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RIVER

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Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814-0100

March 29, 2013

Re: Comment Letter—Bay-Delta Plan SED

Dear Ms. Townsend:

Friends of the River appreciates the opportunity to comment on the Substitute Environmental Document (SED) in support of potential changes to the Water Quality Control Plan (WQCP) for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary: San Joaquin Rivers and Southern Delta Water Quality. Friends of the River is a signatory to the comments submitted by the Environmental Water Caucus (EWC) and incorporates the EWC comments by reference. We also hereby incorporate the comments submitted by California Sportfishing Alliance and C-WIN. We have additional comments regarding areas in the SED that merit further or revised analysis. This letter focuses on the Lower San Joaquin River (LSJR) flow objectives for the protection of fish and wildlife beneficial uses.

I. Compliance with the Delta Reform Act

The State Water Resources Control Board (Board) acknowledges its obligation to comply with the Delta Reform Act; yet, there is scant information in the SED on the Board's duty to implement it. In fact, the Board appears to assign responsibility for the Delta Reform Act's implementation to other agencies. In doing so, the Board misses an important opportunity to set rigorous and effective water quality standards for the LSJR.

The law requires that the Board adopt flow criteria by December 31, 2010. The Board did adopt flow criteria in its 2010 report but now has failed to incorporate the 2010 report conclusions in the present SED. To essentially start all over in determining flow criteria in this WQCP update and ignore those earlier conclusions undermines the purpose of the Delta Reform Act.

The language of the Act clearly anticipated a logical order of adoption of regulations, with the Water Board flow criteria occurring first. The Water Code states, “It is the intent of the Legislature to establish an accelerated process to determine instream flow needs of the Delta *for the purpose of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan.*” (Water Code, § 85086, subd. (b), emphasis added.) The Act goes on to state:

For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions. The flow criteria shall be developed in a public process by the board within nine months of the enactment of this division.[. . .] The flow criteria shall not be considered predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP.

(Subd. (c)(1).)¹ This language anticipates the Board developing flow criteria to help inform the BDCP and Delta Plan decisions, while acknowledging that the flow criteria is not “predecisional” with respect to BDCP permits. The flow criteria can only inform the BDCP and Delta Plan processes if it is determined before the BDCP and Delta Plan agencies do their respective environmental analyses of those projects. The 2010 flow criteria recommendations have been largely disregarded by the BDCP and Delta Stewardship Council (DSC), and instead the DSC has called on the SWRCB to finalize its water quality objectives in order to aid the analysis in the BDCP.²

The Board has reversed the logical order of policy making, and instead has lagged behind the progress of the DSC’s Delta Plan and the BDCP, particularly with respect to the Sacramento River. This misconstrued timing is reflected in the Board’s Fact Sheet, “The timing of Phase II ensures that the substantial body of information on Delta outflow, exports, and habitat needs to be developed through the BDCP process will be fully considered in the State Water Board’s Bay-Delta Plan update.” While this specifically addresses Phase II, it reflects a fundamental problem with the sequencing of the analyses conducted by the Board, the DSC and the BDCP agencies. The BDCP wants guidance from the Board, and the Board wants guidance from the BDCP. It is only logical, however, that the Board would first determine water quality standards for tributaries to the Delta – only then can agencies decide on policies regarding management and potential new conveyance.

¹ See also, Water Code, § 85320(b)(2)(A).

² See Final Draft Delta Plan (Nov. 2012), p. 141, “Updating the water quality objectives for the Delta, including an update of flow objectives, is important to protect the Delta ecosystem and the reliability of the Delta’s water supplies. The sooner these objectives are set, the earlier the ecosystem can be protected and restored, the greater the possibility that a successful BDCP will be approved, the earlier a more reliable water supply can be improved, and therefore the earlier the coequal goals can be achieved. That is why the Delta Plan calls upon the SWRCB to complete its work by specified deadlines.”

Water Code section 85086 also specifically recognizes the Board’s public trust obligations in establishing the flow criteria. Accordingly, the Board should have started with its 2010 criteria in determining the water quality standards for protection of fish in the Bay Delta. It should have then revisited an analysis of the water needs associated with the other beneficial uses in the relevant water bodies, and taken the Public Trust Doctrine into consideration in making these determinations. The amended WQCP objectives should have been based on these criteria. It should have then drafted various alternatives based on the objectives and conducted a feasibility analysis of those alternatives.

In addition, while the Board nominally recognizes its duty to further the coequal goals of the Delta Reform Act, it fails to incorporate this obligation throughout the SED analysis. (SED, p. 1-12.) If the Board had incorporated the Delta Reform Act obligations, it would have been compelled to recognize that the revised water quality objectives must not just maintain water quality as it stands today but it must also restore the Delta ecosystem from its rapid decline. Instead, the Board seems to assume the restoration obligations rest with other agencies and fails to take any strong measures to ensure water quality improvement to the tributaries feeding the Delta.

The Board has interpreted the Delta Reform Act in a way that seems to preserve the status quo of unsustainable water deliveries and crashing migrating fish populations, without abiding by the language of the Delta Reform Act. The Act defines its “coequal goals” as the two goals of providing more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. “The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” Merriam Webster defines “reliable” as “giving the same result on successive trials,” or “dependable.”³ The definition does not include any reference to providing enough quantity to suit any and all desires, or any reference to providing enough quantity to meet past demands. A reliable water supply gives users notice about what they can expect going forward. It does not mean maintenance of status quo of water deliveries. The SED should be revised to reflect this interpretation of the terms “reliable water supply” and “coequal goals.”

II. Compliance with CEQA

The Board has elected to rely on an SED to analyze the impacts of the revised WQCP objectives in lieu of an EIR. An SED differs from an EIR in that an SED need not comply with requirements found in chapter 3 and 4 of CEQA (Pub. Resources Code, §§ 21100-21154) or in Public Resources Code section 21167. (Pub. Resources Code, § 21080.5, subd. (c).) However, the substantive mandates of CEQA must still be met in an SED. (*Mountain Lion Foundation v. Fish and Game Comsn.* (1997) 16 Cal.4th 105, 113-114.)

³ Online version available at <http://www.merriam-webster.com/dictionary/reliable>.

a. Geographic Scope

An EIR or SED should discuss significant impacts that the proposed project will cause in the area that is affected by the project. (CEQA Guidelines, § 15126.2, subd. (a).) One crucial step in determining the environmental impacts of a project is the determination of the geographic scope of the region that will feel the effects of the proposed project. CEQA Guidelines section 15130 states, “Lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.” The geographic scope is reflected in the description of the environmental setting. “This area cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting.” (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1216.)

The Board has phased analysis of the Sacramento River water quality standards and the San Joaquin River water quality standards in its WQCP update. A reasonable explanation for this limited geographic scope required by CEQA Guidelines section 15130 cannot be found in the SED. Separating the analysis of the San Joaquin River from the Sacramento River has resulted in a disjointed depiction of the conditions in the Delta. While the Board’s objective is to establish revised water quality objectives for the protection of fish and wildlife beneficial uses, it cannot achieve that objective without taking a broader look at the Delta conditions overall. The failure to explain the phased approach to the WQCP amendments frustrates the public disclosure goals of CEQA.

The Board has also limited the scope of its analysis to the Lower San Joaquin River, creating a cut off point at the San Joaquin River’s confluence with the Merced River. By excluding the Upper San Joaquin River from the analysis, the SED creates the illusion that the two sections of the river are isolated and independent bodies. Even though activities in the Upper San Joaquin watershed are subject to additional restoration requirements, the environmental setting is still relevant to this WQCP update, particularly regarding cumulative impacts. Failure to properly characterize the geographic scope of the WQCP update will allow the SED to leave certain potentially significant environmental impacts unanalyzed, in violation of Public Resources Code section 21080.5(d)(2). Moreover, the SED intermittently includes a description of Upper San Joaquin conditions, an apparent acknowledgement of the relevance of such information. The Board should have been consistent in its approach and included the conditions on the Upper San Joaquin River in the overall environmental setting throughout the SED. Unless the Board can show that activities in the Upper San Joaquin River watershed have no relationship with the flows in the Lower San Joaquin River watershed, the geographic scope in this SED is overly narrow and cannot be justified. The SED should be revised to expand the scope of analysis.

b. CEQA Baseline

CEQA Guidelines, section 15125 dictates the standard for an environmental setting, which normally constitutes the baseline. Subdivision (a) states:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental

analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.

The Board issued a Notice of Preparation (“NOP”) in 2009 and has used the environmental setting of this date for its baseline analysis.⁴ The Board also issued a revised NOP, however, in 2011, and an additional NOP in January of 2012. The Board acknowledges the potential change in circumstances that may have occurred in the intervening years and notes that the SED will include a description of the disparity in environmental setting in the intervening years where relevant. (SED, p. 4-12.) Such a description does not appear to be present, however, in all the resource chapters. The SED fails to acknowledge that a second revised NOP was issued in 2012, however, and does not explain why baseline was not adjusted to reflect the change in the Board’s regulatory approach.

Given that almost four years has passed since the initial NOP, it would only be logical to adjust the baseline to reflect the conditions that existed when the revised NOP was issued. If the conditions were somewhat unchanged in the intervening three years, then 2009 might have been a reasonable baseline date. However, the SED notes that in 2009 VAMP was being implemented and is as a result reflected in the baseline. VAMP expired in 2011. Given that VAMP was a temporary experiment in an attempt to meet fish flow standards and given that it was a failure in terms of resuscitating migrating fish populations, using a baseline that includes VAMP creates the false illusion that such conditions were “the norm” that complied with the objectives established in the 2006 WQCP. The SED notes that requirements under D-1641 are higher than those of VAMP. Thus, using a baseline that includes VAMP may have created an unrealistically low baseline.

The selection of 2009 as the baseline year skews the analysis to make the water quality plan update appear to be more helpful than it truly is. The SED notes that the National Marine Fisheries Services (NMFS) in 2009 released a BO on the long-term operations of the CVP and SWP (NMFS BO) but, as a result of litigation, injunctions have been issued and parts of the BOs were remanded to NMFS and the U.S. Fish and Wildlife Service for modification. The SED notes, “Although, the future of the RPAs identified in the BO is somewhat uncertain, this SED assumes the NMFS BO is in effect in the baseline and will continue into the future.” (SED, p. 4-12.) There have since been amendments to the 2009 BiOPs that have attempted to address

⁴ See SED p. ES-16. “The environmental baseline for the SED is February of 2009, the date that the CEQA process began for the plan amendments. The baseline assumes compliance with the 2006 Bay-Delta Plan objectives and program of implementation and other requirements that existed in 2009, including implementation of VAMP and the NMFS BO flow requirements on the Stanislaus River. The baseline does not include the long-term San Joaquin River Restoration flow requirements; however, these conditions and other conditions are included in the cumulative impacts analysis.”

problems with the Reasonable and Prudent Alternatives analysis.⁵ These amendments could have been included in a 2011 baseline and would have reflected a more accurate depiction of conditions on the ground when the analysis in the SED truly began.

The baseline analysis contains additional errors. The SED baseline assumes compliance with the 2006 Bay Delta Plan objectives and program of implementation. (SED, p. E-16.) Compliance with the 2006 Plan objectives should only be included in the baseline if that is what actually occurred. It is improper to include theoretical circumstances into baseline conditions. Even if flows habitually were on the low end of the spectrum, then the Board cannot assume that the full range of flows or even an average of those flows occurred in the baseline. It is well settled that agencies cannot use hypothetical circumstances in a baseline. An agency errs in adopting a baseline that “compar[es] the proposed project to what *could* happen, rather than to what was actually happening.” (*Communities for A Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal. 4th 310, 322, citing *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 658.) An EIR “must focus on impacts to the existing environment, not hypothetical situations.” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955.) The Board should revise the SED to omit assumptions regarding compliance with the 2006 Bay Delta Plan objectives and any assumptions that suggest that anything even slightly better than the status quo would revive migratory fish populations.

c. Project Objectives

The core of an EIR or SED is the list of project objectives. The project objectives establish the main goals of the project and are the cornerstone to shaping the analysis of alternatives. The CEQA Guidelines note, “A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decisionmakers in preparing findings or a statement of overriding considerations, if necessary.” (CEQA Guidelines 15124, subd. (c).)

The SED lists its project objectives in the following way:

[T]he goals related to the LSJR flow objectives and associated program of implementation are as follows.

- To provide flow conditions in the LSJR and three eastside tributaries—the Stanislaus, Tuolumne, and Merced Rivers—together with other reasonably controllable measures, *sufficient to support and maintain the natural production of viable native fish populations migrating through the Delta, including flows that mimic the natural hydrographic conditions to which native fish species are adapted.* [emphasis added]
- To consider relevant factors in establishing the objectives, such as factors identified in Water Code Section 13241, those contained in other applicable laws (e.g., the past, present, and probable future beneficial uses of water), and economic factors.

⁵ http://swr.nmfs.noaa.gov/ocap/040711_OCAP_opinion_2011_amendments.pdf

- To provide for adaptive management of flows in order to respond to evolving scientific understanding and changing environmental conditions while minimizing water supply costs.
- To provide for development and implementation of an appropriate monitoring and evaluation program to inform adaptive management of LSJR flows and future changes to the Bay-Delta Plan.
- To provide for and encourage coordination and integration of existing and future regulatory processes related to LSJR flows.

(SED, p. 3-2) The standards that the Board must meet are clear: adopt objectives “for the protection of fish and wildlife beneficial uses, new water quality objectives for the protection of agricultural beneficial uses in the southern portion of the Delta, and a program of implementation to achieve those objectives.” Thus, any alternative that does not recover migratory and native fish populations does not meet this objective.

The Board has additional obligations to comply with the Delta Reform Act to further the coequal goals of water supply reliability and ecosystem restoration, as well as other obligations under the Water Code. The Board should have first determined its obligations under the Delta Reform Act, the Clean Water Act, and the Porter-Cologne Act, and articulated these obligations in its project objectives, rather than inserting vague statutory references. The Board should have reconciled its obligations under these laws with its 2010 flow criteria recommendations, and then shaped the alternatives from this starting point. By muddling the project objectives with additional vague standards and qualifiers, the Board distracts itself from its main goals and arrived at alternatives that do not achieve the most fundamental goals of this revision of water quality objectives. The SED’s vague objectives belie the conclusions in the entire SED. Further, lack of well-defined objectives will skew the alternatives analysis, rendering the entire SED analysis improper.

d. Reasonable Range Project Alternatives

CEQA requires that an agency consider a reasonable range of alternatives that meet most if not all of the project objectives. CEQA Guidelines, section 15126.6 states the following:

An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. . . . The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. . . . [T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.

(Subdivisions (a) & (b).) This provision emphasizes that an agency must provide the rationale for the selection of alternatives. Thus, an EIR that fails to justify its rationale for its selection of

alternatives and fails to include alternatives that are tethered to project objectives violates CEQA. When an agency uses the scoping process to narrow the range of potential alternatives to be analyzed in detail in an EIR, the EIR should ultimately describe the facts and rationale by which rejected alternatives were deemed infeasible. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 569, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404-5.)

The SED considered four alternatives for the LSJR flows: a No Project Alternative (Alternative 1), a 20% unimpaired flow (Alternative 2), and 40% unimpaired flow (Alternative 3), and a 60% unimpaired flow (Alternative 4). The SED provides no reasonable explanation for the range of alternatives considered. It appears as though the Board has used the baseline percentage of unimpaired flow from the three Lower San Joaquin tributaries (25%-34% on average) as the floor and the Board's 2010 flow criteria recommendations (60% for the LSJR) as the ceiling. This selection criteria is not rooted in CEQA and fails to demonstrate a connection with the project objectives. The Board's central objective is to adopt a standard that is protective of native fish populations and has already identified that a level of 60% of unimpaired flow from the LSJR is necessary to restore migratory fish populations. Accordingly, 60% should set the floor, not the ceiling in shaping alternatives analyzed. As it stands now, it appears that the selection of alternatives was arbitrary and the selection of the preferred alternative was simply a stab in the middle of the 2010 recommendations and current conditions. If the Board considered alternatives that were more in line with its 2010 recommendation and then determined that those alternatives were infeasible, it should have explained this process in the SED.

This lack of explanation as to what shaped the alternatives leaves the reader confounded as to why the SED analyzes 20, 40, and 60 percent flows, as opposed to 60, 70 or 80 percent or even 50, 60 and 70 percent flows. It is noteworthy that NMFS has recommended that the Board begin its analysis at least at 45% of unimpaired flows, and then revise as necessary.⁶ As it stands now, the selection of alternatives appears unjustified and untied to the central project objective, which is to adopt water quality standard that protect fish and wildlife beneficial uses. The SED should be revised to include a more reasonable range of alternatives or a justification for the alternatives it has analyzed in this SED.

e. Environmentally Superior Alternative

Under CEQA, if an alternative is presented that meets project objectives and can reduce significant impacts to a less than significant level, the lead agency must adopt this alternative if feasible. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.) Before a legislative body may approve a project with a significant environmental impact, it is required by CEQA to make findings identifying the specific considerations that make infeasible the environmentally superior alternatives. (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603.) An agency may reject environmentally superior alternatives under CEQA

⁶ NMFS presentation to the Board at the March 20th, 2013 public hearing, available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/dsedoc/nmfs.pdf

if it properly finds them to be infeasible for any of the statutorily specified reasons, including economic infeasibility. (*Ibid.*) The analysis of alternatives should help an agency determine whether there are other, less environmentally detrimental ways of achieving project objectives:

The purpose of an EIR is not to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated. Since the purpose of an alternatives analysis is to allow the decisionmaker to determine whether there is an environmentally superior alternative that will meet most of the project's objectives, the key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a reduced level of environmental impacts.

(*Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.) If an agency elects not to adopt the Environmentally Superior Alternative (ESA), it must provide its rationale in failing to do so and explain why this alternative is not feasible if that is the case. “[CEQA] simply required the City to consider environmentally superior alternatives, explain the considerations that led it to conclude that those alternatives were infeasible, weigh those considerations against the environmental harm that the Plan would cause, and make findings that the benefits of those considerations outweighed the harm.” (*California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1007-08.)

The Board adopted a hybrid alternative, combining Alternative 2 and 3, as its preferred alternative, even though it had identified Alternative 3 as the ESA. The Board, however, did not explain why the ESA was infeasible. (SED, p. 20-30.) Thus, it remains unclear why the Board instead adopted the weaker hybrid alternative. If the Board has concluded that Alternative 3 is not feasible, then it must provide an explanation explaining so. The Board appears to have selected the hybrid alternative because it would ostensibly result in less water supply impacts; however, this conclusion is unmeritorious because the Board has not taken a thorough look at feasible mitigation measures that would substantially lessen those impacts. (Please refer to Subsection (g) of this comment letter for a discussion of feasible mitigation measures.)

Even if the Board did find Alternative 3 to be infeasible, its adoption of a hybrid alternative is still flawed. An agency can only select an alternative that has less environmental impacts (like those to water supply) if it meets the project objectives. The hybrid alternative doesn't meet the objective of water quality standards that protect sensitive beneficial uses; thus, it fails to meet the central project objective.

At the March 20th public hearing, both NMFS and the U.S. EPA posited that a standard of 35% of unimpaired flows is simply insufficient for the Delta ecosystem. The Delta Reform Act of 2009 contemplated that NMFS (as well as Department of Fish and Wildlife, and U.S. Fish and Wildlife Service) would provide key input into the requisite flow criteria; thus, the opinions of these agencies must be considered. (Water Code, § 85084.5) As a result, the Board's proposal of 35% unimpaired flow from the LSJR is not truly the ESA and is not a justifiable standard.

f. Cumulative Impacts Analysis

An EIR must analyze a project's impacts that are cumulatively considerable. (CEQA Guidelines, § 15130.) CEQA Guidelines section 15355 defines cumulative impacts as "two or more individual effects which, when considered together, are considerable to which compound or increase other environmental effects. . . The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probably future projects." The agency must list a list of past, present, and probably future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the lead agency. (Subdivision (b).) The agency must also describe the geographic scope of the cumulative impacts analysis and provide a reasonable explanation for the geographic limitation used. (Subdivision (b)(2)(3).)

The SED's cumulative impacts analysis is incomplete and misleading due to curtailed scope of analysis. The SED contains a summary of the projects it has considered in its cumulative impacts analysis in Chapter 16, and contains a summary of the cumulative impact analysis within each resource chapter. The update to the Sacramento River portion of the WQCP is not included in the list of cumulative impact projects. Because the WQCP update for the San Joaquin River and the Sacramento River has been phased, a true cumulative impacts assessment has not been conducted.

The Board has piecemealed the analysis of the flows to the Bay Delta by separating the analysis of the LSJR from the Sacramento River. (Please see comment letter submitted by the Environmental Water Caucus for a full discussion of the legal flaws with piecemealing analysis under CEQA.) This piecemealed analysis taints the cumulative impacts analysis. While the Board has already commenced the analysis of Phase II of the WQCP update, it could not determine the cumulative impacts of the two phases because it has not yet determined what flows it will require in the Sacramento River. This gap in analysis is a fatal flaw derived from the piecemealing of the update into two phases. This omission renders the cumulative impacts analysis incomplete.

Beyond the lack of comprehensive analysis by including the Sacramento River, the SED does not contain a true cumulative impacts assessment of the Preferred Alternative. Instead, it contains conclusory statements that the impacts would be similar to Alternative 3. For example, the SED states, "[g]enerally, the Preferred LSJR Alternative had impacts close to those of LSJR Alternative 3. As a result, it is expected the Preferred LSJR Alternative would have very similar cumulative impacts to those of LSJR Alternative 3 as summarized in Chapter 16. . ." (SED, p. 20-30.) This type of conclusion without substantiation does not aid the reader in understanding the implications of the Board's decisions. The Board should revise the SED to include a separate analysis of the preferred hybrid alternative rather than just making deductions from the analysis of Alternatives 2 and 3.

g. Adoption of Feasible Mitigation Measures

The Board describes its obligations to adopt feasible mitigation measures correctly, if incompletely, at SED page 4-7. The Board must adopt feasible mitigation measures or alternatives that will avoid significant impacts of the proposed project. (Pub. Resources Code, § 21080.5 (d)(2)(A).) An SED must identify feasible mitigation measures for each significant environmental impact identified in the SED. (Cal. Code Regs., tit. 23, § 3777(b)(3).) The Board acknowledges its obligation to implement Article X, section 2 of the California Constitution and to abide by the precedent of *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (public trust obligations). However, the Board fails to consider this authority when it considered feasible mitigation measures and alternatives. The Board has the duty to determine whether diversions are reasonable in use and in method of diversion, among other things. The Board must integrate this authority in its feasibility findings for mitigation measures and alternatives. It appears, however, that the Board has not considered any mitigation measures for impacts to water supply. For example, in its analysis of the water supply impacts of LSJR Alternative 3, the Board concludes that the impacts will be significant and unavoidable. The SED states:

[t]here is no mitigation possible for the reduced river diversions on the Merced River. This is because the purpose of the LSJR Alternative 3 is to increase river flows during the months of February-June to improve fish habitat conditions and improve survival of rearing and migrating fish. The runoff to the eastside tributary reservoirs is determined by rainfall and snowmelt conditions and the reservoir storage capacity is fixed. Accordingly, there is no possibility of increasing the total surface water supply to provide more water for surface water diversions. More water released to the Merced River would leave less water available for water supply diversions. Impacts would be significant.

[. . .]

CEQA does not grant agencies new, discretionary powers independent of the powers granted to the agencies by other laws. . . While it may be possible for water diverters (e.g., irrigation districts or municipalities) to reduce their reliance on surface water diversions, thereby reducing the significant impact of LSJR Alternative 3. . . , the State Board does not have the authority to mandate the actions of others that would offset reduced surface water diversions. Impacts would remain significant and unavoidable.

(SED, pp. 5-89—90.) In light of the Board’s authority to regulate reasonable and beneficial uses, its Public Trust Doctrine authorities and its duties under the Delta Reform Act to encourage local water supply development, this conclusion is insufficient. The Board has not considered any options that water supply users may implement to reduce their consumption of Merced River water, much less analyzed the feasibility of such options. The Board’s conclusion that it “would need to require lower flows than are currently required by LSJR Alternative 3” is therefore erroneous. (SED, p. 5-90.) The Board also fails to acknowledge the policies of the Delta Reform Act which require less reliance on the Delta by exporters and which attempt to foster increased

regional self-sufficiency. This failure to consider mitigation measures and their feasibility fails to satisfy the Board's duties under CEQA.

In conclusion, the SED requires significant revisions. Revising the core principles, such as the project objectives and project purpose, and revisiting the Board's interpretation of its own authority to implement feasible mitigation measures and alternatives would greatly improve the SED analysis. We urge the Board to embrace its full authority under the Delta Reform Act, the Water Code and the Public Trust Doctrine to implement a WQCP that is truly protective of migratory fish species in the San Joaquin River and its tributaries.

Thank you for your consideration.

Best Regards,

A handwritten signature in black ink that reads "Kathryn Cotter". The signature is written in a cursive, flowing style.

Kathryn Cotter
Staff Counsel, Friends of the River