Tribe), and tribes in water basins affected by Delta imports and exports (such as the Yurok and Hoopa Valley Tribes). Under AB 52, the Board should have consulted with the tribes to assure identification of potential tribal cultural resources in the project area (including identification of the Bay-Delta watershed itself and its rivers and tributaries as tribal cultural resources), the potential significance of project

³²⁶ Dadashi, *supra* note 316 at 234.

³²⁷ Cal. Pub. Res. Code, § 201884.3 (b)(2) (2021).

³²⁸ Cal. Pub. Res. Code, § 201884.3 (b)(2) (2021).

³²⁹ Cal. Pub. Res. Code, § 21082.3.

³³⁰ Under Cal. Exec. Order No. B-10-11 (Sept. 19, 2011), the Board is encouraged, but not required, to consult with Tribes on policies that affect tribal communities.

³³¹ Exhibit H.

³³² Attachment 13, Gary Mulchay, Comments on Tribal Engagement Section of Draft Staff Report–Tribal Water Rights [hereinafter “Attachment 13”].

impacts on identified resources, and the development of project alternatives and mitigation measures to avoid and reduce impacts. Without proper consultation, the Board made errors in documenting tribal perspectives, and has failed to capture the richness and depth of historical and present tribal relationships with Bay-Delta waterways. The State Water Board's failure to take up AB 52 consultation demonstrates a pattern and practice of brushing past tribal concerns and neglecting to treat tribal representatives as experts of their own histories and practices.

ii. The State Water Board is not exempt from AB 52 consultation.

The Board's assertion that it is exempt from AB 52 tribal consultation is plainly wrong. Environmental reviews under the Board's certified regulatory program "remain[] subject to the broad policy goals and substantive requirements of CEQA."³³³ Through AB 52, the Legislature expanded CEQA's substantive requirements and policy goals to include consideration of impacts on tribal cultural resources and incorporation of tribes' unique expertise in environmental assessments.³³⁴ To comply with CEQA's substantive requirements and policy goals, including AB 52 tribal consultation requirements, the Board must conduct consultation on all Bay-Delta Plan environmental reviews.

The Staff Report asserts that the Board is exempt from AB 52 consultation because the project's notice of preparation ("NOP") was filed before July 1, 2015.³³⁵ Staff's analysis that the Board may bypass AB 52 consultation because the Board has kept this legally required update pending for more than a decade is troubling and undercuts its commitments to meaningful consultation and engagement with tribes.

In any event, although the NOP for the Bay-Delta Plan updates was issued on January 24, 2012, it was not until at least 2017 that preparation of any environmental analysis for Phase II of the Bay-Delta Plan commenced. The Board approved Phase I amendments to the Bay-Delta Plan in December 2018 after nearly a decade of initiating a review process for updating Phase I water quality standards in 2008.³³⁶ Meanwhile, in October 2017, the State Water Board released a Fact Sheet and Scientific Basis Report outlining its recommendations for the Phase II update and assuring the public that it "plan[ned] to complete [the Bay-Delta Plan update] process without further delay."³³⁷ Nine months later, the Board released a framework document describing the Phase II update process, which projected that the Board would release a draft staff report on comprehensive Phase

³³³ Pesticide Action Network N. Am. v. Dept. of Pesticide Regulation, 16 Cal.App.5th 224, 243 (2017).

³³⁴ Assemb. B. 52, c. 532, § 1(b)(4), (5), 2013–2014 Leg., Reg. Sess. (Cal. 2014).

³³⁵ AB 52 applies to any "project that has a notice of preparation or a notice of negative declaration filed or mitigated negative declaration on or after July 1, 2015." *Id.* § 11.

³³⁶ Cal. State Water Res. Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* 3 (2018), https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf.

³³⁷ Cal. State Water Res. Control Bd., *Fact Sheet: Phase II Update of the Bay-Delta Plan: Inflows to the Sacramento River and Delta and Tributaries, Delta Outflows, Cold Water Habitat and Interior Delta Flows* 1 (2017), https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/201710_phaseII_factsheet.pdf; Cal. State Water Res. Control Bd., *Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows* 99 (2017), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_wa/terfix/exhibits/docs/PC_FFA&IGFR/part2/pcffa_168.pdf.

II amendments in 2018.³³⁸ It was not until September 2023 that the draft Staff Report for Phase II of the Bay-Delta Plan was released. While the Board points to 2012 as the starting point for Phase II amendments to the Bay-Delta Plan, the actual starting point was 2017 – two years after AB 2015 was adopted.

Given that the Board will need to recirculate the draft SED with a stable, complete, and finite project description, the Board will also need to engage AB 52 consultation on the revised SED to comply with CEQA’s substantive mandates and broad policy goals. The Board should take this as an opportunity to correct its previous missteps and meaningfully work with tribal governments to understand and mitigate the impacts to tribal cultural resources. AB 52 acknowledges tribes as experts of their own histories and practices related to the tribal cultural resources with which they are traditionally and culturally affiliated. It also acknowledges the importance of allowing tribal governments to share their knowledge in the environmental review process with the ultimate goal of environmental and cultural resource protection. Without tribal consultation, violations of tribes’ sovereign rights to government-to-government consultation and assaults to tribal cultural resources and interests may replicate through these subsequent environmental reviews.

II. The Board must adopt flow-based standards that guarantee protection of beneficial uses.

A. The Board should adopt an inflow objective of 65 percent with a reasonable adaptive range and management strategies to implement a functional flows regime.

The proposed Plan amendments’ numeric inflow objective of 55 percent of unimpaired flow with an adaptive range of 45 to 65 percent is incapable of meeting the Board’s legally mandated duties to reasonably protect beneficial uses and base water quality criteria on “sound scientific rationale.”³³⁹ Based on the best available science and Traditional Ecological Knowledge regarding Bay-Delta waterways, as well as the exigency of the ecological crisis in the Bay-Delta, we recommend that the Board adopt a flow objective of 65 percent unimpaired flow with a reasonable adaptive range (permitting inflows/outflows to drop no lower than 60 percent unimpaired flow) together with management strategies that implement a functional flows approach.

When flows follow the natural hydrograph and return closer to unimpaired flow levels, all native Bay-Delta species benefit, as do the communities that depend on Bay-Delta ecology. “Flows are the “‘master variable’ driving geomorphic, biological, chemical process important to aquatic ecosystems.”³⁴⁰ The Staff Report underscores this: “The frequency of meeting the flows to support estuarine beneficial uses increases with each increase in the range of flow scenarios.”³⁴¹ As the Staff Report further explains, “[t]he more frequently a species flow is met, the more favorable conditions

³³⁸ Cal. State Water Res. Control Bd., *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan* 6 1-2 (2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

³³⁹ Cal. Wat. Code § 13241; 40 C.F.R. § 131.11(a)(1).

³⁴⁰ CA SWRCB- Web Support, *June 7, 2023 State Water Resources Control Board Meeting*, YOUTUBE (June 7, 2023), <https://www.youtube.com/watch?v=DxfPFqJfSn4> (featuring Emily Moloney’s presentation at 1 hour, 37 minutes).

³⁴¹ Staff Report at 3-117; Staff Report at 3-110 (“Generally, the higher the flows up to 100 percent of unimpaired flow (and higher in summer and fall) and the lower the X2 value, the greater the expected benefits are for native species and the ecosystem, provided that adequate supplies are maintained for cold water and flows at other times.”).

are to support the beneficial use.”³⁴² Sufficient flows are also critical to avoiding and mitigating spread of harmful algal blooms, which, as explained in Section B below, impair fish and wildlife, recreational, and tribal beneficial uses, among others.³⁴³ Without adequate flows, the range of processes necessary for functioning aquatic systems suffer. In turn, beneficial uses that depend on a functional ecology are impaired.

At inflows of 55 percent, extinctions of native fish species and further degradation of Bay-Delta waterways is at best delayed, not avoided. This is particularly so as the SED understates likely impacts on fish and wildlife by, as discussed below, including in its modeling unprotected flows that would disappear once additional water projects like the Delta Conveyance Project and Sites Reservoir are built. As elaborated in attached comments by Restore the Delta, “If the goal of the Board is to do the bare minimum, then 55% may work but in the probable scenario of increased exports, excessive use of Temporary Urgency Change Petitions, and the construction of new water infrastructure projects, extinction of native fish is guaranteed.”³⁴⁴ Further, as climate change increases water temperatures and imposes other stressors on aquatic systems, adequate flows become even more important, not less. Flow objectives that based on data about actual regulatory flow levels and are responsive to the exigency of the crisis in the Bay-Delta and the climate crisis are needed.

Flow objectives should also incorporate a reasonable adaptive range that ensures inflow and outflow levels fall no lower than 60 percent unimpaired flows – the lowest level the Board identified as necessary to “preserve the attributes of a natural variable system to which native fish species are adapted.”³⁴⁵ And it should incorporate management strategies and criteria governing how flows will be managed within the adaptive range to ensure protection of beneficial uses, including those uses dependent on upstream reservoir cold water storage. These management strategies should embody a functional flows regime to best guarantee protection of beneficial uses.

Functional flows are components of the hydrograph that provide a distinct geomorphic or ecological function and attempt to reflect the natural patterns of flow variability.³⁴⁶ Functional flows differ from other flow-based approaches “in that flow allocations are made with consideration of how the duration, timing, and rate of change of flows – rather than just the magnitude – are influenced by the geomorphic context and sediment supply conditions.”³⁴⁷ Developing management strategies that seek to create a functional flow regime can mitigate tradeoffs with increasing flows, ensuring, for instance, that cold water temperatures are maintained at levels needed for upstream spawning while streams receive pulse flows that mimic processes to which species are adapted.

Adaptive management premised on functional flows also offers an opportunity to meaningfully incorporate TEK in partnership with tribes, as the Staff Report indicates that the

³⁴² Staff Report at 3-117.

³⁴³ Staff Report at 7.12.1-29 (“low streamflow may be the most important factor for maintaining HABs, at least for *Microcystis*.”); *see also id.* at 7.12.1.38 (“Several studies indicate that low flows through the Delta are associated with increased HAB formation. HABs are more frequent and more severe in dry years”).

³⁴⁴ Exhibit A at 3.

³⁴⁵ Public Trust Report at 5; *see also Id.* at 120-21.

³⁴⁶ Sarah M. Yarnell, Geoffrey E. Petts, John C. Schmidt, Alison A. Whipple, Erin E. Beller, Clifford N. Dahm, Peter Goodwin, & Joshua H. Viers, *Functional Flows in Modified Riverscapes: Hydrographs, Habitats and Opportunities*, 65 *BioScience* 963, 966 (2015).

³⁴⁷ Yarnell, *supra* note 346 at 970.

Board aspires to do.³⁴⁸ For Buena Vista Rancheria, for instance, TEK reflects the importance of [mimicking] natural flows.”³⁴⁹ The Tribe’s experience spans the dry, normal, and wet years expressed in the natural hydrograph. Delta species are adapted to this natural variability. A functional flow regime, for example, would teach that in certain times of the year, even in a dry year, a pulse flow would be required to give a queue to the salmon to come upriver to spawn. In this way, TEK integrates indigenous knowledge, grounded observation, lived experience with the needs of aquatic species, and best available science into allowing natural processes to be expressed in a managed system.

The experiences of tribes with functional flows is reinforced by the scientific literature. Researchers conducted a case study on Putah Creek, a highly regulated river, by studying the response of fish species to a functional flow regime, which was designed to mimic the seasonal changes in decreases and increases of flow.³⁵⁰ By the end of the study, native fish assemblages had greatly increased,³⁵¹ likely due to flow events that allowed for increased flows, cooler water temperatures, and the creation of favorable conditions for habitat and spawning for fish.³⁵² A narrow adaptive range and management strategies that aim to follow a functional flows regime can help balance the competing needs of the Bay-Delta waterways.

B. The Staff Report’s proposed plan amendments fail to comply with the requirement that water quality objectives ensure the reasonable protection of beneficial uses.

As written, the Staff Report’s proposed plan amendments would not meet the standard of reasonable protection of beneficial uses required under the Porter-Cologne Act.³⁵³ Staff’s rationale for the proposed plan amendments is that “[b]ecause 55 percent unimpaired flow is the flow level at which *more significant improvements* to fish and wildlife beneficial uses are expected and cold water supplies can still be maintained, the proposed starting point for the flow level is 55 percent.”³⁵⁴ The Staff Report misunderstands the law: the standard under Porter-Cologne is reasonable protection, not “more significant improvement.” Nothing in the Staff Report links a 55 percent inflow objective to reasonable protection of beneficial uses. Some improvement on baseline conditions is not the same as reasonable protection.

As just one example of where the Staff Report’s analysis falls short, the Staff Report makes no effort to explain whether or how a 55 percent inflow objective will ensure flows necessary to support viability of native fish species. At best, the Report considers the percent increases in species abundance indices relative to baseline conditions, as shown in Table 3.14-7.³⁵⁵ But this analysis leaves out critically imperiled species like the Chinook salmon and Delta smelt, as well as California White Sturgeon, and makes no effort to explain whether the increases over baseline it does consider

³⁴⁸ Staff Report at 5-58 (“TEK could improve adaptive management of unimpaired flow to achieve a functional flow regime.”).

³⁴⁹ CA SWRCB- Web Support, *supra* note 340.

³⁵⁰ J. D. Kiernan, P. B. Moyle, & P. K. Crain, *Restoring native fish assemblages to a regulated California stream using the natural flow regime concept*, Ecological applications: a publ’n of the Ecological Soc’y of America, 1472 (2012).

³⁵¹ *Id.* at 1480.

³⁵² *Id.* at 1480-1481.

³⁵³ Cal. Wat. Code § 13241.

³⁵⁴ Staff Report at 5-16 (emphasis added).

³⁵⁵ Staff Report at 3-122 to 123.

will come anywhere close to reasonable protection of beneficial uses (versus a modest slowing of existing pathways to extinction).³⁵⁶

These errors are replicated in the SED's analysis of Aquatic Biological Resources. For instance, the SED considers the frequency of meeting winter-spring outflows to benefit estuarine habitat and species, showing, for instance, that at 55 percent unimpaired flows, there would be sufficient outflows to support positive population growth for Green and White sturgeon 19 percent of the time and Longfin smelt 32 percent of the time.³⁵⁷ It concludes that such growth-supporting flow levels would "occur at a greater frequency under the proposed Plan amendments compared with baseline conditions and should contribute to increased population abundance for bay shrimp, green and white sturgeon, longfin smelt, Sacramento splittail, and starry flounder." But again, it makes no effort to consider benefits to other imperiled fish species such as Delta smelt or Chinook salmon other than hypothesizing that "[o]ther native aquatic species that use estuarine habitat likely also should benefit from the more natural hydrological regime, including increased Delta outflows, that would occur as a result of the proposed Plan amendments." The Staff Report also makes no effort to quantify benefits to other essential riparian species like tule, willow, cochina (mugwort), and cottonwood necessary to protect Tribal Beneficial Uses, or to mitigation of HABs and improvement of other water quality parameters necessary to satisfy recreational beneficial uses.

And even for the species it does consider, the SED makes no effort to explain whether frequencies of providing adequate flows are sufficient to support viable fish populations. For instance, Delta smelt, which spawn and die every year, would need growth-sustaining flows most years. Likewise, longfin smelt spawn and die every two years, but a 55 percent flow objective would provide adequate flows to support longfin population growth only 32 percent of the time from January to June.³⁵⁸ And even with 55 percent instream flows, the SED concludes that winter-spring Delta outflows adequate to support longfin smelt populations would only be met *two percent* more of the time.³⁵⁹ It is simply implausible that this two percent increment is the difference between endangerment and viability for this imperiled species.

The Report also *overstates* even these benefits to native fish species through assumptions quietly baked into its models. The Staff Report's analysis of effects on hydrology and beneficial uses are based on "modeled flows" premised on the existing state of storage and export infrastructure and water rights permitting.³⁶⁰ These modeled flows are comprised largely of "expected uncaptured flows" including "flood control releases, and other flows that occur in the system because the water is not needed for diversion or not able to be diverted due to physical or other limitations."³⁶¹ This differs from the 2017 Scientific Basis Report, where Delta inflow and outflow levels did "not include other uncaptured flows."³⁶² Instead, the 2017 Scientific Basis Report calculated unimpaired flows by "illustrat[ing] the flows that would be expected to occur if meeting the percent of unimpaired flow

³⁵⁶ *Id.*

³⁵⁷ Staff Report at 7.6.2-38 (referencing Table 7.6.2-5).

³⁵⁸ Staff Report at 7.6.2-38 (referencing Table 7.6.2-5).

³⁵⁹ *Id.*

³⁶⁰ *See id.* at 6-1 (explaining that "modeled results represent the overall system changes caused by replacing one set of requirements with another . . . [a]ctual historical real-time operations may vary from modeled operations, resulting in different water availability outcomes than those calculated here.").

³⁶¹ Staff Report at 3-111; *see id.* at 6-5 (modeled flows are based in significant part on "reservoir flood-release spills").

³⁶² *Id.*

level was the only factor controlling flows.”³⁶³ The Scientific Basis Report *explicitly excluded* “other flows that would occur as a result of flood control releases, other regulatory flow requirements, or other reasons that are not associated with the percent unimpaired flow requirements” to ensure that its analyses were grounded on “the expected minimum flows that would result under [each unimpaired flow] requirement” considered.³⁶⁴ As a result, the SED concedes that its “analyses of expected flows show *greater* benefits than the results for the flow levels presented in the Scientific Basis Report due to these other flow contributions from flood control releases, other regulatory requirements, and other purposes.”³⁶⁵

What the Staff Report obfuscates, however, is that the Board, together with the Department of Water Resources (DWR), is already planning to eliminate much or all of these uncaptured flows. As discussed above, the Board is currently considering applications for new and modified water rights for the Sites Project over protest by Winnemem Wintu Tribe, Restore the Delta, and numerous other environmental and environmental justice organizations and tribes. And in December 2023, DWR approved the Delta Conveyance Project and certified its Final EIR. If these projects are brought online, as the State is seeking, they will largely, if not entirely, eliminate uncaptured Bay-Delta flows, including existing flood control releases and water currently not needed for diversion.³⁶⁶ Considering that the Board is already anticipating these changes, its sleight of hand in substituting mandatory unimpaired flow levels with modeled flows that include flood releases and other uncaptured flow provides a highly misleading portrait of the extent to which the proposed Plan amendments will improve prospects for native fish species survival and other beneficial use attributes above baseline, not to mention the extent to which they will actually satisfy the Board’s legal obligations to reasonably protect beneficial uses.

Compounding this problem, the Board makes no effort at all to account for impacts of climate change on hydrology, water supply, temperature, and other water quality parameters expected to affect protection of beneficial uses. The Staff Report is explicit that “[a]nticipated changes in hydrology and water supply associated with climate change are not explicitly modeled using SacWAM for this Staff Report.”³⁶⁷ Instead, the Staff Report employs uncertainty about the precise effects of climate change on local hydrology and water supply to ignore climate change altogether. But uncertainty does not alleviate the Board’s responsibility to reasonably forecast and account for the implications of climate change on protection of beneficial uses. The law is clear that an agency is “not entitled to simply throw up its hands and ascribe any effort at quantification to a ‘crystal ball inquiry.’”³⁶⁸ Rather, environmental analysis “necessarily involves some ‘reasonable forecasting’ and [] agencies may sometimes need to make educated assumptions about an uncertain future.”³⁶⁹ By omitting the obvious implications of climate change on hydrology, water supply, and

³⁶³ 2017 Scientific Basis Report, *supra* note 10, at 5-7.

³⁶⁴ *Id.* at 5-8.

³⁶⁵ Staff Report at 3-111 (emphasis added).

³⁶⁶ The Staff Report also concedes that actual flows may in the future vary significantly from modeled flows if, for instance, “reservoirs [are] eventually [] operated using protocols that different from the scenarios as modeled.” *Id.* at 7.2.6-55.

³⁶⁷ Staff Report at 6-8.

³⁶⁸ *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 75 (D.D.C. 2019) (quoting *Scientists’ Inst. For Pub. Info. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

³⁶⁹ *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); *see also, e.g., Sierra Club v. County of Fresno*, 6 Cal. 5th 502, 522 (2018) (“[S]cientific certainty is not the standard.”); *L.A. Unified Sch. Dist. v. City of Los Angeles*, 58 Cal.App.4th 1019, 1027-28 (1997) (rejecting agency’s determination that project’s noise impacts on schools was “too speculative” to evaluate); *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs*, 91 Cal.App.4th 1344, 1370 (2001).

other parameters, the Board makes its proposed plan amendments look better on paper than they could possibly manifest in reality.

The Staff Report's discussion of the other flow alternatives fare no better. For instance, its discussion of the high flow alternative highlights Staff's failure to link the proposed flow regime to the protection of beneficial uses. As discussed earlier, the Staff Report rejects a 65 percent unimpaired flow objective because maintaining cold water resources and managing water supply becomes "more challenging."³⁷⁰ "Challenging" water management is not a bar to creating adequate water quality objectives. The Porter-Cologne Act acknowledges the difficulties of water management and still mandates that water quality objectives consider "water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area."³⁷¹ At 65 percent unimpaired inflows, the Board can create water quality conditions that protect downstream beneficial uses while managing upstream water storage concerns. This is particularly so if, as commenters recommend, the Board pairs the 65 percent unimpaired flow objective with a reasonable adaptive range (allowing flows no lower than 60 percent unimpaired flow) and adaptive management strategies premised on a functional flows approach.

III. The Board must designate Tribal Beneficial Uses and protect Tribal Reserved Rights.

California's current water rights regime excludes nearly half of the State's over 200 tribes from federal reserved water rights and relies on a prior appropriative rights scheme that reflects genocide, displacement, and exclusion.³⁷² Since time immemorial California Native American tribes have used, and continue to use, Bay-Delta waters to support their cultural, subsistence, and ceremonial rights. As a result of years of activism, studies, and advocacy by Native American tribes, Tribal Beneficial Uses (TBUs) were established as a water quality protection measure for the preservation of California surface waters in a manner unique to tribal culture, tradition, ceremonies, and lifeways. TBUs account for traditional and cultural uses of water not covered by existing beneficial uses, and potential greater fish consumption by California Native American tribes. They are the only beneficial uses that specifically name California tribes in their definitions.

The implications of designating TBUs are far reaching. First, adding TBUs to the Bay-Delta Plan is essential in fulfilling the State Water Board's obligations to protect water quality standards under the Clean Water Act and Porter-Cologne Act. Second, failure to designate TBUs would violate the spirit of the Board's commitments to advancing racial equity and environmental justice in its watershed management. Adding TBUs to the list of existing beneficial uses is necessary for the State to begin repairing the harm it has done to tribal culture and identity by implementing and maintaining a colonial system of water rights and governance.³⁷³

Even more pressing, without formal designation of TBUs, Native tribes will continue to experience waterways that are incompatible with tribal subsistence, health, culture, and ceremony. Because of tribes' unique relationships to the waterways, existing water quality standards are

³⁷⁰ Staff Report at 5-16.

³⁷¹ Cal. Water Code § 13241.

³⁷² State Water Bd. Racial Equity Resolution No. 2021-0050 (Nov. 16, 2021).

³⁷³ Attachment 4, Coalition, Comment Letter on Proposed Addition of Tribal Beneficial Uses to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta [hereinafter "Attachment 4"].

inadequate to protect California Native American communities that have greater exposure to water pollutants due to greater ingestion of water, dermal exposure, ingestion of plants, and ingestion of fish and shellfish through tribal traditional and cultural practices and subsistence fishing.³⁷⁴ In addition, the loss of native fish and riparian species through impaired water flow poses existential harms to many tribal nations, whose identity and cultural and spiritual practices depend on thriving populations of native species. Formally designating TBUs affirms, and actually allows for, the heightened protection needed for tribal uses of and engagement with water.

Commenters urge the Board to designate TBUs without any further delay on a whole watershed basis, in accordance with how tribes live and experience the Bay-Delta as one interconnected system. At this point, the Board is still “considering” the addition of TBUs to the Bay-Delta Plan.³⁷⁵ But mere consideration is not enough.³⁷⁶ The Board itself recognized the need to protect activities specific to tribes’ historic and unique uses of California waters when it established and defined two beneficial uses unique to California tribes.³⁷⁷ The Board should take the next logical step and codify TBUs on par with all other existing beneficial uses in the Bay-Delta Plan which are designated Plan-wide, not limited to specific waterbodies or parts of waterbodies.³⁷⁸ Adding TBUs to the list of existing beneficial uses is a simple task and one that is necessary for the Board to begin the subsequent process of developing water quality objectives and implementation programs. Finally, ample evidence affirms that tribes have exercised traditional, cultural, and subsistence uses throughout the entire Bay-Delta watershed since time immemorial, and thus there is no need for further proceedings to make these designations for the Bay-Delta Plan through this update.

A. Watershed-wide TBUs designation is consistent with the State Water Board’s authorities under federal and state water quality protection statutes.

The State Water Board is the only agency with authority to protect Tribal Beneficial Uses of the Bay-Delta watershed. The State Water Board is charged with protecting water quality throughout California, pursuant to the federal Clean Water Act and the Porter-Cologne Act.³⁷⁹ Beneficial uses form the cornerstone of water quality protection under these statutes. The Clean Water Act and U.S. EPA’s implementing regulations require states to establish beneficial uses reflecting general categories of uses specific to the navigable waters involved and water quality criteria to protect those uses.³⁸⁰ Water quality criteria must be adequate to protect, among other 19 designated beneficial uses: shellfish harvesting; commercial and sport fishing; warm and cold freshwater habitat; migration of aquatic organisms; spawning, reproduction, and/or early development; estuarine habitat; wildlife

³⁷⁴ See, Cal. Reg’l Water Quality Control Bd., Cent. Valley Region, *Tribal Beneficial Uses Designations: A Primer to the Basin Plan Amendment Process* 7 (2022), https://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/tribal_beneficial_uses/tbu_r5_bpaprimer.pdf.

³⁷⁵ Staff Report at 11-10.

³⁷⁶ Attachment 13 at 1.

³⁷⁷ Cal. Water Res. Control Bd., Res. No. 2017-0027 (May 2, 2017) (hereafter State Water Bd. TBUs Resolution).

³⁷⁸ See, e.g., Cal. Water Res. Control Bd., *supra* note 337, at 7 (stating the beneficial uses designated in the Bay-Delta Plan, which do not contain any geographic limitations).

³⁷⁹ 33 U.S.C. § 1313; Cal. Water Code § 13160.

³⁸⁰ Clean Water Act, § 303(c)(2)(A); 40 C.F.R. § 131.10(a).

habitat; and rare, threatened, or endangered species.³⁸¹ They must also protect both contact and non-contact water recreation and municipal and domestic water supply.³⁸² Once beneficial uses are designated, appropriate water quality objectives and programs of implementation are established to ensure the protection of beneficial uses.³⁸³

While the Porter-Cologne Act provides Regional Water Boards with primary responsibility for formulating and adopting water quality control plans for their respective regions,³⁸⁴ the State Water Board is also empowered to formulate its own water quality control plans, which supersede any conflicting regional plans.³⁸⁵ Since 1978, the State Water Board has exercised this authority to establish water quality control standards across the Bay-Delta watershed through the Bay-Delta Plan.³⁸⁶

In 1972, the State Water Board adopted a uniform list of beneficial uses, including descriptions, to be applied throughout all basins of the state.³⁸⁷ The basis for this list of beneficial water uses is section 13050(f) of the Porter-Cologne Act, which states: “‘Beneficial uses’ of the waters of the state that may be protected against water quality degradation include, but are not necessarily limited to, domestic, municipal, agricultural, and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.” The State Water Board has recognized the same seventeen beneficial uses for the Delta since its 1995 Bay-Delta Plan update.³⁸⁸ Notably absent from these beneficial uses are uses that directly recognize and protect tribal interests, and those of other subsistence fishers.

In response to growing calls to account for activities specific to Native American tribes’ traditional and cultural uses of California’s waters in beneficial use designations, the State Water Board in 2017 established three new statewide beneficial uses definitions for use by the State and Regional Water Boards: Tribal Tradition and Cultural (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing (SUB) – collectively, TBUs.³⁸⁹ These beneficial uses were developed in collaboration with California tribes and members of the public to recognize the unique relationship that tribes have to California waterways and to acknowledge the need for heightened protections for tribal uses beyond the beneficial uses already recognized in water quality control plans. After the State Water Board’s adoption, the U.S. EPA approved all three definitions, giving them immediate effect for Clean Water Act purposes.³⁹⁰

³⁸¹ Cal. Reg’l Water Quality Control Bd., Cent. Valley Region, *supra* note 375 at 8.

³⁸² Cal. State Water Res. Control Bd., *supra* note 111 at 8.

³⁸³ 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2; *see* Wat. Code, § 13241.

³⁸⁴ Cal. Water Code § 13240.

³⁸⁵ Cal. Water Code § 13170; *see United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 109.

³⁸⁶ Cal. Water Res. Control Bd., *supra* note 337 at 4.

³⁸⁷ *See* Cal. Reg’l Water Quality Control Bd., North Coast Region, *Basin Plan*, Chapter 2 (2018), https://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/180710/BPChapter2BeneficialUses.pdf.

³⁸⁸ Cal. Water Res. Control Bd., Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 8-9. (Dec. 13, 2006).

³⁸⁹ State Water Bd. TBUs Resolution, *supra* note 378.

³⁹⁰ Tomás Torres, Director, Water Division, EPA letter to Felicia Marcus, Chair, State Water Resources Control Bd. (July 14, 2017), https://www.epa.gov/sites/default/files/2017-07/documents/ca_hg_approval_letter_with_enclosures_signed_071417.pdf.

The adoption of these TBUs definitions, however, did not in itself amend basin plans or designate these uses to specific waterbodies in the State. Instead, Regional Water Boards must choose to add TBUs definitions to their respective basin plans. Once the definitions are included in the basin plan, the regions can then designate TBUs to waterbodies, or specific parts of waterbodies, and move toward protecting those uses of water.³⁹¹ While the Regional Water Boards have their own processes in place for waterways within their jurisdiction, the State Water Board has authority over the Bay-Delta watershed through the Bay-Delta Plan. As the State Water Board controls water quality for the Bay-Delta watershed through the Bay-Delta Plan, the State Water Board should adopt TBUs for the Bay-Delta watershed as a whole. Adopting TBUs on a watershed-wide basis is the best way to ensure the protection of tribal uses of water.

B. Designation of TBUs is necessary to realize the Board's commitments to advance racial equity and repair harm to tribal communities.

Protecting TBUs through the Bay-Delta Plan is long overdue. While DTEC appreciates that the Board is now, for the first time, considering incorporating TBUs into the Bay-Delta Plan, consideration is not enough. The Board has an opportunity to make good on its promises to protect tribal uses of water to ensure that tribes have the opportunity to continue to practice their tribal tradition, culture, and lifeways by formally designating TBUs as beneficial uses of Bay-Delta waters on a whole watershed-wide basis, on par with its treatment of every other designated use of Bay-Delta waters. In addition to its statutory authorities, the State Water Board's recent Racial Equity Resolution calls for meaningful protection of TBUs.³⁹² The Racial Equity Resolution recognizes the damage the State has done to tribes' cultural, spiritual, and subsistence traditions, including by: dispossessing tribes of their lands and waterways through colonization, genocide, and displacement; depriving tribes of water rights through broken federal treaty promises and failure to recognize reserved rights under state law; and degrading tribes' uses of water by managing watersheds through large-scale diversions and failing to provide the instream flows needed for a healthy Bay-Delta ecosystem.³⁹³ In the Racial Equity Resolution, the Board emphasizes its work to recognize and protect TBUs in its efforts to address environmental injustices.³⁹⁴ Failure to add TBUs to the Bay-Delta Plan would violate the spirit of the Board's commitments to advancing racial equity and environmental justice in its watershed management.

The Board reiterated its calls for the protection of tribal uses in a recent comment letter to the EPA.³⁹⁵ There, the Board argued that tribal use designations in water quality standards are the best tool for protecting tribes' cultural, spiritual, and subsistence traditions, due to the limited reach of water rights for many California tribes resulting from the sordid history of violence, dispossession, and duplicitous treaty negotiations by federal and state

³⁹¹ Cal. Water Res. Control Bd., *Protecting water quality for Tribal Beneficial Uses 2*, https://www.waterboards.ca.gov/tribal_affairs/docs/2022/tbu-basin-amendment-09202022.pdf.

³⁹² State Water Bd. Racial Equity Resolution No. 2021-0050, ¶ 9(2) (Nov. 16, 2021).

³⁹³ *Id.* ¶¶ 7(b)-(c).

³⁹⁴ *Id.*

³⁹⁵ Attachment 12, State Water Resources Control Bd., Comment Letter on Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, p. 3 (Mar. 6, 2023) (hereafter, "Tribal Reserved Rights Comment Letter").

governments.³⁹⁶ But for the State's role in undermining the ratification of treaties with California tribes, California Native American tribes would have treaty reserved rights that the State would need to protect through water quality standards. While the State Water Board and the EPA must do more to realize and protect tribal water rights, adopting TBUs is a small step toward making amends for the State's role in undermining tribal sovereignty and cultural and ceremonial uses of water. The Board has an opportunity and obligation to prevent further harm to tribes by adopting TBUs in the Bay-Delta Plan now.

C. The Board must designate TBUs on a watershed-wide basis in accordance with the evidence before it.

In addition to the Board's statutory authorities and policy commitments, watershed-wide TBUs designation is supported by testimony and documentation already before the Board. A whole watershed approach recognizes that tribes have always lived and experienced the Bay-Delta as one interconnected, interdependent system – stretching from the headwaters to the Pacific. Watershed-wide TBUs designation is also needed to protect migratory species and other cultural resources that require healthy conditions throughout the ecosystem. For example, Bay-Delta channels serve as a key migratory route and nursery area for the Nur, which spend most of their adult lives in the saline lower estuary bays or the Pacific Ocean and return to inland streams and tributaries to spawn.³⁹⁷ The overall ecosystem health needed to support TBUs must be achieved through a whole watershed approach.

It is well-established that tribes have practiced cultural and subsistence traditions in the Bay-Delta since time immemorial. Native Californians have lived in the Bay-Delta for thousands of years, using and stewarding native Bay-Delta plants, fish species, and other wildlife. Although the degraded quality of Bay-Delta waters has posed serious threats to tribal cultural survival, tribes' unique relationships with Bay-Delta waters, species, and landscapes have persisted. The experiences of Shingle Springs Band of Miwok Indians, the Winnemem Wintu Tribe, and Buena Vista Rancheria of Me-Wuk Indians exemplify historical and ongoing tribal uses of Bay-Delta waters as an interconnected system, and the irreparable harm tribes face if the Board does not take urgent action to restore the health of the Bay-Delta watershed.

For years, California Native American tribes have implored the State Water Board to timely adopt TBUs and have provided extensive documentation of their irreplaceable connections to and use of Bay-Delta waters. In its 2022 Petition for Rulemaking, the Coalition – including Shingle Springs Band of Miwok Indians and Winnemem Wintu Tribe – called on the Board directly to update Bay-Delta water quality standards, including by incorporating TBUs into its water quality control plan. The Petition shared how, despite an increasingly degraded Delta watershed, the tribes continue to engage Tribal Beneficial Uses according to the Board's own TBU definitions, including Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing.³⁹⁸ Petitioner Shingle Springs Band of Miwok Indian, for example, shared how the loss of native riparian vegetation, degraded water quality, and proliferation of harmful algal blooms interferes with tribal

³⁹⁶ *Id.*; *California Water Curtailment Cases*, Nos. H047270 & H047927 (Cal. Ct. App. Mar. 14, 2022).

³⁹⁷ Cal. Water Res. Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* at 38 (Aug. 3, 2010).

³⁹⁸ See Cal. Water Res. Control Bd., *Tribal Beneficial Uses Fact Sheet* (Nov. 2020), https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.

members' ability to carry out traditional ceremonial practices, gather riparian vegetation for cultural implements, carry out traditional fishing practices, and practice and pass on traditional ecological knowledge.³⁹⁹ Petitioner Winnemem Wintu Tribe, described how continuing declines in Nur populations threaten the very core of tribal identity and the Tribe's existence as a People.⁴⁰⁰ The Petition called on formal beneficial use designation as a first and necessary step towards ensuring the protection of the cultural, spiritual, and traditional rights of California Native American Tribes.

Tribal members and representatives have continued to articulate their ongoing connections to Bay-Delta waterways through hours of oral testimony, meetings, and public comments before the State Water Board. On June 7, 2023 the State Water Board held a hearing to consider adding TBUs to the Bay-Delta Plan. There, the Coalition, along with other tribes and tribal non-profit organizations, detailed the ample record of tribes' beneficial uses of waterways for subsistence and culturally-specific purposes up and down the Bay-Delta. Several tribal representatives described the necessity of designating TBUs on a whole watershed-wide basis, consistent with how their communities understand the Bay-Delta as an interconnected system whose waterways continue to support practices and activities specific to historic, present, and future tribal uses of water. For the Buena Vista Rancheria of Me-Wuk Indians, all Ki-ku (water) is connected.⁴⁰¹ Today, tribal uses of Ki-ku are disrupted by a legacy of settler colonization and genocide, land use modification and privatization, and the pollution of waterways. During a public comment period following the tribal panel, members of the public – and the Board itself – shared significant support for adding TBUs beneficial uses to the Bay-Delta Plan. Commenters called on the Board to formally designate TBUs throughout the watershed without the specific designation process currently employed by the regional boards.

Given the considerable evidence already in the record of tribes' irreplaceable connections to and use of Bay-Delta waters, no additional proceedings are needed to support adding TBUs to the Bay-Delta Plan. Asking tribes to provide further documentation to prove the existence of their cultural, spiritual, and subsistence traditions in the Bay-Delta water risks re-traumatization, fails to recognize the substantial investment tribes have already made in educating the State Water Board, and is unnecessarily burdensome. The State Water Board should formally designate TBUs on a watershed-wide basis consistent with the Board's treatment of all other beneficial uses in the Bay-Delta Plan.

D. The Board's concerns surrounding Plan-wide TBUs designation are unconvincing.

Instead of taking the simple step of designating TBUs, the Staff Report offers a series of policy concerns, none of which present an actual (as opposed to political) barrier to designation, but which collectively manifest the Board's political reluctance to formally center tribes and tribal uses of water in water governance.

³⁹⁹ Exhibit E at 41.

⁴⁰⁰ Exhibit E at 41.

⁴⁰¹ Tribal elders of the Buena Vista Rancheria of Me-wuk Indians, whose Rancheria land is located in Southwestern Amador County in the Mokelumne River Watershed, have shared this message: Ki-ku (water) is life. Ki-ku is a relation. Ki-ku connects us. Past, present, future. Upstream, downstream. Below ground, above ground. All Ki-ku is connected. All water is connected. Presentation by Emily Moloney, Water Coordinator, Buena Vista Rancheria of Me-wuk Indians to State Water Resources Control Bd. (June 7, 2023).

The Staff Report reiterates the Board's concerns for designating TBUs ahead of the Regional Water Boards and suggests that case-by-case designation by the Regional Boards is more appropriate. But leaving TBUs designation to the primary responsibility of the Regional Water Boards leaves tribal uses of water vastly unprotected. It also ignores the need for flow-based regulations in protecting TBUs and the Board's authority to govern water quality standards directly. Without formal designation of TBUs in the Bay-Delta Plan, tribal uses will not receive the protection required for tribes' cultural, spiritual, and subsistence traditions in the Bay-Delta – protections that are afforded to other beneficial uses across the watershed. The Board should heed its own call to action and designate TBUs on a watershed-wide basis now.

i. The Board has authority to designate TBUs at the watershed-wide level.

The suggestion that TBU designation must take place at the regional level first ignores the fact that the State Water Board governs Bay-Delta water quality standards directly, and that the Board has assumed authority since 1978 to make beneficial use designations under the Bay-Delta Plan.⁴⁰² Furthermore, Staff's suggestion that beneficial use designation be left to the Regional Boards fails to acknowledge that beneficial uses in regional basin plans have never been treated as sufficient to protect beneficial uses in the Bay-Delta.⁴⁰³ If the State Water Board leaves Regional Water Boards to engage in site-specific designation processes, TBUs will not be protected in a manner consistent with how tribes live and experience the Bay-Delta as one interconnected system.

Currently, Regional Water Boards are taking different approaches to TBUs designations, with some making limited, site-specific designations while others are pursuing watershed-wide designations.⁴⁰⁴ This disjointed, patchwork approach to designation is especially challenging for tribes who practice cultural, spiritual, and subsistence traditions in waterways that cross Regional Board jurisdictions and must therefore navigate different TBU designation processes. It also ignores the extensive evidence and Traditional Ecological Knowledge before the Board affirming the need for a Plan-wide approach on par with other beneficial use designations.

Regional Board beneficial use designations occur through the regulatory action of amending the region's basin plans.⁴⁰⁵ Each basin plan amendment is subject to legal requirements and an extensive information gathering and public review process. Unlike beneficial use designation at the state level, beneficial use designations at the regional level apply to specific waterbodies or parts of waterbodies, not to an interconnected watershed like the Bay-Delta. The Central Valley Water Board, for example, is in the process of designating TBUs for specific waterbodies within its basin plan. After adopting TBU definitions into its Sacramento and San Joaquin River Basin Plan, project staff are now consulting with tribes who anticipate submitting TBU designation requests on a rolling basis. Each waterbody designation request must contain "substantial evidence," which includes not just scientific and technical data, but also a full range of cultural information including tribal histories

⁴⁰² See Exhibit F at 8.

⁴⁰³ See, e.g., Shingle Springs Band of Miwok Indians et al, Request for Reconsideration of Rulemaking Decision of the State Water Resources Control Board Denying Petition to Review and Revise Bay-Delta Water Quality Standards, Ex. G to *Title VI Complaint*, 7 (Aug. 22, 2022).

⁴⁰⁴ See Cal. Water Res. Control Bd, *Regional Water Board Progress Updates on Tribal Beneficial Uses*, https://www.waterboards.ca.gov/tribal_affairs/regional_tbu_updates.html.

⁴⁰⁵ Cal. Water Res. Control Bds. *supra* note 375 at 5.

and other forms of tribal ecological knowledge.⁴⁰⁶ Once submitted, Regional Water Board staff will review information provided with the designation request and, eventually, prepare an SED.⁴⁰⁷ The basin plan amendment will also require external scientific review, public workshops and meetings and, finally, Regional Water Board review of the amendment through a public hearing.⁴⁰⁸

Approaching TBU designations differently from other beneficial uses is not only insufficiently protective; giving TBUs less weight would also undermine the State Water Board's commitments to centering tribes and Traditional Ecological Knowledge in its watershed management. Additionally, more narrow designations could raise privacy and confidentiality concerns if tribes were asked to identify specific locations with spiritual and cultural importance. Such an approach would also cause unnecessary burden and delay for tribes and the State Water Board alike, as greater evidentiary burdens and consultation would likely be required for more granular TBUs designations. In contrast, tribes have already provided the Board with ample evidence of their relationship to and beneficial uses of the Bay-Delta as one interconnected system, so formal tribal consultation on watershed-wide TBUs designations could be completed during this Bay-Delta Plan update without further delay.

Contrary to the Board's suggestion that designation of TBUs in the Bay-Delta Plan is premature and dependent on actions by the Regional Water Boards, the Board has all the authority it needs to designate TBUs in the Bay-Delta Plan. Demurring to the Regional Water Boards to designate specific waterbodies or parts of waterbodies on a case-by-case basis is inconsistent with the Board's treatment of all other beneficial uses in the Bay-Delta Plan, relegating Tribal Beneficial Uses, without reason or explanation, to a second-tier status. All other beneficial uses in the Bay-Delta Plan are designated Plan-wide, not limited to specific waterbodies or parts of a waterbody, and TBUs should be accorded the same treatment.⁴⁰⁹ Given that the Board has assumed sole authority to make beneficial use designations under the Bay-Delta Plan, it has also assumed the responsibility to rectify this failure.

E. Existing beneficial uses are insufficient to protect tribal uses of water.

Even if the Regional Boards go through the process of amending their basin plans and designating tribal uses to specific waterbodies, TBUs will remain unprotected unless and until they are added to the Bay-Delta Plan on a Plan-wide basis and accompanied by adequate flow standards.

The Board suggests that certain TBUs will be protected as a consequence of flow actions for the reasonable protection of fish and wildlife.⁴¹⁰ It is wrong. While flow actions for the reasonable protection of fish and wildlife may benefit tribal uses of water, extensive documentation and testimony before the Board shows that formal designation of TBUs

⁴⁰⁶ See *id.* at 11.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ See, e.g., State Water Res. Control Bd. *supra* note 337 at p. 7 (stating the beneficial uses designated in the Bay-Delta Plan, which do not contain any geographic limitations).

⁴¹⁰ Staff Report at 11-11.

separate from existing beneficial uses is needed to ensure adequate protection of tribal uses of waters throughout the Bay-Delta. Flows and water volumes needed to protect tribal uses have importance differences from those needed to protect existing designated beneficial uses, such as fisheries and aquatic habitats.

For example, the culturally specific ways that tribes interact with the water – like elevated levels of fish consumption through subsistence fishing practices, directly entering and ingesting water during ceremony, and putting reeds in mouth during basket weaving – require distinct protections.

Likewise, more flows are needed to mitigate HABs in Bay-Delta waterways to levels that allow for tribal cultural and ceremonial use; otherwise, the presence of cyanotoxins in locations containing tribal cultural resources or sacred sites may prevent people from exercising TBUs altogether for fear of harm to their health. As one example, the Winnemem Wintu Tribe’s coming-of-age ceremonies involve swimming across a river near a sacred rock, and water blessings consist of cupping river water in their hands and placing it on their heads and hearts.⁴¹¹ Neither of these practices can take place when HABs are present.⁴¹² Additionally, riparian resources used by tribes, such as tule, are not directly covered by other beneficial uses. The Board’s suggestion that flow measures for existing beneficial uses would protect certain TBUs ignores the science and traditional ecological knowledge presented to the Board by tribes.

i. The Board itself has acknowledged that Regional Water Board designation of TBUs would not be adequate to protect tribal beneficial uses in the Bay-Delta.

In a prior resolution addressing designation of TBUs in the context of water quality objectives for mercury, the State Water Board suggested that certain constraints may apply to the Regional Boards’ implementation of TBUs in their basin plans.⁴¹³ That is, the resolution instructed that regional water quality control plans will not contain requirements to address flow needs for fisheries or aquatic habitat to protect a CUL, T-SUB, or SUB beneficial use.⁴¹⁴ Such limitations are improper, as the evidence is clear that sufficient flows are necessary to ensure protection of TBUs. And any limitations on use of flow-based criteria that may exist for regional basin plans do not and must not apply here, where the State Water Board is making the designations directly and has authority to set flow-based criteria on its own cognizance. Flow-based criteria are a principal instrument the Board has used to protect beneficial uses since the inception of the Bay-Delta Plan, and this should apply no differently to TBUs than for all other beneficial uses. If the Board fails to adopt TBUs at a Plan-wide level, there will be no consideration of flow-based criteria sufficient to protect tribal cultural uses of water.

The Board’s proposal for case-by-case designation by the Regional Boards ignores tribes’ repeated calls for watershed-wide protection of tribal cultural uses of water, consistent with how tribes understand and interact with the Bay-Delta as one interconnected system. The Board should

⁴¹¹ Attachment 1, Exhibit E, Attachment B, Decl. of Gary Mulcahy ¶ 32 [hereinafter “Decl. of Gary Mulcahy”].

⁴¹² *Id.*

⁴¹³ Cal. Water Res. Bd. TBUs Resolution, *supra* note 378.

⁴¹⁴ *Id.* ¶ 12, Resolution 7. This directive does not preclude elevating flow requirements to protect TBUs for needs unrelated to fisheries or aquatic habitat. In fact, the Resolution expressly recognizes that flow objectives may be established for CUL beneficial uses.

make real its commitments to centering tribal voices. As stated in the Board's Anti-Racism Resolution, the Board must "center[] its work and decision-making on Black, Indigenous, and people of color who are disproportionately represented in the most vulnerable communities and in unsheltered populations, while ensuring the full benefits of the Water Boards' programs for all people."⁴¹⁵ To date, the Board has yet to take tangible action to effectuate its Anti-Racism Resolution in the Delta. If the State Water Board is truly invested in repairing the injustices and inequities baked into its own programs and the water rights regime it implements, it will begin by making real its commitments to formally designate and protect TBUs as part of the Bay-Delta Plan.

Implementing TBUs in the Bay-Delta Plan is an important step towards ensuring that the cultural, spiritual, and subsistence traditions practiced by tribes throughout the Bay-Delta watershed since time immemorial can persist in the face of existential threats posed by the Bay-Delta's degraded quality, which will be further heightened by climate change.⁴¹⁶ The State Water Board has an opportunity through the TBUs designation and implementation process to meaningfully center tribes and traditional ecological knowledge in its management of Bay-Delta water resources. If TBUs are actually protected, the benefits of a healthier Bay-Delta ecosystem will not only serve tribes, but will also extend to all Californians who rely on the water, species, and landscapes supported by this unique ecosystem.

IV. The Board must ensure protection of Tribal Reserved Rights.

In addition to formally designating and protecting tribal uses of water, water quality standards must also account for and protect tribal reserved rights.⁴¹⁷ The EPA is in the process of finalizing a rule that will formalize and clarify already existing requirements that state agencies – including the State Water Board – ensure in setting or amending water quality standards that those standards protect tribal reserved rights.⁴¹⁸ As the EPA observed in the proposed rules, it has already disapproved state water quality standards adopted by the State of Maine that did not adequately protect tribal reserved rights and admonished the State of Washington to consider tribal reserved fishing rights in setting human health criteria.⁴¹⁹ The State Water Board has itself agreed that explicit consideration of tribes' cultural, spiritual, and sustenance practices in a water quality context is warranted.⁴²⁰ In fact, in its comment to the EPA on its proposed rule, the State Water Board urged the EPA to go a step further and protect the rights and interests of tribes that fall outside recognized tribal reserved rights.⁴²¹

⁴¹⁵ *Id.* at 7; Cal Water Res. Control Bd., Anti-Racism Resolution at ¶ 7(b).

⁴¹⁶ Attachment 11, Coalition Comment on Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights [hereinafter "Attachment 11"].

⁴¹⁷ "Tribal reserved rights" are distinct from *Winters* rights or "federal reserved rights." Tribal reserved rights refer to any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.

⁴¹⁸ Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74361 (Dec. 5, 2022).

⁴¹⁹ 87 Fed. Reg. at 74365.

⁴²⁰ Attachment 12.

⁴²¹ "USEPA's decision to tether the proposed rule to a rights-based approach will not adequately protect all the tribes' uses of waters. All of a tribe's activities and actual uses of a waterbody are not necessarily reflected by the tribal reserved right. In such cases, limiting water quality protections to only those tribal activities stemming from the tribal reserved right has the drawback of not reflecting all of the tribal uses actually being made of waterbodies." (Attachment 12 at 11.)

Despite the Board's insistence on the importance of even more expansive protections for tribal uses of water, the Board's draft Staff Report excludes any discussion of how and when tribal reserved rights will be protected and accounted for.⁴²² Specifically, the Report includes no consideration at all of flow levels necessary to protect tribal reserved rights (including but not limited to reserved fishing and hunting rights of tribes in the Klamath River Basin) and includes no program of implementation specifying how tribal reserved rights will be protected and federal reserved water rights prioritized. In deferring development of regulatory text as well as a program of implementation for the Bay-Delta Plan update,⁴²³ the State Water Board leaves tribal reserved rights vastly unprotected.

As discussed above, the Board has unlawfully deferred development and environmental review of the program of implementation even while conceding that the program is necessary "to achieve [flow, salinity, and water quality] objectives."⁴²⁴ Without a program showing when and how the standards will be put into effect, the standards the Board approves will be paper commitments that, as in the case with Phase I standards, will likely be years away from practical implementation; meanwhile, instream flows will remain inadequate to protect tribal reserved rights and cultural resources. The Board must proceed to develop and disclose a program of implementation that ensures that the implementation of the Bay-Delta Plan does not impinge on federal reserved water rights, including unquantified *Winters* rights, and assures protection of tribal reserved rights for all tribes in the Bay-Delta watershed and its tributaries. The Board should begin by undertaking a more robust program to identify aquatic-dependent tribal reserved rights, identify and quantify federal reserved water rights, and ensure that reserved water is not available for appropriation. The Board must meaningfully engage California Native Tribes as partners in these processes, rather than developing its proposed pathway and engaging with tribes on protection of their own rights and resources as a check-the-box afterthought.

V. The Board must do more to assure integration of Traditional Ecological Knowledge in Bay-Delta water governance.

A. The Board must meaningfully engage tribes as the holders of Traditional Ecological Knowledge.

As currently drafted, the State Water Board's brief section on Traditional Ecological Knowledge ("TEK")⁴²⁵ is inadequate to meaningfully engage tribal perspectives essential for well-informed decision-making in the Bay-Delta. As its original stewards, California Native Tribes and Indigenous communities have deep expertise critical for successful watershed management in the Bay-Delta. Traditional Ecological Knowledge includes observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction

⁴²² Attachment 13 at 1.

⁴²³ Staff Report at 1-2 ("However, the specific changes to the Bay-Delta Plan, and specifically the program of implementation, have not been developed yet.").

⁴²⁴ *Id.* at 1.

⁴²⁵ This section generally uses the phrase "Traditional Ecological Knowledge," or "TEK," but recognizes that a variety of terms, including Traditional Knowledge, Indigenous Traditional Knowledge, Native Science, and related formulations, which are preferred by different Tribes and Indigenous Peoples.

and experience with the environment.⁴²⁶ It is specific to a location and applies to phenomena across biological, social, cultural, and spiritual systems.⁴²⁷ TEK is an accumulating body of knowledge, practice, and belief that continues to develop and evolve through generations of cultural transmission and ecological changes.⁴²⁸ TEK is unique to each group of Indigenous Peoples and deeply connected to the communities holding that knowledge.

Inclusion of Traditional Ecological Knowledge is necessary for appropriate protection of tribal uses of Delta waters and also respectful of the sovereignty and self-determination of Tribal Nations throughout the watershed. After receiving requests from California Native American tribes to incorporate TEK into proposed Plan amendments and implementation measures, the Board states that it has begun the process of documenting TEK and traditional resource management strategies of tribes in the Bay-Delta watershed, including its tributaries.⁴²⁹ What the Board misses, however, is an understanding that TEK cannot simply be written down and then used (or discarded) by the Board in its decision-making; indeed, to treat TEK in such an extractive manner would further the legacy of alienating tribes from water and its management.

As currently drafted, the Staff Report's focus on TEK documentation risks extracting Indigenous Knowledge from tribal communities without their consent. The Staff Report explains, for example, that staff are currently exploring avenues to interview tribal members with the intention of documenting their TEK. The Report does not, however, outline how these interviews will be conducted, what information will be collected, and how that information will be used, stored, and disseminated. Nor does it conceive of the tribes as partners in incorporating TEK into evaluation, implementation, and updating of water quality standards.

Accordingly, while the Board is moving in the right direction in acknowledging the importance of TEK, the Board and staff members face severe limitations in their current understanding and implementation of TEK. These limitations stem from the long history of tribal exclusion from decision-making processes in the Bay-Delta. As the Board rightfully points out, access to TEK is limited because tribes are often hesitant to share their knowledge for fear that they will lose the rights to their data, thereby threatening tribal sovereignty.⁴³⁰ The Board must shift from a framework that focuses on documentation of TEK to one focused on proactive and consistent engagement with tribes in governance and protection of their own cultural resources. Working in partnership with tribes to incorporate TEK that is culturally precise and sufficiently robust to encompass the diversity of Indigenous knowledge forms held by California tribal communities will be critical to ensure that flows and diversions are managed in a way that restores holistic ecological health and human connection to the water. And the Board must ensure that Indigenous Knowledge is

⁴²⁶ Office of Sci. and Tech. Pol'y Council on Env't Quality, Memorandum for Heads of Federal Departments and Agencies, (Nov. 30, 2022) <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>. (citing U.S. Fish & Wildlife Services, *Traditional Ecological Knowledge for Application by Service Scientists* (Feb. 2011), <https://www.fws.gov/sites/default/files/documents/TEK-Fact-Sheet.pdf>).

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Staff Report at 11-13.

⁴³⁰ *Id.*

engaged in a manner that is respectful of tribal sovereignty and is mutually beneficial for tribal communities.

As the Board continues to develop a deeper understanding of TEK and as it continues to grow and maintain mutually beneficial relationships with Tribal Nations needed to appropriately include TEK in the Bay-Delta Plan, it should consider the following recommendations. First, the Board must engage with California Native American tribes to accurately and appropriately describe tribal relationships to Bay-Delta waters through government-to-government consultation. Without meaningful consultation and engagement, the Staff Report fails to appreciate the deep and ongoing connections California Native American Tribes maintain to Bay-Delta waters. Second, the Board must improve and sustain meaningful engagement with tribes in the setting, implementation, and evaluation of water quality standards. Third, the Board should co-create and implement a policy for meaningful incorporation of TEK together with tribes. Presently, the Board offers no concrete steps for documenting and incorporating TEK into the Bay-Delta Plan. The Board should work together with tribes to create a concrete plan.

B. Meaningful consultation with tribes is essential to restoration of the ecological health of the Bay-Delta and human connection with the water.

The State Water Board has statutory and policy obligations to consult with tribes in the adoption of the Bay-Delta Plan. Instead of pursuing meaningful consultation with tribes to affirmatively protect their water-related cultural resources, states, including California, have demonstrated a recurring practice of excluding tribes from decision-making processes and coordinating with them only as a check-the-box exercise. That is exactly what happened here. Instead of engaging in legally mandated AB 52 government-to-government consultation, the Board held several tribal meetings and listening sessions where staff shared updates on the Bay-Delta Plan and solicited feedback from tribal representatives. The Board should have undertaken AB 52 consultation from the inception of the Phase II update process (at least as of 2017, when the Board took its first steps toward the update), consulting with tribes on a nation-to-nation basis to understand how the scope of the plan affects individual tribes and their distinct interests in the Bay-Delta watershed. A handful of tribal meetings where staff and Board members engaged tribal interests generally does not constitute the type of meaningful government-to-government consultation mandated under CEQA.

Even in the absence of statutory consultation requirements, the Board's own Tribal Consultation Policy states that "a best practice is to consult with tribes out of respect for their status as sovereign governments or based on the unique tribal interests that may be affected by a proposed action, policy, or set of activities."⁴³¹ The Board's current tribal engagements fall well short of its commitments to strengthening and sustaining government-to-government relationships with California Native American Tribes. Without tribal consultation on the SED itself, violations of tribes' sovereign rights to government-to-government consultation and assaults to tribal cultural resources and interests will be replicated through subsequent environmental reviews. Given that the Board will need to recirculate the draft SED with a stable, complete, and finite project description, it must engage AB 52 consultation on the revised SED to create a more accurate and

⁴³¹ Cal. State Water Res. Control Bd., *Tribal Consultation Policy* 10 (2019), https://www.waterboards.ca.gov/tribal_affairs/docs/california_water_board_tribal_consultation_policy.pdf.

complete analysis with California Native American tribes whose identity, culture, and religion are integrally connected with the Bay-Delta.

By creating this document unilaterally, the State Water Board's Tribal Engagement section is truncated and fails to capture the richness and depth of historical and present tribal relationships with Bay-Delta waterways. Currently, the draft Staff Report devotes only 22 out of 6,000 pages tribal considerations. The Board should dedicate ample space to engaging the voices and perspectives of tribes in and around the watershed, and it should integrate learnings from tribal consultation and engagement throughout its analysis, rather than relegating them to a small standalone chapter. Further, because each tribe can only speak for itself, the Board cannot substitute engagement with a single tribe for engagement with impacted tribal nations. Rather, the Board must prioritize proactive and consistent engagement with the diversity of tribal communities throughout the Bay-Delta and its headwaters on a nation-to-nation basis. In the meantime, these comments provide suggestions to help fill in some of the current gaps in knowledge and additional illustrative examples from the experiences of DTEC members.

As an initial matter, the Board's description of the Bay-Delta as "sustain[ing] Indigenous Peoples for over 5,000 years"⁴³² severely understates California Native American tribes' history and presence in the Bay-Delta. Indigenous Peoples have used and diverted the water running through their ancestral lands since time immemorial and should be recognized as the Delta's first water users. Although the degraded quality of Bay-Delta waters has posed serious threats to tribal cultural survival, tribes' unique relationships with Bay-Delta waters, species, and landscapes have persisted. Today, many California tribes continue to rely on Bay-Delta waterways for subsistence, ceremony, and tradition. The Board must do more to acknowledge and engage the ongoing relationships tribes have to the Delta waters. To do otherwise is to ignore the lived experiences of Delta tribes who continue to assert their inherent water rights: namely, the rights that flow from tribes' longstanding water stewardship and use.⁴³³

The Board must also broaden its conception of TEK as something frozen in the past that can be reduced to sentences to a living relationship that tribes hold with water, land, and all they sustain, one focused on connection, stewardship, identity, and mutuality. Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, and Buena Vista Rancheria of Me-Wuk Indians offer the following illustrations of exercise of TEK by DTEC members to further the Board's understanding. The Board can begin to understand from our tribes' commitments to exercise of TEK, and restoration of TEK in our own governance and cultural activities, the unique relationships tribal nations hold to Bay-Delta waters and the irreparable harm tribes face if the Board does not prioritize working with tribes to restore the health of the Bay-Delta watershed.

The Shingle Springs Band of Miwok Indians has stewarded and utilized resources from the waterways of the Sacramento-San Joaquin River Delta for sustenance, medicine, transportation, ceremony, clothing, and shelter, among other cultural and subsistence uses,

⁴³³ *Id.*; ACCIP, *Trust and Natural Resources Report* (1997) 20 [hereafter ACCIP Trust and Natural Resources].

since time immemorial.⁴³⁴ In recent years, the Tribe has been returning to Bay-Delta waterways and working to restore connections to cultural resources and traditional ways of life by reclaiming its culture and healing the alienation of many tribal members from the water. In 2017, the Tribe founded a TEK program to aid in these efforts. TEK program coordinators spend time reeducating tribal members about their connections to the waterways and teach tribal members how to make regalia, food, clothing, shelter, and transportation out of natural resources found along their ancestral village sites. In 2020 the Tribe purchased a small tract of land at its ancestral village site in Verona, where the Feather River meets the Sacramento River. Yet, despite regaining this limited riparian access to ancestral waterways, the degraded condition of the Bay-Delta is impeding the Tribe's long-sought reconnection. For example, traditional riparian cultural resources – like tule, a long grassy plant that once lined the waterways and from which the Tribe fashioned fishing boats, regalia, and other important cultural and subsistence implements – either no longer exist or are largely unsuitable for use because of the polluted state of the water.

During the summer of 2022, the Winnemem Wintu partnered with state and federal agencies in pursuing measures to bring winter-run Chinook salmon eggs back to the McCloud River.⁴³⁵ The partnership supports a joint effort to return the salmon to their original spawning areas in cold mountain rivers for the first time since Shasta Dam blocked their migration in the 1940s.⁴³⁶ The partnership recognizes the Winnemem Wintu as the original stewards of salmon whose knowledge and expertise is essential for the future flourishing of the species. In May 2023, the Winnemem Wintu, California Department of Fish and Wildlife (CDFW), and National Oceanic Atmospheric Administration (NOAA) Fisheries signed agreements to restore Chinook salmon in the McCloud River.⁴³⁷ The new agreements call on the Winnemem Wintu Tribe to be a “co-equal decision-maker,” and call for the Tribe to contribute TEK to the project, including oral history, knowledge of the Tribe's deep cultural connection to winter-run Chinook salmon, and practical knowledge of the species.⁴³⁸ Working in close consultation with the Winnemem Wintu – and relying on a hand-scribbled design by Chief Caleen Sisk – a team of UC-Davis scientists constructed a groundbreaking egg incubator that mimics the conditions of the McCloud River.⁴³⁹ The incubator, which the Tribe is referring to as the Nur-Nature Based incubator (*Nur* is the Winnemem Wintu word for salmon), allows young salmon more time to practice swimming against river currents.⁴⁴⁰ The incubator hatched an estimated 40,000-plus eggs this past summer and fall and is observed to have nurtured healthy young salmon that are well prepared for life in a free flowing river.⁴⁴¹

⁴³⁴ Decl. of Malissa Tayaba ¶ 2.

⁴³⁵ Native News Online Staff, NATIVE NEWS ONLINE, California Tribe Teams Up with State, Federal Agencies to Protect Endangered Salmon (May 08, 2023), <https://nativenewsonline.net/environment/california-tribe-teams-up-with-state-federal-agencies-to-protect-endangered-salmon> (referencing work to transport 40,000 fertilized eggs. Many of the eggs hatched and the Tribe worked with staff to collect juvenile fish before they reached the reservoir and biologists moved them downstream so the salmon could continue to the ocean.).

⁴³⁶ *Id.*

⁴³⁷ NOAA Fisheries, The Original Salmon Stewards, <https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/original-salmon-stewards> (last visited Jan. 19, 2024).

⁴³⁸ Native News Online Staff, *supra* note 436.

⁴³⁹ Marc Dadigan, *Rewilding Baby Salmon Using Indigenous Knowledge*, Earth Island J. (Nov. 7, 2023), <https://www.earthisland.org/journal/index.php/articles/entry/re-wilding-baby-salmon-according-to-indigenous-knowledge?fbclid=IwAR3c0zEWoW080H6whBbf91bUZ6o-jIRPX86uEnXAUKpr-w3G3jDKiAzjcpG##>.

⁴⁴⁰ Dadigan, *supra* note 440.

⁴⁴¹ *Id.*

C. The Board must sustain meaningful engagement with tribes in the setting, implementation, and evaluation of water quality standards.

Designating TBUs in the Bay-Delta Plan is necessary but not sufficient to restore ecological health and integrity of Bay-Delta waterways: Restoration of flows sufficient to protect tribal uses of Bay-Delta waters will not occur until the State Water Board operationalizes TBUs by establishing water quality objectives, criteria, and a program of implementation that substantively support tribal uses of Bay-Delta waters. Although Bay-Delta Plan review has lagged years and even decades behind the statutory deadline, past failures must not hinder progress on ensuring protection of TBUs. Rather, TBU implementation provides an opportunity for the Board to make real on its important statutory obligations to regularly review and update the Bay-Delta Plan.

First, the Board has an opportunity to engage tribes as partners in ensuring TBU protection through design of the Phase I and II programs of implementation. As explained above, the Board's failure to set forth and analyze programs of implementation together with the standards themselves is an immense oversight that only further delays progress on the comprehensive completion of the Bay-Delta Plan update. Without a program of implementation in place, tribal communities and other members of the public are left without clear direction on the actions the Board will take to achieve water quality objectives, making it impossible to provide constructive feedback and recommendations. The Board should center tribal participation and Traditional Ecological Knowledge in the development of the program of implementation, both to meet its commitments to consultation and tribal engagement and to ensure that water quality objectives and implementation plans are culturally appropriate and substantively protective of tribal uses.

Second, after the Board designates TBUs for the Bay-Delta watershed as a whole – which must be done through the current plan update – it should partner with tribes to evaluate how well water quality standards and their implementation are working to protect TBUs and where they are falling short. This will require establishing a framework for ongoing government-to-government consultation and engagement with tribal non-profit organizations during periodic reviews of the Bay-Delta Plan – which, pursuant to the Clean Water Act, must occur on an ongoing, triennial basis.

Third, where water quality standards are leaving TBUs unprotected, the Board must work with the tribes to identify changes to water quality standards and their implementation required to ensure protection of TBUs, just as with any other beneficial uses. This will require providing resources to and empowering tribes and tribal-nonprofits to work together with the Board to identify and evaluate numeric and/or narrative water quality objectives for TBUs, including flow-based and other water quality objectives adequately protective of TBUs, and a program of implementation to realize the objectives, as well as building tribal capacity to monitor water quality to ensure safe conditions for practicing cultural, spiritual, and subsistence traditions. To facilitate this ongoing engagement and participation, the Board should establish a tribal advisory group for Bay-Delta Plan TBUs that would participate in every triennial review and in working with the Board on periodic updates of the Bay-Delta Plan.

D. The Board should co-create and implement a policy for meaningful incorporation of TEK together with tribes.

To effectively engage Traditional Ecological Knowledge in water governance, the State Water Board must work together with California Native American tribes to co-create and implement a TEK policy. The State Water Board joins a growing list of state and federal agencies that have taken up efforts to improve the recognition and inclusion of TEK as a compliment to western ecological knowledge in environmental research, policies, and decision-making.⁴⁴² As the Board correctly points out, the collaboration of Indigenous knowledge with western knowledge can deepen understanding of the interconnectedness of the natural world and provide a more holistic and effective approach to adaptive management. After centuries of suppression of Indigenous knowledge forms, lifeways, and philosophies, the process of engaging TEK can revitalize tribal uses of water throughout the watershed and better inform environmental policy and adaptive management.

While the Staff Report emphasizes the importance of TEK to inform reasonable protection of TBUs, it lacks guidance for incorporating Indigenous Knowledge in Bay-Delta planning, or water governance more broadly. For example, staff identify how TEK may be used to improve ongoing monitoring and assessment of native species or to enhance information about historical species assemblages to inform planning in adaptive management of floodplain restoration sites. Although these examples correctly outline the significance of TEK in improving watershed management, the Board's analyses stop short of offering concrete next steps for incorporation of TEK into the Bay-Delta Plan. Without such measures, the Board runs the risk of extracting knowledge from tribes without ensuring that Indigenous Knowledge is considered and applied in a manner that is respectful of tribal sovereignty and is mutually beneficial for tribal communities.

To assure that implementation of TEK does not become yet another exercise in cultural appropriation, the Board should co-create a TEK policy together with California Native American tribes to actually protect those uses and inform decision-making. The policy should include a set of guidelines and best practices for working with tribes to request, document, and integrate TEK in decision-making in a way that is sensitive to tribal interests and respectful of tribal sovereignty, similar to the Board's own Tribal Consultation Policy.⁴⁴³ The Board should consider the creation of a Tribal Advisory Board to assist in developing the TEK policy, in addition to TBU evaluation and implementation.

Guidelines set forth by the federal administration offer a useful starting point for the State Water Board. In December 2022, The White House Council on Environmental Quality ("CEQ") and the White House Office of Science and Technology Policy ("OSTP") jointly released government-wide guidance and an accompanying implementation memorandum for recognizing and including Indigenous Knowledge in federal research, policy, and decision making.⁴⁴⁴ The guidance identifies promising practices for collaborating with Tribal Nations and Indigenous Peoples and

⁴⁴² For example, this list includes the U.S. Environmental Protection Agency, the Departments of Agriculture and the Interior, the National Oceanic and Atmospheric Administration, and the Advisory Council on Historic Preservation.

⁴⁴³ See State Water Resources Control Bd., *Tribal Consultation Policy* (June 2019), https://www.waterboards.ca.gov/about_us/public_participation/tribal_affairs/docs/california_water_board_tribal_consultation_policy.pdf.

⁴⁴⁴ Office of Sci. and Tech. Pol'y Council on Env't Quality, *supra* note 427.

respecting the decisions of these communities to engage or decline to participate in knowledge sharing on their own terms.

As one example, the guidelines acknowledge that appropriately recognizing and applying Indigenous Knowledge requires growing and maintaining strong and mutually beneficial relationships between agencies and tribal communities.⁴⁴⁵ Such relationships are important in building trust and common understanding for pursuing co-management of resources and in facilitating the exchange of information. The State Water Board should similarly commit to growing and sustaining relationships with tribal partners throughout the Bay-Delta. The guidelines identify several principles and practices necessary for agencies to make sustained efforts to build and maintain trust to support Indigenous Knowledge:

1. *Acknowledge Historical Context and Past Injustice.*
2. *Practice Early and Sustained Engagement.*
3. *Earn and Maintain Trust.*
4. *Respect Different Processes and World Views.*
5. *Recognize Challenges.*
6. *Consider Co-management and Co-stewardship Structures.*
7. *Pursue Co-Production of Knowledge.*⁴⁴⁶

The second principle mirrors tribes' repeated requests that the Board engage in regular, meaningful, and robust consultation consistent with AB 52 and the Board's own Tribal Consultation Policy. With this principle, the White House Guidelines emphasize that agencies should not initiate consultation with an assumption that the Tribal Nation will share its knowledge, but rather "with an inclusive process that empowers the Tribal Nation to determine if, and how, Indigenous Knowledge may be included in the agency's process."⁴⁴⁷ Likewise, the White House guidelines' focus on earning and maintaining trust, pursuing co-production of knowledge, and developing co-management structures mirror what tribes have been asking of the Board for designation and implementation of TBUs. As the federal government's experience recognizes, a robust, co-created TEK policy will do much to avoid the damaging missteps that have characterized the current Bay-Delta update process and assure a better relationship between the Board and tribes, and ultimately better outcomes for the Bay-Delta, going forward.

VI. The Board's economic analysis overstates costs to the agricultural industry from reduced reliance on Delta water while ignoring the vast benefits from restoration of ecological health and social welfare in the Bay-Delta.

The State Water Board's economic analysis is inadequate. By focusing almost exclusively on costs to agricultural production from reducing diversions and ignoring costs to communities from continued suppression of instream flows, the Board fails to provide an accurate picture of costs and benefits to support informed decision-making.

⁴⁴⁵ Office of Sci. and Tech. Pol'y Council on Env't Quality, *supra* note 427.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 9.

Under the Porter-Cologne Act, the State Water Board must take into account economic considerations, among other factors, when establishing water quality objectives for the reasonable protection of beneficial uses.⁴⁴⁸ Likewise, under the Board’s CEQA-certified regulatory program, the SED for the Bay-Delta Plan update must “take into account a reasonable range of . . . economic” as well as environmental and other factors.⁴⁴⁹ The Clean Water Act sets a floor for water quality in the state: the Board may only take economic considerations into account in setting objectives to the extent that they are “*more stringent* than required by federal law.”⁴⁵⁰

Ultimately, the purpose of the Porter-Cologne Act is “to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.”⁴⁵¹ This means that in setting water quality objectives, the Board must consider not only costs of reducing discharges but also the myriad of benefits – economic and social, tangible and intangible. Further, neither the Porter-Cologne Act, nor any other expression of legislative policy, prioritizes economic considerations above other values, such as protection of public trust resources and beneficial uses or restoration of ecological integrity. Even so, for the Board’s economic analysis to mean anything in decision-making, it must provide a reasonably comprehensive analysis of costs and benefits of its decision. This requires a searching and unbiased analysis of quantifiable and non-quantifiable benefits from restored flows in the Bay-Delta to tribes, disadvantaged communities, diverse sectors, and ecosystems in and around the Bay-Delta.

The economic analysis set forth in Chapter 8 of the Staff Report falls well short. The Board dedicates nearly its entire economic analysis in Chapter 8 to quantifying losses to agricultural production from restoration of instream flows. But this analysis relies on questionable assumptions and outdated and unreliable data. At the same time, the Board waives away benefits from restored flows. The result is an economic analysis that presents a worst-case scenario with inflated numbers on the cost side and essentially no values to compare to on the benefits side.

A. The economic analysis overstates costs to the agricultural industry from reduced reliance on Delta water.

The Board’s economic analysis relies on outdated data and questionable assumptions, making its estimates of economic costs to agriculture unreliable for decision-making.

First, the Board’s agricultural production model (SWAP) is calibrated based on 2010 data.⁴⁵² But the Board concedes that agricultural production, and agricultural water use patterns, have

⁴⁴⁸ Section 13241 of the Water Code sets forth a non-exclusive lists of considerations in establishing water quality objectives, including “past, present, and future beneficial uses of water,” “environmental characteristics of the hydrographic unit under consideration, “water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area,” “economic considerations,” and the “need to develop and use recycled water.” Cal. Wat. Code § 13241.

⁴⁴⁹ 23 Cal. Code Regs. § 3777(c).

⁴⁵⁰ *City of Burbank v. State Wat. Res. Control Bd.*, 35 Cal.4th 613, 628 (2005) (emphasis added).

⁴⁵¹ *Id.* at 619; see Cal. Wat. Code § 13000. The Board must conform to and implement this legislative policy in its policy decisions. Cal. Wat. Code § 13001 (“The State board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter”).

⁴⁵² Staff Report at 8-11 n.3 (« Crop water estimates presented here were developed using 2010 land use data developed by DWR. »).

changed significantly since 2010, and are likely to change even more in future years.⁴⁵³ For instance, the Board notes that “plantings of alfalfa” – particularly water-intensive crop – “are anticipated to decline in Kings, Kern, Tulare, and Fresno Counties, due to competition from other crops, especially tree nuts.”⁴⁵⁴ California’s Department of Food & Agriculture releases annual crop reports with data on the production and value of crops throughout the state. The Board should utilize more recent crop data to provide a more accurate analysis.

Second, the modeling assumptions baked into the Board’s analysis are highly questionable. For instance, the Staff Report indicates that modeling assumes relatively low ground water pumping replacement rates. And it appears not to consider mitigations on losses through water management measures like water conservation, recycling, demand management, and ground water storage and recovery, as well as mitigations on losses from crop switching. Indeed, the Board concedes that the SWAP model “does not capture the full set of other water management actions that agricultural producers may pursue in response to reduced water supplies” and that as a result, the SWAP model results “should be considered an indicator of the change in crop acreage and agriculture economic effects,” though the actual outcome “may vary.”⁴⁵⁵ As a result, the Board’s conclusions about anticipated economic costs to agriculture from reduced Delta exports is likely a worst-case scenario, when in reality much of the costs can be offset by measures to reduce reliance on the need for Delta water.

Likewise, in section 8.4.4, Agricultural Economic Effects on Economically Disadvantaged Communities, the Staff Report uses the IMPLAN model to analyze employment information relevant to agricultural economic effects on disadvantaged communities (“DACs”). Here the Board assumes that groundwater would *not* be used as a replacement for reduced Sacramento/Delta surface water supplies.⁴⁵⁶ But the Board does not support this assumption; rather as the Board acknowledges, the reality is that water users may increase groundwater pumping as a substitute supply which could lead to agricultural economic effects that could be less than indicated by the IMPLAN modeling results.⁴⁵⁷ And water users are likely to undertake water management actions, including water transfers, water recycling, crop switching, and other conservation measures that could also result in much lower agricultural economic costs on DACs (and reliance on groundwater substitutes), and potentially even benefits as water users and governmental sectors invest in measures to reduce water use and promote reuse. In other words, the Board’s analysis assumes that systems will not adapt in response to changed water conditions, which is not the case.

B. The Staff Report makes no effort to quantify benefits to a host of sectors from restored Delta flows.

Despite its legal obligations to consider a reasonable range of economic factors, the Report makes no effort to quantify benefits to a host of sectors from restored flows and

⁴⁵³ *Id.* at 8-41 (noting that “cropping patterns have changed over time when compared with the SWAP baseline year of 2010; in particular, there has been an increase in acreage of tree crops, such as almonds, and a reduction in acreage of alfalfa”).

⁴⁵⁴ Staff Report at 8-21; *see also id.* at 8-52 (noting that alfalfa, which was the highest acreage crop in the San Joaquin Valley in 2010 – 2012, had significantly declined by 2015, putting it second to almonds).

⁴⁵⁵ Staff Report at 8-41 to 8-42.

⁴⁵⁶ *Id.* at 87-89.

⁴⁵⁷ *Id.*

ecological health in the Delta. In fact, the Report's economic analysis only allocates 16 out of 120 pages to the assessment of economic benefits. Further, while the section on economic costs to agriculture production provides detailed modeling quantifying anticipated revenue loss, the section on economic benefits makes little to no effort to quantify benefits on the other side of the ledger. Instead, the Board puts forth a brief and qualitative assessment of potential positive economic effects on commercial and recreational fisheries, recreation, ecosystem services, wildlife refuges, and energy (hydropower) production. Without a comprehensive analysis of the potential positive economic effects – based on technical modeling and economic forecasting – it is impossible to accurately balance the economic costs and benefits of the alternatives the Board is considering. The result is an incomplete economic analysis that the public is unable to evaluate and the Board cannot rely on for decision-making.

For example, in the section on commercial and recreational fishing industries, the Report glosses over positive economic effects to fishing and alludes to any economic benefits in only general terms. Instead of modeling fishing revenues estimates against baseline and each of the different flow scenarios (as the Report did in its agricultural crop revenue modeling), the analysis provides a qualitative assessment of the likelihood of positive economic effects to commercial and recreational fishing industries. The section notes that the Sacramento/Delta update to the Bay-Delta Plan would be “expected to contribute to the recovery of Chinook salmon and other native fish species, which would have positive economic effects on California’s commercial and recreational fishing industries.”⁴⁵⁸ But it does not attempt to quantify these positive economic effects; rather, the only data the Board provides at all for this sector are annual revenue estimates from commercial fishing industries and estimates on Chinook salmon population harvests, which have declined significantly over the past few decades. The Report briefly mentions that the 2023 salmon closures are projected to “take a toll on California’s fishing industry that will result in loss of 100 percent of the 5-year average annual ex-vessel value of \$15,033,200,”⁴⁵⁹ but it provides no explanation of the benefits to the fishing industry – and the sectors that rely on it – from not just lifting the closure, but restoring native fisheries and preventing additional listings with restored instream flows.

A thorough economic analysis of commercial and industrial fishing industries would quantify revenue loss in greater detail and model fishing revenues compared to baseline and each of the flow scenarios. It would also analyze second and third order impacts to the communities and individuals who traditionally rely on fishing for jobs and economic security, sustenance, recreation, and cultural activities. In September of 2020, the California Department of Water Resources conducted a survey of historically burdened, underrepresented, low income and otherwise vulnerable populations (also referred to as Economically Disadvantaged Communities) to gather input from disadvantaged community members who live in the Delta.⁴⁶⁰ The survey found that respondents rely on Delta fish to feed their families on a nearly costless basis. Specifically, the survey found that “[f]or 90% of the fishing locations respondents identified, they indicated that they eat fish from the Delta four or more times per week.”⁴⁶¹ Without analyzing the myriad of impacts to disadvantaged communities –

⁴⁵⁸ Staff Report at 8-105.

⁴⁵⁹ *Id.*

⁴⁶⁰ See Cal. Dept. of Water Resources, *Your Delta Your Voice Environmental Justice Community Survey* (May 2021), available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Public-Information/DCP_EJ-Survey-Report-5-28-2021_Final_508.pdf.

⁴⁶¹ *Id.* at 7.

including food, economic and housing security, health outcomes, and cultural loss – the Report’s analysis fails to accurately present the economic and social impacts resulting from devastated fisheries, or the benefits from their restoration.

Declining fish populations also impact tribal communities. It is well documented, for example, that a loss of fisheries is directly linked to declining health outcomes for tribal communities, including obesity, diabetes, and cardiovascular disease.⁴⁶² For instance, “[d]ata from the 2005 Karuk Health and Fish Consumption Survey show that the loss of the most important food source, the Spring Chinook Salmon run, is directly linked to the appearance of epidemic rates of diabetes in Karuk families, which are nearly four times the national average.”⁴⁶³ Loss of native food sources is also associated with high rates of heart disease and hypertension for members of the Karuk tribe.⁴⁶⁴ These health impacts extend to the loss of mental, emotional, cultural, and spiritual benefits of harvesting and eating traditional food sources.⁴⁶⁵ The Yurok Tribe, for instance, suffers from a suicide rate nearly *14 times* the national average.⁴⁶⁶ This rash of suicides has been linked to the loss of native fisheries and the ensuing damage to tribal identity and culture.⁴⁶⁷

The Report similarly elides economic benefits to a host of additional sectors and systems, including recreation, ecosystem services, wildlife refuges, and hydropower production. The Report briefly introduces each sector, describes how that sector has suffered from poor water quality standards, and then acknowledges that the proposed plan amendments could provide economic benefits. But it makes no effort at all to quantify those benefits or model revenue estimates under the different flow scenarios. In the ecosystem services section, for example, the Report describes a number of values generated by ecosystem services that are directly tied to market activity, including the use by humans of timber, raw materials, food, and fuel.⁴⁶⁸ While the Report states that it is challenging to quantify non-market values of ecosystem services, such as viewing wildlife, hiking, and enjoying scenic vistas, the Board’s analysis makes no attempt to quantify those values which provide direct economic use to humans. The analysis instead surmises that the proposed Plan amendments, which are intended to provide for the reasonable protection of fish and wildlife beneficial uses, would “complement ecosystem services,” and “could help to address [...] issues” resulting from inadequate Bay-Delta water quality standards such as aquatic species decline, physical habitat degradation, water quality impairments, and climate change.⁴⁶⁹ Even worse, the Board wholly ignores existing models that quantify economic and social values of ecosystem services, which are already relied on by state and federal governments in their decision-making, as well as the vast literature on currently available

⁴⁶² Decl. of Gary Mulcahy ¶ 31.

⁴⁶³ Kari M. Norgaard, *The Effects of Altered Diet on the Health of the Karuk People* 3 (Nov. 2005), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/PCFFA&IGFR/part2/pcffa_195.pdf.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ See Joe Mozingo, *How a Remote California Tribe Set Out to Save Its River and Stop a Suicide Epidemic*, L.A. Times (May 19, 2017), <https://www.latimes.com/local/california/la-me-salmon-demise-yurok-suicides-20170519-htlstory.html>.

⁴⁶⁷ *Id.*

⁴⁶⁸ Staff Report at 8-108.

⁴⁶⁹ Staff Report at 8-109.

ecosystem service models and the need to incorporate their results to allow for informed decision-making on regulatory actions that affect water flows and other resources.⁴⁷⁰

The Report similarly makes no attempt to quantify or otherwise value the vast benefits to Economically Disadvantaged Communities from improved instream flows and reduction in HABs and other detrimental pollutants, including benefits to improved community health and wellness, reduction of health system costs, increased recreational opportunities, enhanced spiritual and aesthetic values, restoration of connection to the landscape, improvement in greenspace and reduction in heat island effects, and the many other human values that derive from restored relationships with a healthy estuary.

The Report likewise fails to set forth any meaningful analysis of the vast benefits to tribal communities – both quantifiable and invaluable – from restored instream flows. These include benefits to tribal sovereignty and self-determination, tribal culture and identity, exercise of tribal religion and ceremony, and tribal health and wellness. Instead of attempting to value these benefits in economic or even non-economic terms, the Board sweeps them away entirely with the passing assertion that values like cultural heritage, aesthetics, and spiritual enrichment are hard to quantify⁴⁷¹. Furthermore, by wholly excluding the Trinity River from its analysis, the Report’s economic analysis automatically discounts any potential benefits to that ecosystem and the tribal communities that depend on it. In sum, the Board has given a highly speculative and likely inflated number on the costs side of the ledger and pretends that there is no number at all on the benefits side to compare to. The result is a highly misleading portrait of economic effects of increased instream flows.

Relatedly, the report makes no effort to quantify costs from the current no project scenario, where massive diversions and exports persist, or the costs that would result from non-protective standards like the Voluntary Agreements. This includes quantifiable costs related to the proliferation of HABs, fisheries, ecosystem services, public health and hospital systems, recreational industries, and tribal economies, as well as indeterminable costs to tribal culture, identity, religion, and sovereignty and to the welfare of communities harmed by and alienated from unhealthy waterways. Without this realistic baseline assessment of costs from business as usual, it is impossible for the public to evaluate the economic impacts (which may well be net positive) from restoring flows.

VII. The Board violates its obligations to consider and safeguard the public trust.

The public trust is an ancient common law doctrine that “enshrin[es] humanity’s entitlement to air and water as a public trust.”⁴⁷² The State of California acceded to public trust responsibilities when it acquired title to “all navigable waterways and the lands lying beneath them” at the inception

⁴⁷⁰ See, e.g., USGS, *Ecosystem Services Assessment and Valuation*, <https://www.usgs.gov/centers/geosciences-and-environmental-change-science-center/science/ecosystem-services-assessment> (discussing and linking to several models used by USGS to quantify and map economic and social values for ecosystem services); Office of Management and Budget, *Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis* (Aug. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/08/DraftESGuidance.pdf>; see also, e.g., A. Villamagna et al., *A Methodology for Quantifying and Mapping Ecosystem Services Provided by Watersheds* (2015), https://link.springer.com/chapter/10.1007/978-94-017-9846-4_8#Bib1.

⁴⁷¹ Staff Report at 8-108.

⁴⁷² *Env’t. Law Found. v. State Water Res. Control Bd.*, 26 Cal.App.5th 844, 856 (2018).

of statehood.⁴⁷³ The doctrine rests on several related precepts: that “the public rights of commerce, navigation, fishery, and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society;” that “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace;” and that “certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.”⁴⁷⁴

The State’s public trust responsibilities extend to a broad array of natural resources, including navigable waters, tidelands, baylands, wildlife, fish, and the water on which they depend, which it holds in trust for the benefit of the public.⁴⁷⁵ Indeed, under the Water Code, “[a]ll water within the State is the property of the people of the State.”⁴⁷⁶ As trustee, the State is legally obligated to protect these public trust resources and prevent their impairment.⁴⁷⁷ “While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited.”⁴⁷⁸ For instance, public trust protections extend to inland waters and non-navigable streams to the extent diversions could impact navigable waters, as well as groundwater extractions that could have adverse impacts on other public trust waters.⁴⁷⁹ The range of uses protected by the public trust is expansive, “encompassing not just navigation, commerce, and fishing, but also the public right to hunt, bathe, or swim,” as well as aesthetic, spiritual, and ecological values.⁴⁸⁰ Public rights protected by the trust also include “preservation of . . . lands in their natural state, so that they may serve as . . . open space[] and as environment which provide food and habitat or bird and marine land, and which favorably affect the scenery and climate of the area.”⁴⁸¹ Despite allowing for water diversions detrimental to fish and wildlife, California has long been concerned with the decline of fish and wildlife resources in the state, highlighting the need for rigorous attention to its public trust duties.⁴⁸²

Through the Water Code, the Legislature designated the State Water Board as steward of the People’s water, giving it “expansive powers to safeguard the scarce water resources of the state.”⁴⁸³ As such, the Board “has an *affirmative duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust users whenever feasible.”⁴⁸⁴ “[T]he Board’s authority to apply the public trust doctrine extends to rights not

⁴⁷³ *Nat. Audubon Soc’y v. Superior Ct.*, 33 Cal.3d 419, 434 (Cal.1983).

⁴⁷⁴ *Env’tl. Law Found.*, 26 Cal.App.5th at p. 856 (citation omitted).

⁴⁷⁵ See *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal. App. 4th 202, 233-34 (2015); see also, e.g., *Colberg, Inc. v. State of California ex rel. Dept’s of Pub. Works*, 67 Cal.2d 408, 416 (The public trust doctrine obligates the State to protect common resources, including fish and the water on which they depend, by acting as “trustee of a public trust for the benefit of the people”).

⁴⁷⁶ Cal. Wat. Code § 102.

⁴⁷⁷ *Id.*

⁴⁷⁸ *S.F. Baykeeper, Inc. v. State Lands Com.*, 242 Cal.App.4th 202, 233 (2015).

⁴⁷⁹ *People v. Gold Run Ditch & Mining Co.*, 66 Cal.138, 151-52 (1884); see *Nat. Audubon*, 33 Cal.3d 419, *Env’tl. Law Found.*, 26 Cal.App.5th 884.

⁴⁸⁰ *S.F. Baykeeper*, 242 Cal.App.4th at 233.

⁴⁸¹ *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (1971).

⁴⁸² Cal. Fish & Game Code §§ 2761(b), (c), (d); see also §§ 2050–55 (the California Endangered Species Act) (California’s legislature at least since 1985 has intended to “make reasonable efforts to prevent further decline in fish and wildlife, to restore fish and wildlife to historic levels where possible, and to enhance fish and wildlife resources where possible”).

⁴⁸³ *Id.* at 444 (citation omitted).

⁴⁸⁴ *Id.* at 446 (emphasis added); see also *Light v. State Water Resources Control Bd.*, 226 Cal.App.4th 1463, 1489 (2014).

covered by the permit and license system;” it is “independent of and not bounded by the limitation of the Board’s authority [to permit]” water rights.⁴⁸⁵ As a consequence, the Board’s duty to protect the public trust requires it to take “full consideration of the state’s public interest” before taking any action or decision that could “adversely affect” the public trust.⁴⁸⁶ In undertaking this analysis, the Board must identify the interests protected by the public trust, identify and adopt feasible measures to reduce or avoid impacts to trust resources, and make clear and explicit to the public any balancing the Board undertakes that could impact public trust resources.⁴⁸⁷ In undertaking this balancing, the Board is to extend a “presumption in favor of public use, access, and enjoyment.”⁴⁸⁸

The Board cannot move forward with a Bay-Delta Plan Update on this Staff Report without violating its sacred duties to consider and protect the public trust. The Staff Report fails to perform *any* public trust analysis at all despite the Board’s clear legal obligations and a settlement agreement through which the Board committed to doing just that in this Staff Report. And had the Board performed the required analysis, it would show that the actions the Board is considering for this water quality control plan update – including the proposed plan amendments and the Voluntary Agreements – fall well short of protecting public trust resources to the extent feasible.

A. The Staff Report omits the legally required public trust analysis.

In July 2020, the Board entered into a Settlement Agreement and Release of Claims with plaintiffs California Sportfishing Protection Alliance, Aqualliance, and the California Water Impact Network to resolve claims in the case *California Sportfishing Protection Alliance, et al. v. California State Water Resources Control Board and Thomas Howard*, Case Number RG15780498 (“Settlement Agreement”). The Agreement recognizes that the Board’s “duty to balance competing interests in formulating water quality objectives can be harmonized with its duty under the common law public trust doctrine to protect public trust resources to the extent feasible and consistent with the public interest.”⁴⁸⁹ But this is only possible if the Board undertakes a “transparent public trust evaluation” in formulating water quality control standard updates.⁴⁹⁰

Toward these ends, the Settlement Agreement is explicit that “the Staff Report prepared in connection with the pending update to the Bay-Delta Plan [must] include, in addition to the analysis required by the Porter-Cologne Water Quality Control Act, an *express evaluation* of whether the proposed amendments [to the Bay-Delta Plan] will protect the subject fish and wildlife public trust uses to the extent feasible and consistent with the public interest, taking into consideration all relevant factors.”⁴⁹¹ Among factors to be considered are: the public interest in protecting public

⁴⁸⁵ *Env’t. Law Found.*, 26 Cal.App. at 862.

⁴⁸⁶ *S.F. Baykeeper*, 242 Cal.App.4th at 234.

⁴⁸⁷ See, e.g., *Nat. Audubon*, 33 Cal.3d at 426 (“Before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protect by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests”).

⁴⁸⁸ *In re Water Use Permit Applications*, 9 P.3d 409, 454 (Haw. 2000); see Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471 (1970) (discussing presumption in favor of protecting public resources).

⁴⁸⁹ *State Water Resources Control Bd. Cases*, 136 Cal.App.4th 674, 777-78 (2006).

⁴⁹⁰ 2020 Settlement Agreement and Release of Claims with California Sportsfishing Protection Alliance, Aqualliance, and the California Water Impact Network at 3 in the case *California Sportfishing Protection Alliance, et al. v. California State Water Resources Control Board and Thomas Howard* (Case Number RG15780498) [hereinafter “Settlement Agreement”].

⁴⁹¹ Settlement Agreement at 4.

trust fish and wildlife uses; evaluation of whether proposed amendments will protect subject fish and wildlife public trust uses to the extent feasible; the extent to which proposed amendments to the Bay-Delta Plan protect fish and wildlife public trust uses under different hydrological conditions, including during periods of drought and water supply shortage; economic impacts of the proposed amendments to trust and non-trust uses; and evaluation of the proposed plan amendments' consistency with Fish and Game Code section 5937.⁴⁹² The Board must also "explain its findings and describe the specific factors it balanced in making its determination of whether the proposed amendments will protect the subject fish and wildlife public trust uses to the extent feasible and consistent with the public interest."

The Staff Report does not include the required public trust analysis. Indeed, aside from passing mentions of the Board's public trust responsibilities, the Staff Report does not discuss public trust uses or resources at all, not to mention provide a "transparent public trust evaluation for the Bay-Delta Plan Update."⁴⁹³ As a consequence, the Staff Report does not fulfill the Board's very clear Settlement Agreement commitments, nor does it come anywhere close to complying with its general duties under well-settled law to consider the public trust and inform the public of any balancing it undertakes and the consequences of this balancing for public trust interests.

Even setting aside the Board's responsibilities to make its public trust analysis "transparent," there is simply no public trust consideration that can be inferred from the analysis that the Staff Report does undertake. Although the law is clear that the Board must protect public trust uses "whenever feasible," the Board did not assess feasibility at all in the Staff Report.⁴⁹⁴ Rather the Report merely recognizes the Board's "duty to protect, where feasible, the state's public trust resources" without making explicit the public trust interests at stake, how they will be affected by the proposed plan amendments or alternatives, whether there are feasible actions that could better protect the resources, or what tradeoffs the Board is engaging in its decision-making.⁴⁹⁵ It is impossible to protect public trust resources whenever feasible without conducting a feasibility analysis.

To the extent the Board believes that its consideration of the "high flow alternative" in the SED constitutes the requisite feasibility analysis, it is wrong. The Staff Report recognizes that "the Delta Reform Act required the Board to identify flow criteria for the Delta ecosystem necessary to protect public trust resources."⁴⁹⁶ The Board's findings on flows necessary to protect public trust resources are set forth in its August 2010, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* ("Public Trust Flows Report").⁴⁹⁷ The Public Trust Flows Report found that "the best available science suggests that current flows are insufficient to protect public trust resources" and that "there is sufficient scientific information to support the need for increased flows to protect public resources," and it set

⁴⁹² *Id.*

⁴⁹³ Settlement Agreement at 3.

⁴⁹⁴ *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th at 778 (the Board has discretion to determine what is feasible); *In re Bay-Delta etc.*, 43 Cal. 4th 1143, 1154 (2008) ("the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible") (quoting *Nat'l Audubon Soc'y*, 33 Cal. 3d at 446).

⁴⁹⁵ Staff Report at 7.12.2-10.

⁴⁹⁶ Staff Report at 1-7 to 1-8.

⁴⁹⁷ *Id.*

forth specific flow objectives to protect public trust resources.⁴⁹⁸ The Staff Report states that the high flow alternative – which would require between 65 and 75 percent unimpaired flow – “*could* provide for Delta inflow and Delta outflows identified in the State Water Board’s 2010 [Public Trust Flows] report.”⁴⁹⁹ But it does not give flows in this range fair consideration. Whereas the proposed plan amendments include an expansive adaptive range, the high flow alternative includes none at all. As a consequence, because the high flow alternative would never allow flows to go below 65 percent, even to avoid impairment of public trust interests, the high flow alternative provides no latitude for functional flow or adaptive management to allow the Board to avoid its claim that the high flow alternative would present “challenges in maintaining suitable water temperatures for cold water aquatic species and carryover storage for environmental and water supply purposes.”⁵⁰⁰ The high flow alternative, in other words, is set up to fail. The Board should instead consider and adopt the proposed plan amendments set forth in this comment, which are based in TEK and the best available science. These amendments would maintain public trust flows as an objective while allowing for adaptive management to avoid impairment of other ecological values and permit some balancing, with clear and explicit guardrails, of public trust values against other priorities where in the public interest.

Likewise, to the extent the Board believes it can substitute analysis of environmental impacts or beneficial uses for a public trust analysis, it is also wrong. The Board must balance protection of the broad range of designated beneficial uses with its duty to protect public trust uses.⁵⁰¹ While it is true that the Board has an obligation to “take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses,” this obligation is different from conducting state water management policy with reasonable use and public trust in mind.⁵⁰² The Staff Report considers certain beneficial uses such as municipal, industrial, agricultural, hydropower, fish, and wildlife uses, but it does not identify the connection to public trust uses. “[A] use does not qualify as a trust use simply because it might confer a public benefit.”⁵⁰³ The Board omits entirely public trust uses of critical importance to the cultural, spiritual, and economic survival of Delta tribes: subsistence fishing, ceremonial, recreational, cultural, ecological, and other uses tribes in the Bay-Delta have practiced with respect to Bay-Delta waters since time immemorial. And it gives short shrift to the vital recreational, aesthetic, and health-sustaining public trust uses that Delta communities – particularly disadvantaged environmental justice communities – are entitled to enjoy. This omission is particularly clear with respect to the Board’s failure to consider flows that could reasonably mitigate the growing HABs scourge in the Bay-Delta, which increasingly prevents the public from enjoying Delta waters. This is especially so for residents of disadvantaged Delta communities, who cannot simply travel elsewhere to recreate, as the Staff Report assumes.⁵⁰⁴

Nor can a public trust analysis be backed out of the Staff Report’s evaluation of beneficial uses. As discussed above, the Staff Report at best considers incremental improvements to requisite flows and other habitat measures that proposed plan amendments would and VAs might yield; it

⁴⁹⁸ State Water Resources Control Bd., *supra* note 299.

⁴⁹⁹ Staff Report at 7.2-7.

⁵⁰⁰ *Id.* at 7.2-8.

⁵⁰¹ *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 777-78 (2006).

⁵⁰² Cal. Wat. Code, §§ 1243.5, 85023.

⁵⁰³ *San Francisco Baykeeper, Inc.*, 242 Cal. App. 4th at 235-36 (sand mining, an industrial use of land, despite having public benefit, is not part of the public trust); *Zack’s, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1176 (2008) (acting for public benefit is different from protecting the public trust).

⁵⁰⁴ Staff Report, Ch. 7.18-10.

does not, however, consider whether the proposed amendments or any alternatives would *actually* provide reasonable protection of beneficial uses as required by the Porter-Cologne Act. For instance, aside from the percent increases in species abundance indices relative to baseline conditions (which the Staff Report ran only on four Bay-Delta species),⁵⁰⁵ the Report omits analysis that would be necessary to explain whether or how the proposed alternatives will protect fish and wildlife beneficial uses. Without disclosure of the alternatives' abilities to protect beneficial uses, the public also cannot discern whether any of the options the Board is considering would protect public trust resources, or the extent to which they would trade public trust values away in service of other interests.

B. The Staff Report proposes Bay-Delta Plan amendments that go too far in trading away public trust interests.

Based on the analysis the Board has provided, it is clear that the options it is considering for a Bay-Delta Plan update go too far in trading away public trust resources and uses. The Board must ensure that “[a]ll uses of water, including public trust uses, must . . . conform to the standard of reasonable use.”⁵⁰⁶ Sustainability of native fisheries is one of the key considerations the Board must take into account in its planning efforts, including in determining the reasonableness of use or diversion of water.⁵⁰⁷ But the Board gives it short shrift. For instance, the available evidence shows that Chinook salmon thrive at inflows that occur at unimpaired flow levels of 65 percent and higher.⁵⁰⁸ Yet the Board fails to meaningfully consider an alternative that would provide for 65 percent unimpaired inflows. While the proposed plan amendments could hypothetically allow flows *as high as* 65 percent, the Board targets a 55 percent flow objective and allows flows to drop as low as 45 percent. From experience, this floor is likely to become the norm (even the ceiling) for unimpaired flows in the Delta. And the Board does nothing to explain when and how flows would be maintained at 65 percent to avoid deleterious impacts on Chinook salmon and other imperiled native fish species. Nor, as discussed above, does the Board give meaningfully consideration to an alternative that would maintain flows at the range necessary to avoid irreversible harm to Chinook salmon while allowing for adaptive management to avoid impacts on other public trust values. While some (transparent) balancing is permissible, the Board cannot balance away public trust interests entirely.

Second, the Board advances consideration of voluntary agreements that will not only impair public trust resources and uses but also shed the Board's duties to protect them. The Board's duty to protect public trust resources can be surrendered “only in rare cases.”⁵⁰⁹ Parties that acquire rights in trust property, such as water flows, “generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.”⁵¹⁰ But here, VA Parties (i.e., state and federal agencies, local water agencies, private companies, and a non-profit mutual benefit corporation) will have unfettered discretion to manage public trust resources through vaguely defined flow and non-flow measures.⁵¹¹ The

⁵⁰⁵ Staff Report, Ch. 3, Table 3.14-7.

⁵⁰⁶ *Santa Barbara Channelkeeper v. City of San Buenaventura*, 19 Cal. App. 5th 1176, 1186 (2018) (citations omitted).

⁵⁰⁷ *Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal. App. 5th 976, 1003 (2020) (citations omitted), *as modified* (July 8, 2020).

⁵⁰⁸ Staff Report at 3-114.

⁵⁰⁹ *Nat. Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d at 441.

⁵¹⁰ *Id.* at 441.

⁵¹¹ Staff Report at 1-3.

Board's overseeing of this water management is crucial, especially since the Board itself recognizes the inherent uncertainty in VA implementation measures and, therefore, in VA outcomes in the years ahead.⁵¹² And yet the Staff Report expresses no concerns with VA standards and measures that are subject to change and allow VA Parties an eight-year period of unchecked experimentation, at the near certain expense of public trust resources and values.⁵¹³ With the VAs, the Board impermissibly surrenders its duty to protect public trust by guaranteeing years of uncertainty and experimentation by non-State actors.

Indeed, while the State has not yet disclosed final VA agreements, draft agreements contain clauses that evidence an intent to exempt VA parties from effective Board oversight, even if necessary to protect public trust interests. The Draft Yuba River Implementation Agreement provides that:

[T]he Parties will ask the State Water Board to include in the Bay-Delta Plan amendments provisions confirming that: (a) the State Water Board will not take any water-quality or water-right actions that would affect YWA beyond the actions described as YWA's contributions to the Yuba River VA Program, or any other actions that would increase any of YWA's commitments to contribute to the implementation of any of the Bay-Delta Plan's water-quality objectives, during the term of this Agreement; and (b) if the State Water Board takes any such actions, then YWA may terminate or withdraw from this Agreement.⁵¹⁴

In sum, the VA agreements would trade away the Board's legal obligations to protect and preserve the public trust and hand its authority to regulate Bay-Delta water quality over to a select community of water rights claimants that can experiment with habitat measures and continue to divert water without public trust resources in mind. The inevitable consequence will be further impairment of the public trust and sacrifice of the interests of communities most dependent on public trust resources and uses – Delta tribes and disadvantaged communities. The Board simply cannot approve or advance the VAs consistent with its obligations as trustee of the People's trust.

VIII. The Staff Report fails to adequately address the emergent public health and environmental dangers of HABs.

The Staff Report's discussion regarding harmful algal blooms fails to address HABs impacts on beneficial uses, including TBUs, and fails to address HABs' role in exacerbating existing environmental injustices. The Board also continues to ignore requests that it adopt numeric water quality criteria for HABs, and it ignores the EPA's mandate to consider adopting the EPA's

⁵¹² See e.g., Staff Report at 9-52, 9-81, 9-111, 9-113.

⁵¹³ See *id.* at Ch. 1 (talking generally about the inherent flexibility in implementation associated with VAs).

⁵¹⁴ Attachment 8, Draft Implementation Agreement between California Department of Water Resources and Yuba County Water Agency [hereinafter "Attachment 8"]; see also Attachment 9, Draft Mokelumne River Implementation Agreement [hereinafter "Attachment 9"] (describing the relicensing of the Lower Mokelumne River Hydroelectric Project, "In any Clean Water Act section 401 water quality certification issued by the State Water Resources Control Board (SWRCB) in connection with any proceeding regarding the relicensing of the Lower Mokelumne River Hydroelectric Project (FERC Project No. 2916) commencing during the effective period of the Voluntary Agreement, the SWRCB will not impose any condition regarding flows or non-flow measures which exceeds the requirements for the Mokelumne River specified in this Exhibit B.X.1.") (emphasis added).

recommended HABs criteria, published pursuant to notice and comment.⁵¹⁵ Despite ample evidence that HABs can be managed throughout achievable measures like increasing flows, the Staff Report speaks only to HABs as a problem requiring further study and monitoring. While DTEC appreciates the commitments to better monitor and track HABs, HABs have already been established as a prevalent problem within the Bay-Delta that requires urgent action through water quality standards themselves.

A. The Board should adopt a surface water objective for HABs, based on the EPA's recommended guidance.

On June 6, 2019, following a 90-day public comment period, the EPA issued final recommended human health recreational ambient water quality criteria for the cyanotoxins *microcystins* and *cylindrospermopsin*.⁵¹⁶ The EPA's recommended criteria identify maximum concentrations of cyanotoxins that would be protective of human health given a primary contact recreational exposure scenario: 8 µg/L for microcystins and 15 µg/L for cylindrospermopsin, using 10-day assessment periods.⁵¹⁷ These levels are less protective than the trigger levels set forth in the California Voluntary Guidance for Response to HABs in Recreational Inland Waters for advisory notification, which set Tier 1 Caution warning levels at 0.8 µg/L for microcystins and 1 µg/L for cylindrospermopsins.⁵¹⁸ The EPA's guidance makes clear that such numeric nutrient criteria are relevant not only for notification purposes but as "useful tools to support water quality assessments, watershed protection or restoration, TMDL development, and permitting programs," among other functions.⁵¹⁹

EPA's recommended criteria represent a bottom-line objective the Board should adopt to combat HABs. Under the Clean Water Act, the Board must adopt EPA's recommended criteria parameters in this long-overdue triennial review, or, if declines to do so, "provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with [Clean Water Act] section 303(c)(1)."⁵²⁰ Yet other than acknowledging the existence of EPA's recommended criteria,⁵²¹ the Staff Report provides no discussion of their applicability to Bay-Delta waterways or its reasons for refusing to adopt the EPA's recommended criteria. Given that it has been well over a decade since the Board last conducted a triennial review, the Board is in no position to defer this analysis to the illusory next review, nor would the law allow it. And although the Board is not legally required to adopt EPA's recommended criteria, it still must create water quality standards that are scientifically defensible and protective of designated uses.⁵²² The State Water Board can do this "by adopting criteria based on (1) the EPA's recommended criteria, (2) the EPA's criteria modified to reflect local conditions, or (3) other scientifically defensible methods."⁵²³ In addition to the EPA recommendations, the State has already done the work to develop its own

⁵¹⁵ Environmental Protection Agency, *Recommended Human Health Recreational Ambient Water Quality Criteria for Swimming Advisories for Microcystins and Cylindrospermopsin* 5 (May 2019), <https://www.epa.gov/sites/default/files/2019-05/documents/hh-rec-criteria-habs-document-2019.pdf>.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ California Voluntary Guidance for Response to HABs in Recreational Inland Waters, https://mywaterquality.ca.gov/habs/resources/habs_response.html.

⁵¹⁹ Final Technical Support Document at p. 26.

⁵²⁰ 84 Fed. Reg. at 26414; *see* 40 C.F.R. § 131.20(a).

⁵²¹ Staff Report at 7.12.1-132.

⁵²² 84 Fed. Reg. § 26414 (2019).

⁵²³ *Id.*

health-based criteria-for HABs specific to California waterways; it simply has not taken the requisite next step of translating them in water quality objectives.⁵²⁴ Nor has the Board explained how it intends to adopt HABs criteria based on other scientifically defensible methods.

Without a HABs objective, the widespread damage caused by HABs will remain both impossible to meaningfully assess and pervasive. To meet its obligations to protect the public trust and provide for the reasonable protection of beneficial uses, including Tribal Beneficial Uses, DTEC urges the Board to adopt a water quality objective for HABs, using the EPA recommended water quality criteria as a baseline to create numeric objectives protective of beneficial uses.

B. The Staff Report fails to fully identify and discuss the detrimental impacts of HABs on beneficial uses.

The Staff Report fails to adequately discuss the impacts of HABs on beneficial uses, namely, the impacts HABs have on recreation and fishing. Staff claim that HABs will not have a significant impact on recreation, a hasty and incorrect conclusion:

An incremental increase in potential HABs from changes in reservoir levels could cause closures to recreation in some waterbodies, but the potential increased frequency of closures is not expected to result in a substantial number of recreationists moving to alternate recreational locations to the extent that it would physically deteriorate those alternate locations . . . Therefore, the impact would be less than significant.⁵²⁵

First, this impacts analysis misses the mark by only discussing the potential for physical deterioration on alternative recreation spots. This analysis fails to comment on the initial problem – HABs shutting down recreation spots in the first place. Within the recreation chapter, Staff cites that eleven lakes throughout California have closed over a three year period because of HABs.⁵²⁶ This number seems significant, but the Staff Report does not discuss the implications of these closures. If the Report had discussed the impact of recreation closures due to HABs, Staff would have concluded that HABs impacts on recreation is a significant environmental effect and a significant impairment to recreational beneficial uses. Second, even if the analysis only focuses on HABs forcing people to recreate elsewhere, this is still a significant impact. By inadequately mitigating HABs and forcing residents to recreate elsewhere, the legacy of racism and discrimination that segregated Bay-Delta communities lives on. These recreational waterways are not only for recreation – they are also waterways that communities live and work on and nearby. Those communities also recreate at these waterways and should not be forced to relocate their uses because of HABs, even if they had the resources to do so. The environmental injustice implications of HABs are stark – and are already felt by Bay-Delta residents. As explained by a member of Restore

⁵²⁴ California Cyanobacteria and Harmful Algal Bloom (CCHAB) Network, Appendix to the CCHAB Preliminary Changes to the Statewide Voluntary Guidance on CyanoHABs in Recreational Waters 1 (Jan. 2016).

⁵²⁵ Staff Report at 7.18-10.

⁵²⁶ *Id.*

the Delta and Stockton resident, Big Break Shoreline has had to close access to its kayak launch point over the summer to prevent people from recreating in HABs-infested waters.⁵²⁷ He explains,

The kayak launch closing canceled a kayaking trip for youth from Stockton to escape the HABs-infested waters in Stockton HABs closures that last for the majority of the summer, or that force residents of disadvantaged communities to drive many miles to enjoy water recreation when rivers exist a few blocks away from their homes, but are too polluted to enter, are prime examples of disparate impacts resulting from Water Board management of the Delta.⁵²⁸

Similarly, DTEC member Little Manila Rising has also faced difficulties organizing recreational opportunities for youth in the community. The organization received a State Coastal Conservancy grant to implement a kayaking program for Stockton youth to explore Bay-Delta waterways. But, because of the proliferation of HABs throughout Stockton-adjacent portions of the San Joaquin River, the organization has been unable to carry out the programming for almost a full year after receiving the grant.⁵²⁹ The organization has also been forced to travel significant distances and allocate burdensome amounts of funding for transportation to access water safe enough for recreational activities – costs that lower-income Stockton residents often cannot bear.⁵³⁰ For residents familiar with Delta waterways, the Bay-Delta “now instills a feeling of disgust”⁵³¹ and makes residents wonder whether “recreational trips are safe any longer or will be available in the future.”⁵³²

HABs’ impacts on recreation also hold economic implications. Stockton is already one of the country’s most economically distressed cities. The foul odors of HABs render waterways inaccessible, impair tourism,⁵³³ decrease property values, and increase drinking-water treatment costs.⁵³⁴ As Dillon Delvo, Executive Director of Little Manila Rising, explains: “[u]nlike many water front communities that have beautiful waterways that are economic drives, [South Stockton] waterways are toxic and inaccessible. They are something that residents and would-be tourists run from rather than gravitate toward.”⁵³⁵ These impacts also feed into the idea that the area is “unworthy of economic and recreational improvement . . . [.] a narrative that is ingrained and keeps Stockton stagnant, just like our waterways.”⁵³⁶

HABs also have dire implications for the subsistence fishing practices that thousands rely upon in the Bay-Delta. An estimated 24,000 to 40,000 subsistence fishing visits are

⁵²⁷ Attachment 14, Spencer Fern, HABs Comments on the Draft Staff Report for the Phase II Update to the Bay-Delta Plan 3 (202) [hereinafter “Attachment 14”].

⁵²⁸ *Id.*

⁵²⁹ Attachment 1, Exhibit B, Declaration of Spencer Fern ¶ 9 [hereinafter “Decl. of Spencer Fern”].

⁵³⁰ *Id.*

⁵³¹ Attachment 1, Exhibit D, Declaration of Artie Valencia ¶ 5 [hereinafter “Decl. of Artie Valencia”].

⁵³² Attachment 1, Exhibit C, Declaration of Sarai Medina ¶ 7 [hereinafter “Decl. of Sarai Medina”].

⁵³³ Delta Protection Commission, *Economic Sustainability Plan for the Sacramento-San Joaquin Delta*, at p. ii-iii (Delta recreation and tourism adds a total of \$144 million to the regional economy, which is a decline from 2012 estimates.)

⁵³⁴ Walter Dodds et al., *Eutrophication of U.S. Freshwaters: Analysis of Potential Economic Damages*, 43 Env’t Sci. & Tech. 12 (2009).

⁵³⁵ Attachment 1, Exhibit E, Attachment D, Declaration of Dillon Delvo ¶ 19 [hereinafter “Decl. of Dillon Delvo”].

⁵³⁶ Decl. of Artie Valencia ¶ 3.

made to the Delta annually.⁵³⁷ Subsistence fishers throughout the Bay-Delta, many of whom are immigrants and/or people of color,⁵³⁸ experience a loss of food supply as fish populations decline. Impaired Bay-Delta water quality also puts them at heightened risk of exposure to contaminants that accumulate in waterways and the fish they consume.⁵³⁹ Indeed, OEHHA advises against the consumption of five separate fish species in the Sacramento River and Northern Bay-Delta⁵⁴⁰ and two fish species in the Central and South Bay-Delta based on the presence of PCBs, mercury, and other toxins.⁵⁴¹ OEHHA also advises against consuming all fish and shellfish species in the Port of Stockton.⁵⁴² The disparate impacts borne by Bay-Delta communities of color as a result of HABs are not adequately addressed in the Staff Report. Addressing HABs should be a priority in Staff's ultimate recommendation to the Board and in the Board's decision.

C. The Staff Report fails to recognize that HABs create disparate impacts for Native communities and impair Tribal Beneficial Uses.

The Staff Report lacks any discussion of the impacts of HABs on Tribal Beneficial Uses, despite their damaging and widespread effects. Proliferation of HABs create unique harms for Native tribes as HABs impede Native religious and cultural practices.

DTEC member Winnemem Wintu's coming-of-age ceremonies involve swimming across a river near a sacred rock, and water blessings consist of cupping river water in their hands and placing it on their heads and hearts.⁵⁴³ Neither of these practices can take place when HABs are present.⁵⁴⁴ According to Shingle Springs Band tribal council member Malissa Tayaba, HABs "are becoming more and more of an obstacle for [the tribe] every year in accessing traditional cultural resources, furthering the alienation already posed by the Delta's degraded state."⁵⁴⁵ HABs have forced the cancellation of tribal fishing trips designed to teach youth about traditional diets and food sovereignty.⁵⁴⁶ And "even if [tribal members] could catch fish, they knew they could not eat them because of the risk of toxic exposure from the harmful algal blooms."⁵⁴⁷

The continuing decline in water quality results in unique injury to Bay-Delta tribes: it perpetuates the legacy of colonization, marginalization, and genocide that has marked the California state government's relationship with Native tribes since the mid-1800s. And it compromises the continuing existence of tribes as a People.

⁵³⁷ Barbara Barrigan-Parrilla et al., *The Fate of the Delta: Impacts of Proposed Water Projects and Plans on Delta Environmental Justice Communities* 54 (2018), <https://www.restorethedelta.org/wp-content/uploads/The-Fate-of-the-Delta-final.pdf> [hereinafter, "Fate of the Delta"].

⁵³⁸ Fraser Shilling et al., *Contaminated Fish Consumption in California's Central Valley Delta*, 110 Env't Rsch. 334, 335, 337 (2010).

⁵³⁹ Fate of the Delta, *supra* note 538, at 54-55.

⁵⁴⁰ Cal. Office of Env't Health Hazard Assessment, Fish Advisories, Sacramento River and Northern Delta, <https://oehha.ca.gov/advisories/sacramento-river-and-northern-delta> (last visited Jan. 12, 2024).

⁵⁴¹ Cal. Office of Env't Health Hazard Assessment, Fish Advisories, Delta, Central and South, <https://oehha.ca.gov/fish/advisories/delta-central-and-south-0> (last visited Jan. 12, 2024).

⁵⁴² *Id.*

⁵⁴³ Decl. of Gary Mulcahy ¶ 32.

⁵⁴⁴ Decl. of Gary Mulcahy ¶ 32.

⁵⁴⁵ Decl. of Malissa Tayaba ¶ 16.

⁵⁴⁶ Decl. of Malissa Tayaba ¶ 16.

⁵⁴⁷ Decl. of Malissa Tayaba ¶ 17.

As Vice Chair Tayaba explains:

[The Shingle Springs Band of Miwok Indians] are the survivors of disease, colonization, genocide and removal. We return to Pusune, Wallok, and other important sites to remember, reconnect, teach, learn, and restore. We cannot do this work without healthy rivers – the lands, plants, fish, and animals that connect me and my Tribe to our ancestors and that are interwoven with my culture, religion, and identity cannot exist if there is not enough water in the Sacramento River and its tributaries to create the conditions needed to support life. If [Bay-Delta] water quality continues to deteriorate, I fear that the resources and landscapes we are working so hard to restore our connection to will become increasingly unsuitable for use or disappear altogether. Such loss would amount to cultural genocide for our Tribe.⁵⁴⁸

Native tribes cannot move elsewhere to escape HABs. Their existence and livelihoods are threatened by HABs, which are exacerbated by continual delays and ineffectual water quality standards that fail to address HABs. To allow for adequate protection of TBUs and to allow for Native tribes to retain and restore their cultural heritage, responsive and effective action must be taken to address HABs.

D. The Staff Report fails to adequately identify the significant environmental impact HABs will have on air quality and human health.

The Staff Report incorrectly asserts that air quality impacts of HABs in depleted Bay-Delta waterways are unlikely to be significant. A recent study published by the University of North Carolina found a link between HABs-produced volatile organic chemical compounds and the formation of secondary organic aerosols,⁵⁴⁹ which can contribute to the formation of the air pollutant PM_{2.5}.⁵⁵⁰ The authors state, “[t]he inhalation of ultrafine and fine aerosol, regardless of composition, is associated with adverse health outcomes, including elevated risks of cardiovascular and pulmonary morbidity and mortality.” This study is the first of its kind and demonstrates the need for further research into the respiratory effects of HABs. Adding to the litany of known harms HABs can cause, the implications of this study are grave when considering the impacts HABs have on communities. Many Bay-Delta communities of color already bear numerous environmental harms, with HABs adding to that burden. This is especially prevalent in South Stockton.

South Stockton contains a constellation of transportation infrastructure and heavy industry sites, creating high air pollution impacts.⁵⁵¹ According to CalEnviroScreen, multiple census tracts in South Stockton – all within a half-mile of Bay-Delta waterways – score in the 96th through 99th percentiles of all California communities for overall pollution burdens, meaning that these communities suffer from more pollution exposure than up to 99% of the rest of the state.⁵⁵² Parts of South Stockton are also among the most disadvantaged

⁵⁴⁸ Decl. of Malissa Tayaba ¶ 17.

⁵⁴⁹ Attachment 6 at 1807.

⁵⁵⁰ *Id.* at 1799.

⁵⁵¹ Decl. Dillon Delvo ¶ 14.

⁵⁵² See Cal. Office of Env’t Health Hazard Assessment, CalEnviroScreen Version 4.0, <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40> (last visited Jan. 12, 2024).

communities in the country.⁵⁵³ For example, residents of the census tract where Coalition member Little Manila Rising is based are in the 99th percentile nationally for PM_{2.5}, the 86th percentile for asthma, and the 91st for proximity to Superfund sites.⁵⁵⁴ The same census tract is in the 96th percentile nationally for number of low-income households⁵⁵⁵ and is in the 87th percentile for linguistic isolation,⁵⁵⁶ which refers to the proportion of limited English-speaking households. HABs cause outsized aesthetic, economic, spiritual, and health impacts to the area's residents. Because of the legacy of discriminatory urban planning decisions and ongoing industrial development, South Stockton has relatively little greenspace and is particularly prone to the heat island effect.⁵⁵⁷ During the summer, residents of South Stockton often try to escape the heat by using the city's waterways, only to encounter HABs. As a Stockton resident and Restore the Delta employee puts it:

The people living closest to the waterways often belong to environmental justice communities that suffer the most from air and water pollution. They don't have the money to pay for air conditioning. They cannot afford to go somewhere else during the summer's sweltering heat . . . The sad truth is that the waterways hurt more than they help.⁵⁵⁸

HABs also pose particular health risks to the community's unhoused residents. For instance, South Stockton's Mormon Slough is home to a large encampment of unhoused residents who use the Shipping Channel and San Joaquin River for basic needs like hygiene, sanitation, and subsistence fishing.⁵⁵⁹ These 248 residents risk ingesting or coming into direct contact with the toxic blooms and suffering severe health effects.

Waterways and riparian buffers could help absorb heat, reduce temperature disparities, and mitigate the effects of climate change. Instead, South Stockton's waterways create new health risks for a vulnerable community.⁵⁶⁰ These activities and the proximity of South Stockton residential areas to the waterways put these residents at disproportionately high risk of inhaling airborne toxins from HABs, which can be mobilized by wind and travel for miles, exacerbating respiratory problems like asthma.⁵⁶¹ The results of the UNC study discussed above illustrate that it is likely that many health risks caused by HABs are yet to be understood.

And in some cases, the contact with HABs is especially direct. High school students regularly run around the banks of McLeod Lake during physical education classes, mere feet from the blooms.⁵⁶² One student reported that she and her classmates occasionally had to cover their

⁵⁵³ See White House Council on Env't Quality, Climate and Economic Justice Screening Tool, <https://screeningtool.geoplatform.gov/en/#22/37.94502384/-121.2722151> (last visited Jan. 12, 2024).

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ See Cal. Office of Env't Health Hazard Assessment, CalEnviroScreen 4.0 Indicator Maps, <https://experience.arcgis.com/experience/ed5953d89038431dbf4f22ab9abfe40d/> (last visited Jan. 12, 2024).

⁵⁵⁷ Decl. of Dillon Delvo ¶ 21.

⁵⁵⁸ Decl. of Sarai Medina ¶ 4.

⁵⁵⁹ Decl. of Dillon Delvo ¶ 17.

⁵⁶⁰ See Decl. of Sarai Medina ¶ 21.

⁵⁶¹ See Kirkpatrick et al., Inland Transport of Aerosolized Florida Red Tide Toxins, 9 Harmful Algae 186, 186 (2010); Decl. of Barbara Barrigan-Parrilla ¶ 18; Kris Freeman, Seasick Lungs: How Airborne Algal Toxins Trigger Asthma Symptoms, 113 Env't Health Perspectives 632 (2005).

⁵⁶² Decl. of Spencer Fern ¶ 2.

noses and mouths because the smells were so bad.⁵⁶³ Since Stockton residents suffer from some of the highest asthma rates nationwide, these students and other residents are uniquely vulnerable to health impacts from aerosolized HAB particles.⁵⁶⁴

Staff must act now to create flow objectives that are responsive to the threats that communities of color face because of HABs. Delaying in creating responsive and effective standards jeopardizes communities' health, livelihood, and well-being and continues the legacy of environmental racism and injustice in the Bay-Delta.

IX. The Board Should Reject the Voluntary Agreements.

Despite widespread pushback, the Board continues to mobilize the VAs as an alternative to minimum unimpaired flow regulations. For the past seven years, the VAs have been a painful distraction from the real work before the Board – the legally mandated task of updating water quality standards to ensure reasonable protection of beneficial uses and public trust resources. Instead, the Board has delayed the update to accommodate exclusionary backroom negotiations between State and federal agencies, local water agencies, and private companies at the expense of a robust, public process. And it now proposes to substitute regulatory standards for eight more years of experimentation by the same water diverters that acquired water rights through genocide, exclusion, and violence and have driven the Bay-Delta's ecological crisis through unsustainable diversions and exports. This is not a way to manage water for the public benefit. The process that produced the VAs lacks fundamental legitimacy; the VAs themselves lack the requisite basis in science and would undermine efforts to attain protection of beneficial uses and public trust resources; consideration of VAs continues to delay meaningful update of water quality standards at the expense of ecological and human health and welfare as well as tribal sovereignty; and the VA framework, and the Board's consideration of it, are riddled with legal vulnerabilities that will only set back this gravely delayed update even further. It is time for the Board to let go of the VAs and put its resources into regulating in the public interest.

A. The Voluntary Agreements are the result of inequitable and discriminatory processes that exclude Native American Tribes, communities of color, and the general public from participating in water quality governance.

The public will never accept the Voluntary Agreements as a legitimate substitute for sound governance of Bay-Delta water quality. In addition to being wholly inadequate to protect the health of the Bay-Delta estuary, the Voluntary Agreements are the result of exclusionary, backroom negotiations that have prioritized the voices and interests of water agencies over Bay-Delta tribes, communities, and ecosystems. The VAs are, in other words, irreparably tainted.

“Nowhere are water policy inequities clearer than in the Bay-Delta ‘voluntary agreement’ process.”⁵⁶⁵ The Board states that VAs resulted from negotiations between “interested stakeholders

⁵⁶³ Exhibit A, Declaration of Cintia Cortez ¶ 3 [hereinafter “Decl. of Cintia Cortez”].

⁵⁶⁴ See, e.g., Decl. of Barbara Barrigan-Parrilla ¶ 18.

⁵⁶⁵ “The voluntary agreement process has failed for years to solve the Bay-Delta’s water problems. It is, however, working for California’s water elite. It maintains their control of water allocations. It has stopped the State Board from requiring more environmental flows in our rivers and the Bay-Delta.” (Op-ed by Chief Sisk and Barbara Barrigan-Parilla) <https://www.mercurynews.com/2021/09/18/opinion-governor-must-integrate-justice-into-state-water-policy/>

and various other state agencies.”⁵⁶⁶ But it omits that the only entities that have ever been invited to the government’s VA negotiating table, or even privy in any respect to discussions, are water agencies, water contractors, irrigation and water districts, and private companies. The singular presence of these entities at the negotiating table manifests a throughline from the violent and exclusionary foundations of California’s water rights systems to water governance today.

As discussed above, California’s water rights system rests on deeply unjust and inequitable foundations. Between 1845 and 1852 – as the architecture for state water rights was being elaborated – the State’s Indigenous population declined by two-thirds as the result of murder, disease, starvation, and displacement; overall it is estimated that fewer than 30,000 of the precolonial population of California Native American people survived this period that has come to be known as the California Genocide.⁵⁶⁷ As Governor Newsom has recognized, the State itself endorsed and even legislated a systematic campaign to destroy and remove California tribes.⁵⁶⁸ In one of its first acts, for instance, the new California legislature adopted the Act for Government and Protection of Indians, which, far from providing protection, provided for the removal of tribes from their traditional lands, separation of children from families, and creation of a system of indentured servitude for minor crimes. Additional legal instruments like the California Land Act and land reclamation policies (including the 1887 Dawes Act among others) served as tools for further dispossession and displacement of tribes from their ancestral homelands. Meanwhile, in perhaps the greatest of these many acts of state-sponsored deception, California tribes were compelled to sign 18 treaties between 1851 and 1852 which, at the behest of the California congressional delegation, were never ratified and instead maintained in secrecy for over 50 years, beyond the congressional prohibition on ratification of new treaties with American Indian tribes.⁵⁶⁹

The upshot for California tribes is that in addition to being dispossessed of ancestral lands and waters, the state and federal governments’ breach of treaty promises to tribes has limited tribes’ ability to claim and effect federal water rights – rights which should have priority of use dating to the inception of California statehood when the treaties were executed. And like other communities of color in California, tribes have suffered from systematic exclusion and discrimination that has vastly limited their ability to acquire riparian land and assert and maintain appropriate water rights within the colonial system. The result is, today, a water rights system where the vast majority of water rights holders are white (91 percent according to one DWR analysis), as are the vast majority of persons who direct water agencies and agricultural water districts.⁵⁷⁰

By giving water rights claimants who acquired rights through the dispossession and exclusion of tribes and communities of color the *only* seats at the negotiating table, the State brings the racism and genocidal foundations of the water rights systems directly into the Bay-Delta planning process. Indeed, the State never invited *any* California Native American tribe into discussions, not to mention engaging in legally mandated AB 52 consultation on this government-directed program. Nor did it open the door to Bay-Delta community-based organizations, tribal non-profits, environmental justice organizations, fishing interests, environmental or conservation

⁵⁶⁶ Staff Report at 9-3.

⁵⁶⁷ Madley, *supra* note 22.

⁵⁶⁸ Executive Order N-15-19.

⁵⁶⁹ ACCIP, *supra* note 30 at 5.

⁵⁷⁰ Restore the Delta, *Analysis: California Water Rights Still 90% White*, (Feb. 27, 2023) <https://www.restorethedelta.org/2023/02/27/analysis-california-water-rights-still-90-white/>.

groups, Delta residents, or any other stakeholders fighting for and dependent on a healthy Bay-Delta estuary.

Beyond excluding key stakeholders from the private negotiations, the agencies formulating the Voluntary Agreements have repeatedly denied requests from stakeholders seeking information about the negotiations and their participants. The Natural Resources Defense Council, for example, submitted several California Public Record Act requests for documents related to the Voluntary Agreements. The agencies refused to share documents pertaining to the negotiations, claiming that nearly all relevant documents were exempt from disclosure under the Public Records Act.⁵⁷¹ The undersigned have submitted similar requests to VA participants seeking documentation of discussions and discussion participation and have been similarly rebuffed. Compounding the shroud of secrecy, the individuals invited into the backroom deals were required to sign confidentiality agreements to further shield the negotiations from public input.⁵⁷² The agencies' decision to withhold key information demonstrates a pattern and practice of excluding Tribes, disadvantaged communities, and others from providing meaningful input on processes that affect all members of the public.

When the Board did eventually extend an invitation to non-party stakeholders to engage in any discussion about the VAs, it did so nearly two months after the voluntary agreement framework had been settled and with only three days' notice.⁵⁷³ Further, the invitation was limited to workshops on "implementation of the [voluntary agreement] program."⁵⁷⁴ Communities who are most impacted by current and future environmental harms caused by detrimental water quality standards continue to be left out of critical government planning processes.

The Board suggests that the exclusionary origins of the VAs can be cured by bringing the VAs forward now for public review and agency approval through the instant Bay-Delta Plan update process. It is wrong. As an initial matter, the State continues to hide the full contours of the agreements from public review; indeed, the Board provides the public only a "preliminary draft of the Strategic Plan" for the VAs, not the final VAs themselves, at the same time that it proposes to adopt the still unformulated agreements in lieu of a regulatory update.⁵⁷⁵ And it insultingly suggests that "TEK could . . . inform adaptive management of the proposed VAs if they are adopted, through engagement by VA parties with California Native American tribes" without ever consulting with tribes themselves on the subject.⁵⁷⁶ The Board's attempt to now engage some form of albeit patchwork public review of the VAs is also too little too late. The Voluntary Agreements were pre-determined in closed door negotiations and are no longer open for meaningful input. And they derive from a process that excluded the vast majority of stakeholders actually affected by degraded Bay-Delta water quality. The limited public insight the Board offers into the VAs now cannot overcome the fact that the VAs perpetuate injustice by leaving water management in the hands of the same people who brought the Bay-Delta watershed into a state of crisis.

⁵⁷¹ Email from Jessica Aresca, CalEPA Pub. Rec. Act Coordinator, to Doug Obegi (Feb. 2, 2022), https://www.nrdc.org/sites/default/files/media-uploads/final_responses_to_calempa_public_records_act_requests_dated_7_23_21_and_11_8_21.pdf.

⁵⁷² See Nat. Res. Def. Council, *Common Interest and Confidentiality Agreement* (2019), https://www.nrdc.org/sites/default/files/media-uploads/va_water_user_common_interest_agreement.pdf.

⁵⁷³ Decl. of Barbara Barrigan-Parrilla ¶ 24.

⁵⁷⁴ *Id.*

⁵⁷⁵ Appendix G1 at 1.

⁵⁷⁶ Staff Report at 9-74.

B. The VAs lack a scientific basis and would conflict with the Board’s legal obligations to ensure reasonable protection of beneficial uses and public trust resources.

As discussed above, state and federal law charge the Board with maintaining water quality standards adequate to protect beneficial and public trust uses in the Bay-Delta and with regulating rights to use and divert Bay-Delta water to satisfy those standards. And the Clean Water Act’s implementing regulations are clear that water quality standards must be based on a sound scientific rationale.⁵⁷⁷ The VAs are not. Instead, the VAs would trade away improvements in instream flow – which both TEK and science demonstrate are essential to restoring ecosystem health and allowing for survival of native fish species and restoration of native riparian habitat – for vague non-flow habitat restoration commitments that have no basis in science. As a result, in addition to suffering from fundamental illegitimacy, the VAs would fall short of ensuring adequate water quality to protect beneficial uses of Bay-Delta waters and public trust interests.

i. The VAs ignore the well-documented need for adequate flows.

The Board has repeatedly recognized that the viability of native fish populations in the Bay-Delta primarily depends on increasing flows. For instance, in its 2017 Scientific Basis Report, which the Final Draft Scientific Basis Report Supplement⁵⁷⁸ (“Scientific Basis Report Supplement”) adds to, the Board stated that “flow is commonly regarded as a key driver or ‘master variable’ governing the environmental processes in riverine and estuarine systems such as the Bay-Delta and its watershed” and that “flow and physical habitat . . . are not interchangeable.”⁵⁷⁹ This conclusion was consistent with the Board’s findings in its 2010 Public Trust Flows Report that 75% of unimpaired Delta outflow from January through June, 75% of unimpaired Sacramento River inflow from November through June, and at least 60% of unimpaired San Joaquin River inflow from February through June would be required “to preserve the attributes of a natural variable system to which native fish species are adapted.”⁵⁸⁰ Flows adequate to maintain public trust resources and beneficial uses, according to the Board, are substantially greater than Bay-Delta waterways currently maintain, not to mention levels currently required under D-1641.⁵⁸¹ Neither the Staff Report, nor the Final Scientific Basis Report, suggest otherwise. Rather, the best available science shows that increased flows would, in addition to mitigating HABs and improving riparian habitat, address a broad range of factors that the Supplemental Report recognizes limit fish prevalence: temperatures, contamination, dissolved oxygen, and salinity, among others.⁵⁸²

The current VA framework also radically reduces the amount of additional flows that would have been provided under a 2017 VA proposal (1.3 million acre feet) to less than 500,000 acre feet per year on average – far less than the increased outflows than the Board has indicated are necessary to protect beneficial uses and the public trust.⁵⁸³ And it makes clear that even these numbers are

⁵⁷⁷ 40 C.F.R. § 131.11(a)(1).

⁵⁷⁸ Staff Report at App. G2.

⁵⁷⁹ 2017 Scientific Basis Report, *supra* note 10.

⁵⁸⁰ Public Trust Flows Report, *supra* note 299 at 5.

⁵⁸¹ See, e.g., Staff Report at 7.6.2-39 (showing that minimum required daily outflow is “often substantially lower than Delta outflows observed under baseline as well as under the 45 to 65 scenarios”).

⁵⁸² Supplemental Report at Table 2-1.

⁵⁸³ See Cal. Nat. Res. Agency, *Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions* (2022), Term Sheet App. 1 (Table 1a detailing

subject are to change, as they merely “reflect[] status of negotiations as of the date of [the Draft VA Framework].” As a final VA package has not yet been finalized, neither the public nor the Board can know how much flow it would assure. Further, the VA framework provides its signatories with broad discretion in how the VA Flow Measures would be deployed – allowing them, for instance, to “test hypothesis in consideration of hydrological conditions.”⁵⁸⁴ In contrast to the much greater clarity and certainty provided by an unimpaired flow objective, the VAs provide little insight into how much water the Board will actually require to flow through Delta waterways.

The VA framework attempts to offset the shortcomings in its flow assurances with non-flow habitat restoration commitments.⁵⁸⁵ But as amply documented in comments on the Draft Scientific Basis Report Supplement, including by the undersigned, there is no scientific basis for the assumption on which the VAs are built that physical habitat restoration can make up for flows. Nor can they substitute for instream flows adequate to support resident fish populations and fish migration and rearing, reduce the incidence of harmful algal blooms, restore aesthetics and recreational opportunities, and support other public trust uses. TEK and science, including that recognized and relied on by the Board itself, cut in the opposite direction.

The Scientific Basis Report Supplement goes so far as to suggest that reliance on flows will somehow harm the Bay-Delta watershed:

Reliance on one management tool, such as flow, is less likely to result in a desired outcome, given the level of uncertainty with future conditions. While flow actions rely on a certain amount of precipitation falling each year, many habitat restoration sites may be available to fishes in all water years.⁵⁸⁶

This statement misses the point. Adequate flows are unavailable because of poor water management by the Board, including its the authorization of excessive water exports and consideration of significant new diversion and storage projects. “[T]he uncertainty of future conditions” is largely the result of the Board’s own mismanagement and would only be made worse should the Board adopt VAs premised on uncertain habitat restoration measures with purely hypothetical benefits rather than science- and TEK-based unimpaired flow objectives that promote science-based functional flow regimes. Further, commenters do not propose that the Board rely exclusively on flows as a management tool, but rather that the Board pair a 65 percent unimpaired flow objective with holistic management strategies premised on a functional flow regime. Habitat restoration and other management strategies will do little to promote fish recovery or restore other measures of ecosystem health if there is insufficient water available in the system.

The voluntary agreements also exacerbate the problem of insufficient flows by remaining silent on Trinity River Division diversions into the Delta and Trinity River releases, even though the

proposed new contributions to Delta outflow) https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/email-items/VoluntaryAgreementMOUtermSheet20220329_SIGNED-20220811.pdf; *see generally* Doug Obegi, *Honey, the VAs Shrank the Delta Flows*, NATURAL RESOURCES DEFENSE COUNCIL, <https://www.nrdc.org/experts/doug-obegi/honey-i-shrank-delta-flows-aka-voluntary-agreements> (April 11, 2022).

⁵⁸⁴ Staff Report, App. A (Draft VA Strategic Plan), at 10.

⁵⁸⁵ Cal. Nat. Res. Agency, *supra* note 584 at 5.

⁵⁸⁶ Cal. Water Res. Control Bd., *Final Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreements for the Sacramento River, Delta, and Tributaries Update to the San Francisco Bay/Sacramento-San Joaquin Delta Water Quality Control Plan* (2023), 6-30 [hereinafter “Final Scientific Basis Report”].

TRD is a major artificial supplier of Sacramento River inflow. Despite this silence, the regulation of Bay-Delta inflows and outflows necessarily implicates flows through the Trinity River and the federally reserved rights of tribes in the Trinity and Lower Klamath basins.

Ultimately, there is insufficient evidence before the Board that trading flows for habitat restoration measures will allow for adequate protection of fish and wildlife, recreation, and other beneficial uses as well as public trust interests. The Board has already grappled with the flow-for-habitat tradeoff in Phase I of the Bay-Delta Plan Update, and it came to precisely this conclusion. There, the Board stated that “there is no evidence of the efficacy of non-flow measures to protect fish and wildlife beneficial uses, the amount of water that would be saved through the non-flow measures, or how the non-flow measures would achieve the plan amendments’ goals and objectives Moreover, most non-flow measures require flow in order to be effective.”⁵⁸⁷ Despite much conjecture, neither the Staff Report nor the Scientific Basis Report Supplement establishes otherwise.

ii. The VAs are not grounded in a scientific rationale, as evidenced by the lack of protection they will afford fish and wildlife beneficial uses.

The description of the VAs by the Board and the VA parties is also misleading in insinuating to the public that the VAs would assure some actual improvement in instream flows over baseline conditions. The VA framework promises Flow Measures comprising blocks of additional flow, but this so-called addition is relative to a regulatory baseline – not actual conditions in the waterways. Through this sleight of hand, the Staff Report and Final Scientific Basis Report sow confusion and make it difficult for the public to understand what – if any – benefits the VAs would offer.

First, the Staff Report and Final Scientific Basis Report confuse the public and obscure actual impacts of the VA proposal by comparing the VAs to multiple, confusingly described baselines. The Final Scientific Basis Report’s baseline, referred to as the “reference condition,” is based on flows resulting from State Water Board Revised Water Right Decision 1641 (D-1641) and the 2008/2009 BiOps.⁵⁸⁸ This baseline differs from the Staff Report’s baseline for the proposed Plan amendments and non-VA alternatives, which accounts for regulatory requirements of D-1641, 2019 BiOps, and the 2020 Incidental Take Permit.⁵⁸⁹ This is also different from the Staff Report’s baseline for the VAs Chapter, which is also utilized by the Draft Strategic Plan, and is explained further below.⁵⁹⁰ As a lay reader, it is challenging to understand how these different baselines compare. It is even more difficult to assess whether VAs are providing benefits or adverse impacts relative to the current conditions baseline that CEQA ordinarily requires for environmental

⁵⁸⁷ Cal. Water Res. Control Bd., *Master Response 5.2: Incorporation of Non-Flow Measures* (2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/docs/mr5.2.pdf.

⁵⁸⁸ Final Scientific Basis Report, *supra* note 587, at 1-6.

⁵⁸⁹ Staff Report at 6-4 (“The project baseline includes requirements as they have been implemented in recent years in an attempt to represent existing conditions.”) *see also id.* Table 6.2-1 SacWAM Baseline Model Assumptions.

⁵⁹⁰ Staff Report at 9-13 (“The 2019 BiOps condition is different than the Staff Report baseline in that the 2019 BiOps condition is the theoretical assumed starting point for accounting purposes upon which VA assets would be added, rather than a reflection of current or prior existing conditions or baseline . . . The major difference between the baseline and 2019 BiOps condition relative to exports and Delta outflows is the applicability of San Joaquin River inflow to export (I:E) constraints that apply during April and May.”).

assessments “to provide the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.”⁵⁹¹

Second, the Board’s comparison to a regulatory baseline rather than an actual conditions baseline obscures that the VAs would assure little, if any, additional flows relative to current or historical conditions. The Draft VA Strategic Plan states that the VA “Flow Measures will be additive to the Delta outflows required by [Revised D-1641] and resulting from the 2019 Biological Opinions.”⁵⁹² But the Draft VA Strategic Plan itself concedes that the 2019 Biological Opinions are being challenged in court, including by the California Attorney General’s Office for failing to protect endangered fish species from federal water export operations.⁵⁹³ And the Board has acknowledged that the “best available science . . . indicates that [D-1641 and 2008 and 2009 BiOps] are insufficient to protect fish and wildlife.”⁵⁹⁴ If unprotected flows are eliminated due to operation of the Sites Reservoir and Delta Conveyance Project, accompanied by new water rights permitting, minimum required flows under the VAs may be significantly less than the Delta currently experiences.

Even taking this low baseline, the VAs do not appear to offer any practical improvement in ecological flows. Table 6-4 to the Final Scientific Basis Report Supplement makes this plain. This table compares the frequency of exceeding ecological flow thresholds under the report’s reference condition with the frequencies under the VAs – the results show nearly identical flow threshold frequencies.⁵⁹⁵

⁵⁹¹ 14 Cal. Code Regs. (“CEQA Guidelines”) § 15125(a)(1).

⁵⁹² Staff Report, App. A (Draft VA Strategic Plan), at 7.

⁵⁹³ State of Cal. Dept. of Justice, *Attorney General Becerra Files Lawsuit Against Trump Administration for Failing to Protect Endangered Species in the Sacramento and San Joaquin Rivers* (Feb. 20, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-against-trump-administration-failing>.

⁵⁹⁴ 2017 Scientific Basis Report, *supra* note 10 at 1-5; see also Staff Report at 4 (Existing flows in the Sacramento/Delta watershed “are generally substantially higher than the minimum flows required under D-1641 and other regulatory requirements.”); see also Staff Report at 7.6.2, 39 (Daily outflow under D-1641 is “often substantially lower than Delta outflows” currently experienced in the Delta.”).

⁵⁹⁵ Final Scientific Basis Report, *supra* note 585 at 6-22 (referring to Table 6-4); see also Staff Report (referring to Table 9.64) (showing almost identical numbers comparing the VAs to the Staff Report’s VAs baseline condition).

Table 6-4. Frequency of Exceeding Ecological Flow Thresholds within the Seasons Specified in Section 5.4

Threshold (cfs)	Reference Condition	VA	VA w/o SJ Contributions	VA Default	VA Distributed	VA Concentrated
Georgiana Slough Flow Reversal Low (17,000)	53%	52%	52%			
Georgiana Slough Flow Reversal High (20,000)	43%	44%	44%			
Fall-Run Outmigration (20,000)	26%	26%	26%			
Winter-Run Outmigration (20,000)	57%	60%	60%			
Bay Shrimp Low (20,000)	51%	55%	52%	54%	53%	53%
Bay Shrimp High (25,000)	41%	45%	44%	45%	44%	44%
Longfin Smelt (43,000)	29%	29%	29%	29%	29%	29%
Sacramento Splittail Low (30,000)	39%	43%	41%	44%	42%	41%
Sacramento Splittail High (47,000)	26%	25%	25%	26%	25%	25%
Starry Flounder (21,000)	42%	46%	46%	46%	46%	46%
Green and White Sturgeon (37,000)	15%	15%	15%	15%	15%	15%
Collinsville X2 (7,100)	99%	99%	99%	99%	99%	99%
Chippis Island X2 (11,400)	81%	87%	87%	87%	87%	87%
Port Chicago X2 (29,200)	41%	43%	43%	43%	43%	43%

Table 3. Frequency of the Reference Condition and VA scenario exceeding ecological flow thresholds that represent flows at which specific benefits are achieved, specified by Section 5.4 of the Final Scientific Basis Report.

Third, the VAs' proposed objectives lack the requisite scientific basis for water quality standards. The VAs propose two objectives: a new narrative viability objective that purports to "maintain water quality conditions, including flow conditions...sufficient to support and maintain the natural production of viable native fish populations" and a modified version of the existing Narrative Salmon Objective, which would push out attainment of salmon doubling to 2050.⁵⁹⁶ The Staff Report fails to identify how the VAs will meet either of these goals. For instance, the Board concluded that the combination of instream rearing and floodplain habitat needed to support 25 percent of the salmon doubling goal would never be met in the VA scenario for the American and Sacramento Rivers.⁵⁹⁷ The VAs would also never meet the spawning habitat needed to support 25 percent of the doubling goal in the American River.⁵⁹⁸ Nor do they explain how tributary physical restoration actions would assure restoration of spawning and rearing habitat sufficient to meet 25 percent of the offspring and salmon double goal populations for each tributary within the VA terms.⁵⁹⁹ Nor how meeting 25 percent of the salmon doubling objective would assure attainment of the salmon doubling goal by 2050, as it is unlikely that population increases would occur in the linear fashion that the VA modeling appears to assume.

Indeed, the data on projected increases in habitat area for delta smelt, longfin smelt, and salmonids reveal the ineffectiveness of VAs in meeting their own goals. As shown in Figure 9.6-3 of the Staff Report, the largest projected increase in habitat area under the VAs is 19 percent, with the majority of projected increases in habitat being less than 10 percent, and delta smelt larvae

⁵⁹⁶ Staff Report at 9-7.

⁵⁹⁷ *Id.* at 9-77.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.* at 9-5.

experiencing projected decreases from March through June.⁶⁰⁰ In general, Figure 9.6-3 shows little improvement under the VA scenario relative to the baseline condition or the 2008-2009 BiOps.

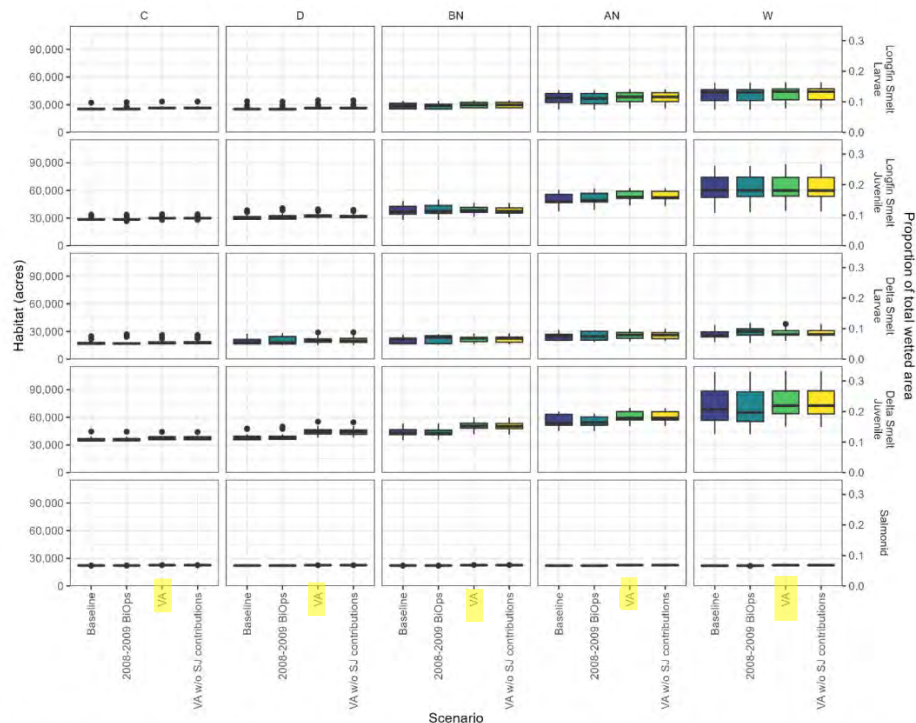


Figure 9.6-3. Total Suitable Estuarine Habitat Area Expected for Each Species, Scenario, and Water Year Type

Fig. 1. Box plots illustrating the total suitable estuarine habitat area expected for baseline scenario, 2008-2009 BiOps, VA scenario, and VA without San Joaquin contributions scenario, across critical, dry, below normal, above normal, and wet years for longfin smelt larvae and juveniles, delta smelt larvae and juveniles, and salmonoids.

The Board’s analysis of the VAs also suggests in other respects that the VAs may impair conditions for protected species. For instance, abundance indices calculated for four species (Bay Shrimp, Sacramento splittail, longfin smelt, and starry flounder) showed decreases in abundance in wet years.⁶⁰¹ And the Staff Report admits that VAs will not be effective during drought conditions, which are expected to increase in frequency and severity with climate change: “[A]dditional flows in the VAs will not be enough to make up for the difference between a Wet and Dry year.”⁶⁰²

iii. The uncertainties of the VAs undercut any scientific analysis presented within the Staff Report.

The Scientific Basis Report Supplement’s responses to comments do little to allay concerns about the abnormal levels of uncertainty and speculation baked into the VA proposals and modeling, which ultimately make expected outcomes under the VAs little more than guesswork.⁶⁰³ Indeed, the Board itself concedes that while “the quantitative and qualitative analyses described in

⁶⁰⁰ *Id.* at 9-79

⁶⁰¹ *Id.* at 9-77.

⁶⁰² Final Scientific Basis Report, *supra* note 585 at 6-30; *see also id.* (“An extended drought during the 8-year term of the VAs could significantly decrease the realized benefits.”).

⁶⁰³ Staff Report at 9-81.

the Final Draft Scientific Basis Report Supplement indicate expected benefits from the proposed VAs, *the actual outcomes of the VAs are not certain at this time.*⁶⁰⁴ Nor does the draft VA program offer much in the way of clarity as to what type of restoration projects will be initiated, where and when they will be initiated, how they will be maintained and managed, and how they could provide for fish recovery without water. Likewise, there is no discussion in the Staff Report of the impact of potential future water infrastructure projects, like the Delta Conveyance Project and Sites Reservoir, on habitat restoration projects and their efficacy with higher levels of water storage and export.

Finally, the Staff Report omits adequate explanation for how VA effects would be accounted for and evaluated. The VAs' new narrative viability is wildly vague. And the draft VA program offers little by way of metrics to explain how progress toward this viability objective, or objectives for other beneficial uses, will be assessed. Instead, the VA program would leave development of metrics for evaluating VA outcomes up to the VA Science Program,⁶⁰⁵ comprised of the VA parties themselves. And the Staff Report does not explain how the program will guard against the obvious possibility of bias from relying on regulated parties to both develop their own metrics and evaluate their own progress across the metrics.

iv. Adoption of the VAs would not assure protection of beneficial uses impaired by HABs

HABs are the product of low freshwater flows, poor water circulation, and high water temperatures, combined with excess nutrients from agricultural runoff and wastewater and bright sunlight.⁶⁰⁶ Once HABs form, they create dead zones that can kill fish and other animals.⁶⁰⁷ Accordingly, a report that purports to evaluate a policy's impact on fish must consider how it will impact HABs. While the draft Supplemental Report was essentially silent on the issue of HABs⁶⁰⁸, the Final Scientific Basis Report offers no improvement. The Final Scientific Basis Report Supplement dedicates no more than two pages to HABs considerations and its discussion of strategies for addressing HABs is minimal at best.

Where the Final Scientific Basis Report Supplement does discuss measures to address HABs, it notes that the most successful strategies for mitigating HABs include "increasing the flow of water, promoting mixing of the water column, and reducing the supply of nutrients" while "warm water temperatures, high availability of light, and an ample supply of nutrients," are likely to facilitate their proliferation.⁶⁰⁹ But instead of following this science – by, for instance, setting adequate

⁶⁰⁴ Staff Report at 9-81 ("Additional uncertainties in VA outcomes arise from the timing of physical habitat restoration completion; assumptions of the suitability of VA habitat assets . . . the lack of a quantitative connection between certain aspects of habitat and species abundance.").

⁶⁰⁵ Final Scientific Basis Report, *supra* note 585 at 1-10 ("The VA Science Program is proposed to . . . track and report progress relative to the metrics and outcomes stated in Appendix 4.").

⁶⁰⁶ See Jayne Smith et al., *California Water Boards' Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring: Full Report with Appendices 1-3* (2021), https://ftp.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/1141_FHABStrategy_FullReport.pdf.

⁶⁰⁷ Env't Prot. Agency, *Harmful Algal Blooms*, <https://www.epa.gov/nutrientpollution/harmful-algal-blooms> (last updated Aug. 25, 2022).

⁶⁰⁸ Despite the increasing proliferation of HABs in the Bay-Delta, HABs were only mentioned once in the Supplemental Report. See Coalition Comment on Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreement at p. 7- 8.

⁶⁰⁹ Final Scientific Basis Report, *supra* note 585 at 2-24.

minimum instream flow requirements – the VAs would only monitor HABs.⁶¹⁰ While necessary, monitoring alone is not enough. The HABs crisis in the Bay-Delta has exploded in recent years, with 120 incidents reported in 2022, up from 91 in 2021, and 57 in 2020.⁶¹¹ Because this HABs data relies on voluntary public reporting, the actual number of incidents is likely much higher than reported. While the Final Scientific Basis Report Supplements acknowledges that HABs decrease in frequency and severity with increasing flow, it fails to analyze how low flows, like the flows proposed by the VAs, will exacerbate HABs.

Also concerning, the Final Scientific Basis Report Supplement notes that while the VAs propose to increase flows primarily during spring above current regulatory minimums, low summer flows in the Bay-Delta are the main driver of HABs.⁶¹² As the report acknowledges, “[i]t is therefore unknown but unlikely that the VAs will have any benefits in reducing the frequency or severity of cyanoHABs in the Delta.”⁶¹³ In addition to neglecting flows, the VAs do not address or incorporate any of the other factors that could mitigate the formation of HABs, such as residence time of water, light availability, turbidity, and nutrient concentrations.⁶¹⁴

v. The Report’s claims to engage TEK to inform adaptive management of the Voluntary Agreements is misleading.

Scientific Basis Report Supplement claims that Staff have taken strides to document Traditional Ecological Knowledge to inform reasonable protection of beneficial uses, including TBUs.⁶¹⁵ These claims are misleading and again misunderstand the nature of TEK. Holding a handful of listening sessions to receive tribal input on examples of TEK is no substitute for the collaborative and mutually respectful process that must take place to successfully integrate TEK into water quality planning and water governance more broadly. And again, the Board assumes that TEK can simply be written down and then used (or discarded) in decision-making. The Report, for example, provides several examples of traditional stewardship practices but makes no effort to actually engage tribes in implementing TEK. By focusing its efforts on “documenting” TEK rather than proactively and consistently engaging tribes in governance and protection of their own cultural resources, the Board risks extracting Indigenous Knowledge from tribal communities and, as a result, further alienating tribes from water management. The VA process excluded tribal perspectives from the very beginning. For the Board to turn around now and claim that it has and will engage tribal communities and their TEK to inform adaptive management of the VAs is not only misleading but insulting and disrespectful to tribal communities.

Ultimately, the VA framework is damaging to tribal sovereignty and interests. And it would provide for the payment of hundreds of millions of dollars of taxpayer funds to water rights claimants to compensate for the diversion of water that is manifestly unreasonable and thus beyond

⁶¹⁰ *Id.* at 2-25.

⁶¹¹ Cal. Delta Stewardship Council, *Harmful Algal Blooms*, <https://viewperformance.deltacouncil.ca.gov/pm/harmful-algal-blooms> (last updated Jan. 18, 2023).

⁶¹² Final Scientific Basis Report, *supra* note 585 at 6-23.

⁶¹³ *Id.*

⁶¹⁴ Mine Berg & Martha Sutula, *Factors Affecting Growth of Cyanobacteria with Special Emphasis on the Sacramento-San Joaquin Delta*, SCCWRP Technical Report 869 (2015); P.W. Lehman et al., *Long-term trends and causal factors associated with Microcystis abundance and toxicity in San Francisco Estuary and implications for climate change impacts*, 718 HYDROBIOLOGIA 141-158 (2013).

⁶¹⁵ Final Scientific Basis Report, *supra* note 585 at 1-4.

the scope of any state water right.⁶¹⁶ By endorsing Voluntary Agreements rather than updating the Plan through the mandated public process, the Board would surrender its discretion to a select group of private water rights holders at the expense of ecological and human health and public trust interests.

vi. The Report's claims to engage TEK to inform adaptive management of the Voluntary Agreements is misleading.

The Scientific Basis Report Supplement claims that Staff have taken strides to document Traditional Ecological Knowledge to inform reasonable protection of beneficial uses, including TBUs.⁶¹⁷ These claims are misleading and again misunderstand the nature of TEK. Holding a handful of listening sessions to receive tribal input on examples of TEK is no substitute for the collaborative and mutually respectful process that must take place to successfully integrate TEK into water quality planning and water governance more broadly. And again, the Board assumes that TEK can simply be written down and then used (or discarded) in decision-making. The Report, for example, provides several examples of traditional stewardship practices but makes no effort to actually engage tribes in implementing TEK. By focusing its efforts on “documenting” TEK rather than proactively and consistently engaging tribes in governance and protection of their own cultural resources, the Board risks extracting Indigenous Knowledge from tribal communities and, as a result, further alienating tribes from water management. The VA process excluded tribal perspectives from the very beginning. For the Board to turn around now and claim that it has and will engage tribal communities and their TEK to inform adaptive management of the VAs is not only misleading but insulting and disrespectful to tribal communities.

Ultimately, the VA framework is damaging to tribal sovereignty and interests. And it would provide for the payment of hundreds of millions of dollars of taxpayer funds to water rights claimants to compensate for the diversion of water that is manifestly unreasonable and thus beyond the scope of any state water right.⁶¹⁸ By endorsing Voluntary Agreements rather than updating the Plan through the mandated public process, the Board would surrender its discretion to a select group of private water rights holders at the expense of ecological and human health and public trust interests.

C. The Board's consideration of the VAs has delayed, and continues to delay, update and implementation of Bay-Delta water quality Standards.

Instead of carrying out its duties to update water quality standards, the Board has delayed satisfying its legal obligations to accommodate private negotiations of export allowances to the detriment of native species and wildlife, California Native American tribes, and Delta community members.

⁶¹⁶ See 2022 VA Memorandum of Understanding, *supra* note 582 at Term Sheet App. 3 (outlining \$2,589 million in voluntary agreement implementation costs).

⁶¹⁷ Final Scientific Basis Report Supplement, *supra* note 587 at 1-4.

⁶¹⁸ See 2022 VA Memorandum of Understanding, *supra* note 584 at Term Sheet App. 3 (outlining \$2,589 million in voluntary agreement implementation costs).

The Board “must conduct a triennial review of its water quality standards,” including those contained in the Bay-Delta Plan.⁶¹⁹ California courts have repeatedly affirmed the Board’s responsibility to conduct this triennial review of water quality standards.⁶²⁰ But the State Water Board has only completed three full reviews of the Bay-Delta Plan since its initial adoption: in 1991, 1995, and 2006.⁶²¹ And in its 2006 review, the Board declined to make any substantive changes to the 1995 water quality standards. As a consequence, Bay-Delta waters are still subject to water quality standards adopted twenty-eight years ago, under significantly different ecological, biological, climatic, and demographic conditions. Further, although the 1995 water quality standards anticipated and accommodated drought conditions, the Board has in recent years repeatedly waived the existing Bay-Delta water quality standards, substituting an ad hoc approach to water quality regulation for the comprehensive and publicly-informed review and update of water quality standards that state and federal law require.⁶²²

The State Water Board has made clear its intent to delay updating Bay-Delta water quality standards to allow the California state government to complete private negotiations of voluntary agreements regarding Bay-Delta Plan flow measures.⁶²³ As early as October 2017, the Board explicitly stated that it was “encouraging voluntary agreements” as a substitute for a regulatory update.⁶²⁴ At the same time, Governor Brown asked then Board Chairwoman Marcus to delay consideration of the Phase I updates to accommodate consideration of the VAs.⁶²⁵ Although the Board promised to release the Phase II draft Staff Report for public review and comment in 2018, it delayed by another five years as VA negotiations dragged out. It was not until March 29, 2022 that the California Natural Resources Agency released a Memorandum of Understanding for the VAs, executed by California state agencies, the U.S. Bureau of Reclamation, and a subset of Bay-Delta stakeholders – contractors, water districts, and water authorities – that export Bay-Delta freshwater flows.⁶²⁶ The Board then waited another year and a half to release the promised draft Staff Report while it evaluated the scientific basis for the VAs and delayed further as it awaited the Draft Strategic Plan for the VAs, which was completed in September 2023, the same month that the Board finally released the VAs.

⁶¹⁹ *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 108 (citing 33 U.S.C. § 1313(c)(1)); Cal. Wat. Code, § 13240 (requiring that water quality control plans be “periodically reviewed”).

⁶²⁰ See e.g., *City of Arcadia v. State Water Resources Control Bd.* (2011) 191 Cal.App.4th 156, 175; *City of Duarte v. State Water Resources Control Bd.* (2021) 60 Cal.App.5th 248, 265; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 108; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 632 (Brown, J., concurring).

⁶²¹ Cal. Water Res. Control Bd., Resolution 2018-0059 at p. 1.

⁶²² See, e.g., Cal. Water Res. Control Bd., *State Water Project and Central Valley Project Temporary Urgency Change Petition*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.html (last visited May 3, 2022).

⁶²³ See Cal. Water Res. Control Bd., *Proposals for Voluntary Agreements to Update and Implement the Bay-Delta Plan* (2022), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/proposed_voluntary_agreements.html; see also, e.g., Cal. Water Res. Control Bd., *supra* note 15 (encouraging stakeholders to reach voluntary agreements and recording its plan to consider voluntary agreements as part of a plan to implement amended water quality standards).

⁶²⁴ See Cal. Water Res. Control Bd., *Fact Sheet: Phase II Update of the Bay-Delta Plan* at 2 (Oct. 4, 2017).

⁶²⁵ Letter from Edmund G. Brown Jr., Governor, State of California, Gavin Newsom, Lieutenant Governor, State of California to Felicia Marcus, Chair, Cal. State Water Res. Control Bd (Nov. 6, 2018) <https://media.modbee.com/static/blc2000/waterletter.pdf>.

⁶²⁶ Cal. Nat. Res. Agency, *supra* note 584.

State and water districts purport that the Voluntary Agreements offer swift updating and implementation of outdated Bay-Delta water quality standards. But the secret negotiations have gone on for nearly a decade and only served to delay an update to inadequate water quality standards as Delta ecosystems, tribes, and communities have continued to suffer. And even now, accommodation of the VAs promises further delays: The VA parties have still not released a final VA package, and as, described below, serious consideration of the VAs would require the Board to recirculate the draft Staff Report and SED and would then almost certainly be set aside by the courts, requiring the Board to go back to the drawing board. The VAs have clearly failed. The Board must finally put an end to accommodation of the VAs and move expeditiously to comply with its legal obligations to update and implement the Bay-Delta Plan.

D. Adoption of the VAs would put the Board in clear violation of CEQA.

All of the CEQA issues identified within the Staff Report and its SED are amplified in the VA alternative. Among the many flaws with the Board's consideration of the VAs under CEQA, the VAs constitute nothing close to a stable and certain project and are sufficiently distinct from the proposed Plan amendments that recirculation would be necessary before the VAs could be seriously considered. The Board's evaluation of the VAs relies on a flawed baseline premised on hypothetical rather than existing conditions. And the State made no efforts at all to carry out legally required AB 52 consultation – or any consultation at all – in creating or evaluating the VAs and their potentially significant impacts on tribal cultural resources.

As explained above, one of the core CEQA provisions applicable to certified regulatory programs is “an accurate, finite, and stable description” of the proposed project.⁶²⁷ The public and decision-makers must understand what a proposed project will actually entail to enable intelligent public participation and informed decision-making. By contrast, when a CEQA document “contains unstable or shifting descriptions of the project, meaningful public participation is stultified.”⁶²⁸

The VAs are based on shifting sands. Project descriptions that fail to set out the nature and scope of the project are “fundamentally inadequate and misleading.”⁶²⁹ Voluntary agreements have not been finalized, and the VA package still awaits finalization of accounting measures of flow and non-flow assets on which the VA program is premised.⁶³⁰ Because the VAs lack a minimum instream flow guarantee, adoption of the VA assets as a substitute for a clear regulatory requirement may result in significantly less instream flow than under existing conditions, particularly if the Delta Conveyance Project, Sites Reservoir, and additional water diversion projects are approved. Compounding the uncertainty, some undisclosed portion of the flows promised through the VAs relies on potential water purchases, but the sources of those waters have not been identified.⁶³¹ The

⁶²⁷ *Washoe Meadows*, 17 Cal.App.5th at 287 (quoting *County of Inyo*, 71 Cal.App.3d at 192-93 (explaining that an “accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR”).

⁶²⁸ *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 656 (2007).

⁶²⁹ *Washoe Meadows*, 17 Cal.App.5th at 287 (quoting *Treasure Island*, 227 Cal.App.4th at 1052).

⁶³⁰ Staff Report at 9-81 (“[T]he VA Parties are developing accounting procedures for flow and non-flow assets that, when finalized, would provide additional certainty in how the assets would be provided and thus in the benefits they would be expected to provide.”).

⁶³¹ See generally Staff Report at 9-12; see *id.* at 9-13 (“The sources of the flow assets for the PWA Water Purchase Market Price Program and permanent state water purchases are not fully known at this time and are hereafter termed *unspecified water purchases*.”).

SED also offers little clarity about the nature, location, and extent of habitat restoration measures that will substitute for flows. And by relying on broad assumptions and generalizations, the VA analysis offers no meaningful insight into potential environmental impacts.⁶³² Essentially, the VA analysis is guesswork, speculating about what assets the parties might offer and grasping at straws about how those putative assets may impact the environment. This is not a stable project description under CEQA.

Further, as described above, the VAs – which utilize flow and non-flow habitat restoration measures, and are proposed for an 8-year timeframe – differ dramatically from the proposed Plan amendments and non-VA alternatives – which all set minimum unimpaired flow objectives and persist until expressly amended.⁶³³ The alternatives also differ in their goals, as the VAs modify an existing narrative objective and add a new one, while the flow-based alternatives continue the existing narrative objective and set varying numeric objectives for flows. Because the Board has not clearly disclosed the VAs as its proposal for updating the Bay-Delta Plan and as well-established law makes clear, the Board cannot adopt the VAs based on this Staff Report and SED, and it could not adopt them in the future without correcting the many flaws – many of them incurable – that infect the VAs and their environmental review.⁶³⁴

Among these flaws, the analysis of the VAs also fails to employ an appropriate baseline to accurately evaluate the VAs' reasonably foreseeable environmental impacts. CEQA requires that environmental review documents "contain a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the NOP is published."⁶³⁵ The selection of an appropriate baseline is essential to this task, otherwise the project description, analysis of impacts, mitigation measures, and comparison of alternatives become meaningless.⁶³⁶ Here, as explained above, the Staff Report and SED employ three different baselines. One baseline is used for the evaluation of the proposed Plan amendments and flow-based alternatives,⁶³⁷ another is used for the VA chapter contained in the SED and by the Draft Strategic Plan for the VAs,⁶³⁸ and a third is used

⁶³² Final Scientific Basis Report Supplement, *supra* note 587 at 7-2 ("Analysis of habitat restoration benefits is *based on the assumption* that restored sites will replicate natural ecosystem functions and that restoration sites will be maintained over time such that species benefits do not diminish over time.") (emphasis added); *see Id.* ("Specific locations for VA habitat restoration projects *are not yet available*, so the modeling relied upon possible locations selected with regional expert opinion. Different locations for these restoration projects could affect the actual outcomes.") (emphasis added); *see* Staff Report, at 9-139 ("The proposed VAs include flow that would be provided through water purchases, but the sources of water for the unspecified water purchases described in the VA Term Sheet *are not fully known* at this time.") (emphasis added).

⁶³³ Staff Report at 9-4 & 9-7.

⁶³⁴ *See, e.g. Washoe Meadow*, 17 Cal.App.5th 277.

⁶³⁵ CEQA Guidelines § 15125(a).

⁶³⁶ *County of Amador v. El Dorado Cnty. Water Agency*, 76 Cal.App.4th 931, 953 (1999).

⁶³⁷ Staff Report at 6-4 ("The project baseline includes requirements as they have been implemented in recent years in an attempt to represent existing conditions."); *see also id.* Table 6.2-1 SacWAM Baseline Model Assumptions.

⁶³⁸ Staff Report at 9-13 ("The baseline is the primary point of comparison for evaluating the environmental impacts of the alternatives evaluated in the Staff Report. The major difference between the baseline and 2019 BiOps condition relative to exports and Delta outflows is the applicability of San Joaquin River inflow to export (I:E) constraints that apply during April and May."); *see also* Staff Report, App. G1, Draft Strategic Plan for the Proposed Agreements to Support Healthy Rivers and Landscapes at 7 ("These Flow Measures will be additive to the Delta outflows required by Revised Water Rights Decision 1641 (Revised D-1641) and resulting from the 2019 Biological Opinions.").

for the Final Scientific Basis Report Supplement.⁶³⁹ Beyond the confusion caused by shifting baselines, the baselines used to evaluate the VAs clearly flout CEQA requirements. Under CEQA, the baseline must ordinarily describe physical environmental conditions as they currently exist, not hypothetical situations.⁶⁴⁰ Yet the VA baselines are expressly not reflective of physical conditions as they currently exist, or even as they existed in the past or might exist in the future.⁶⁴¹ Instead, the Board utilizes a baseline premised on regulatory limits, some of which are in flux and none of which reflect conditions as they actually exist.⁶⁴² Adopting a baseline premised on regulatory conditions rather than actual conditions is a clear violation of CEQA as it precludes the public and decision-makers from understanding the true environmental consequences of the VAs and meaningfully comparing them to the considered alternatives.⁶⁴³

Next, under CEQA an SED must consider significant environmental impacts and measures to mitigate them to insignificance.⁶⁴⁴ As discussed above, the draft Staff Report violates CEQA by failing to consider whether the VAs will *worsen* already persistent harmful algal blooms that impact fish and wildlife objectives, as well as a host of other beneficial uses.

Further, adoption of the Voluntary Agreements puts the State Water Board in further violation of CEQA due to the lack of government-to-government consultation with California Native American tribes. The Board has clear obligations under CEQA to meaningfully consult tribes in evaluating policy proposals that may impact tribes and their unique relationship to water ways. Specifically, AB 52 amended CEQA to mandate that public agencies consult with tribes traditionally and culturally affiliated with the geographic area affected by a project early in the environmental review process to “avoid damaging effects to any tribal cultural resources” wherever feasible.⁶⁴⁵ AB 52 states that a project that may “cause a substantial adverse change in the significance of a tribal cultural resource” is a “project that may have a significant effect on the environment.”⁶⁴⁶ And in determining whether a project may have such an effect, public agencies are required to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project.⁶⁴⁷

No such consultation happened here. No tribe is a party to the VAs, nor was any tribe allowed to participate in their negotiation. Nor were tribes consulted in the evaluation of the VAs at

⁶³⁹ Final Scientific Basis Report Supplement, *supra* note 587 at 1-6 (The reference condition used in the Scientific Basis Report is the “flows resulting from State Water Board Revised Water Right Decision 1641 (D-1641) and the 2008/2009 BiOps, as modeled.”).

⁶⁴⁰ CEQA Guidelines § 15125; see *POET, LLC v. State Air Resources Bd.*, 12 Cal.App.5th 52, 80 (2017) (Board failed to demonstrate that its “CEQA analysis employ[ed] a realistic baseline that [gave] the public and decision makers the most accurate picture practically possible of the project’s likely impacts.” (citation omitted)); *County of Amador*, 76 Cal.App.4th at 955 (“An EIR must focus on impacts to the existing environment, not hypothetical situations.”).

⁶⁴¹ See CEQA Guidelines § 15125.

⁶⁴² See Staff Report at 6-6 (referencing Table 6.2-1)(outlines the host of regulatory requirements in the Bay-Delta assumed in the baseline modelling for the SED’s other project alternatives, of which the 2019 BiOps are only one regulatory requirement.)

⁶⁴³ See *Cmntys. for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal.4th 310, 322 (2010) (“An approach using hypothetical allowable conditions as the baseline results in ‘illusory’ comparisons that ‘can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,’ a result at odds with CEQA’s intent.” (citation omitted)).

⁶⁴⁴ Cal. Code. Regs. Tit. 23 § 3777(b)(2).

⁶⁴⁵ Pub. Res. Code §§ 21080.3.1(b), 21084.3; see generally Assem. Bill No. 52 (2014) chp. 532.

⁶⁴⁶ Cal. Pub. Res. Code § 21084.2 (2021).

⁶⁴⁷ Cal. Pub. Res. Code § 21080.3.1(b) (2021).

any point, not to mention early in the planning process. Instead, tribes were contacted just days before the Board’s January 19, 2023 workshop, well after the VA framework was formulized and after the draft Scientific Basis Report Supplement was issued. Last minute meetings under the guise of tribal consultation are no substitute for the legal consultation requirements mandated by CEQA and set forth under the Board’s own tribal consultation policy. Under AB 52, the Board should have consulted with tribes to assure identification of potential tribal cultural resources in the project area, the potential significance of project impacts on identified resources, and the development of project alternatives and mitigation measures to avoid and reduce impacts. The Board’s failure to engage AB 52 consultation in its evaluation of the VAs exacerbates prior exclusion from the VA negotiations themselves and demonstrates a pattern and practice of neglecting tribal communities and their concerns. And to the extent the Board believes that it did not need to undertake AB 52 consultation for the VAs because the notice of preparation for the Bay-Delta Plan update was issued prior to AB 52’s effective date, it is clearly mistaken. The Board first publicly noticed its intent to accommodate VAs as a pathway for updating Phase II of the Bay-Delta Plan in 2017, well after the AB 52 went into effect.⁶⁴⁸ Nor is the Board absolved of responsibility for undertaking this consultation even if it is not technically a party to the VAs, as the Board is the lead agency charged with evaluating the VAs and adopting, or rejecting, them as part of the Bay-Delta Plan update.

E. The Board attempts to improperly circumvent EPA oversight authority by adopting the VAs as a regulatory substitute.

Under the Clean Water Act, the EPA exercises ultimate oversight authority over water quality standard setting by the States. Accordingly, whenever a State revises or adopts new standards – consisting of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses – it must submit those standards to the EPA for approval or disapproval.⁶⁴⁹ If the EPA determines based on its review of the submitted standards that they are not consistent with Clean Water Act requirements, then the EPA must give the State an opportunity to meet the requirements and promulgate compliant federal standards if the State fails to timely or appropriately act.⁶⁵⁰ Further, the EPA must promptly prepare and publish proposed regulations setting forth revised or new water quality standards in any case where the EPA Administrator “determines that a revised or new standard is necessary to meet the requirements” of the Clean Water Act – an exercise of authority that the EPA Administrator is currently considering pursuant to the Coalition’s December 2022 Petition for Rulemaking.⁶⁵¹

The State Water Board has long taken the position that while “water quality standards” require EPA approval before they can go into effect, “[o]ther portions of the Bay-Delta Plan, such as the program of implementation, are to be submitted to U.S. EPA as part of the continuing planning process, but do not require approval.”⁶⁵² Indeed, the Board has never “concede[d] that it is required under the federal Clean Water Act to submit all parts of the [Bay-Delta] Plan to the U.S. EPA for approval.”⁶⁵³ Rather, “in the view of the State Water Board, the objectives for flow and

⁶⁴⁸ Cal. Water Res. Control Bd., *supra* note 168 at 2.

⁶⁴⁹ 33 U.S.C. § 1313(c)(2)(A).

⁶⁵⁰ 33 U.S.C. § 1313(c)(2)(3).

⁶⁵¹ 33 U.S.C. § 1313(c)(2)(4); *see* Attachment 1.

⁶⁵² Cal Water Res. Bd. Resolution No. 2006-0098 ¶ 10.

⁶⁵³ *Id.*

operations are not subject to U.S. EPA approval and are provided to U.S. EPA for its consideration as a matter of state/federal comity.”⁶⁵⁴

It is clear from these positions and from the nomenclature used to describe the VA program that the State and VA parties have attempted to construct the VAs with the intention to circumvent EPA water quality standard oversight authority. The Staff Report describes the VAs’ “flow and non-flow actions” as “implementation measures for an existing and proposed new water quality objective in the Bay-Delta Plan.”⁶⁵⁵ And, as the Board’s resolution adopting the 2006 Bay-Delta Plan makes clear, the Board takes the position that neither objectives nor implementation measures would be subject to EPA approval; rather, at most the Board would submit them to EPA as a matter of comity.

The Board’s transparent efforts to circumvent EPA oversight authority fail. However they are labeled, it is clear that the VAs would modify water quality standards for the Bay-Delta and thus be subject to EPA oversight. The Porter-Cologne Act defines the water quality control plan in much the same way that federal Clean Water Act defines water quality standards – as comprising “beneficial uses to be protected,” “water quality objectives,” and “a program of implementation needed for achieving water quality objectives.”⁶⁵⁶ These elements together comprise water quality standards – that is the designated uses of the waters involved and the water quality criteria for such waters based upon such uses. The VA’s new narrative objectives, and the measures organizing flow and non-flow assets to achieve them, are, together with beneficial uses the Board designates, the water quality standards that must be submitted to and *approved or disapproved* by the EPA.⁶⁵⁷ Indeed, this is manifestly the case as the VAs would stand in for regulatory water quality standard updates (the proposed plan amendments) that the Board appears to concede would require EPA approval before they could go into effect.⁶⁵⁸ Creative labeling does not make it otherwise.

F. In adopting the VAs, the Board would impermissibly delegate its regulatory authorities to regulated parties.

It is well established that the Board, in exercising regulatory authorities delegated to it by the Legislature, cannot confer on private parties “unrestricted authority to make fundamental policy decisions.”⁶⁵⁹ “This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.”⁶⁶⁰ An unconstitutional delegation of authority occurs when the governing body: “(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.”⁶⁶¹ To avoid an unlawful delegation, the governing body must therefore:

⁶⁵⁴ *Id.*

⁶⁵⁵ Staff Report at 9-1.

⁶⁵⁶ Compare Cal. Water Code § 13050 with 33 U.S.C. § 1313.

⁶⁵⁷ In addition to setting forth a new narrative objective, the VAs effectively modify the existing Narrative Salmon Protection Objective by proposing to attain its salmon doubling goal by 2050. Staff Report at 9-1.

⁶⁵⁸ See Resolution No. 2006-0098, *supra* note 653 at ¶ 10.

⁶⁵⁹ *People ex rel. Lockyer v. Sun Pac. Farming Co.*, 77 Cal.App.4th 619, 633-34 (2000) (citing *People v. Wright*, 30 Cal.3d 705, 712 (1982)).

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.* (quoting *Carson Mobilehome Park Owners’ Ass’n v. City of Carson*, 35 Cal.3d 184, 190 (1983)).

first resolve the truly fundamental issues, and must then establish an effective mechanism to assure the proper implementation of its policy decisions. Thus, a delegation of authority must be accompanied by safeguards which insure that the delegatee does not act arbitrarily.⁶⁶²

“To put it simply, the Legislature could not lawfully grant the power to make laws to a private entity.”⁶⁶³

An unlawful delegation of power occurs not only when the Legislature impermissibly delegates its legislative powers, but also when a regulatory body impermissibly delegates its regulatory authorities to regulated entities. Indeed, the Court of Appeal in its 2014 decision in *Light v. State Water Resources Control Board* recognized that unlawful delegation would apply where the State Water Board abdicates its regulatory responsibilities by impermissibly delegating them to regulated parties without establishing adequate policy guardrails and holding ultimate authority to formulate and exercise governing standards.⁶⁶⁴ The Court of Appeal in *Light* set forth a clear line between permissible involvement of regulated industry in shaping well-considered agency decision-making and impermissible abdication of regulatory authority, reasoning that:

There is a tension when private industry shares responsibility for the governmental regulation of its commercial activities. On the one hand, members of the industry are well positioned to understand the regulatory needs and the impact of regulation on their business activities. In this respect they are ideal partners in the formulation of appropriate regulations. Perhaps for this reason, it has never been held that the *mere involvement of regulated private parties* in the making of administrative regulations constitutes an improper delegation of governmental authority. On the other hand, by involving members of the regulated industry the agency runs the risk associated with the fox guarding the henhouse. As a result, there is a ‘tight line between lawful and unlawful delegation of regulatory authority.’⁶⁶⁵

As a consequence, while “private entities can formulate and suggest potential regulation, the doctrine of unlawful delegation requires the . . . regulatory agency to exercise the final say over whether any particular regulation becomes law.”⁶⁶⁶ In addition, the regulatory agency cannot delegate regulatory power to entities “composed of interested members of regulated industries without imposing standards or safeguards to prevent abuse. Absent the required standards, such grants of authority constitute unconstitutional delegations of legislative power.”⁶⁶⁷

Here, the Board’s adoption of the VAs in lieu of a regulatory Plan update would constitute a textbook instance of unlawful delegation. The Legislature, through the Water Code, designated the

⁶⁶² *Id.* (quoting *Wilkinson*, 144 Cal.App.3d at 442).

⁶⁶³ *Int’l Ass’n of Plumbing etc. Officials v. Cal. Building Stds. Com.*, 55 Cal.App.4th 245, 253 (1997).

⁶⁶⁴ *Light v. State Water Resources Control Bd.*, 226 Cal.App.4th 1463, 1490-92 (2014) (considering whether the Board’s adoption of Regulation 862 “improperly delegated the regulatory authority of the Board to [water demand management programs (“WDMPs”)]”).

⁶⁶⁵ *Id.* (quoting *Plumbing etc. Officials*, 55 Cal.App.4th at 253).

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.* (quoting *Dunn-Edwards Corp. v. S. Coast Air Quality Mgmt. Dist.*, 19 Cal.App.4th, 545-46 n.5 (1993)).

State Water Board as “the state water pollution control agency for all purposes stated in the” federal Clean Water Act, and it vested authority to establish water quality control plans specifically in the State Water Board and the regional water boards.⁶⁶⁸ Through Bay-Delta planning processes, the Board exercises authorities specifically delegated to it by the Legislature through section 13170 of the California Water Code. In addition to updating water quality standards, it also carries out related duties delegated to it by the Legislature for water quality planning and oversight, including the duty to periodically review the Bay-Delta Plan pursuant to section 13240 of the California Water Code to ensure that it provides reasonable protection for designated beneficial uses.⁶⁶⁹ In adopting the VAs, the Board would abdicate these responsibilities, vesting them instead in regulated parties (water agencies, irrigation districts, and private companies) who would be extended eight years of unconstrained experimentation with water quality control planning, accompanied by the responsibility to review and assess their own progress in meeting legal requirements to protect designated beneficial uses and public trust responsibilities.

The Staff Report does surprisingly little to disguise this unlawful delegation. In chapter 9, the Board concedes that it received a fully formulated VA term sheet, signed by state and federal agencies, local water agencies, private companies, and a non-profit mutual benefit corporation.⁶⁷⁰ It also received updates to add additional parties and VA components. Although, as discussed above, the State Water Board was implicated in development of the VAs to the extent that it elected to delay legally required updates to accommodate these private negotiations, the Board, by its own admission, had no role in their development or formulation.

To the extent the Board believes that it can convert this private dealmaking into lawful exercise of regulatory authority by giving its blessing to the VAs through a formal approval, it is clearly wrong. While the Board “can provide for and encourage the participation of private associations in the regulatory process, it must stop short of giving such groups the power to initiate or enact rules that acquire the force of law.”⁶⁷¹ This brightline limitation applies equally to regulation “that would abrogate the state’s police power by giving a private party or parties a veto over a regulatory function.”⁶⁷²

The VAs do just that. The Board concedes that it received the VAs after conducting its own analysis and makes no pretense at analyzing them together with proposed Plan amendments to render its own determination about their effectiveness or propriety.⁶⁷³ It sets forth the VAs in exactly the form in which they were thrust on the Board, making no effort to modify them to ensure that they satisfy beneficial uses or protect public trust resources (nor could it as the VAs have been handed to the State Water Board as a ready-made contract, which the Board lacks the power to amend). And the VAs would wholly shield Bay-Delta water quality planning from any review or oversight by the Board during their eight year term, as it is only “in the eighth year of the VAs [that] the State Water Board would consider the reports, analyses, information, and data from the VA Science Program, as well as recommendations from the VA Governance Committee and the Delta

⁶⁶⁸ Cal. Water Code §§ 13160, 13170, 13240.

⁶⁶⁹ Cal. Water Code § 13240; *see also* 33 U.S.C. § 1313(c) (requiring triennial review of standards contained in state water quality control plans).

⁶⁷⁰ Staff Report at 9-1.

⁶⁷¹ *Plumbing etc. Officials*, 55 Cal.App.4th at 254.

⁶⁷² *Id.*

⁶⁷³ Staff Report at 9-2.

Independent Science Board (ISB) to decide the future of the VA program.”⁶⁷⁴ Through the VAs, regulated parties created their own accountability structure, setting forth vaguely defined “objectives” against which the VAs would be evaluated. And adopting the VAs would put the Board in direct conflict with its duties under the federal Clean Water Act to conduct a triennial review of water quality standards – which could not occur until, at best, the conclusion of the VAs’ eight-year term. Rather, during the VA term, regulated entities would purportedly conduct their own review, submitting their own findings to the Board through reports – a quintessential instance of the fox guarding the henhouse.⁶⁷⁵

Compounding these problems, the VAs both leave the resolution of fundamental policy issues to regulated parties and fail to provide adequate direction for the implementation of any such policy, in clear violation of the law. The VAs purport to set forth a new narrative objective to achieve the viability of native fish populations, but this objective is so vaguely defined that it provides little in the way of policy direction or standards to guide regulated party actions during the VA term.⁶⁷⁶ And the Staff Report does nothing to direct implementation of that policy, even if it could be discerned from the new objective. Rather, it explains in almost indecipherable terms that “[t]ributary assets” under the VAs will “include flow and non-flow assets negotiated as of November 10, 2022.”⁶⁷⁷ Translated, this means that the Board will, in lieu of setting clear regulatory instream flow standards, allow regulated parties to decide for themselves how much additional water to leave in the streams and how much to instead experiment with habitat restoration measures that could purportedly make up for some of the loss in needed flow (an assumption that, as explained above, lacks any sound basis in science or TEK). Making the matter worse, the Staff Report never explains what the “physical habitat restoration actions” will look like, where they will occur, or how such decisions are to be made during the VA term.⁶⁷⁸ Indeed, agreements that will provide some direction for commitments to habitat restoration activities have not yet been finalized or made available for either Board or public review.⁶⁷⁹

Further, the regulated parties, under the VA program, would exercise *their own* governance of VA activities.⁶⁸⁰ While the VA program asserts that this Governance structure will provide “accountability and transparency of the VA Program,” it instead further shields the program from regulatory oversight, as the Board plays no role at all in governance. Rather, the Board would merely “designate a representative to participate in the Systemwide Governance Committee as an advisory resource” but *not* as a voting member. In this way too, the VAs delegate the Board’s regulatory review and oversight responsibilities to a newly created governance committee in which the Board itself plays no meaningful role. Indeed, the Draft VA Governance Program is explicit that “the parties to each respective Tributary/Delta Voluntary Agreement” – which do not include

⁶⁷⁴ *Id.* at 9-6.

⁶⁷⁵ The Draft VA Governance Program states that the State Water Board will fulfill its review requirements under the Clean Water Act, 33 U.S.C. § 1313(c)(1), and Water Code § 13240, by incorporating annual and triennial reporting and the Strategic Plan developed by the Systemwide Governance Committee into their triennial review. This is laughably inadequate. The Clean Water Act is explicit that it is the responsibility of the *State* to “hold public hearings for the purpose of reviewing applicable water quality standards, and as appropriate, modifying and adopting standards” at least once every three years. The State cannot exercise this responsibility if it is shielded from review of VA implementation, obtaining insight only through self-reports from the VA parties.

⁶⁷⁶ *See* Staff Report at 9-7.

⁶⁷⁷ Staff Report at 9-8.

⁶⁷⁸ *See, e.g.,* Staff Report at 9-9.

⁶⁷⁹ Staff Report, App. G at 4.

⁶⁸⁰ *Id.* at 4.

the Board – “will establish [their] own governance structure.”⁶⁸¹ At the same time, it relegates the State Board to an advisory, rather than regulatory function, explaining that “the role of State Water Board staff will be to provide advice on compliance with the Bay-Delta Water Quality Control Plan.”⁶⁸²

Comparison with the delegation of authority to a governing body found lawful in *Light* illustrates the problem. There, the State Water Board, by regulation, “clearly set out the fundamental purposes of the WDMP’s,” “established detailed standards for the manner in which the WDMP governing bodies are to monitor stream level and the type of corrective measures that can be instituted,” and “placed itself between the governing bodies and the regulated growers.”⁶⁸³ Further, “no program developed by a governing body” under the regulation would “become effective – will acquire the force of law – until it has been approval by the Board, and that approval must be sought annually.”⁶⁸⁴ Here, by contrast, the Board left the development of the regulatory substitute (the VAs) to regulated parties. It makes no attempt to set forth clear policy direction of its own to organize activities by the VAs or guide their governing body. It establishes no standards for the manner in which the VA parties, or their governing bodies, operate. And far from placing itself “between the governing bodies and the regulated” water diverters, it places itself apart from them, abdicating the field entirely during the eight-year VA term and peering into the governance structure only in an advisory capacity. Unlike in *Light*, the Board does not oversee or approve activities by the regulated body during the VAs’ initial eight-year term, not to mention doing so annually. It is hard to imagine a clearer example of unlawful delegation than adoption of the VAs would effect.

Ultimately, it is a widely known secret that the VAs are not the Board’s idea – rather, the Board is being pressured, perhaps directed, to consider and even adopt the VAs by the California Natural Resources Agency and the Governor’s Office. But the Legislature vested water quality control oversight in the State Water Board, not these other State entities. The VAs are a clear workaround to, and divestiture of, Board authority. Despite failures of trust and communication that have long characterized relationships between the Board and Delta communities and tribes, the undersigned prefer to see the Board exercising its own oversight authority, diligently safeguarding public trust resources and beneficial uses, than entrusting private parties with the authority and responsibility to do so. Indeed, the law requires it.

CONCLUSION

For the reasons set forth above, we urge the Board to act on the Delta Tribal Environmental Coalition’s recommendations and expeditiously complete an update to the Bay-Delta Plan that protects public trust and beneficial uses (including Tribal Beneficial Uses), complies with CEQA and other legal requirements and policy commitments, centers the needs and interests of Delta tribes and communities, and restores a thriving Bay-Delta ecosystem for current and future generations.

⁶⁸¹ Staff Report, App. G (Draft VA Governance Program) at 4.

⁶⁸² *Id.* at 6.

⁶⁸³ *Light*, 226 Cal.App.4th at 1492.

⁶⁸⁴ *Id.*

Respectfully submitted,

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Delta Tribal Environmental Coalition Attachments List

Sacramento/Delta Update to the Bay-Delta Plan 2023 Draft Staff Report and Substitute Environmental Document

1. Shingle Springs Band of Miwok Indians, et al., Title VI Complaint and Petition for Rulemaking for Promulgation of Bay-Delta Water Quality Standards (Dec. 15, 2022).
2. San Francisco Baykeeper, et al., Petition to the State of California Game Commission to List The California White Sturgeon (*Acipenser transmontanus*) as Threatened under the California Endangered Species Act (CESA) (Nov. 29, 2023). .
3. San Francisco Baykeeper, et al., Petition To List The San Francisco Estuary White Sturgeon (*Acipenser Transmontanus*) Population As A Threatened Distinct Population Segment Under The Endangered Species Act with Critical Habitat (Nov. 29, 2023).
4. Shingle Springs Band of Miwok Indians, et al., Comment Letter on Proposed Addition of Tribal Beneficial Uses to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta (August 21, 2023).
5. Shingle Springs Band of Miwok Indians, et al., Comment Letter on Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreements for the Sacramento River, Delta, and Tributaries Update to the San Francisco Bay/Sacramento-San Joaquin Delta Water Quality Control Plan (February 8, 2023)
6. Haley E. Plaas, et al., *Secondary Organic Aerosol Formation from Cyanobacterial-Derived Volatile Organic Compounds*, 7 ACS Earth and Space Chemistry 1592 (2023).
7. *California Sportfishing Protection Alliance, et al. v. California State Water Resources Control Board and Thomas Howard*, Case No. RG15780498 Settlement Agreement and Release of Claims (2020).
8. Draft Implementation Agreement between Department of Water Resources and Yuba County Water Agency (July 25, 2023).
9. Draft Mokelumne River Implementation Agreement (July 25, 2023).
10. Letter from U.S. EPA, to Michael Jewell, U.S. Army Corps of Engineers (March 16, 2023)
11. Shingle Springs Band of Miwok Indians, et al., Comment Letter on Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (March 6, 2023).
12. State Water Resources Control Bd., Comment Letter on Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights
13. Gary Mulchay, Comments on Tribal Engagement Section of Draft Staff Report–Tribal Water Rights (2023).
14. Spencer Fern, HABs Comments on the Draft Staff Report for the Phase II Update to the Bay-Delta Plan (2023).
15. Cintia Cortez, General Comments on the Draft Staff Report for the Phase II Update to the Bay-Delta Plan (2023).
16. Zach Gigone, HABs Public Hearing Presentation Script on the Draft Staff Report for the Phase II Update to the Bay-Delta Plan (2023).

EXHIBIT B

Comments by the Delta Tribal Environmental Coalition

*Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem
Wintu Tribe, Little Manila Rising, and Restore the Delta*

**October 2024 Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-
San Joaquin Delta Watershed**

January 10, 2025

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INTRODUCTION

Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta (collectively, the Delta Tribal Environmental Coalition, or “DTEC”), submit the following comments on the Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (“Bay-Delta Plan”) issued by the State Water Resources Control Board (“Board”) on October 25, 2024.

These comments address DTEC’s positions and concerns about the draft Bay-Delta Plan’s treatment of the following issues: (1) the voluntary agreement (“VA”) pathway, which remains inscrutable and illegal and should be disregarded; (2) the Board’s obligation to comply with the California Environmental Quality Act (“CEQA”) by conducting environmental review of the Bay-Delta Plan in its entirety and identifying a clear and stable project; (3) designation of Tribal Beneficial Uses for Bay-Delta waterways, which the Board should affect through the current Bay-Delta Plan update; (4) strengthening tribal consultation and Traditional Ecological Knowledge (“TEK”) proposals; and (5) rectifying the Board’s failure to set forth an enforceable surface water objective for harmful algal blooms (“HABs”).

These comments focus on opportunities to strengthen the regulatory pathway to assure consistency with the Board’s duties under the Porter-Cologne Act and Clean Water Act, as well as fulfillment of the Board’s commitments to racial equity and repair for the profound injury the State has caused to tribal sovereignty and cultural survival. The comments only address the VA pathway to remind the Board that the VAs are not a legal means to fulfill the Board’s obligations, and that their exclusionary process perpetuates the discriminatory history and oppressive foundations of the California water rights system. DTEC urges the Board to focus on repairing its relationships with Tribes and disadvantaged Delta communities that have been disenfranchised throughout the history of California water governance, as well as meeting its obligations under the law, by proceeding with a protective regulatory water quality control update, designating and protecting tribal beneficial uses of water, and committing to robust partnership with Tribes in Bay-Delta water governance as well as public transparency and engagement with affected communities in regular Bay-Delta Plan reviews and updates going forward.

COMMENTING PARTIES

A. Shingle Springs Band of Miwok Indians

The Shingle Springs Band of Miwok Indians is a California Native American Tribe with ancestral homelands spanning seven counties in Northern California—Sacramento, El Dorado, Amador, Yolo, Placer, Sutter, and Yuba—and the watersheds of multiple Delta waterways, including the Sacramento River, American River, Feather River, Bear River, and Cosumnes River. The Tribe has stewarded and used resources from the Delta for sustenance, medicine,

transportation, shelter, clothing, and ceremony, among other cultural, religious, and subsistence uses, since time immemorial.

The 600 present-day members of the Shingle Springs Band of Miwok Indians are descendants of the Miwok and Nisenan Indians who thrived in California's fertile Central Valley for thousands of years before contact with Europeans. The Tribe is also descended from native Hawaiians who were forcibly brought to Nisenan territory in 1839 by John Sutter, a Swiss land baron who enslaved hundreds of Indigenous people to power his Sacramento Valley ranch. The Tribe's deep connection to Delta waterways was assaulted when its members were forced from their ancestral villages through colonization, disease, state-sponsored violence, and privatization of land. In 1920, the Secretary of the Interior purchased the 160-acre Shingle Springs Rancheria east of Sacramento in El Dorado County and placed it into trust for the displaced Tribe. However, the landlocked Rancheria remained inaccessible to the Tribe for decades and is far from the waterways that sustained the Tribe and their way of life for millennia.

As the survivors of colonization, genocide, removal, and disease, the Tribe is committed to returning to the Delta's waterways and restoring connections to cultural resources and traditional ways of life. In 2020, the Tribe purchased a small tract of land at its ancestral village site of Wallok in present-day Verona, where the Feather River meets the Sacramento River. Yet, despite regaining this limited riparian access to ancestral waterways, the degraded condition of the Delta impedes the Tribe's long-sought reconnection. Traditional riparian resources from which members of the Tribe fashion cultural and subsistence implements either no longer exist or are unsuitable for use because of the polluted state of the water, and harmful algal blooms increasingly prevent tribal members from accessing the water for fishing or ceremonial purposes. The Tribe's timeless exercise of cultural traditions rooted in Delta waters persists, as its members continue seasonal gatherings and traditional teachings, bringing back medicine, ceremonies, and songs. The Tribe returns to ancestral village sites to remember, reconnect, teach, learn, and restore but cannot exercise these practices without healthy rivers and the lands, plants, fish, and animals they sustain, which connect the Tribe to its ancestors and are its lifeblood.

B. Winnemem Wintu Tribe

The Winnemem Wintu are a California Native American Tribe whose identity and existence are intertwined with the headwaters of the Bay-Delta. In the Winnemem language, "Winnemem Wintu" translates to "Middle Water People," reflecting the Tribe's identification with its ancestral homelands along the McCloud River lying between the Sacramento and Pit Rivers. Traditionally, the Winnemem Wintu's historical territory spanned the upper Sacramento River and McCloud River watersheds, which provide freshwater flows into the Bay-Delta. These waters have sustained the life and spirituality of the Tribe since time immemorial.

Winnemem Wintu culture and identity are inextricably connected with the Nur, or Chinook salmon, which once flourished in the Bay-Delta's waterways. In the Tribe's creation story, the Nur gave the Winnemem Wintu their voice, and the Tribe in turn promised to always

speak for the Nur. The Winnemem Wintu and the Nur have depended on each other for thousands of years—the Winnemem speaking for, caring for, and protecting the salmon, and the salmon giving themselves to the Winnemem for sustenance. Ceremonies, songs, dances, and prayers about the relationship between the Nur and the Winnemem Wintu are the fabric of Winnemem Wintu culture, religion, and spirituality.

Damming and diversion of Bay-Delta waters and poor water quality have contributed to the near extinction of Chinook salmon, thereby threatening the continued existence of the Winnemem Wintu as a People. This existential threat layers over centuries of state-supported campaigns and projects to remove the Winnemem Wintu from their historic homelands and divest them of their relationship to the water. These efforts culminated in construction of the Central Valley Project's Shasta Dam in the 1930s and 40s, which flooded over 90% of the Winnemem Wintu's historical village sites, sacred sites, burial sites, and cultural gathering sites while blocking the Nur from migrating into Bay-Delta headwaters to spawn. The continued reliance on Central Valley Project exports and the degradation of Bay-Delta water quality impairs the ability of Chinook salmon to reestablish their natural migratory pathways into Winnemem Wintu homelands.

C. Buena Vista Rancheria of Me-Wuk Indians

The Buena Vista Rancheria of Me-Wuk Indians ("BVR") is a California Native American Tribe with ancestral homelands spanning six counties, including Sacramento, Amador, San Joaquin, El Dorado, Calaveras, and the northern part of Stanislaus County. The Tribe's ancestral lands stretch from the eastern bounds of the Sacramento and San Joaquin River Delta to the western slope of the northern Sierra Nevada mountains. Bay-Delta waters have sustained the Tribe since time immemorial. Significant tributaries and rivers that feed into the San Joaquin and Sacramento River Delta flow through Buena Vista Rancheria territory, including, among others, the Mokelumne, Consumnes, and San Joaquin Rivers.

For the Buena Vista Rancheria of Me-Wuk Indians, Ki-ku (Me-Wuk for water) is the foundation of the world. Me-Wuk and Yokut creation stories describe water as a relation, and tribal members trace family lines through water. Water is understood as connected to all things and a life force of its own. In addition to supporting ecosystems and subsistence uses, water is revered for the pivotal role it plays in the Tribe's spiritual, cultural, and traditional lifeways and practices. The Tribe's traditional village sites were located near waterways, and family lines are still understood to be connected to BVR ancestral land through relations to water and spaces near water.

Today, tribal members continue to rely on water for ceremonial practice and frequently access water from BVR's ancestral lands for ceremony. Water from the Sacred Springs of Buena Vista Peaks, for example, is used by tribal dancers who gather, bathe, and ingest water from the springs before ceremony. Water from these springs is also used for cleansing after tribal burials, in sweat lodges, as a disinfectant for illness, and for irrigating native plants as part of the Tribe's

restoration projects. BVR culture, tradition, and ceremony express the sacred importance of water stewardship: water takes care of the BVR people, who must, in turn, take care of the water.

Buena Vista Rancheria of Me-Wuk Indians has survived generations of abuse, neglect, and destructive policies that aimed to destroy tribal existence and forcibly assimilate tribal identity—including the termination era of the 1950s. Today, BVR continues to face ongoing ecological and political threats to its tribal cultural existence. Decades of industrialization across the Mokelumne River and the central Delta around Stockton, including mining, damming, and agricultural development, have contaminated streambeds, disrupted natural flow regimes, and destroyed tribal villages and fishing sites. In recent years, the community has been particularly concerned about runoff from historic mine sites and Delta agricultural development, which continue to contaminate their waters. For example, Tribal members have been restricted from accessing ceremonial water from the Sacred Springs after e-coli was detected, most likely the result of upstream cattle grazing. In larger waterways in the Tribe’s ancestral homelands, Harmful Algal Blooms and other water quality concerns have restricted the Tribe’s exercise of traditional water-based practices. Tribal Ceremonies in the Delta have been prevented due to low flows and HABs, which have, for example, exacerbated the health concerns about gathering and processing Tule for the annual Tule Boat Races. Low flows have decimated populations of salmon, turtles, crayfish, and other species essential to tribal culture and identity and continue to threaten populations of tule, willow, cottonwood, and other riparian species necessary to the Tribe’s cultural practices. Without access to safe, flowing water and all it sustains, the Tribe is severed from the very core of its identity as Me-Wuk and Yokut people.

D. Little Manila Rising

Little Manila Rising is a 501(c)(3) non-profit organization dedicated to bringing multifaceted equity to Stockton, California, a city of 320,000 residents on the eastern edge of the Delta along the San Joaquin River.¹ Stockton is one of the most diverse cities in America,² with a population 44% Hispanic, 21% Asian, 12% Black, and 19% non-Hispanic white.³ About a third of the city’s residents live in South Stockton, a historically underserved and under-resourced area where many of the city’s Black, Asian, and Latine communities reside.⁴

Little Manila Rising was founded in 1999 to advocate for the historic preservation and revitalization of South Stockton’s Little Manila community. Once home to the largest population of Filipinos in the world outside the Philippines, Little Manila was decimated in the 1970s when

¹ U.S. Census Bureau, Quickfacts: Stockton City, California, <https://www.census.gov/quickfacts/stocktoncitycalifornia> (last visited Nov. 17, 2022).

² Gaby Galvin, America’s Most Diverse City is Still Scarred by its Past, U.S. News & World Rep. (Jan. 22, 2020), <https://www.usnews.com/news/cities/articles/2020-01-22/stockton-california-americas-most-diverse-city-is-still-scarred-by-its-past>.

³ U.S. Census Bureau, *supra* note 1.

⁴ Galvin, *supra* note 2; *see also* Michelle Anderson, The Fight to Save the Town: Reimagining Divided America 40-41 (2022).

the California state government, supported by Stockton city officials, constructed the Crosstown Freeway directly through the community, demolishing homes and displacing residents.

Little Manila Rising continues to advocate for the interests of South Stockton residents through programs addressing education, environment, redevelopment, and public health. Little Manila Rising recognizes that the health and well-being of the communities it represents are tied to the health and resiliency of the Bay-Delta, and it has frequently engaged the State Water Board on the need to improve water quality standards. These improvements are a critical part of larger efforts to correct the effects of historical marginalization, institutionalized racism, and harmful public policy experienced by South Stockton residents.

E. Restore the Delta

Restore the Delta is a 501(c)(3) non-profit organization based in Stockton, whose mission is to ensure the health of the Bay-Delta so that fisheries, communities, and family farming can thrive there again. Restore the Delta works to protect water quality, improve access to clean waterways, and reduce flood and drought impacts resulting from climate change, particularly in communities of color. To achieve this mission, Restore the Delta advocates for the interests of local and marginalized Delta stakeholders to ensure that they have a meaningful voice in water management decisions affecting the well-being of their communities.

Many of Restore the Delta's 75,000 members live in or near the Bay-Delta and have a strong personal interest in ensuring healthy freshwater flows to support a thriving ecosystem, safe recreation, safe and sustainable drinking water, and a clean environment. Restore the Delta has advocated before the State Water Board for improved Bay-Delta water quality standards and the restoration of instream flows for over fifteen years.

BACKGROUND

Almost sixteen years after initiating the Bay-Delta Plan review and update process and seven years after promising expeditious release of proposed standards, the Board released its draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed on October 25, 2024. But rather than identify a clear set of Clean Water Act and Porter-Cologne Water Quality Control Act-compliant standards ready for analysis and adoption, the Board has set forth an inscrutable web of regulatory and non-regulatory options, including contractual Voluntary Agreements between water users and agencies that would substitute for regulatory water quality standards. The Board also repeatedly states throughout the draft that all options remain on the table—that it has not yet selected a preferred approach for this long overdue update. This October 2024 draft makes clear that the Board is not meaningfully closer to adopting enforceable regulatory controls for Bay-Delta water quality than it was when it released its framework proposal for a Bay-Delta Plan Update in 2018.

The Board has delayed and continues to delay complying with its legal duties to revise concededly inadequate water quality standards to accommodate exclusionary Voluntary Agreement negotiations—all to the profound detriment of California Native American Tribes and disadvantaged Delta communities whose identities, culture, health, and welfare are tied up with increasingly depleted Delta flows and disappearing public trust resources. As a result, on May 24, 2022, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, and Save California Salmon filed a petition for rulemaking and public trust complaint with the Board, petitioning it to timely complete its Bay-Delta Plan review and update, engage in government-to-government consultation with affected Tribes and allow for meaningful public participation in the Plan update, integrate tribal beneficial uses into the Plan, and issue regulatory water quality standards that protect the full range of beneficial uses and public trust interests. The Board denied the petition on June 24, 2022 as well as a petition for reconsideration of the denial on September 21, 2022.

Having become clear that the Board would not act on its own, DTEC sought intervention by the U.S. Environmental Protection Agency (EPA) in its oversight capacity. On December 16, 2022, the Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Save California Salmon, Little Manila Rising, and Restore the Delta, later joined by the Buena Vista Rancheria of Me-Wuk Indians, submitted to EPA a Civil Rights Complaint under Title VI of the federal Civil Rights Act of 1964 and Petition for Rulemaking to Promulgate Water Quality Standards for the San Francisco Bay/Sacramento-San Joaquin Delta. The EPA accepted the Title VI Complaint on August 8, 2023 and initiated an investigation into discrimination by the Board.⁵ The Board subsequently agreed to engage in negotiations toward the execution of an informal resolution agreement to resolve the complaint without formal enforcement action, and EPA issued a letter on September 12, 2023 tolling its deadline to issue preliminary findings of discrimination to allow the negotiations to play out. Fifteen months later, DTEC and the public are awaiting a final agreement resolving the civil rights investigation. By incorporating the recommendations herein and entering into a robust informal resolution agreement for the Title VI Complaint, the Board can fulfill its legal obligations and may obviate the need for further federal intervention.

DISCUSSION

I. The VA framework is Inequitable and Illegal

More than a year after releasing its draft Staff Report and Substitute Environmental Document (SED), and more than eight years after soliciting them, the Board is continuing to equivocate on whether or how voluntary agreements may be worked into this damagingly delayed update to the Bay-Delta Plan. In doing so, the Board has produced a draft water quality control plan that is inscrutable to the public and incapable of being acted on by decision-makers. It is riddled with possible changes or additions that *could be* integrated if the Board were to

⁵ See filings at U.S. Env'tl Protection Agency, External Civil Rights Docket, 2014 – Present, EPA File #01RNO-23-R9, <https://www.epa.gov/external-civil-rights/external-civil-rights-docket-2014-present>.

adopt the VA alternatives—some of which would modify regulatory requirements full stop (for instance, a new narrative fish viability objective⁶), others of which would apply somehow only to VA parties, and many of which are set forth only as concepts or placeholders still being elaborated by VA parties and await presentation to the Board.⁷ The result is a shell of a document that ultimately serves only to make clear the Board’s reticence to take a stand—either to disavow as it should the irreparably flawed VAs and move forward with a regulatory update based on sound science and Indigenous knowledge, or to own up to the VAs as the Board’s own plan to avoid requiring ecologically necessary flow conditions and confront the inevitable lawsuits that will follow.

For all the reasons set forth in DTEC’s January 19, 2024 comment letter on the draft Staff Report and SED, the VA framework is an irretrievably flawed distraction from the work the Board should be doing to update regulatory water quality standards to protect beneficial uses of Bay-Delta waterways. The VAs are the outcome of a discriminatory and inequitable process, through which water rights holders designed their own rules behind closed doors, shutting out Tribes and disadvantaged Delta communities whose identities and welfare turn on Delta water quality controls as well as the public at large.

As discussed below, the Board would sanction these exclusionary processes by adopting the VAs as its water quality control plan. Doing so would prove hollow the Board’s commitments to advancing racial equity and environmental justice—its promises to “center[] [its] work and decision-making on Black, Indigenous, and people of color who are disproportionately represented in the most vulnerable communities and in unsheltered populations,” to “improv[e] communication, working relationships, and co-management practices with all California Native American Tribes,” and to “address the connection between protecting and managing water resources and systemic and institutional racism.”⁸ It would also put the Board in clear violation of state and federal law, including constitutional prohibitions on delegation of its regulatory authorities discussed below, as well as a host of provisions of the Clean Water Act and Porter-Cologne Act detailed in DTEC’s January 19, 2024 comment letter. Worse still, the Board does all this without any discernible benefit to the watershed: There is a clear consensus from Tribes, affected communities, and scientists that the VAs lack the necessary scientific basis and fail to provide for the flows that are essential to the rebound and survival of this imperiled watershed.⁹ The VA parties’ attempts to belatedly integrate some form

⁶ State Water Resources Control Bd., October 2024 Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed at 23 (Oct. 2024) (hereinafter “Draft Bay-Delta Plan”).

⁷ See, e.g., *id.* at 80-81.

⁸ See State Water Board, Resolution No. 2021-0050, *Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism* (Nov. 16, 2021).

⁹ See Comments by the Delta Tribal Environmental Coalition, Sacramento/Delta Update to the Bay-Delta Plan, 2023 Draft Staff Report and Substitute Environmental Document at 91-94 (Jan. 19, 2024) (hereinafter “DTEC Comments on Bay-Delta SED”).

of tribal engagement into VA implementation cannot cure the discrimination and legal flaws baked into these agreements and their ratification by the Board.

Ultimately, the Board's years-long consideration of the VAs has only slowed this mandatory update to outdated water quality standards, hurrying the decline in the Bay-Delta ecosystem and undermining trust in the Board and the VA parties. DTEC urges the Board to finally dispense with its consideration of the VAs and complete a regulatory update to the water quality standards without further delay.

A. The VA Framework is the Result of a Discriminatory and Inequitable Process and Cannot be Cured through Belated Tribal and Public Engagement

The VAs are contracts between regulators and regulated entities developed in secret without knowledge or participation of Delta Tribes, Delta communities, or the public at large. The only groups that actively participated in the VA negotiations alongside regulators were water agencies, water contractors, irrigation districts, and private companies—that is, large water rights holders that acquired their entitlements through the systematic disenfranchisement of Tribes and people of color.¹⁰ By bringing the disenfranchisement baked into the water rights system directly into its system for water quality control, the Board shows that California water governance remains shaped by the violent, exclusionary, and unjust foundations of California water law.¹¹ In the words of Chief Caleen Sisk of the Winnemem Wintu Tribe, “Nowhere are water policy inequities clearer than in the Bay-Delta ‘voluntary agreement’ process.”¹²

California's water rights system rests on unjust and inequitable foundations. Between 1845 and 1852—as the architecture for state water rights was being elaborated—the State's Indigenous population was cut by two-thirds as the result of murder, disease, starvation, and displacement; overall it is estimated that fewer than 30,000 of the precolonial population of California Native American people survived this period that has come to be known as the California Genocide.¹³ As Governor Newsom has recognized, the State itself endorsed and even legislated a systematic campaign to destroy and remove California Tribes.¹⁴ Additional legal instruments like the California Land Act and land reclamation policies (including the 1887 Dawes Act among others) served as tools for further dispossession and displacement of Tribes from their ancestral homelands. Meanwhile, in a remarkable act of State deception, California

¹⁰ See Amicus Brief by Winnemem Wintu Tribe et al., *Cal. Water Curtailment Cases*, Case Nos. H047270 and H047927 (Cal. Ct. App. Mar. 15, 2022).

¹¹ See DTEC Comments on Bay-Delta SED at 86-89.

¹² “The voluntary agreement process has failed for years to solve the Bay-Delta's water problems. It is, however, working for California's water elite. It maintains their control of water allocations. It has stopped the State Board from requiring more environmental flows in our rivers and the Bay-Delta.” (Op-ed by Chief Sisk and Barbara Barrigan-Parrilla) <https://www.mercurynews.com/2021/09/18/opinion-governor-must-integrate-justice-into-state-water-policy/>

¹³ See generally Benjamin Madley, *An American Genocide: The United States and the Californian Indian Catastrophe, 1846-1873* at 23 (2017).

¹⁴ See State of California, Executive Order N-15-19 (June 18, 2019).

Tribes were compelled to sign eighteen treaties between 1851 and 1852 which would have ceded ancestral lands for reservations and reserved rights to provide for the continuity of tribal lifeways. But at the behest of the California congressional delegation, these treaties were never ratified and instead kept secret for over fifty years until well after treaty-making authorities had been revoked.¹⁵ An enduring consequence for California Tribes is that in addition to being dispossessed of ancestral lands and waters, the state and federal governments' breach of treaty promises has limited Tribes' ability to assert federal reserved water rights—water rights which should have priority of use dating back to the execution of treaties at the inception of California statehood.

Racist state legislation and discriminatory policies have also excluded communities of color for acquiring rights to land, and by extension, water. In the early decades of California statehood, Asian immigration comprised the majority of California's agricultural workforce. By 1880, Chinese immigrants worked across Delta regions as farm owner-operators, large- and small-scale tenants, and laborers. More than 5,000 Japanese California were listed as farm operators on the 1900s census. And "thousands of Filipinas/os in the 1920s and 1930s provided California growers with the cheap, immigrant labor they needed to harvest the 'green gold' growing from the fields and orchards of the Central Valley and Delta. The State, through the 1913 California Alien Land Law and subsequent amendments expanding its discriminatory restrictions, responded by systematically barring Asian immigrants from owning farmland and thereby acquiring water rights.

The disenfranchisement of Asian immigrants is echoed in the stories of Black and Latino/a migrant workers. Governments responded to the growing presence of Black American in the Central Valley in the 20th century through racially restrictive covenants and other discriminatory zoning practices, redlining, and violence. These tactics forced farmworkers of color to move to settlements on the outskirts of Central Valley farmland previously abandoned by white residents because of their lack of water access and concentrated communities of color in overburdened and underserved neighborhoods.¹⁶ The Board itself has acknowledged the multi-generational impacts of their discriminatory policies and their footprint in natural resource access and control today:

The historical seizures of land from people of color have had, and continue to have, long-standing, oppressive impacts that extend beyond the loss of the land itself. These impacts include the loss of the associated water rights and other natural resources of value, lack of access to affordable and reliable governmental

¹⁵ Advisory Council on Cal. Indian Policy, *Historical Overview Report: Special Circumstances of California Indians* 5 (1997) at 5.

¹⁶ See, e.g., Rubin et. al, *Unincorporated Communities in the San Joaquin Valley: New Responses to Poverty, Inequity, and a System of Unresponsive Governance* (Nov. 27, 2007), available at: https://www.prrac.org/projects/fair_housing_commission/los_angeles/Colonias_CRLA_%20PolicyLink%20Framing%20Paper.pdf.

services, and forced relocation to areas with fewer or lower quality natural resources.¹⁷

Today, race remains closely associated with cumulative environmental burdens and historic disenfranchisement, with the top 10% of the most polluted neighborhoods in California comprising 89% people of color and California neighborhoods redlined in the 1930s holding the highest pollution burden and population vulnerability scores today.¹⁸

The upshot of this long lineage of governmental discrimination is that Tribes and communities of color have been vastly limited in acquiring land and capital along with associated riparian or appropriative water rights. Still today, the vast majority of water rights holders (91 percent according to one DWR analysis) and the vast majority of persons who direct water agencies and agricultural water districts are white.¹⁹ And Tribes and communities of color have been disproportionately saddled with the ecological, economic, and cultural damage of a dewatered Delta.

By giving water rights claimants who acquired rights through the dispossession and exclusion of Tribes and communities of color the only meaningful seats at the VA negotiating table, the State brings the racism and genocidal foundations of the water rights systems directly into the Bay-Delta planning process. The State never invited any California Native American Tribe into the VA discussions. Nor did it open the door to Bay-Delta community-based organizations, Tribal non-profits, environmental justice organizations, Delta residents, and other stakeholders fighting for and depending on a healthy Bay-Delta estuary.

When the Board did eventually extend an invitation to non-party stakeholders to engage in any discussion about the VAs, it did so months after the VA framework had been formalized.²⁰ And these invitations have been limited to workshops on “implementation of the [voluntary agreement] program,” eliminating space for meaningful engagement in crafting the terms of agreements themselves.²¹

The Board’s vague proposal to integrate tribal engagement into VA monitoring only continues this trend. The draft proposes to require the VA parties to develop a tribal engagement plan in coordination with California Native American Tribes as well as a Traditional Ecological Knowledge Subcommittee to the VA Science Committee. But it offers no vision for tribal

¹⁷ State Water Res. Control Bd., Res. No. 2021-0050, *Condemning racism, xenophobia, bigotry, and racial injustice and strengthening commitment to racial equity, diversity, inclusion, access, and anti-racism*.

¹⁸ CalEPA, Pollution and Prejudice, <https://storymaps.arcgis.com/stories/f167b251809c43778a2f9f040f43d2f5>.

¹⁹ Restore the Delta, *Analysis: California Water Rights Still 90% White*, (Feb. 27, 2023) <https://www.restorethedelta.org/2023/02/27/analysis-california-water-rights-still-90-white/>.

²⁰ Little Manila Rising et al., *Petition for Rulemaking to Review and Revise Bay-Delta Water Quality Standards* (May 24, 2022), Attachment E, Decl. of Barbara Barrigan-Parrilla ¶ 24.

²¹ *Id.*

engagement beyond a structure that would “inform tribal leaders of progress toward achieving the VA objectives” and provide opportunities for tribal feedback.²² There is nothing in this proposal that suggests that Tribes would have a meaningful role in developing flow and habitat commitments, assessing protection of beneficial uses, shaping adaptive management, or informing the future of the program beyond its protected eight-year period of experimentation. The Board and VA parties would appear to have complete discretion to disregard input from Tribes without explanation or accountability. Nor is there any provision made to fund Tribes for undertaking the labor that this proposal contemplates. Ultimately, Tribes had no role in creating the VA instrument, and vague promises to allow Tribes to inform VA implementation, without compensation for this work or assurances that tribal input will be meaningfully integrated into governance, cannot cure the VA’s inequitable foundations. Nor does it accord due respect to the rights and interests of Tribal Nations as sovereign entities.

In a similar vein, the Board’s proposal for VA governance makes no mention at all of the interests and engagement of environmental justice communities and Delta residents who will be impacted by the VAs.²³ There is no provision for public workshop or outreach, no subcommittee for Delta residents or non-profits, no assured seat at the table in shaping and evaluating the VA experiment as it proceeds. Comments by VA parties at the November and December 2024 workshops underscore that the power to determine flow and habitat commitments will continue to rest with the VA parties—the irrigation districts and water rights holders—not with the affected and excluded public. And it will be up to the VA parties to determine composition and inclusion in governance activities, such as the VA Science Committee. The VA parties, in other words, will continue to determine who is at the table and whose experiences and perspective count as legitimate. This is not how governance of public goods should function.

B. Adoption of the VAs Would Unlawfully Delegate Regulatory Authority to Regulated Parties

As has been discussed extensively in prior comment letters, adoption of the VAs would put the Board in clear violation of federal and state law.²⁴ Among other things, it would violate the Board’s obligation to ensure that its water quality standards have a sound basis in science, that the Board conduct a fulsome triennial review of the performance of water quality standards, that the Board comply with CEQA in its certified regulatory program, and that the Board comply with federal civil rights protections that guarantee the inclusion of racial and linguistic minority groups and Tribes in decisions on public services, benefits, and programs.²⁵ DTEC incorporates these prior comments by reference. DTEC writes here to elevate one such legal defect that goes

²² Draft Bay-Delta Plan at 102-03.

²³ *Id.*

²⁴ See DTEC Comments on Bay-Delta SED.

²⁵ *Id.*

to the core of what’s wrong with the VAs—that in adopting them, the Board would unlawfully delegate regulatory authorities vested in the Board by the Legislature to regulated parties.

An unconstitutional delegation of authority occurs when the governing body: “(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.”²⁶ To avoid an unlawful delegation, the governing body must:

first resolve the truly fundamental issues, and must then establish an effective mechanism to assure the proper[] implementation of its policy decisions. Thus, a delegation of authority must be accompanied by safeguards which insure that the delegatee does not act arbitrarily.²⁷

An unlawful delegation of power occurs not only when the Legislature impermissibly delegates its legislative powers, but also when a regulatory body impermissibly delegates its regulatory authorities to regulated entities. The Court of Appeal in its 2014 decision in *Light v. State Water Resources Control Board* recognized that an unlawful delegation would occur where the State Water Board abdicates its regulatory responsibilities by vesting them in regulated, private parties without establishing adequate policy guardrails and holding ultimate authority to formulate and exercise governing standards.²⁸

As a consequence, while “private entities can formulate and suggest potential regulation, the doctrine of unlawful delegation requires the . . . regulatory agency to exercise the final say over whether any particular regulation becomes law.”²⁹ In addition, the regulatory agency cannot delegate regulatory power to entities “composed of interested members of regulated industries without imposing standards or safeguards to prevent abuse. Absent the required standards, such grants of authority constitute unconstitutional delegations of legislative power.”³⁰

The Board’s adoption of the VAs in lieu of a regulatory Plan update would constitute a textbook instance of unlawful delegation. Under the Porter-Cologne Act, the California Legislature gave specific responsibilities and authorities to the State Water Board. The Legislature designated the State Water Board “the state water pollution control agency for all purposes stated in the” federal Clean Water Act, and it vested authority to establish water quality control plans specifically in the State Water Board and regional water boards.³¹ Notably, the Legislature vested the Board with the authority to establish water quality control plans, including

²⁶ *People ex rel. Lockyer v. Sun Pac. Farming Co.*, 77 Cal.App.4th 619, 633-34 (2000) (quoting *Carson Mobilehome Park Owners’ Ass’n v. City of Carson*, 35 Cal.3d 184, 190 (1983)).

²⁷ *Id.*

²⁸ *Light v. State Water Resources Control Bd.*, 226 Cal.App.4th 1463, 1490-92 (2014) (considering whether the Board’s adoption of Regulation 862 “improperly delegated the regulatory authority of the Board to [water demand management programs]”).

²⁹ *Id.*

³⁰ *Id.* (quoting *Dunn-Edwards Corp. v. S. Coast Air Quality Mgmt. Dist.*, 19 Cal.App.4th, 545-46 n.5 (1993)).

³¹ Cal. Water Code §§ 13160, 13170, 13240.

the duty to periodically review the Bay-Delta Plan pursuant to section 13240 of the California Water Code to ensure that it provides reasonable protection for designated beneficial uses.³²

By adopting the VAs, the Board would effectively abdicate these responsibilities. The Board would vest the power to establish water quality controls, which was given to it by the Legislature, in regulated parties such as water agencies, irrigation districts, and private companies. Instead of setting clear regulatory instream flow standards, the Board would allow parties to decide how much water to leave in streams and how much to engage in habitat restoration. These parties would be given eight years of experimentation with water quality control planning. The VAs would illegally shield the Board from its statutory duties to conduct triennial and periodic reviews of water quality standards through “public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards” and to make the results of that review available to the EPA Administrator.³³ The Board would allow the VA parties to essentially self-assess whether they are meeting the legal requirements needed to protect designated beneficial uses and public trust responsibilities.³⁴ And the Board would merely “designate a representative to participate in the Systemwide Governance Committee as an advisory resource” but not as a voting member.³⁵

The Board relies on an obscure law, Government Code section 11415.60, as the source of authority to accept the negotiated VAs. The draft Plan states that, “[f]or the water rights that are part of the VAs, the State Water Board may issue Government Code section 11415.60 decisions by settlement or other decisions, orders, or regulations to implement and enforce VA commitments in accordance with the below provisions.”³⁶ Section 11415.60 provides that an agency “may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding.” This provision is invoked by agencies that have initiated formal enforcement actions against a licensee that has abused the terms of

³² Cal. Water Code § 13240; *see also* 33 U.S.C. § 1313(c) (requiring triennial review of standards contained in state water quality control plans).

³³ 33 U.S.C. § 1313(c)(1); *United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 108 (1986) (confirming that “every state water pollution control agency must conduct a triennial review of its water quality standards and submit proposed revisions to the Environmental Protection Agency”); Wat. Code § 13240 (requiring that water quality control plans be “periodically reviewed”).

³⁴ Draft Bay-Delta Plan at 71-72, 103-04 (describing process for evaluation and continuation of VAs beyond initial eight-year term); *id.* at 101-02 (describing periodic evaluation of ecological outcomes by VA parties).

³⁵ Draft Governance Program for the Healthy Rives and Landscapes Program (Oct. 18, 2024), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Support-Healthy-Rivers-and-Landscape/Draft_HRLGovernanceProgram_Fall2024.pdf.

³⁶ Likewise, the March 29, 2024 draft Global Agreement to the Healthy Rivers and Landscapes Program in the Bay-Delta describes section 11415.60 as the legal authority to establish an enforcement agreement between parties and the Board. The draft Global Agreement also states that the Enforcement Agreements are enforceable pursuant to Government Code section 11415.60. *See* Section 2.21 of the Draft Global Agreement, <https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Support-Healthy-Rivers-and-Landscape/20240408-HRL-Agreements-0408-2-pm.pdf>; *see also* Draft Strategic Plan for the Proposed Agreements to Support Healthy Rivers and Landscapes at I (Oct. 2024), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2024/strategic-plan.pdf.

their license in service of fair and efficient negotiated settlements of penalties, effectively codifying agencies' "implied power to settle licensing disputes."³⁷ Typical instances of the use of this provision include a settlement by the California Bureau of Gambling Control for revocation of a gambling license and issuance of fines for off-the-book transactions³⁸ and a settlement between the California Corporations Commissioner and a lender to rectify illegal lending practices.³⁹

The Board's contemplated use of section 11415.60 stretches the plain meaning of the law well beyond its intended use, bearing no resemblance to these one-off enforcement settlements. Rather, the Board here seeks to use the provision prophylactically to exempt an entire class of regulated entities from being subject to regulatory water quality controls that might constrain exercise of their license, permit, or vested right. Nothing in section 11415.60 gives the Board authority to allow regulated parties to dictate water quality controls. Nor does section 11415.60 allow the Board to divest itself of the duty to exercise the regulatory authorities vested in it under the Clean Water Act and Porter-Cologne Act. Through so-called Enforcement Agreements, the VA parties have effectively created their own instruments to meet a water quality objective that they themselves have set subject only to the Board's ratification as a shield against regulatory oversight. This is not what the Legislature intended when it codified implied agency dispute resolution authority in section 11415.60.

C. The Board Cannot Evade Federal Oversight of the Revisions the VAs Would Create to Water Quality Standards

To the extent the Board and the VA parties believe they can craft the VAs in such a way as to evade EPA oversight and Clean Water Act compliance, they are clearly wrong. Under the Clean Water Act, states must maintain water quality standards for waters within their jurisdiction which include, at minimum, use designations consistent with Clean Water Act requirements and "water quality criteria sufficient to protect the designated uses."⁴⁰ Any revision to these water quality standards must be submitted to the EPA Administrator, which shall assess the standards for consistency with Clean Water Act requirements and approve or disapprove them based on the results of this assessment.⁴¹ If the EPA Administrator determines that the standards falls short, EPA must specify necessary changes for State adoption and promulgate standard directly if those changes are not accepted.⁴²

³⁷ *Rich Vision Ctrs., Inc. v. Bd. of Medical Examiners*, 144 Cal.App.3d 110, 115 (1983).

³⁸ *Souza v. Cal. Gambling Control Com.*, Case No. C094470, 2023 WL 3673619 (Cal. Ct. App. May 26, 2013).

³⁹ *Growth Resource Group, Inc. v. DuFauchard*, Case No. B202359, 2008 WL 51466897 (Cal. Ct. App. Dec. 9, 2008).

⁴⁰ 40 C.F.R. § 131.6. State water quality standards must also include an antidegradation policy consistent with 40 C.F.R. section 131.12. 40 C.F.R. § 131.6(d).

⁴¹ 33 U.S.C. § 1313(c)(3).

⁴² *Id.*

As DTEC discussed at length in its January 2024 comments on the Draft Bay-Delta Staff Report and SED, it remains clear that the State and VA parties have attempted to construct the VAs with an eye toward circumventing EPA water quality standard oversight and Clean Water Act compliance.⁴³ For instance, the draft Bay-Delta Plan situates the majority of the VA discussion under its proposed program of implementation—which the Board has previously asserted would be submitted to EPA “as part of the continuing planning process, but do[es] not require approval.”⁴⁴

These efforts fail. Adoption of the VAs would substantively modify water quality objectives, including by adding a new narrative fish viability objective and changing other substantive provisions of the Sacramento/Delta tributary inflow, inflow-based outflow, cold water habitat, and narrative interior Delta flow objectives.⁴⁵ Even as to the objectives that remain unaffected by the VAs, EPA will have serious reason to doubt whether they could possibly protect existing and designated water uses and achieve the Clean Water Act’s ameliorative aims when “they would not apply to VA parties during the term of the VAs.”⁴⁶ In other words, the resulting patchwork standards could not possibly meet the Clean Water Act’s requirements to “protect the public health or welfare, enhance the quality of water and serve the purposes of” the Act.⁴⁷ However, styled and situated within the document, it is clear that the voluntary agreements are functioning as a stand-in for regulatory water quality controls and will be treated as such by EPA and the federal courts.

II. The Draft Bay-Delta Plan Makes Clear the Many CEQA Violations Apparent in the Board’s SED

As discussed in DTEC’s comments on the September 2023 Substitute Environmental Document for the draft Bay-Delta Plan, the Board has failed to comply in multiple respects with the demands of CEQA in its environmental review of the draft Bay-Delta Plan.⁴⁸ The Board’s October 2024 release of proposed changes to the Plan makes these deficiencies even more pronounced. These deficiencies include: (1) failing to review the Program of Implementation under CEQA, (2) failing to engage in required government-to-government consultation with Tribes in preparation and review of the Plan as required by Assembly Bill (AB) 52, and (3) failing to articulate a stable project description.

⁴³ DTEC Comments on Bay-Delta SED at 103.

⁴⁴ State Water Board, Resolution No. 2006-0098 ¶ 10; *see also* Draft Bay-Delta Plan at 6 (“To the extent that this plan addresses matters outside the scope of the Clean Water Act, this plan will be provided to the USEPA for its consideration as a matter of state/federal comity.”).

⁴⁵ Draft Bay-Delta Plan at 23.

⁴⁶ *Id.*

⁴⁷ 33 U.S.C. § 1313(c)(2)(A).

⁴⁸ *See* DTEC Comments on Bay-Delta SED.

A. The Board Failed to Review the Program of Implementation as Required by CEQA

Under CEQA, the entire water quality control plan update is a single “project,” which must be reviewed in a single CEQA document. CEQA defines a “project” as the “whole of an action, which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”⁴⁹ Under this definition, “when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project.”⁵⁰ CEQA prohibits chopping a “group of interrelated actions . . . into bite-size pieces to avoid CEQA review.”⁵¹ Yet this is just what the Board has done in excluding the Program of Implementation (POI) from the SED—and, indeed, from any environmental review whatsoever.

As indicated on the face of the draft Bay-Delta Plan and the statute and regulations that govern it, the POI is an integral part of the CEQA project subject to environmental review.⁵² The Water Code defines a water quality control plan to comprise three elements: (1) beneficial uses to be protected, (2) water quality objectives, and (3) a POI for achieving water quality objectives.⁵³ The California Natural Resources Agency certified the Board’s adoption of its water quality control plans as a CEQA-exempt regulatory program.⁵⁴ This means that the preparation of the entire plan is subject to the rules governing certified regulatory programs under CEQA and the Board’s regulations.⁵⁵ The Board is required to prepare substitute environmental documents that comply with the “broad policy goals and substantive standards of CEQA not affected by the limited exemption set forth in section 21080.5(c),” including the requirement to analyze a project in its entirety and to avoid piecemeal review.⁵⁶ The upshot is that the entire water quality control plan—including the beneficial uses to be protected, the water quality objectives, and the POI—are the “project” for purposes of CEQA and must be reviewed together in a single environmental document.

The SED did not consider the POI; indeed, it was explicit that “the specific changes to the Bay-Delta Plan, and specifically the program of implementation, have not been developed yet” at the time of the environmental review.⁵⁷ In failing to subject the POI to environmental review in the SED, the Board unlawfully piecemealed the environmental review and excluded the POI from any environmental impact consideration. This is particularly problematic if the Board were to adopt the VA pathway, which is interwoven throughout the Plan and the effects of

⁴⁹ Pub. Resources Code, 21065; Cal. Code Regs., tit. 14 § 15378.

⁵⁰ *Tuolumne Cnty. Citizens for Responsible Growth v. City of Sonora*, 155 Cal. App. 4th 1214, 1229 (2007).

⁵¹ *Ass’n for a Cleaner Env’t v. Yosemite Cmty. Coll. Dist.*, 116 Cal.App.4th 629, 639 (2004).

⁵² See Draft Bay-Delta Plan at 4 (asserting that the Plan includes the Program of Implementation, which sets forth “the responsible parties and actions required to achieve the [water quality] objectives”).

⁵³ Cal. Water Code § 13241

⁵⁴ 23 Cal. Code Regs. 3775; 14 Cal. Code Regs. 15251(g).

⁵⁵ 23 Cal. Code Regs. 3777; Cal. Pub. Res. Code 21080.5; 14 Cal. Code Regs. 15250, et seq.

⁵⁶ *PANNA v. DPR*, 16 Cal.App.5th 224, 242 (2017).

⁵⁷ See 2023 Draft Bay-Delta Staff Report at 1-2.

which have never been subject to wholesale environmental review. To comply with CEQA, the Board must recirculate an SED that reviews the Project, including the POI, in its entirety.

B. The Board Failed to Engage in Assembly Bill 52 Consultation with Tribes in Preparing the Program of Implementation

The Bay-Delta Plan POI proposes a series of Tribal engagement and consultation mechanisms, addressed in Section IV below. But ironically the POI is silent on one of the Board's most fundamental consultation duties under state law—the requirement to engage in government-to-government consultation with Tribes in the preparation and review of its water quality control plans.⁵⁸ The inclusion of Tribal engagement and consultation mechanisms in the POI does not remedy this failure. Without AB 52 consultation, the Bay-Delta Plan cannot be legally implemented.

As discussed above, the Board's adoption of water quality control plans is a CEQA-exempt regulatory program. Therefore, the Board is required to prepare substitute environmental documents that comply with the "broad policy goals and substantive standards of CEQA not affected by the limited exemption set forth in section 21080.5(c)."⁵⁹ Section 21080.5(c) does not include an exemption for AB 52 consultation. The Public Resources Code section 21080.5(c) exemption for certified regulatory programs embraces only Chapters 3 and 4 and section 21167 of CEQA. AB 52 consultation requirements for CEQA documents are codified in chapters 2.5 and 2.6 of CEQA and thus fall outside the limited exemption.⁶⁰ These sections lay out substantive requirements for public agencies, including the Board, to robustly consider impacts on tribal cultural resources and integrate Tribes' unique expertise and government-to-government engagement in the environmental review process.⁶¹

The Board failed to engage in AB 52 consultation in the development of the SED for the Phase II update released in September 2023 and the POI released in October 2024 as part of the draft Bay-Delta Plan. The Board should have undertaken government-to-government consultation for the entire Bay-Delta Plan update, as required by AB 52. This means engaging in AB 52 consultation in preparation and review of all components of the water quality control plan. Yet the Board undertook government-to-government consultation on none of them.

⁵⁸ AB 52 acknowledges Tribes as experts of their own histories and practices related to the tribal cultural resources with which they are traditionally and culturally affiliated. It also acknowledges the importance of allowing tribal governments to share their knowledge in the environmental review process with the ultimate goal of environmental and cultural resource protection.

⁵⁹ *PANNA v. Dept. of Pesticide Regulation*, 16 Cal.App.5th 224, 242 (2017).

⁶⁰ See Pub. Res. Code §§ 21073, 21075, 21080.3.1, 21084.3.

⁶¹ See A.B. 52, (Ca. 2014), at § 1 (recognizing "that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.").

The Staff Report asserted that the Board is exempt from AB 52 consultation because the Notice of Preparation (NOP) for its review of the Bay-Delta Plan update was filed before AB 52 took effect on July 1, 2015.⁴⁹ It is wrong.

AB 52's requirements apply to any "project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015."⁵⁰ The Staff Report points to the 2012 Supplemental Notice of Preparation as the starting point for Phase II amendments to the Bay-Delta Plan, three years before AB 52 took effect. The Board's assertion that it can bypass government-to-government consultation with Tribes because the Board has kept its legally required update pending for more than a decade is deeply troubling and undercuts the Board's commitments to meaningful engagement with Tribes. It is also mistaken: It was not until at least 2017 that preparation of any environmental analysis for Phase II of the Bay-Delta Plan commenced. In 2017, the Board published a Notice of Opportunity to provide input to inform the development of the POI for the update of the Bay-Delta Plan. The Board should have undertaken AB 52 consultation from that point onwards, consulting with Tribes on a government-to-government basis to understand how the scope of the Plan affects Tribal cultural resources and Tribes' distinct interests in the Bay-Delta watershed. A handful of intertribal meetings where Board members and staff engaged Tribal interests does not satisfy CEQA's mandate for meaningful government-to-government consultation.⁶²

Given that the Board still has not conducted environmental review of the Bay-Delta Plan as a whole, it can still go some ways toward remedying these defects. The Board should immediately issue AB 52 notices and engage in the required consultation with Tribes to identify impacts on tribal cultural resources and alternatives or mitigations to avoid or minimize these impacts. This is the bare minimum of the Board's legal and moral duty to California Native American Tribes that have been cut out of decision-making process.

C. The Board Has Still Failed to Articulate the Stable Project Description Required by CEQA

The Board has repeatedly failed to provide a clear and stable project description as required by CEQA. DTEC's comments on the draft SED discussed this deficiency at length and

⁶² See A.B. 52, (Cal. 2014) at § 5-6 (outlining specific requirements for consultation, including that the "lead agency shall begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation." and "[w]ithin 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, which shall be accomplished by means of at least one written notification that includes a brief description of the proposed project and its location, the lead agency contact information, and a notification that the California Native American tribe has 30 days to request consultation pursuant to this section").

outlined its consequences for informed public consultation and environmental decision-making.⁶³ Rather than remedying this failure by setting forth a clear and stable project, the draft Bay-Delta Plan only makes the problem more pronounced.⁶⁴

Among the core CEQA provisions applicable to certified regulatory program documents are those governing the contours of the CEQA “project” subject to environmental review. The Board must provide “an accurate, finite, and stable description” of the proposed project.⁶⁵ This provision stems from the most foundational demands of CEQA—meaningful public participation in environmental review of proposed agency action and informed public decision-making.⁶⁶ The public and decision-makers must understand what a proposed project will actually entail to enable intelligent public participation and decision-making that is fully informed by analysis of a project’s reasonably foreseeable environmental impacts. When a CEQA document “contains unstable or shifting descriptions of the project, meaningful public participation is stultified.”⁶⁷

The Court of Appeal’s 2017 decision in *Washoe Meadows Community v. Department of Parks & Recreation* is instructive.⁶⁸ There, the agency prepared a draft EIR that set forth five different alternatives to address the Upper Truckee River’s contribution to discharge of sediment into Lake Tahoe, indicating that “following a period for public comment, one of the alternatives, or a variation thereof, would be selected as the project.”⁶⁹ The court held that a CEQA document that “states the eventual proposed project will be somewhere in a ‘reasonable range of alternatives’ is not describing a stable proposed project” as required by CEQA.⁷⁰ Instead, the EIR “functioned more as a scoping plan under CEQA Guidelines section 15083,” which should be formulated prior to environmental review to identify the range of actions, alternatives, and effects to be analyzed.⁷¹ The EIR’s failure “to identify the project being proposed” was a prejudicial error regardless whether the designation of a stable project would have resulted in a

⁶³ Comments by the Delta Tribal Environmental Coalition, Sacramento/Delta Update to the Bay-Delta Plan, 2023 Draft Staff Report and Substitute Environmental Document (2024), at 32-43.

⁶⁴ In a similar vein, the California Administrative Procedures Act (“APA”) requires that regulations, such as the Board’s water quality standards, are clear, consistent, and concise, meaning that their meaning “will be easily understood by those persons directly affected by them” and that they are “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” Cal. Gov. Code. §§ 11349-11349.1. A regulation does not comply with the “clarity” standard if, among other things, it can be “reasonably and logically interpreted to have more than one meaning” or if it “presents information in a format that is not readily understandable by persons ‘directly affected.’” 1 Cal. Code Regs. § 16(a)(1). The Bay-Delta Plan’s piecemeal and inscrutable integration of VA measures and carveouts into water quality regulations plainly fails APA requirements.

⁶⁵ *Washoe Meadows Cmnty. v. Dept. of Parks & Recreation*, 17 Cal.App.5th 277, 287 (2017) (quoting *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d at 192-93 (explaining that an “accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR”)).

⁶⁶ See CEQA Guidelines § 15201; *Washoe Meadows*, 17 Cal.App.5th at 285 (“Informed public participation is essential to environmental review under CEQA.”).

⁶⁷ *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 656 (2007).

⁶⁸ *Washoe Meadows*, 17 Cal.App.5th at 287.

⁶⁹ *Id.* at 283.

⁷⁰ *Id.* at 288.

⁷¹ *Id.*

different outcome. The court deemed the error prejudicial because it thwarted CEQA’s statutory mandate for “informed public participation and informed decisionmaking.”⁷²

As explained in DTEC’s January 2024 comments, the SED suffers from precisely the project description errors that the Court of Appeal identified in *Washoe Meadows*. Rather than identify a clear, stable project, it proposed a range of different project alternatives, disclaiming any as the Board’s actual project proposal.⁷³ This instability is most apparent in the SED’s approach to the VAs.⁷⁴

The Board’s draft Bay-Delta Plan doubles down on this uncertainty. The draft articulates a reasonably lucid set of amendments to the 2006 plan, which track the “proposed plan amendments” in the SED.⁷⁵ Then in the same breath, the draft eviscerates any clarity, asserting that the Board “is considering . . . both possible regulatory provisions and provisions related to Voluntary Agreements (VAs) proposed by State and federal agencies and water users.”⁷⁶ The draft then proceeds to set forth twenty-eight “notes to readers,” most of them asserting that the regulatory text would not apply to some water users or would change substantially if the VAs are adopted. For instance, the Board asserts that if the VAs are “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.”⁷⁷ If this were not inscrutable enough, the Board then announces that adoption of the VAs would also add “a new narrative objective (referred to as the narrative fish viability objective).”⁷⁸ But it makes no effort to break down the compliance locations, parameters, time periods, values, and other dimensions set forth for all other objectives under consideration by the Board or explain how the addition of this objective would affect other water quality objectives in the proposed plan amendments.⁷⁹ The Board’s other “notes to readers” about the implications of the adoption of VAs—which the Board insists remain on the table—are just as vague and inscrutable.⁸⁰

The end result is a multiverse approach to a water quality control plan that continues to put forth the VAs, a regulatory update, or some combination of them as potential pathways. This

⁷² *Id.* at 289-90 (citations omitted).

⁷³ 2023 Draft Bay-Delta Staff Report and SED at 1-20.

⁷⁴ See DTEC Comments on Bay-Delta SED at 99-100.

⁷⁵ 2013 Draft Bay-Delta SED at § 7.1.4.1.

⁷⁶ Draft Bay-Delta Plan at ix (emphasis omitted).

⁷⁷ *Id.* at 23.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See, e.g., *id.* at 50 (“Note to reader: The Board is considering a regulatory pathway and a VA pathway that includes a regulatory pathway applicable to parties not covered under a VA. The regulatory pathway would serve as the regulatory pathway if the VAs are adopted. . . . As described in Chapter 3, if the proposed VAs are adopted, the substantive provisions of the new inflow and cold water habitat objectives may either be incorporated into this section, or may remain as objectives in Table 3 that do not apply to VA parties during the term of the VAs.”)

noncommittal approach leaves the public guessing about what if any updates are actually under consideration and unable to intelligently participate in the review and decision-making process.⁸¹ The Board must make a commitment to a clear and stable project and then subject that project to environmental review and comment before it can proceed toward approval.

III. The Board Should Formally Define, Designate, and Protect Tribal Beneficial Uses through this Bay-Delta Plan

The Board's draft Bay-Delta Plan Update proposes long overdue measures to integrate recognition and protections for Tribal Beneficial Uses into Bay-Delta water quality planning. In May 2022, DTEC petitioned the Board to formally incorporate cultural and subsistence beneficial uses into the Bay-Delta Plan. Two years later, the Board is proposing to do so by formally incorporating Tribal Tradition and Culture (CUL), Tribal Subsistence (T-SUB), and Subsistence (SUB) beneficial uses into the Plan. Incorporation of these uses begins to remedy the damaging failure to recognize culturally-specific uses of Bay-Delta waterways that Tribes have exercised for millennia. The Board also asserts that it is considering formally designating CUL for the entire Bay-Delta watershed through the current Bay-Delta Plan Update in recognition of the thoroughly-documented cultural importance to Tribes of the waterways and the native fish and wildlife they support. DTEC applauds the Board for taking this long-awaited step and urges the Board to complete this formal designation without delay. As discussed below, the Board should also clarify that subsistence fishing uses, which are integral to and inseparable from cultural uses of water, are included within CUL, or if it persists in setting forth distinct definition, it should complete a similar watershed-wide designation for T-SUB and SUB.

Through completing its two proposals—incorporating TBUs into the Bay-Delta Plan and designating CUL for the watershed—the Board is taking critical steps toward fulfilling its obligations under the Clean Water Act and the Porter-Cologne Act to recognize uses and values of Bay-Delta waters. In doing so, the Board also works to realize its commitment to racial equity and environmental justice and to begin to rectify the damage the State has done to tribal identity and culture by undermining federal reserved water rights for Tribes, failing to recognize tribal water rights under state law, and promoting and implementing a colonial system of water rights and governance that has suppressed Tribes' relationships to water. If the Board is seriously

⁸¹ These problems are compounded by the lack of certainty and clarity in the VAs themselves. As EPA noted in its comments on the draft SED, "the public cannot effectively comment on major elements of the [VA] proposal because the proposal is, at this time, uncertain." U.S. EPA, *Comment Letter—Sacramento/Delta Staff Report*, p. 10 (Jan. 19, 2024), <https://www.epa.gov/system/files/documents/2024-01/epa-comments-on-sept-2023-ca-swr-cb-sac-delta-draft-staff-report-2024-01-19.pdf>. For instance, the VA Term Sheet, Staff Report, and Draft Strategic Plan each provide different descriptions of the flow assets, which they assert are "still being negotiated." *Id.* DTEC agrees that "[g]iven the critical role these flow assets will play in resource protection, it is important for the State Water Board to provide a consistent and complete description of the VA proposal being offered as an alternative." *Id.* Even more to the point, the Board must, as the lead agency, make clear its independent position on whether it is advancing the VAs as its proposed water quality control plan amendment so there is a certain project description for the public to weigh in on.

committed to repairing its role in tribal cultural genocide, it must stand by its commitments to formally designate CUL and protect TBUs, and it must center California Tribal Nations in this process.

DTEC accordingly provides the following recommendations to guide the Board's designation of CUL and integration of TBUs through the Bay-Delta Plan. First, the Board should adopt CUL during the current Bay-Delta Plan update on a whole watershed basis, aligning with Tribes' experience of the Bay-Delta watershed as one interconnected system. There is ample evidence that Tribes have exercised traditional, cultural, and subsistence uses throughout the entire Bay-Delta watershed since time immemorial, and thus there is no need for further proceedings to make this designation. Second, in the interests of timely designation, DTEC supports the Board's proposal to designate CUL separately from the other TBUs. Doing so, however, should not be taken as an indication that CUL and T-SUB are distinct beneficial uses. For many Tribes, including those party to this comment, subsistence fishing is integral to and indistinguishable from culture, heritage, and tradition. For these Tribes, the protection of culture inherently implies protection for how Tribes have sustained themselves and their ways of life for generations. Third, as the Board implements TBUs going forward, it should ensure that water quality controls, including flow-based standards, adequately protect TBUs throughout the Bay-Delta, from its headwaters to the Pacific. Fourth, DTEC recommends that the Board set forth a framework for centering Tribes and Traditional Ecological Knowledge in implementation of TBUs, including in setting water quality objectives that assure meaningful protection of TBUs and periodically evaluating the success of the Bay-Delta Plan in attaining those protections.

Implementing TBUs through the Bay-Delta Plan is an important step toward ensuring that the cultural, spiritual, and subsistence traditions practiced by Tribes throughout the Bay-Delta watershed since time immemorial can persist in the face of existential threats posed by the Bay-Delta's degraded water quality, which is being exacerbated by climate change. By integrating TBUs into the Bay-Delta Plan and designating CUL throughout the watershed, the Board will take important steps toward amplifying the voices of Tribes and ensuring the sustainability of their ways of life. The Board will make further progress toward these ends by meaningfully centering Tribes and Traditional Ecological Knowledge in the management of Bay-Delta waterways. If TBUs are protected, the benefits of a healthier Bay-Delta ecosystem will not only serve Tribes but will also extend to all Californians who rely on the water, species, and landscapes of this unique ecosystem.

A. The Board Correctly Proposes to Integrate Tribal Beneficial Uses into the Bay-Delta Plan Update

The Board's proposal to integrate TBUs into the Bay-Delta Plan fulfills promises it made to California Native American Tribes in 2017. At that time, the Board established three new statewide beneficial uses for its water quality control plan for inland surface waters, enclosed

bays, and estuaries: Tribal Tradition and Culture (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing (SUB)—collectively, TBUs.⁸² The EPA approved all three, giving them immediate effect for Clean Water Act purposes.⁸³ These TBUs recognize the unique relationship that Tribes have to California waterways and the plant and animal species they support, and they acknowledge the need for heightened protections for tribal water uses beyond the beneficial uses already recognized in water quality control plans. The Board must not assume that TBUs can be met through protection of other beneficial uses.

The Board has both the legal authority and moral duty to integrate TBUs into the Bay-Delta Plan. Under the federal Clean Water Act and California’s Porter-Cologne Act, the principal law governing the State’s protection of water quality and beneficial uses, the Board must protect water quality throughout California.⁸⁴ The cornerstone of both statutes is promulgation of water quality standards comprising beneficial uses and objectives or criteria to achieve them. In addition, the Board’s 2021 Resolution Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism (Racial Equity Resolution) affirms the Board’s commitment to recognizing and protecting TBUs.⁸⁵ The Racial Equity Resolution recognizes the damage the State has done to Tribes’ cultural, spiritual, and subsistence traditions, including by: dispossessing Tribes of their lands and waterways through colonization, genocide, and displacement and suppressing tribal water rights through broken federal treaty promises and failure to recognize reserved rights under state law. The Board has committed to advancing racial equity and environmental justice in its watershed management. DTEC agrees with the U.S. EPA that the Board’s proposals to incorporate TBUs into the plan and designate CUL throughout the watershed are necessary steps towards fulfilling that commitment.⁸⁶

The inequity of the current water rights system in California—which excludes nearly half of California’s over 200 Tribal Nations from federal reserved water rights and relies on a prior appropriative rights scheme that reflects genocide, displacement, and exclusion—further

⁸² State Water Resources Control Bd., Resolution No. 2017-0027 (May 2, 2017) (hereafter State Water Bd. TBUs Resolution)

⁸³ Tomás Torres, Director, Water Division, EPA letter to Felicia Marcus, Chair, State Water Resources Control Bd. (July 14, 2017).

⁸⁴ 33 U.S.C. § 1313; Wat. Code, § 13160.

⁸⁵ State Water Resources Control Bd., Resolution No. 2021-0050, ¶ 7(a) (Nov. 16, 2021) (hereafter State Water Bd. Racial Equity Resolution).

⁸⁶ See Statement of EPA Regional Administrator Martha Guzman, Bay-Delta Plan Workshop (Dec. 3, 2024), <https://www.youtube.com/watch?v=VWNiLNjJYE> (affirming EPA’s ardent support for designation of tribal cultural water uses for the entire Bay-Delta watershed as well as its positions that designation effectuates the government’s responsibility to aid in the “healing” of the state’s colonial past “by reconciling our western rules with those water uses that preexisted the entirety of our current water governance” and that “it is necessary and appropriate that the Board protect and support fisheries and aquatic resources that have been inextricably linked to tribal ways of life throughout time immemorial”).

underscores the imperative of integrating TBUs into the Bay-Delta Plan.⁸⁷ In a recent comment letter to the EPA, the Board argued that tribal beneficial use designations in water quality standards are a necessary and appropriate tool to protect Tribes' cultural, spiritual, and subsistence traditions, particularly due to the limited reach of water rights for many California Tribes resulting from the sordid history of violence, dispossession, and duplicitous treaty negotiations by federal and state governments.⁸⁸ The undersigned agree. While the Board and the federal government must do more to recognize and protect tribal water rights, the Board is correct that tribal cultural and subsistence uses of water can and should be protected now through water quality control planning. The proposals offered by the Board, in this draft Plan update, start to realize the Board's own ambitions to and guarantee tribal water uses meaningful protection. The Board's proposed action also provides vital recognition of the continuing presence of Tribal Nations in the Bay-Delta watershed and the continuing importance of these waterways to tribal identity, culture, subsistence, and spirituality.

B. Tribal Tradition and Culture (CUL) Must be Designated Across the Watershed through the Bay-Delta Plan Update

1. The Board has the Legal Authority to Designate CUL for the Bay-Delta Watershed

As invited by the Board, DTEC provides the following comments on the Board's proposal to undertake "formal designation of CUL in the Bay-Delta watershed as part of the current update to the Bay-Delta Plan or through a subsequent appropriate process."⁸⁹ DTEC strongly agrees with the Board that formal designation of CUL for the Bay-Delta watershed is necessary "due to the cultural importance of water and native fish and wildlife particularly salmon, to Tribes."⁹⁰ To further aid the Board, DTEC provides the following recommendations to ensure that the designation of CUL is consistent with the evidence before the Board and the Board's commitments.

First, DTEC urges the Board to designate CUL across the entire watershed. This whole watershed approach recognizes that Tribal Nations and tribal people have always lived and experienced the Bay-Delta as one interconnected, interdependent system—stretching from the headwaters to the Pacific—and accords with Indigenous knowledge and lived experience of Bay-Delta Tribes. For instance, tribal elders of the Buena Vista Rancheria of Me-Wuk Indians, whose Rancheria land is located in Southwestern Amador County in the Mokelumne River Watershed, have shared this message:

⁸⁷ State Water Resources Control Bd., Comment Letter on Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, p. 3 (Mar. 6, 2023) (hereafter, "Tribal Reserved Rights Comment Letter"), <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0240>

⁸⁸ *Id.* at 3-10.

⁸⁹ Draft Bay-Delta Plan at 11.

⁹⁰ *Id.*

Ki-ku (water) is life. Ki-ku is a relation. Ki-ku connects us. Past, present, future. Upstream, downstream. Below ground, above ground. All Ki-ku is connected. All water is connected.⁹¹

In a similar vein, Vice Chair Malissa Tayaba of the Shingle Springs Band of Miwok Indians attested to the interconnectivity of Delta waters and peoples in her declaration in support of the Petition for Rulemaking to designate tribal beneficial uses for Bay-Delta waters:

These confluences are not only the location of important village sites; they also symbolize the interconnectivity of our rivers, mirroring our interconnectivity with the water and the life it gives to us, the land, and all living beings.⁹²

The whole watershed approach is also needed to protect migratory species relied on as tribal cultural resources that require healthy conditions throughout the ecosystem. For example, Bay-Delta channels serve as a key migratory route and nursery area for the Nur (salmon), which spend much of their adult life in the Pacific Ocean and return to inland streams and tributaries to spawn. Winnemem Wintu Government Liaison Gary Mulcahy (Ponte Tewis) in his declaration in support of designation of tribal beneficial uses for Bay-Delta waterways spoke to the interconnectivity between Delta waters, the Nur, and the Tribe as a people:

The Winnemem Wintu are a spiritual people. We believe in a creator who gave life and breath to all things. In our creation story we were brought forth from a sacred spring on Mt. Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the salmon, which we call the Nur, took pity on us and gave us their voice, in return we promised to always speak for them. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands of years—the Winnemem speaking and caring for and trying to protect the salmon, and the salmon giving of themselves to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and prayers of the relationship between the salmon the Winnemem Wintu are intricately woven into the very fabric of Winnemem Wintu culture and spirituality.⁹³

Indeed, all other beneficial uses in the Bay-Delta Plan are designated Plan-wide, not limited to specific waterbodies or parts of a waterbody, and CUL should be accorded the same

⁹¹ Presentation by Emily Moloney, Water Coordinator, Buena Vista Rancheria of Me-Wuk Indians to State Water Resources Control Bd. (June 7, 2023).

⁹² Attachment A, Declaration of Malissa Tayba in Support of Petition for Rulemaking at ¶ 8 (hereinafter “Tayaba Decl.”)

⁹³ Attachment B., Declaration of Gary Mulcahy in Support of Petition for Rulemaking ¶ 5 (hereinafter “Mulcahy Decl.”).

treatment.⁹⁴ Treating TBUs designations more restrictively than other beneficial uses of Bay-Delta waters would be discriminatory and would undermine the Board's commitments to center Tribes and Traditional Ecological Knowledge in its watershed management.⁹⁵ Additionally, more narrow designations could raise privacy and confidentiality concerns if Tribes were asked to identify specific locations with spiritual and cultural importance. Such an approach would also cause unnecessary burden and delay for Tribes and the Board alike, as distinct evidentiary burdens and consultation would likely be required for more granular TBU designations. In contrast, Tribes have already provided the Board with abundant evidence of their relationship to and beneficial uses of Bay-Delta waterways as one interconnected system.

Second, given the extensive evidence already in the record of Tribes' irreplaceable connections to and cultural uses of Bay-Delta waters throughout the watershed, the Board is correct to proceed with the designation through the current Bay-Day Plan update.⁹⁶ As just one example of the evidence before the Board, Vice Chair Tayaba has attested to the inextricable entanglement of her ancestors' culture and way of life with Delta waterways, as well as the Tribes' existing and continuing exercise of tribal cultural practices in these ancestral rivers. In the words of Vice Chair Tayaba:

I have been working to return the Tribe to our ancestral Delta waterways and restore connections to our ancestors' culture and way of life. I founded the Tribe's Traditional Ecological Knowledge (TEK) program 5 years ago to begin this process of relearning and reclaiming our culture and healing the alienation that exists for many tribal members. I began TEK's work focused on building traditional regalia for our ceremonies, using resources from Pusune, Wallok, and other sites with river plants and species descended from those gathered by our ancestors. Building that regalia deepened my awareness of the importance of being connected to our villages, the rivers, and the resources they contain. From

⁹⁴ See Draft Bay-Delta Plan at 7 (specifying beneficial uses designated in the Bay-Delta Plan without any geographic limitations).

⁹⁵ The Department of Water Resources (DWR) has recognized the Delta as a tribal cultural resource, referred to as the Delta Tribal Cultural Landscape (Delta TCL), in conducting its CEQA reviews of projects in the Delta. DWR, Final Environmental Impact Report: Delta Conveyance Project, 32-33 (2023) <https://cadwr.app.box.com/s/bt782159x85hnqp6z4wqa2tf0oan3gvl>. DWR acknowledges that the Delta TCL possesses in its whole "culturally valuable physical, spiritual and ceremonial features," and it assesses its project approvals for their effects on the Delta TCL. See DWR, Final Environmental Impact Report: Long-Term Operations of the State Water Project, 7-8 (2024) https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Endangered-Species-Protection/2024-FEIR-Long-Term-Ops/Chapters/07_FEIR_Tribal-Cultural-Resources_508.pdf. The Board itself takes a broader view of the geographic scope of Bay-Delta water quality controls, which have implications for tribal cultural uses of water throughout the entire Bay-Delta watershed, including its naturally and artificially connected headwaters and receiving waters. See, e.g., Draft Staff Report and SED, ch. 7-1 at Figure 7.1-1c; cf. DTEC Comments on Bay-Delta SED at 36-37 (commenting on the SED's unlawful exclusion of the Trinity River from its project and study area, as the Trinity River is both legally classified as part of the Bay-Delta and relied upon for Delta inflows).

⁹⁶ See, e.g. Tayaba Decl.; Mulcahy Decl.; Letter by Shingle Springs Band of Miwok Indians et al. to Executive Director Eileen Sobeck, RE Proposed Addition of Tribal Beneficial Uses to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta (Aug. 21, 2023).

there, we have spent a lot of time reeducating the Tribe about who we are and where we are from, bringing people back to our land and village sites, and teaching them how to make regalia, food, clothing, shelter, and transportation all out of natural resources like our ancestors did. This work reforges and sustains our connection to the rivers and enables us to practice our true way of life, now and for future generations.⁹⁷

Asking Tribes to provide further documentation to prove the existence of their cultural, spiritual, and subsistence traditions in Bay-Delta waters would risk re-traumatization, fail to recognize the substantial investment Tribes have already made in educating the Board, and be unnecessarily burdensome. No additional evidentiary or other proceedings can be needed to designate CUL for the watershed.

Third, the Board should correct the definition of CUL set forth in the Draft Bay-Delta Plan to clarify that tribal tradition and culture encompasses fishing, gathering, and consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials. As discussed below, subsistence fishing is, for Bay-Delta Tribes, integral to tribal tradition and culture. And formally recognizing this in the definition is necessary to align the definition of CUL used in the Bay-Delta Plan with the definition of CUL already adopted by the State Water Board and approved by EPA, which the Board has directed Regional Boards to integrate in their basin plans.⁹⁸

2. Tribal Subsistence Fishing is Integral to Tribal Tradition and Culture

Separately the Board notes the possibility that T-SUB and SUB beneficial uses would be designated waterway-by-waterway by Regional Water Quality Control Boards rather than by the Board itself for the watershed as a whole.⁹⁹ DTEC disagrees with the Board's recommendation to defer T-SUB and SUB designations to Regional Water Boards. Rather as DTEC has previously explained, all TBUs should be designated throughout the whole watershed under the Board's authority just as the Board proposes to do for CUL.¹⁰⁰ It is the Board that has the authority and obligation to protect TBUs in the Bay-Delta Plan. And it is the Board that governs

⁹⁷ Tayaba Decl. ¶ 13.

⁹⁸ See State Water Resources Control Bd., Tribal Beneficial Uses—Cultural Uses of Water (setting forth the following definition for CUL established by the Board in 2017: “Uses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials”).

⁹⁹ Draft PBay-Delta Plan at 11.

¹⁰⁰ See, e.g., Shingle Springs Band of Miwok Indians et al, Request for Reconsideration of Rulemaking Decision of the State Water Resources Control Board Denying Petition to Review and Revise Bay-Delta Water Quality Standards, Ex. G to Title VI Complaint, p. 7 (Aug. 22, 2022).

Bay-Delta water quality standards directly, not the Regional Boards.¹⁰¹ The very existence of the Bay-Delta Plan is evidence of the Board’s longstanding recognition that water quality objectives for beneficial uses in regional basin plans are not sufficient to protect beneficial uses for Bay-Delta waters as a whole and that additional watershed-wide objectives are required.

There are numerous reasons for the Board to treat subsistence fishing beneficial uses similarly to CUL and effect these designations on a watershed-wide basis. Foremost, for Bay-Delta Tribes, subsistence fishing is part of and inseparable from tradition and culture. This is true for DTEC Tribal Nations, as evidenced in the declarations by tribal representatives in support of tribal beneficial use designations for the Bay-Delta watershed.

Vice Chair Malissa Tayaba has attested, for instance, that for her ancestors, Delta waterways were both a “grocery store” and “a source of my ancestors’ spiritual and religious practice, providing materials for traditional regalia, cultural practices, and sites for ceremony.”¹⁰² For instance, Vice Chair Tayaba explains that fish, animals, and plants harvested from the rivers are used to craft regalia used in ceremonial and religious practices: “Every part [of the regalia] has a purpose—it describes who we are and why, and it connects us to the land.”¹⁰³ Fishing and gathering from the river was just as much a matter of culture and spirituality as it was of subsistence; these dimensions of tribal identity cannot be disentangled.

Today the Shingle Springs Band’s work to reconnect its members to the rivers and to tribal identity involves fishing as subsistence and a way of life. Vice Chair Tayaba explains that in purchasing a site at the Tribes’ ancestral village of Wallok at present date Verona, the Tribe has been able “to access our ancestral village site and the resources found at the confluence of the Sacramento and Feather Rivers. Beyond physically getting aback to Verona, there is a newer generation of our tribal youth that need to be exposed to the river, need to learn how to fish, and how to live our traditional ways of life.”¹⁰⁴ One tribal council member, for instance, “takes youth to the Verona area on group fishing trips, as part [the Tribe’s] work to restore traditional diets and food sovereignty.”¹⁰⁵ In teaching tribal members to fish and gather from the rivers for sustenance, ceremony, and cultural tradition, the Tribe has worked to “reforge and sustain[] our connection to the rivers” and fortify tribal lifeways.¹⁰⁶

¹⁰¹ Indeed, the authority to permit and regulate exercise of water rights is vested in the Board, including the authority to impose controls on diversions to protect instream flows necessary to ecological integrity and protection of beneficial and public trust uses.

¹⁰² Tayaba Decl. ¶ 9-10 (“The rivers were my ancestors’ grocery story; their stewardship of Delta plant, animal, and fish species sustained them for millennia. When my ancestors fished these waters, they were abundant. Salmon, striper, catfish, sturgeon, eel, lamprey, and all other fish in the Sacramento area were part of their diet. Ethnographers have documented stories of people walking into the river and catching fish with their hands, they were so plentiful.”).

¹⁰³ *Id.* at ¶ 10.

¹⁰⁴ *Id.* at ¶ 14.

¹⁰⁵ *Id.* at ¶ 16.

¹⁰⁶ *Id.* at ¶ 13.

Likewise, for the Winnemem Wintu, Government Liaison Gary Mulcahy attested that Nur (salmon) are integral to tribal tradition, culture, and identity. In the words of Mr. Mulcahy,

The Nur are at the center of Winnemem Wintu cultural and spiritual life. They were also once the staple of our diet, sustaining us throughout the year. The salmon are gone now, as our other traditional food stocks. Our people now suffer among the highest rates of diabetes of any population in the United States. Obesity and heart disease are common. Our inability to access the salmon and for the salmon to access our watershed are destroying our bodies as well as our spiritual and cultural existence.¹⁰⁷

Without the Nur, the Winnemem Wintu “will not survive as a People.”¹⁰⁸ Tribes, in other words, do not treat subsistence fishing as distinct from tradition and culture, and there is no basis for the Board to do so either.

Second, although the Regional Water Boards can designate TBUs as they relate to their own basin plans, it is the Board that has the superseding authority and obligation to effect beneficial use designations for its own water quality control plans. The Board notably exercised this authority when it effected the statewide water quality control plan for inland waterways to set statewide mercury standards. The Board should do the same here. Without designating T-SUB and SUB, the Board will continue to fail to properly account for subsistence fishing when setting water quality standards that control the Bay-Delta watershed as a whole.

Third, it is arbitrary and discriminatory to segment the designation of T-SUB and SUB to a stream-by-stream basis. Such segmented designation is contrary to ample evidence which shows Tribes have exercised subsistence practices throughout the entire watershed since time immemorial. The native fish that Tribes and subsistence communities rely on migrate throughout this same watershed. This piecemeal designation would also result in differential treatment between subsistence fishing and commercial and sportfishing uses, which enjoy watershed-wide designation.

In sum, DTEC supports the Board’s proposal to designate CUL throughout the watershed in the current Bay-Delta Plan Update. But DTEC also urges the Board to provide subsistence fishing uses the same protections and designate all TBUs watershed-wide, avoiding parceling subsistence practices out of cultural water uses in a manner that does not reflect tribal tradition and lived experience or the evidence before the Board.

¹⁰⁷ Decl. of Gary Mulcahy ¶ 31.

¹⁰⁸ *Id.*

3. The Board must Center Tribal Nations in the Bay-Delta Plan Update and Designation Process

In the process of incorporating TBUs and designating CUL, the Board must center tribal participation and Traditional Ecological Knowledge. Doing so is necessary to realize the Board's commitments to consultation and tribal engagement and to ensure that water quality objectives and their implementation are culturally appropriate and substantively protective of tribal water uses. It is not enough to "incorporate[] TBUs in the context of providing reasonable protection of fish and wildlife."¹⁰⁹ Rather, the Board must actively work to protect tradition and culture, centering people and Tribes, not only the fish and wildlife with whom they are connected. As the Board has previously acknowledged, "[t]he tribes themselves know their unique relationship to waterbodies and the environment and should be given the platform suitable to their unique relationship."¹¹⁰

To this end, the Board should establish a framework for government-to-government consultation with Tribal Nations and engagement with tribal members and non-profit organizations throughout ongoing TBU implementation efforts. This includes partnering with Tribes and tribal non-profits to develop numeric and/or narrative water quality objectives for TBUs and to establish flow-based and other water quality criteria to satisfy the objectives, engaging with Tribes and tribal non-profits to assess whether those water quality objectives and criteria are adequate during regular Bay-Delta Plan reviews, and building tribal capacity to monitor water quality to ensure safe conditions for practicing cultural, spiritual, and subsistence traditions. The tribal advisory group for the Bay-Delta Plan discussed below should play a key role in facilitating this ongoing engagement and participation, including through participation in every triennial review.

The Board must recognize that TBUs are unique beneficial uses and require protection that cannot be fully encompassed by protecting other beneficial uses. As the Board operationalizes TBUs, it should use the full scope of water quality protection tools available to ensure that tribal water uses are protected—including adopting flow-based criteria. Low flows and degraded water quality impair Tribes' ability to practice cultural, spiritual, and subsistence traditions throughout the Bay-Delta watershed. The flows and water volumes needed to protect tribal water uses have important differences from those needed to protect other designated beneficial uses, such as fisheries and aquatic habitat uses. The "[i]mplementation measures for the reasonable protection of fish and wildlife" will not ensure that tribal subsistence fishing, nor subsistence fishing more generally, are protected.¹¹¹ Relatedly, CUL cannot be "directly supported" by attempting to indirectly protect it through flow actions for other beneficial uses.¹¹²

¹⁰⁹ Draft Bay-Delta Plan at 10.

¹¹⁰ Tribal Reserved Rights Comment Letter at 12.

¹¹¹ Draft Bay-Delta Plan at 10.

¹¹² *Id.*

Tribes interact with the water in culturally specific ways. Many Tribes engage in greatly elevated levels of fish consumption through subsistence fishing practices relative to the average consumer, some directly ingest and immerse in water during ceremony, and others put reeds in their mouths during basket weaving. TBUs, in other words, require distinct regulatory protections.

Incorporating CUL and designating TBUs in the Bay-Delta Plan are important first steps, but meaningful protection of tribal water uses will not occur until the State Water Board operationalizes TBUs by establishing water quality objectives and a program of implementation that substantively safeguard tribal uses of Bay-Delta waters.¹¹³ The Board should commit to undertaking these steps in accordance with its statutory requirement to review the Bay Delta Plan every three years. Although Bay-Delta Plan review has lagged decades behind this statutory deadline, past failures must not hinder progress on protection of TBUs. Rather, TBU implementation provides an opportunity for the Board to make good on its statutory obligations to regularly review and update the Bay-Delta Plan to assure protection of designated uses.

IV. The Board Should Clarify and Strengthen its Tribal Consultation and TEK Proposals

In Section 4.5.3 of the draft Bay-Delta Plan, the Board outlines steps it plans to take to engage with Tribes and incorporate Traditional Ecological Knowledge (TEK) to inform the Board's effort to implement the Bay-Delta Plan's regulatory pathway. As mentioned in the previous sections, until the POI is subject to environmental review and until the Board conducts AB 52 consultation, the POI should not be adopted. Notwithstanding these critical steps, this section examines the Board's proposals for Tribal engagement and consultation in the POI.

DTEC appreciates the Board's efforts to integrate tribal decision-making and self-governance into the Plan. As the Board is aware, it has a legal and moral obligation to do so in light of the State's well-documented and acknowledged participation in the California Genocide and suppression of tribal water-based practices.¹¹⁴ While the undersigned endorse the Board's general suggestions, DTEC remains concerned that the Board's proposals are overly vague and do not go far enough in respecting Tribes' legal status as sovereigns or meaningfully integrating Tribes and Indigenous knowledge into water governance. DTEC provides the following suggestions to assist the Board in realizing its commitments in the consultation and engagement process and in integrating TEK into Plan implementation.

The list below includes proposals set forth in section 4.5.3 of the draft Bay-Delta Plan together with DTEC's recommendations for improvements.

¹¹³ State Water Bd. TBUs Resolution, ¶ 12 & Resolution 7. This directive does not preclude elevating flow requirements to protect TBUs for needs unrelated to fisheries or aquatic habitat. In fact, the Resolution expressly recognizes that flow objectives may be established for CUL beneficial uses.

¹¹⁴ See DTEC Comments on Bay-Delta SED at 6-13.

1. *Develop and regularly update a tribal engagement plan in coordination with California Native American Tribes for consultation, outreach, and engagement to incorporate tribal knowledge and perspectives into its Bay-Delta Plan update, and implementation effort*

Recommendation: DTEC supports the development of a tribal engagement plan governing Bay-Delta Plan implementation as well as future triennial reviews and Plan updates to ensure that consultation missteps are not repeated. The tribal engagement plan should provide for AB 52 consultation on environmental review documents for Bay-Delta Plan updates and implementation measures, as well as ongoing Tribal consultation in water quality monitoring, triennial reviews, and other implementation and assessment processes. The Board should be explicit that its commitment is to engage in government-to-government consultation with all State-recognized Tribes in the Bay-Delta watershed, from its headwaters to the Bay and including Tribes in the Klamath River basin affected by inflow of Trinity River water into the Sacramento River. And it should be explicit that its commitment is to consult with State-recognized Tribes, as required by state law and in recognition of the State's complicity in thwarting nearly half of California Native American Tribes from accessing trust lands and other mechanisms for federal listing.

While DTEC agrees with the Board that a tribal engagement plan will bring valuable clarity and consistency to tribal engagement in Bay-Delta water governance, DTEC recognizes that the plan may take time to develop as the Board engages in outreach to Tribes to inform the policy. Consequently, the Board should clarify that it will engage in tribal consultation under AB 52, Executive Order B-10-11, and its existing tribal consultation policy while developing its new tribal engagement plan.

2. *Establish a tribal listening session once per year and establish periodic reviews to share updates and hear feedback*

Recommendation: The Tribal listening sessions the Board has undertaken on the Bay-Delta Plan since 2023 have provided important space to engage tribal concerns and priorities outside formal government-to-government consultations and general public comment periods. DTEC urges the Board to build on this precedent in recognition of the legal status of Tribes as sovereign nations and their unique interests and contributions to water management. But in doing so, it should heed the lessons of the past two years. First, an annual session is too infrequent to support meaningful public engagement and would likely exclude many eager participants. Offering these sessions on a quarterly basis would increase the possibility of participation and allow for more iterative engagement, making these sessions something other than a pro forma exercise. Second and in a similar vein, the Board should commit to genuine dialogue with tribal participants in these sessions and actionable follow-up in service of meaningfully integrating tribal feedback and perspectives into Bay-Delta governance. To this end, DTEC recommends that the Board share updates at each quarterly listening session,

which should include reporting back on steps taken in response to comments from prior sessions.

3. *Create a Bay-Delta Tribal Advisory Group to provide input to SWRCB on Bay-Delta Plan update and implementation issues and related matters*

Recommendation: Establishing a Tribal Advisory Body to advise on Bay-Delta water governance should be a priority for the Board. This body should be treated as a core component of the Board's decision-making on Bay-Delta water quality control matters with the ability to exercise authority delegated by the Board. To this end, the Board and its officers should communicate with and engage recommendations from the Tribal Advisory Body about proposed actions on Bay-Delta water quality control at the inception of decision-making processes. The Board should also proactively seek input from the Tribal Advisory Body on matters including tribal consultation and engagement, protection of tribal beneficial uses and tribal interests, and engagement of Traditional Ecological Knowledge and tribal partnerships to improve water quality monitoring and control.

The Tribal Advisory Body's composition, structure, authorities, and meeting frequency should be determined in consultation with Tribes and formalized in a charter or similar document. Meeting agendas should be created by the Tribal Advisory Body, informed by Board input, and together with meeting minutes should be publicly posted and maintained on the Board's website and distributed to the Board's tribal contact list.

4. *Engage in Government-to-Government consultations on Board's actions, policies, and processes*

Recommendation: Government-to-government consultations should be governed by the Board's forthcoming tribal consultation plan and should include AB 52 consultation on CEQA documents (including SEDs). The Board should engage in government-to-government consultation during implementation, monitoring, and review of the Bay Delta Plan, as well as in the formulation of new or modified policies. The Bay-Delta Plan should describe in detail how the Board will incorporate input received during government-to-government consultations with Tribes into its work. This should include a requirement that the Board provide a written description to each Tribe following consultation of outcomes of the consultation, including how input was incorporated and made actionable by the Board.

5. *Improve tribal engagement processes using existing resources and devote additional resources as they become available.*

Recommendation: DTEC appreciates the Board's recognition that engagement and consultation on Board processes is resource-intensive for Tribes and that the Board must be a proactive partner in filling resource gaps. Tribes are asked to consult on a broad

range of agency actions that affect their cultural resources and interests beyond the business of the Board, often with limited or no dedicated funding to support these activities. Securing additional resources to support Tribes in building and sustaining capacity to engage with the Board on water governance is critical and should be a priority for the Board.

As resources are made available to Tribes, those resources should not only go toward consultation and engagement: The Board should also provide funding for Tribes to directly perform water quality monitoring in the watershed as part of Bay-Delta Plan implementation and periodic review. Tribes are already engaged in water quality monitoring. For instance, Shingle Springs Band of Miwok Indians operates a water quality monitoring program to make sure that water-based cultural and ceremonial practices are safe to perform and to support the Tribe's stewardship of waterways at culturally important locations. Funding and training would help Tribes build capacity to undertake water quality monitoring, both to inform the safety of their water-based practices and to fill data gaps for HABs and other water quality parameters throughout the watershed.

6. *Consider and incorporate TEK, tribal feedback, and perspectives shared by California Native American Tribes to inform the Board's efforts to update and implement the Bay-Delta Plan. If the Board develops specific policies and guidelines regarding incorporation of TEK, adhere to those policies and guidelines.*

Recommendation: The Board proposes to adhere to its own policies and guidelines regarding incorporation of TEK *if* they are developed. While the Board must of course adhere to its own policies, the Board's commitment should not be conditional. The Board should commit to developing a TEK policy to guide the integration of TEK into Bay-Delta water governance.

The policy should approach TEK as a place-based, living knowledge system integrated into decision-making through active partnership with Tribes. Tribes must be given the formal policy for review, comment, and approval before the policy goes into effect.

The integration of TEK should not be relegated only to monitoring but should be meaningfully incorporated into triennial reviews and future updates to water quality objectives and programs of implementation. This will require sustained engagement and consultation with Tribes, including through the Tribal Advisory Body, formal consultations, and coordination with Tribes for future Bay-Delta planning. Lastly, this policy should apply more broadly to state and regional board processes, not only to the Bay-Delta Plan.

7. *Follow the CARE principles in considering TEK.*

Recommendation: DTEC endorses the Board’s proposal to follow the CARE principles for Indigenous data governance. However, the Board must be more explicit in the rules and policies it will abide by to assure Indigenous data sovereignty. It should revise the Bay-Delta Plan to make its position clear that Indigenous data, including knowledge related to sacred and culturally important sites and practices, is *always* the property of the Tribe and can never be required to be divulged without the Tribe’s consent or used without the Tribe’s active partnership. The Board should also be explicit that it will develop and abide by safeguards to protect the confidentiality of sensitive Indigenous data and prevent its inadvertent disclosure and misuse. The Board should provide training for its staff on the CARE principles and other protocols to safeguard Indigenous data sovereignty. And it should be explicit that it will approach Indigenous knowledge or TEK not as a static body of knowledge that can be extracted from Tribes to inform policymaking but rather as the “living environmental governance of indigenous peoples” that must be exercised in active collaboration and partnership with the Tribes themselves.¹¹⁵

V. The Board Should Adopt an Enforceable Surface Water Objective for HABs

DTEC appreciates the Board’s commitments to address HABs in the October 2024 draft Bay-Delta Plan. These include actions to implement the Freshwater Harmful Algal Bloom Monitoring Strategy required by Assembly Bill 834 within the Bay-Delta watershed, as well as a Special Study Relating to HABs as part of the Bay-Delta Monitoring and Evaluation Program. That study will inform the development of mechanistic and predictive HABs modeling and test the efficacy of HABs management and mitigation measures.¹¹⁶ DTEC also appreciates the Board’s plans to coordinate with California Native American Tribes and environmental justice communities on efforts to implement the Delta CHABs Monitoring Strategy.¹¹⁷ These are important steps toward ensuring that monitoring prioritizes the protection of public health and safety.

However, the Board continues to ignore DTEC’s request that the Board adopt numeric water quality criteria for HABs.¹¹⁸ In doing so, the Board flouts the EPA’s mandate that it consider adopting the EPA’s recommended HABs criteria, published pursuant to notice and comment more than five years ago. While DTEC appreciates the Board’s commitments to better track and monitor HABs, the prevalence of the problem is well-known. HABs require urgent redress through an enforceable standard in light of their severe public health impacts. Despite ample evidence that HABs can be managed by increasing flows, and that increased flows are the most effective means of addressing the problem, the draft Bay-Delta Plan focuses merely on

¹¹⁵ Kyle Whyte, *On the Role of Traditional Ecological Knowledge as a Collaborative Concept: A Philosophical Study*, *Ecological Processes* 2:7 at p. 5 (2013).

¹¹⁶ Draft Bay-Delta Plan at 117, 123.

¹¹⁷ *Id.* at 123.

¹¹⁸ See DTEC Comments on Bay-Delta SED at 79-81.

improving science, research, monitoring, and modeling of HABs. The furthest the Plan goes towards corrective action is in suggesting that the Board will “identify possible management and mitigation measures that could be used to controls HABs in the Delta.”¹¹⁹ This is insufficient. Achievable management and mitigation measures, such as adequate flows, are well understood, and it is the Board’s responsibility to adopt enforceable HABs standards to ensure that such protective measures are put in place.

As DTEC discussed in its comments on the Draft Staff Report and Substitute Environmental Document, EPA adopted recommended human health recreational ambient water quality criteria for HABs on June 6, 2019 under Clean Water Act section 304(a).¹²⁰ EPA’s final recommended human health recreational ambient water quality criteria for the cyanotoxins *microcystins* and *cylindrospermopsin* identify maximum concentrations of these cyanotoxins that would be protective of human health given a primary contact recreational exposure scenario. Those concentrations are 8 µg/L for microcystins and 15 µg/L for cylindrospermopsin, using 10-day assessment periods.¹²¹ EPA’s recommended criteria represent a regulatory floor to address HABs through water quality standards. These levels are less protective than the trigger levels set forth in the California Voluntary Guidance for Response to HABs in Recreational Inland Waters for advisory notification, which set Tier 1 Caution warning levels at 0.8 µg/L for microcystins and 1 µg/L for cylindrospermopsin.¹²²

Under the Clean Water Act, the Board must either adopt EPA’s recommended criteria for microcystins and cylindrospermopsin in this long-overdue triennial review and update, or, if it declines to do so, it must “provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with [Clean Water Act] section 303(c)(1).”¹²³ The draft Bay-Delta Plan is silent on EPA’s recommended water quality criteria for microcystins and cylindrospermopsin, and the Board has still not provided any indication for why it would decline to adopt these criteria.

The Board must create water quality standards that are scientifically defensible and protective of designated uses.¹²⁴ The Board can do this “by adopting criteria based on (1) the EPA’s recommended criteria, (2) the EPA’s criteria modified to reflect local conditions, or (3) other scientifically defensible methods.”¹²⁵ The Board not only has access to EPA’s recommended criteria, but the State has also already done the work to develop its own health-

¹¹⁹ Draft Bay-Delta Plan at 123.

¹²⁰ 84 Fed. Regs. 26413 (2019).

¹²¹ *Id.*

¹²² California Voluntary Guidance for Response to HABs in Recreational Inland Waters, https://mywaterquality.ca.gov/habs/resources/habs_response.html.

¹²³ 40 C.F.R. § 131.20(a).

¹²⁴ 84 Fed. Reg. § 26414 (2019).

¹²⁵ *Id.*

based criteria for HABs specific to California waterways.¹²⁶ The Board simply has not taken the requisite next step of translating those criteria into water quality objectives modified to reflect local conditions. Were it to take the third, alternative approach, the Board would need to explain how it would adopt HABs criteria based on other scientifically defensible methods.

Without a HABs objective, HABs will continue to cause widespread damage and endanger public health. As DTEC explained in its comments on the Draft Staff Report and Substitute Environmental Document, HABs detrimentally impact beneficial uses, especially recreation and fishing.¹²⁷ Furthermore, HABs impair Tribal Beneficial Uses and create disparate impacts on Tribes and Native communities.¹²⁸ Finally, HABs have severe impacts on air quality and human health, particularly in already overburdened environmental justice communities like South Stockton.¹²⁹ To meet its obligations to protect the public trust and provide for the reasonable protection of beneficial uses, including Tribal Beneficial Uses, DTEC once again urges the Board to adopt a water quality objective for HABs, using the EPA's recommended water quality criteria as a baseline to create numeric objectives.

CONCLUSION

The Delta Tribal Environmental Coalition urges the Board to adopt DTEC's recommendations for the regulatory pathway regarding the designation of Tribal Beneficial Uses for Bay-Delta waterways, Tribal consultation and Traditional Ecological Knowledge proposals, and the adoption of an enforceable surface water objective for harmful algal blooms. That regulatory pathway must be the sole path forward to comply with CEQA's requirements for a stable project description and the APA's requirements for clarity and certainty in rulemaking, to satisfy state and federal water quality control law, and because the voluntary agreement pathway remains illegal and inequitable. DTEC urges the Board to move forward with Tribal Beneficial Use designations and a regulatory pathway to protect these and other existing and designated uses without further delay.

Respectfully Submitted,

/s/ Stephanie Prufer

Thomas Peterson, Student Attorney

Stephanie Prufer, Student Attorney

Naji Thompson, Student Attorney

¹²⁶ California Cyanobacteria and Harmful Algal Bloom (CCHAB) Network, Appendix to the CCHAB Preliminary Changes to the Statewide Voluntary Guidance on CyanoHABs in Recreational Waters 1 (Jan. 2016).

¹²⁷ See Comments by the Delta Tribal Environmental Coalition, Sacramento/Delta Update to the Bay-Delta Plan, 2023 Draft Staff Report and Substitute Environmental Document (2024) at 81-83.

¹²⁸ *Id.* at 83-84.

¹²⁹ *Id.* at 84-86.

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Executive Director
Restore the Delta

* This letter does not purport to state the views of Yale Law School, if any.

ATTACHMENT A

1 I, Malissa Tayaba, declare as follows:

2 1. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little
3 Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians,
4 and Winnemem Wintu Tribe. The matters stated herein are stated upon my personal knowledge
5 and, if called to testify, I could and would testify competently to them.

6 2. I am a member of the Shingle Springs Band of Miwok Indians, Indigenous Peoples of
7 the Sacramento Valley. Since time immemorial, our ancestors stewarded and utilized resources
8 from Delta waterways – including the Sacramento, American, Feather, Bear, and Cosumnes Rivers
9 – for sustenance, medicine, transportation, shelter, clothing, and ceremony, among other cultural
10 and subsistence uses. Our history, sacred sites, and cultural resources are found throughout these
11 waterways. I was raised in the west side of Sacramento, near the Nisenan village of Pusune at the
12 confluence of the American and Sacramento Rivers. When I was four, my family relocated to the
13 Shingle Springs Rancheria in El Dorado County, about 40 miles east of Sacramento. Two years
14 ago, I moved my family from the Rancheria to Verona, near the Nisenan village of Wallok at the
15 confluence of the Feather and Sacramento Rivers, to deepen our connection with the waterways,
16 natural resources, and sacred sites that are our lifeblood.

17 3. For nearly two decades, I have worked for the tribal government. I founded our
18 Traditional Ecological Knowledge (TEK) program to help preserve the Tribe’s traditional lifeways,
19 natural resource management, and spiritual practices so that these teachings can be passed down
20 through the generations. Traditional knowledge and cultural revitalization are vital elements of
21 who we are as tribal people. In 2021, I began a three-year term as a Vice Chair of the Tribe, where
22 I am continuing to serve as a cultural leader and culture keeper for the Tribe. I submit this
23 testimony based on my personal experience of conditions in and around Verona, as well as my
24 experience as Vice Chair with the challenges the Tribe has faced accessing cultural resources and
25 sacred sites along our ancestral waterways.

26 **My Timeless Connection to Delta Waters**

27 4. My family is descended from the Nisenan and Miwok Tribe, who had village sites
28 along the Sacramento River, stretching at least from the confluence with the Feather River down to

1 what is now the Freeport area of southern Sacramento. This particular area of my Tribe's vast
2 ancestral territory is also known as Nissim Pawenan. Among many others, two sites of particular
3 importance to me, my family, and Tribe are the Nisenan villages of Pusune and Wallok.

4 5. Pusune lies at the confluence of the Sacramento and American Rivers, located in what
5 is today downtown Sacramento in an area known as Discovery Park. Pusune was the birthplace of
6 Pamela Cleanso Adams, the matriarch of my family. Pamela is believed to have been born between
7 1832 and 1850; though the exact date is unknown, a newspaper referred to her as a centenarian
8 when she passed in 1932. Pamela witnessed and experienced firsthand the colonialism, State-led
9 violence, disease, privatization of land, and other forms of dispossession that decimated Native
10 populations and forced many people from their ancestral lands and waterways. Through these
11 attacks on her way of life and existence, Pamela survived. She carried my family's name and is the
12 one the Adams clan are all descended from. To my family, she is our matriarch – who we are
13 evolved from. Despite the State's and colonizers' efforts to remove and dispossess our ancestors,
14 Pamela always remained at the water, connected to Delta species and natural resources.
15 Emblematic of her deep relationship to Pusune, Pamela tethered her houseboat to the confluence
16 and lived there until her death. This relationship is timeless; she was born at the confluence, lived
17 and died at the confluence, and her presence, along with many other ancestors, remains there today.
18 Many members of my family – direct descendants from Pamela – remained near the confluence for
19 generations.

20 6. In addition to Pusune's importance as the birthplace of Pamela and the ancestral home
21 of the Adams clan, the village's strategic location also makes it a significant site. Situated where
22 the Sacramento and American Rivers meet, Pusune was highly trafficked, as our ancestors traveled
23 up and down the rivers. The value of this confluence as a center of life was recognized by non-
24 Native settlers, who chose to build Sacramento on the same site.

25 7. Wallok is located at the confluence of the Sacramento and Feather Rivers, in what is
26 now known as Verona. In the mid-nineteenth century, this area was a haven where Nisenan and
27 Hawai'ian communities comingled. Alongside Wallok, this confluence was also home to a
28 Hawai'ian village established by native Hawai'ians who were forcibly brought to Nisenan territory

1 in 1839 by Swiss land baron John Sutter. Sutter enslaved hundreds of Native people to power his
2 nearly 50,000-acre ranch in the Sacramento Valley. Both Wallok and the Hawai'ian village were
3 fishing villages, and residents often traveled up and down the rivers to catch and sell fish. The
4 Nisenan and Hawai'ian communities interacted in Verona, and the cultures became mixed as they
5 married and had children together. This is my family's story: Pamela traveled from Pusune to
6 Wallok, where she married a Hawai'ian man from the village. Though Pamela was rooted in
7 Pusune, she would travel to Verona often, lived there for a period, and spent significant time there
8 within the community.

9 8. These confluences are not only the location of important village sites; they also
10 symbolize the interconnectivity of our rivers, mirroring our interconnectivity with the water and the
11 life it gives to us, the land, and all living beings.

12 9. The rivers were my ancestors' grocery store; their stewardship of Delta plant, animal,
13 and fish species sustained them for millennia. When my ancestors fished these waters, they were
14 abundant. Salmon, striper, catfish, sturgeon, eel, lamprey, and all other fish in the Sacramento area
15 were part of their diet. Ethnographers have documented stories of people walking into the river and
16 catching fish with their hands, they were so plentiful.

17 10. The rivers were also a source of my ancestors' spiritual and religious practice,
18 providing materials for traditional regalia, cultural practices, and sites for ceremony. Traditional
19 regalia is fundamental to our religious practice. Every part has a purpose – it describes who we are
20 and why, and it connects us with the land. My ancestors precisely and skillfully crafted regalia
21 from various traditional resources found along the rivers. They created headpieces from feathers of
22 waterfowl like egrets and blue heron; fashioned skirts from the barks of willows, cottonwoods,
23 dogwoods, dogbane, and other river plants; and adorned regalia with abalone, clam, and other shells
24 gathered from the rivers. Plants, roots, and berries found along the rivers also played an important
25 role in religious ceremony. For example, my ancestors harvested mugwort along the rivers near
26 Pusune and Wallok and burned it for cleansing purposes in almost all of their ceremonies. The
27 mugwort that I and other members of the Tribe harvest at these sites today is descended from the
28 plants gathered by my ancestors, connecting us to them.

My Cultural Survival Requires a Healthy Delta

11. When my family was removed from their ancestral rivers through colonialism, genocide, discriminatory laws, disease, and other forms of dispossession, much of our language and many of our cultural and spiritual practices were lost. At that time, my family and other tribal ancestors were known as the Verona Band of Homeless Indians. Later, we became the Shingle Springs Band of Miwok Indians, after the Secretary of the Interior purchased 160 acres for our ancestors in Shingle Springs, California in 1920. This rocky, inhospitable land is about 40 miles from Pusune and the Delta waterways that have been our lifeblood since time immemorial. The Rancheria land was inaccessible to my family and many other tribal members for decades after it was put into trust for our Tribe.

12. Despite these many obstacles, I have remained connected to the Delta waterways and landscapes that have always been my family's home. I spent much of my childhood driving back and forth between the Shingle Springs Rancheria and Sacramento to access my family's ancestral home in Pusune and the cultural and spiritual resources found at the confluence of the Sacramento and American Rivers.

13. I have been working to return the Tribe to our ancestral Delta waterways and restore connections to our ancestors' culture and way of life. I founded the Tribe's Traditional Ecological Knowledge (TEK) program 5 years ago to begin this process of relearning and reclaiming our culture and healing the alienation that exists for many tribal members. I began TEK's work focused on building traditional regalia for our ceremonies, using resources from Pusune, Wallok, and other sites with river plants and species descended from those gathered by our ancestors. Building that regalia deepened my awareness of the importance of being connected to our villages, the rivers, and the resources they contain. From there, we have spent a lot of time reeducating the Tribe about who we are and where we are from, bringing people back to our land and village sites, and teaching them how to make regalia, food, clothing, shelter, and transportation all out of natural resources like our ancestors did. This work reforges and sustains our connection to the rivers and enables us to practice our true way of life, now and for future generations.

1 14. Our TEK program has come a long way in the last few years, including purchasing
2 land in Verona that enables us to access our ancestral village sites and the resources found at the
3 confluence of the Sacramento and Feather Rivers. Beyond physically getting back to Verona, there
4 is a newer generation of our tribal youth that need to be exposed to the river, need to learn how to
5 fish, and how to live our traditional ways of life.

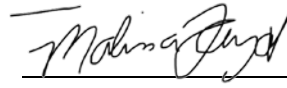
6 15. Despite our successes building our cultural knowledge and regaining access to our
7 ancestral waterways and resources, the degraded condition of the Delta interferes with our efforts to
8 do the reeducation that is vital to our cultural survival. For example, traditional riparian cultural
9 resources – like tule, a long grassy plant that once lined the waterways and served many purposes
10 for our ancestors and is continued to be used by tribal members today, including in regalia, basket
11 weaving, transportation, and shelter – either no longer exist or are not safe to gather and use
12 because of water quality issues. For example, I was down at Pusune recently and saw elderberry
13 (which is an important medicine), one of the last sedge beds in the area, and new growth of willow
14 and mugwort. But I also saw the polluted, stagnant quality of the water that sustained them. And
15 the question is, how healthy are these plants for our medicinal, cultural, and spiritual uses, which
16 together amount to religious uses?

17 16. Harmful algal blooms are becoming more and more of an obstacle for us every year in
18 accessing traditional cultural resources, furthering the alienation already posed by the Delta's
19 degraded state. For example, one of our tribal council members takes youth to the Verona area on
20 group fishing trips, as part of our work to restore traditional diets and food sovereignty. Last year,
21 these fishing trips were derailed because there were blooms all over the sloughs just up-river from
22 Verona. So even if they could catch fish, they knew they could not eat them because of the risk of
23 toxic exposure from the harmful algal blooms.

24 17. Although the landscape and the waterways have changed, we remain. We continue
25 the seasonal gathering and the traditional teachings, we bring back the medicine, the ceremonies,
26 and songs. We are the survivors of disease, colonization, genocide, and removal. We return to
27 Pusune, Wallok, and other important sites to remember, reconnect, teach, learn, and restore. We
28 cannot do this work without healthy rivers – the lands, plants, fish, and animals that connect me and

1 my Tribe to our ancestors and that are interwoven with my culture, religion, and identity cannot
2 exist if there is not enough water in the Sacramento River and its tributaries to create the conditions
3 needed to support life. If Delta water quality continues to deteriorate, I fear that the resources and
4 landscapes we are working so hard to restore our connection to will become increasingly unsuitable
5 for use or disappear altogether. Such loss would amount to cultural genocide for our Tribe.

6
7 I declare, under penalty of perjury, that the foregoing is true and correct to the best of my
8 knowledge and recollection. I executed this declaration on 23 May 2022 in Shingle Springs, CA.

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11 _____
12 Malissa Tayaba
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ATTACHMENT B

1 I, Gary Mulcahy, declare as follows:

2 **Background**

3 1. My English name is Gary Mulcahy. My Winnemem Wintu name is Ponti Tewis. I
4 am a member of the Winnemem Wintu Tribe, and the Government Liaison for the Tribe. I have
5 worked on and represented the Tribe on issues related to water flows, salmon runs, and tribal
6 sovereignty and cultural use and access continuously from the late 1990s. I am testifying in that
7 capacity. The matters set forth herein are stated upon my personal knowledge, and if called to
8 testify, I could and would testify competently as to them.

9 2. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little
10 Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians,
11 and Winnemem Wintu Tribe.

12 3. We, the Winnemem Wintu, are a historic Native California Tribe listed as a
13 recognized California Native Tribe by the California Native American Heritage Commission
14 (NAHC), a California Agency. The Winnemem Wintu are also known as: Northern Wintoon, Baird
15 Indians, McCloud River Indians, McCloud Wintu, Okwanuchu (a Shasta Indian word for people of
16 the north), Oylaca (un-ratified Cottonwood Treaty of 1851), Wailacca (various spellings meaning
17 northern people), Northern Wintu, Baird Auxiliary, and many others. The traditional name is
18 Winnemem Wintu (Winnemem: meaning Middle Water (the McCloud River) and Wintu: meaning
19 People – Middle Water People).

20 4. The Winnemem's historical territory includes the east side of the upper Sacramento
21 River watershed, the McCloud River watershed from origin to termination, the Squaw Creek
22 watershed from origin to termination, and approximately 20 miles of the Pit River from confluence
23 of the McCloud River, Squaw Creek, and Pit River up to Big Bend.

24 5. The Winnemem Wintu are a spiritual people. We believe in a Creator who gave life
25 and breath to all things. In our creation story we were brought forth from a sacred spring on Mt.
26 Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the Salmon, which we
27 call the Nur, took pity on us and gave us their voice, and in return we promised to always speak for
28 them. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands

1 of years – the Winnemem speaking and caring for and trying to protect the salmon, and the salmon
2 giving of themselves to the Winnemem to provide sustenance throughout the year. Ceremonies,
3 songs, dances, and prayers of the relationship between the salmon and the Winnemem Wintu are
4 intricately woven into the very fabric of Winnemem Wintu culture and spirituality.

5 6. Prior to colonization, there were around 20,000 Winnemem Wintu people living in
6 several hundreds of villages in our traditional homeland, mostly situated up and down the McCloud
7 River. Each village had a head person – a spiritual leader – and conducted ceremonies together at
8 sacred sites, most of which were located in and around the rivers.

9 7. The deterioration of water quality and instream flows on rivers and tributaries in our
10 traditional homeland has been damaging to our Tribe’s cultural resources and practices, sacred sites,
11 village sites, burial grounds, and access to traditional food resources.

12 **Broken Treaty Promises**

13 8. Long has the State of California prospered on the backs of the Indigenous Peoples –
14 from the time this State was conceived, up to and including this very day. You, the State of
15 California, lobbied in Congress to make sure the treaties were never ratified because you wanted all
16 the resources for yourself. You, the State of California, paid \$5 dollars a head for Native scalps,
17 because you didn’t want us here. You, the State of California, have destroyed millions of acres of
18 Indigenous cultural lands, which included sacred sites, village sites, burial grounds and medicinal
19 gathering areas, by allowing them to be paved over, dug up, planted over, dammed up, flooded out,
20 logged out, siphoned off, or polluted to an uninhabitable state.

21 9. We, the Winnemem Wintu Tribe, signed a Treaty of Peace and Friendship on August
22 16, 1851, at Reading’s Ranch in Cottonwood with the Federal Government and other Northern
23 California tribes. This treaty promised the Winnemem Wintu a 25-square mile reservation
24 comprising land along the Pit, McCloud, and Sacramento Rivers. This reservation was to be
25 established in consideration for the ceding of all other Winnemem Wintu tribal lands to the Federal
26 Government. This treaty, like the 17 others signed by California Tribes between 1851 and 1852,
27 was never ratified. The U.S. Senate rejected the treaties in secret session at the request of the State
28 of California and placed them under an injunction of secrecy for the next 50 years. The treaties

1 only resurfaced in 1905, after Congress had taken away the power of the President to make treaties
2 with Native American tribes.

3 10. Although the Winnemem Wintu's land was never legally ceded, the State of
4 California and the federal government acted as if it had been and began issuing land patents to
5 settlers, mining claims to miners, and designating large swaths of our homelands as national forests.
6 The Winnemem believed our treaty to be final and binding and relied on the federal government's
7 promise that it would establish the reservation guaranteed by the treaty to protect the Winnemem
8 from being massacred by the influx of white settlers and miners onto our lands. But the
9 government broke its promise and the reservation never materialized. Despite increasing violence
10 and threats to our survival, the Winnemem Wintu remained in our traditional homeland along the
11 rivers with no place else to go.

12 11. We would like to state for the record that any and all determinations of water rights
13 recognized or permitted under California state law are, in the view of the Winnemem Wintu, *illegal*
14 on their face, and any diversion or use of water under color of these rights should be enjoined until
15 such time as the inherent water rights of the Indigenous People of this state are recognized,
16 protected, and preserved first and foremost, before and above, any and all other claims to water in
17 the State of California.

18 **Baird Fish Reservation**

19 12. In 1872 the U.S. Fish Commission (now U.S. Fish and Wildlife Service) began
20 construction of a salmon egg collection facility on the McCloud River about two miles above the
21 confluence of the McCloud and Pit Rivers. This salmon egg collection facility was first known as
22 the McCloud River Facility and later as the Baird Fish Hatchery.

23 13. The Winnemem Wintu were told that a 250-acre reservation had been established
24 around the Baird Fish Hatchery, and that the Winnemem who worked at the hatchery would be
25 protected. These Winnemem would become known as the "Baird Indians" or the "Baird Auxiliary."
26 Unfortunately, the Winnemem Wintu later learned that the "reservation" was not a reservation for
27 them, but a "fish reservation."
28

14. With the help of the Winnemem Wintu, the hatchery was successful in its egg exportation. From 1872 until it finally ceased operation in 1935, salmon eggs were sent all over the world to either augment existing salmon populations or to establish new salmon populations. The most significant were the salmon population and runs that were established in the rivers of New Zealand. (Based on U.S. Fish Commission reports [i.e., Stone and USFC references 1871 – 1907].)

15. New Zealand, a country where once no salmon existed in its rivers, now has teeming salmon runs throughout the year in all its rivers thanks to the Baird Fish Hatchery and the Winnemem Wintu that worked there. Meanwhile, here at home in California, our salmon runs are inching ever closer to extinction. The winter-run Chinook and the spring-run Chinook once thrived in vast numbers, but, with the loss of hundreds of miles of historical spawning grounds in the Upper Sacramento and McCloud River watersheds, the runs are now just a faint echo of what they once were.

16. Today, the winter-run salmon are listed as endangered under both the federal and California Endangered Species Acts. The spring-run salmon are listed as endangered under the state ESA and threatened under the federal ESA.

17. If the salmon go extinct, it is likely the Winnemem will too, as our numbers have dwindled with them. But there is a small light of hope. We believe that the salmon sent to New Zealand from the McCloud River to establish the New Zealand runs, if brought back home to the McCloud River from whence they came, could be the salvation from the probable extinction of the winter-run Chinook salmon.

Allotments

18. In 1893 President Grover Cleveland authorized the issuance of land allotments to members of the Winnemem Wintu Tribe. These allotments, some 4,480 acres in total, at 160 acres each, located on and around the Sacramento, McCloud, and Pit Rivers, allowed the Winnemem to remain somewhat in our traditional homeland. However, many of the allotments were on land that was unsuitable even for grazing.

19. Not all the Winnemem received allotments. On October 3, 1914, Horace Wilson, Supervisor within the Department of Interior, submitted to the Commissioner of Indian Affairs in

1 Washington, D.C. a letter indicating that a tract of land should be purchased for the Baird Indians
2 along the McCloud River. The Winnemem were included in previous lists of Indian bands
3 deserving of allotments, but while other bands listed in the letter eventually received land bases, the
4 Winnemem (Baird) band did not.

5 20. On April 20, 1915, in a letter to Cato Sells, agent Terrell reported on his progress of
6 purchasing lands for California's Indians. Terrell described the Indians near Redding as not fitting
7 within the guidelines of the Allotment Act. He stated, however, that the Baird (Winnemem) Indians
8 were in need of homes. He further stated that he investigated lands above the government fishery at
9 Baird and proposed the purchase of these lands for the Winnemem. He described the self-
10 sufficiency of the Winnemem based on the salmon and other sustenance crops. D.P. Doak, who
11 owned several tracts of this land, was approached and was mentioned in later letters.

12 21. The Terrell letter also included a census of the Indians present, which included the
13 name of Flora Curl, age 5. Florence Curl Jones was the Spiritual and Tribal Leader of the
14 Winnemem Wintu Tribe. Florence passed away at the age of 95, but before she did, she passed
15 leadership down to her great niece Caleen Sisk, who is the Spiritual and Tribal Leader of the
16 Winnemem Wintu today.

17 22. In August 1915, Terrell sent a letter reporting to Washington that D.P. Doak, the man
18 who had obtained land on the McCloud River, refused to sell land for the Indian Allotments,
19 waiting instead for higher prices due to speculation about the building of a new dam that would
20 provide power to the state. According to Terrell, Doak stated that he would not cause problems for
21 the Indians living on his land, but he would not sell. The letter also stated that the government
22 would provide lands for the Indians once removed due to the dam's construction.

23 **Central Valley Project Indian Lands Acquisition and Construction of Shasta Dam**

24 23. The idea of constructing a dam on the Sacramento River began to come to fruition in
25 the 1930s. Agents were dispatched to landowners and allottees in the area that would be affected
26 by any dam construction and the resulting inundation it would cause. Many of the Indian allottees
27 could neither be found nor contacted, for a variety of reasons, regarding the possible sale or
28

1 exchange of their land for other land that would not be inundated. This proved to be problematic
2 and delayed the beginning of construction of the dam.

3 24. To remedy this problem, in 1937 Public Law 198 [S1120] was introduced and titled
4 the Central Valley Project Indian Land Acquisition Act ("Act"). This Act was signed into law in
5 1941, as 55 Stat. 612. The purpose of this Act specifically states:

6 That, in aid of the construction of the Central Valley project, authorized by the Acts of
7 April 8, 1935 (49 Stat. 115), and August 26, 1937 (50 Stat. 850), there is hereby granted
8 to the United States, subject to the provisions of this Act, (a) all the right, title, and
9 interest of the Indians in and to the tribal and allotted lands within the area embraced by
10 the Central Valley project

11 25. This Act, which took all the Indian Lands within the area embraced by the Central
12 Valley Project, also set out provisions for compensating those affected, e.g., (1) provide just
13 compensation for the lands that would be flooded (55 Stat. 612, sec. 2); (2) acquire lands and
14 improvements for the land taken (55 Stat. 612, sec. 3); and (3) provide a cemetery to be held in trust
15 for the appropriate tribe or family, as the case may be (55 Stat. 612, sec. 4).

16 26. 1938 brought the beginning of construction on a new dam at Kennett, CA, known first
17 as the Kennett Dam and later as Shasta Dam. When completed, the dam would capture flows from
18 three rivers, the Sacramento, McCloud, and Pit, as well as the flow from other tributaries such as
19 Squaw Creek. The captured water would eventually inundate thousands of acres of land, including
20 hundreds of miles of prime salmon spawning grounds, historical tribal village sites, sacred sites,
21 burial sites, and cultural gathering sites. The dam would also effectively extirpate all existing
22 salmon runs in the upper Sacramento, McCloud, and Pit Rivers.

23 27. The removal of the Winnemem from the river began with the taking of Winnemem
24 allotments. In 1943 the Winnemem living on traditional homelands on the lower McCloud River
25 (Baird and surrounding areas) were removed. The Winnemem Wintu that were removed from the
26 area were not removed by relocation, because no like land was ever provided to replace the land
27 that would be flooded; they were removed by virtue of their homes being bulldozed down. The
28 filling of Shasta Lake inundated Winnemem lands and sacred sites. The Department of Interior and
its Bureau of Reclamation never fulfilled the requirements of the Act. No compensation was ever
provided for the over 4,480 acres of allotment lands that were taken, nor were there ever any other

1 lands acquired for the Winnemem to replace the lands that were taken. The 4,480 acres of
2 allotment lands did not even include the thousands to hundreds of thousands of acres of additional
3 Winnemem Wintu historical homeland that were also taken. Over 90% of the Winnemem Wintu's
4 historical village sites, sacred sites, burial sites, and cultural gathering sites along the three rivers
5 and tributaries were inundated by the filling of Shasta Lake.

6 28. The only promised item from the Act that was somewhat completed was the creation
7 of a cemetery in Central Valley, CA (now Shasta Lake City). But the Bureau of Reclamation failed
8 to hold the cemetery in trust for the "appropriate tribe" as the statute directed, even though ALL the
9 Indians that were originally interred in this cemetery were members of the Winnemem Wintu Tribe
10 either by marriage or birth. The Bureau named the cemetery the Shasta Reservoir Indian Cemetery,
11 thereby denying the Winnemem Wintu listing on the Bureau of Indian Affairs' list of tribes with
12 assets held in trust.

13 29. Shasta Dam has since become known as the "keystone" of the Central Valley Project
14 to both state and federal agencies, but to the Winnemem Wintu, it is an instrument that destroyed
15 our homeland, culture, and identity as a People. Today, there are fewer than 130 Winnemem Wintu
16 living. We have no tribal trust lands. We have no federal recognition. Despite being original
17 inhabitants of the Delta headwaters, we have no recognized rights to the water.

18 30. Today, the Shasta Dam continues to wholly block the Nur's migration. In an effort to
19 save our salmon, which we believe are a cultural and spiritual Tribal Property, the Winnemem
20 Wintu Tribe submitted a draft Volitional Fish Passage Project to the Bureau of Reclamation in 2016
21 for the reintroduction of salmon into the McCloud River, and the means to progress through their
22 natural life cycle – a swim-way that would allow the salmon to swim to the ocean from their
23 spawning grounds and return from the ocean to spawn again of their own volition. So far, the State
24 and Federal governments continue to reject our proposal in favor of a "trap and truck" plan to move
25 fish in and out of the river. We believe this path is set up for failure.

26 **Interests in Bay-Delta Plan Update and Consultation**

27 31. The Winnemem Wintu will not survive as a People if the Nur do not return to our
28 homeland. The Nur are at the center of Winnemem Wintu cultural and spiritual life. They were

1 also once the staple of our diet, sustaining us throughout the year. The salmon are gone now, as are
2 our other traditional food stocks. Our people now suffer among the highest rates of diabetes of any
3 population in the United States. Obesity and heart disease are common. Our inability to access the
4 salmon and for the salmon to access our watershed are destroying our bodies as well as our spiritual
5 and cultural existence. Even if there were a passageway around Shasta Dam, the salmon will not
6 return to our headwaters if they cannot survive the migration through the Delta due to low flows
7 and high temperatures. For this reason, and because we act in solidarity with Delta tribes suffering
8 from the ecological crisis in their homelands, it is critical to the Winnemem Wintu that natural
9 flows throughout the Delta be restored.

10 32. About four years ago, I began to hear reports from Winnemem Wintu tribal members
11 of foul green algal blooms emerging in Shasta Lake, the Upper Sacramento, and on the Pit River
12 arm and Squaw Creek arm. These harmful algal blooms (“HABs”) have grown larger and more
13 expansive on the years since. The HABs hurt the river ecosystems, further diminishing the Nur’s
14 chance of survival. They also block us from sacred sites and prevent us from holding many of our
15 ceremonies. One of our coming-of-age ceremonies requires girls to swim across the river near a
16 sacred rock, but if HABs are present, the water will be too toxic to swim in. We have also not been
17 able to perform any water blessings in the areas affected by HABs – that is, cupping water in our
18 hands from the river and placing it on our heads and hearts. These ceremonies can be
19 performed on everyone, especially to introduce new souls to the site, and we conduct them
20 frequently when not impeded by HABs.

21 33. We are ready to and insist on consulting government-to-government on water quality
22 issues in the Bay-Delta. As described above, our home is in the headwaters of the Bay-Delta, and
23 our continued existence as a People as impacted by the Bay-Delta water projects, including the
24 Shasta Dam. Flows into and through the Delta determine the ability of the Nur to survive and
25 eventually return to their headwaters in Winnemem Wintu homeland. We are in the geographic
26 area of the Bay-Delta Plan and believe that we are entitled to be consulted as a sovereign
27 government on setting of water quality standards and water rights and flow management for the
28 Bay-Delta and its headwaters.

1 34. In 2018, I first learned of the State of California's decision to conduct secret
2 negotiation of so-called "voluntary agreements" with water exporters and large agricultural water
3 users that would determine any obligations they would have to reduce their diversions and exports
4 of Bay-Delta water. As stated above, we do not believe in the legitimacy of the asserted water
5 rights of these negotiating parties and see any attempt to recognize and even pay off these rights
6 through the voluntary agreements as a further act of violence against our People.

7 35. Even though the voluntary agreements would directly affect the interests of our People
8 and the interests of other Northern California tribes, neither I, nor any representative of the
9 Winnemem Wintu, nor any representative of any tribe to my knowledge, have been invited into the
10 negotiations nor consulted on the State's approach to use of the voluntary agreements for the Bay-
11 Delta.

12 36. We, the Winnemem Wintu, have not been able to meaningfully participate in setting
13 water quality standards for the Bay-Delta, despite how long the Board has had to update the 2006
14 Bay-Delta Plan. The Winnemem Wintu have never received notice or invitation for consultation
15 with the State Water Board on any proceedings related to updates to the Bay-Delta Plan or either
16 phase of its updating process. This is despite the fact that our tribal cultural resources are directly
17 affected by the outcome of any proceeding on the Bay-Delta Plan or decision on the voluntary
18 agreements. This lack of consultation is also in stark contrast to the more inclusive and
19 participatory process implemented by the former CALFED Bay-Delta Authority.

20 37. It seems clear to us, the Winnemem Wintu, that the survival of the fish and the Tribes
21 that depend on them is secondary to appeasing wealthy water exporters. The salmon and the rivers
22 that sustain them are the lifeblood of my Tribe. By failing to update the Bay-Delta Plan and to
23 adopt and enforce water quality standards that protect the rivers rather than those that divert their
24 waters for profit, the State is knowingly facilitating the death of the rivers and of the salmon they
25 sustain and the cultural resources they provide. And through this, the State is enabling yet another
26 genocide against our culture, our People. We urge the State to do better, to begin to truly repair the
27 violence it has done to my Tribe and to Indigenous People throughout the state and to engage with
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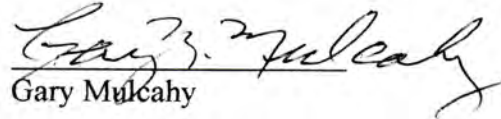
1 us in meaningful government-to-government consultation on matters affecting our interests, rather
2 than making these commitments yet another in a series of broken promises.

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4 I declare, under penalty of perjury, that the foregoing is true and correct to the best of my
5 knowledge and recollection. I executed this declaration on 23 May 2022 in Sacramento.

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Gary Mulcahy

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