Common Response 1.2
Water Quality Control Planning Process

Introduction

This introduction provides important context to this common response. A similar introduction is provided in each common response to ensure that the reader has the appropriate context when reviewing common responses. For ease of reference, a table of contents is included after this introduction to guide readers to specific subject areas.

Protecting the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta) watershed and its many beneficial uses of water is one of the State Water Resources Control Board's (State Water Board or Board) primary responsibilities and top priorities. In response to declines of several native aquatic species since the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (Bay-Delta Plan or Plan) was last comprehensively updated, the State Water Board commenced a process to update the Bay-Delta Plan for the Sacramento River and its tributaries, Delta eastside tributaries (including the Calaveras, Cosumnes, and Mokelumne Rivers), and Delta for the reasonable protection of fish and wildlife beneficial uses, referred to as the Sacramento/Delta update to the Bay-Delta Plan. The Bay-Delta Plan identifies beneficial uses of water to be protected in the Bay-Delta watershed, water quality objectives and program of implementation to achieve the reasonable protection of those beneficial uses, monitoring, evaluation, and special study provisions. The State Water Board's proposed action to update the Bay-Delta Plan is supported by a Staff Report/Substitute Environmental Document (Staff Report), which provides an evaluation of the environmental impacts and economic effects in support of consideration of different alternatives to update the Bay-Delta Plan to achieve reasonable protection of fish and wildlife beneficial uses in the Sacramento/Delta. The Staff Report is functionally equivalent to an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) but also provides the additional analyses that support the State Water Board's consideration of the action under the Clean Water Act and Porter-Cologne Water Quality Control Act (Porter-Cologne Act or Porter-Cologne).

Development of the final Staff Report and final draft Bay-Delta Plan were informed by several opportunities for public comment over multiple years. This common response may address issues that were raised during any of those public comment periods. In September 2023, the State Water Board released the 2023 draft Staff Report evaluating different alternatives for the Sacramento/Delta update to the Bay-Delta Plan for public review and comment. The 2023 draft Staff Report evaluated the following: proposed Plan amendments that were based on the 2018 Framework for a possible Sacramento/Delta update to the Bay-Delta Plan (2018 Framework); proposed Voluntary Agreements (VAs), referred to as the Healthy Rivers and Landscapes (HRL) proposal; as well as Low Flow and High Flow alternatives and several modular alternatives that would modify the other alternatives. During the development of the 2023 draft Staff Report, the proposed VAs were renamed "Healthy Rivers and Landscapes" or "HRL" by the VA proponents, also referred to as the "HRL participants." For purposes of responses to comments, "VAs" and "HRL" are used synonymously. Due to the change in terminology during the development of the Staff Report and responses to comments, "VA" is generally used most often except in some cases where "HRL" is used.

The State Water Board released draft amendments to the Bay-Delta Plan in October 2024 (2024 draft Plan) for public review and comment that incorporated alternatives identified in the 2023 draft Staff Report with revisions based on public comments. The State Water Board released revised draft Plan updates in July 2025 (July 2025 revised draft Plan), but delayed public comment on that version of the Plan pending further updates, though some parties did submit public comments on the July 2025 draft that are part of the State Water Board's response to comments. In December 2025, the State Water Board released Chapter 13, *Revised Proposed Plan Amendments*, as a limited recirculation of the 2023 draft Staff Report (2025 partially recirculated draft Staff Report) together with the December 2025 revised draft Plan for public review and comment. These documents reflect the updated proposed project, referred to as the revised proposed Plan amendments, which brings together in the Bay-Delta Plan program of implementation a VA pathway that incorporates commitments identified in the HRL proposal and would apply to specified HRL water rights, and a regulatory pathway based on the proposed Plan amendments that would apply to other water rights and to any HRL water rights no longer covered under the VA pathway. In August 2026, the State Water Board released a final draft Bay-Delta Plan that included refinements to the revised proposed Plan amendments based on public comments received on the December 2025 revised draft Plan. At the same time, the State Water Board released this final Staff Report, including responses to comments previously received on the draft Staff Report. The final Staff Report informs the State Water Board's consideration of adoption of the Sacramento/Delta updates to the Bay-Delta Plan.

The State Water Board reviewed and considered all comments and developed common responses to address recurring comments and common themes. The State Water Board received many comments on the Sacramento/Delta update to the Bay-Delta Plan covering a broad range of policy and environmental issues. Major topic areas that elicited frequent comments included tribal engagement and Tribal Beneficial Uses, agricultural resources, municipal water supplies, economic effects, groundwater resources, fish and wildlife ecological health, commercial and recreational fishing, economically disadvantaged communities, the water quality control planning process, project alternatives, harmful algal blooms (HABs) and other water quality issues, and hydrology and hydrologic modeling. The State Water Board appreciates the active engagement of interested and affected parties, including local, state, and federal agencies, water users, environmental and fishing organizations, California Native American Tribes, and members of the general public.

The State Water Board made a concerted effort to understand and respond to comments related to the water quality control planning process and related State Water Board authorities. This common response references related sections of the Staff Report and other common responses, as appropriate, where recurring comments and common themes overlap with other subject matter areas. This common response addresses, but is not limited to, the following topics:

- State Water Board authorities
    - Porter-Cologne Act and the Clean Water Act, including reasonable protection of fish and wildlife and consideration of other beneficial uses, and Water Code section 13241 factors
    - Water rights, including the Public Trust Doctrine, article X, section 2 (waste and unreasonable use), future actions on the implementation methodology and regulation, and due process
    - Non-flow measures
- Interaction of the State Water Board's efforts to update and implement the Bay-Delta Plan with other regulatory requirements (e.g., Federal Energy Regulatory Commission [FERC]

requirements), including the 2018 Bay-Delta Plan update for the Lower San Joaquin River and Southern Delta (LSJR/SD)

For additional discussion of the water quality control planning process and the State Water Board's authorities, please refer to *Executive Summary*, Section 1.3.2, *Bay-Delta Water Quality Control Planning Background*, and Chapter 5, *Proposed Changes to the Bay-Delta Plan for the Sacramento/Delta,* Section 5.2, *State Water Board Responsibilities and Authorities*. For responses to comments on the CEQA analysis, see Common Response 7.1, *General CEQA and Approach to the Analysis*. For responses to comments concerning the Staff Report's economic analysis, including comments related to municipal water supply economic effects, please see Common Response 8.1, *Economic Analysis and Other Considerations*.

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State Water Board Authorities Related to the Water Quality Control Planning Process

The State Water Board is responsible for orderly and efficient administration of the state's water resources, including the coordinated consideration of water rights, water quality, and drinking water. (Wat. Code, § 174.) It performs dual functions in both ensuring water quality and allocating water rights. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 112.)

The Bay-Delta Plan addresses water diversions and use in the water quality planning context, including the federal Clean Water Act and state Porter-Cologne Act. As discussed in this common response, there are a variety of water right and water quality authorities that the State Water Board may utilize to implement new and revised objectives, and the State Water Board has discretion in which it chooses to use in accordance with state law.

Multiple commenters expressed concern that the State Water Board has not complied with legal requirements governing the water quality control planning process or with other laws relating to the Board's duties and obligations, including the Porter-Cologne Act, federal Clean Water Act, Administrative Procedure Act; article X, section 2 of the California Constitution, the Public Trust Doctrine; the federal Endangered Species Act (ESA), the California Endangered Species Act (CESA), and federal constitutional rights to due process and prohibitions on the taking of private property rights for a public purpose without just compensation.

As further detailed in this common response, the State Water Board complied with all legal requirements and standards governing the water quality control planning process and the Staff Report provides significant evidentiary support for the Board's decision. Importantly, in updating the Bay-Delta Plan, the Board is engaged in the quasi-legislative act of adopting a regulation. Legislative acts are presumed valid and the legislative body "need not make explicit findings to support its action." (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 509.) To overcome the presumption of validity, the burden is on a challenging party to establish the decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. (*American Coatings v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460.) Importantly, the "entirely lacking" standard of review "is not the same as a substantial evidence test;" it "is more deferential to agency decision making than the substantial evidence standard." (*Id.* at 461.) In fact, review of "quasi-legislative acts are accorded the most deferential level of judicial scrutiny." (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1331.)

Porter-Cologne Water Quality Control Act and the Clean Water Act

Water quality in California is governed by a complex regulatory framework under the federal Clean Water Act and Porter-Cologne Act. The Clean Water Act is a comprehensive water quality law designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) The Clean Water Act follows a "cooperative federalism" approach whereby individual states adopt and implement major provisions of the law, provided that certain minimum standards and criteria are met and approved by the U.S. Environmental Protection Agency (USEPA). The Clean Water Act requires states to establish water quality standards that specify both the beneficial uses of waterbodies and the levels of quality that must be met and maintained to protect those designated uses.

The Porter-Cologne Act (Wat. Code, § 13000 et seq.), enacted in 1969, pre-dates the Clean Water Act and was recognized as one of the nation's strongest pieces of anti-pollution legislation. The Porter-Cologne Act "expresses the public's 'primary interest in the conservation, control, and utilization of the water resources of the state,' and intends to advance that interest by ensuring the protection of the 'quality of all the waters of the state' for the public's use and enjoyment" (*Sweeney v. California Regional Water Quality Control Bd.* (2021) 61 Cal.App.5th 1093, 1113). Courts have held that "[b]ecause the Porter-Cologne Act is a law 'providing for the conservation of natural resources,' it is 'of great remedial and public importance and thus should be construed liberally' so as to promote the general object sought to be accomplished" (*Id.* at p. 1116).

The Porter-Cologne Act is a broad-based regulatory program implemented by the State Water Board and nine regional water boards that, following passage of the federal Clean Water Act, integrated portions, including the National Pollutant Discharge Elimination System (NPDES) permit process for point source discharges and certain federal water quality planning requirements. Under the Porter-Cologne Act, California regional water quality control boards and the State Water Board develop water quality control plans that specify beneficial uses of the state's waters, set water quality objectives to protect those beneficial uses, and detail programs of implementation to achieve those water quality objectives. (Wat. Code, §§ 13050, subd. (j), 13240, 13170.)

Porter-Cologne requires the State Water Board to "establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." (Wat. Code, § 13241.) The landmark California water law ruling, *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App3d 82, also referred to as the "Delta Water Cases" or "Racanelli" decision for Justice John T. Racanelli who wrote the opinion, recognized that "[i]n formulating a water quality control plan, the [State Water] Board is invested with wide authority" to attain the highest reasonable water quality." (*Racanelli* at p. 109; Wat. Code, § 13000.) This authority specifically includes "the power and duty to provide water quality protection to the fish and wildlife that make up the delicate ecosystem within the Delta." (*Id*. at p. 98.)

A water quality objective is distinguishable from how an agency implements and enforces the objective as either a point source (subject to USEPA authority) or nonpoint source (not subject to USEPA authority). Under the Clean Water Act, point-source discharges of pollutants to waters of the United States are prohibited unless authorized under an NPDES permit issued by USEPA or the state. Nonpoint-source pollution includes all other pollution exempted from NPDES permitting, including water diversions, dams, and reservoirs. For this nonpoint-source pollution, the State Water Board can implement water quality objectives pursuant to other legal authorities, including but not limited to water right permitting authorities, the state law prohibition on waste and unreasonable use, and the Board's obligations under the Public Trust Doctrine (further discussed below).

The adoption or revision of water quality control plans under the Porter-Cologne Act is exempt from the general rulemaking requirements of the California Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) and is instead subject to special limited APA procedures (Gov. Code, § 11353). Pursuant to section 11353, the State Water Board must submit the regulatory provisions of water quality control plan amendments to California's Office of Administrative Law (OAL) for approval before the amendments become effective. OAL reviews the regulatory provisions for compliance with certain APA standards and public participation requirements under the Federal Water

Pollution Control Act (33 U.S.C. § 1251 et seq.). On approval, a summary of the regulatory provisions is sent to the Secretary of State for filing.

As noted in the Introduction, the Staff Report is functionally equivalent to a CEQA EIR but also provides the additional analyses necessary to support the Board's consideration of the action under the Porter-Cologne Act. This functional equivalency is allowed because the Board's basin planning is a CEQA certified regulatory program (Pub. Resources Code, § 21080.5; tit. 14, Cal. Code Regs., § 15251, subd. (g)). A certified regulatory program is one that the Secretary of the Resources Agency has certified as meeting certain substantive and procedural standards, such as including the protection of the environment among its principal purposes and requiring an interdisciplinary approach to ensuring the integrated use of the natural and social sciences in decision making (Pub. Resources Code, § 21080.5, subd. (d)). Certified regulatory programs are exempt from CEQA chapter 3 requirements for state agencies, boards, and commissions, chapter 4 requirements for local agencies, and section 21167 regarding actions to attack, review, set aside, void, or annul the decision of a public agency for CEQA noncompliance, except as provided in CEQA chapter 4.5, article 2 regarding master EIRs (Pub. Resources Code, § 21080.5, subd. (c)). For more discussion of the Board's certified regulatory program, please see the overview and approach to analysis in Common Response 7.1, *General CEQA and Approach to the Analysis*.

Bay-Delta Plan

California's regional water quality control boards oversee water quality in California's nine regions, which stretch from Oregon to Mexico. However, the State Water Board is the only entity that performs both adjudicatory and regulatory functions in allocating water rights and ensuring water quality. (Wat. Code, § 174.) The State Water Board is designated as the water pollution control agency for all purposes under the Clean Water Act and may adopt water quality control plans in accordance with specified provisions for regional water quality control planning. When it does so, such "plans, when adopted, supersede any regional water quality control plans for the same waters to the extent of any conflicts." (Wat. Code, § 13160, 13170.)

The Bay-Delta Plan is complementary to the other water quality control plans adopted by the state and regional boards and to state policies for water quality control adopted by the State Water Board. The State Water Board's authority to adopt water quality control plans for waters of the state is not limited by geographic or hydrologic boundaries. (*Ibid.*; Wat. Code, § 13170.) Only the regional water boards' water quality control plans are geographically limited since their plans must be for all areas within their regions. (Wat. Code, § 13240.) In contrast, the boundaries of State Water Board water quality control plans, like the Bay-Delta Plan, are not predetermined by law, nor does Water Code section 12220, which only defines the boundaries of the legal Delta, limit the State Water Board's plenary authority to regulate the state's waters as it sees fit.

The State Water Board's approach to protecting Bay-Delta water quality and assigning responsibility to meet those objectives is continuously evolving based on new information and changing conditions. As stated in the *Racanelli* decision, the Board's 1978 proceedings to set water quality standards for the Bay-Delta were where "the Board for the first time acted pursuant to its combined authority to determine water rights and to establish water quality standards. In discharging its dual functions, the Board reconsidered existing water quality standards in light of current data concerning the effects on the Delta of the operations of the [Central Valley Project (CVP) and the State Water Project (SWP)]—the users with the greatest impact. The Board also undertook to modify the existing water rights permits of the projects—the water rights holders with the lowest

seniority—in order to implement the enacted water quality standards" (*Racanelli*, *supra*, 182 Cal.App3d at p. 111). The CVP is operated by the U.S. Bureau of Reclamation (Reclamation) and the SWP is operated by the California Department of Water Resources (DWR). In August 1978, the State Water Board exercised its reservation of jurisdiction over the water right permits for the Projects (the collective term for the SWP and CVP) and adopted Water Right Decision 1485 (D-1485). In the subsequent litigation, the court took issue with the Board's approach to develop water quality standards solely based on the Projects' water rights without considering all water diverters in the system, including upstream diverters. (*Id.* at pp. 118-119 ["Board erroneously based its water quality objectives upon the unjustified premise that upstream users retained unlimited access to upstream waters, while the projects and Delta parties were entitled only to share the remaining water flows"].)

In May 1991, after the *Racanelli* decision, which "directed the State Water Board to take a global view towards its dual responsibilities to the State's water resources," the State Water Board adopted the 1991 Water Quality Control Plan for Salinity in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1991 Bay-Delta Plan). Thereafter, USEPA disapproved parts of the 1991 Bay-Delta Plan because USEPA believed it did not provide adequate protections for the estuarine habitat and other designated fish and wildlife uses of the Bay-Delta Estuary. USEPA then issued its own water quality standards to protect estuarine habitat and fish and wildlife uses in the Bay-Delta Estuary. Following USEPA's action, on December 15, 1994, the state and federal governments came together and adopted Principles for Agreement for Bay-Delta Standards Between the State of California and the Federal Government (CRA et al. 1994.) The parties to the agreement, including representatives of the state and federal governments and urban, agricultural, and environmental interests proposed water quality objectives to the State Water Board for its adoption (SWRCB 1995). These objectives became the 1995 Bay-Delta Plan update.

Following the 1995 Bay-Delta Plan update, the Board conducted a proposed eight-phase water rights hearing from 1998-1999 to assign responsibility for meeting the objectives in the Plan. In Phases 1 through 7 of the Bay-Delta Water Rights Hearing, the State Water Board partially determined responsibilities for meeting the Plan objectives and resolved other related issues. Importantly, the Hearing recognized some flow-dependent objectives for fish and wildlife were being met by the Projects pursuant to CESA and ESA requirements for their operations. DWR and Reclamation also agreed to interim implementation of other unallocated flow-dependent objectives in the 1995 Bay-Delta Plan until those responsibilities were permanently allocated. Following the conclusion of Phases 1-7 of the Bay-Delta Water Rights Hearing, the State Water Board considered all of the evidence and argument in the hearing record and adopted Revised State Water Board Decision 1641 (2000) (D-1641)[1] as part of the implementation of the 1995 Bay-Delta Plan. D-1641 recognized that Phase 8 could allocate additional responsibilities, including to other water users; however, Phase 8 was stayed and eventually dismissed based on a further commitment from DWR and Reclamation to meet the flow-dependent objectives for an interim and indefinite period unless and until DWR or Reclamation requested that the State Water Board convene a hearing to consider allocating responsibilities to other parties (State Water Board Order WR 2001-05.)

As a result of DWR's and Reclamation's agreements, as reflected in D-1641, water quality objectives have been implemented primarily by the Projects and most water users in the watershed have not had any limitations on their diversions to ensure that the Bay-Delta Plan objectives are met.

[1] As revised in accordance with State Water Board Order WR 2000-02 (2000).

However, the State Water Board has long signaled that other entities outside of the Projects may be required to help meet water quality objectives and there is no ongoing obligation in either D-1485 or D-1641 to assign all future responsibility for updated objectives solely to the Projects.

For example, in D-1641 the Board explicitly recognized that others may be responsible at a future date for helping to meet water quality objectives stating: "As discussed above, the flow-dependent objectives are to be met through amendments to existing water rights. The DWR and [Reclamation] are meeting the remaining objectives as part of their current obligation under the federal and state Endangered Species Acts. It is in the public interest that these objectives continue to be implemented while the [State Water Board] conducts further proceedings to reach a final determination as to the responsibilities of parties to help meet these objectives." Similarly, the court in *El Dorado Irrigation District v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 944 noted in part that: "The Board has a legitimate interest in requiring El Dorado to contribute toward the maintenance of Delta water quality objectives to the extent El Dorado's diversion of natural flow contributes to the degradation of water quality in the Delta. The Board is under no obligation to require the [P]rojects to bear all the burden of meeting water quality objectives in the Delta indefinitely."

In 2009, the State Water Board issued a Notice of Preparation (NOP) and in 2011 a Revised NOP, signaling its intent to update the Bay-Delta Plan to address flows for the reasonable protection of fish and wildlife in the Lower San Joaquin River and its three major tributaries (the Stanislaus, Tuolumne, and Merced Rivers) (collectively "LSJR") and salinity standards for the reasonable protection of southern Delta agriculture, which is highly influenced by LSJR flows (^SWRCB 2009; SWRCB 2011). With regard to flows, the Board's watershed-based planning strategy recognized that the geology, hydrology, and impacted species in the LSJR Basin, which is fed by the southern Sierra Nevada Mountains, differs in important ways from geology, hydrology, and impacted species in the Sacramento River watershed, which is fed by the northern Sierra Nevada and Cascade Mountains (NMFS 2014). Specifically, Chinook salmon, the primary indicator of native fish in the LSJR, was in need of immediate action due to the threat of extirpation, lack of protections under the federal and state endangered species acts, and expiration of the San Joaquin River Agreement (SJRA) that was providing some level of flows to support fall-run. Within the San Joaquin River watershed, the Stanislaus, Tuolumne, and Merced Rivers were the only salmon-bearing streams left, and fall-run Chinook salmon was the remaining primary key indicator species for the reasonable protection of fish and wildlife, since spring-run Chinook salmon were extirpated (SWRCB 2018). In adopting updated objectives in 2018 for the LSJR, the Board modified its approach and recognized that protecting the fish that migrate to or from the LSJR watershed requires flows of an adequate volume and quality, including temperature, within the salmon-bearing tributaries. For more discussion regarding the LSJR/SD, please see the section below titled, *Interaction with Other State Water Board Regulatory Activities, 2018 Lower San Joaquin River Flows and Southern Delta Salinity Update to the Bay-Delta Plan.*

In 2012, the Board issued a Supplemental NOP for its Sacramento/Delta update. In particular, the State Water Board sought input and information to support whether Delta outflows, Delta inflows, and water project operational constraints should increase, decrease, or remain the same (^SWRCB 2012). As noted above, there are currently few other instream flow requirements for the Sacramento River basin and Delta eastside tributaries in the Bay-Delta Plan other than those that are implemented by the Projects as required by D-1641. The revised proposed Plan amendments provide a regulatory framework that addresses comprehensive minimum instream flow and cold water habitat provisions and distributes the responsibilities more broadly across the watershed in a

way that adjusts to available supplies and provides flexibility. The State Water Board plans to implement the Sacramento/Delta updates to the Bay-Delta Plan primarily through a regulation and associated water right curtailments informed by a methodology that will be developed through a public process. The Board may also implement the objectives through other water right or water quality actions, such as conditioning of water rights and water quality certification associated with FERC hydropower licensing processes, consistent with applicable law and procedures. For further discussion regarding FERC, please see the section below titled, *Interaction with Other State Board Regulatory Activities*, *Water Quality Certification and the Federal Energy Regulatory Commission Process*. Please see Staff Report Section 13.2, *Planning Process*, for additional background information regarding the process for the Plan updates.

Narrative vs. Numeric Water Quality Objectives

Some commenters expressed concern regarding a revision included in the December 2025 revised draft Plan[2] that relocated the proposed numeric portion of the Sacramento/Delta inflow objective to the program of implementation, arguing that this change reflected a lower commitment to a specific volume of water and diminished the scientific rigor that went into the development of the numeric requirements. Commenters suggested that the change would somehow weaken the Board's ability to implement and enforce minimum instream flow standards. Other commenters argued that the narrative objectives are unlawful for lack of clarity citing California Government Code section 11349. Commenters reference federal regulations that require states to adopt water quality criteria in the form of specific numerical values. (40 C.F.R. § 131.11(b)(1).) Commenters also argue that the Porter-Cologne Act requires "quantitative, rather than vague qualitative criteria" and that the "vague" criteria/objectives in the proposed Plan amendments are "capable of multiple interpretations."[3] Commenters argue that the provisions of 40 C.F.R. § 131.11(b)(2) require that narrative criteria may only be used where numerical criteria cannot be established or to supplement numerical criteria.

The State Water Board considers both the objectives and the program of implementation together in its overall determination of reasonable protection (see discussion below on reasonable protection of fish and wildlife beneficial uses and consideration of other beneficial uses). Locating the numeric inflow requirements in the program of implementation rather than stating those requirements as water quality objectives does not diminish the science supporting those flow requirements in any way. Nor does their location in the program of implementation alter the enforceability of these requirements. Water Code section 13247 requires state agencies, including the State Water Board, to comply with water quality control plans, including requirements in the program of implementation, unless otherwise directed or authorized by statute.

For context, it is important to consider the unique nature of the Bay-Delta Plan. The Plan applies the Clean Water Act primarily through state law authorities, which provides the State Water Board with flexibility in how it structures and implements the Plan. Additionally, as discussed above, a water quality objective is distinguishable from how an agency implements and enforces the objective. This is particularly true when implementing objectives outside of the federal permitting authority of the USEPA. (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123; *City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal.App.4th 1392, 1431 [Congress has chosen not to give the USEPA the authority to regulate nonpoint source pollution].) This means that for nonpoint sources of pollution, generally,

[2] Relative to the prior October 2024 draft Plan.

[3] Quotes in this sentence are from Comment Letter 1144, and not from the Porter-Cologne Act.

the State Water Board has broad discretion in how it chooses to describe and implement the objective in accordance with state law. This is consistent with the US Supreme Court's narrow interpretation of Clean Water Act section 101(g), which allows regulation of water users by a state to protect water quality while avoiding a fundamental interference to a state's water allocation authority. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 720.)

Some commenters argue that because these narrative objectives are capable of multiple interpretations, they violate the APA's clarity standard and are not valid regulations. This is incorrect and ignores that the objectives must be viewed together with the program of implementation provisions. Water Code section 13050, subdivision (h) defines "water quality objectives" as the limits or levels of water quality constituents or characteristics established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area. Other comments stated that the narrative objectives are vague, so progress or attainment of the objectives will be unknown. The revised proposed Plan amendments include narrative objectives with detail and specificity on how to implement and achieve the objectives in the program of implementation. Additionally, as discussed above, the State Water Board will submit the regulatory provisions of water quality control plan amendments to OAL for approval before the amendments become effective, and OAL will review the Plan amendments for compliance with the clarity standard of the APA.

The 1995 Bay-Delta Plan, Table 3, *Water Quality Objectives for Fish and Wildlife Beneficial Uses*, included both narrative and numeric objectives. The two narrative objectives were for Salmon Protection and for Brackish Tidal Marshes of Suisun Bay. The 2018 Bay-Delta Plan added a narrative and numeric objective for the LSJR. The revised proposed Plan amendments include five year-round, narrative objectives that are an expression of the desired flow and biological conditions in the Sacramento/Delta watershed and the Delta:

Sacramento River/Delta Tributary Flows

Maintain water quality conditions, including inflow conditions from the Sacramento River/Delta tributaries, together with other measures in the watershed, sufficient to support and maintain the natural production of viable native fish populations. Conditions and measures that reasonably contribute toward maintaining viable native fish populations include the relative magnitude, duration, timing, quality and spatial extent of flows as they would naturally occur.

Sacramento River/Delta Cold Water Habitat

Maintain streamflows and reservoir storage conditions on Sacramento River/Delta tributaries to protect cold water habitat for sensitive native fish species, including Chinook salmon, steelhead, and other native cold water fish species. Cold water habitat conditions to be protected include maintaining sufficient quantities of habitat with suitable temperatures on streams to support passage, holding, spawning, incubation, and rearing while preventing stranding and dewatering due to flow fluctuations.

Delta Outflow

Maintain water quality conditions, including Delta outflows, together with other measures in the watershed, sufficient to support and maintain the natural production of viable native fish populations. Conditions and measures that reasonably contribute toward maintaining viable native fish populations include, but may not be limited to, flows that support fish species, including the relative magnitude, duration, timing, quality and spatial extent of flows. Indicators of viability include population abundance, spatial extent, distribution, structure, genetic and life history diversity, and productivity.

Interior Delta

Maintain water quality conditions, including flow conditions in the interior Delta, together with other measures in the watershed, sufficient to support and maintain the natural production of viable native fish populations. Conditions and measures that reasonably contribute toward maintaining viable native fish populations include the relative magnitude, duration, timing, quality, and spatial extent of flows. Indicators of viability include population abundance, spatial extent, distribution, structure, genetic and life history diversity, and productivity.

Fish Viability

Maintain water quality conditions, including flow conditions in and from tributaries and into and out of the Delta, together with other measures in the watershed, sufficient to support and maintain the natural production of viable native fish populations. Conditions and measures that reasonably contribute toward maintaining viable native fish populations include, but may not be limited to: (1) flows that support native fish species, including the relative magnitude, duration, timing, temperature, and spatial extent of flows; and (2) conditions within water bodies that enhance spawning, rearing, growth, and migration in order to contribute to improved viability. Indicators of viability include population abundance, spatial extent, distribution, structure, genetic and life history diversity, and productivity. Flows provided to meet this objective shall be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year.

The Sacramento/Delta narrative objectives are similar in their level of specificity to the narrative objective for LSJR flows and other narrative flow objectives that have been adopted nationwide. The narrative objective for LSJR flows is as follows:

Maintain inflow conditions from the San Joaquin River watershed to the Delta at Vernalis sufficient to support and maintain the natural production of viable native San Joaquin River watershed fish populations migrating through the Delta. Inflow conditions that reasonably contribute toward maintaining viable native migratory San Joaquin River fish populations include, but may not be limited to, flows that more closely mimic the natural hydrographic conditions to which native fish species are adapted, including the relative magnitude, duration, timing, and spatial extent of flows as they would naturally occur. Indicators of viability include population abundance, spatial extent, distribution, structure, genetic and life history diversity, and productivity.

Kentucky, Missouri, New Hampshire, New York, Rhode Island, Tennessee, Vermont, and Virginia have all adopted narrative flow criteria for the protection of aquatic life. Many narrative criteria are general in nature. Narrative criteria are written in various ways, but they commonly address two general components: (1) a description of the resource to be protected and/or a resource protection goal, and (2) one or more statements describing the hydrologic condition needed to be maintained to achieve the protection goal. For example, Missouri adopted, and USEPA approved, the following narrative criteria: "Waters shall be free from physical, chemical, or hydrological changes that would impair the natural biological community" (USEPA and USGS 2016).

The narrative objectives meet the standards of Government Code section 11349.1, subdivision (a) and are neither unclear nor vague. The terms in the Sacramento/Delta narrative objectives are specific with precise scientific and dictionary definitions and taken together describe the overall statement of desired conditions for viable native fish populations, including salmon that migrate throughout the Delta watershed. For example, Delta outflows and interior Delta flows must be "sufficient to support and maintain the natural production of viable native fish populations." The phrase "support and maintain" means that there must be enough flow to provide, and continue providing, a basis for the existence of fish populations. Merriam-Webster Dictionary definition 2(b) states the meaning of the word "support" is "to provide a basis for the existence or subsistence of" something (Merriam-Webster 2026a). The term "natural production" is unambiguous; it refers to

fish spawned and reared in nature as opposed to spawned and reared in a fish hatchery. The term "natural production" is commonly used with respect to salmonids ("natural production during the baseline period [is] that portion of production not produced in hatcheries" and "production [is] the number of fish that recruit to adulthood…" [USFWS 1995].)

In addition, the narrative Delta outflow objective provides examples of indicators of fish population viability, which include population abundance, spatial extent, distribution, structure, genetic and life history. The narrative cold water habitat objective provides specific examples of sensitive native cold water fish species (i.e., Chinook salmon and steelhead) and describes both the conditions that need to be maintained and those that need to be avoided stating, "suitable temperatures on streams to support passage, holding, spawning, incubation, and rearing while preventing stranding and dewatering due to flow fluctuations." The fish viability objective identifies that flows provided to meet the objective shall be managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial uses at other times of the year. This is neither vague nor ambiguous and is consistent with the program of implementation which, for example, requires local cooperative solutions to identify measures to minimize or avoid redirected impacts including measures to protect refuge water supplies and native terrestrial species of concern (revised proposed Plan amendments section 4.4.2.4) and allows the Executive Director to approve exceptions to curtailments for Central Valley Project Improvement Act wildlife refuge supplies or other State or federal designated refuges or reserves (revised proposed Plan amendments section 4.4.3).

Federal regulations regarding water quality criteria apply to the inclusion of pollutants in water quality standards, which are then implemented through the issuance of NPDES permits for point source discharges of waste. Numeric criteria can also be developed and applied in flow-based water quality objectives that are implemented by the regulation of water diversions as has been done in past Bay-Delta Plan updates; however, the Board is not required to do so and may consider other approaches. Within the Plan, the numeric flow requirements are equally enforceable whether included as water quality objectives or in the program of implementation. The numeric flow requirements in the program of implementation can be considered legally binding provisions that address designated uses, water quality objectives (narrative or numeric) to protect those uses, and they express or establish the desired conditions or instream level of protection (USEPA 2012.)

One commenter asserted that the narrative objectives including the phrase "sufficient to support and maintain the natural production of viable native fish populations" are not comprehensive enough because the objective would not be protective of other beneficial uses like commercial and recreational fishing (COMM) and other recreational beneficial uses, such as boating and swimming (REC-1 and REC-2). The new Sacramento/Delta narrative objectives are specifically focused on native species, though it is expected that improvements in water quality to attain the narrative objectives will also contribute toward the protection of these other beneficial uses. In addition, commercial and recreational fishing, as well as boating and swimming, are not solely reliant on sensitive native species (e.g., salmonids) because other abundant native species and non-native aquatic species are available to be consumed. Furthermore, other water quality objectives and other efforts within and outside of the Bay-Delta Plan exist to protect these other beneficial uses, e.g., Salmon Protection objective, bioaccumulation and mercury fish tissue objectives (SFBRWQCB 2025 and ^Central Valley Water Board 2019), the Central Valley Regional Water Quality Control Board's Delta Nutrient Research Plan, and the State Water Board's Freshwater and Estuarine Harmful Algal Bloom Program. For additional discussion of the water quality objectives for fish and wildlife uses, see Common Response 1.3, *Revised Proposed Plan Amendments*.

Lawful Parameters for Water Quality Objectives

Some commenters raised concerns that inclusion of water quality objectives based on flow is inappropriate under the Porter-Cologne Act, arguing that flow relates to water quantity, not quality. These comments are incorrect for the reasons discussed below.

Flow is a water quality parameter within the Board's authority and responsibility that can be and has been regulated to protect fish and wildlife beneficial uses under the Porter-Cologne Act. Water quality objectives address "water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (Wat. Code, § 13050, subd. (h).) Water Code section 13050, subdivision (g) defines the term "quality of the water" as the "chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use." Flow and the functions it provides are physical properties and characteristics of water that affect its use. Therefore, proposed water quality objectives based on flow fit within the relevant Water Code provisions. This is consistent with the Board's approach to setting water quality objectives in the 1978, 1995, and 2018 Plan updates. As the court noted in the 2006 *State Water Resources Control Board Cases*, "water flow can be regulated as a water quality objective because… 'the rate and quantity of flow… are physical properties or characteristics of water' which 'have an impact on the beneficial uses of' water in the Bay-Delta. Thus, a flow objective sets the amount of water that must be flowing in a watercourse at a given time 'for the reasonable protection of beneficial uses of [the] water.'" (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 701, [citations omitted].)

Flow is also not simply the volume of water present, but also its direction, timing, duration, rate of change, and frequency of specific flow conditions. Contrary to commenter assertions, flow does in fact alter what uses can be made of that water. As discussed in Staff Report Section 3.2, *Flow and the Ecosystem*, 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. The importance of flow in supporting fish and wildlife beneficial uses is described in more detail in Staff Report Chapter 3, *Scientific Knowledge to Inform Fish and Wildlife Flow Recommendations*.

A commenter contended that the State Water Board impermissibly relies on adding "or in a water body" to the definition of "quality of the water" in Water Code section 13050, subdivision (g) in order to justify the use of flow as a parameter for water quality objectives. The Board disagrees with this contention. This is a contorted reading of the statutory text, assigning an artificially narrow definition to the word "water." Indeed, Merriam Webster lists "a particular quantity or body of water" as one of the definitions in its entry for the word "water." Additionally, as described above, subdivision (g) states that the quality of water includes "other properties and characteristics of water which affect its use."

A similar argument was made with regard to water project operations as a parameter for water quality objectives, specifically taking issue with the Delta Cross Channel Gates closure objective. Again, this is an overly narrow reading of the Porter-Cologne Act. The Delta Cross Channel Gates closure objective has been included in the Bay-Delta Plan since it was first adopted in 1978 (then called the Delta Plan). Water Code section 13050, subdivision (i) defines "Water Quality Control" as "the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance." Water project operations, including the Delta Cross Channel, are appropriate objective parameters because these are activities

that may affect the "quality of waters" as defined in Water Code section 13050, subdivision (g), and are within the Boards authority for "Water Quality Control."

Implementation of Objectives

The State Water Board received many comments from water right holders expressing concern that the Board lacks the authority to modify water rights in its planning process. Some comments assert that the analyses in the Staff Report conclude that the Plan updates will require water users to decrease their water use contrary to water right priority. Adoption of the revised proposed Plan amendments does not modify water rights; it establishes water quality objectives and a program of implementation to reasonably protect beneficial uses based on current scientific and legal information. The State Water Board assigns responsibility for implementing the Bay-Delta Plan objectives using its quasi-legislative or adjudicative water rights and water quality authorities. The State Water Board may implement the objectives by adopting regulations, conducting adjudicative proceedings, or both, that take into consideration the requirements of the Public Trust Doctrine and the California Constitution, article X, section 2. The State Water Board plans to largely implement the flow components of the Sacramento/Delta updates to the Bay-Delta Plan by adopting a regulation, or regulations, that authorizes water right curtailments based on water right priorities and subject to possible modifications, such as public health and safety, and public trust obligations.

All water belongs to the people of the state. (Wat. Code, § 102.) "Water rights have been the subject of pervasive regulation in California. The State of California has a substantial public interest in protecting its fields, streams, and wildlife. The State owns the fish in its streams in trust for the public. A water right, whether it predates or postdates 1914 is not exempt from reasonable regulation. Just as a real property owner does not have an unfettered right to develop property in any manner he or she sees fit, an owner of a water right may be similarly restricted." (*People v. Murrison* (2002) 101 Cal.App.4th 349, 360-361 [citations omitted].) In this way, a water right is not a guarantee of a specific amount of water and the reasonable regulation of a water right such that less than the historical maximum is received at any given time is not a change to the underlying right. A water right is generally a priority to use water that is available for diversion as against all junior water right holders who have a right to use that source – it is not a guarantee of water being available under any right and does not confer a right to water that needs to remain instream for the reasonable protection of water quality and instream uses. Therefore, it is incorrect for a water right holder to assert that their water right is being modified by the proposed Plan amendments and premature for water right holders to assert that their right will be violated (e.g., during a curtailment) prior to a curtailment occurring under a given set of facts.

Some water right holders have stated that the Plan amendments will violate their water rights by asserting that implementation will make fish and wildlife a priority above municipal, domestic, and agricultural uses in violation of Water Code sections 106 and 106.3. Water Code section 106 states that it "is hereby established policy of this State that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation." Water Code section 106.3, known as the "Human Right to Water," establishes a state policy "that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes" (i.e., water for human health and safety) and that all relevant state agencies, including the Board, should consider this when revising, adopting, or establishing policies, regulations, and grant criteria.

With respect to Water Code section 106, courts have found the statutes in chapter 1 of division 1 of the Water Code are declarative of general public policy and that the same legislative enactment that created section 106 included an express declaration that in "enactment of this code the Legislature does not intend thereby to effect any change in the law relating to water rights." (*Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 269.) Moreover, section 107 states that the "declaration of the policy of the State in this chapter is not exclusive, and all other or further declarations of policy in this code shall be given their full force and effect." That includes the policy in Porter-Cologne that the "people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state" and that the "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest 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." (Wat. Code, § 13000.)

With respect to section 106.3, the Board adopted the Human Right to Water as a core value (SWRCB 2016). Consistent with that, Section 4.4.3 of the revised proposed Plan amendments expressly commit the Board to developing appropriate provisions for implementation that will provide for short-term and long-term exceptions to curtailments to allow continued diversions for minimum human health and safety water supplies where alternate supplies are not available or for other emergency circumstances. As the California Supreme Court has observed: the "primary function" of section 106 "is to establish priorities between competing appropriators" and while section 106 also declares water policy, it "must be read in conjunction with later enactments requiring consideration of in-stream uses." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 448 fn. 30.) "Thus, neither domestic and municipal uses nor in-stream uses can claim an absolute priority." (*Ibid.*)

In conclusion, the Staff Report analyses do not adjudicate, diminish, or redefine the scope of water rights or make determinations about which specific flows are legally "available" to particular right holders. Questions about legal entitlements would be addressed, if needed, in implementation. For further discussion, see *Water Rights* below.

Achievement of Objectives and Consideration of Beneficial Uses

Some commenters argued that the VA pathway fails to ensure that specific objectives will be met. For example, commenters stated that the inflow objective, which calls for flows of "relative magnitude, duration, timing, quality and spatial extent of flows as they would naturally occur" would not be achieved because the VA pathway largely maintains the unnatural flow patterns and magnitudes under D-1641 and only add a small amount of flow in the spring. Similarly, commenters argued that the inflow-based Delta outflow objective, which requires inflows to be provided as outflows with adjustments for downstream natural accretions and depletions will not be met because the VA pathway excludes numerous inflows from this objective and instead allows them to be diverted by the CVP and SWP. Commenters argued that the program of implementation fails to ensure suitable water temperatures and levels of carryover storage necessary to achieve the cold water habitat objective under both VA and regulatory pathways.

Water Code section 13242 requires the program of implementation for achieving water quality objectives to include: a) a description of the nature of actions which are necessary to achieve the objectives (including recommendations for appropriate action by any entity, public or private), b) a

time schedule for the actions to be taken, and c) a description of surveillance to be undertaken to determine compliance with the objectives. The program of implementation in the revised proposed Plan amendments articulates specific requirements to meet the objectives under the regulatory pathway, including flexible provisions for implementation of the cold water habitat objective over time. In addition, the program of implementation incorporates the VA pathway as an alternative to the regulatory pathway.

The VA pathway is somewhat analogous to the Vernalis Adaptive Management Plan (VAMP) experiment, which was a past proposal under the SJRA to provide flows for a period of 12 years during April and May on the San Joaquin River. The 1995 Bay-Delta Plan identified municipal and industrial beneficial uses, agricultural beneficial uses, and fish and wildlife beneficial uses and objectives to protect those beneficial uses including salinity objectives for the Delta and Suisun Marsh, Delta outflow objectives, San Joaquin River (at Vernalis) and Sacramento River (at Rio Vista) flow objectives, export limits, and a narrative salmon protection objective (also known as the salmon doubling objective). Through D-1641, the Board approved the SJRA proposal to conduct the VAMP experiment in lieu of meeting the Vernalis pulse flow objectives for the San Joaquin River in the 1995 Plan for a 12-year period.

In subsequent litigation, the State Water Board contended that the Plan authorized the implementation of VAMP flows as part of a staged implementation of the Vernalis pulse flow objective; however, the Court found that the 1995 Plan, as written, did not allow for staged implementation because VAMP flows were not identified in the program of implementation. (*State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 727.) While the Court deemed that VAMP could, under the right circumstances, be an appropriate and permissible step toward implementation of the Plan's objectives, VAMP flows that were for the most part lower than the objectives in the Plan did not fit within the requirements of the 1995 Plan and would require the Board to modify the Plan through a regulatory proceeding. (*Id.* at pp. 728-729.) Further, the Court found that the Plan did not contain any information that authorized the Board to implement a flow regime that could provide fewer flows than the volumes of water that the objectives required. (*Id.* at pp. 726-727.) The Court concluded that the Board had not included the VAMP experiment in the program of implementation as an alternative pathway towards achieving the relevant flow objectives but rather included it among an additional set of actions focused on improving habitat conditions, separate from, and in addition to those actions needed to achieve the flow objectives in the Plan. (*Id.* at p. 728.) For these reasons, the court found that when the Board adopted the flow regime established under the SJRA and VAMP experiment, it failed to comply with the 1995 Bay-Delta Plan as required under Water Code section 13247. (*Id.* at p. 730.)

In response to the Court's ruling, the Board amended the program of implementation in its 2006 update to the Bay-Delta Plan to allow for the staged implementation of the pulse flow objectives, which included VAMP flows to be conducted in lieu of the pulse flows for a period of 12 years. The VAMP experiment was designated to end December 31, 2011, and was not extended. Nevertheless, in the State Water Board Cases, the court recognized that such a temporary program did not create an "illusory and unenforceable" provision stating, "[a]s we have previously explained, while the Board allowed performance of the San Joaquin River Agreement, in doing so the Board *required* the Bureau to meet the Vernalis flow objectives during the term of the agreement, with the exception of the Vernalis pulse flow objective. More importantly, the Board required the Bureau to meet *all* of the Vernalis flow objectives if the San Joaquin River Agreement was dissolved before it expired. Thus, even if the San Joaquin River Agreement *is* unenforceable, it makes no difference, because the

Board's decision assures the Vernalis flow objectives will be met if the agreement is canceled." (*State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 775 [italics in original].)

The State Water Board has consistently encouraged voluntary actions that are consistent with updated Bay-Delta Plan provisions for their potential to provide large-scale benefits that will amplify the ecological benefit of new and existing flows beyond what the State Water Board could require through flow and water project operations alone. Successful voluntary measures to implement the Bay-Delta Plan could provide comprehensive, enduring, and timely benefits to the ecosystem. With this in mind, the Sacramento/Delta Plan update's program of implementation contains two pathways for achieving the Plan's narrative water quality objectives: a VA pathway that would allow for implementation of flow and non-flow commitments in lieu of implementing other provisions for tributary inflow, cold water habitat, and inflow-based Delta outflows; and a regulatory pathway that would apply to water rights not included in the VA pathway and that would also apply to VA water rights in the event the VA pathway is discontinued. Like the VAMP experiment, this dual-pathway approach establishes a backstop that would come into effect if the VA pathway proves ineffective or its commitments are not met.

As described above, the Board has the authority to experiment in its implementation of the Bay-Delta Plan. (Wat. Code, § 13242.) Unlike the initial issues with the VAMP experiment, the program of implementation contained in the Sacramento/Delta Update to the Bay-Delta Plan includes a time schedule for implementation and assigns responsibilities to VA participants. Under the VA pathway, VA participants would not be subject to the provisions of the regulatory pathway for the initial eight-year term of the VA pathway, with the possibility for extension. Instead, VA participants would provide a combination of increased flows, depending on water year type, and non-flow habitat restoration actions aimed at improving spawning and rearing capacity for salmonids, estuarine species, and other native fish and wildlife. The VA pathway provides an opportunity for exploring the effects of flow regimes and spawning and rearing habitat restoration on fish populations and is expected to provide additional protection for fish and wildlife public trust uses relative to baseline while also reducing impacts on other water uses. VA participants assert that the VAs will serve as a comprehensive approach to managing and integrating habitat, flow, landscape, and other factors to protect native fish and wildlife species, while concurrently protecting water supply reliability and facilitating increased coordination among state agencies, public water agencies, and stakeholder groups on scientific studies, monitoring, and adaptive management of flow and non-flow commitments. Additionally, the regulatory pathway remains an important complement to the VA pathway, as it provides a necessary backstop to return to if VA commitments are not met or if the VA pathway does not adequately contribute to meeting the narrative objectives and the reasonable protection of fish and wildlife beneficial uses.

Other provisions in the program of implementation also provide for staged implementation, including the cold water habitat measures. The impact assessment in the Staff Report focuses on changes in water temperature conditions for fish relative to baseline conditions. As discussed in Common Response 7.6.2, *Aquatic Biological Resources and Cold Water Habitat*, most tributaries with reservoirs have existing temperature management concerns at certain times under baseline conditions. These existing temperature issues do not represent a temperature impact, although the cold water habitat objective is intended to remedy that over time. The VA pathway includes a cold water habitat provision requiring that it be implemented in a manner to improve temperatures to the extent possible and avoid redirected impacts to water temperatures. Note that flows are lower under the VA pathway and therefore are less likely to result in redirected temperature impacts. See

Common Response 7.6.2, *Aquatic Biological Resources and Cold Water Habitat*, regarding implementation of the cold water habitat objective.

Commenters raised similar concerns with the fish viability and salmon protection objectives, arguing that the revised proposed Plan amendments fail to show how the fish viability objective and the salmon protection objective will be met. One commenter suggested that achieving the salmon protection objective would require a larger salmon population than what is required for viability and argued that the record fails to show any likelihood of even achieving the viability objective. The salmon protection objective is pre-existing in the Bay-Delta Plan and is not being revised with the Plan amendments. However, both the salmon protection objective as well as the new fish viability objective require that water quality, flow, or storage conditions be maintained to support fish viability or doubled populations not alone, but together with other measures in the watershed. The Staff Report documents that improvements to both water conditions and non-flow measures are necessary to restore native fish populations. It is expected that improvements in instream flow and habitat conditions will result in commensurate improvements in fish viability and fish abundance metrics.

The revised proposed Plan amendments acknowledge that achievement of the narrative objectives for salmon protection and fish viability will require actions not just by the State Water Board, but from other entities as well. The revised proposed Plan amendments state that the narrative objectives for salmon protection and fish viability are implemented by the collective actions identified in the Bay-Delta Plan for the protection of fish and wildlife beneficial uses, including flow and water quality actions taken by the State Water Board and regional water boards, and actions by other entities to improve habitat and other conditions for the protection of salmon. The program of implementation identifies the flow and non-flow actions necessary to achieve the objectives. Non-flow actions described in the program of implementation include, but are not limited to, fisheries management, hatchery management reform, predator management, and habitat restoration.

The Plan amendments are focused on supporting and maintaining viable native fish populations. Indicators of viability include population abundance, spatial extent, distribution, structure, genetic and life history diversity, and productivity. In contrast, the salmon protection objective is expressed in terms of abundance only, but it will require many of the same water quality conditions to achieve and will depend on the interrelated actions of other entities.

Overall, the record supports that the regulatory pathway of the revised proposed Plan amendments is expected to provide reasonable protection of fish and wildlife beneficial uses including progress toward achieving the salmon protection objective (Staff Report Section 13.5.3, *Regulatory Pathway*). The exact combination of flow (magnitude, timing, duration, and variability) values, locations, and extent of non-flow measures necessary to achieve doubling is currently not known. Accordingly, the State Water Board has discretion to be flexible with the time needed to achieve reasonable protection of fish and wildlife beneficial uses with the water supply adjustments (WSAs) in the regulatory pathway and recognizing uncertainty in the VA pathway experimental approach. As part of the periodic review process, the State Water Board will evaluate progress toward implementation of the narrative salmon protection and fish viability objectives and whether changes to the Bay-Delta Plan or its implementation are needed to achieve the objectives. The State Water Board received many comments on topics related to reasonable protection of beneficial uses. Commenters expressed concern that the benefits from the proposed VAs would not be large enough to adequately restore and protect the Bay-Delta ecosystem and thus would not reasonably protect fish and wildlife beneficial uses or other beneficial uses including commercial and recreational fishing. For example,

commenters claim that the VAs or proposed Plan amendments from the 2023 draft Staff Report would only provide marginal improvement and that marginal improvement in the status of native fish species and estuarine habitat conditions (including simply slowing their decline) is not the standard for determining adequacy of Bay-Delta Plan updates under the Porter-Cologne Act. Other commenters alleged that the Staff Report did not adequately consider all beneficial uses such as municipal, industrial, and agricultural supply and that the alternatives considered, including the proposed Plan amendments, would not adequately protect all beneficial uses, or that the VAs are the only alternative that would reasonably protect all beneficial uses. Please see the discussion below regarding beneficial uses in the water quality control planning context.

As part of the water quality control planning process, the State Water Board must establish water quality objectives that, in its judgment, will ensure the reasonable protection of beneficial uses and the prevention of nuisance. When formulating these water quality objectives, the Board must consider a number of factors including but not limited to: consideration of past, present, and probable future beneficial uses of water; the environmental characteristics of the hydrographic unit being considered; water quality conditions that could reasonably be achieved through the coordinated control of all factors affecting water quality in the area; the need for developing housing within the region; and economic considerations. (Wat. Code, § 13241.) As described above, the State Water Board views both the water quality objectives and the program of implementation together in these considerations and making its determination. The section below discusses the rationale and support for reasonable protection of fish and wildlife beneficial uses, the consideration of other beneficial uses, and discretion to achieve reasonable protection over time.

Beneficial Uses in Water Quality Process

Some commenters raised concerns that the State Water Board has not established water quality objectives and a program of implementation that ensures the reasonable protection of all beneficial uses, and that the proposed flow requirements disproportionately focus on protecting fish and wildlife beneficial uses at the expense of other beneficial uses, such as municipal, industrial, and agricultural supply. They allege that the State Water Board has not adequately balanced competing beneficial uses and has generalized or de-emphasized the potential adverse impacts on other beneficial uses such as municipal and agricultural water supplies. However, when some commenters claim that the State Water Board had not considered protection of all beneficial uses in the Bay-Delta Plan, it is important to note that they may be confusing the term “beneficial uses” as used in basin planning with the term “beneficial uses” as used in the water rights context.

Under the Porter-Cologne Act, water quality objectives are established for the “reasonable protection of beneficial uses.” This is a reference to the “beneficial uses” that are designated in a basin plan and that are to be “protected against quality degradation” (Wat. Code, § 13050, subd. (f)). In other words, that the water is of *sufficient quality* to reasonably protect the use, with “quality of the water” referring to “chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water that affect its use” (Wat. Code, § 13050, subd. (g) [emphasis added]). For example, Table 2 of the Bay-Delta Plan establishes a salinity objective adequate to reasonably protect agricultural beneficial uses. Notably, the reasonable protection of agriculture in the water quality control plan context is not about whether agriculture will receive a specific volume or flow of water as compared to other beneficial uses. Instead, it is a salinity objective that ensures that the water that is diverted and used for agricultural irrigation in the western, interior, and southern Delta is of sufficient quality (i.e., not so salty that it will harm the crops). Some confusion is understandable because water quality objectives to protect fish and wildlife beneficial uses (as

opposed to municipal, industrial, or agricultural beneficial uses) are unique in that they do consider volumes of water. This is because the water itself is habitat for aquatic species, and the quality of that habitat is degraded, or completely eliminated (e.g., when a river goes dry), when water diversions reduce flow below the level where the water body can still support a functioning aquatic ecosystem. Therefore, protecting water quality for fish and wildlife requires setting sufficient minimum instream flows. Stated another way, protection of municipal, agricultural, and fish and wildlife beneficial uses in the Bay-Delta Plan is not an analysis of competing water allocations because water quality objectives for municipal, industrial, and agricultural uses are measured in maximum levels of chloride, electrical conductivity, or other constituents, not volumes of water (^2018 Bay Delta Plan; ^Central Valley Water Board 2019; SFBRWQCB 2025).

Confusion arises because under water rights law, "beneficial use" is used as a different term of art for a different purpose. For example, to maintain an appropriative water right to a specific quantify of water, the water must "be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use if for such a purpose the right ceases" (Wat. Code, § 1240). This is a reflection of the "use it or lose it" nature of appropriative water rights where "'due to the scarcity of water in general in California, its societal importance, and the peculiar nature of common and multiple rights to water from the same watercourse, the courts have recognized that water rights may be forfeited through nonuse under certain circumstances'. Under [Water Code] section 1241, which codifies these common law rulings, if an appropriator fails beneficially to use all or a portion of the appropriated water for a period of five years, 'that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water'." (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 889 [citations omitted].)

Water rights beneficial uses are defined in title 23 of the California Code of Regulations under division 3, *State Water Resources Control Board and Regional Water Quality Control Boards*, in chapter 2, *Appropriation of Water*, article 2, *Definitions*, subarticle 2, *Beneficial uses.* That section lists and defines beneficial uses and advises that the "board will determine whether other uses of water are beneficial when considering individual applications to appropriate water." The listed water right beneficial uses include domestic, irrigation, power, frost protection, municipal, mining, industrial, fish and wildlife preservation and enhancement, aquaculture, recreation, water quality, stockwatering, and heat control (Cal. Code Regs., tit. 23, § 659 et seq.). While the definitions "irrigation," "industrial," and "fish and wildlife" may look similar to water quality beneficial uses in a basin plan, they are being used in a different context, which is to define the beneficial purpose of the water right, for example as the "purpose of use" in a water right permit or change petition. In addition, even if water is applied to a "beneficial use" as defined under water rights law, the right does "not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water" (Cal. Const., art. X, § 2).

In contrast, the beneficial uses defined in the Bay-Delta Plan are for the purpose of establishing water quality objectives that will protect the use. The beneficial uses related to fish and wildlife include Estuarine Habitat (EST), Cold Freshwater Habitat (COLD), Warm Freshwater Habitat (WARM), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development of Fish (SPWN), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE). These fish and wildlife beneficial uses support other beneficial uses such as Shellfish Harvesting (SHELL), Commercial and Sport Fishing (COMM), Navigation (NAV), Water Contact Recreation (REC-1), and Non-Contact Water Recreation (REC-2). Additionally, the Plan amendments add definitions for Tribal Subsistence Fishing (T-SUB), Subsistence Fishing (SUB), and Tribal Tradition and Culture (CUL) to the Bay-Delta Plan and designate CUL. This is in recognition of the

centrality that vital fish populations, especially salmon, have for cultural, spiritual, ceremonial and traditional rights and lifeways of tribes in the Bay-Delta watershed and therefore the reasonable protection of the aquatic life beneficial uses identified in the Bay-Delta Plan and CUL overlap.

It is essential to note that distinguishing water right beneficial uses and water quality beneficial uses does not mean that the Board is not evaluating or considering how people might be impacted if the amount of water for domestic or irrigation purposes changes because the reasonable protection of fish and wildlife beneficial uses requires that less water be diverted. 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" and the task of accomplishing this belongs to the Board. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619; Wat. Code, § 13000.) Many people submitted written comments, spoke passionately during the oral public comment period, or both, about the ways increased flows for fish and wildlife could cause social or economic effects, beneficial or detrimental, either to them personally or as representatives of their communities and industries. The Board also analyzed multiple factors, including the economic impacts of less water supply to municipal, industrial, and agricultural uses, when establishing water quality objectives (Wat. Code, § 13241, subd. (d)). For example, when looking at economics, the Board is weighing how people, including their communities and livelihoods, could be affected by changes in water supply. In addition, while the purpose of CEQA is to analyze potential adverse impacts to the physical environment of an action, those analyses also reveal how less potential water supply could affect farming communities and agricultural businesses (e.g., through agricultural land conversion, which is then factored into the economic analysis) or drive people's actions in response, such as seeking more groundwater pumping for irrigation or heightening the need for a community to build additional recycled water infrastructure, which could in turn have both impacts to the physical environment (e.g., impacts to groundwater resources or from construction) but also economic impacts from the cost. These are only a few examples of how the Board is holistically informed of all the demands being made on the waters under consideration and the total values involved.

Reasonable Protection of Fish and Wildlife Beneficial Uses

The Bay-Delta watershed is an integral part of California's environment, economy, and way of life. Protecting the Bay-Delta watershed and its many beneficial uses of water is one of the State Water Board's primary responsibilities and top priorities. It is widely recognized that the Bay-Delta ecosystem is in a state of prolonged decline that has brought some species to the brink of extinction. Changes in ecology due to agricultural practices, urbanization, discharges of contaminants, flood control, and climate change, combined with substantial and widespread water development and infrastructure projects, were accompanied by precipitous population declines in an array of species that depend on the ecosystem. In the early 2000s, scientists noted the steep decline of several native estuarine fish populations, and estuarine species have continued to decline to the present day. Simultaneously, natural production of all runs of Central Valley salmon and steelhead remains near all-time low levels. Based on these precipitous declines in native fish and other aquatic species in the Bay-Delta watershed, the State Water Board is updating the Sacramento River and Delta portions of the plan that were last substantively updated in 1995.

As noted above, a water quality control plan consists of designation or establishment of: (1) beneficial uses to be protected; (2) water quality objectives for the reasonable protection of the beneficial uses; and (3) a program of implementation for achieving the water quality objectives. The Bay-Delta Plan contains flow-related water quality protections to ensure that the quality of water

for various beneficial uses of water—drinking, irrigation, fisheries, and more—are reasonably protected. The Plan is complementary to the other water quality control plans adopted by the State and regional water quality control boards and State policies for water quality control adopted by the State Water Board. The Plan provides reasonable protection for the Bay-Delta watershed's beneficial uses that require control of salinity (caused by saltwater intrusion, municipal discharges, and agricultural drainage), instream flows and Delta outflows, and water project operations (limits on diversions and associated operations and management).

The water quality objectives needed to reasonably protect fish and wildlife beneficial uses are addressed by the objectives and program of implementation in the Bay-Delta Plan. Water Code section 13241 provides that the Board "shall establish water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses…." The Board has broad authority, discretion, and expertise to determine what levels of flow provide "reasonable protection" to beneficial uses under Water Code section 13241. For example, some commenters have claimed that the State Water Board is restricted in its consideration of reasonable protection from adopting measures that are more stringent than those required under the ESA or CESA, asserting this is a prohibited conflict or an impermissible "regulatory oversight" of ESA. Notably, however the State Water Board's RARE beneficial use explicitly recognizes that reasonable protection encompasses the uses of water that support habitats necessary, at least in part, for the survival and maintenance of plant or animal species established under State or federal law as being rare, threatened, or endangered. For an additional discussion of how the ESA is a minimum or "floor" and not a maximum or "ceiling" for species protection, please see Common Response 1.1, *General Comments*, regarding compliance with other laws and policies.

There is no set formula in determining reasonableness. In establishing water quality objectives and a program of implementation to achieve the objectives, the State Water Board must consider a number of factors in determining how to reasonably protect particular uses, including beneficial uses of water, the environmental characteristics of the hydrographic unit being considered, water quality conditions that could reasonably be achieved through the coordinated control of all factors affecting water quality in the area, economic considerations, and other factors. (Wat. Code, § 13241, subd. (a)–(f).) (See the discussion below for more information regarding section 13241 factors.) Federal regulations provide that criteria (objectives) must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. (40 C.F.R. § 131.11(a)(1).) What this means is that the criteria must be sufficient to protect the most sensitive use, not that the most sensitive use must be protected to the exclusion of other uses. The revised proposed Plan amendments support the most sensitive beneficial uses, native fish and wildlife. Protection of the most sensitive beneficial uses in turn protects other beneficial uses to the extent that they overlap fish and wildlife beneficial uses.

As discussed in Chapter 3 of the Staff Report, *Scientific Knowledge to Inform Fish and Wildlife Flow Recommendations*, 10-percent increments of unimpaired flows between 35 and 75 percent (referred to as *scenarios*) were evaluated. Those evaluations show that inflows in the 55 scenario (and corresponding outflow) would be expected to provide marked improvements in protection of fish and wildlife beneficial uses, including achievement of the flow thresholds associated with protection of various aquatic species and achievement of floodplain inundation acreage. These improvements are greater in the 65 scenario; however, conservation of cold water resources in reservoirs becomes more challenging at this higher flow level, and water supply costs increase substantially (discussed more in Chapter 6, *Changes in Hydrology and Water Supply*; Chapter 7, *Environmental Analysis*; and

Chapter 8, *Economic Analysis and Other Considerations*). At the 75 scenario, the water supply costs are large, and cold water conservation within reservoirs is very difficult, particularly without significant additional water supply costs. Expected benefits to fish and wildlife are marginal in the 45 scenario but could be increased by implementing complementary ecosystem actions. On some tributaries, it is more difficult to maintain cold water pool protections and meaningful levels of water supply while also meeting a higher flow level.

Based on the above and in consideration of the section 13241 factors, including consideration of other uses of water, the proposed flow requirements are an adaptive range between 45 and 65 percent of unimpaired flow that allow the State Water Board to adjust the required flows based on new information and changing environmental and fish and wildlife conditions. Additionally, in response to public comments expressing concerns that the above inflow requirements would have significant water supply impacts and could result in drawing down reservoir storage, with associated temperature impacts, modifications to the starting point for the inflows under the regulatory pathway for water rights that were issued before the end of 2025 were incorporated into the revised proposed Plan amendments that reduce water supply impacts and allow more water to be stored in reservoirs at the outset of Plan implementation.

These modifications are referred to as WSAs that, upon initial implementation, lower the required percent of unimpaired flow watershed-wide during all but the wettest hydrologic conditions down to 45 or 35 percent of unimpaired flow, with additional tributary-specific WSAs for three rainfall and municipal supply dominated tributaries, the Mokelumne and Calaveras Rivers and Putah Creek. Under the watershed-wide WSAs, 55% of unimpaired flow is required in the wettest 1/3 of hydrologic conditions, 45 percent of unimpaired flow in the middle 1/3 of conditions, and 35 percent of unimpaired flow in the driest 1/3 of conditions.[4] The Mokelumne and Calaveras Rivers and Putah Creek include additional tributary-specific WSAs that reduce the inflow requirements more frequently down to 35 percent and off-ramp entirely in the driest conditions.

The Staff Report analysis shows that 45 to 65 percent of unimpaired flow would provide reasonable protection of fish and wildlife beneficial uses. However, because the water supply impacts are significant and may be difficult to implement immediately, the WSAs help moderate the impacts to cold water supply and water supply for agriculture, drinking water, and other uses and allow water users time to adapt during initial implementation. Importantly, unimpaired flow itself is a measurement that adapts to water availability. It is not a fixed flow rate by water year type (as was utilized in the past) but is based on a percent of the available water and shifts proportionally as the available flow changes. By providing a flexible but enforceable benchmark for the protection of flows for fish and wildlife beneficial uses (e.g., the flow rate in a river or stream is measurable in real time), the unimpaired flow metric can also provide a more durable framework for determining when water in excess of environmental needs and existing water rights is available for future diversion.

In addition to the increased minimum instream flow requirements, the State Water Board incorporated non-flow measures into the program of implementation to help address ecosystem needs. These complementary measures include recommended actions to protect and restore habitat; reduce impacts from recreational, commercial, and illegal harvest; identify and reduce the negative impacts of introduced species on native species, including predation and competition;

[4] As defined in the revised proposed Plan amendments based on specified rounded thresholds for the last 30 years of the four river index, with these indices subject to update through the periodic review process.

improve hatchery management; and address barriers to fish passage, among others. In addition, some complementary ecosystem projects may also serve as an implementation mechanism for the proposed cold water habitat objective. The non-flow measures include requirements and guidelines for additional monitoring, reporting, evaluation, and special studies needed to implement and inform future updates to the Plan. The VA pathway also includes implementation of non-flow habitat restoration actions targeted at improving spawning and rearing capacity for juvenile salmonids, estuarine species, and other native fish and wildlife on a portion of the Sacramento/Delta tributaries.

Habitat restoration and ecosystem projects identified in the Plan would contribute to providing reasonable protection to fish and wildlife in the Sacramento/Delta and may help reduce the amount of water required to achieve that overall goal. For example, California's native cold water fish species are dependent on cold water in various life stages and therefore considerable effort is needed to efficiently address cold water habitat downstream of existing dam infrastructure that acts as migration barriers and limits salmon and steelhead to low elevations near the floor of the Central Valley where air and water temperature can be extremely warm. Managing and providing cold water habitat within the valley floor is water intensive and may be more expensive than providing fish passage that gives native fish access to higher elevation habitats in certain tributary watersheds. As discussed above, the habitat restoration and ecosystem projects identified in the Plan that other entities should take will contribute towards achieving the overall goal of improving conditions for fish and wildlife in the Bay-Delta watershed and may help reduce the amount of water it takes to reasonably protect fish and wildlife.

The State Water Board recognizes that providing instream flows for the environment necessarily results in less water being available for other uses. The State Water Board is sensitive to those potential supply impacts and is giving them careful consideration. The Plan amendments were developed to improve flow and water quality conditions for fish and wildlife in the Sacramento/Delta, but implementation will impact a large geographic area and a system that has been highly altered for decades. To accommodate for these issues, the Plan amendments provide for incremental implementation that would be expected to improve conditions for native fish and wildlife in the Sacramento/Delta watershed over time.

Like the addition of WSAs to moderate impacts to water supply discussed above, the revised proposed Plan amendments incorporate the VA pathway as an alternative to the regulatory pathway. The VA pathway specifically allows for the HRL flow, habitat, and related commitments to be implemented for an 8-year period with the possibility of extension in lieu of the regulatory pathway. The HRL participants believe their flow, habitat, and related commitments will improve fish and wildlife conditions at lower water supply costs than the regulatory pathway. The final Scientific Basis Report Supplement for the VAs, Appendix G2 of the Staff Report, found that the VA pathway would be expected to result in benefits for fish and wildlife, although there are uncertainties in the magnitude of those benefits and whether they would result in population-level improvements. To address the uncertainty, the VA pathway includes supplemental science and monitoring activities that would monitor and evaluate the effectiveness of the VA pathway to inform a Board decision on whether to continue, modify, or terminate the VA pathway. The VA pathway offers an opportunity to measure the effectiveness of the combination of HRL flow and habitat commitments and advance understanding of management of the Bay-Delta watershed to improve fish and wildlife conditions. For those reasons, the VA pathway is included in the revised proposed Plan amendments in combination with the regulatory pathway and with opportunities for course correction if the VA pathway is not achieving the desired effects.

The science supporting unimpaired flow requirements, including the adaptive range, together with the evaluation of impacts on other water uses are explained in a level of detail in the Staff Report that is appropriate and provides a factual basis for the State Water Board's decision to move forward with the Plan update. The objective of the Clean Water Act is to *restore* and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. 1251(a).) The Clean Water Act includes, as an interim objective to eliminating all water pollution, the achievement of water quality levels that allow waters to be fishable and swimmable. (33 U.S.C. § 1251 (a)(2); 40 C.F.R. § 131.2.) In many cases, the State and regional water boards are still aiming to achieve these interim objectives. The iterative nature of Clean Water Act implementation has been upheld in the most robust applications for the regulation of point source discharges. And while the federal Clean Water Act requires states to designate water standards and identify bodies of water that fail to meet these standards, it does not compel a state to regulate nonpoint source pollution. (See *City of Arcadia v. State Water Res. Control Bd.*, *supra*, 135 Cal.App.4th at p. 1431 [nonpoint source pollution can only be enforced as regulatory requirements under state authority].)

As noted above, the Porter-Cologne Act establishes as state policy that "activities and factors which may affect the quality of the waters of the state shall be regulated 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." (Wat. Code, § 13000.) Water quality control plans govern both point source and nonpoint source pollution. Point source discharges emanate from discrete or discernable sources, such as pipes, ditches, or canals. Nonpoint source discharges emanate from diffuse runoff from land use management activities such as animal grazing, irrigated agriculture, and silviculture. (*Environmental Law Foundation v. State Water Resources Control Bd.* (2023) 89 Cal.App.5th 451, 462, *as modified* (Apr. 13, 2023) ["Nonpoint source pollution presents unique regulatory challenges, which cannot be readily addressed by strategies designed to control point source pollution"].) Nonpoint source pollution can also result from controllable factors that are not discharges of waste, including hydrologic modification and water diversions.

The WSAs and VA pathway are properly provided as components of staged implementation toward fully achieving the new water quality objectives in the Plan. As stated in the *Racanelli* decision, "[w]ater quality objectives, we realize, may not always be readily enforceable. The statutory factors enumerated in section 13241, particularly the provisions for recommended action and time schedule, reflect the Legislature's recognition that an implementing program may be a lengthy and complex process requiring action by entities over which the Board has little or no control and also requiring significant time intervals. Thus, we do not believe that difficulty in enforcement justifies a bypass of the legislative imperative to establish water quality objectives which in the judgment of the Board will ensure reasonable protection of beneficial uses." (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 122.) A subsequent court decision has affirmed the State Water Board's authority and discretion to provide for staged implementation and alternative options for implementation, but the alternate provisions and time schedules must be articulated in the Plan itself. (*State Water Res. Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 729 [finding that the Board's power to approve any alternate, experimental flow objective to be met on an interim basis is constrained by the terms of the program of implementation, which in this case did not provide the flexibility to do so].)

Here, the regulatory pathway provides the backstop that, with the unimpaired flow requirements, will provide reasonable protection for fish and wildlife beneficial uses. The regulatory backstop allows interim WSAs to ease the transition toward full implementation of the numeric flow

requirements and allows an alternative VA pathway that offers an opportunity to measure the effectiveness of the combination of HRL flow and habitat commitments and advance understanding of management of the Bay-Delta Watershed to improve fish and wildlife conditions. The program of implementation takes into account the difficulty of enforcing new flow requirements that will necessarily reduce the amount of water available for diversions and considers the options reasonably available to diverters to comply with the Plan. The Plan will be periodically reviewed and contains sufficient ability to adaptively implement, which will be important as measures are implemented and a better understanding of their effectiveness is gained.

The Staff Report reviews and considers potential effects of the Plan amendments and various alternatives, including the regulatory and VA pathways, through an evaluation of public trust and public interest concerns including, but not limited to, aquatic resources, economics, reservoir storage, power production, and groundwater resources. A precise quantification of potential water uses and impacts on these uses, or a cost-benefit analysis, is not required to meet the State Water Board's water quality planning obligations. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 118-119.) However, the Staff Report goes beyond the minimum requirements and, as summarized in the *Executive Summary* and discussed in detail throughout the Staff Report, provides such an evaluation. Additionally, in accordance with CEQA and the Porter-Cologne Act, the Staff Report identifies and evaluates the potential significant adverse environmental impacts of the revised proposed Plan amendments, as well as economic and other effects. This includes, for example, analyses of impacts on agricultural resources (Sections 7.4, 9.7.4, and 13.7.4, each titled *Agriculture and Forest Resources*), utilities and service systems (Sections 7.20, 9.7.20, and 13.7.20, each titled *Utilities and Service Systems*), and other economic analyses (Chapter 8, Section 9.8, and Section 13.8, each titled *Economic Analysis and Other Considerations*). The Staff Report's analyses provide a sufficient and credible assessment of the environmental impacts and other considerations that will inform the State Water Board's decision regarding the Plan amendments. For a summary of the resource impacts analyzed in the Staff Report, please refer to Chapter 1, *Executive Summary*.

Board Consideration of Factors under Water Code Section 13241

Section 13241 of the Porter-Cologne Act has two main requirements. First, it requires the Water Board to "establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance," and, second, it requires the Water Board to consider factors such as past, present, and probable future beneficial uses of water, as well as other factors such as economic considerations and the need for housing, when establishing water quality objectives. "Consider" is defined as "to think about carefully," "to take into account," "to regard or treat in an attentive or kindly way," "to gaze on steadily or reflectively," or "to come to judge or classify." (Merriam-Webster 2026b.) Failure to agree with a particular point of view is not a failure to consider it. In establishing water quality objectives, section 13241 also recognizes that "it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." (Wat. Code, § 13241.) Beneficial uses to be protected, as defined under the Porter-Cologne, are listed in the Bay-Delta Plan and regional water quality control plans encompassing the plan area. In developing and analyzing the Plan amendments, the Board carefully considered the quality of all beneficial uses of water, and all 13241 factors. As discussed in more detail below, Section 13.6.2 of the Staff Report, *Water Code Section 13241 Analysis*, identifies sections and appendices of the Staff Report where each of these factors are analyzed.

Some commenters appear to interpret section 13241 as requiring each water quality objective to protect all beneficial uses, claiming that proposing water quality objectives that fail to protect all beneficial uses is a violation of section 13241; however, it is important to note that nowhere does section 13241 require each water quality objective by itself to protect all beneficial uses. The Clean Water Act similarly conceives of a water quality standard as protecting a particular use, not all uses. For example, water quality criteria are defined as "elements of water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports *a* particular use. When criteria are met, water quality will generally protect the designated use." (40 C.F.R. § 131.3(a), [emphasis added].) For municipal and industrial beneficial uses, the Bay-Delta Plan provides protection from the effects of salinity intrusion. For agricultural beneficial uses, the Bay-Delta Plan provides protection from salinity intrusion and agricultural drainage. See Plan Section 3.2*, Water Quality Objectives for Municipal and Industrial Beneficial Uses*, and Section 3.3*, Water Quality Objectives for Agricultural Beneficial Uses*.[5] Moreover, to the extent the Plan amendments result in more instream flow, that dilution will accrue to the benefit of other beneficial uses in the Bay-Delta Plan. For example, the Board has had to develop flow accounting protocols (Appendix B.1 to the revised proposed Plan amendments) to demonstrate that HRL flow commitments would be provided as additive Delta outflows and not instead result in increased exports out of the Delta. Otherwise, for example, when salinity objectives are controlling Project operations, the additional increment of HRL flow commitments could provide for meeting existing water quality obligations and, as a result, provide for increased Project exports instead of contributing to Delta outflow. See revised proposed Plan amendments, Appendix B.1, *Voluntary Agreement Pathway Accounting Protocols*, B.1.4.3, *Verification of Increased Delta Outflow.*

Some commenters alleged that the State Water Board failed to properly consider factors identified in section 13241 of the Porter-Cologne Act when developing the water quality objectives in the Plan amendments. These factors include: (a) past, present, and probable future beneficial uses of water; (b) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; and (f) the need to develop and use recycled water. (Wat. Code, § 13241.) The draft Staff Report discusses these factors as they relate to the proposed regulatory and VA pathways, and other project alternatives. Final Staff Report Section 13.6.2, *Water Code Section 13241 Analysis*, identifies sections and appendices of the Staff Report where each of these factors are analyzed. The following six subsections (a-f) provide additional information and comment responses regarding how each of the six factors are considered by the Board for this Plan update.

(a) Past, present, and probable future beneficial uses of water

Some commenters state that this factor of section 13241 requires the Board to consider future water supply projects like the proposed Sites Reservoir or the Delta Conveyance or present management directives such as ESA biological opinion requirements for the operation of the CVP and SWP and President Trump's 2025 Executive Order 14181 calling for water diversions from the Bay-Delta watershed to be maximized. Some commenters suggested that the Staff Report fails to analyze what San Joaquin River flow contributions are needed to provide reasonable protection for Delta outflow when combined with the proposed range of flow contributions from the Sacramento

[5] Note: These descriptions remain unchanged from the 1995 Bay-Delta Plan, p.14.

River and its tributaries, and the Delta eastside tributaries, and in the absence of such an analysis the Board cannot determine what flows from each source constitute a reasonable level of protection given the resulting impacts on other beneficial uses.

In doing so, many commenters confused the *water quality* term "beneficial uses" as defined in Porter-Cologne with the *water rights* term "beneficial uses" and concluded that unless the Board weighed their past, present, and probable future water supply demands against fish and wildlife beneficial uses, this consideration had not been met. That is incorrect. Please see the discussion above regarding *Beneficial Uses in Water Quality Process.* However, while this confusion is based on a misreading of the statute, it is somewhat immaterial from a practical perspective because the Board, in seeking 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" (Wat. Code, § 13000) considers water supply impacts in myriad ways in determining what is reasonable, as discussed above under *Beneficial Uses in Water Quality Process*, *Reasonable Protection of Fish and Wildlife Beneficial Uses*, and below under *(d) Economic Considerations.* The Board also considers water supply impacts in its CEQA-equivalent analyses, see Staff Report Section 13.7.21.1, *Cumulative Impact Analysis*, and Section 7.23, *Cumulative Impact Analysis, Growth-Inducing Impacts, and Significant Irreversible Environmental Changes*, for consideration of other reasonably foreseeable water management projects and actions.

With respect to water quality and new water supply projects, the Plan amendments direct the State Water Board to consider imposing additional requirements on new water supply projects to ensure that future authorizations for the diversion and use of water are consistent with and support the salmon protection, fish viability, inflow, inflow-based Delta outflow, and interior outflow objectives of the Bay Delta Plan. The Plan also specifies that new water supply projects would be on the regulatory pathway and would not receive WSAs, unless approved through a subsequent public periodic review process to update the Plan based on supporting scientific and environmental documentation, including compliance with CEQA and preparation of a supporting Scientific Basis Report as appropriate. Please see Common Response 1.3, *Revised Proposed Plan Amendments*, for information on flow requirements applicable to new water supply projects. Please see the sections within this common response titled *Reasonable Protection of Fish and Wildlife Beneficial Uses*, and *2018 Lower San Joaquin River Flows and Southern Delta Salinity Update to the Bay-Delta Plan* regarding comments related to reasonable protection and San Joaquin River flow contributions to Delta outflow. Also see Staff Report Section 13.6.2, *Water Code Section 13241 Analysis*, for additional information regarding how the Board considered past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto

As discussed in Staff Report Section 13.6.2, *Water Code Section 13241 Analysis*, information regarding the environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto, is included in Chapter 2, *Hydrology and Water Supply*, and in the environmental setting section of each Chapter 7 resource section (Sections 7.3 through 7.20).

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area, including consideration and authority over non-flow measures

Commenters asserted that the Plan amendments' reliance on unimpaired flows, as opposed to non-flow measures, to address fish and wildlife beneficial uses fails to consider the "[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." (Wat. Code, § 13241, subd. (c).) In every iteration of the Bay-Delta Plan, the State Water Board has consistently acknowledged and incorporated flow and non-flow measures to comprehensively address Delta aquatic ecosystem and tributary ecosystem needs. For example, the 1995 Bay-Delta Plan included in its program of implementation both measures that it considered as within State Water Board authority over diversion and use, and measures it identified as requiring State Water Board water rights and water quality authority and multi-agency cooperation, including but not limited to, managing and limiting agricultural drainage, managing groundwater, encouraging water conservation, screening water diversions to protect aquatic resources, reducing fish entrainment at the CVP and SWP, reviewing and modifying commercial and sport fish harvesting regulations, reducing illegal fish harvesting, reducing the impacts of introduced species, improving hatchery programs, evaluating ramping rates at reservoirs, expanding gravel replacement and maintenance for salmon spawning, and restoring and preserving marsh, riparian, and upland habitat.

These comprehensive measures were carried forward from the 1995 Bay-Delta Plan and updated in the 2018 Bay-Delta Plan with programs like the Central Valley Salinity Alternatives for Long-Term Sustainability (CV-SALTS), the Irrigated Lands Regulatory Program, and recommendations specific to the San Joaquin River. (See 1995 Bay-Delta Plan, Chapter IV, Sections B and C, pp. 28-41; 2018 Bay-Delta Plan, Chapter IV, Sections B and C, pp. 34-57.) The revised proposed Plan amendments further build on this integration by reorganizing all of the relevant measures under Section 4.4, *Implementation of Water Quality Objectives for Fish and Wildlife Beneficial Uses*, including through Section 4.4.10, *General Provisions*, which includes but is not limited to Trinity River operations, re-examination of the designation of Fully Appropriated Stream Systems, instream flow dedications, Sustainable Groundwater Management Act authorities, water use efficiency, conservation, and recycling, and habitat restoration and other ecosystem projects.

However, even with the coordinated implementation of non-flow measures to improve water quality conditions for fish and wildlife, increased flow is still necessary because flow is foundational for fish survival and flow has been significantly impaired in this watershed (see Staff Report Chapter 3, *Scientific Knowledge to Inform Fish and Wildlife Flow Recommendations*). The numeric flow requirements are set as a range so that they may be adaptively implemented. Adaptive implementation includes the ability of non-flow measures to inform adaptive adjustments to the required percentage of unimpaired flows. As discussed in detail in Chapter 4 of the Staff Report, *Other Aquatic Ecosystem Stressors*, benefits of flows are enhanced when implemented in concert with non-flow habitat restoration, control of waste discharges, control of invasive species, fisheries management, and other efforts. As noted above, the proposed program of implementation identifies actions that other entities should take to address other ecosystem stressors (see proposed Bay-Delta Plan, Section 4.4.10.7) and provides a framework to incorporate both flow and complementary ecosystem projects such as physical habitat restoration into local cooperative solutions (see proposed Bay-Delta Plan, Section 4.4.2.4). In addition, some complementary ecosystem projects may also serve as an implementation mechanism for the proposed inflow and cold water habitat objectives (see revised proposed Plan amendments, Sections 4.4.2.3 and 4.4.2.4). The VA pathway

also includes implementation of non-flow habitat restoration actions targeted at improving spawning and rearing capacity for juvenile salmonids, estuarine species, and other native fish and wildlife on a portion of the Sacramento/Delta tributaries. Thus, the State Water Board is considering the water quality conditions that could be reasonably achieved through the coordinated control of all factors that affect water quality, as required under section 13241.

The State Water Board's authority to require and enforce the implementation of non-flow actions depends on the proposed non-flow action and whether the facts and circumstances support requiring them. For example, in State Water Board Water Right Decision 1631 (1994) (D-1631) [*Mono Lake*], the Board required restoration activities in connection with a water diversion; however, the factual record in the water right proceeding supported the allocation of responsibility to the water diverter and the need for, and benefit of, the particular restoration actions under consideration in light of the physical solution doctrine. Under the physical solution doctrine, "a water diverter can be compelled to employ a physical solution through which competing water demands can be met and the constitutional goal of promoting maximum beneficial use of the State's waters will be served." (D-1631, p. 118.) Based on the reasonable use of water doctrine, California courts have frequently considered whether there is a physical solution available by which competing needs can be served more efficiently. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 383–384; *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal.2d 316, 339–340; Cal. Const., art. X, § 2; Wat. Code, § 100.) In D-1631, which resolved the major controversies relating to the Los Angeles Department of Water and Power's (LADWP) diversion of water from the Mono Basin, the State Water Board required restoration actions to expedite the recovery of resources that LADWP's prior diversions degraded. The State Water Board looked at the connection between the diversion and the loss of waterfowl habitat and concluded that in light of competing uses of water, it would not require restoration of the maximum amount of habitat through higher Mono Lake elevation levels than the State Water Board ultimately required. Rather, it held that a physical solution could restore additional habitat to restore public trust uses while requiring a smaller commitment of water. Thus, the imposition of non-flow requirements turned on the facts of the case and specific considerations of whether the habitat restoration under review could protect public trust issues while allowing diversion of water for other uses.

Some comments have used the term "physical solutions doctrine" when simply referring to non-flow measures. Reference to the physical solutions doctrine is misplaced when it is not in reference to resolution of a water rights dispute. "The phrase 'physical solution' is used in water rights cases to describe an agreed-upon or judicially imposed resolution of conflicting claims in a manner that advances the constitutional rule of reasonable and beneficial use of the state's water supply." (*Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1025.) "[A] water diverter can be compelled to employ a physical solution through which competing water demands can be met and the constitutional goal of promoting maximum beneficial use of the State's waters will be served." (D-1631, p. 118.) Comments appear to improperly broaden the use of the term and apply it to any instance where construction projects or physical habitat restoration is suggested, regardless of whether it settles a water right dispute. The Staff Report (e.g., see Section 7.21, *Habitat Restoration and other Ecosystem Projects*) and Plan amendments (e.g., see Section 4.4.10.7) do not use this term and instead generally refer to non-flow habitat restoration and other ecosystem projects as "non-flow" measures or actions. Please see final Staff Report, Section 13.6.2, *Water Code Section 13241 Analysis*, for additional information regarding how the staff report considers water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality.

Commenters raised additional concerns related to non-flow measures that are addressed in other common responses. For comments regarding mitigation measures, see the discussion of mitigation measures in Common Response 7.1, *General CEQA and Approach to the Analysis*. For comments advocating for the inclusion of non-flow measures in the Plan amendments, see the discussion of non-flow measures that are included in the Plan amendments in Common Response 1.3, *Revised Proposed Plan Amendments*. See Common Response 7.6.2, *Aquatic Biological Resources and Cold Water Habitat*, for a discussion of non-flow measures in implementing the cold water habitat objective.

(d) Economic Considerations

The State Water Board included an extensive economic analysis in the Staff Report, including in Sections 7.4, 9.7.4, and 13.7.4, each titled *Agriculture and Forest Resources*; and Chapter 8, Section 9.8, and Section 13.8, each titled *Economic Analysis and Other Considerations*. Economic modeling results are provided in Appendix A3, *Agricultural Economic Analysis: SWAP Methodology and Modeling Results*; Appendix A4, *Regional Economic Analysis Modeling Procedure*; and Appendix G3c, *Economic Considerations for the Proposed Voluntary Agreements*.

The economic analysis provided in the Staff Report is appropriately detailed for the scope of the project. Please see Common Response 8.1, *Economic Analysis and Other Considerations*, for regulatory context including a discussion of the level and scope of the analysis.

Section 8.6, *Other Economic Effects*, in the 2023 draft Staff Report (now Sections 8.6 and 8.7 in the final Staff Report) considers other economic effects that could occur as a result of the Sacramento/Delta update to the Bay-Delta Plan, including effects on commercial and recreational fisheries, recreation, ecosystem services, wildlife refuges, and energy (hydropower) production. Section 13.8.4, *Fisheries Economic Effects*, provides economic information relevant to recreational and commercial fisheries and discusses fisheries economic effects under the revised proposed Plan amendments. In addition, in response to comments received on the economic analysis presented in the draft Staff Report, Chapter 8, *Economic Analysis and Other Consideration*, has been updated to include a new Section 8.6, *Fisheries Economic Analysis*, that addresses potential economic benefits from implementation of the flow scenarios and subsequent aquatic ecosystem improvements and benefits for native fish species. Among other topics, Section 8.6 in the final Staff Report includes discussion of subsistence fishing and tribal uses of fish. This new section provides additional context and information concerning beneficial fisheries and ecosystem economic effects but does not change the conclusions of the Staff Report's economic analysis.

The State Water Board used the best tools and information available to evaluate and estimate economic effects. The Staff Report identifies estimated agricultural water supply economic effects and municipal water supply economic effects based on the SacWAM modeled changes in water supply. However, it would be highly speculative to quantify the fisheries and other related beneficial economic effects of the project that are associated with aquatic ecosystem improvements. As discussed in Section 8.6 of the final Staff Report, *Fisheries Economic Analysis*, the economic analysis of flow scenario effects on aquatic ecosystems is largely qualitative due to the challenges with fish population modeling in the Sacramento/Delta watershed. For further discussion of challenges with fish population modeling, please see Appendix G2, *Final 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*, and Common Response 3.1, *Fish Protection*. Additionally, please see Staff Report Section 13.5, *Beneficial*

Environmental Effects, for analyses of the benefits of the regulatory and VA pathways of the Plan amendments.

The Staff Report adequately describes and evaluates agricultural water supply economic effects, municipal water supply economic effects, and other economic effects. As discussed in the *Regional Economic Effects* Sections 8.4.3, 9.8.2.4, and 13.8.2.5, the evaluation of economic effects presented in the Staff Report also includes a regional economic analysis to estimate how changes in water supply and resulting changes at the local agricultural economy would affect regional economic activity within the Sacramento/Delta watershed and the state as a whole. These analyses consider effects on households and businesses, including industry output (sales), personal income, and employment.

The Staff Report also includes multiple chapters and sections that evaluate and describe economic effects on economically disadvantaged communities (DACs), including Section 8.4.4, *Agricultural Economic Effects on Economically Disadvantaged Communities*, Section 8.5.9, *Economically Disadvantaged Communities and Drinking Water*, and Section 13.8.2.6, *Agricultural Economic Effects on Economically Disadvantaged Communities*. In addition, Chapter 10, *Economically Disadvantaged Communities*, provides an overview of DACs and their water supplies and incorporates information from several other sections and chapters to summarize possible effects of the Sacramento/Delta update to the Bay-Delta Plan on DACs. See Common Response 8.1, *Economic Analysis and Other Considerations*, for response to municipal water rates, and for potential sources of funding for municipal water conservation and alternative water supplies.

(e) The need for developing housing within the region

Water Code section 13241, subdivision (e) requires consideration of the need for developing housing within the region when establishing water quality objectives. While water supply is an important public service that supports urban development and could affect the growth potential of a community; economic conditions (such as job growth, income growth, demographics, mortgage interest rates, available housing stock, regulatory obstacles, developable land, and funding) are generally the primary factor that limit construction of new housing. The existing problems with housing shortages in the Bay Area and other parts of the state are due to myriad factors, including housing supply shortage, affordability, and regulatory restrictions not related to water supply.

Commenters note that California is experiencing a housing crisis according to the California Department of Housing and Community Development, estimating the need to add more than 2.5 million new homes over the next eight-year cycle.[6] Commenters assert that while new homes are equipped with water-efficient appliances, fixtures, and landscaping, they will still require a reliable water source. (See, e.g., Wat. Code, § 10910 et seq. [requiring a water supply assessment from local suppliers for large development projects subject to CEQA].) Commenters request a more specific evaluation on development of regional housing and the ability to replace reduced Sacramento/Delta supply with other water management actions such as water transfers, repeating that these options are not realistic or feasible. In this way, commenters infer a requirement and then claim that the Board has not met it.

Numerous municipal water suppliers commented that the draft Staff Report fails to adequately consider housing factors, and that reduced water supplies will affect their ability to carry out their responsibilities to comply with state affordable housing laws. They argue that water supply impacts

[6] Even this number fluctuates wildly from between 56,000 to 8.2 million and in one controversial paper, zero. (CalMatters 2026.)

could result in impacts on housing and a displacement of people if existing and new water supplies are insufficient. Government Code section 65584 requires cities and counties to plan for their fair share of regional housing growth and mandates that local governments allocate land to meet existing and projected housing needs across all income levels (regional housing needs allocation). Local governments are required to update the housing elements of their general plans to show the locations where housing can be built and the policies and strategies that will be implemented to meet that community's housing needs.

The California Department of Housing and Community Development lists the main challenges in the housing crisis as 1) not enough houses being built, 2) increased inequality and lack of opportunities, 3) too much income going towards rent, 4) fewer people becoming homeowners, 5) disproportionate number of Californians experiencing homelessness, and 6) multiple, seemingly insurmountable barriers to finding affordable housing for vulnerable populations (CDHCD n.d.). In high-cost areas such as Los Angeles and the Bay area, the supply shortage is greatly exacerbated by affordability issues for most working people, due to opposition to social housing and tenant protection initiatives (Greenberg et al. 2024). In addition, housing projects go through multiple layers of review by cities and counties prior to approval that can be slow and cumbersome (Taylor 2015). While environmental review pursuant to CEQA can provide valuable information to decision makers and help avoid or reduce environmental impacts, it can add time and expense to the review process and opponents will raise various concerns and may litigate the adequacy of review. Recent initiatives from Governor Newsom are intended to increase California's low-income housing supply, including the passage of AB130, which exempts housing infill projects from CEQA review (Newsom 2025). However, regulatory obstacles are now being replaced by funding bottlenecks in many areas (CalMatters 2025).

Comments that assign responsibility for the State's housing crisis to the Board's efforts to provide minimal stream protection for Bay-Delta watershed health are misplaced. The Board has not approved let alone implemented its plan. While it is possible that water moratoria in localized areas could prevent new housing supply in some instances, water shortage is rarely, if ever, cited in the factors contributing to California's current housing challenges (Shen et al. 2024). As stated above, many housing issues are ones of affordability with funding being a current impediment (CalMatters 2026). Additionally, the Plan amendments contain provisions to address human health and safety needs and other possible short-term and long-term exceptions to curtailments associated with implementation of the Bay-Delta Plan for specific purposes. Those purposes include provisions to allow continued diversions for minimum human health and safety water supplies where alternate supplies are not available and for other emergency circumstances such as emergency firefighting.

As discussed in final Staff Report Section 13.6.2, *Water Code Section 13241 Analysis*, the project would not directly restrict development of housing. As explained in Section 7.16, Section 9.7.16, and Section 13.7.16, each titled *Population and Housing*; and Section 7.23, Section 9.7.21, and Section 13.7.21 each titled *Cumulative Impacts, Growth-Inducing Impacts, and Significant Irreversible Environmental Changes*, the project would not induce substantial population growth either directly or indirectly. While the project would result in reductions to municipal water supply, which in turn could affect housing development, most municipalities have or are developing alternate water supplies, including replacement groundwater pumping, groundwater storage and recovery, water transfers, increased use of recycled water, and water conservation. Mitigation measures to avoid or reduce impacts on municipal supplies are discussed in Sections 7.20, 9.7.20, and 13.7.20, each titled *Utilities and Service Systems*.

The Staff Report provides adequate consideration and evaluation of housing as a component of municipal use. The Bay-Delta watershed is a complex system that serves as a critical resource for the state. It provides drinking water to millions of Californians, provides much of the water supply for farmland throughout the state, and is vital to California Native American Tribes whose cultures are deeply entwined with the watershed and the ecosystem. The Plan amendments were developed to improve flow and water quality conditions for fish and wildlife beneficial uses in the Sacramento River watershed, Delta eastside tributaries, and Delta regions (Sacramento/Delta). The State Water Board recognizes that providing instream flows for the environment necessarily results in less water available for other uses. Providing balanced protection of all beneficial uses of water is vitally important and requires careful consideration, and the State Water Board has been particularly sensitive to water supply impacts to municipal use.

Accordingly, water supply, including supplies from the Sacramento/Delta watershed for municipal use is evaluated extensively throughout the Staff Report. Chapter 6, *Changes in Hydrology and Water Supply,* is devoted entirely to describing the changes in hydrology and supply as a result of the proposed Plan amendments. Table 6.4-1 details total annual average water supply to each region in the study area by type of use (agriculture, municipal, and wildlife refuge), and the sources of water supplies range from local surface water supplies, groundwater, and water imported from across the state. Table 6.4-1 shows that of the total average historical water deliveries of approximately 40.9 million acre-feet (MAF) in the study area, about 8.1 MAF was for municipal use. Sacramento/Delta supply provides close to 12 MAF of the total supply, with around 3 MAF of Sacramento/Delta supply going to municipal use. Chapter 6 of the Staff Report provides additional details on each of the regions and uses, showing which regions are more reliant on Sacramento/Delta water for municipal use such as the Bay Area and Southern California regions.

For example, under a 55 scenario, average annual reductions of supply to the Bay Area and Southern California regions are 26% and 27% of Sacramento/Delta supply respectively, and 14% and 5% of total supply respectively, the majority of which goes to municipal use in those areas. In Section 7.20, *Utilities and Service Systems*, the Staff Report further evaluates impacts from changes in water supply on municipal use and concludes that some municipal water suppliers may need new or expanded water supplies. Impact conclusions represent the worst-case scenarios and in many cases impacts will be less than significant. Plan provisions for adaptive implementation of the numeric inflow requirements are provided to adjust and refine the flow requirements to benefit native fish and wildlife while also minimizing water supply impacts, and for the numeric inflow requirements to be implemented in a coordinated fashion with the cold water habitat and inflow-based Delta outflow requirements.

As discussed above, the State Water Board also plans to use its authorities to develop appropriate provisions to address human health and safety needs and other possible reasons for short-term and long-term exceptions to curtailments to allow continued diversions for minimum human health and safety water supplies where alternate supplies are not available. Consideration of municipal supply is further reflected in the revised Plan amendments, which include WSAs for existing water rights at the outset of Plan implementation to reduce water supply impacts. The tributary-specific WSAs would allow for additional adjustments on rainfall-dominated and municipal supply-dominated tributaries, including Putah Creek and the Mokelumne and Calaveras Rivers, that would allow for more frequent reductions in the required flow levels within this range, as well as no new flow requirements during the driest conditions.

As described in Chapter 2, *Hydrology and Water Supply*, many water users have made significant investments to diversify their water supply portfolios and the proposed Plan amendments could lead to further diversification beyond that which has occurred due to existing or potential population growth, drought, environmental needs, climate change, economic factors, and other reasons. Section 6.6 of the Staff Report, *Other Water Management Actions*, provides general information regarding the current and potential future use of other water management actions by water users who may experience reductions in Sacramento/Delta supplies under the proposed Plan amendments. Water suppliers provided many comments with additional details on these efforts and expressed concern that they have exhausted the ability to further utilize other water management actions. It is important to note that environmental impact conclusions from reduced Sacramento/Delta supply do not rely on implementation of other water management actions, and the Staff Report acknowledges that the availability of replacement supplies may be limited in some cases. It is not possible to quantify exactly how the various water users that may experience reduced Sacramento/Delta supplies will manage their water supply portfolios in response to reduced supplies, and this type of quantification is beyond the scope of detail required in this planning process. Housing is a major component of municipal supply that is already evaluated extensively throughout the Staff Report. Statements that the State Water Board failed to consider housing are incorrect as demonstrated by the extensive analyses in the Staff Report. Also see the section below, *Applicability of Water Code Section 13142*, related to comments and responses concerning housing under that Water Code provision.

(f) The need to develop and use recycled water

As discussed in final Staff Report Section 13.6.2, *Water Code Section 13241 Analysis*, other water management actions, including water recycling, are discussed in Section 6.6, *Other Water Management Actions*, and Section 7.1, *Approach to Analysis*. The evaluation of actions that may be taken in response to changes in water supply presented in Sections 7.3 through 7.20 addresses other water management actions, including water recycling. While the project does not require sustainable management and water supply diversification efforts, including the need to develop and use recycled water, the project may accelerate and increase the need for such efforts to manage water sustainably and may promote development of recycled water. As detailed in Section 4.4.10.5 of the revised proposed Plan amendments, the State Water Board will continue to encourage and promote water recycling projects, including projects involving the use of recycled water for groundwater recharge, through expediting permit processes and providing funding opportunities.

Applicability of Water Code Section 13142

A few commenters referenced California Water Code section 13142 and specifically mentioned the state's goal of providing a decent home for every Californian. Section 13142 of the Water Code is located within article 3. *State Policy for Water Quality Control* (sections 13140 - 13149.2). Section 13142 specifies: "State policy for water quality control shall consist of all or any of the following:

(a) Water quality principles and guidelines for long-range resource planning, including ground water and surface water management programs and control and use of recycled water.

(b) Water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities.

(c) Other principles and guidelines deemed essential by the state board for water quality control.

The principles, guidelines, and objectives shall be consistent with the state goal of providing a decent home and suitable living environment for every Californian."

This response summarizes how the Staff Report considers potential impacts to housing and water supply, including supply impacts to municipal use. Additionally, it is important to first note that the requirements for *State Policy for Water Quality Control* (Wat. Code, §§ 13140. - 13149.2) are separate and distinct from the requirements for *Regional Water Quality Control Plans* (Wat. Code, §§ 13240 – 13249), and that the proposed Bay-Delta Plan amendments are under the *Regional Water Quality Control Plans* process.

Commenters referencing this Water Code section suggested that the proposed Plan update looks like a building moratorium and raised concerns with possible effects on issuance of building permits. A commenter suggested that the Plan amendments will take water away from existing homes. One commenter suggested that the Plan amendments do not provide adequate guidance to local agencies regarding how to manage water needs with potentially less water. A commenter asked if "the Board proposes that a priority system be established in which the last in time of connections for homes and businesses to Vacaville, Fairfield, Vallejo, or SID's systems should be issued an order to vacate their homes and stop water use until the unimpaired flows can be passed through and carryover storage requirement of 900,000 acre feet is again met." Another commenter suggested that local agency drought measures will be rendered unusable. Commenters communicated that California, and specific areas within California, are in a housing supply and affordability crisis of historic proportion and suggested that the Plan ignores state-mandated need to develop new housing units.

The revised proposed Plan amendments do not include a building moratorium or change the process for issuance of building permits. As described in Section 1.3.1, *Purpose and Need for Bay-Delta Update*, the purpose of the project is to update to the Sacramento/Delta portions of the Bay-Delta Plan to reasonably protect native aquatic species within the Bay-Delta watershed that rely on adequate flows into and out of the Delta and associated water quality conditions, including temperatures, for their protection given that adequate flows and water quality conditions are essential habitat for aquatic species. The Staff Report acknowledges that there may be potential impacts to water supply, including to municipal supply. The Plan amendments do propose that, with certain exceptions, the water right priority system be used to implement potential curtailments necessary to achieve the flow objectives. However, water rights priorities apply to the holders of water rights. In some cases, this could be a municipal water service provider, or it might be a water wholesaler, irrigation district, or other water right holder that provides water to a municipal water service provider. In no case does the water right priority system extend to customers of water service providers based on order of connection because service connections are not water rights. As described below, potential impacts to water supply and housing, including during droughts, were evaluated in multiple sections of the Staff Report.

The Staff Report includes various analyses that evaluate potential impacts to water supply, including to municipal and domestic supplies for housing and to human health and safety. Sections 7.20 and 9.7.20, each titled *Utilities and Service Systems*, and Section 13.7.20.1, *Impact Analysis*, specifically evaluate potential impacts to municipal water supply within "*Impact UT-d: Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed.*" Section 7.16, *Population and Housing¸* and Chapter 13, *Revised Proposed Plan Amendments*, evaluate potential impacts to population and housing including whether the project would displace substantial numbers of existing housing or people, necessitating the construction of replacement housing elsewhere (Impact POP-b and Impact POP-c). Appendix D,

Supplemental Municipal Supply Analysis Information, considers potential impacts to municipal water supply during consecutive dry year sequences. Sections 8.5, 9.8.3, 13.8.3, each titled *Municipal Water Supply Economic Effects*, estimate the potential costs to affected municipal service providers of securing reliable water supplies, with the focus on (1) cost of developing other water supplies to replace the reduced Sacramento/Delta water supply; (2) the opportunity cost of lost supply if no other supply sources are available; or (3) costs of using other water supplies within existing water portfolios to replace the reduced Sacramento/Delta water supply. Section 7.22, *New or Modified Facilities*, evaluates actions that entities may take that would involve construction to modify or build new facilities and infrastructure to supplement or conserve surface water supplies and other construction projects that may result from implementation of the proposed Plan amendments. As discussed in Section 7.23.2, *Growth-Inducing Impacts*, water availability is not the limiting factor preventing or slowing population growth in California, with the exception of a few, mostly coastal, areas that have imposed development or water connection moratoria because of limited municipal water supply. The 2012–2016 drought set records for lowest river flows, smallest snowpack, and highest temperatures, yet California's population continued to grow at approximately 300,000 people per year on average from 2010 to 2019 (PPIC 2020).

As discussed in Chapter 13, *Revised Proposed Plan Amendments*, given the overwhelming importance of municipal water, agencies—on their own or in concert with others—may develop new supply through additional groundwater wells, new or modified wastewater treatment plants for water recycling, desalination, groundwater storage and recovery, water purchases, and/or surface storage projects; these are the types of projects that this Staff Report considers to be likely responses to the revised proposed Plan amendments. Because local responses to the revised proposed Plan amendments are unknown, the precise magnitude and locations of potential impacts cannot be specifically determined. Projecting the specific ways that all municipal users may respond to reduced surface supply would require undue speculation. However, it is likely that at least some municipalities may need to obtain new water supplies. The general costs for installing or implementing additional groundwater pumping, groundwater recovery and storage, recycled water, water transfers, and desalination are described in Section 8.3, *Costs Associated with Other Water Management Actions*. Chapter 8, *Economic Analysis and Other Considerations*, also provides information related to potential sources of funding for municipal water conservations, which may help offset potential reductions to water supply from the Plan amendments.

The State Water Board is committed to the human right to water and to exercising its authority to ensure human health and safety supplies for all Californians. To this end, the revised proposed Plan amendments include provisions to commit the State Water Board during the Plan implementation process to develop appropriate provisions to address human health and safety needs and other possible reasons for short-term and long-term exceptions to curtailments associated with implementation of the Bay-Delta Plan for specific purposes. Those purposes include provisions to allow continued diversions for minimum human health and safety water supplies where alternate supplies are not available and for other emergency circumstances such as emergency firefighting. Those provisions may be informed by other relevant regulatory efforts in order to provide for consistency as appropriate.

Additionally, the regulatory pathway program of implementation promotes local cooperative solutions that could amplify the ecological benefit of new and existing flows with physical habitat restoration and other complementary ecosystem measures. Local cooperative solutions also may reduce the volume of water that needs to be dedicated for instream purposes, resulting in less water supply reductions for municipal use.

In Section 7.20, *Utilities and Service Systems*, the State Water Board determined that effect on municipal water suppliers could be significant even if proposed mitigation was applied. Mitigation Measure MM-UT-d discusses ways that municipal suppliers can avoid or reduce effects on municipal supplies by diversifying water portfolios, conjunctive groundwater use, water recycling, water conservation and increasing water use efficiency. However, the State Water Board recognizes the unique water supply portfolios, resources, and circumstances of each service provider. It would be speculative to make assumptions regarding how each service provider will respond to implementation of the flow objectives because it will depend on many individual and collective decisions including, but not limited to, the discrete actions of other local water users in response to reductions in surface water and alternative sources of water supply. The Staff Report summarizes potential impacts in Section 13.7.22, *Impact Summary*, and determines that Impact UT-d is potentially significant and proposes that mitigation measures MM-UT-d be implemented to avoid or reduce impacts on municipal supplies.

Applicability of Water Code Section 13141

Commenters cited Water Code section 13141, which provides: "prior to implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan" (Wat. Code, § 13141). Under the Porter-Cologne Act, the State Water Board is also required to include economic considerations when establishing water quality objectives for the reasonable protection of beneficial uses (Wat. Code, § 13241).

The State Water Board's Water Quality Control Planning program is certified under CEQA as exempt from the requirement to prepare an EIR because it requires a plan or other written documentation (i.e., the Staff Report) that complies with specified requirements for environmental analysis and public review. However, references to CEQA EIR requirements, although not binding on the State Water Board's procedural planning process, can be informative regarding substantive issues. With respect to economics, CEQA does not require an analysis of project-related social or economic effects unless they are related to physical changes in the environment. Nevertheless, a lead agency may include an assessment of economic or social effects in an EIR in whatever form the agency desires (Cal. Code of Regs., tit. 14, § 15131). The Staff Report's economic analysis satisfies any economic considerations required under sections 13141 and 13241 of the Porter-Cologne Act, and under CEQA to the extent that economic impacts could result in potentially significant impacts on the physical environment. Chapter 8, Section 9.8, and Section 13.8, each titled *Economic Analysis and Other Considerations*, identify potential economic effects from the proposed Plan updates.

Additionally, commenters mentioned land fallowing related to their economic comments. See Sections 7.4, 9.7.4, and 13.7.4, each titled *Agriculture and Forest Resources*, for discussions on fallowing, land idling, and conversion to nonagricultural uses. Also see Section 8.4, *Agricultural Water Supply Economic Effects*, for an analysis of potential economic effects from changes in water supply, including fallowing. For additional details on the Statewide Agricultural Production (SWAP) model used to analyze fallowing, see Appendix A3, *Agricultural Economic Analysis: SWAP Methodology and Modeling Results*. Sections 7.23, 9.7.21, and 13.7.21, each titled *Cumulative Impact Analysis, Growth-Inducing Impacts, and Significant Irreversible Environmental Changes*, identify that there could be potentially significant adverse cumulative impacts related to conversion of farmland to nonagricultural use and identify mitigation measures to address these impacts from changes in hydrology and water supply.

Section 8.4.5, *Financial Assistance for Agricultural Water Conservation*, provides information on financial assistance programs that support agricultural water conservation related efforts. Section 8.5.10, *Potential Sources of Funding for Municipal Water Conservation and Alternative Water Supplies*, summarizes potential sources of funding for municipal water supply and conservation. Please see Common Response 8.1, *Economic Analysis and Other Considerations*, for more information on potential funding sources for municipal water conservation and alternative water supplies.

Water Rights

The State Water Board performs dual functions in both ensuring water quality and allocating water rights. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 112.) In performing these functions, the State Water Board's powers include both quasi-legislative rulemaking authority and quasi-adjudicative authority. "In performing its regulatory function of ensuring water quality by establishing water quality objectives, the Board acts in a legislative capacity. The Water Quality Control Plan is itself a quasi-legislative document." (*Ibid.*) As a quasi-legislative action, the Board's promulgation of the water quality objectives in the Bay-Delta Plan is subject to deference and findings of fact are not required. (*Id.* at p. 150.)

Previously, the State Water Board used its combined water quality and water rights authorities to develop and update the Bay-Delta Plan and implement the Plan's flow-related objectives through a companion water right decision. The State Water Board, however, is not limited to implementing the water quality objectives through a quasi-adjudicative water right proceeding. As described in the 2018 Bay-Delta Plan and the revised proposed Plan amendments, the State Water Board will exercise its quasi-legislative or quasi-adjudicative power involving water rights and water quality to require implementation of the water quality objectives. The State Water Board may implement the objectives by conducting subsequent proceedings, which may include adopting regulations or quasi-adjudicative proceedings, or both. The State Water Board may also use its Clean Water Act section 401 water quality certification authority or take other water quality actions to implement the water quality objectives in the Bay-Delta Plan.

As discussed in Chapter 5 of the Staff Report, *Proposed Changes to the Bay-Delta Plan for the Sacramento/Delta,* the State Water Board is the only public agency with authority to administer water rights in California. A water right is legal permission to use a reasonable amount of water for a beneficial purpose such as domestic, irrigation, power, and fish and wildlife preservation and enhancement uses.[7] The State Water Board helps regulate California's surface water rights by issuing permits, licenses, and registrations authorizing the diversion of water and by investigating unauthorized diversion and unreasonable use of water. The State Water Board shares the authority to enforce water right laws with the state courts.

California has a hybrid system of water rights, recognizing both appropriative and riparian water rights. A riparian water right generally provides a right to use the natural flow of a waterbody on riparian land, which is land that touches a lake, river, stream, or creek. Riparian land must be in the same watershed as the water source, and the diverted water must be used on land that drains back to the lake, river, stream, or creek from which the water was taken. Riparian rights remain with the

[7] The beneficial uses of water pertaining to water rights are defined in California Code of Regulations, title 23, sections 659–672. While similar terminology is used, beneficial use for water rights is different from the beneficial uses identified in basin plans for the purpose of protecting against water quality degradation. See above discussion regarding *Beneficial Uses in the Water Quality Process.*

property when it changes hands, although parcels severed from the adjacent water source generally lose their right to the water. Riparian rights may be used to divert the natural flow of a stream. However, riparian rights may not be used to store water for later use, use water that originates in a different watershed, use water previously stored by others, use return flows (including groundwater return flow), or use other water foreign to the natural stream system. Riparian rights are not lost by non-use.

An appropriative water right is generally needed for water that is diverted for use on non-riparian land, to store water for use when it would not be available under natural conditions (e.g., stored during a wet time for use during a drier time), or to transfer water. Prior to 1914, appropriative water rights were acquired by putting water to beneficial use. An appropriative water right that was acquired before 1914 is called a *pre-1914 appropriative water right* and is not subject to the permitting authority of the State Water Board. Appropriative water rights obtained after 1914 require a water right permit and subsequently a license issued by the State Water Board or its predecessors. The seniority of pre-1914 and post-1914 appropriative rights is based on a first-in-time concept (priority date hierarchy). In times of water shortage, the most recent, or "junior," water right holder must be the first to discontinue use. Each post-1914 appropriative water right's priority date is based on the time the permit application was filed with the State Water Board or its predecessors.

Commenters asserted that the State Water Board has no authority to impose responsibility to implement the water quality objectives on riparian water users and pre-1914 appropriative water right holders who are not subject to the State Water Board's permitting authority. "California maintains a 'dual system' of water rights, which distinguishes between the rights of 'riparian' users, those who possess water rights by virtue of owning the land by or through which flowing water passes, and 'appropriators,' those who hold the right to divert such water for use on noncontiguous lands." (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1478 (*Light*).) Since 1914, all appropriative surface water rights must be acquired by application to the State Water Board (or its predecessors) for a permit to appropriate water. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429.) For additional information regarding California water rights, please refer to Staff Report Sections 2.7, *Existing and Future Water Rights in the Sacramento/Delta Watershed*, and 5.2.2, *Water Rights*. However, commenters conflate permitting or licensing authority with regulatory authority. The State Water Board's regulatory authority is greater than the scope of its water rights permitting authority.

The State Water Board has broad authority under article X, section 2, of the California Constitution and the Public Trust Doctrine to implement the flow requirements within the Plan amendments through water right actions, including actions involving riparian users and pre-1914 appropriators. All water rights, regardless of the basis of right, are subject to the constitutional reasonableness doctrine. (Cal. Const., art. X, § 2; *Light*, *supra*, 226 Cal.App.4th at p. 1479.) The Public Trust Doctrine prevents water users from acquiring a vested right to appropriate water in a manner harmful to public trust interests. (*National Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, 445 (*National Audubon*).) The State Water Board may exercise its regulatory powers through either quasi-legislative or quasi-judicial proceedings. (See, e.g., *Light*, *supra*, 226 Cal.App.4th at pp. 1472-1473 [in regulating the unreasonable use of water, the State Water Board can weigh the use of water for the protection of wildlife habitat against the commercial use of water by riparian users and early appropriators].)

The State Water Board has implementation and enforcement authority to protect the public trust (see the *Public Trust Doctrine* section below), and to prevent the waste or unreasonable use of water, regardless of the basis under which the water right is held. As discussed above, the State Water Board's authority to prevent the waste or unreasonable use of water extends to all users. This principle was affirmed in the *Light* decision, *supra*, which upheld a State Water Board regulation intended to protect salmon that was likely to limit water diversions for frost protection of crops. In responding to a challenge on the grounds that the State Water Board lacked "the regulatory authority to limit water use by riparian users and early appropriators, whose diversion is beyond the permitting authority of the [State Water] Board," the court concluded the following.

> Although the [State Water] Board has no authority to require such users to obtain a permit to divert, there is no question it has the power to prevent riparian users and early appropriators from using water in an unreasonable manner. We conclude that, in regulating the unreasonable use of water, the [State Water] Board can weigh the use of water for certain public purposes, notably the protection of wildlife habitat, against the commercial use of water by riparian users and early appropriators. Further, the [State Water] Board may exercise its regulatory powers through the enactment of regulations, as well as through the pursuit of judicial and quasi-judicial proceedings.

(*Light*, *supra*, 226 Cal.App.4th at pp. 1472–1473; see also *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1986) 186 Cal.App.3d 1160, 1168-1171 [concluding that the State Water Board has jurisdiction to conduct administrative proceedings applying the reasonableness doctrine to all water rights, including pre-1914 water rights].) Thus, regardless of the scope of the State Water Board's permitting authority over water users, the limiting principles of reasonableness and the Public Trust Doctrine apply to all water rights, irrespective of their legal basis.

Public Trust Doctrine

Some commenters expressed concern that the proposed regulatory pathway, the VA pathway, or both pathways, fall short of adequately protecting fish and wildlife public trust resources. Some commenters asserted that the draft Staff Report had not adequately considered the public trust because it significantly underestimates the negative impacts caused by decreases in water supply. Other commenters pointed out that the State Water Board had not conducted an explicit public trust analysis as it agreed to do under the terms of a 2020 settlement agreement between the Board and the California Sportfishing Protection Alliance, AquAlliance, and California Water Impact Network (CSPA 2020).

All water rights are subject to the Public Trust Doctrine, which requires the state, as trustee for the benefit of the people, to protect public trust resources in navigable waterways and lands lying beneath them. The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust. (*National Audubon*, *supra*, 33 Cal.3d at p. 441.) When regulating water use, including throughout the water quality control planning process, the State Water Board has an obligation to take the public trust into account and to protect public trust resources whenever feasible. (See *id*. at p. 446.) The purpose of the public trust is to protect navigation, fish, recreation, environmental values, and fish and wildlife habitat, although the objective of the public trust has and can evolve "in tandem with the changing public perception of the values and uses of waterways." (*Id.* at pp. 434-435.)

The Public Trust Doctrine requires the State Water Board to consider the effects of the diversion or use of water on streams, lakes, or other bodies of water and "preserve, so far as consistent with the

public interest, the uses protected by the trust." (*Id.* at p. 447.) Thus, before approving an appropriative water right diversion, the Board must consider the effects of that diversion on public trust resources and avoid or minimize those effects when feasible. In applying the Public Trust Doctrine, the State Water Board also has the power to reconsider past water allocation or appropriation decisions, even if the Board previously considered public trust impacts as part of its original decision. (*Id.*)

It is important to note, however, that water may be appropriated despite harm to public trust interests if the public interest in diversion outweighs the harm to public trust values. (*Id.* at pp. 446-447.) "[T]he public trust permits—indeed requires—the balancing of competing uses." (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1369 [internal quotation marks and citations omitted].) In any given instance, the Board must determine whether it is feasible to protect public trust values and evaluate what level of protection of public trust values is consistent with the public interest. (*State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at p. 778.) To do this, the Board must balance "competing interests in adopting water quality objectives and formulating a program of implementation to achieve those water quality objectives." (*Ibid.*) Neither a precise quantification of potential water uses and impacts on those uses nor an explicit cost-benefit analysis are required to meet the State Water Board's water quality planning obligations. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 118-119.) When considering the public trust as it pertains to water resources, the adoption and implementation of a water quality control plan generally satisfies the State Water Board's public trust duty. (*State Water Resources Control Bd. Cases*, *supra*, at p. 778.)

At the time the 2023 draft Staff Report was released for public comment, an explicit public trust analysis was not included, as the rulemaking process for the Sacramento/Delta update to the Bay-Delta Plan was still at a preliminary stage with numerous options being evaluated for potential inclusion in the Plan update. As part of the process to revise the 2023 draft Staff Report in response to input from the public, the State Water Board has now identified a precise set of revised proposed Plan amendments as the proposed project, and the Board has added Section 13.6.1, *Public Trust Analysis*, summarizing the Board's public trust evaluation for the amendments to the Bay-Delta Plan. This Staff Report section contains a discussion of both the regulatory and VA pathways, and a summary of the analyses conducted to determine how best to protect public trust resources to the extent feasible. Informed by public comments and the Staff Report, the State Water Board has formulated revised proposed Plan amendments that are intended to balance public trust resources and other competing uses of water.

In response to numerous public comments received expressing concern over water supply and reservoir storage impacts that would result from the unimpaired flow requirement as presented in the 2023 draft Staff Report, the State Water Board made revisions to the numeric flow requirements, adding in WSAs to reduce water supply and carryover storage and associated temperature impacts and the associated economic disruption at the outset of Plan implementation. The Staff Report acknowledges uncertainty of outcomes from implementation of the Plan amendments, including under the VA pathway, and to the extent that initial implementation of the Plan amendments does not adequately protect public trust resources, the Plan includes adaptive implementation provisions allowing for adjustments to better protect public trust resources if necessary. Additionally, under the periodic review process discussed in Staff Report Section 13.3.9.5, *Annual and Periodic Review*, the State Water Board will hold public hearings every three years to address topics including implementation progress, the effectiveness of objectives and implementation measures at reasonably protecting fish and wildlife beneficial uses, and any necessary adjustments to the Plan or

its implementation. The annual and periodic review processes afford the State Water Board more flexibility to make adjustments to the Bay-Delta Plan if needed without beginning the entire water quality control plan amendment process anew.

As discussed in Staff Report Section 13.6.1, *Public Trust Analysis*, the State Water Board has duly considered its public trust responsibilities. In adopting the revised proposed Plan amendments and final Staff Report, the State Water Board will make a finding (or findings) that the Plan protects and balances public trust resources to the extent feasible.

Also see the sections titled *Beneficial Uses in Water Quality Process* and *Reasonable Protection of Fish and Wildlife Beneficial Uses* within this common response for additional information on the reasonable protection of fish and wildlife beneficial uses and the Board's consideration of other uses of water.

California Constitution, Article X, Section 2

All water rights are subject to the overriding constitutional limitation that water use must be reasonable. (See Cal. Const., art. X, § 2 ["[t]he right to water… shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use… of water.]; see also Wat. Code, § 100; *Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal.3d 183.) There is no set definition of what constitutes an unreasonable use. (*Light*, *supra*, 226 Cal.App.4th at p. 1479.) Rather, "[w]hat constitutes reasonable use is dependent upon not only the entire circumstances presented but varies as the current situation changes… [and] cannot be resolved *in vacuo* from statewide considerations of transcendent importance." (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.) Thus, what may have been reasonable at one time may become unreasonable as time passes and circumstances change. Determining what is or is not reasonable in the context of water use requires balancing competing public interests, an analysis that the Board "is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 130; Wat. Code, §174.) In revising the Bay-Delta Plan, and as discussed in Chapter 1, *Executive Summary*; Chapter 3, *Scientific Knowledge to Inform Fish and Wildlife Flow Recommendations*; Chapter 4, *Other Aquatic Ecosystem Stressors*; Common Response 3.1, *Fish Protection*; and elsewhere throughout the Staff Report, the State Water Board has determined that changed circumstances and updated scientific information necessitate revising the water quality objectives and program of implementation for the reasonable protection of fish and wildlife beneficial uses.

Some commenters alleged that adopting the proposed inflow and cold water habitat objectives would violate article X, section 2, asserting that adopting the revised proposed Plan amendments would require an unreasonable amount of water be devoted to a single beneficial use and would yield uncertain, possibly minimal benefits. Similarly, commenters asserted that the Board has not sufficiently evaluated the benefits to fish and wildlife or the impacts to water users, associated with the revised proposed Plan amendments, and that, as a result, the Board does not possess sufficient information to determine that the regulatory pathway of the revised proposed Plan amendments amount to a reasonable use of water. As discussed above, the State Water Board is uniquely qualified to serve as the regulating authority over water quality and water allocation in California, and the Board will determine what is reasonable by approving, or not approving, the Bay-Delta Plan amendments as proposed, or with modifications. Adopting a set of carefully considered water

quality objectives (and the program of implementation designed to achieve those objectives) to support aquatic ecosystem conditions and prevent the further deterioration of water quality in order to reasonably protect fish and wildlife beneficial uses would not constitute an unreasonable use of water.

The Staff Report contains extensive analysis of the benefits associated with a range of alternatives (see Chapter 3, *Scientific Knowledge to Inform Fish and Wildlife Flow Recommendations*; Section 9.6, *Beneficial Environmental Effects of Proposed VAs*; and Section 13.5, *Beneficial Environmental Effects*) and their potential impacts on various resources, including water supply (see Chapter 6, Section 9.5, and Section 13.4, each titled *Changes in Hydrology and Water Supply*; Chapter 10, *Economically Disadvantaged Communities*), groundwater resources (see Section 7.12.2, Section 9.7.12.2, and Section 13.7.12.2, each titled *Groundwater*), aquatic resources (see Section 7.6.2, Section 9.7.6.2, and Section 13.7.6.2, each titled *Aquatic Biological Resources*), and economic resources (see Chapter 8, Section 9.8, and Section 13.8, each titled, *Economic Analysis and Other Considerations*). Additional discussion of the benefits and impacts associated with different alternatives is also contained in Section 7.24, *Alternatives Analysis*; Section 9.9, *Modular Alternatives for Proposed VAs*; and Section 13.7.22, *Impact Summary* and 13.7.23, *Ability to Achieve Project Purpose and Goals*. It is also worth noting that relevant caselaw has found that neither a precise quantification of potential water uses and impacts on those uses, nor an explicit cost-benefit analysis are required to meet the State Water Board's water quality planning obligations. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 118-19.) Common Response 3.1, *Fish Protection*, further expands on the flow and habitat benefit analyses contained in the Staff Report and scientific basis reports.

Other commenters highlighted *Bring Back the Kern v. City of Bakersfield* (*Bring Back the Kern*) for the proposition that article X, section 2 not only constrains diversion and use by regulated water users, but also actions by courts and regulatory bodies that *require* a certain use of water; and that the reasonableness of a use of water must be considered before that use is required by a legal authority ((2025) 110 Cal.App.5th 322). First, it is important to note that *Bring Back the Kern* has not resulted in a settled legal rule to be applied moving forward; the case is still being reviewed by the California Supreme Court. (*Id.*, review granted July 16, 2025, S290840.)

Second, commenters' citations to *Bring Back the Kern* are inapposite to the current situation. Unlike in *Bring Back the Kern*, where a California superior court stepped in to impose instream flow requirements as a result of litigation brought by an environmental non-governmental organization, here, the requirements contained in the revised proposed Plan amendments are supported by the considerable analyses contained in the Staff Report and scientific basis reports (discussed above), products of more than a decade of work to analyze the benefits and impacts associated with the evaluated project alternatives. This satisfies the duty placed on the Board by article X, section 2 of the California Constitution, a duty that courts have found highly discretionary:

> As the trial court found … whatever duty article X, section 2 and the Water Code impose on the State Board to prevent waste and unreasonable use of water, the duty is highly discretionary. Article X, section 2 and the identical language in Water Code section 100 simply state that the general welfare requires that unreasonable use of water 'be prevented,' without any directives as to how or under what circumstances the government should execute that policy. Thus, to the extent those provisions impose a duty, they do not limit the State Board's discretion as to when and how to satisfy that duty.
>
> (*Los Angeles Waterkeeper v. State Water Resources Control Bd. (2023) 92 Cal.App.5th 230, 277*.)

Courts have also previously recognized that a Board action updating a water quality control plan in response to changed circumstances that necessitate revised water quality standards inherently

includes a waste and unreasonable use determination. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 130.) Thus, to the extent that commenters have asserted that the Board has not satisfied its duties under article X, section 2 of the California Constitution, they are mistaken.

Implementation Methodology and Curtailment Regulation

The State Water Board implements the Bay-Delta Plan objectives using its quasi-legislative or adjudicative authorities involving water rights and water quality. The State Water Board may implement the objectives by adopting regulations, conducting adjudicative proceedings, or both, that take into consideration the requirements of the Public Trust Doctrine and the California Constitution, article X, section 2. The State Water Board is planning to implement the flow components of the Sacramento/Delta updates to the Bay-Delta Plan primarily through water right curtailments based on water right priorities subject to possible modifications (e.g., drought, public health and safety, public trust obligations). Water released from storage is not available to downstream users unless it is abandoned. (See, e.g., *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 570 [when the stored water is released for use, it is not part of the river's natural flow and rediversion of this water does not count toward the appropriator's current allocation of river water]; see *State Water Resources Control Bd. Cases*, *supra*, 136 Cal.App.4th at pp. 737–745 [a riparian or appropriator has no legally protected interest in other appropriators' stored water or in the continuation of releases of stored water].) In order to inform the curtailments, the State Water Board will develop an implementation methodology to determine when water is not available at water right holders' priorities of right. A draft of this methodology will be developed through a public process within one year of approval of the current Plan amendments by OAL. Within two years of approval of the current Plan amendments by OAL, the State Water Board will adopt implementation regulations consistent with the above that will identify specific curtailment procedures and requirements. The initial version of methodology will then be finalized in coordination with the implementation regulation.

A few commenters argued that the State Water Board lacks authority to implement the Plan through a water right curtailment regulation. These commenters assert that the State Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights and may only do so through comprehensive stream adjudication under Water Code section 2500 et seq. Commenters cite for example, the *California Water Curtailment Cases* (2022) 83 Cal.App.5th 164, in support of their arguments. Other comments argue that the State Water Board would have to petition the court to impose streamflow requirements on water rights that were already adjudicated. A commenter suggested that stream adjudication procedures set forth in Water Code section 2500 et seq. are the only way the State Water Board can determine or consider water rights priority.

An adjudicatory proceeding is not the only legal proceeding available to give force and effect to flow requirements within the Bay-Delta Plan or to determine water rights priority. As explained in Staff Report Section 5.2.3, *Regulations and Adjudicative Proceedings*, the State Water Board conducts both quasi-legislative and quasi-judicial administrative proceedings, and different rules apply depending on the type of action pending before the State Water Board. In the past, the State Water Board conducted adjudicative water right hearings to implement the Bay-Delta Plan. In a quasi-adjudicative proceeding, the procedural rules are similar to those of a court in that testimony is submitted and subject to cross-examination and rebuttal, evidentiary motions may be made, and ex parte communications with the decision-maker are prohibited. This type of hearing is best suited for cases with a discrete set of issues and limited individual parties. Quasi-legislative proceedings,

including hearings for the adoption or amendment of regulations, water quality control plans or state policy for water quality control, and hearings to gather information to assist the State Water Board in formulating policy for future action, are not adjudicative proceedings and are subject to different procedures. (See Cal. Code Regs., tit. 23, § 649 et. seq.) A rulemaking proceeding is most effective when a large number of parties will be subject to the regulation. For the purposes of implementing the Bay-Delta Plan, which involves over 17 thousand water right holders, quasi-legislative procedures will be substantially less time consuming compared to quasi-adjudicative proceedings and better tailored for actions that require a comprehensive approach. Both types of proceedings provide notice and adequate opportunities for public involvement. However, the quasi-legislative process is generally more assessable to the public due to those processes being generally relatively less rigid and, in this case, less time consuming. The State Water Board possesses legal authority to adopt regulations declaring that a particular use of water under given circumstances is unreasonable without the requirement to conduct a hearing as to any individual water right. (*Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 1004 [citing *Light*, *supra*, 226 Cal.App.4th at pp. 1484-1485] ["*Stanford Vina*"].)

The *California Water Curtailment Cases* involved litigation over water right curtailments issued in 2015 in the absence of regulation. The Santa Clara County Superior Court determined that the State Water Board did not have enforcement authority under Water Code section 1052 to require water right holders not subject to the State Water Board's permitting authority (pre-1914 appropriative and riparian water right holders) to cease their diversions based solely on a lack of water availability under their priority of right.[8] The superior court in the *California Water Curtailment Cases* recognized the express language in Water Code section 1058.5 authorizing an emergency regulation to require curtailment when water is not available under the diverter's priority of right and expressed no opinion of the State Water Board's authority to require curtailments in reliance on that authority. Separately, the Third District Court of Appeal upheld the State Water Board's adoption and implementation of an emergency regulation setting minimum instream flows for protection of endangered salmonids in specific streams and preventing as an unreasonable diversion and use of water diversions that cause flows in the streams to drop below those minimum levels. (*Stanford Vina*, *supra*, 50 Cal.App.5th 976.)

To implement the Bay-Delta Plan, one of the authorities the State Water Board would rely on is Water Code 1058, which provides: "The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code." As discussed in detail above, the State Water Board has the authority and responsibility to adopt and implement the Bay-Delta Plan for the reasonable protection of beneficial uses, to prevent waste and unreasonable use and protect public trust resources where feasible, and for the orderly and efficient administration of the state's water resources. As part of administrating water rights, the State Water Board may adopt regulations to curtail water diversions under any water right type to protect more senior rights, and to protect minimum instream flows for the reasonable protection of fish and wildlife beneficial uses, including HRL flow commitments or other flows provided from approved local cooperative solutions and instream flow dedications approved pursuant to Water Code section 1707.

[8] Senate Bill 389 (Allen), Chapter 486, Statutes of 2023, subsequently amended Water Code section 1051 to give the Board the authority to investigate the validity of any right, whether riparian or appropriative, and enforce it as a trespass under Water Code section 1052. This means that, unlike at the time of the *California Water Curtailment Cases*, riparian and pre-1914 appropriative water rights are now subject to Water Code division 2.

When the amount of water available in a surface water source is not sufficient to support the needs of existing water right holders, junior appropriators must cease diversion in favor of more senior rights. However, there is currently no method for most diverters: to determine whether there is sufficient flow in the system to support their diversion and senior water uses downstream; to determine whether releases of stored water are abandoned flows that may be diverted or whether those flows are not available for diversion because they are being released for downstream purposes; and to know if water is natural flow available for diversion by riparians or if it is stored or imported water, and when and to what extent correlative reductions in water use are needed due to the need to share limited supplies amongst riparian rights.

The numeric inflow requirements for the Sacramento/Delta tributaries will primarily be implemented by limiting water diversions to ensure that the applicable flow requirements remain instream. In order to implement the numeric inflow requirements in accordance with water right priorities, demands for water that exceed the available supplies while preserving the instream flows and amounts needed to serve senior water right demands will be subject to curtailment in order of water right priority unless an exception to curtailment applies. Water that would otherwise be available under the priority of right that is bypassed or released from storage to meet the inflow requirements is not abandoned and is not available for diversion downstream by other water right holders and claimants. Given the large number of diverters subject to the Plan, the implementation methodology and regulation are necessary to effectively and efficiently administer and enforce the water right priority system and the Bay-Delta Plan to ensure that flow requirements are met in accordance with water availability.

Some commenters argued that the State Water Board must petition to reopen an existing adjudication to impose Bay-Delta Plan requirements. The case law does not support this contention. In the *Stanford Vina* case, for instance, the State Water Board began promulgating emergency regulations implementing in-stream flow requirements for certain creeks, including Deer Creek. (*Stanford Vina*, *supra*, 50 Cal.App.5th at p. 989.) The petitioner was entitled to use about 66 percent of Deer Creek's flow due to a judicial decree that was first entered in 1923 and amended in 1926. (*Id.* at p. 986.) The Third District Court of Appeal, however, did not hold that the Board needed to petition to reopen that adjudication to implement in-stream flow requirements. (*Id.* at p. 1007.) In a similar vein, in cases where the adjudications in question were in the Board's quasi-judicial capacity, courts have not held that the Board was required to reopen the adjudication in order to exercise its regulatory powers. (See *El Dorado Irrigation District v. State Water Resources Control Bd.*, *supra*, 142 Cal.App.4th at pp. 942-944; *Light*, *supra*, 226 Cal.App.4th at pp. 1482-1483.) The case law indicates that the Board need not reopen an existing adjudication to impose regulatory requirements akin to Bay-Delta Plan requirements.

Moreover, the State Water Board need not conduct a stream-wide adjudication before it adopts curtailment regulations to administer the Bay-Delta Plan in accordance with water right priorities. In the *Light* case, for example, the Board adopted regulations concerning stream water diversions used for protecting crops from frost, in order to prevent salmonid deaths. (*Light*, *supra*, 226 Cal.App.4th at pp. 1474-1475.) This case did not involve a stream-wide adjudication, but the First District Court of Appeal held that as these regulations were in furtherance of public trust interests, the regulations did not inherently violate the rule of priority. (*Id.* at pp. 1474-1475, 1489.) Hence, the case law does not support the notion that the lack of a stream-wide adjudication prevents the Board from validly adopting regulations such as curtailment regulations.

Additionally, multiple comments asserted that Delta riparian and pre-1914 right holders can divert when previously stored water is in the system, citing *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 153, the doctrine of confusion goods, and Water Code section 12200 et. seq. The *Butte Canal* case and the doctrine of confusion of goods do not apply in this context, for several reasons. First, the technological limitations mentioned at length in dicta in *Butte Canal* are no longer a reality. Through streamflow gaging, sampling, satellite imaging, computer modeling, and more, it is possible to reasonably determine the amount of water in a stream. Second, the doctrine of confusion of goods deals with an entity that willfully mixes their goods with another. That person loses their goods, unless the goods are of the same quality and the quantity mixed can be ascertained. (*Id.*, at p. 147.) Fresh water in this case is fungible, and as noted above, it is possible to reasonably determine the amount mixed by an upstream water right holder (e.g., the CVP or SWP) into the system. Therefore, the mixer (e.g., CVP or SWP) would not lose their good by mixing in the stream (the Sacramento River and other tributaries), and the doctrine does not apply. Third, *Butte Canal* does not stand for the proposition it is cited for in the comment. At no point in the *Butte Canal* ruling does the California Supreme Court consider a situation where a diverter, on adding water to a system and improving water quality, objects to downstream diversions because downstream diverters are enjoying the benefits of improved water quality. To read *Butte Canal* as considering such a situation is contrary to law and fact.

Some commenters asserted that Water Code sections 12201 and 12202 of the Delta Protection Act place an ongoing responsibility on the Projects (CVP and SWP) to guarantee that Delta water users always have sufficient water of adequate quality, even if that requires the Projects to release stored Project water to support Delta diversions when natural and abandoned flows are inadequate to satisfy their demands. However, nothing in the Delta Protection Act entitles Delta water users to Project water or serves to exempt Delta water users from regulatory requirements, including future actions to implement updates to the Bay-Delta Plan. Delta water users remain subject to other regulatory requirements (see, e.g., *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89 [upholding the ability of the Board to apply Term 91, which precludes the ability of downstream users to divert stored water released by the Projects to comply with water quality objectives and specifically finding that such action was not precluded by the Area of Origin statutes]; *El Dorado Irrigation District v. State Water Resources Control Bd.*, *supra*, 142 Cal.App.4th 937 [imposing a condition to protect the diversion of water while federal and state water agencies were releasing water to meet water quality objectives did not contravene the county of origin and area of origin statutes]), and to the extent that Delta water users divert natural flows that contribute to the degradation of water quality in the Delta, the Board has not only a legitimate interest but the legal authority to curtail such diversions. These authorities include article X, section 2 of the California Constitution, the Public Trust Doctrine, and Water Code sections 100, 100.5, 104, 105, 275, and 1058. (See also *Light*, *supra*, 226 Cal.App.4th 1463 [holding that the Board had the authority to enact regulations to preclude the unreasonable use of water and evidence sufficient to support the regulation was reasonably necessary to prevent unwarranted salmon mortality]).

Water Code section 12204 prohibits the export of water that is needed to provide salinity control and an adequate water supply to Delta users, or the export of water to which Delta users are entitled. However, the courts have not interpreted these provisions to mean that Delta users are entitled to water previously stored by the Projects in accordance with the priority system that is released for export from the Delta or to meet water quality objectives. Though Delta water users may derive incidental water quality benefits from the Projects' releases of stored water, they have no right to divert the Projects' previously stored water itself without a contract or other such

mechanism subject to the associated conditions. Rather, like any water right holder, Delta water right holders' lawful diversions under their rights are limited to natural and abandoned flows available at their priority of right.

This point was underscored in the *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 771-72 where the court noted that: "[a]s for the argument of the Central Delta parties that the Delta Protection Act gives Delta riparians and appropriators a right to water stored upstream by others, we disagree. Nothing in the Delta Protection Act purports to grant any kind of water right to any particular party. The Delta Protection Act does preclude the diversion of water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta; however, it is for the Board to decide, in the exercise of its judgment, what level of salinity control should be provided and what is an adequate supply of water for users in the Delta."

Therefore, whatever obligation the Projects have to provide an adequate supply of water for users in the Delta does not serve to relieve those users of the legal requirement to have sufficient water rights to support their diversions. The Delta Protection Act does not create any new water right outside the purview of the Board's regulatory authority, nor does it provide users within the watershed with any right to stored water held within or released from Project reservoirs.

The Plan specifies that numeric inflow requirements for the Sacramento/Delta tributaries and associated inflow-based Delta outflows will be implemented in accordance with water right priorities. The inflow objective applies throughout the Sacramento/Delta watershed to protect water quality in upstream reaches and contribute to Delta outflow. Compliance points in upper watershed reaches are important to protect water quality in those reaches and ensure comprehensive watershed contribution to Delta outflows. The State Water Board will develop an implementation methodology to determine when water is not available at water right holders' priorities of right. In implementing curtailments, the Board will consider and accommodate as appropriate relevant court decrees, settlement agreements, and other arrangements that affect water diversion and use to the extent consistent with the water right priority system. Note that the Board is not a party and is not bound by private agreements and stipulations. A draft of the methodology will be developed through a public process within one year of approval of the Plan amendments by OAL. Within two years of approval of the current Plan amendments by OAL, the State Water Board will adopt implementation regulations consistent with the above that will identify specific curtailment procedures and requirements. The initial version of the methodology will then be finalized in coordination with the implementation regulation.

Some commenters expressed concerns about the accuracy of the Board's water right records and suggested these issues could result in violations of the rule of priority and other legal and factual errors that will put the objectives of the program at risk during the most critical times. Comments noted alleged issues that arose during implementation of the emergency drought regulation and specifically mentioned the Water Unavailability Methodology.

The State Water Board agrees that accurate water right and use records, including measurement data, is critical for managing and making informed decisions regarding California's water supply, especially during droughts, and will be instrumental for Bay-Delta Plan implementation. As discussed in Section 2.7 of the 2023 draft Staff Report, *Existing and Future Water Rights in the Sacramento/Delta Watershed*, all diverters whose diversion and use are not reported by a watermaster are required to submit annual reports of water diversion and use (annual reports) to the State Water Board electronically through the Electronic Water Right Information Management

System (eWRIMS) Report Management System (RMS). That section has been updated to reflect the transition to the California Water Accounting, Tracking, and Reporting System (CalWATRS), which is the state's new and improved water rights data system. In addition, Water Measurement Regulation (SB88) in chapter 2.8 of title 23 of the California Code of Regulations requires diverters who divert more than 10 acre-feet of water per year to measure and report their diversions. When there is a need for additional information from water users, the State Water Board has authority to order submittal of information as discussed in the section of this common response titled *Information Request Authority*. The State Water Board has specifically revised the water measurement regulation with the goal of standardizing data, improving data quality, and simplifying requirements to improve regulatory compliance. Through the revised water measurement regulation and planned refinements to the prior drought curtailment methodology before implementing the Bay-Delta Plan, the Board anticipates improvements in the quality and extent of water rights and diversion data that will further improve the accuracy of data informing implementation of the Bay-Delta Plan. The revised proposed Plan amendments also identify that the methodology would be subject to improvement over time given that data and tools are expected to improve over time. If specific improvements are needed related to the Bay-Delta Plan, those would be considered during the methodology development process and during annual and periodic reviews. Please see Common Response 1.3, *Revised Proposed Plan Amendments*, for additional information on data considerations, including water measurement.

Other commenters expressed concern regarding the State Water Board's ability to accurately impose curtailments in order of water rights priority, and suggested that water rights, including related contracts, are complex and require more than just a pull of data from a database to properly administer order of priority. The State Water Board acknowledges that implementation of the Bay-Delta Plan will be complex. The State Water Board has recently implemented emergency drought curtailments in the Bay-Delta, Russian River, and Klamath River watersheds to maintain water rights priority during times of extreme water supply shortages, and implementation of the proposed Plan updates will build from these efforts. Other commenters suggested that the Board has not considered the correct information necessary to implement the water rights priority system, or that the Board has not complied with the appropriate statutes or procedures to verify or determine water rights priority dates. These types of implementation comments are unripe because the methodology and curtailments will require a separate implementing mechanism either via an implementing regulation as discussed in the Staff Report and Plan amendments, or through a different mechanism such as issuance of water quality certifications or a water rights adjudication. Additional opportunities for public input and due process, where appropriate, will be provided. Please see Common Response 1.3, *Revised Proposed Plan Amendments*, for additional discussion of the implementation methodology.

Implementation of VA and Regulatory Pathways Together

Some commenters expressed concerns about the rule of water rights priority when implementing the VA and regulatory pathways together. Comments stated that it would be unfair for more senior diverters to bypass diversions when more junior HRL water rights are allowed to divert. Chapter 13, *Revised Proposed Plan Amendments*, of the 2025 partially recirculated draft Staff Report describes the revised proposed Plan amendments, including the regulatory pathway, VA pathway, WSAs, and provisions for an implementation methodology. The VA pathway would apply to water rights included in the approved VA pathway, and the regulatory pathway would apply to water rights not included in the approved VA pathway; the regulatory pathway would also apply to water rights

included in the VA pathway if the VA pathway is discontinued. The VA pathway incorporates specified flow, habitat, and related commitments, along with accounting, monitoring, reporting, and review provisions for the water rights included in that pathway. The regulatory pathway includes provisions for implementing numeric flow requirements in accordance with water right priorities.

There will not be an increase in curtailment of water rights under the regulatory pathway to make up for water that would have been provided by any junior HRL water right. Rather, the implementation methodology will determine curtailments as if all water rights were implementing the regulatory pathway, except that rights approved under the VA pathway would not receive an order to curtail to meet the regulatory pathway flow requirements. As a practical matter, less flow will remain instream for the duration of the VA pathway; however, no senior water right will be further curtailed to make up that flow. In addition, HRL water rights would still be subject to curtailment when no water is available under their priority of right without accounting for instream flow requirements and those users would be required to bypass regulatory pathway flows provided by other users consistent with water right priorities. Further, water provided under the VA pathway by HRL participants must be made available under a water right that is not curtailed. Together, these provisions will ensure that the implementation of the VA pathway does not increase the obligation of water right holders on the regulatory pathway and that HRL flow commitments are provided from supplies that are available and consistent with water right priorities in a manner that does not impact other water right holders inconsistent with water right priorities.

Rule of Priority and Tributary-Specific Water Supply Adjustments

Some commenters expressed concerns about the rule of water right priority when implementing the WSAs. As described in Common Response 1.3, *Revised Proposed Plan Amendments*, and in response to prior comments, modifications to the starting point for the inflows under the regulatory pathway were incorporated into the revised proposed Plan amendments that reduce water supply impacts and allow more water to be stored in reservoirs at the outset of Plan implementation. These modifications are referred to as WSAs which provide for lowering the required percent of unimpaired flow during all but the wettest hydrologic conditions down to 45 or 35 percent of unimpaired flow, with additional *tributary-specific* WSAs for three rainfall and municipal supply dominated tributaries (the Mokelumne and Calaveras Rivers, and Putah Creek). Please see the discussion of WSAs in Common Response 1.3, *Revised Proposed Plan Amendments*, for additional information on why these three tributary watersheds received specialized WSAs.

Most of the comments related to WSAs are addressed in individual comment responses or in Common Response 1.3, *Revised Proposed Plan Amendments*. The revised proposed Plan amendments provide flexibility through adaptive implementation to tailor flow requirements and cold water habitat implementation for the unique conditions of each tributary. This flexibility would not violate water right priority because such tailoring does not change or increase any obligation of another right holder on a different tributary. The response below responds specifically to comments related to implementing water rights priority when WSAs are also implemented.

One commenter argued that applying WSAs, including tributary-specific WSAs, would violate the rule of water right priority without conducting a watershed-wide adjudication to confirm the validity and relative priority of all water right claims. As explained above, the State Water Board need not conduct a watershed-wide adjudication before it adopts curtailment regulations to administer the Bay-Delta Plan in accordance with water right priorities. Additionally, the revised proposed Plan amendments and Staff Report Section 13.3.3.2, *Sacramento/Delta Tributary Inflows*,

describe that flow requirements will be implemented in accordance with water right priorities subject to possible modifications (e.g., drought, public health and safety, public trust obligations). As described in Common Response 1.3, *Revised Proposed Plan Amendments*, each tributary will be required to meet the flows requirements specific to that tributary, and the water that is provided will be protected to the Delta and through the Delta. The proposed framework does not violate the rules of water rights priority as suggested by the commenter. Further, the WSAs only serve to lower water supply impacts overall and on individual tributaries. Please see the discussion of the implementation methodology in Common Response 1.3, *Revised Proposed Plan Amendments*, for additional information on the proposed curtailment methodology.

Commenters also questioned why WSAs appear to extend a preference to municipal uses and whether they follow water right priorities. People depend on municipal water supply for drinking and basic domestic uses. Water Code section 106 establishes the policy of the state to prioritize municipal supply over agricultural water supply. The Board also has authorities under the Public Trust Doctrine and article X, section 2 of the California Constitution to prevent the waste and unreasonable use of water. Such authority may be used alongside water right priorities to implement the Bay-Delta Plan. Further, the tributary-specific WSAs do not violate water right priorities because they do not change the obligations of other water right holders outside of the three tributaries or otherwise affect them. Under existing conditions without new Bay-Delta Plan instream flow requirements different tributaries already have different instream flow requirements due to FERC licenses, agreements, biological opinions, and other reasons. Like the watershed-wide WSAs, the tributary-specific WSAs only serve to reduce water supply impacts of the Plan amendments.

Additionally, comments that claim implementation violates water rights priority are unripe because the implementation of the methodology and associated curtailments will require a separate implementing mechanism either via an implementing regulation as discussed in the Staff Report and Plan amendments, or through a different mechanism such as issuance of water quality certifications or a water rights adjudication. Additional notice, opportunities for public input, and due process where appropriate, will be provided.

Due Process and Compensable Taking of Private Property

Some commenters asserted that the Sacramento/Delta updates to the Bay-Delta Plan would constitute compensable takings under the Fifth Amendment of the United States Constitution because they would reallocate water, assign responsibility for meeting instream flow requirements, or would require adjustments to operation of infrastructure previously devoted solely for agricultural and municipal purposes.

The revised proposed Plan amendments have not yet been implemented, either via an implementing regulation as discussed in the Staff Report and Plan amendments, or through a different mechanism such as issuance of water quality certifications or a water rights adjudication. Thus, any challenge that implementation of the Plan constitutes a compensable taking is therefore unripe.

Further, even if commenter-raised takings issues were ripe, in order for there to be a cognizable property interest to support a takings claim, a plaintiff must demonstrate they possess a right to use the property allegedly taken. (*American Pelagic Fishing Co. v. United States* (Fed. Cir. 2004) 379 F.3d 1363, 1377.) Water rights by their nature, including being subject to hydrology, senior demands, and constitutional principles, are "limited and uncertain." (*People v. Murrison* (2002) 101

Cal.App.4th 349, 359.) Water rights differ from more traditional property rights in that they are non-possessory rights of use inherently subject to the overriding limitations and restrictions set forth by California's constitutional prohibition of waste and unreasonable use (Cal. Const. art. X, § 2) and the Public Trust Doctrine. All water in California is the property of the people of the State and is owned in trust for them by the State. (Wat. Code, §§ 102, 1001; *Kidd v. Laird* (1860) 15 Cal. 161, 179-180.) No water right holder has a vested right to divert a specified quantity of water without limitation. (*Eddy v. Simpson* (1853) 3 Cal. 249, 252; *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 100, 105-106, 147.) Instead, a water right entitles its holder to use up to a certain quantity of water, subject to the overriding limitations and restrictions of California's reasonable use and public trust doctrines, which inhere in the water right itself. (*National Audubon*, *supra*, 33 Cal.3d at pp. 437, 440, 445, 447; *Joslin v. Marin Municipal Water Dist.*, *supra*, 67 Cal.2d at pp. 144-145.)

Pursuant to these doctrines, a water right holder may be prevented from diverting the maximum quantity of water under its water rights in order to prevent harm to fishery resources and other beneficial uses. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at 130). These limitations do not qualify as a taking, physical or regulatory, of a property right, since no one holds a property right that entitles them to the unlimited and unregulated use of surface water in California in violation of the Public Trust Doctrine or constitutional prohibition on waste and unreasonable use. The state is not required to undertake an eminent domain proceeding or to otherwise compensate a water right holder for a property interest that water right holder does not have. (*American Pelagic Fishing Co.*, *supra*, 379 F.3d at p. 1372.) For these reasons, implementation of the Plan amendments would not result in a taking requiring compensation.

Some commenters cited *Casitas Municipal Water District v. United States* to assert that any carryover storage requirement is a taking. See *Casitas Municipal Water Dist. v. United States* (Fed. Cir. 2013) 708 F.3d 1340 (*Casitas VI*). This assertion is not accurate. The case involved a water bypass for fish under ESA requirements and analyzed it as a physical taking. (*Casitas IV*, *supra*, 708 F.3d at p. 1343.) However, the Federal Circuit concluded that the federal government had not yet conducted a taking because the amount of water bypassed had not encroached on the amount that plaintiff was entitled to beneficially use under their permit. (*Id.* at pp. 1358-1359.) The court noted that "the only diversion relevant to the takings claim would be a diversion that impinges on [plaintiff]'s right to beneficial use. No such diversion has yet occurred. . . . It is this potential future diversion of water (i.e., a diversion that impinges on [plaintiff]'s right to beneficial use) that, if and when it occurs, will begin the cascade of 'events which fix the government's alleged liability' . . . . Because the act constituting a taking has not yet occurred, [plaintiff]'s takings claim has not yet accrued." (*Id.* at p. 1359 [citations omitted].) For holders of California water right permits (as with holders of all water rights in the State), their water rights are subject to the limitations and restrictions of California's reasonable use and public trust doctrines, the bounds of which the State Water Board determines in a given situation. (See *National Audubon*, *supra*, 33 Cal.3d at pp. 437, 440, 445, 447, 452; *Joslin v. Marin Municipal Water Dist.*, *supra*, 67 Cal.2d at pp. 144-145.)

Lastly, some commenters alleged that because the Plan amendments will affect the exercise of their water rights, they are entitled to, or will be entitled to, an adjudicative proceeding or the same procedural due process as an adjudicative decision, and therefore the State Water Board has violated, or will violate, their due process protections in the water quality control planning process.

As explained above, the State Water Board conducts both quasi-legislative and quasi-adjudicative administrative proceedings, and different rules apply depending on the type of action pending

before the State Water Board. A quasi-adjudicative (also referred to as quasi-judicial) proceeding is best suited for cases with a discrete set of issues and limited individual parties. The procedural due process in a quasi-adjudicative proceeding is similar to those of a court in that testimony is submitted and subject to cross-examination and rebuttal, evidentiary motions may be made, and ex parte communications with the decision-maker are prohibited. A quasi-legislative proceeding (rulemaking) is most effective when a large number of parties will be subject to the regulation. Quasi-legislative proceedings, including hearings for the adoption or amendment of regulations, water quality control plans or state policy for water quality control, are not adjudicative proceedings and are subject to different procedures. (See Cal. Code Regs., tit. 23, § 649 et. seq.) Both types of proceedings provide notice and adequate opportunities for public involvement.

The "procedural due process" raised by commenters is associated with quasi-adjudicatory decisions and is not required at this stage of the planning process. "Quasi-legislative acts involve the adoption of rules of general application on the basis of broad public policy, while quasi-judicial acts involve the determination and application of facts peculiar to an individual case." (*Monsanto Co. v. Off. of Env't Health Hazard Assessment* (2018) 22 Cal. App. 5th 534, 561–62). Procedural requirements for quasi-legislative proceedings will instead be determined by the relevant governing statute. (*McKinny v. Oxnard Union High Sch. Dist. Bd. of Trs*. (1982) 31 Cal. 3d 79, 99.) As the California Supreme Court stated (quoting Justice Homes), "[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in a town meeting or assembly of the whole." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-613.)

The process to amend the Bay-Delta Plan is quasi-legislative and subject to the procedural rules articulated in, *inter alia*, Water Code section 13244. The Board has complied with all noticing and public participation requirements associated with the water quality control planning process, and has provided ample opportunities for robust participation by interested parties and the public in general. See Common Response 1.1, *General Comments*, for additional discussion of the adequacy of the public process and noticing.

Additional opportunities for participation from interested parties will be available throughout the process to develop an implementing methodology and the associated curtailment regulations and other implementation actions. The adoption of an implementing regulation would similarly be a quasi-legislative action adopted pursuant to Water Code section 1058, with procedures for public notice and participation in accordance with the APA (Gov. Code, §§ 11340-11361). In contrast, an Administrative Civil Liability (ACL) complaint issued for a violation of a regulation would entitle a diverter to a quasi-adjudicative hearing and procedural due process appropriate for a quasi-adjudicatory proceeding.

Fish and Game Code Section 5937

Fish and Game Code section 5937 requires that "[t]he owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam." Some commenters contend that the Staff Report failed to analyze whether the proposed VAs comply with Fish and Game Code section 5937. Another commenter requested that any citations to Fish and Game Code section 5937 be removed from the Plan amendments, arguing that "it is not the duty of the State Water Board to enforce the application [of Fish & Game Code, §

5937] through its exercise of its regulatory jurisdiction over water quality" and instead the Plan "must conform to the 'reasonable protection' standard of the Porter-Cologne Act."

Fish and Game Code section 5937 is a legislative expression of the Public Trust Doctrine. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 626, 629-630.) As the California Supreme Court explained in *National Audubon Society v. Superior Court*, "[t]he 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." (*National Audubon*, *supra*, 33 Cal.3d at p. 446.) While the State Water Board analyzes the Public Trust Doctrine and Fish and Game Code section 5937 more often in the context of specific water right matters (see, e.g., State Water Board Water Right Decision 1631 (1994) [*Mono Lake*]; State Water Board Order WR 95-04 [*Big Bear Lake*]), the Supreme Court's broad mandate to consider the public trust "in the planning and allocation of water resources" also requires consideration of the public trust and Fish and Game Code section 5937 in water quality planning under the Porter-Cologne Act. The State Water Board therefore considers the Public Trust Doctrine and Fish and Game Code section 5937 when establishing beneficial uses and water quality objectives (such as the cold water habitat objective), to ensure reasonable protection of those beneficial uses under the Plan amendments. Please refer to final Staff Report Section 13.6.1, *Public Trust Analysis*, for the State Water Board's public trust analysis of the revised proposed Plan amendments and the discussion of Fish and Game Code section 5937.

The Board is not itself a dam owner and therefore cannot be liable under Fish and Game Code section 5937 for the improper operation of any dam. However, the Board has the authority and duty under the Public Trust Doctrine to ensure the Plan amendments do not lead to a violation of section 5937 by dam owners. The Board describes its various authorities to adopt and implement the Plan amendments in section 1.3, *Legal Authority*, and throughout the program of implementation (Chapter 4) in the revised proposed Plan amendments.

The Staff Report discusses Fish and Game Code section 5937 in Sections 7.12.1, *Surface Water*, and 7.6.2, *Aquatic Biological Resources*, specifically as it relates to existing temperature concerns. Although there are existing instream flow requirements on some tributaries and other ongoing efforts intended to help protect native fish species and habitat, including cold water habitat, existing regulatory requirements that apply to a limited subset of streams and for a limited number of reservoirs are insufficient to protect native fish species in the Sacramento/Delta. The Staff Report acknowledges that existing laws (e.g., Fish and Game Code section 5937, Basin Plan Water Quality Objectives for temperature) are applied unevenly or not currently being implemented in many locations.

As described in Chapter 3, *Scientific Knowledge to Inform Fish and Wildlife Flow Recommendations*, salmonids require adequate cold water and flow conditions throughout their freshwater lifecycle and particularly during the spawning and rearing period. Before construction of reservoirs and other habitat alterations, salmonids generally had year-round access to cold water habitat in higher elevations. Since construction of dams and other habitat alterations, this access has been eliminated or substantially reduced to the detriment of salmonid populations. Remaining populations that would otherwise migrate to upstream habitat are now dependent on maintenance of suitable conditions in the downstream reaches below dams. During summer and fall, when warm air temperatures exert a strong influence on river temperatures, the release of cold water from reservoirs is critical for maintaining suitable cold water habitat. Under current conditions, temperature management is frequently a concern below reservoirs on many tributaries throughout

summer and fall for the protection of salmon, especially during droughts and critically dry periods. Some reservoirs currently have cold water management requirements. However, comprehensive requirements do not currently exist for all tributaries where reservoirs are present or for tributaries without reservoirs.

As discussed in the Staff Report, changes in flow and reservoir storage under the Plan amendments could affect stream temperatures and the availability of cold water downstream of reservoirs. The numeric inflow requirements on regulated tributaries would generally result in higher spring flows compared with baseline conditions. While higher spring flows that more closely resemble the natural hydrologic regime would benefit native anadromous salmonids and other native species, higher spring flows could subsequently result in reductions in reservoir storage and lower reservoir cold water pool volume in summer and fall months.

Accordingly, as a complementary measure to the inflow requirements, the revised proposed Plan amendments include a new cold water habitat objective for the Sacramento/Delta tributaries. The objective is intended to minimize redirected impacts on cold water habitat from the new inflow and Delta outflow requirements and to address other existing and potential future temperature management concerns on the tributaries for salmonids and other native species. Because temperature needs depend on the species of salmonid, the life stage, and other factors and because temperature management actions depend on the specific circumstances of each tributary, a narrative objective is proposed. The objective under the revised proposed Plan amendments would require that measures be implemented to provide cold water habitat for salmonids and other native cold water fish species in the Sacramento/Delta tributaries, including management of cold water storage and releases and alternate protective measures (including measures to install and operate temperature control devices, measures to provide for passage above dams, and other measures) to ensure that fish below dams are kept in good condition. To the extent that existing measures are in place for temperature control, those requirements could be used to meet Bay-Delta Plan requirements.

The Staff Report acknowledges that potential temperature increases could occur in some streams under some circumstances and managing these factors to protect cold water habitat for fish is complex and challenging. However, the implementation of the narrative cold water habitat objective and the flexibility provided in the inflow requirements would be expected to improve water temperature conditions for native cold water fish. The cold water habitat objective is intended to bolster existing legal protections to ensure comprehensive temperature protection over time. Although approaches may differ among tributaries, the effectiveness of cold water management will require ongoing coordination, collaboration, and technical review among water managers, stakeholders, and technical experts to facilitate both short-term and long-term planning and decision-making efforts.

Under the VA pathway, changes in streamflows and reservoir levels would be less compared to the regulatory pathway, and model results for the American, Feather, and Sacramento Rivers indicate that water temperature conditions under the VA pathway would be similar to baseline. The environmental analysis considers whether implementation of the VA pathway would cause temperature impacts relative to baseline conditions. The VA pathway includes flexibility in the timing of flow commitments, which could reduce or avoid possible temperature-related effects and provide some temperature benefits. However, due to the uncertainty in the timing of VA flow commitments, and in some cases the location, and associated possible changes in water

temperatures, this impact is conservatively considered potentially significant. As indicated in the Staff Report, existing water temperature concerns may not be addressed by the VA pathway alone.

The revised proposed Plan amendments include a provision requiring that the VA pathway be implemented in a manner to improve temperatures to the extent possible and avoid redirected impacts to water temperatures. As part of the annual and periodic review processes, the HRL participants will be required to report on measures they have undertaken to address temperature impairments in their stream systems in coordination with HRL implementation measures. Information regarding temperature effects, as well as other effects of the VA pathway on the protection of native fish and wildlife, will inform decisions regarding continuation, modification, or termination of the VA pathway overall and for individual HRL components.

Additional protections for temperature impacts are included in Staff Report Section 7.6.2.5, *Mitigation Measures,* ***MM-AQUA-a,d*****: Mitigate impacts on aquatic special-status species and wildlife movement or wildlife nurseries**, which contains the following for export reservoirs not subject to the cold water habitat objective:

1. **Implement Existing Laws that Protect and Mitigate Impacts from Dams and Diversions:**

    i. Existing Regulatory Requirements: Reservoir owners and operators are subject to existing regulatory requirements intended to protect water quality in reservoirs and streams below reservoirs. Consistent with California Fish and Game Code section 5937, cold water flows from reservoirs should be maintained and timed to provide for downstream temperatures at critical times of the year to ensure that fish below dams are kept in good condition. Additional regulatory authorities that protect cold water habitat include FERC license requirements, National Marine Fisheries Service (NMFS) Biological Opinion (BiOp) requirements, regional water board basin plan requirements for the protection of beneficial uses, and State Water Board public trust authority.

Enforcement Authority

Compliance with applicable laws, regulations, plans, policies, and orders is critical to protecting public trust resources, beneficial uses, and the integrity of California's water rights system. Under Water Code section 1825 "[i]t is the intent of the Legislature that the state take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water." Enforcement also prevents violators from gaining a competitive advantage over those who operate responsibly and follow the law.

Under existing law, the State Water Board has several types of enforcement authority. The State Water Board may take enforcement action to prevent unauthorized diversions of water under Water Code section 1052. Diverting water when it is unavailable under a water right holder's priority of right constitutes an unauthorized diversion and a trespass against the state. Violations are subject to an ACL under the Water Code. (Wat. Code, § 1052.) Currently, an ACL order for an unauthorized diversion may impose liability of up to $1,000 per day, plus $4,000 per acre foot of water that is illegally diverted for violations during specified drought periods. (Wat. Code, § 1052; Cal. Code Regs., tit. 23, § 1100, subd. (b)(1).)

The State Water Board may also issue fines of up to $1,000 per day for violations of the terms and conditions of water right permits, licenses, certificates and registrations. (Wat. Code, § 1846; Cal. Code Regs., tit. 23, § 1100, subd. (b)(6).) Under existing law, administrative cease and desist orders (CDOs) and court injunctions may also be issued to require that diversions stop. (Wat. Code, § 1831.) For the State Water Board to require cessation of diversions of water when it is unavailable under a water right holder's priority of right, each diversion must be investigated and charged, generally on the basis of a complaint, and water right holders may request an evidentiary hearing on issues that include availability of water under the water right holder's priority. This process is not well suited to water management, as it does not afford interim relief, and an enforcement hearing would extend past any single irrigation season or water year. On the other hand, violation of a curtailment order issued under regulations allows for direct enforcement penalties of up to $10,000 per day plus $3,000 per acre foot of water, allowing for more timely enforcement and providing a clearer compliance incentive. (Wat. Code, § 1846, subd. (b); Cal. Code Regs., tit. 23, § 1100, subd. (b)(5).) Under existing law, the State Water Board also may initiate adjudicative proceedings to prevent the waste or unreasonable use of water. (Wat. Code, § 275.) If a CDO is violated, the State Water Board may impose an ACL. (Wat. Code, § 1845, subd. (b)(1).) The enforcement penalty for each type of violation is initially established in statute, and then subsequently adjusted based on the consumer price index. (Wat. Code, § 1855.5, subd. (a)(1).) Current penalties, adjusted for the consumer price index, are listed in the Code of Regulations. (Cal. Code Regs., tit. 23, § 1100.) In the event that the State Water Board has adopted a regulation defining the unreasonable use, the State Water Board may issue a CDO and/or simultaneously impose an ACL in response to violations of the regulation. (Wat. Code, §§ 1831, sub. (d)(4); 1846, subd. (a)(2).) The State Water Board also has the authority to impose an ACL of up to $10,000 per day for violation of a water quality certification. (Wat. Code, § 13385, subds. (a)(5) & (c).)

When first adopting and implementing a new program, the focus will necessarily be on outreach with the regulated community, not enforcement and fines. In general, the State Water Board and regional water quality control boards adhere to the progressive enforcement practices that: 1) assist cooperative water users in achieving compliance; 2) compel compliance for recalcitrant respondents; and 3) provide a disincentive for noncompliance. When responding to a potential violation, an informal response such as a phone call, email, or letter may suffice to inform the water user that an apparent violation has been identified and to explain what corrective actions need to be taken to return to compliance. In some circumstances, a report may be developed informing the respondent that enforcement staff believe a violation has occurred or is continuing to occur, describing the violation, and recommending corrective action. Such reports and correspondence are often referred to as "notices of violation." If a violation continues, the enforcement response will escalate until compliance is achieved and, where appropriate, will include monetary penalties or other formal enforcement action as necessary for resolution of the violation.

Regarding general enforceability of the requirements contained in the Bay-Delta Plan, when implementing the Bay-Delta Plan, the Board can utilize several administrative and legal mechanisms to compel compliance. The State Water Board has continuing authority under Water Code sections 100 and 275 to enforce the requirements of article X, section 2 of the California Constitution and its constitutional prohibition on waste and unreasonable use (discussed in-depth earlier in this common response.) Pursuant to these authorities and its general rulemaking authority under Water Code section 1058, the Board may adopt regulations defining an unreasonable use, method of use, or method of diversion of water. For instance, the Board could adopt a regulation finding it unreasonable for a water right holder or claimant to divert when subject to curtailments to ensure

water remains available at more senior diverters' priorities of right and to ensure that instream flow requirements are met. Upon adoption of such a regulation, the Board may issue a CDO, impose an ACL in response to violations of the regulation, or both. (Wat. Code, §§ 1831, subd. (d)(4); 1846, subd. (a)(2).)

Commenters argued that the VAs are not enforceable because they are voluntary or have no clear enforceable standards. The HRL commitments are included as regulatory requirements in the revised proposed Plan amendments and the VA pathway would have regulatory effect upon adoption of Plan amendments. The revised proposed Plan amendments include clear descriptions of the required actions the HRL participants are required to conduct (e.g., flow, habitat, and science), the required timelines for those actions, and the consequences if those actions and timelines are not complied with. Early termination or modification of the VA pathway for some or all HRL water rights is the primary enforcement mechanism for the VA pathway within the Board's authority. The Board may issue decisions by settlement or other decisions, orders, or regulations to enforce VA pathway commitments in accordance with the Plan's provisions. See also Common Response 1.3, *Revised Proposed Plan Amendments,* for responses to comments on enforceability of the VA pathway.

Several commenters expressed concern that Reclamation in particular will not provide the federal funds or flow commitments associated with the VA pathway because the state's ability to enforce Clean Water Act and Water Code requirements is constrained by the United States Supreme Court's decision in *United States Department of Energy v. Ohio.* That case held that that the U.S. had not waived sovereign immunity from liability for civil fines imposed by a state for past Clean Water Act violations. (*Dept. of Energy v. Ohio* (1992) 503 U.S. 607, 611.) ACL orders would not be applicable for Reclamation's HRL commitments; however, as stated above, early termination or modification of the VA pathway for some or all HRL water rights is the primary enforcement mechanism for the VA pathway within the Board's authority.

In addition, the State Water Board's authorities are not limited to civil fines. Section 313 of the Clean Water Act provides: "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural .... (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." (33 U.S.C. § 1323(a).) Reclamation is not immune from enforcement through decisions or orders in the nature of injunctive relief.

The State Water Board can issue CDOs against Reclamation. As stated in Water Right Order 2006-0006, "[u]pon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of part 2 of division 2 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction." (See State Water Board Order WR 2006-0006, p. 32.)

In addition, the State Water Board's tools for maintaining compliance are not just limited to the courts. Subsequent approvals typically require compliance with water right and regulatory requirements. For example, temporary transfers are typically contingent on compliance with water right and regulatory requirements, including Bay-Delta Plan requirements and associated water right requirements.

Information Request Authority

Some commenters questioned the Water Boards' authority to require monitoring and surveys. Through enactment of Water Code section 186, the state legislature broadly granted the State Water Board "any powers… that may be necessary or convenient for the exercise of its duties authorized by law." In addition, the Board is empowered to "make such reasonable rules and regulations as it may… deem advisable in carrying out its powers and duties under this code." (Wat. Code, § 1058.) Pursuant to its authorities, including but not limited to Water Code sections 13165, 13267, and 1051, the State Water Board may require monitoring, evaluation, reporting, and special studies to address both the individual and cumulative impacts of diversions and discharges on beneficial uses of water. Further, courts have concluded that a water quality control plan's program of implementation must include "consideration of monitoring activities through '[a] description of surveillance to be undertaken to determine compliance with objectives.'" (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 133 [discussing Wat. Code, § 13242, subd. (c)(2)].) Thus, the Board may request information, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by these code sections, to investigate the quality of any waters of the state. Finally, monitoring activities contained in the revised proposed Plan amendments Bay-Delta Monitoring and Evaluation Program are also required pursuant to water right requirements of the SWP and CVP as included in State Water Board Decisions 1641, 1485, and 1422. (D-1641, *supra*; State Water Board Decision 1485 (1978); State Water Board Decision 1422 (1973).)

Interaction with Other State Water Board Regulatory Activities

Generally, if requirements contained in the Bay-Delta Plan differ from those contained in any water right order or water quality certification, the more stringent requirement would control. Provisions for adaptive implementation of the numeric inflow requirements are provided to optimize flows to benefit native fish and wildlife while also minimizing water supply impacts, and for the numeric inflow requirements to be implemented in a coordinated fashion with the cold water habitat and inflow-based Delta outflow requirements. Adaptive implementation may be allowed on a seasonal, annual, or long-term basis as part of local cooperative solutions or may be required by the Executive Director or State Water Board. Adaptive implementation may also be used to integrate, as appropriate, Bay-Delta Plan requirements with other existing or future environmental requirements including water quality certifications for FERC projects, water right orders, and ESA requirements.

Water Quality Certification and the Federal Energy Regulatory Commission Process

Multiple commenters made statements regarding the interaction between Plan amendments and FERC processes. In the Sacramento/Delta, numerous reservoirs in the upper watersheds are primarily operated for hydropower production, although some have a water supply component for agriculture and urban use. Most of the facilities are regulated by FERC and under Clean Water Act section 401. Several facilities depend on interbasin diversions that move water from one watershed to another. As described in the Staff Report, the Plan amendments are intended to be complementary to FERC and water quality certification requirements to provide sufficient flow for instream beneficial uses within the area of a hydroelectric project and also downstream and through the Delta. While water quality certifications and FERC licensing have interactions with the Bay-Delta Plan, they are independent processes.

The Bay-Delta Plan provides that the State Water Board will exercise its legislative or adjudicative powers involving water rights and water quality, including using its Clean Water Act section 401 water quality certification authority associated with FERC hydropower licensing processes, to implement the water quality objectives. FERC issues licenses for non-federal hydroelectric power projects that affect navigable waters, occupy federal lands, use water or water power at a government dam, or affect interstate commerce. (16 U.S.C. § 797(e).)

As part of the FERC licensing process and pursuant to Clean Water Act section 401, a facility that discharges into navigable waters must first receive a state certification that the discharge will not violate state water quality requirements before the federal license can be issued. (Section 401(a), 33 U.S.C. § 1341(a).) The release of water from hydropower facilities constitutes a discharge under the Clean Water Act. (*S.D. Warren Co. v. Maine Board of Environmental Protection* (2006) 547 U.S. 370, 376-377, 385-386.) Once the State Water Board receives a certification request, it must act on the request within a "reasonable period of time" not to exceed one-year; otherwise, the certification requirement is waived. (33 U.S.C. § 1341(a)(1).) To avoid the potential denial of certification if the federal period for certification cannot be met, an applicant may withdraw and refile its request for certification, thus allowing the state sufficient time to process the request. (See Cal. Code Regs., tit. 23, §§ 3837, subd. (b)(2), 3838, subd. (c) [providing for denial without prejudice].) The state's certification may set conditions implementing Clean Water Act requirements, including the requirements of section 303 of the Clean Water Act for water quality standards and implementation plans, or to implement "any other appropriate requirement of State law." (33 U.S.C. § 1341(d).) These conditions "shall become a condition of any Federal license or permit" subject to 401 certification. (*Ibid.*)

Through Clean Water Act section 401 certification, a state may regulate a hydropower facility's activities, not just its discharge, to ensure compliance with applicable water quality standards. (*PUD No. 1*, *supra*, 511 U.S. at pp. 711-712.) Thus, Clean Water Act section 401 grants states broad authority to impose any conditions on a certification necessary to assure compliance with water quality standards or other appropriate requirement of state law. (33 U.S.C. § 1341(d); *PUD No. 1*, *supra*, 511 U.S. at pp. 711-713.) Under this provision, the flow objectives and related requirements provide a basis for appropriate certification conditions that will ensure compliance with water quality standards. (*PUD No. 1*, *supra*, 511 U.S. at pp. 714-715.)

The conditions of water quality certification become a condition on the federal permit or license. (33 U.S.C. § 1341(d).) In other words, a federal agency such as FERC has no authority to review or reject

the conditions a state agency includes in a timely issued Clean Water Act section 401 certification. (*American Rivers, Inc. v. Federal Energy Regulatory Com.* (2d Cir. 1997) 129 F.3d 99, 110-111.) This mandate was enacted, in part, to ensure that a federal agency could not "override State water quality requirements." (*Deschutes River Alliance v. Portland General Electric Co.* (D. Or. 2017) 249 F.Supp.3d 1182, 1190 [discussing legislative history of section 401(d)].)

Further, the United States Supreme Court has addressed the scope of a state's certification authority, concluding that a state is not limited to regulating the discharge. "Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." (*PUD No. 1*, *supra*, 511 U.S. at pp. 711-712.) In that case, the Court concluded that Washington State's minimum stream flow requirement was a permissible condition of a section 401 certification to enforce a designated use contained in the state's water quality standard. (Id. at p. 723.) Thus, the State Water Board may consider the activity as a whole when imposing conditions in a water quality certification, including conditions implementing water quality standards. In doing so, the state is not limited to implementing numeric water quality criteria, but may also set conditions to protect designated uses (such as cold water fishery) and apply the state's antidegradation policy. (*Id.* at pp. 714-719.)

The Plan amendments are intended to be integrated with FERC and water quality certification requirements to provide sufficient flow for instream beneficial uses. Generally, if requirements contained in the Bay-Delta Plan differ from those contained in any water quality certification, the more stringent requirement would control. However, as stated above, Plan provisions for adaptive implementation of the numeric inflow requirements are provided to optimize flows to benefit native fish and wildlife while also minimizing water supply impacts, and for the numeric inflow requirements to be implemented in a coordinated fashion with the cold water habitat and inflow-based Delta outflow requirements. Adaptive implementation may be allowed on a seasonal, annual, or long-term basis as part of local cooperative solutions or may be required by the Executive Director or State Water Board. Water right holders may propose local cooperative solutions for individual tributaries, two or more tributaries, or for regions. Adaptive implementation may also be used to integrate, as appropriate, Bay-Delta Plan requirements with water quality certification requirements.

2018 Lower San Joaquin River Flows and Southern Delta Salinity Update to the Bay-Delta Plan

Two vast and distinct river systems join to form the Bay-Delta: the Sacramento River in the north and the San Joaquin River in the south. Each of these systems is fed by snowmelt and runoff from different geographic regions and vary in important ways in terms of precipitation, extent of water supply development, topography, and at-risk native fish and wildlife. In recognition of these differences and the vast scale and complexity of each system, the State Water Board undertook two separate processes to update the Bay-Delta Plan that are related but not interdependent, meaning one can exist or function without the other. This is similar to regional water quality control board basin planning processes where elements of water quality control plans are updated incrementally over time.

In this proceeding, the State Water Board is considering updates to the Bay-Delta Plan for flows and cold water habitat on the Sacramento River and its tributaries, Delta eastside tributaries (including the Calaveras, Cosumnes, and Mokelumne Rivers), interior Delta flows, and Delta outflows. This Bay-

Delta Plan update proceeding is referred to as the Sacramento/Delta Plan update. The revised proposed Plan amendments for the Sacramento/Delta include a regulatory pathway with numeric flow requirements (45 to 65 percent of unimpaired flow year-round, starting at 55 percent) with WSAs and a VA pathway. The VA pathway is an alternate implementation pathway for the HRL water rights identified in Appendix B.1 of the revised proposed Plan amendments. Please see Common Response 1.3, *Revised Proposed Plan Amendments*, for additional background information regarding the Sacramento/Delta Plan updates and related HRL proposal.

In a previous proceeding, the State Water Board adopted Bay-Delta Plan amendments in December 2018 that established new and revised flow objectives that apply from February through June on the LSJR and its three major salmon-bearing tributaries, the Stanislaus, Tuolumne, and Merced Rivers, for the protection of fish and wildlife, a new salinity objective for the reasonable protection of agricultural uses in the southern Delta, and a program of implementation for these objectives (referred to as the 2018 LSJR/SD Plan updates or 2018 Plan updates). The new flow objectives that apply to the Stanislaus, Tuolumne, and Merced Rivers require 40 percent of unimpaired flow from February through June within an adaptive range of 30 to 50 percent. Additionally, as publicly noticed in April 2023,[9] the State Water Board is also considering possible updates to the Bay-Delta Plan that would be needed for a proposed VA in the Tuolumne River watershed that was presented to the Board in November 2022.

While the proposed Sacramento/Delta Plan amendments reorganize, reformat, and renumber the Bay-Delta Plan, these amendments make no substantive changes to the adopted LSJR flow objectives or water quality objective for agriculture in the southern Delta, or their programs of implementation, either directly or indirectly. However, as discussed in the Staff Report, to the extent that the Sacramento/Delta Plan amendments would increase freshwater outflow above the existing baseline, the impact could be beneficial to southern Delta salinity (related to agricultural beneficial uses) and result in cumulative beneficial effects on native anadromous, estuarine, and resident fish species.

Prior to the adoption of 2018 LSJR/SD Plan updates, the Board received many public comments regarding the updates and the Board's substitute environmental document (SED) in support of its decision. Some comments received during the current Sacramento/Delta updates were by parties who challenged the Board's adoption of the 2018 updates in Sacramento Superior Court and reiterate legal claims made in that litigation. The Board successfully defended the 2018 Plan updates, and the appeal is still pending. For more discussion, please see *Litigation Challenging the 2018 Bay-Delta Plan Update* below.

Comments related to the 2018 Bay-Delta Plan Amendments for LSJR and Southern Delta

During the Sacramento/Delta Plan update proceeding, multiple comments suggested changes to the LSJR/SD components of the 2018 Bay-Delta Plan including suggestions to add WSAs to the LSJR numeric flow requirements, move the LSJR numeric flow objectives to the program of implementation, remove the San Joaquin Basin 60-20-20 water year type index, and to change the

[9] State Water Resources Control Bd., Notice of Preparation and Environmental Documentation and Scoping Meeting (Apr. 11, 2023), at <https://waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/notice-noptuolumneva-041123.pdf> [as of Aug. 7, 2026].

April through August southern Delta salinity objectives back to 0.7 dS/m as they were in the 2006 Bay-Delta Plan. Other comments were received regarding reservoir carryover storage requirements for LSJR flows, and LSJR biological goals. Other comments criticize the State Water Board for delays in implementing the 2018 LSJR/SD Plan amendments and suggest that the delay is due to many years of State leadership directing State Water Board staff to work on VAs. At least one other commenter claimed that the State Water Board was already implementing the LSJR/SD Plan amendments. These comments apply to flow objectives and implementation requirements and processes that are outside the scope of the Sacramento/Delta Plan update.

Some public comments received for the Sacramento/Delta Plan updates referenced proposed VAs for the Tuolumne or Merced Rivers, which the proponents describe as being part of the HRL proposal. However, the VA pathway for the Sacramento/Delta Plan updates only addresses VA proposals that were in the scope of the ongoing Sacramento/Delta update to the Bay-Delta Plan. As discussed above, this does not include consideration of instream flows on the LSJR tributaries or mainstem LSJR that were updated in 2018. To do otherwise would have caused a significant delay in the Sacramento/Delta update process. Further, the State Water Board has not yet received a final proposed HRL for the Merced River. With respect to inclusion of the Friant HRL in the VA pathway, as discussed in more detail below that only involves contributions to Delta outflows and does not address instream flows for the San Joaquin River or cover any San Joaquin River water rights, including Friant water rights.

Some comments were more broadly concerned about how the proposed Sacramento/Delta Plan updates interact with the 2018 updates including how they will each be implemented. This section responds to comments received that relate to 2018 LSJR/SD updates, including the geographic scope of those updates relative to the currently proposed updates, as well as other comments related to the San Joaquin River watershed.

The 2018 LSJR/SD Plan update differed in important ways from the current Sacramento/Delta update. Both the 2018 LSJR/SD and currently proposed Sacramento/Delta Bay-Delta Plan updates were started primarily in response to significant declines in native fish species. However, the LSJR/SD update was considered separately and first for several reasons, including that the Board committed to reviewing the LSJR flow objectives following the expiration of the San Joaquin River Agreement (SJRA) and associated Vernalis Adaptive Management Plan (VAMP) that occurred in 2011; compliance issues related to the expiration of the SJRA and SD salinity compliance issues that required a review of the regulatory requirements; the very poor condition and near extirpation of fall-run Chinook salmon in the LSJR following extirpation of spring-run Chinook salmon in part due to flow conditions; the environmental conditions of the LSJR watershed are unique; the fish in the LSJR watershed have unique characteristics; the LSJR watershed is distinct hydrologically and geographically; and the water quality objectives themselves are different.

Multiple public comments questioned the Board's authority and discretion to define the geographic scope of the Sacramento/Delta and 2018 LSJR/SD proceedings to update the Bay-Delta Plan. The State Water Board's authority to adopt water quality control plans for waters of the state is not limited by geographic or hydrologic boundaries and is not predetermined by law. (Wat. Code, § 13170.) The Porter-Cologne Act places no geographic limits on the Board's authority to adopt water quality control plans, other than stating that the area subject to the plan must be "specified." (*Id.* § 13050, subd. (j).) The State Water Board has the authority to formulate and amend water quality control plans and the broad discretion to define the geographic scope of water quality control plans to fulfill the legislated mission to attain the highest reasonable water quality and provide reasonable

protection of beneficial uses for *any* waters in the state that fall under the purview of the federal Clean Water Act (*Id.* §§ 13170, 13241 [emphasis added]).

Related comments appear to interpret the Water Code section 13241, subdivision (c) requirement to consider "water quality that could reasonably achieved through the coordinated control of all factors which affect water quality in the area" as a requirement to include all water resources that drain into the Bay-Delta. This interpretation of Water Code section 13241, subdivision (c) is incorrect. The State Water Board has the authority to formulate water quality control plans and the discretion to define the geographic scope of water quality control plans, and any amendments thereto, to fulfill the legislated mission to attain the highest reasonable water quality and provide reasonable protection of beneficial uses. (Wat. Code, §§ 13170, 13241.) The Porter-Cologne Act requirement that the Board consider the factors listed in Water Code section 13241 applies to the geographic scope identified for the Plan amendment process. The geographic scope of the proposed Plan amendments for the Sacramento/Delta is defined as the watersheds of the Sacramento/Delta and Delta east side tributaries. Accordingly, the Staff Report provides an analysis of Water Code section 13241 factors with respect to Sacramento/Delta Plan updates. Section 13.6.2 of the Staff Report, *Water Code Section 13241 Analysis*, identifies sections and appendices of the Staff Report where each of these factors are analyzed.

The State Water Board decision to evaluate different amendments to the Bay-Delta Plan in separate proceedings reflects the independent and segregable nature of the planning activities and is a regular practice of the regional water quality control boards. Although the State Water Board is evaluating flow-based objectives for the protection of fish and wildlife in both water quality control planning proceedings, one proceeding is not a reasonably foreseeable consequence of the other. (*See Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 282.) Adoption and implementation of the inflow-based Delta outflow objective, and the other revised proposed Plan amendments, can occur independently of the implementation schedule for LSJR flows and southern Delta salinity. When the State Water Board implements the LSJR flow and the southern Delta salinity components of the Bay-Delta Plan, any resulting implementation effects and increased contribution of flows to the Delta will have been considered in the Sacramento/Delta watershed proceeding as part of the plan and study area and will complement and work with the regulatory structure established by the revised proposed Plan amendments. Thus, the independent Bay-Delta Plan update proceedings including this Staff Report provide appropriate environmental, Porter-Cologne Act, and public trust analyses that evaluate the whole of the action considered in each proceeding.

As discussed above, new and revised LSJR flow objectives were needed to fill the void left by the expired SJRA and VAMP, which was a voluntary agreement and an experimental flow program that included coordinated pulse flows from the Stanislaus, Tuolumne, and Merced Rivers to the San Joaquin River during the critical April and May juvenile salmon outmigration period. The SJRA and VAMP ended in 2011, and the Board committed to reviewing the results of the VAMP and determining if changes were needed to the objectives or their implementation, which occurred as part of the 2018 update to the Bay-Delta Plan. LSJR flows during the months of January through June (important months for salmonid spawning, rearing, and juvenile outmigration) are generally substantially more impaired from a greater level of water development and diversion than inflows from the Sacramento River and Delta eastside tributaries. The San Joaquin River watershed now only supports fall-run Chinook salmon. Fall-run Chinook salmon is the largest Central Valley Chinook salmon run and the one that primarily supports a commercial fishing economy and recreational, subsistence, and tribal fishing. The LSJR fall-run Chinook salmon that return to the Stanislaus, Tuolumne, and Merced Rivers have experienced the largest reductions in natural

production and adult returns in the Bay-Delta watershed, when comparing the 1967–1991 and 1992–2011 time periods. (SWRCB 2018, Figure 19-1.) San Joaquin spring-run Chinook salmon were extirpated from the San Joaquin River watershed after construction of Friant Dam in 1942. There are ongoing efforts to try to reintroduce spring-run Chinook salmon as part of the San Joaquin River Restoration Program (SJRRP) (see the *Upper San Joaquin River Watershed* section below for more information). For these reasons, the two efforts are separate proceedings that each have their own public process, environmental documentation, and Board decision making. Although the processes are related, one project does not legally compel the other and the two can be implemented independently.

In summary, the State Water Board has the authority to formulate water quality control plans and the discretion to define the geographic scope of water quality control plans, and any amendments thereto, to fulfill the legislated mission to attain the highest reasonable water quality and provide reasonable protection of beneficial uses. (Wat. Code, §§ 13170, 13241.) Accordingly, it is appropriate for the State Water Board to define the geographic scope of proceedings to amend the Bay-Delta Plan to address the water quality and flow conditions that are needed to achieve reasonable protection for beneficial uses that are unique to each geographic area and its watershed characteristics, such as precipitation patterns, hydrology, fish and wildlife populations, water quality issues, water development, diversion demand, and other factors.

Litigation Challenging the 2018 Bay-Delta Plan Update

Twelve cases challenging the 2018 Bay-Delta Plan updates were coordinated in Sacramento Superior Court (*State Water Board Cases*). The State Water Board prevailed on all claims (Sacramento Super. Ct. 2024), and nine parties appealed to the Third District Court of Appeal. Those parties are the Bay Area Water Supply and Conservation Agency et al., the City of Modesto, Merced Irrigation District, Modesto Irrigation District, North Coast Rivers Alliance et al., San Franciso Baykeeper et al., San Joaquin Tributaries Authority et al.,[10] Stockton East Water District, and Westlands Water District. The Court of Appeal proceeding is still pending.

Parties challenged the Board's 2018 Bay-Delta Plan, including but not limited to claiming the Board had not met the requirements of CEQA or the Porter-Cologne Act, claiming the Board violated the mandates of article X, section 2 of the California Constitution, or the Public Trust Doctrine, and claiming the Board had denied them due process or taken their water rights. Parties also claimed that the Sacramento/Delta and LSJR/SD Plan amendment proceedings should have been combined into one proceeding to update the Bay-Delta Plan and that updating Plan requirements for the two watersheds separately was "piecemealing" in violation of CEQA. This identical claim was made by public commenters during the proposed Sacramento/Delta Plan updates.

As described above, the Bay-Delta Plan is being updated and implemented through separate proceedings that each have their own purpose, public process, environmental documentation, and Board decision making. Although the processes are related, one project does not legally compel the other and the two can be updated independently. Please also see the sections below regarding piecemealing and geographic scope.

To the extent that parties are attempting renewed challenges to the 2018 Bay-Delta Plan update by submitting the same challenges as comments on the Sacramento/Delta Plan amendments, the time

[10] San Joaquin Tributaries Authority includes San Francisco Public Utilities Commission, Turlock Irrigation District, Modesto Irrigation District, and South San Joaquin Irrigation District.

for challenges to the 2018 Bay-Delta Plan has passed. To the extent that parties are reiterating claims made before the Sacramento Superior Court in the State Water Board Cases litigation, appeal of those claims properly remains before the Third District Court of Appeal

Piecemealing

Some commenters asserted that the State Water Board did not fully evaluate the environmental impacts of the proposed Plan amendments or the "whole of the action" because the Bay-Delta Plan requirements for the LSJR/SD were updated in 2018 and the Board is now considering Bay-Delta Plan updates for the Sacramento/Delta in this proceeding. Commenters also claimed that performing separate environmental reviews for these different watersheds and not including the upper San Joaquin River watershed constitutes improper "piecemealing" or "segmenting" which, commenters further contend, underestimates potential environmental impacts and is prohibited under CEQA.

Other comments claimed that the Sacramento/Delta and LSJR/SD Plan updates are interdependent, represent a single project, and should be evaluated together to fully estimate environmental effects under CEQA and for purposes of considering the Porter-Cologne Act factors set forth in Water Code section 13241. Commenters claim that the proposed inflow-based Delta outflow is evidence of the interdependence of the Sacramento/Delta and LSJR/SD Plan update proceedings because the inflow-based outflow requirement relies on inflows from the Sacramento and San Joaquin Rivers. Related comments claim that the separate Bay-Delta Plan update proceedings for Sacramento/Delta and LSJR/SD artificially narrow the project description, analysis of Water Code section 13241 factors, and public trust analyses, which, commenters claim, is inconsistent with the water right priority system and unlawfully burdens water right holders in the watersheds covered by the Bay-Delta Plan amendments for Sacramento/Delta and LSJR/SD.

The Staff Report is functionally equivalent to a CEQA EIR but also provides the additional analyses necessary to support the Board's consideration of the action under Porter-Cologne. This functional equivalency is allowed because the Board's basin planning is a CEQA certified regulatory program and exempt from specific CEQA provisions, including section 21167 regarding challenges to the public agency action for CEQA noncompliance. For more discussion of the Board's certified regulatory program, please see the overview and approach to analysis in Common Response 7.1, *General CEQA and Approach to the Analysis*. That said, the Board is mindful that while it is subject to certain procedural exemptions from CEQA, it "remain[s] subject to the broad policy goals and substantive standards of CEQA not affected by the limited exemption set forth in section 21080.5, subdivision (c)." (*Pesticide Action Network North America v. Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 242.)

Pursuant to CEQA, the State Water Board prepares an SED whenever it proposes to approve or carry out basin planning that may have significant impacts on the environment. (Pub. Resources Code, §§ 21100, 21080.5; Cal. Code Regs., tit. 14, § 15251, subd. (g).) CEQA defines a "project" in part as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...." (*Id.* § 21065.) A lead agency must analyze the entire project, or the "whole of an action which has a potential for physical impact on the environment," and cannot "piecemeal" its review of the project's significant environmental impacts. (*Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 969 [italics omitted]; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358.) This principle ensures 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. [Citation omitted.]" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396; Cal. Code Regs., tit. 14, § 15378, subd. (a).)

In other words, there may be improper piecemealing when: (1) "the purpose of the reviewed project is to be the first step toward future development;" or (2) "the reviewed project legally compels or practically presumes completion of another action." (*Aptos Council*, *supra*, at p. 279 [citing *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223].) "On the other hand, two projects may properly undergo separate environmental review (i.e., no piecemealing) when the projects have different proponents, serve different purposes, or can be implemented independently." (*Ibid.*)

CEQA does not mandate a single environmental document for two projects simply because they are being contemplated by the same agency at overlapping or similar times. (*Aptos Council*, *supra*, 10 Cal.App.5th at 282, fn. 4.) Contrary to commenters' claims, the separate Bay-Delta Plan update proceedings for the Sacramento/Delta and LSJR/SD have not "chopp[ed] a large project into many little ones" in an attempt to "submerge environmental considerations." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 396.) The Bay-Delta Plan amendments for the Sacramento/Delta and LSJR/SD apply to largely different geographic regions whose rivers are influenced by snowpack and runoff in two distinct areas and involve different water quality objectives and implementation requirements for different sensitive indicator species (i.e., fall-run Chinook salmon who return to the LSJR and an entire suite of Chinook salmon and other species in the Sacramento/Delta). Moreover, the LSJR update is not a "reasonably foreseeable consequence" of the Sacramento/Delta update or vice-versa. The regulatory reforms operate independently of each other and can be implemented separately.

For the 2018 LSJR/SD amendment process, the SED fulfilled the requirements of CEQA and the State Water Board's CEQA regulations (Cal. Code Regs., tit. 23, § 3775 et seq.) and provided the analysis for consideration of the Porter-Cologne Act section 13241 factors as well as other analyses, such as to fulfill the State Water Board's public trust responsibilities. For the Sacramento/Delta Plan update, the Staff Report includes chapters and subchapters (primarily Chapters 7, *Environmental Analysis*; 9, *Proposed Voluntary Agreements*, and 13, *Revised Proposed Plan Amendments*) that are the SED that fulfills the requirements of CEQA and the State Water Board's CEQA regulations (Cal. Code Regs., tit. 23, § 3775 et seq.). The Staff Report also provides the analysis for the Board's consideration of the factors identified in section 13241 of the Porter-Cologne Act as well as its public trust responsibilities (see Staff Report Section 13.6, *Public Trust and Water Code Section 13241 Analyses*).

As described in Section 13.3.3.5, *Delta Outflow*, the inflow-based Delta outflow objective would be implemented by requiring that required inflows be provided as Delta outflows, including required inflows from the Sacramento/Delta tributaries and any required inflows from the San Joaquin River and its tributaries. Some commenters claimed that the Staff Report fails to analyze the San Joaquin River flow contributions needed to provide reasonable protection for Delta outflow when combined with the proposed range of flow contributions from the Sacramento River and its tributaries, and the Delta eastside tributaries. These commenters further asserted that in the absence of such an analysis the Board cannot determine what flows from each source constitute a reasonable level of protection given the resulting impacts on other water uses. Other public comments claimed the Staff Report did not acknowledge, include, or consider the 2018 LSJR/SD updates in its numerous analyses. These comments are incorrect. The Staff Report analyzes a range of Delta inflows from the Sacramento/Delta tributaries, Delta inflows from the LSJR required by the 2018 LSJR/SD updates, a

potential future VA on the Tuolumne River, and a range of Delta outflows. Specifically, the Staff report analyzes the LSJR inflows as contributions to Delta outflow as described in Section 13.4.2.6, *Lower San Joaquin River Watershed Contributions to Delta Outflow*, and Section 9.5.3.9, *Delta Inflows, Exports, Interior Delta Flows, and Delta Outflow Results.*

In order to capture the range of possible additional LSJR flows that could contribute to Delta outflows under proposed Tuolumne and Friant VAs, two scenarios are evaluated within Chapter 9, *Proposed Voluntary Agreements*. The first scenario is referred to as "VA w/Bias Correction and LSJR Placeholder." The second scenario is referred to as "VA w/Bias Correction and 40% UF Merced & Stanislaus." Both scenarios include the proposed Tuolumne River VA and Friant contributions, as well as other VA contributions, including unspecified water purchases. A full list of flow requirements and more detailed descriptions of the modeling assumptions used can be found in Appendix G3a, *Sacramento Water Allocation Model Methods and Results for the Proposed Voluntary Agreements*. The resulting expected changes in Delta outflow are presented in Section 9.5.3.9 *Delta Inflows, Exports, Interior Delta Flows, and Delta Outflow Results*.

Potential contributions to Delta outflow from the Tuolumne River HRL commitments and implementation of the 2018 Bay-Delta Plan LSJR flow objectives are also discussed further and summarized in Section 13.4.3.1, *Flows*, under Delta outflow results. Expected benefits and potential environmental impacts of these additional sources of Delta outflow are presented in Section 13.5, *Beneficial Environmental Effects*, and Section 13.7, *Environmental Analysis*, respectively. The public trust and Water Code section 13241 analyses of the Delta inflow and outflow scenarios are described in Section 13.6, *Public Trust and Water Code 13241 Analyses*.

In addition, cumulative impacts associated with the 2018 LJSR/SD updates are discussed in Staff Report Section 7.23, *Cumulative Impact Analysis, Growth-Inducing Impacts, and Significant Irreversible Environmental Changes*. Also, see Sections 9.7.21 and 13.7.21, each titled *Cumulative Impacts, Growth-Inducing Impacts, and Significant Irreversible Environmental Changes* for additional information on potential cumulative effects. The proposed Sacramento/Delta Plan amendments make no changes to the LSJR flow objectives or water quality objective for agriculture in the southern Delta, either directly or indirectly. To the extent that the Sacramento/Delta Plan amendments would increase freshwater outflow above the existing baseline, the impact could be beneficial to southern Delta salinity (related to agricultural beneficial uses) and result in cumulative beneficial effects on native anadromous, estuarine, and resident fish species. Implementation of the LSJR/SD updates could be a further constraint on supplies for water users that receive water from both the LSJR tributaries and the Sacramento/Delta. Therefore, the impacts of implementing the LSJR/SD updates are potentially cumulatively considerable to the Sacramento/Delta Plan amendments in the resource areas of agricultural and forest resources, air quality, biological resources, cultural resources, energy and greenhouse gas emissions, hydrology and water quality, recreation, and utilities and service systems. Additionally, both projects could result in similar construction-related impacts, which would be potentially cumulatively considerable in the areas of geology and soils, hazards and hazardous materials, noise, and transportation for some areas.

The LSJR/SD SED provides substantial evidence that the LSJR flows objectives will maintain inflow conditions from the LSJR watershed sufficient to support and maintain the natural production of viable native LSJR watershed fish populations. As described in the 2018 Bay-Delta Plan, a goal of the LSJR flow objectives is to provide flows to protect fish that migrate to or from the LSJR salmon-bearing tributaries including "migrating through the Delta." The protection to be provided through the LSJR flow objectives extends beyond the three tributaries to the mainstem LSJR through

Vernalis, and downstream through the Delta. The program of implementation within 2018 Bay-Delta Plan specifically states "[a]lthough the lowest downstream compliance location for the LSJR flow objectives is at Vernalis, the objectives are intended to protect migratory LSJR fish in a larger area, including within the Delta, where fish that migrate to or from the LSJR watershed depend on adequate flows from the LSJR and its salmon-bearing tributaries." Adoption and implementation of the inflow-based Delta outflow requirements would not alter the upstream inflow requirements from the LSJR and thus would have no effect on the required inflows from the LSJR. At the time LSJR flows are implemented, they would become part of the required flows that contribute to inflow-based Delta outflow.

Upper San Joaquin River Watershed

The Upper San Joaquin River watershed is the portion of the San Joaquin River from its headwaters above Friant Dam to its confluence with the Merced River. The LSJR is the portion of the San Joaquin River stretching from its confluence with the Merced River downstream to the Delta. Multiple commenters claimed that the Upper San Joaquin River and its watershed should have been included in the Bay-Delta Plan proceedings for the 2018 LSJR/SD updates, the current Sacramento/Delta updates, or that there should have been one update proceeding with a broad geographic scope that included the Upper San Joaquin River, LSJR, and Sacramento/Delta watersheds. Some commenters claimed that excluding the Upper San Joaquin River from the Bay-Delta Plan update processes disregards a substantial portion of flow available to the Delta and sources of pollution to the Delta, with some commenters further claiming that excluding the Upper San Joaquin River from the Bay-Delta Plan update proceedings overly burdens the water right holders downstream in the LSJR watershed (including the watersheds for the Stanislaus, Tuolumne, and Merced Rivers) or unfairly burdens water right holders in other watersheds to achieve increased flow requirements for Delta outflow. Other commenters claimed that including the Friant HRL commitments in the VA pathway is not consistent with the geographic scope of the revised proposed Plan amendments for the Sacramento/Delta because the Friant HRL proposal is described as including flows from the SJRRP associated with Friant Dam and located on the Upper San Joaquin River.

The purpose of the Bay-Delta Plan update for the LSJR/SD was to establish flow objectives and a program of implementation for the reasonable protection of fish and wildlife beneficial uses in the LSJR watershed, including the three eastside, salmon-bearing tributaries (the Stanislaus, Tuolumne, and Merced Rivers). The LSJR, Stanislaus, Tuolumne, and Merced Rivers were the appropriate waters to include in new and revised flow objectives and implementation requirements because they support fall-run Chinook salmon and Central Valley steelhead. At the time the 2018 LSJR/SD Plan update process was initiated, salmon populations were not present on the Upper San Joaquin River and the SJRRP had just been initiated. Because the Upper San Joaquin River did not support salmon populations at the time that the LSJR/SD Plan update was initiated and the purpose of the LSJR/SD Plan update was to establish flows for the reasonable protection of fish and wildlife on salmon-bearing tributaries and the LSJR, the Upper San Joaquin River was not included in the geographic scope of the 2018 LSJR/SD Plan update. This was also intended to allow the SJRRP time to implement its program to establish and maintain "an experimental population [of spring-run Chinook salmon] in the San Joaquin River" (Fish & G. Code, §§ 2080.2, 2080.3). Additional background information regarding the SJRRP is provided below in the *Friant HRL* section, and in Chapter 7 of the Staff Report, *Environmental Analysis*.

The inflow-based Delta outflow objective requires that the required inflows from the Sacramento/Delta tributaries and the required inflows from the LSJR tributaries that are needed to

reasonably protect fish and wildlife beneficial uses in those tributaries, be protected and provided as Delta outflows (see Section 4.4.2.6 of the revised proposed Plan amendments). When the Bay-Delta Plan amendments are implemented, water right holders with points of diversion in the Sacramento/Delta tributary watersheds will be responsible for bypassing the required inflows from Sacramento/Delta tributaries, and water right holders with points of diversion in the three LSJR salmon bearing tributary watersheds will be responsible for bypassing the required inflows from the LSJR. Excluding the Upper San Joaquin River from the revised proposed Plan amendments does not change the obligation of water right holders to contribute to required inflows or outflows from the Sacramento/Delta or LSJR tributaries, since the inflow-based Delta outflow requirement is based on inflow requirements from the Sacramento/Delta tributaries and the LSJR salmon bearing tributaries (Stanislaus, Tuolumne, and Merced Rivers).

The revised proposed Plan amendments do not modify any flow objectives or assign responsibility related to the San Joaquin River or the 2018 Plan updates. As described in the revised proposed Plan amendments, the State Water Board implements the Bay-Delta Plan objectives using its quasi-legislative or adjudicative authorities involving water rights and water quality. The State Water Board may implement the objectives by adopting regulations, conducting adjudicative proceedings, or both, that take into consideration the requirements of the Public Trust Doctrine and the California Constitution, article X, section 2. The State Water Board will also continue, as necessary and appropriate, to use its Clean Water Act section 401 water quality certification authority, waste discharge requirements, and other water quality and water rights actions to implement objectives in this Plan. Comments related to LSJR/SD implementation and that are independent of the Sacramento/Delta update, would not be ripe until the Board further considers allocation of responsibility for meeting the LSJR/SD flow objectives. Additional notice and opportunities for public input and due process, where appropriate, will be provided when the Board implements the Bay-Delta Plan objectives adopted in 2018 or those currently considered for the Sacramento/Delta. It is also important to note that separate from the proposed Plan updates, all surface water rights in California are subject to water curtailments during times when there is insufficient supply to meet all demands (e.g., recent drought emergency regulations).

Friant HRL

The HRL Participants' inclusion of Friant HRL commitments in their proposal[11] did not change the geographic scope of the Sacramento/Delta update to the Bay-Delta Plan. The Friant HRL commitments are a commitment to Delta outflows resulting from implementation of the SJRRP associated with Friant Dam and located on the Upper San Joaquin River. The SJRRP was established in 2009, after the 2006 Stipulation of Settlement (Settlement) following the decision in *Natural Resources Defense Council et al, v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906. The Settlement "resolve[d] 18 years of contentious litigation" challenging the Reclamation for violating Fish and Game Code section 5937 with its operations of the CVP Friant Unit. (*Ibid*; Fish & G. Code, § 2080.2.) As discussed above under *Fish and Game Code Section 5937*, Fish and Game Code section 5937 requires that the "owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the

[11] 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 (March 29, 2022, as revised November 9, 2022), at <https://waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/revised-va-mou-swrcb-copy.pdf> [as of Aug. 7, 2026].

dam, to keep in good condition any fish that may be planted or exist below the dam." The aim of the SJRRP is to restore 150 miles of the Upper San Joaquin River from Friant Dam to the confluence of the Merced River with the goal of reestablishing and supporting self-sustaining spring-run and fall-run Chinook salmon populations in "good condition." (SJRRP, n.d.-a) Reclamation is obligated to provide the SJRRP flows in accordance with the Settlement, independent of the Bay-Delta Plan. Under the Friant HRL, Friant proposes to contribute to Delta outflows through continued implementation of the SJRRP with reduced recapture (i.e., rediversion) of restoration flows in the Delta and/or the LSJR to the extent necessary to achieve a goal of contributing up to 50,000 acre-feet toward Delta outflows.[12]

As part of the SJRRP, an experimental population of Central Valley spring-run Chinook salmon was officially established by the National Marine Fisheries Service (NMFS) on December 31, 2013, and in 2019 the SJRRP documented its first returning adult spring-run Chinook salmon. In the summer of 2025, the highest recorded spring-run Chinook salmon return for the SJRRP occurred, with approximately 448 spring-run adult salmon returning to the Upper San Joaquin River (SJRRP, n.d.-b) and over 1,200 spring-run adult salmon migrating up the Tuolumne River to hold before spawning. (TID, 2025) The SJRRP continues to work on challenges related to barriers that inhibit fish passage, dry river segments, low river flow and high river temperature conditions, and water management conflicts. The 2018 Bay-Delta Plan amendments included a provision (2018 Bay-Delta Plan, p. 57) to review SJRRP flow contributions to water quality requirements at Vernalis and the revised proposed Plan amendments include a provision to consider actions to protect beneficial uses on the Upper San Joaquin River as part of annual and periodic reviews of the Bay-Delta Plan. The Board may consider flow and water quality objectives and implementation requirements for the Upper San Joaquin River in a future update to the Bay-Delta Plan.

As previously highlighted, Reclamation is obligated to provide the SJRRP flows in accordance with the Settlement, independent of the Bay-Delta Plan. The Settlement included a "Water Management Goal" allowing for "recirculation, recapture, reuse, exchange or transfer of the Interim Flows or Restoration Flows for the purpose of reducing or avoiding impacts to water deliveries to all of the Friant Division long-term contractors caused by the Interim Flows and Restoration Flows" provided however that the Water Management Goal must "ensure that any recirculation, recapture, reuse, exchange or transfer of the Interim Flows and Restoration Flows shall have no adverse impact on the Restoration Goal, downstream water quality or fisheries." (NRDC 2006, ¶ 16.) The Friant HRL commitments to Delta outflow would materialize partly as foregone diversions of water at the CVP and SWP Delta export facilities, which are located within the geographic scope of the revised proposed Plan amendments.

The Sacramento/Delta updates include both a regulatory pathway and an alternative VA pathway for those water rights that would be subject to the regulatory pathway. The Friant water rights are not subject to the Sacramento/Delta regulatory pathway because they are outside of the Sacramento/Delta; therefore, their provision of HRL commitments is not meeting an obligation that they themselves have under the Sacramento/Delta update.[13] This is reflected in the language of

[12] Draft Strategic Plan for the Proposed Agreements to Support Healthy Rivers and Landscapes, at <https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Support-Healthy-Rivers-and-Landscape/Draft_StrategicPlan_2024_10_29.pdf> [as of Aug. 7, 2026].

[13] Prior to the release of the 2023 draft Staff Report, the Friant HRL Parties withdrew from providing VA flows and their future participation was uncertain (Section 7.2.3.7, *Proposed Voluntary Agreements (Alternative 6)*, footnote 4). They later rejoined.

Appendix B.1, *Voluntary Agreement Pathway Accounting Protocols*, of the revised proposed Plan amendments. For the Sacramento River and each of the other listed tributaries, the accounting procedures describe what the participants "will be required to follow in order to utilize the VA pathway identified in the Bay-Delta Plan." The Friant System accounting includes no such language simply stating, "[t]his section describes the accounting procedures for Friant HRL participants" and there are no covered water rights affiliated with the Friant HRL (revised proposed Plan amendments, Sections B.1.12, B.1.18). As such, inclusion of the Friant HRL does not change the scope of the Bay-Delta Plan updates to include the Upper San Joaquin River. Lastly, the Friant HRL commitment does not alter any of the terms of the SJRRP and does not constitute or indicate State Water Board agreement with any alterations to the terms of that agreement.

The inclusion of the Friant HRL flow contributions in the VA pathway does not prevent the Board from considering adoption of Bay-Delta Plan requirements, or other regulatory requirements, for the Upper San Joaquin River in the future. However, the CEQA-equivalent impacts analysis in the Staff Report, did include the Upper San Joaquin River in the study area (see Staff Report Section 1.4.1, *Sacramento/Delta Watershed, Plan Area, and Study Area*) because the San Joaquin River Exchange Contractors receive water exported from the Delta in exchange for foregoing their historic rights to San Joaquin River water that is now impounded by the Friant Division. See Sections 6.4.8, *Sacramento/Delta Supply to the San Joaquin Valley*, and 7.4.2.10, *San Joaquin Valley*, *Friant Division* for more explanation.

Implementation of Plan Amendments

Some comments claim that the Staff Report does not clarify how the 2018 LSJR/SD Plan updates would be implemented or align with the proposed Sacramento/Delta Plan amendments. Other comments claim that the LSJR/SD and Sacramento/Delta updates to the Bay-Delta Plan are inconsistent or incompatible.

As discussed in the Staff Report and revised proposed Plan amendments, following adoption of the Plan amendments the Board will implement the Sacramento/Delta update for Sacramento/Delta water right holders through further water quality or water right proceedings, such as via an implementing regulation, issuance of water quality certifications, conditioning of water rights, or a combination of actions. Implementation will include additional opportunities for public involvement and appropriate due process. Specifically, the revised proposed Plan amendments provide that within two years of OAL approval, the State Water Board intends to adopt curtailment regulations as necessary to implement the Sacramento/Delta updates. Implementation of flow objectives will be in order of water right priority unless an exception to curtailment applies. Section 4.4.3 of the revised proposed Plan amendments specify that "[t]he implementation methodology is intended to be integrated with the methodology to implement Lower San Joaquin River instream flows, to the extent possible." The revised proposed Plan amendments would be implemented consistent with the water right priority system through curtailments that would apply to water rights under both the regulatory pathway and VA pathway. It is possible that implementation of the water right priority system could result in small reductions to agricultural and municipal water supply in the San Joaquin Valley region. (See Sections 13.7.4.1 and 13.7.20.1, each titled *Impact Analysis*, and 13.8.2.2, *San Joaquin Valley*.) The Board may also consider implementation procedures other than, or in addition to curtailment regulations, that are designed to achieve comparable protections.

Some comments expressed concerns that adaptive implementation features and other components of the program of implementation for the LSJR/SD Plan amendments are not the same as the

proposed Sacramento/Delta amendments and claim that these differences suggest the amendments will not work together or are unfairly treating water right holders in different watersheds. As described above, the environmental conditions in the LSJR are different than those in the Sacramento River and Delta tributaries. It is appropriate for the State Water Board to define the scope of each independent update and consider objectives and implementation requirements specific to each update. Both the LSJR/SD updates and Sacramento/Delta updates provide flexibility to tailor flow requirements to the unique conditions of each tributary. The State Water Board may tailor flow requirements without violating water right priority because such tailoring does not change or increase any obligation of another right holder on a different tributary.

Other comments about various differences between the updates underscore the reasoning for the separate processes. The features of each program of implementation are designed to address the specific watershed, hydrology, biology, and water infrastructure characteristics of the LSJR/SD and the Sacramento/Delta. For example, one commenter observed that biological goals are required in the program of implementation for both the LSJR/SD and Sacramento/Delta updates, but that the specific requirements for biological goals are not identical between the LSJR/SD and the Sacramento/Delta updates. Similar comments were submitted regarding different features of adaptive implementation options, voluntary agreements, and local cooperative solutions.

Biological Goals and the process to develop them are necessarily going to be different in the different watersheds. The definition of local cooperative solutions in the revised proposed Plan amendments for the Sacramento/Delta is conceptually similar to, but more detailed than, the definition of voluntary agreements in the program of implementation for LSJR flows. These features of the program of implementation were developed to address the specific watershed, hydrology, biology, and water infrastructure characteristics of the LSJR/SD and the Sacramento/Delta. While there are similar concepts and tools in the program of implementation for the LSJR/SD and Sacramento/Delta; they do not need to be identical to achieve their purpose or work together in a complementary way to support reasonable protection of beneficial uses.

Another commenter asserted that the proposed narrative inflow objective for Sacramento/Delta tributaries is inconsistent with the numeric unimpaired flow objectives from the 2018 LSJR/SD Plan Update and requested that the Board revise the LSJR flow objectives to remove any numeric requirements to better align the two sets of objectives. As discussed under *Narrative v. Numeric Water Quality Objectives* above, the Board considers both the objectives and the program of implementation together in its overall determination of reasonable protection. Both have equal force and effect. The commenter's request that the LSJR flow objectives be revised to eliminate numeric unimpaired flow objectives is beyond the scope of the current process to update the Bay-Delta Plan.

The Board is committed to and values the public process and all public comments received on its Bay-Delta planning processes. To reinforce this commitment, the revised proposed Plan amendments include periodic review processes in which the Board will solicit public comments on the Bay-Delta Plan to support future consideration of possible changes. In addition, the Board will conduct annual reviews to provide and receive updates on implementation activities and possible adaptive implementation actions. The periodic review process provides an opportunity to submit public comments regarding other components of the Bay-Delta Plan including comments regarding the 20108 LSJR/SD Plan updates that are outside the scope of the current Sacramento/Delta planning process.

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