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July 26, 2018

*Via email transmission & USPS*

Eileen Sobeck, Executive Director  
State Water Resources Control Board  
P O Box 100  
Sacramento, CA 95812-0100

Eileen.Sobeck@waterboards.ca.gov

Re: Response to July 19, 2018 letter  
Denial of Extension Request for Lower San Joaquin River/Southern Delta  
Phase 1, Bay-Delta Proposed Final Plan Amendments

Ladies and Gentlemen:

On July 19, 2018, you sent the attached letter limiting the authority of the public and local and regional agencies representing the public to comment on a Substitute Environmental Document. You stated that written comments would only be considered in regard to "Final Amendments in double underline and double strikeout, located in Appendix K...". Parties were then supposedly to have the ability to look through Appendix K and attempt to determine the effect and meaning of double underlined language, but could not comment upon any other terms or provisions in Appendix K that may be affected or altered by the double underlined or double strikeout language. How exactly this could be accomplished when the double underlined language may have dramatic effect upon other elements of the plan was not explained. As an example, on page 30, the phrase "The Executive Director may approve adaptive adjustments that satisfy the criteria above and as provided below." The double underlined language above that states "The State Water Board may approve..." but did not double underline the following phrase "adaptive adjustments to the flow requirements as set forth in A through D below."

We now have two parties supposedly making fundamental changes in flow requirements – the Executive Director and the State Water Board – whether the following

To: Eileen Sobek, Executive Director, State Water Resources Control Board  
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requirement in subparagraph (a) that “The STM working group must approve changes and adjustments between 30% and 50%” is not any way clarifying.

In subparagraph (b), a line is not double underlined. It states “The Executive Director may approve such changes on an annual basis if the change is recommended by one or more members of the STM working group.” Whether the State Water Board is similarly constrained unless 1 or more members of the STM working group recommend a change is unclear.

Please note our comments on delegation of authority hereafter, but you have created absolute chaos by your purported attempt to limit comments to only double underlined language. On page 34, you double underline certain language but do not double underline the language regarding an annual operations plan, but again, uncertainty is created in regard to the Board’s delegation of authority. The language that is not double underlined states: “An annual operations plan shall be informed by the review activities described below and may be modified with the approval of the State Water Board or Executive Director,” and then double-underlined “A multi-year operations plan meeting these requirements may be submitted at any time.” No one is given any clue as to whether the Executive Director must hold hearings, consider evidence and make findings, or whether the State Water Board must conduct such proceedings.

Artificial bifurcation of hearing subjects has been addressed by the Courts in analogous situations. If the agency is required to conduct a hearing before approving a project, as it is with a Water Quality Control Plan change, the agency must include environmental review as one of the subjects of the hearing.” *CEQA Guidelines*, §15202(b); *Bakersfield Citizens for Local Control v. City of Bakersfield* (5<sup>th</sup> Dist. 2004) 124 Cal.App.4th 1184, 1200-1201. Artificial segregation of the right to comment and to address the effect of changes in a project or in a substitute environmental document through description of the project (such as whether or not the Executive Director or the Board makes changes in the Plan and project) is counter to the requirements of CEQA, and as shown by the above comments, is confusing and uncertain. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412 [addition of significant new information without meaningful opportunity for public to comment on all project impacts and effects violates CEQA.]; see also *Laurel Heights Improvement Ass’n v. Regents of University of California* (1993) 6 Cal.4<sup>th</sup> 1112.)

Water Code § 13001 does not mention delegation by the State Board to its Executive Director. Instead, it states: “It is the intent of the Legislature that the State Board and each Regional Board shall be the principal state agencies with primary responsibility for the coordination and control of water quality...”. Section 13100 of the Water Code states that “The organization membership and some of the duties of the State

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Board are provided for in Article 3 commencing with Section 174. Sections of the Water Code referred to State policy for water quality control and provided for their periodic review and revision (Water Code § 13143), but no Section provides for delegation of the authority to consider, determine and elect to make changes in a Water Quality Control Plan on the part of the Executive Director, nor any authority to delegate. There are extensive Sections (Water Code §§13208 - 13223) delineating the power of the Regional Board to delegate regarding Water Quality Control Plan (Water Code §13223), and the Legislature even authorized the SWRCB to establish a committee of Regional Board members “to assist the State Board in carrying out its responsibilities in water quality control.” (Water Code §13171), but there are no similar provisions relating to the State Board or the Executive Director, or new committees.

Over the years, temporary urgency permits and other shortcuts have been chosen by the State Board, and it has been argued that the State Board has the inherent power to provide in emergency type circumstances for delegation, and there is some support for that in the water rights section, but we cannot find any authority for that power in the Water Quality Control Planning adoption or Federal Clean Water Act. Instead, this is yet another effort by SWRCB staff to suppress the expression of facts and viewpoints they disfavor, and to orchestrate a process that allows them to implement their subjective policy views of how water should be used without hindrance from individual rights and protections...the same individual rights and protections that the SWRCB members have sworn to respect and protect.

The Bagley-Keene Open Meeting Act in Government Code Section 11122.5(b)(1) states: “A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate or take action on any item of business that is within the subject matter of the State body.” We cannot find any agenda at which the State Board members discussed and decided that written comments would be limited to double-underlined language, or the items of business that are now stated to have been adopted by the State Board. (Government Code § 11125.) Section 11125(b)(2) specifically prohibits engaging in separate conversations or communicating outside of a meeting with members of a legislative body

“... in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency. If that person does not communicate to members of the legislative body, the comments or positions of any other member or members of the legislative body.”

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The question is, how can a letter be sent by the Executive Director limiting comments to a certain procedure without having violated the terms and provisions of the Bagley-Keene Act, and how can the subject of that communication and comments to a proposed Water Quality Control Plan and the substitute environmental document that supposedly considers the significant environmental impacts from the plan adoption, and alternatives and mitigation measures be pre-empted to prevent comment, especially when the subject matter is to potentially add language to the Plan excusing the Board Members from making changes or alterations and vesting that power in the Executive Director?

**Conclusion:**

There is sufficient previous comments on the failure of the SED in its various forms to meet the requirements of a substitute Environmental Document. There is an assumption that water is the only method of meeting fishery numbers and goals, and there is no need to identify the impacts to human environment or any other environmental impact when it is presumed that the only tool to work with is more water flow. Other individuals' comments and our previous comments are incorporated herein, but the procedural and substantive remedy for violation of the Bagley-Keene Act is "... action taken by a State Board in violation of Section 11123 or 11125 is null and void under this Section, and an award of attorney's fees," (Government Code § 11130.5) and most importantly, a criminal misdemeanor conviction for the staff member or Board Members who participated in such a serial meeting. (Government Code § 11130.7.)

This Board should withdraw the July 19, 2018 letter of its Executive Director, should invite all comments either in writing or orally, and should provide a specific explanation of whether or not the Executive Director will be required to hold evidentiary hearings and give notice, and whether or not the State Board will make the decision as to whether or not a plan or a schedule should be altered, since there does not appear to be any authority under the Federal Clean Water Act or California water quality provisions for delegation of that judgment to the Executive Director or new committees.

Very truly yours,

MINASIAN, MEITH,  
SOARES, SEXTON & COOPER, LLP

By:   
PAUL R. MINASIAN

PRM:dd

Attachment: July 19, 2018 letter of Eileen Sobek, SWRCB Executive Director  
Exchange Conf\SWRCB re Bay-Delta Proposed Final Plan Amendments.7.26.18.wpd



EDMUND G. BROWN JR.  
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MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

RECEIVED

State Water Resources Control Board

July 19, 2018

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S.J.R.E.C.W.A.

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San Luis and Delta Mendota Water Authority  
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Los Baños, CA 93635

David Guy, President  
Northern California Water Association  
455 Capitol Mall, Suite 335  
Sacramento, CA 95814

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Tehama-Colusa Canal Authority  
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Steve Chedester, Executive Director  
San Joaquin River Exchange Contractors  
Water Authority  
P.O. Box 2115  
Los Baños, CA 93635

Jason Phillips, CEO  
Friant Water Authority  
155 E. Shaw Avenue, Suite 301  
Fresno, CA 93710

**Re: Denial of Extension Request for Lower San Joaquin River/Southern Delta Bay-Delta  
Proposed Final Plan Amendments**

Dear Ms. Mizuno and Messrs. Chedester, Phillips, Sutton and Guy:

The State Water Resources Control Board (State Water Board) is in receipt of your letter dated July 18, 2018 on behalf of the San Luis and Delta Mendota Water Authority, Tehama-Colusa Canal Authority, Friant Water Authority, Northern California Water Association, and San Joaquin River Exchange Contractors Water Authority requesting an extension of the comment period on the proposed final plan amendments and postponement of the adoption meeting. For the reasons detailed below, the State Water Board respectfully denies your request.

The State Water Board engaged in a nine-year process with extensive public outreach to develop the proposed final plan amendments and associated Final Substitute Environmental Document (Final SED). This included releasing proposed plan amendments and a draft SED in 2012, and then substantially revising and recirculating the proposed plan amendments with a Recirculated Draft SED in 2016. The Recirculated Draft SED and proposed plan amendments (contained in Appendix K of the Recirculated Draft SED) were then subject to a six-month comment period. The State Water Board carefully reviewed all comments that were timely submitted, and has now issued the proposed Final SED, which includes an extensive response to comment that more than fulfills the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et. seq.) and the Guidelines for Implementation of the California Environmental Quality Act (CEQA Guidelines) (Cal. Code of Regs., tit. 14, § 15000 et seq.).

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

Ms. Mizuno  
Messrs. Chedester, Phillips, Sutton and Guy

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July 19, 2018

The July 6, 2018 *Notice of Public Meeting and Consideration of Adoption of Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and Final Substitute Environmental Document* (Board Meeting Notice) states (emphasis in original):

**SUBMISSION OF WRITTEN COMMENTS ON REVISED APPENDIX K**

The text of the Proposed Final Amendments is found in Appendix K of the Final SED. Extensive public participation, including review and comment, was already provided on the prior draft documents. The public comment period on the Recirculated SED closed on March 17, 2017 and, except for Appendix K as specified below, no additional written comments on the Final SED will be accepted, consistent with the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 3779, subd. (e).)

The State Water Board will only accept written comments on the revisions to the 2016 Draft Amendments that are reflected in the Proposed Final Amendments in double underline and double strikeout, located in Appendix K, Revised Water Quality Control Plan, of the Final SED. Written comment letters must be received by 12:00 p.m. (noon) on Friday, July 27, 2018.


The Final SED includes clarifications and amplifications of information in response to comment and refinements to the State Water Board's consideration of economic effects as required by the Porter-Cologne Water Quality Control Act (Wat. Code § 13241, subd. (d)). Those clarifications, amplifications, and refinements do not result in any new potentially significant adverse impacts on the environment, any substantial increase in the severity of potentially significant adverse impacts on the environment, or establish any new feasible project alternatives or mitigation measures. Therefore, recirculation for additional public comment is not required under CEQA or the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15088.5).

The State Water Board is now seeking written comments on the easily-identifiable double strikeout/double underline revisions to Appendix K, not the entirety of the proposed Final SED. As indicated in the Board Meeting Notice, the revisions to Appendix K and the rationale for each revision are described in Master Response 2.1, *Amendments to the Water Quality Control Plan* (Final SED, Volume 3, and summarized in Table 2.1-1, which can be accessed here: [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/bay\\_delta\\_plan/water\\_quality\\_control\\_planning/2018\\_sed/docs/mr2.1.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/docs/mr2.1.pdf) ) Given the relatively limited number of changes to Appendix K, a three-week comment period is sufficient time to review and provide written comment on those revisions.

Finally, please note that parties are being provided more than 45 days between when the proposed final amendments and proposed Final SED were made available to the public on July 6, 2018 and the commencement of the Board meeting on August 21, 2018.

For the above reasons, the request to extend the written comment period and postpone the adoption meeting is respectfully denied.

Sincerely,

  
Eileen Sobeck  
Executive Director