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26 SUPERIOR COURT OF THE STATE OF CALIFORNIA

27 IN AND FOR THE COUNTY OF TUOLUMNE

28 SAN JOAQUIN TRIBUTARIES  
29 AUTHORITY, a Joint Powers Authority;  
30 OAKDALE IRRIGATION DISTRICT, a  
31 public agency; SOUTH SAN JOAQUIN  
32 IRRIGATION DISTRICT, a public agency;  
33 TURLOCK IRRIGATION DISTRICT, a  
34 public agency; CITY AND COUNTY OF  
35 SAN FRANCISCO, a public agency.

36 Petitioners and Plaintiffs,  
37 vs.

38 CALIFORNIA STATE WATER  
39 RESOURCES CONTROL BOARD, and  
40 DOES 1 through 100, inclusive,

41 Respondents and Defendants.

) CASE NO.:  
)  
) PETITION FOR WRIT OF MANDAMUS  
) (CCP §§ 1985 and 1094), VERIFIED  
) COMPLAINT FOR DECLARATORY AND  
) INJUNCTIVE RELIEF (CCP § 1060), AND  
) REQUEST FOR PRELIMINARY  
) INJUNCTION AND/OR TEMPORARY  
) RESTRAINING ORDER

42 **FILED BY FAX**

**TABLE OF CONTENTS**

I. INTRODUCTION .....	2
II. PARTIES .....	9
A. Petitioner/Plaintiff San Joaquin Tributaries Authority .....	9
B. Respondent/Defendant State Water Resources Control Board.....	11
III. JURISDICTION AND VENUE .....	12
IV. STANDING .....	12
V. EXHAUSTION OF ADMINISTRATIVE REMEDIES .....	13
VI. STATUTE OF LIMITATIONS .....	14
VII. NOTICE OF CEQA SUIT AND NOTICE TO ATTORNEY GENERAL .....	14
VIII. PRIVATE ATTORNEY GENERAL DOCTRINE .....	14
IX. IRREPARABLE HARM .....	15
X. STANDARD OF REVIEW .....	15
A. Standard of Review for Adoption of Phase 1 Amendments and Bay-Delta Plan .....	15
B. Standard of Review for Adoption of the SED (CEQA Standard of Review) .....	16
XI. GENERAL ALLEGATIONS .....	18
A. SJTA Member Agencies .....	18
1. Oakdale Irrigation District (OID) and South San Joaquin Irrigation District (SSJID).....	18
2. Modesto Irrigation District (MID) and Turlock Irrigation District (TID) .....	19
3. San Francisco .....	20
B. Plan Bay Area .....	24
C. Water Quality Control Plans .....	25
1. Water Quality Control Plans .....	25
2. Water Quality Control Plans for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) .....	25

**TABLE OF CONTENTS (Cont'd.)**

D.	Review and Update to the 2006 Bay-Delta Plan .....	26
1.	State Water Board Delay in Pursuing an Update to the 2006 Bay-Delta Plan .....	26
2.	The SWB's Unlawful Segmentation/Phasing of the Revisions to the 2006 Bay-Delta Plan .....	27
3.	2012 Draft SED and 2012 Revised Bay-Delta Plan.....	29
4.	The 2016 Proposed Phase 1 Amendments and the 2016 Draft SED.....	30
a.	The Plan Area .....	30
b.	Water Quality Objectives.....	31
c.	Program of Implementation .....	33
d.	The SED did not Evaluate the Project Adopted by the State Water Board .....	36
i.	WSE Modeling Constraints .....	36
ii.	SWAP Model.....	39
iii.	SalSim Model.....	39
5.	The SED's Analysis Fails to Analyze the Impacts of San Francisco's Most Reasonably Foreseeable Method of Compliance with the Phase 1 Amendments: Increased Water Rationing .....	40
A.	The SED Fails to Analyze the Environmental Impacts of Water Rationing Within the RWS Service Area.....	41
B.	The SED Fails to Identify or Assess the Phase 1 Amendments' Conflict with State and Local Plans Promoting Green Infrastructure. ....	43
C.	The SED Fails to Analyze the Economic Impacts of Water Rationing. ....	43
6.	The SED's Three Proposed Methods of Compliance by San Francisco Are Not Supported by Substantial Evidence. ....	44

**TABLE OF CONTENTS (Cont'd.)**

A.	Large-Scale Water Transfers from MID or TID to San Francisco Are Unprecedented and Not Reasonably Foreseeable. ....	45	
i.	There is No Historical Support for Such a Transfer. ....	45	
ii.	It is Not Reasonably Foreseeable that MID or TID Would Agree to Export Water During a Protracted Drought. ....	45	
iii.	The SED improperly relies on the WSIP PEIR’s environmental analysis of a 2 mgd transfer with the Districts.....	46	
iv.	The SED’s assumed purchase price for a large scale transfer has no reasonable basis. ....	46	
B.	Large-Scale Desalination Plant at Mallard Slough Is Not Reasonably Foreseeable. ....	46	
C.	The In-Delta Diversion Project Is Not Reasonably Foreseeable.....	46	
7.	The SED’s Treatment of Municipal Water Service Providers is Inconsistent.....	48	
8.	The SFPUC Alternative to the Phase 1 Amendments. ....	48	
9.	Public Comments on the Phase 1 Amendments and SED .....	50	
10.	SED, Final Phase 1 Amendments, and the State Water Board’s Response to Public Comments.....	51	
11.	State Water Board’s Deficient Response to Public Comments .....	53	
12.	Framework Document .....	53	
13.	State Water Board’s Adoption of the SED and Bay-Delta Plan.....	53	
<b>FIRST CAUSE OF ACTION</b>			
Writ of Mandate - Adoption of the Phase 1 Amendments was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Proc., § 1085)			
The SWB’s determination that the Phase 1 Amendments provide reasonable protection – as required by Water Code § 13000 and § 13242 – was arbitrary, capricious, and lacking in evidentiary support .....			54
<b>SECOND CAUSE OF ACTION</b>			
Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)			
The SWB’s weighing and balancing of competing beneficial uses was arbitrary, capricious, and/or entirely lacking in evidentiary support because it was based upon models and analysis that ignored and/or artificially minimized negative impacts of the Tributary UIF Objective .....			56

**TABLE OF CONTENTS (Cont'd.)**

**THIRD CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)  
The SWB did not analyze whether the Phase 1 Amendments reasonably protected the identified beneficial uses as required by Water Code § 13241 because the SWB used changes in temperature, floodplain inundation, and production of Chinook salmon as a proxy for the identified beneficial uses.....58

**FOURTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)  
The SWB's modeling and analysis fails to show that the Phase 1 Amendments reasonably protected the proxies that the SWB used for assessing whether the Beneficial Uses were reasonably protected as required by Water Code § 13000 and 13241 .....60

**FIFTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful and/or arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)  
The SWB failed to consider water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area (Water Code, § 13241).....62

**SIXTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful (Code of Civ. Procedure § 1085)  
The Program of Implementation is Unlawful Because it Does Not Describe the Actions Necessary to Achieve the Objectives as Required by Water Code Section 13242, but Rather Allows for Changes to the Objectives without a Properly Noticed Hearing, Without Evaluation of Environmental Impacts, and Without State Water Board Consideration and Determination of What Constitutes a Reasonable Level of Protection .....64

**SEVENTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful (Code of Civ. Procedure § 1085)  
The Program of Implementation is Unlawful Because it Requires Carryover Storage for the Purpose of Directly Protecting Beneficial Uses without a Balancing of Relevant Factors and Without Consideration of Other Beneficial Uses in Violation of Water Code Sections 13241 and 13242 .....66

**TABLE OF CONTENTS (Cont'd.)**

**EIGHTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful  
(Code of Civ. Procedure § 1085)  
The Program of Implementation is Unlawful Because it Fails to  
Comply with the Requirements of Water Code § 13242 .....67

**NINTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful  
(Code of Civ. Procedure § 1085)  
The Program of Implementation Overstates the State Water Board's  
Authority to Implement the Objectives, Rendering the Program of  
Implementation Illusory and Constituting a Violation of the SWB's  
Obligation to Implement its Own Plan (Water Code, § 13247). ....70

**TENTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful  
(Code of Civ. Procedure § 1085)  
The Adoption of the Program of Implementation was Unlawful Because it  
Requires the Development of Biological Goals after the Adoption and Approval  
of the Phase 1 Amendments and Bay-Delta Plan .....71

**ELEVENTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was Unlawful  
(Code of Civ. Procedure § 1085)  
The Program of Implementation Unlawfully Delegates Authority to  
the Executive Director .....72

**TWELFTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary,  
capricious, and/or entirely lacking in evidentiary support  
(Code of Civ. Procedure, § 1085)  
Under the State Water Board's Analysis, the Level of Protection  
Afforded to Fish and Wildlife Beneficial Uses by the Bay-Delta Plan is  
Unreasonable Given the Limited Expected Protection to Fish and Wildlife  
Beneficial Uses and the Significant Impact on Municipal and Agricultural  
Water Supplies and Other Beneficial Uses .....73

**THIRTEENTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary,  
capricious, and/or lacking in evidentiary support  
(Code of Civ. Procedure § 1085)  
The evidence in the record establishes the Phase 1 Amendments do not  
provide a reasonable level of protection to the identified Beneficial Uses  
as required by Water Code § 13241 .....76

**FOURTEENTH CAUSE OF ACTION**

Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary,  
capricious, and/or lacking in evidentiary support  
(Code of Civ. Procedure § 1085)  
The SED fails to consider the economic impacts of implementation .....77

**TABLE OF CONTENTS (Cont'd.)**

**FIFTEENTH CAUSE OF ACTION**

Violations of California Environmental Quality Act  
(Pub. Resources Code § 21000, et seq.)  
The State Water Board Failed to Proceed in a Manner Required by Law ..... 78

**SIXTEENTH CAUSE OF ACTION**

Violations of California Environmental Quality Act  
(Pub. Resources Code § 21000, et seq.)  
The State Water Board's Decision to Adopt the SED Is Not  
Supported by Substantial Evidence ..... 89

**SEVENTEENTH CAUSE OF ACTION**

Violations of California Environmental Quality Act  
(Pub. Resources Code § 21000, et seq.; 23 CCR 3779;  
14 CCR 15088; 14 CCR 15088.5)  
The Board Must Recirculate the SED ..... 100

**EIGHTEENTH CAUSE OF ACTION**

Violations of Due Process Clauses of California and U.S. Constitutions  
(Cal. Const. Art. 1, § 7; U.S. Const., 14th Amend., § 1) ..... 102

**NINETEENTH CAUSE OF ACTION**

The Water Quality Objectives in the Phase 1 Amendments do not  
comply with the standards of necessity, authority, clarity, consistency,  
reference, and nonduplication  
(Government Code § 11353; Government Code § 11349.1) ..... 105

**TWENTIETH CAUSE OF ACTION**

The Objectives in the Phase 1 Amendments are Unlawful Because They  
Violate the Rules of Water Right Priority ..... 106

**TWENTY-FIRST CAUSE OF ACTION**

The Objectives in the Phase 1 Amendments are Unlawful  
Because They Constitute a Waste and Unreasonable Use of Water  
(Cal. Const. Art. X, Section 2) ..... 107

**TWENTY-SECOND CAUSE OF ACTION**

The Objectives in the Phase 1 Amendments are Unlawful Because They  
Violate Federal Antidegradation Policy and SWRCB Resolution No. 68-16 ..... 109

**TWENTY-THIRD CAUSE OF ACTION**

The State Water Board Failed to Conduct the Required Use  
Attainability Analysis  
(Clean Water Act and Porter-Cologne Act) ..... 112

**TWENTY-FOURTH CAUSE OF ACTION**

The State Water Board Failed to Adopt Water Quality Standards that  
Support the Most Sensitive Use  
(Clean Water Act, 33 U.S.C. § 1251, et seq. and Porter-Cologne Act) ..... 114



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
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25  
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27  
28

**TABLE OF CONTENTS (Cont'd.)**

TWENTY-FIFTH CAUSE OF ACTION  
The Objectives in the Phase 1 Amendments are Unlawful  
Because They Violate FERC’s Exclusive Jurisdiction ..... 115

TWENTY-SIXTH CAUSE OF ACTION  
The Salinity Standard is Unlawful Because it Improperly Allocates  
Responsibility for Salinity Control at Vernalis to Senior Right Holders  
on the Stanislaus, Tuolumne, and Merced Rivers..... 116

TWENTY-SEVENTH CAUSE OF ACTION  
The State Water Board Unlawfully Incorporated its Delta Reform Act  
Obligations into Phase 1 of the Bay-Delta Plan Update ..... 118

TWENTY-EIGHTH CAUSE OF ACTION  
The SWB Failed to Adopt a Sufficient Statement of Overriding  
Considerations with the Requisite Balancing of Economic, Legal, Social,  
Technological, or Other Benefits ..... 120

TWENTY-NINTH CAUSE OF ACTION  
The Carryover Storage Requirement Violates the Constitution Because it  
Amounts to Unlawful Physical Taking without Compensation ..... 121

THIRTIETH CAUSE OF ACTION  
The Carryover Storage Requirements Constitute an Unlawful  
Regulatory Taking without Compensation ..... 123

THIRTY-FIRST CAUSE OF ACTION  
Declaratory Relief ..... 126

PRAYER FOR RELIEF ..... 127

VERIFICATIONS ..... 130

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1           Petitioners/Plaintiffs San Joaquin Tributaries Authority, a Joint Powers Authority, Oakdale  
2           Irrigation District, a public agency, South San Joaquin Irrigation District, a public agency, Turlock  
3           Irrigation District, a public agency, and City and County of San Francisco allege as follows:

4           2.       Petitioners/Plaintiffs San Joaquin Tributaries Authority (“SJTA”),<sup>1</sup> Oakdale  
5           Irrigation District (“OID”), South San Joaquin Irrigation District (“SSJID”), Turlock Irrigation  
6           District (“TID”), and the City and County of San Francisco (“San Francisco”) acting through its  
7           San Francisco Public Utilities Commission (“SFPUC”) (collectively “Petitioners”) file this petition  
8           for writ of mandamus and complaint for declaratory and injunctive relief seeking (1) a writ of  
9           mandate under Code of Civil Procedure Sections 1085 and/or 1094.5 and Public Resources Code  
10          Sections 21168.5 and/or 21168 directing the Respondent State Water Resources Control Board  
11          (“State Water Board” or “Board” or “SWB”) to vacate and set aside its adoption of Resolution No.  
12          2018-0059 that, among other things, (a) approved and adopted the “Substitute Environmental  
13          Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco  
14          Bay-Sacramento San Joaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water  
15          Quality” (“SED”), and (b) adopted amendments (“Phase 1 Amendments”) to the Water Quality  
16          Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary (“Bay-Delta  
17          Plan”); (2) a temporary restraining order and/or preliminary and permanent injunctions enjoining  
18          the State Water Board from implementing, administering, applying, enforcing, relying upon,  
19          amending permits or licenses in compliance with, issuing water quality certifications in accordance  
20          with, or otherwise acting upon the Phase 1 Amendments to the Bay-Delta Plan; (3) a temporary  
21          restraining order and/or preliminary and permanent injunctions enjoining the State Water Board  
22          from adopting any further revisions to the Bay-Delta Plan pending full compliance with the United  
23          States and California Constitutions, the Porter-Cologne Water Quality Control Act, the California  
24          Environmental Quality Act (“CEQA”), the CEQA Guidelines, all requirements for certified  
25          regulatory programs, and all other applicable laws, rules and regulations; (4) a writ of mandate

26 \_\_\_\_\_  
27  
28 <sup>1</sup> The SJTA is a California Joint Powers Authority comprised of the following public entities: Oakdale Irrigation District  
28 (“OID”), South San Joaquin Irrigation District (“SSJID”), Modesto Irrigation District (“MID”), Turlock Irrigation  
District (“TID”), and the City and County of San Francisco (“San Francisco”) acting through its San Francisco Public  
Utilities Commission (“SFPUC”).

1 directing the State Water Board to comply with the United States and California Constitutions, the  
2 Porter-Cologne Water Quality Control Act, CEQA, the CEQA Guidelines, all requirements for  
3 certified regulatory programs, and all other applicable laws, rules and regulations; and (5) a  
4 judgment declaring that the State Water Board’s adoption of the Phase 1 Amendments to the Bay-  
5 Delta Plan is void and invalid, and that the Bay-Delta Plan is void and unenforceable.

## 6 **I. INTRODUCTION**

7 3. The Porter-Cologne Water Quality Control Act (“Porter-Cologne Act”) requires the  
8 State Water Board to adopt “water quality control plans” that protect the waters of the state for the  
9 many beneficial uses to which those waters are put, including domestic use, municipal supply,  
10 agricultural production, and the preservation of fish and wildlife resources. (Wat. Code, § 13000, *et*  
11 *seq.*) Each water quality control plan must (1) identify the “beneficial uses” that will be protected  
12 by the plan, (2) establish “objectives” that provide a reasonable level of protection for those  
13 beneficial uses considering, among other things, all other beneficial uses to which those waters are  
14 put, and (3) create a “program of implementation” needed to achieve those objectives. (Wat. Code,  
15 §§ 13050[j], 13241, 13242.) The objectives – which are the regulatory component of the plan –  
16 must reflect the Board’s balancing of all beneficial uses of water.

17 4. The State Water Board is required to review its water quality control plans every  
18 three years pursuant to the federal Clean Water Act. (33 U.S.C. § 1313[c][1].) This action and  
19 proceeding pertains to the State Water Board’s review and revision of its water quality control plan  
20 for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary (“Bay-Delta Plan”).

21 5. The current review of the Bay-Delta Plan formally began in 2009 when the Board  
22 issued a Notice of Preparation (“NOP”) advising the public it would begin its review and update  
23 process using a phased approach. Although the 2009 NOP identified the location of the proposed  
24 project as being the entire Bay-Delta watershed, the SWB decided to split its update of the Bay-  
25 Delta Plan into two geographic regions. Phase 1 focused on southern Delta salinity and San  
26 Joaquin River flows (including tributaries to the San Joaquin River). According to the SWB, Phase  
27 2 will focus on other elements of the Bay-Delta Plan, including Delta outflow and Sacramento  
28 River inflow (including tributaries to the Sacramento River).

1           6.       The Board described Phases 1 and 2 as being separate processes involving different  
2 water quality objectives that can be developed and implemented independently of each other. This  
3 description of the process conflicts with a recent acknowledgment by the California Supreme Court  
4 that “[p]ast experience has shown that piecemeal efforts to address the Bay-Delta’s problems have  
5 failed because those problems are interrelated and because conflicting interest groups and  
6 stakeholders can block actions that promote some interests at the expense of others.” (*In re Bay-*  
7 *Delta, etc.*, (2008) 43 Cal.4th 1143, 1165.)

8           7.       Phases 3 and 4 of the updated process appear to be in a state of either  
9 redevelopment or abandonment. Initially, the State Water Board described Phase 3 as the process  
10 through which the Board would implement the changes from Phases 1 and 2 through water right  
11 actions and other activities. The SWB described Phase 4 as the process through which the Board  
12 would develop and implement flow objectives to address public trust needs on high priority  
13 streams pursuant to the Delta Reform Act requirement that the Board “develop new flow criteria  
14 for the Delta ecosystem necessary to protect public trust resources.” (Wat. Code, § 85086[c][1].)  
15 However, in the Board’s most recent explanation of the phased update process, descriptions of  
16 Phases 3 and 4 have disappeared and it is not clear whether these phases will occur.

17           8.       Approximately four years after the SWB issued the 2009 NOP, it circulated a Draft  
18 Substitute Environmental Document at the end of 2012 (“2012 Draft SED”) in support of potential  
19 changes to the Bay-Delta Plan for Phase 1. The proposed Phase 1 changes were restricted to the  
20 San Joaquin River watershed and included a new narrative objective for the ostensible protection  
21 of fish and wildlife on the San Joaquin, Tuolumne, Merced, and Stanislaus Rivers that would be  
22 applicable from February through June. This new narrative objective was proposed by the Board as  
23 a regulation to balance the need to protect fish and wildlife resources against the need to protect  
24 other beneficial uses, including domestic use, municipal supply and agricultural production, among  
25 many others. To achieve this new narrative objective, the Board stated that it would require 35  
26 percent unimpaired flow from February through June from each of the Merced, Tuolumne, and  
27 Stanislaus Rivers.  
28

1           9.       The SWB received approximately 4,000 comments on the proposed changes to the  
2 Bay-Delta Plan and the 2012 Draft SED. However, the Board did not respond to the comments on  
3 the 2012 Draft SED.

4           10.     In September of 2016, the State Water Board released a “revised” substitute  
5 environmental document, along with a set of new proposed changes to the Bay-Delta Plan. The  
6 documents released by the Board in 2016 were significantly different from their 2012 counterparts,  
7 except the proposed revisions were consistent insofar as they were geographically constrained to a  
8 subset of waterways within the San Joaquin River watershed. Specifically, the Board proposed  
9 adding, among other things, a new objective to the Bay-Delta Plan that would require a range of  
10 30% to 50% unimpaired flow from February through June on the Stanislaus, Tuolumne, and  
11 Merced Rivers (tributaries to the San Joaquin River), with an initial 40% unimpaired flow  
12 requirement. Given that the Board placed the unimpaired flow compliance points on the tributaries  
13 and not the San Joaquin River, the numeric objectives could only be implemented by six major  
14 water right holders in the entire San Joaquin River watershed, five of which are SJTA member  
15 agencies. The Board also proposed a vague and sweeping narrative objective requiring that “inflow  
16 conditions” be maintained “from the San Joaquin River watershed to the Delta” that are sufficient  
17 “to support and maintain the natural production of viable native San Joaquin River watershed fish  
18 populations migrating through the Delta.” (2016 Draft SED, Appx. K, p. 18.)

19           11.     The State Water Board used several computer simulation models to measure  
20 impacts of the proposed project on water supply, water temperature, agricultural production, and  
21 salmonid production numbers. However, the operational assumptions used in the modeling differ  
22 drastically from the actual requirements of the water quality objectives.

23           12.     The initial analysis performed by the State Water Board demonstrated that requiring  
24 40% unimpaired flow from the Stanislaus, Tuolumne, and Merced Rivers had an adverse and  
25 devastating impact on, among other things, reservoir levels and instream water temperatures that  
26 are important to the protection of certain fisheries. The State Water Board never publicly released  
27 these initial modeling results which showed that requiring 40% unimpaired flow would harm fish  
28 and wildlife beneficial uses.

1           13.     To mitigate these adverse results, the State Water Board – through a trial and error  
2 process – began internally to add operational constraints to the models. These modeling constraints  
3 were not included in, or added to, the objectives, and, in fact, were contradictory to the unimpaired  
4 flow objective in certain cases. For instance, to address the adverse impact that a 40% unimpaired  
5 flow objective would have on reservoir storage (and by extension on cold water reserves needed to  
6 influence instream temperatures for the benefit of certain fisheries), the Board incorporated an  
7 operational constraint into the modeling that limited the level to which the major reservoirs on the  
8 Stanislaus, Tuolumne, and Merced Rivers could be reduced, setting a minimum reservoir  
9 requirement. This constraint, known as carryover storage, is not required by the objectives in the  
10 Bay-Delta Plan. However, the modeling of impacts assumes it is a requirement. Similarly, the  
11 Board incorporated operational assumptions that diverge from the February-June 40% unimpaired  
12 flow objective by shifting flows to other times of the year, outside the regulated February-June  
13 time period. This modeling assumption, described by the Board as flow shifting, is not required by  
14 the objectives. Rather, the flow shifting directly contradicts the 40% unimpaired flow objective by,  
15 among other things, decreasing the percentage of unimpaired flow to less than 40% during the  
16 months of February through June so that a portion of that water can be stored and then released at  
17 other times of the year when it might be more beneficial to certain fishery resources.

18           14.     The Board released this mitigated analysis to the public in a revised SED in 2016,  
19 and later relied upon it when adopting the 40% unimpaired flow objective and the other Phase 1  
20 Amendments to the Bay-Delta Plan. Put simply, the Board modeled one project, but adopted  
21 another.

22           15.     Even with all the additional assumptions and constraints that were added to the  
23 model to produce a result that did not adversely impact fish and wildlife resources, the Board's  
24 analysis failed to show the objectives protect fish and wildlife resources. First, the Board focused  
25 its entire analysis on a single species of anadromous fish: Central Valley fall-run Chinook salmon.  
26 The Board never analyzed protection of any other fish and wildlife resource. Second, under the  
27 Board's own analysis, when compared to baseline conditions, the modeling (with all the  
28 operational assumptions and constraints developed during the Board's iterative process) showed a

1 *de minimis* increase in average annual production of Central Valley fall-run Chinook salmon of  
2 1,103. With average annual production in the Central Valley of more than 700,000, the projected  
3 increase in production amounts to a gain of approximately 0.15%, or less than a quarter of 1  
4 percent. The Board failed to analyze whether this *de minimis* increase amounted to a reasonable  
5 “protection” of fish and wildlife resources.

6 16. By contrast, the modeling projects substantial adverse impacts on irrigated  
7 agriculture. The Board’s own analysis estimates the project will impact more than 1 million acres  
8 of agricultural land in the San Joaquin Valley, the majority of which (65%) is designated as Prime  
9 or Unique Farmland, or Farmland of Statewide Importance. Of that 65%, the Board estimates the  
10 project would convert more than 24,000 acres to non-agricultural use.

11 17. The Board also failed to assess the environmental and socioeconomic impacts to the  
12 San Francisco Bay Area of San Francisco’s most reasonably foreseeable method of compliance  
13 with a 40% unimpaired flow objective on the Tuolumne River: increased rationing throughout the  
14 service area of the Hetch Hetchy Regional Water System.

15 18. In response to the 2016 Draft SED and the 40% unimpaired flow objective, the  
16 State Water Board received approximately 3,100 letters, amounting to about 10,400 comments,  
17 from federal, state, and local agencies; elected officials; stakeholders; and members of the public.  
18 In total, the Board received approximately 19,050 pages of material from the public commenting  
19 on the proposed Phase 1 Amendments. The comments covered an extensive range of topics, from  
20 the water quality control planning process itself, to the environmental analysis, to the Board’s  
21 chosen alternatives, to the modeling (and the assumptions therein), to the results that showed a  
22 meager benefit of 1,103 fish.

23 19. After approximately 1 year and 4 months, the Board published responses to the  
24 numerous public comments. Despite the many critiques contained in the 19,050 pages of public  
25 comment, the State Water Board did not make any changes to the substitute environmental  
26 document.

27 20. The State Water Board did, however, make a handful of critical changes to the  
28 project. Specifically, the Board added a completely new narrative objective which requires that the

1 flows provided to meet the 40% unimpaired flow objective from February through June be  
2 managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial  
3 uses at other times of the year. The State Water Board failed to amend the SED to analyze the  
4 impacts of this new objective.

5 21. The Board also provided extensive new analysis in its response to comments, but  
6 declined to accept any public comment on that new analysis. The tactic of including new analysis  
7 in the response to comments and claiming that the new information is not part of the SED was an  
8 improper attempt to speed up the adoption process by avoiding recirculation and prohibiting public  
9 critique of the new analysis. Indeed, the State Water Board limited the public comment period on  
10 the new narrative objective and various other changes made to the Bay-Delta Plan in 2018 to a  
11 mere 21 days.

12 22. On December 12, 2018, the State Water Board adopted the SED and Phase 1  
13 Amendments to the Bay-Delta Plan.

14 23. The Board's adoption must be set aside for the following reasons, among others:

- 15 a. The Board's adoption of the Phase 1 Amendments was arbitrary, capricious,  
16 and lacking in evidentiary support because the Board adopted a plan that  
17 was entirely different from the plan it modeled and analyzed.
- 18 b. The Board's adoption of the Phase 1 Amendments was arbitrary, capricious,  
19 and lacking in evidentiary support because the Board failed to analyze  
20 whether the Phase 1 Amendments were reasonably protective of the  
21 beneficial uses they were intended to protect, considering all other factors  
22 and beneficial uses that must, by statute, be considered.
- 23 c. The Board's adoption of the Phase 1 Amendments is unlawful due to the  
24 inclusion of a program of implementation that requires additional mandatory  
25 actions, such as carryover storage, for the stated purpose of directly  
26 protecting beneficial uses. By including actions in the program of  
27 implementation for the purpose of directly protecting beneficial uses instead  
28 of for the purpose of achieving objectives, the Board has violated the three-



1 step process required by the Porter-Cologne Act: (1) identify beneficial uses,  
2 (2) establish objectives that provide a reasonable level of protection for  
3 those beneficial uses considering all relevant factors and other beneficial  
4 uses, and (3) create a program of implementation that describes the actions  
5 necessary to achieve the objectives. By skipping the second step in this  
6 process, the Board has unlawfully subverted the required balancing that  
7 must be performed when establishing objectives that provide a reasonable  
8 level of protection for the identified beneficial uses.

- 9 d. The Board's adoption of the Phase 1 Amendments is unlawful due to the  
10 inclusion of a program of implementation that requires actions beyond those  
11 necessary to achieve the objectives in violation of the Porter-Cologne Act.
- 12 e. The Board's adoption of the SED violated the California Environmental  
13 Quality Act, Pub. Res. Code section 21000, *et seq.* ("CEQA"), by, among  
14 other things, unlawfully segmenting the environmental review of the Bay-  
15 Delta Plan update into two geographic phases and two separate  
16 programmatic environmental documents.
- 17 f. The SED also fails to disclose, let alone evaluate, the predictable and  
18 adverse environmental and socioeconomic impacts to the San Francisco Bay  
19 Area from the updated Bay-Delta Plan, or identify effective measures to  
20 mitigate them, and the document is therefore inadequate under CEQA, the  
21 certified regulatory program associated with the State Water Board's water  
22 quality control program (Cal. Code Regs., tit. 23, § 3777, *et seq.*), and the  
23 Porter-Cologne Act.
- 24 g. The Board's adoption of the SED was not supported by substantial evidence  
25 because the models relied upon by the Board to evaluate environmental  
26 impacts do not accurately depict the project that was approved.
- 27 h. The Board's adoption of the Bay-Delta Plan violated the due process clauses  
28 of the California and United States Constitutions because the Board limited

1 the project to only a select group of water right holders who can implement  
2 the project, which amounts to an adjudication of water rights without the due  
3 process protections required by an adjudication.

## 4 **II. PARTIES**

### 5 **A. Petitioner/Plaintiff San Joaquin Tributaries Authority**

6 24. Petitioner/Plaintiff SJTA is a California Joint Powers Authority, duly organized and  
7 existing in accordance with the provisions of Section 6500 *et seq.* of the California Government  
8 Code. The SJTA is a separate legal entity from its member agencies, authorized by its member  
9 agencies to sue and be sued in its own name. (Gov. Code, § 6508.)

10 25. The SJTA member agencies are political subdivisions of the State of California  
11 which include (a) the Modesto Irrigation District (“MID”), Oakdale Irrigation District (“OID”),  
12 South San Joaquin Irrigation District (“SSJID”), and Turlock Irrigation District (“TID”), each of  
13 which is a California irrigation district formed and existing pursuant to the provisions of the  
14 Irrigation District Law (Water Code, § 20500 *et seq.*) (collectively, the “Irrigation Districts”); and  
15 (b) the City and County of San Francisco, a municipal corporation and charter city under the  
16 Constitution of the State of California, acting by and through its San Francisco Public Utilities  
17 Commission (“SFPUC” or “San Francisco”).

18 26. The SJTA members hold water rights on the Tuolumne or Stanislaus Rivers, and  
19 various tributaries thereto, which are within the “Plan Area” and/or “Extended Plan Area” as  
20 specified in the Bay-Delta Plan.

21 27. All SJTA members share a common interest in protecting their water rights and  
22 defending against regulation which threatens to adversely affect the cost, reliability, efficiency,  
23 and/or operations of their respective organizations.

24 28. The SJTA was established as a Joint Powers Authority separate from its members to  
25 facilitate an environment in which members are able to provide water in an efficient manner at a  
26 reasonable cost, ensure long term reliability of the systems, and work with other governmental and  
27 public agencies to promote the common welfare of the landowners and water users served by SJTA  
28 members. More specifically, the purposes of the SJTA include, but are not limited to:

- a. Develop a long-term interdisciplinary program of scientific investigation to assist in responsible stewardship of water and land resources.
- b. Engage with regulatory bodies to protect water resources of its member agencies and ensure that any water quality objectives are scientifically sound, sustainable, and provide reasonable and balanced protection of all beneficial uses.
- c. Investigate and develop plans for conservation, conjunctive use, and off-stream storage.
- d. Develop strategies to market water on a voluntary basis consistent with water quality objectives and other legal requirements.
- e. Secure funds from federal, state, or local agencies, including but not limited to, funds available under the Central Valley Project Improvement Act (“CVPIA”), and including both restoration funds, State Water Project (“SWP”) funds, Four Pumps Mitigation funds, Integrated Regional Water Management (“IRWM”) grant funds from the Department of Water Resources (“DWR”), and other funds.
- f. Function as the regional focal point for funding and grant/aid applications related to San Joaquin River water flow and non-flow fish habitat issues.
- g. Develop the procedures for establishing and conducting the SJTA’s coordination functions; and establish a funding basis for initial and sustained operations.
- h. Participate as necessary in Bay/Delta issues affecting the members.

29. In this action, the SJTA represents only the common interests of its member agencies.

30. MID is participating as a member of the SJTA only as to the following causes of action: one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, nineteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-seven and thirty-one. MID is not participating as a member of the SJTA as to the remaining causes of action asserted by

1 the SJTA. Where MID is participating as a member of the SJTA, the SJTA represents only MID's  
2 common interests and not its individual interests.

3 31. Petitioner/Plaintiff OID is, and at all times herein mentioned was, a California  
4 irrigation district organized and operating pursuant to Division 11, commencing with section  
5 20500, of the California Water Code.

6 32. Petitioner/Plaintiff SSJID is, and at all times herein mentioned was, a California  
7 irrigation district organized and operating pursuant to Division 11, commencing with section  
8 20500, of the California Water Code.

9 33. Petitioner/Plaintiff TID is, and at all times herein mentioned was, a California  
10 irrigation district organized and operating pursuant to Division 11, commencing with section  
11 20500, of the California Water Code.

12 34. Petitioner/Plaintiff San Francisco is a municipal corporation and charter city under  
13 the Constitution of the State of California. The SFPUC is the department of San Francisco with  
14 jurisdiction over San Francisco's water, wastewater, and energy facilities. The SFPUC manages  
15 the Hetch Hetchy Regional Water System ("RWS"), which is comprised of numerous facilities that  
16 provide water directly from the Tuolumne River to 2.7 million people throughout the Bay Area.

17 **B. Respondent/Defendant State Water Resources Control Board**

18 35. Respondent/Defendant State Water Board is a public agency of the State of  
19 California, duly created and existing pursuant to California Water Code Sections 174, *et seq.* and  
20 13100, *et seq.*, and responsible for, among other things, formulating and adopting state policy for  
21 water quality control. (Wat. Code, § 13140.)

22 36. Respondent/Defendant State Water Board is responsible for the adjudicatory and  
23 regulatory functions of the state in the field of water resources. (Wat. Code, § 174.)

24 37. Respondent/Defendant State Water Board may adopt water quality control plans for  
25 the waters of the state. (Wat. Code, § 13170.)

26 38. The SJTA does not know the true names and capacities of Respondents/Defendants  
27 herein sued as DOES 1 through 100, inclusive, and for that reason have sued such  
28 Respondents/Defendants by these fictitious names pursuant to Code of Civil Procedure section

1 474. The SJTA will seek leave to amend this Petition to substitute their true names and capacities  
2 when their identities are discovered.

### 3 **III. JURISDICTION AND VENUE**

4 39. This court has jurisdiction to issue a peremptory writ of mandate pursuant to Code  
5 of Civil Procedure sections 1085 and/or 1094.5, and Public Resources Code sections 21168.5  
6 and/or 21168.

7 40. This Court has jurisdiction to issue a temporary restraining order, preliminary  
8 injunction, and/or permanent injunction pursuant to Code of Civil Procedure sections 525, 526, and  
9 527 and California Civil Code sections 3421 and 3422.

10 41. This Court has jurisdiction to grant declaratory relief pursuant to Code of Civil  
11 Procedure section 1060 and Government Code section 11350.

12 42. This Court has jurisdiction over the matters alleged in this Petition/Complaint  
13 pursuant to article 10, section 2 of the California Constitution, and article 1, section 7 of the  
14 California Constitution.

15 43. Venue is proper in the County of Tuolumne, California under Code of Civil  
16 Procedure section 395.

### 17 **IV. STANDING**

18 44. Petitioners/Plaintiffs have standing to assert the actions and claims raised in this  
19 Petition/Complaint.

20 45. The SJTA is a Joint Powers Authority whose members have a common interest in  
21 protecting their water rights and the reliability of their water supply by opposing unlawful  
22 regulations and adjudications, such as the State Water Board's adoption of the Phase 1  
23 Amendments.

24 46. The SJTA members have a common interest in the State Water Board's full  
25 compliance with the California Environmental Quality Act ("CEQA"), the Porter-Cologne Water  
26 Quality Control Act, the Clean Water Act, the U.S. and California Constitutions, and all other  
27 applicable laws in formulating, reviewing, approving, and implementing the Phase 1 Amendments  
28 and the Bay-Delta Plan.

1           47.     The SJTA, its member agencies, their landowners, and/or customers will be directly  
2 and substantially affected by the adverse economic and environmental impacts of the State Water  
3 Board's actions, which include, but are not limited to, impacts on agricultural resources, air  
4 quality, biological resources, greenhouse gas emissions and climate change, water supply,  
5 recreational resources, groundwater resources, hydropower resources, the urban forest (i.e., park  
6 vegetation, landscaping and trees), housing development and sprawl, jobs and economic output,  
7 and aesthetic resources.

8           48.     Petitioners have no plain, speedy, or adequate remedy in the course of ordinary law  
9 unless this Court grants the requested injunctive relief and writ of mandate to require Respondent  
10 to set aside its certification of the SED and adoption of the Phase 1 Amendments. Therefore,  
11 Petitioners have standing to challenge the Phase 1 Amendments and the related SED.

12                   **V.   EXHAUSTION OF ADMINISTRATIVE REMEDIES**

13           49.     Respondent/Defendant State Water Board's adoption of the Phase 1 Amendments  
14 and the Bay-Delta Plan is a final action and not subject to further administrative appeal procedures.

15           50.     Respondent/Defendant State Water Board's adoption of the SED is final and not  
16 subject to further administrative appeal procedures.

17           51.     In accordance with Public Resources Code section 21177, subdivision (a),  
18 Petitioners objected to the adoption of the SED orally and in writing during the period for public  
19 comment provided under CEQA and before the filing of the notice of determination.

20           52.     In accordance with Public Resources Code section 21177, subdivision (b), all  
21 grounds for non-compliance with CEQA that are alleged herein were presented to  
22 Respondent/Defendant State Water Board during the public comment period and before the filing  
23 of the notice of determination.

24           53.     Petitioners elect to prepare the record of proceedings pursuant to Code of Civil  
25 Procedure section 1094.6(c) and Public Resources Code § 21167.6(e)(1)-(11), in accordance with  
26 the notice of election filed concurrently herewith as Exhibit A.

27           54.     Petitioners actively participated in the administrative process that culminated in the  
28 State Water Board's adoption of the Phase 1 Amendments and the Bay-Delta Plan. Petitioners

1 raised procedural and substantive objections to the adoption of the Phase 1 Amendments by timely  
2 submitting written comments to the State Water Board in March 2013, March 2017, and July 2018.  
3 Petitioners and/or other parties have raised all of the factual and legal objections asserted in this  
4 Petition/Complaint during the administrative proceeding.

5 **VI. STATUTE OF LIMITATIONS**

6 55. On or about December 12, 2018, the State Water Board adopted the SED and Phase  
7 1 Amendments to the Bay-Delta Plan.

8 56. This Petition/Complaint is timely filed in accordance with Public Resources Code  
9 section 21080.5(g) and Code of Civil Procedure section 338(i).

10 57. This Petition/Complaint is timely filed in accordance with Water Code section  
11 1126.

12 **VII. NOTICE OF CEQA SUIT AND NOTICE TO ATTORNEY GENERAL**

13 58. Petitioners have complied with Public Resources Code section 21167.5 by prior  
14 service of notice upon the Respondent/Defendant indicating an intent to commence this action. The  
15 notice and proof of service are attached hereto as Exhibit B.

16 59. Petitioners have complied with Public Resources Code section 21167.7 and Code of  
17 Civil Procedure section 388 by sending a copy of this Petition/Complaint to the California  
18 Attorney General. A copy of the letter transmitting this Petition/Complaint to the California  
19 Attorney General is attached hereto as Exhibit C.

20 60. Petitioners request preparation of the record of proceedings pursuant to Public  
21 Resources Code section 21167.6, subdivision (a), in accordance with the request filed concurrently  
22 herewith as Exhibit A, referenced above.

23 **VIII. PRIVATE ATTORNEY GENERAL DOCTRINE**

24 61. Petitioners bring this action as a private attorney general pursuant to Code of Civil  
25 Procedure section 1021.5, and any other applicable legal theory, to enforce important public rights  
26 affecting the public interest.

1           62.     Issuance of the relief requested in this Petition/Complaint will confer a significant  
2 benefit on a large class of persons who receive electricity, irrigation water, and municipal water  
3 supply from the SJTA member agencies.

4           63.     Issuance of the relief requested in this Petition/Complaint will confer a significant  
5 benefit on the general public by requiring the State Water Board, and its appointed officials, to  
6 comply with the legislative mandate of CEQA and the Porter-Cologne Act.

7           64.     The necessity and financial burden of enforcement are such as to make an award of  
8 attorney's fees appropriate in this proceeding. The financial burden was great: Petitioners/Plaintiffs  
9 submitted numerous comments, attended numerous hearings and workshops, met with other  
10 interested parties and State Water Board staff and members, and spent considerable time preparing  
11 and executing litigation. Enforcement was necessary to ensure that various public agencies and  
12 citizens were not required to comply with invalid regulations and a project was not implemented  
13 for which the environmental impacts were not analyzed.

#### 14                                   **IX.     IRREPARABLE HARM**

15           65.     The SJTA and its member agencies are directly and irreparably harmed by the  
16 Board's adoption of the Bay-Delta Plan. The Phase 1 Amendments constitute an unlawful  
17 adjudication of the water rights of the STJA members agencies without due process of law. The  
18 Bay-Delta Plan will cause substantial losses to the surface water supply relied upon by the SJTA  
19 member agencies for agricultural production, municipal supply, recreational use, and hydropower  
20 generation, among other things. Implementation will also cause direct impacts to groundwater  
21 resources relied upon by the SJTA member agencies.

22           66.     The SJTA and its member agencies will be irreparably harmed by the existence of  
23 the regulation as other agencies rely on the objectives in place.

#### 24                                   **X.     STANDARD OF REVIEW**

##### 25           **A. Standard of Review for Adoption of Phase 1 Amendments and Bay-Delta Plan**

26           67.     "In performing its regulatory function of . . . establishing water quality objectives,  
27 the [State Water] Board acts in a legislative capacity." (*United States v. State Water Resources*  
28 *Control Bd.* (1986) 182 Cal.App.3d 82, 112.) When reviewing an administrative action that is



1 legislative in nature, a court “must proceed in ordinary mandamus” under Code of Civil Procedure  
2 section 1085. (*Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 840.) A trial  
3 court “reviews an administrative action pursuant to Code of Civil Procedure section 1085 to  
4 determine whether the agency’s action was [1] arbitrary, capricious, or entirely lacking in  
5 evidentiary support, [2] contrary to established public policy, [3] unlawful, [4] procedurally unfair,  
6 or [5] whether the agency failed to follow the procedure and give the notices the law requires.”  
7 (*Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 611; see *California*  
8 *Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1483; *Am.*  
9 *Canyon Fire Prot. Dist. v. County of Napa* (1983) 141 Cal.App.3d 100, 106; *Lewin v. St. Joseph*  
10 *Hospital* (1978) 82 Cal.App.3d 368, 386.) A court “exercises independent judgment in determining  
11 whether the agency action was consistent with applicable law.” (*Neighbors in Support of*  
12 *Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004 [internal  
13 quotations and citations omitted].)

14         68.     The State Water Board performs an adjudicatory function when it allocates water  
15 rights. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at 113.) When  
16 reviewing an administrative action that is adjudicatory in nature, “the court must proceed under  
17 Code of Civil Procedure section 1094.5 . . .” (*Patterson, supra*, 58 Cal.App.3d at 840.) “The  
18 inquiry in such a case shall extend to the questions of whether the [agency] has proceeded without,  
19 or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial  
20 abuse of discretion.” (Code Civ. Proc., § 1094.5[b].) “Abuse of discretion is established if the  
21 [agency] has not proceeded in the manner required by law, the order or decision is not supported  
22 by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5[b].)  
23 If an agency’s adjudicatory decision “substantially affects a fundamental vested right, [then] the  
24 trial court must exercise its independent judgment on the evidence and find an abuse of discretion  
25 if the findings are not supported by the weight of the evidence.” (*Patterson, supra*, 58 Cal.App.3d  
26 at 840, citing Code Civ. Proc., § 1094.5[c].) If the adjudicatory decision does not affect a  
27 fundamental vested right, then the court determines “whether the findings are supported by  
28 substantial evidence in light of the whole record.” (*Patterson, supra*, 58 Cal.App.3d at 840.) Water

1 rights are fundamental and vested property rights. (*Fort Mojave Indian Tribe v. Department of*  
2 *Health Services* (1995) 38 Cal.App.4th 1574, 1591; see *Arizona v. California* (1963) 373 U.S. 546,  
3 555 [under the law of prior appropriation, “the one who first appropriates water and puts it to  
4 beneficial use thereby acquires a vested right to continue to divert and use that quantity of water  
5 against all claimants junior to him [or her] in point of time”].)

6 69. Where an agency “in two capacities is simultaneously disposing of two legally  
7 required functions with but one decision, review of that determination must be by the more  
8 stringent standard.” (*Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723,  
9 729.) Where uncertainty exists, the “prudent course” is to treat the act as adjudicative and apply the  
10 stricter standard. (*L&M Professional Consultants v. Ferreira* (1983) 146 Cal.App.3d 1038, 1054.)

11 **B. Standard of Review for Adoption of the SED (CEQA Standard of Review)**

12 70. In determining whether to grant a petition for traditional mandamus under Code of  
13 Civil Procedure section 1085 on the ground that an agency has failed to comply with the California  
14 Environmental Quality Act (“CEQA”) in making a quasi-legislative decision, a court will consider  
15 “whether there was a prejudicial abuse of discretion.” (*Western States Petroleum Assn. v. Superior*  
16 *Court* (1995) 9 Cal.4th 559, 568, quoting Pub. Resources Code, § 21168.5). “Abuse of discretion is  
17 established if the agency has not proceeded in a manner required by law or if the determination or  
18 decision is not supported by substantial evidence.” (Pub. Resources Code, § 21168.5)

19 71. The State Water Board’s water quality control planning program is a certified  
20 regulatory program that is exempt from the CEQA requirements of preparing an Environmental  
21 Impact Report (“EIR”) and/or a negative declaration, but the State Water Board must prepare a  
22 substitute environmental document in lieu of an EIR. (Pub. Resources Code, § 21080.5; Cal. Code  
23 Regs., tit. 14, § 15251.) Certified regulatory programs and SEDs are subject to all CEQA  
24 requirements unless they are specifically exempted under Public Resources Code section 21080.5,  
25 as well as “the broad policy goals and substantive standards of CEQA.” (*City of Arcadia v. State*  
26 *Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1421-1422.)

1 **XI. GENERAL ALLEGATIONS**

2 **A. SJTA Member Agencies**

3 72. The SJTA is a joint powers authority comprised of TID, MID, OID, SSJID, and San  
4 Francisco, the latter of which is acting by and through the San Francisco Public Utilities  
5 Commission (SFPUC.)

6 **1. Oakdale Irrigation District (OID) and South San Joaquin Irrigation District (SSJID)**

7 73. OID and SSJID jointly hold adjudicated and decreed pre-1914 water rights on the  
8 Stanislaus River entitling them to the first 1,816.6 cubic-feet/second ("cfs") of flow. OID and  
9 SSJID also hold numerous water right licenses issued by the State Water Board entitling them to  
10 divert and store water from the Stanislaus River.

11 74. The irrigation service areas for OID and SSJID are set forth in the SED. OID's  
12 irrigation service area is situated, generally, on the north and south sides of the Stanislaus River,  
13 downstream of Goodwin Dam. SSJID's irrigation service area is situated, generally, on the north  
14 side of the Stanislaus River, to the west of OID's irrigation service area.

15 75. The United States Bureau of Reclamation ("USBR") owns and operates New  
16 Melones Dam on the Stanislaus River. New Melones Dam has a storage capacity of approximately  
17 2.4 million acre-feet.

18 76. OID and SSJID own and operate – together with their cooperative venture the Tri-  
19 Dam Project – Donnell's Dam and Beardsley Dam on the Middle Fork of the Stanislaus River  
20 upstream of New Melones Reservoir, and Tulloch Dam on the main stem of the Stanislaus River  
21 downstream of New Melones Dam.

22 77. Goodwin Dam is located on the Stanislaus River approximately 59 miles upstream  
23 of the Stanislaus River's confluence with the San Joaquin River, and approximately 2 miles  
24 downstream of Tulloch Dam and 10 miles downstream of New Melones Dam. Goodwin Dam is  
25 jointly owned by OID, SSJID, and Stockton East Water District.

26 78. OID and SSJID entered into an Agreement and Stipulation, dated October 24, 1972  
27 ("1972 Agreement"), with the United States of America, by and through the United States  
28 Department of the Interior, Bureau of Reclamation, Mid-Pacific Region, in the matter of USBR's

1 water right applications 14858, 14859, 19303, and 19304, through which USBR requested, among  
2 other things, authorization from the State Water Board to construct and operate New Melones Dam  
3 on the Stanislaus River. The 1972 Agreement recognized that USBR's construction of New  
4 Melones Dam would inundate OID and SSJID's existing Melones Dam and Reservoir on the  
5 Stanislaus River. Pursuant to the 1972 Agreement, OID and SSJID agreed to withdraw their  
6 protests to USBR's water right applications 14858, 14859, 19393, and 19304, in exchange for,  
7 among other things, USBR's agreement, in recognition of OID and SSJID's more senior water  
8 rights, to deliver to OID and SSJID 654,000 acre-feet of water annually, or the total quantity of  
9 New Melones Reservoir inflow during the water year, whichever is smaller.

10 79. On or about August 30, 1988, OID and SSJID entered another agreement ("1988  
11 Agreement") with USBR, as a substitute to the 1972 Agreement, pursuant to which USBR agreed,  
12 among other things, to deliver to OID and SSJID an amount of water equal to the total inflow to  
13 New Melones Reservoir (measured in acre-feet), plus the amount derived by the following  
14 formula:  $(600,000 \text{ acre-feet} - \text{total inflow in acre-feet})/3$ , but not to exceed a maximum delivery of  
15 600,000 acre-feet of water each water year. The 1988 Agreement also granted OID and SSJID a  
16 conservation account, permitting OID and SSJID to store a cumulative total amount of 200,000  
17 acre-feet in New Melones Reservoir.

18 80. OID provides water for irrigation to approximately 2,900 users on approximately  
19 80,000 acres of farmland. OID also provides water for municipal purposes to 700 customers.

20 81. SSJID provides water for irrigation to approximately 3,000 users on approximately  
21 57,000 acres of farmland. SSJID also provides water for municipal purposes to the cities of  
22 Lathrop, Manteca, and Tracy.

## 23 **2. Modesto Irrigation District (MID) and Turlock Irrigation District (TID)**

24 82. MID and TID hold, among other rights, valid pre-1914 water rights, as well as  
25 numerous licenses issued by the State Water Board and its predecessor agencies, entitling them to  
26 divert water from the Tuolumne River for municipal, irrigation, power, and recreational purposes.

27 83. TID's irrigation service area is situated, generally, between the Tuolumne River to  
28 the north, the Merced River to the south, and the San Joaquin River to the west.

1           84.     TID and MID jointly own and operate New Don Pedro Reservoir on the Tuolumne  
2 River, which has a storage capacity of approximately 2,030,000 acre-feet of water for irrigation,  
3 hydroelectric generation, recreation, and flood control. TID and MID hold the FERC license to  
4 New Don Pedro Dam, which is currently undergoing relicensing (FERC Project No. 2299).

5           85.     Water released from New Don Pedro Reservoir is impounded and regulated by  
6 LaGrange Dam and Reservoir approximately 2.5 miles downstream of New Don Pedro Reservoir,  
7 and approximately 52 miles upstream of the Tuolumne River's confluence with the San Joaquin  
8 River. LaGrange dam is the diversion point for TID and MID canals.

9           86.     Pursuant to an agreement entered into between TID, MID, and San Francisco in  
10 1966 (commonly referred to as the "Fourth Agreement"), San Francisco has a "water bank"  
11 account in New Don Pedro Reservoir entitling San Francisco to a maximum water bank credit of  
12 570,000 acre-feet, with an additional available credit of 170,000 acre-feet when flood control is not  
13 required.

14           87.     TID provides water for irrigation to approximately 4,500 users on approximately  
15 145,000 acres of farmland.

16           88.     TID's operation of New Don Pedro provides electricity to supply approximately  
17 60,000 average households.

### 18       **3. San Francisco**

19           89.     San Francisco holds pre-1914 appropriative water rights in the Tuolumne River that  
20 support a prima facie diversion rate well over 400 million gallons per day ("mgd").

21           90.     The SFPUC Regional Water System ("RWS") is the third largest supplier of water  
22 for domestic and municipal purposes in California, providing water service to 2.7 million people in  
23 San Francisco, Alameda, Santa Clara, San Mateo, and Tuolumne counties. The RWS provides  
24 water directly to San Francisco's residents and to 26 "wholesale customers" in San Mateo, Santa  
25 Clara, and Alameda counties<sup>2</sup> (cumulatively, "RWS Service Area"). Collectively, the 26  
26

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27  
28       <sup>2</sup> The RWS also provides water on a wholesale basis to Cordilleras Mutual Water Company ("MWC") and Groveland  
Community Service District ("CSD") in Tuolumne County. Cordilleras MWC relies entirely on the SFPUC for its  
supply, and Groveland CSD relies on the SFPUC for the majority of its supply.

1 wholesale customers receive over 66% of the water delivered by the RWS. Of these 26 wholesale  
2 customers, which are represented in matters related to the RWS by the Bay Area Water Supply and  
3 Conservation Agency (“BAWSCA”), 13 rely on the SFPUC for 95% or more of their total water  
4 supply, and 8 rely on the SFPUC for 100% of their total supply. The Tuolumne River provides  
5 85% of the water supplied by the RWS.

6 91. The SFPUC has a perpetual obligation to supply its wholesale customers with up to  
7 184 mgd annually, as memorialized in the SFPUC’s 2009 Water Supply Agreement with its  
8 wholesale customers. Although the SFPUC’s wholesale customers do not currently use 184 mgd,  
9 their demand is forecasted to reach that level by 2040. With limited exceptions for drought,  
10 emergencies, and system maintenance, if the wholesale customers’ demands increase to 184 mgd  
11 because of population growth and/or their failure to obtain sufficient alternative water supplies, the  
12 SFPUC is obligated to provide them with 184 mgd. The SFPUC also allocates an additional 81  
13 mgd for “retail” demand within the City and County of San Francisco. Thus, an RWS demand of  
14 265 mgd, as referred to here, reflects San Francisco’s perpetual obligation to its wholesale  
15 customers plus its in-city retail allocation, and is consistent with projected demand in the year 2040  
16 attributable to forecasted population growth.

17 92. Prior to the most recent drought, in fiscal year 2012-2013, RWS annual demand was  
18 223 mgd. Although demand dropped during the 2014-2016 drought to as low as 175 mgd,  
19 deliveries increased to 179 mgd in fiscal year 2016-2017. In fiscal year 2017-2018, total RWS  
20 deliveries increased to 196 mgd. The trajectory is clear: RWS demand is rebounding following the  
21 drought and the removal of rationing requirements.

22 93. Water diverted from the Tuolumne River watershed makes up approximately 85%  
23 of the water used to supply the RWS. The remaining 15% is diverted from the combined Alameda  
24 and Peninsula watersheds (referred to collectively as the “local” watersheds). The RWS begins  
25 with Hetch Hetchy Reservoir and O’Shaughnessy Dam, located in Yosemite National Park on the  
26 main stem of the Tuolumne River. Two additional reservoirs in the Hetch Hetchy Region – Lake  
27 Eleanor and Lake Lloyd (also called Cherry Reservoir) – collect water from the watersheds  
28 northwest of Hetch Hetchy Reservoir on tributaries to the Tuolumne River.

1           94.     San Francisco delivers water from Hetch Hetchy Reservoir to customers without  
2 filtration because the water’s high quality warrants a filtration exemption from the United States  
3 Environmental Protection Agency (“U.S. EPA”) and the State Water Board's Division of Drinking  
4 Water (“DDW”). Hetch Hetchy Reservoir can store up to 360,400 acre-feet of water.

5           95.     In the 1913 Raker Act (38 Stat. 242), Congress granted San Francisco rights-of-  
6 way across federal lands for the Hetch Hetchy Project, and required San Francisco to bypass  
7 certain flows to MID and TID in recognition of their senior water rights. San Francisco also  
8 bypasses additional flow in recognition of other pre-1914 water rights held by MID and TID. The  
9 Raker Act allows San Francisco to divert water from the Tuolumne River only during high flow  
10 periods, i.e., when flows exceed the quantities specified in the Raker Act. During dry periods  
11 when flows do not exceed the quantities specified in the Raker Act, the Act requires San Francisco  
12 to bypass all flow to MID and TID. (Raker Act, §§ 9(b), 9(c).)

13           96.     In 1966, San Francisco, MID, and TID entered into the “Fourth Agreement”  
14 pertaining to the construction and operation of the Don Pedro Reservoir, which is owned and  
15 operated by MID and TID. The Fourth Agreement incorporated the Raker Act’s flow bypass  
16 requirements and created a “water bank” in Don Pedro Reservoir to (1) ensure that San Francisco’s  
17 diversions under its pre-1914 appropriative water rights will not harm MID’s or TID’s senior pre-  
18 1914 appropriative water rights, and (2) allow San Francisco to pre-pay to MID and TID water  
19 released upstream to satisfy MID and TID’s senior water rights.

20           97.     The Fourth Agreement provides that if TID and MID “demonstrate that their water  
21 entitlements, as they are presently recognized by the parties, are being adversely affected by  
22 making water releases that are made to comply with Federal Power Commission<sup>3</sup> license  
23 requirements, and that the Federal Power Commission has not relieved them of such burdens, City  
24 and Districts agree that there will be a re-allocation of storage credits so as to apportion such  
25 burdens on the following basis: *51.7121% to City* and *48.2879% to Districts.*” (Article 8, Fourth  
26 Agreement [emphasis added].)

27  
28  

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<sup>3</sup> The Federal Power Commission, which was created by the Federal Power Act, was the predecessor to the Federal Energy Regulatory Commission.

1           98.     The Board states it will implement the Phase 1 Amendments by 2022 “through  
2 water right actions or water quality actions, *such as Federal Energy Regulatory Commission*  
3 *(FERC) hydropower licensing processes.*” (SED at K-28 [emphasis added].) FERC is currently  
4 conducting a relicensing proceeding for the Don Pedro Hydroelectric Project. TID and MID, as  
5 owners of the project, must obtain a Section 401 water quality certification from the State Water  
6 Board as part of that process. If FERC incorporates the State Water Board’s Section 401 water  
7 quality certification, i.e., the 40% unimpaired flow objective on the Tuolumne River, in a new  
8 license for the Don Pedro Project, San Francisco could, per the Fourth Agreement, be responsible  
9 for contributing approximately 51.7% of the flows required under the Phase 1 Amendments.

10           99.     San Francisco’s Water System Improvement Program (“WSIP”) is a \$4.8 billion,  
11 multi-year, capital program to upgrade the RWS and is approximately 96% complete. The WSIP  
12 identifies delivery and drought reliability elements for meeting current demands in the RWS  
13 Service Area during dry years, including a proposed water transfer of approximately 2 mgd from  
14 TID and MID to San Francisco.

15           100.    As required under CEQA, the San Francisco Planning Department prepared a  
16 Programmatic Environmental Impact Report (“PEIR”) for the WSIP that analyzed facility projects  
17 at a program level and implementation of a water supply option at a project level. As the Board  
18 recognizes in the SED at pp. 16-68, the PEIR rejected as infeasible the concept of San Francisco  
19 relying on a new in-Delta diversion, concluding “since this alternative would have uncertain water  
20 supply reliability and an unknown ability to reduce impacts on Tuolumne River resources, *as well*  
21 *as significant additional environmental impacts*, it was eliminated from further consideration.”  
22 (WSIP PEIR, at 9-126 [emphasis added].)

23           101.    As identified in the SFPUC’s 2015 Urban Water Management Plan, the SFPUC  
24 operates under a Water Shortage Allocation Plan that includes multiple stages of response to water  
25 supply shortages, ranging from use of dry year water supplies (when available), to voluntary  
26 customer water reductions, to enforced rationing. Under that plan, water demand in a single dry  
27 year would initially be satisfied with water deliveries from storage and use of available dry year  
28



1 supplies. As total system storage declines during a sequential year drought, however, it would be  
2 necessary to impose mandatory rationing of 10 to 20%, even without the Phase 1 Amendments.

3 102. The SFPUC uses a hypothetical “design drought” as the basis for planning and  
4 modeling of future water supply and rationing scenarios. The design drought consists of the 1987-  
5 1992 drought, followed by an additional 2.5 years of dry conditions from the hydrologic record,  
6 which includes the 1976-1977 drought. In modeling the water supply shortages that would result  
7 from implementation of the Phase 1 Amendments, SFPUC applied the design drought using the  
8 historical hydrology from 1921 through 2011.

9 **B. Plan Bay Area**

10 103. In 2013, the Association of Bay Area Governments (“ABAG”) and the Metropolitan  
11 Transportation Commission adopted Plan Bay Area 2013 in accordance with “The Sustainable  
12 Communities and Climate Protection Act of 2008,” (Stats. 2008, ch. 728, § 1; Stats. 2009, ch. 354,  
13 § 5), also known as Senate Bill No. 375, which requires California’s 18 metropolitan areas,  
14 including the Bay Area, to reduce greenhouse gas emissions from cars and light trucks. The first  
15 mandatory target requires the Bay Area to reduce its per-capita CO2 emissions from cars and light-  
16 duty trucks by 7% by 2020 and 15% by 2035. The second mandatory target requires the Bay Area  
17 to house 100% of its projected population growth.

18 104. Plan Bay Area 2013 projects that between 2010 and 2040, the nine-county Bay Area  
19 will (1) grow in population from 7.2 million to 9.3 million, an increase of 2.1 million people, or  
20 30%; (2) add 1.1 million jobs; and (3) increase its housing stock by 3.4 million new homes.

21 105. Plan Bay Area 2013 calls for the majority of projected growth to occur in Priority  
22 Development Areas that are “transit-oriented, infill development opportunity areas within existing  
23 communities” because “[c]ompact infill development can reduce vehicle use and vehicle miles  
24 traveled by 20 to 60-percent when compared to traditional suburban developments.” (Plan Bay  
25 Area at 77, 123.)

26 106. ABAG adopted a revised regional growth forecast in February 2016. This forecast  
27 estimates an additional 1.3 million jobs and 2.4 million people, and therefore the need for  
28

1 approximately 820,000 more housing units between 2010 and 2040. This represents an increase of  
2 15% in employment and a 25% increase in households, as compared to Plan Bay Area 2013.

### 3 **C. Water Quality Control Plans**

#### 4 **1. Water Quality Control Plans**

5 107. The State Water Board is solely responsible for setting statewide policy concerning  
6 water quality control (Wat. Code, § 13140-13147), and is authorized to formulate and adopt its  
7 own water quality control plans which supersede conflicting regional basin plans. (Wat. Code,  
8 § 13170.)

9 108. In formulating water quality control plans, the State Water Board is to “attain the  
10 highest water quality which is reasonable, considering all demands being made and to be made on  
11 those waters and the total values involved, beneficial and detrimental, economic and social,  
12 tangible and intangible.” (Wat. Code, § 13000.)

13 109. Water quality control plans must contain the following components for the waters  
14 within a specified area: (1) beneficial uses to be protected, (2) water quality objectives, and (3) a  
15 program of implementation needed for achieving water quality objectives. (Wat. Code, § 13050[j].)

16 110. The State Water Board must establish water quality objectives that ensure “the  
17 reasonable protection of beneficial uses” considering, but not limited to, the following factors: (a)  
18 past, present, and probable future beneficial uses of water; (b) environmental characteristics of the  
19 hydrographic unit under consideration, including the quantity of water available thereto; (c) water  
20 quality conditions that could reasonably be achieved through the coordinate control of all factors  
21 which affect water quality in the area; (d) economic considerations; (e) the need for developing  
22 housing within the region; and (f) the need to develop and use recycled waters. (Wat. Code,  
23 § 13241.)

#### 24 **2. Water Quality Control Plans for the San Francisco Bay/Sacramento-San** 25 **Joaquin Delta Estuary (Bay-Delta Plan)**

26 111. A comprehensive history of the State Water Board’s efforts to develop water quality  
27 control plans for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) is  
28 set forth in the following two appellate decisions: *United States v. State Water Resources Control*

1 *Bd.* (1986) 182 Cal.App.3d 82 (“*Racanelli*”); *State Water Resources Control Bd. Cases* (2006)  
2 136 Cal.App.4th 674 (“*Robie*”).<sup>4</sup> These cases resolved litigation over the State Water Board’s  
3 prior adoption/implementation of the 1978 Bay-Delta Plan and the 1995 Bay-Delta Plan.

4 112. The formerly applicable water quality control plan for the Bay-Delta estuary was  
5 the State Water Board’s Water Quality Control Plan for the San Francisco Bay/Sacramento-San  
6 Joaquin Delta Estuary, dated December 13, 2006 (“2006 Bay-Delta Plan”). The 2006 Bay-Delta  
7 Plan was adopted by SWB Resolution No. 2006-0098, and is implemented pursuant to the SWB’s  
8 Water Rights Decision 1641 (“D-1641”).

9 **D. Review and Update to the 2006 Bay-Delta Plan**

10 **1. State Water Board Delay in Pursuing an Update to the 2006 Bay-Delta Plan**

11 113. In 1999, after a water right hearing to implement the 1995 Bay-Delta Plan, the State  
12 Water Board adopted D-1641, which placed the sole responsibility of meeting all of the objectives  
13 in the 1995 Bay-Delta Plan upon the California Department of Water Resources (“DWR”) and the  
14 United States Bureau of Reclamation (“USBR”) as part of their respective operations of the State  
15 Water Project (“SWP”) and Central Valley Project (“CVP”). However, as part of the water right  
16 hearing that led to D-1641, the Board also accepted the terms of a settlement agreement known as  
17 the San Joaquin River Agreement (“SJRA”). Pursuant to the SJRA, the responsibility for meeting  
18 the April-May pulse flow objectives in the 1995 Bay-Delta plan was temporarily allocated to  
19 certain water right holders in the watershed of the San Joaquin River (including SJTA member  
20 agencies) for a twelve-year period – in exchange, effectively, for compensation from USBR.  
21 During that twelve-year period, a study known as the Vernalis Adaptive Management Plan  
22 (“VAMP”) was to be conducted in order to, among other things, evaluate the effects of varying San  
23 Joaquin River flow and SWP/CVP exports on the survival of juvenile chinook salmon migrating  
24 through the Delta.

25  
26  
27 <sup>4</sup> The opinion in *United States v. State Water Resources Control Bd.* was authored by Justice John T. Racanelli, and is  
28 often identified simply as *Racanelli*. Accordingly, references to that case are short-cited in this Petition/Complaint as  
*Racanelli*. Consistent with this reference, the opinion in *State Water Resources Control Bd. Cases*, authored by Ronald  
B. Robie, will be short-cited in this Petition/Complaint as *Robie*.

1           114. In 2006, the Board made minor revisions to the 1995 Bay-Delta Plan to comply  
2 with Justice Robie’s decision in *State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th  
3 674, resulting in the 2006 Bay-Delta Plan. Following the amendments, D-1641 remained the  
4 implementing document for the 2006 Bay-Delta Plan. At that point, the VAMP study had been  
5 ongoing for seven years, and was set to expire in approximately five years at the end of 2011.  
6 Notably, after the expiration of the VAMP program, USBR has had a difficult time complying with  
7 the flow objectives at the Vernalis compliance point. In fact, in recent communications to the State  
8 Water Board, USBR stated it is no longer operating its facilities with the aim of meeting the  
9 Vernalis flow objectives in the 2006 Bay-Delta Plan.

10           115. In 2008, the State Water Board adopted the 2008 Bay-Delta Strategic Workplan  
11 which, among other things, prioritized the review and update of the Bay-Delta Plan.

12           116. In 2009, the State Water Board issued the Notice of Preparation and Scoping  
13 Meeting for Environmental Documentation for the Update and Implementation of the Water  
14 Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary: Southern  
15 Delta Salinity and San Joaquin River Flows (“2009 NOP”). As explained below, after the formal  
16 review began, the Board’s review process was repeatedly delayed due to inaction on the part of the  
17 State Water Board.

18           **2. The SWB’s Unlawful Segmentation/Phasing of the Revisions to the**  
19           **2006 Bay-Delta Plan**

20           117. On or about February 13, 2009, the State Water Board issued the 2009 NOP,  
21 formally advising the public it planned to pursue a phased approach to revising the 2006 Bay-Delta  
22 Plan. Specifically, the 2009 NOP advised that the Board would begin preparing the environmental  
23 documentation for updating only the “Southern Delta salinity” and “San Joaquin River flow  
24 objectives” components of the Bay-Delta Plan. The Board stated that it would begin “other  
25 portions of the environmental documentation as soon as additional information is available.” (2009  
26 NOP, p. 2.)

27           118. The Board later explained that it was pursuing a four-phased approach to revising  
28 the Bay-Delta Plan.

1           119. Phase 1 of the process addressed revisions to the objectives/program of  
2 implementation for San Joaquin River flows (including certain tributaries to the San Joaquin River)  
3 and southern Delta salinity.

4           120. Phase 2 of the process would address/is addressing revisions to the remaining  
5 objectives/program of implementation for the Bay-Delta Plan, including Delta outflow, Delta  
6 inflow, and Sacramento River flows (including certain tributaries to the Sacramento River).

7           121. In addition to dividing its revisions of the Bay-Delta Plan into two separate  
8 processes, the Board also divided its environmental review and analysis of the revisions into two  
9 separate processes and two separate environmental documents.

10          122. Every draft of the SED the Board has issued for the Phase 1 Amendments has  
11 assumed – for purposes of review and analysis of impacts – that the rest of the Bay-Delta Plan will  
12 remain unchanged. In other words, the Board reviewed and analyzed the Phase 1 Amendments as  
13 if the Phase 2 Amendments did not exist.

14          123. Similarly, the Scientific Basis Report that the SWB adopted in 2017 for the Phase 2  
15 revisions assumed – for purposes of analysis – that the Phase 1 revisions had not occurred, and that  
16 San Joaquin River contributions to the Delta would remain unchanged. In other words, the Board  
17 reviewed and analyzed the Phase 2 Amendments as if the Phase 1 Amendments did not exist.

18          124. The Board itself recognized the problem with segmenting the review of the Bay-  
19 Delta Plan by acknowledging in a Fact Sheet for the Scientific Basis Report that “[t]he Bay-Delta  
20 watershed is an inextricably linked ecosystem – from streams where native fish spawn through to  
21 the ocean.” (Fact Sheet for Phase II Update of the Bay-Delta Plan: Inflows to the Sacramento River  
22 and Delta and Tributaries, Delta Outflows, Cold Water Habitat and Interior Delta Flows, p. 6.)

23          125. Phases 3 and 4 of the process are in a state of redevelopment or abandonment. The  
24 SWB described Phase 3 as the process through which the Board would implement the changes  
25 from Phases 1 and 2 through water right actions and other activities. The SWB previously  
26 described Phase 4 as the process through which the Board would develop and implement flow  
27 objectives to address public trust needs on high priority streams pursuant to the Delta Reform Act  
28 requirement that the Board “develop new flow criteria for the Delta ecosystem necessary to protect

public trust resources” (Wat. Code, § 85086[c][1]), and further pursuant to the Delta Stewardship Council’s directive in the Final Delta Plan (2013), that the Board adopt flow objectives for high-priority tributaries in the Delta watershed by June 2018.

126. In the Board’s most recent explanation of the phased update process, Phases 3 and 4 have disappeared.

### **3. 2012 Draft SED and 2012 Revised Bay-Delta Plan**

127. On or about December 31, 2012, the State Water Board released its “Draft Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the Bay Delta: San Joaquin River Flows and Southern Delta Water Quality” (hereinafter the “2012 Draft SED”).

128. The 2012 Draft SED purported to analyze the environmental impacts associated with Phase 1 Amendments. (2012 Draft SED, p. 1-1.) The 2012 Draft SED stated that the environmental impacts associated with Phase 2 would be evaluated in a separate environmental document.

129. The 2012 Draft SED dispensed with the SJR Flow Objective at Vernalis and narrative objective for the protection of salmon contained in the 1995 and 2006 Bay Delta Plans, and replaced them with Lower San Joaquin River Fish and Wildlife Flow Objectives (hereinafter the “2012 Draft LSJR Flow Objectives”).

130. The 2012 Draft LSJR Flow Objectives included: (a) an objective requiring 1,000 cfs flow at Vernalis on the San Joaquin River during the month of October (2012 Draft SED, Appx K, at 1 of 11); and (b) a new narrative objective (hereinafter the “2012 Draft Narrative Objective”) (2012 Draft SED, Appx K, at 1 of 11.)

131. The program of implementation for the 2012 Draft LSJR Flow Objectives required “35 percent of unimpaired flow...from February through June from each of the Merced, Tuolumne, and Stanislaus Rivers on a 14-day running average...” (2012 Draft SED, Appx K, at 3 of 11.)

132. The program of implementation for the 2012 Draft LSJR Flow Objectives divided up the responsibility for meeting the 1,000 cfs October Vernalis objective; specifically, it provided

1 “the Merced shall provide 24 percent, the Tuolumne 47 percent, and the Stanislaus 29 percent of  
2 the flow needed to achieve a base flow of 1,000 cfs at Vernalis...” (2012 Draft SED, Appx K, at 3  
3 of 11 through 4 of 11.)

4 133. The program of implementation noted that the required “35 percent unimpaired  
5 flow...required from February through June from each of the Merced, Tuolumne, and Stanislaus  
6 Rivers” is “in addition to flows from the LSJR from sources other than the Merced, Tuolumne, and  
7 Stanislaus Rivers.” However, no other sources or required flows were named and/or discussed.  
8 (2012 Draft SED, Appx K, at 3 of 11.)

9 134. The SWB received more than 4,000 comments on the 2012 Draft SED and the  
10 proposed revisions to the Bay-Delta Plan, including comments from the SJTA and its member  
11 agencies.

12 135. The Board did not recirculate the 2012 Draft SED for nearly four years after  
13 accepting public comments.

#### 14 **4. The 2016 Proposed Phase 1 Amendments and the 2016 Draft SED**

15 136. On or about September 15, 2016, the State Water Board recirculated a revised Draft  
16 SED and a draft of the proposed Phase 1 Amendments to the Bay-Delta Plan.

17 137. The 2016 proposed amendments included significant changes to the plan area, the  
18 water quality objectives and the program of implementation to achieve those objectives.

##### 19 **a. The Plan Area**

20 138. In 2016, the Board revised the Plan Area to make it much smaller, including only a  
21 minor portion of the San Joaquin River watershed. Specifically, the Phase 1 Amendments only  
22 target the waters of the Merced, Tuolumne, and Stanislaus Rivers. Waterways/water users  
23 exempted from the objectives include the mainstem of the San Joaquin River upstream of its  
24 confluence with the Merced River, the Kings, Fresno, and Chowchilla Rivers which can flow to the  
25 San Joaquin River, the Calaveras, Mokelumne, and Cosumnes Rivers, the water users on the  
26 westside of the San Joaquin River, and water users in the Sacramento River watershed and the  
27 Bay-Delta estuary.

1                   **b. Water Quality Objectives**

2           139. In 2016, the Board proposed to create new objectives with compliance points on  
3 three of the tributaries to the San Joaquin River which had never before been directly targeted by  
4 the Bay-Delta Plan.

5           140. Specifically, the Phase 1 Amendments contained a new objective for the ostensible  
6 protection of fish and wildlife, requiring as follows: “[a] percent of unimpaired flow between 30%  
7 - 50%, inclusive, from each of the Stanislaus, Tuolumne, and Merced Rivers shall be maintained  
8 from February through June” based upon a minimum 7-day running average flow rate. (2016 Draft  
9 SED, Appx. K, p. 18.) This objective is referred to herein as the “Tributary UIF Objective.”<sup>5</sup>

10          141. The State Water Board defines unimpaired flow as “the natural water production of  
11 a river basin, unaltered by upstream diversions, storage, or by export or import of water to or from  
12 other watersheds.” (2016 Draft SED, Appx. K, p. 20.)

13          142. The Phase 1 Amendments also included a significant change to the flow  
14 requirement at Vernalis. The 2006 Bay-Delta Plan required specific base flows (measured in cfs)  
15 dependent upon the water year classification (e.g., wet, dry, critical). These base flow requirements  
16 could vary from as low as 710 cfs (in critically dry years) to 3,420 cfs (in wet years). In addition,  
17 the 2006 Bay-Delta Plan also required specific pulse flows at Vernalis during certain times in April  
18 and May; those flows could vary from as low as 3,110 cfs (in critically dry years) to as high as  
19 8,620 (in wet years). By contrast, the Phase 1 Amendments require much lower flows, and no pulse  
20 flow: “a minimum base flow value between 800 – 1,200 cfs, inclusive, at Vernalis shall be  
21 maintained [on the San Joaquin River] at all times during February through June.” (2016 Draft  
22 SED, Appx. K, p. 18.) The program of implementation for this objective states that when the  
23 percentage of unimpaired flow requirement on the Stanislaus, Tuolumne, and Merced Rivers is  
24 insufficient to meet this objective, the Stanislaus shall provide 29%, the Tuolumne 47%, and the  
25 Merced 24% of the additional total outflow needed to achieve and maintain the required base flow.

26 \_\_\_\_\_  
27 <sup>5</sup> The term “Tributary UIF Objective” is used throughout this Petition/Complaint to refer to the version of the objective  
28 proposed in 2016, as well as the modified version later proposed and adopted by the Board in 2018, which requires as  
follows: “Maintain 40% unimpaired flow, with an allowed adaptive range between 30% and 50%, inclusive, from each  
of the Stanislaus, Tuolumne, and Merced Rivers from February through June.”



1 The effect of such implementation would be that additional water from the Stanislaus, Tuolumne,  
2 and Merced Rivers – beyond the amount required by the Tributary UIF Objective – would be  
3 required to meet the Vernalis requirement, most likely in dry or critically dry years. This objective  
4 is referred to herein as “Vernalis Base Flow Objective.”<sup>6</sup>

5 143. By targeting only the Stanislaus, Tuolumne, and Merced Rivers in the San Joaquin  
6 River watershed, and by placing the compliance points below each of the rim dams on those three  
7 rivers, the State Water Board created objectives which can only be implemented and/or enforced  
8 against a select group of water users that have diversion facilities downstream of the rim dams and  
9 upstream of the compliance points on the Stanislaus, Tuolumne, and Merced Rivers. Thus, by their  
10 very design, Tributary UIF Objectives require senior water right holders on the Stanislaus,  
11 Tuolumne, and Merced Rivers to meet flow requirements, while simultaneously exempting  
12 countless other junior water rights holders within the San Joaquin River watershed and throughout  
13 the entire Bay-Delta watershed.

14 144. The Phase 1 Amendments also contained a new narrative objective for the  
15 ostensible protection of fish and wildlife. The narrative objective required as follows: “Maintain  
16 inflow conditions from the San Joaquin River watershed to the Delta at Vernalis sufficient to  
17 support and maintain the natural production of viable native San Joaquin River watershed fish  
18 populations migrating through the Delta. Inflow conditions that reasonably contribute toward  
19 maintaining viable native migratory San Joaquin River fish populations include, but may not be  
20 limited to, flows that more closely mimic the natural hydrographic conditions to which native fish  
21 species are adapted, including the relative magnitude, duration, timing, and spatial extent of flows  
22 as they would naturally occur. Indicators of viability include population abundance, spatial extent,  
23  
24  
25

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26 <sup>6</sup> The term “Vernalis Base Flow Objective” is used throughout this Petition/Complaint to refer to the version of the  
27 objective proposed in 2016, as well as the modified version later proposed and adopted by the Board in 2018, which  
28 requires as follows: “At all times during February through June, the flow at Vernalis, as provided by the percent of  
unimpaired flow objective, shall be now lower than the base flow value of 1,000 cfs with an allowed adaptive  
management range between 800 – 1,200 cfs, inclusive.

1 distribution, structure, genetic and life history diversity, and productivity.” (2016 Draft SED,  
2 Appx. K, p. 18.) This objective is referred to herein as the “Inflow Narrative Objective.”<sup>7</sup>

3 145. The Phase 1 Amendments fail to explain how the Tributary UIF Objective relates to  
4 the Inflow Narrative Objective, or to the Vernalis Base Flow Objective.

5 **c. Program of Implementation**

6 146. The SWB also made substantial changes to the program of implementation (“POI”)  
7 to implement the Phase 1 Amendments.

8 147. The POI contains several provisions that do not serve the purpose of implementing  
9 any objectives, but rather of modifying the objectives without Board approval and a properly  
10 noticed hearing.

11 148. The POI states that the Tributary UIF Objective and the Vernalis Base Flow  
12 Objective will be implemented by requiring 40% unimpaired flow, based on a minimum 7-day  
13 average, from each of the Stanislaus, Tuolumne, and Merced Rivers.

14 149. The POI allows the SWB, or the Executive Director of the SWB under certain  
15 conditions, to make the following “adaptive adjustments” to the Tributary UIF Objective:

- 16 a. The required percent of unimpaired flow can be adjusted to any value  
17 between 30% and 50%.
- 18 b. The required percent of unimpaired flow for February through June can be  
19 managed as a total volume of water and released on an adaptive schedule  
20 that is different from what would occur by tracking the unimpaired flow  
21 (referred to as “flow shaping”).
- 22 c. The release of a portion of the February through June unimpaired flow can  
23 be delayed until after June to prevent adverse effects to fisheries, including  
24 temperature, that would otherwise result from implementation of the  
25 February through June flow requirements (referred to as “flow shifting”).  
26

27  
28 <sup>7</sup> The Inflow Narrative Objective that was proposed in 2016 did not change when the SWB responded to comments in 2018. However, the Board added a second narrative objective, which is explained below.

1 d. The Vernalis Base Flow Objective can be adjusted to any value between 800  
2 and 1,200 cfs.

3 150. The “adaptive adjustments” are identified as measures for implementing the  
4 Tributary UIF Objective, the Vernalis Base Flow Objective, and an additional October pulse flow  
5 objective. However, these adaptive adjustments do not achieve those objectives; they change those  
6 objectives.

7 151. The adaptive adjustment that allows for flow shaping is not an activity needed to  
8 achieve the objectives. Instead, it is an activity that allows for the modification of the Tributary  
9 UIF Objective by changing the unimpaired flow component and the 7-day running average  
10 component of that objective. Allowing the required percentage of water to be treated as a total  
11 volume of water and released on an undetermined adaptive schedule, as opposed to bypassed  
12 and/or released in accordance with a specific percentage of unimpaired flow measured based on a  
13 7-day running average, conflicts with the Tributary UIF Objective itself.

14 152. The adaptive adjustment allowing for flow shifting is not an activity needed to  
15 achieve the objectives. Instead, it is an activity that allows for the modification of the Tributary  
16 UIF Objective by changing the unimpaired flow component, the 7-day running average  
17 component, and the temporal scope of that objective from February through June to other times of  
18 the year. Allowing for the release of a portion of the February through June unimpaired flow to be  
19 delayed until after June first requires that the percentage of February through June unimpaired flow  
20 be treated and managed as a total volume of water instead of bypassed/released in accordance with  
21 a specific percentage of unimpaired flow. It then requires that a portion of that total volume of  
22 water be held in a reservoir and released at some time other than February through June. This  
23 operation conflicts with the Tributary UIF Objective itself.

24 153. The POI also requires the Board, when implementing the objectives, to create and  
25 impose minimum reservoir carryover storage targets or other requirements to ensure that providing  
26 flows to meet the flow objectives will not have significant adverse temperature or other impacts on  
27 fish and wildlife or, if feasible, on other beneficial uses. This requirement is referred to herein  
28 “Carryover Storage.”

1           154. The Carryover Storage requirement is not an activity needed to achieve the  
2 objectives. Instead, it is a requirement embedded in the POI intended to avoid the adverse effects  
3 that will be caused by adherence to the Tributary UIF Objective. Any requirement established for  
4 the purpose of protecting a beneficial use must be developed as a water quality objective, a process  
5 which requires the Board to establish a reasonable level of protection considering all the other uses  
6 to which the water is put. By embedding the Carryover Storage requirement in the POI for the  
7 ostensible purpose of directly protecting beneficial uses, rather than developing the requirement as  
8 a balanced objective, the Board has subverted the balancing requirement in the Porter-Cologne  
9 Act.

10           155. The POI does not include a description of any actions necessary to achieve the  
11 Inflow Narrative Objective.

12           156. The POI requires the Board to establish a Stanislaus, Tuolumne, and Merced  
13 Working Group (“STM Working Group”) to assist with the implementation, monitoring, and  
14 effectiveness assessment of the February through June LSJR flow requirements.

15           157. The POI requires the Board to establish “Biological Goals” that will be used to  
16 inform the adaptive methods and to evaluate the effectiveness of the program of implementation.  
17 The Board will not consider approval of the biological goals before the adoption of the plan itself,  
18 but rather within 180 days from the date the Office of Administrative Law approves the  
19 amendments to the plan. The POI states that reasonable contribution to the biological goals may  
20 include meeting temperature targets and other measures of quality and quantity of spawning,  
21 rearing and migration habitat, fry production, and juvenile outmigrant survival to the confluence of  
22 each tributary to the San Joaquin River.

23           158. The POI fails to specify how compliance with the Tributary UIF Objective will be  
24 measured, thereby failing to describe a critical action necessary to achieve the objective. Instead,  
25 the POI states that implementation of the Tributary UIF Objective will require the development of  
26 information and specific measures to achieve the flow objectives and to monitor and evaluate  
27 compliance. These measures were not to be considered for approval by the Board until after the  
28 plan itself was adopted.

1           159. The POI failed to specify a procedure for implementing the adaptive adjustments,  
2 and instead delegated this responsibility to the STM Working Group, or State Water Board staff as  
3 necessary. The procedures for implementing the adaptive adjustments were not to be considered  
4 for approval by the Board until after the plan itself was adopted.

5  
6                           **d. The SED did not Evaluate the Project Adopted by the  
State Water Board**

7           160. The SED did not model or analyze the same objectives adopted by the SWB.

8           161. Instead, the SWB used a trial and error approach, which it referred to as an iterative  
9 process, to arrive at and present the results of multiple computer simulation models showing a  
10 single example of how the system could operate given certain constraints. However, the  
11 operational constraints used in the modeling are inconsistent with the objectives that the SWB  
12 proposed and adopted in several critical ways. In the SED, the Board acknowledged that some of  
13 those constraints do not comprise a plan of implementation or otherwise carry the weight of  
14 regulatory requirements.

15           162. The State Water Board used the Water Supply Effects (“WSE”) model to assess the  
16 impacts of the Phase 1 Amendments on water supply.

17           163. The State Water Board used the Statewide Agricultural Production (“SWAP”)  
18 model to assess the impacts of the Phase 1 Amendments on agriculture; SWAP relied on inputs and  
19 results from the WSE model.

20           164. The model used by the State Water Board to assess the impacts of the Phase 1  
21 Amendments on salmonid production was the SalSim model, which relied on inputs and results  
22 from the WSE model.

23                           **i. WSE Modeling Constraints**

24           165. The WSE model assumes the implementation of multiple operational constraints  
25 that are not required by any of the objectives and, in certain cases, are inconsistent with the  
26 objectives.

27           166. Specifically, the WSE model assumes that when the required unimpaired flow  
28 percentage for the Tributary UIF Objectives is set at 40% or higher, some of the required instream

1 flows (not to exceed 25% of the total quantity of instream flow required from the months of  
2 February through June) will be shifted to the months of July through November, mostly in water  
3 years classified as wet. This assumption is referred to herein as “WSE Flow Shifting.” The purpose  
4 of WSE Flow Shifting is to mitigate the adverse effects on reservoir levels and instream water  
5 temperatures that will result from requiring 40% (or more) unimpaired flow, to show a reduced  
6 likelihood of negative effects on fish and wildlife, and to show an increase in the overall potential  
7 benefit that is not present when the Tributary UIF Objectives are modeled without the WSE Flow  
8 Shifting.

9 167. The WSE Flow Shifting is not required by any of the objectives.

10 168. The WSE Flow Shifting is inconsistent with the Tributary UIF Objective insofar as  
11 (1) it diverges from the unimpaired flow regime and requires the percentage of unimpaired flow  
12 from February through June to be managed as a total volume of water; (2) it requires the  
13 maintenance of flows outside the February through June time period covered by the Tributary UIF  
14 Objectives; and (3) it reduces the amount of unimpaired flow required during the February through  
15 June period to a lower percentage than would otherwise be required by the Tributary UIF  
16 Objective.

17 169. The WSE model includes Carryover Storage requirements that restrict New  
18 Melones Reservoir (on the Stanislaus River), New Don Pedro Reservoir (on the Tuolumne River),  
19 and Lake McClure (on the Merced River) from being drawn below certain levels. Similar to the  
20 WSE Flow Shifting, the Carryover Storage requirement was included in the WSE model to  
21 minimize the impact on instream temperature that would otherwise be caused by the lowering of  
22 reservoir levels and the reduction of coldwater reserves through the implementation of the  
23 Tributary UIF Objective.

24 170. Carryover Storage is not required by any of the objectives.

25 171. The WSE model includes operational constraints that restrict reservoir withdrawals  
26 when the required unimpaired flow percentage is 40% or higher if reservoir levels are below a  
27 certain predetermined point (“Refill Criteria”).

28 172. Refill Criteria is not required by any of the objectives.

1 173. The Refill Criteria was included in the WSE model so that reservoir levels and  
2 coldwater reserves recover more quickly after a drought, thereby minimizing adverse temperature  
3 impacts that would otherwise be caused by the Tributary UIF Objectives.

4 174. The WSE model assumes that current operations will continue and assumes these  
5 operations as a “minimum base flow.” For example, there are current requirements, contained in  
6 licenses issued by the Federal Energy Regulatory Commission (“FERC”), and reasonable and  
7 prudent alternatives set forth in biological opinions issued as part of Section 7 consultation under  
8 the federal Endangered Species Act, that may require more flow than the Tributary UIF Objectives.  
9 These existing flow requirements are referred to as “Minimum Base Flows.”

10 175. Minimum Base Flows are not required by any of the objectives.

11 176. The WSE model is a monthly model, wherein required flows are calculated on a  
12 monthly basis and remain static over the course of an entire month. Specifically, the February  
13 through June minimum instream flow requirement is calculated in the WSE model as a percentage  
14 of that month’s unimpaired flow, for each month in February through June.

15 177. None of the objectives require that flows be calculated on a monthly basis.

16 178. The WSE’s monthly model smooths out the fluctuation in flows required by the  
17 daily running average of the Tributary UIF Objectives and the Vernalis Flow Objective, and fails  
18 to accurately reflect the impacts of those objectives insofar as they require the maintenance of a  
19 percentage of unimpaired flow based on a daily running average.

20 179. All of these operational constraints were developed as part of the SWB’s iterative  
21 process for modeling the objectives in a way that did not adversely affect the beneficial uses that  
22 the objectives were intended to protect. By including all of these operational constraints in the  
23 modeling which are not required by the objectives themselves, and which conflict with the  
24 objectives in certain circumstances, the Board has not analyzed the actual impact of the objectives  
25 and has not developed any modeling results that can be used to determine whether the level of  
26 protection provided by the objectives is reasonable.

1                                   **ii.       SWAP Model**

2           180.   The SWAP model incorporates the results and modeling from the WSE model.

3           181.   The SWAP model assumes that agricultural decisions will be market based, but it  
4 fails to include all reasonably foreseeable market factors. The SWAP model relies only on  
5 commodity pricing to form assumptions as to which crops will be fallowed, but it fails to consider  
6 the secondary value that crops such as alfalfa and pasture have on cattle and dairy sectors.

7           182.   The SWAP model assumes that all lower value crops will be fallowed before higher  
8 value crops through intra-district water transfers. However, individual farmers rarely hold water  
9 rights separate and apart from irrigation districts. Certain irrigation districts do not allow intra-  
10 district water transfers. The SWAP model did not determine which irrigation districts permit such  
11 transfers and which preclude such transfers. The SWAP model did not assess how the agricultural  
12 community would be impacted given the restrictions on intra-district water transfers.

13           183.   The SWAP model does not disclose the commodity pricing and yield production  
14 numbers used. Without such information, the SWB could not assess whether the model correctly  
15 valued crops, whether it properly determined which crops would be fallowed, or whether it  
16 properly assessed the number of acres fallowed.

17           184.   The SWAP model does not consider multiple-year impacts. Specifically, the  
18 SWAP model only considers the impacts to a single year of agriculture and does not consider the  
19 impacts of multiple-year water supply reductions. The WSE Model reflects that the Phase 1  
20 Amendments will result in reductions in water supply in almost every year, with significant multi-  
21 year reductions during drought cycles.

22           185.   The SWAP model obscures the analysis of significant or potentially significant  
23 environmental impacts, and artificially inflates the benefits of the Phase 1 Amendments by  
24 improperly assessing the impact on agriculture.

25                                   **iii.       SalSim Model**

26           186.   The State Water Board used the SalSim model to analyze the impacts of the  
27 objectives on salmonid production.



1 187. The SalSim model assumes that 25% of the required unimpaired flow from  
2 February through June is shifted to the months of September through December in all water year  
3 classifications. This assumption is referred to herein as “SalSim Flow Shifting.” The SalSim Flow  
4 Shifting was used to provide temperature control, to reduce the likelihood of negative effects on  
5 fish and wildlife, and to show an increase in the overall potential benefit that is not present when  
6 the Tributary UIF Objectives are modeled without the WSE Flow Shifting.

7 188. SalSim Flow Shifting is not required by any of the objectives.

8 189. SalSim Flow Shifting is inconsistent with the Tributary UIF Objectives insofar as  
9 (1) it diverges from the unimpaired flow regime and requires the percentage of unimpaired flow  
10 from February through June to be managed as a total volume of water; (2) it requires the  
11 maintenance of flows outside the February through June time period covered by the Tributary UIF  
12 Objectives; and (3) it reduces the amount of unimpaired flow required during the February through  
13 June period to a lower percentage than would otherwise be required by the Tributary UIF  
14 Objective.

15 190. SalSim Flow Shifting was also developed as part of the SWB’s iterative process for  
16 modeling the objectives in a way that did not adversely affect the beneficial uses that the objectives  
17 were intended to protect.

18 **5. The SED’s Analysis Fails to Analyze the Impacts of San Francisco’s Most**  
19 **Reasonably Foreseeable Method of Compliance with the Phase 1 Amendments:**  
**Increased Water Rationing.**

20 191. The SED is required to identify any significant or potentially significant adverse  
21 environmental impacts, analyze reasonable alternatives and mitigation measures to avoid or reduce  
22 any significant or potentially significant adverse environmental impacts, and analyze the  
23 environmental impacts of the reasonably foreseeable methods of compliance. (Cal. Code Regs., tit.  
24 23, § 3777(b)(2-4).) Further, the Board’s analysis of the reasonably foreseeable methods of  
25 compliance must assess a reasonable range of environmental, economic, and technical factors.  
26 (Cal. Code Regs., tit. 23, § 3777(c).)

27 192. CEQA similarly mandates that when an agency adopts a rule, regulation, or  
28 performance standard, it must analyze the reasonably foreseeable methods of compliance for the

rule, regulation, or performance standard. (Pub. Res. Code, § 21159.) This environmental analysis must consider environmental, economic, and technical factors. (Pub. Res. Code, § 21159(c-d).)

193. The SED fails to analyze the environmental and economic impacts of the most reasonably foreseeable method of compliance by San Francisco with the Phase 1 Amendments: reduction of water deliveries throughout the RWS Service Area. Assuming a reoccurrence of the 1987-1992 drought and that San Francisco was responsible for bypassing 51.7% of the additional flow on the Tuolumne River required by the 40% unimpaired flow objective,<sup>8</sup> San Francisco's water supply would be reduced by 129,884 acre-feet per year, or approximately 116 mgd,<sup>9</sup> for each of the six years of drought. A reduction of 116 mgd in each year of such a drought would require San Francisco to impose unprecedented levels of mandatory rationing as follows:

- a. Assuming RWS demand of 223 mgd, which was the pre-drought demand in fiscal year 2012-2013, the SFPUC would be compelled to impose a 39% reduction in deliveries during the first three years of the drought and a 49% reduction in deliveries the following three years.
- b. Assuming RWS demand of 265 mgd, which reflects the SFPUC's maximum contract obligations and is consistent with projected RWS demand in 2040, the SFPUC would be compelled to impose a 40% reduction in deliveries for the first year of the drought, and a 54% reduction in deliveries in each of the subsequent five years.

**A. The SED Fails to Analyze the Environmental Impacts of Water Rationing Within the RWS Service Area.**

194. Increased rationing throughout the RWS Service Area, and the consequent reduction in outdoor water use and resulting loss in park vegetation, landscaping, and trees (the

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<sup>8</sup> The analysis in this Petition assumes a 51.7% flow contribution by San Francisco. As a water supply provider to 2.7 million people throughout the Bay Area, San Francisco must utilize worst-case scenarios for water supply planning purposes. In presenting the potential water supply, environmental, and socioeconomic effects from certain interpretations of the Raker Act and the 1966 Fourth Agreement San Francisco does not waive arguments it may have about how the Raker Act or Fourth Agreement should or will be interpreted in future proceedings before the State Water Board, the Federal Energy Regulatory Commission, courts of competent jurisdiction, or in any other context.

<sup>9</sup> The SED incorrectly states San Francisco's water supply would be reduced by 119,000 acre-feet per year or 106 mgd under this scenario.

1 urban forest) would result in significant environmental impacts that the SED did not analyze,  
2 including but not limited to the following:

3 i. Adverse impacts to cultural, aesthetic and recreational resources. The loss of vegetation  
4 in parks and other public and private outdoor spaces throughout the RWS Service Area  
5 would have an adverse effect on aesthetic resources and result in reduced use and  
6 enjoyment of those areas.

7 ii. Increased risk of urban wildfires. Heightened levels of rationing and water use  
8 restrictions would result in parched vegetation and desiccated trees, thereby increasing fire  
9 hazards within and adjacent to urban areas in the RWS Service Area.

10 iii. Adverse impacts to habitat. Degradation of urban forests and other natural areas within  
11 the RWS Service Area would decrease habitat for wildlife, including threatened and  
12 endangered species.

13 iv. Effects on energy consumption, human health, water quality, air quality and greenhouse  
14 gas emissions from exacerbation of urban heat islands. Increased water rationing and water  
15 use restrictions in the RWS Service Area will result in intensification of urban heat islands.  
16 Intensification of urban heat islands has the potential to increase energy consumption,  
17 elevate levels of air pollutants, and exacerbate health impacts.

18 195. Increased rationing throughout the RWS Service Area would also impact  
19 development in the RWS Service Area and potentially disrupt the pattern of compact, urban  
20 growth called for in Plan Bay Area. This potential disruption could push new development to  
21 areas outside the Bay Area with more reliable dry-year and future water supplies. The SED does  
22 not assess the significant environmental impacts that could result from such sprawl: increased  
23 greenhouse gas and other air pollutant emissions as a result of more vehicle miles travelled and the  
24 loss of open spaces and forests, which function as carbon sinks; land use impacts resulting from  
25 loss of open space and agricultural land due to sprawling development; increased erosion, flooding,  
26 and water quality impacts associated with the development of open spaces; and greater per capita  
27 water consumption as a result of increased population growth in sprawling developments with  
28 higher per capita water usage, as compared to urban infill developments.

1                   **B.      The SED Fails to Identify or Assess the Phase 1 Amendments’ Conflict**  
2                   **with State and Local Plans Promoting Green Infrastructure.**

3           196.    The adverse environmental impacts of severe water supply rationing in the RWS  
4 Service Area contradict state and local plans promoting green infrastructure.

5           197.    Numerous state and local policies encourage green infrastructure, i.e., landscaping  
6 and open space areas, in order to provide social and environmental benefits, including improved  
7 water quality and groundwater recharge.

8           198.    Increased water rationing would have the effect of degrading landscaping and open  
9 spaces in the RWS Service Area. The SED fails to identify, discuss, and reconcile the  
10 inconsistencies with applicable state and local plans that promote green infrastructure.

11          199.    The SED also fails to disclose, let alone discuss, the Phase 1 Amendments’  
12 inconsistency with Plan Bay Area as mandated by CEQA Guidelines section 15125(d).

13                   **C.      The SED Fails to Analyze the Economic Impacts of Water Rationing.**

14          200.    By failing to acknowledge the need for increased rationing throughout the RWS  
15 Service Area, the SED also fails to consider severe economic impacts to San Francisco and its  
16 retail and wholesale customers in the Bay Area resulting from such rationing in violation of the  
17 Board’s certified regulatory program and CEQA. (Cal. Code Regs., tit. 23, § 3777(c); Pub. Res.  
18 Code, § 21159(c); Cal. Code Regs., tit. 14, § 15187(d).)

19          201.    The magnitude of rationing would be far too severe for the RWS residential sector  
20 and dedicated irrigation sector to bear alone, and thus, the commercial and industrial sectors would  
21 be directly affected.<sup>10</sup> The resulting loss in jobs and economic output across the Bay Area during a  
22 sequential-year drought, such as the 1987-1992 drought, would be significant:

23               a.      A loss of 445,907 jobs and a loss in economic output of over \$116 billion,  
24                        assuming RWS pre-drought demand of 223 mgd.

25               b.      A loss of 657,316 jobs and a loss in economic output of over \$234 billion,  
26                        assuming RWS demand of 265 mgd.

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<sup>10</sup> Rationing up to approximately 20-30% in the RWS Service Area can be absorbed solely by cuts to the residential sector and dedicated irrigation.

1           202. Implementation of the Phase 1 Amendments would also result in rate increases for  
2 the SFPUC's customers, who already pay some of the highest water rates in California. The  
3 SFPUC and its wholesale customers recover fixed costs through volumetric rates. When water  
4 sales fall due to rationing, water rates must increase to recover fixed costs and balance water utility  
5 budgets. Under the Phase 1 Amendments, assuming maximum contract deliveries of 265 mgd, San  
6 Francisco would need to raise its rates by 7% and the wholesale customers would need to increase  
7 their rates by 9% just to recover the expected reduction in water sales. At the same time, the  
8 SFPUC's customers would be subject to additional water rate increases of unknown magnitude to  
9 fund the development of alternate water supplies to make up for the significant reductions in RWS  
10 deliveries caused by the Phase 1 Amendments.

11           203. The SED also fails to consider, in violation of Water Code section 13241(d), that  
12 implementation of the Phase 1 Amendments would result in a substantial reduction in San  
13 Francisco's hydropower generation and associated revenue. San Francisco generates electricity  
14 when it releases water from Hetch Hetchy Reservoir for delivery to the Bay Area, primarily via  
15 Canyon Power Tunnel and Kirkwood Powerhouse. Therefore, rationing the delivery of water to  
16 the RWS reduces San Francisco's hydropower generation. San Francisco estimates that the  
17 economic impact of foregone hydropower sales alone due to the implementation the Tributary UIF  
18 Objective on the Tuolumne River would be approximately \$2 million per year for each successive  
19 year of a protracted drought.

20           **6. The SED's Three Proposed Methods of Compliance by San Francisco Are Not**  
21           **Supported by Substantial Evidence.**

22           204. Although the SED concedes that the project may require San Francisco to  
23 significantly curtail its diversions from the Tuolumne River during a sequential-year drought, the  
24 Board did not analyze any of these reasonably foreseeable adverse environmental and economic  
25 impacts from water rationing. Instead, the SED unreasonably assumes that the SFPUC will not  
26 need to increase rationing because San Francisco will be able to develop and/or procure sufficient  
27 replacement water supplies through three methods of compliance identified in the SED: (1) large-  
28 scale water transfers from MID or TID; (2) a large-scale desalination plant at Mallard Slough; and  
(3) in-Delta diversion.

1                   A.       **Large-Scale Water Transfers from MID or TID to San Francisco Are**  
2                               **Unprecedented and Not Reasonably Foreseeable.**

3           205.   The State Water Board's assumption that San Francisco will be able to purchase the  
4           requisite volume of replacement water from MID and/or TID is not supported by substantial  
5           evidence and the analysis of environmental and economic impacts associated with such water  
6           transfers is inadequate.

7                               i.       **There is No Historical Support for Such a Transfer.**

8           206.   The SED estimates that under the Phase 1 Amendments, the SFPUC would  
9           experience a water supply deficit of 119,000 acre-feet per year, or 106 mgd, during a six-year  
10          drought based on the historic hydrology from the 1987-1992 drought. SFPUC's modeling shows  
11          the reduction would actually be 129,884 acre-feet per year, or 116 mgd. But even assuming the  
12          119,000 acre-feet per year estimate were correct, MID and TID have never transferred anything  
13          close to that volume of water to any other entity, especially during a protracted drought. Given  
14          that such a large-scale water transfer to San Francisco is unprecedented, it cannot be considered a  
15          reasonably foreseeable method of compliance by San Francisco with the Phase 1 Amendments.

16                               ii.       **It is Not Reasonably Foreseeable that MID or TID Would Agree**  
17                                       **to Export Water During a Protracted Drought.**

18          207.   The State Water Board's assumption that, following implementation of the Phase 1  
19          Amendments, TID or MID would willingly sell water to San Francisco that is needed within their  
20          own respective service areas in the midst of a protracted drought is pure speculation that ignores  
21          recent history. Specifically, the SED's assumption ignores that San Francisco tried and failed to  
22          negotiate a relatively small water transfer, i.e., 2 mgd, from MID or OID during the most recent  
23          drought. In addition, this assumption ignores persistent local opposition in Stanislaus County to  
24          water transfers to San Francisco. Because the Phase 1 Amendments will only exacerbate dry year  
25          water supply reductions, the likelihood of any such transfers is even more remote.

26          208.   The SED assumes MID and TID will increase their current levels of groundwater  
27          pumping in order to facilitate a large-scale transfer of surface water to San Francisco. But this  
28          assumption contradicts the SED's own conclusion that the current level of groundwater pumping in  
                the Modesto and Turlock subbasins is already unsustainable.

1           209. The Board’s reliance on increased groundwater pumping also ignores the potential  
2 limitation on groundwater pumping within TID and MID that may result from implementation of  
3 the Sustainable Groundwater Management Act, Water Code sections 10720, *et seq.* (“SGMA”),  
4 and a recently enacted groundwater management ordinance in Stanislaus County that restricts out-  
5 of-county transfers of groundwater or pumping to replace surface water, and similar groundwater  
6 management ordinances that counties throughout the Central Valley have enacted.

7                           iii.           **The SED improperly relies on the WSIP PEIR’s environmental**  
8   **analysis of a 2 mgd transfer with the Districts.**

9           210. The SED’s reliance on the WSIP PEIR’s environmental analysis of a 2 mgd transfer  
10 with MID and TID to analyze the environmental impacts of a much larger transfer that could  
11 involve groundwater substitution is improper.

12           211. First, as discussed above, under the Phase 1 Amendments San Francisco could face  
13 a reduction of 116 mgd per year during a protracted drought, which is exponentially more water  
14 than the proposed 2 mgd transfer that the SFPUC analyzed in the WSIP PEIR.

15           212. Second, the potential 2 mgd transfer analyzed in the WSIP PEIR involved solely the  
16 use of conserved water, not a transfer of surface water to be replaced by groundwater substitution,  
17 as contemplated in the SED. Given these dramatic and material differences between the 2 mgd  
18 transfer analyzed in the PEIR and the massive transfer contemplated by the SED, the SED’s  
19 reliance on the PEIR analysis is inaccurate, misleading, and wholly inadequate.

20                           iv.           **The SED’s assumed purchase price for a large scale transfer has**  
21   **no reasonable basis.**

22           213. While acknowledging that the assumed purchase price of water transfers “is key to  
23 the analysis” of economic impacts of such transfers (SED at 20-48), the SED fails to provide any  
24 evidentiary support for its assumptions about the probable price of water transfers under its  
25 proposal.

26                           B.           **Large-Scale Desalination Plant at Mallard Slough Is Not Reasonably**  
27   **Foreseeable.**

28           214. There is no evidence supporting the SED’s conclusion that San Francisco could  
mitigate, even partially, the 129,884 acre-feet/year deficit that it could experience under the Phase

1 Amendments through the development of a large-scale (56,000 acre-feet per year) desalination  
2 plant located in Mallard Slough.

3 215. The SED relies on the feasibility, environmental, and economic analyses of two  
4 disparate projects—the Bay Area Regional Desalination Project (“BARDP”) and Poseidon  
5 Desalination Facility in Carlsbad (“Carlsbad Desalination Plant”)—and fails to take into account  
6 newly enacted legal requirements that apply to desalination plants in California.

7 216. The Board’s reliance on prior analyses of the BARDP is misplaced because those  
8 site-specific analyses contemplated a much smaller facility that produces no more than 22,400  
9 AF—less than half the production capacity of the 56,000 acre-feet per year plant the SED posits.  
10 And even then, the BARDP analyses fail to address numerous, unresolved potential feasibility  
11 concerns. Further, the only available analyses of the BARDP are preliminary and incomplete.

12 217. The Board’s reliance on the 2015 EIR for the Carlsbad Desalination Plant and other  
13 findings related to the plant is also inadequate because those analyses address a facility located in a  
14 disparate geographic area with a distinct source water intake. The SED does not describe in any  
15 detail, or draw any conclusions about, the geographical differences between the San Francisco  
16 Bay-Delta and coastal Carlsbad, and how these differences might affect impacts of a similarly  
17 sized facility at Mallard Slough. For example, important potential impacts of a Mallard Slough  
18 facility overlooked by the SED are those associated with brine discharge into the already stressed  
19 Delta ecosystem, as opposed to into the ocean.

20 218. Further, the Board’s reliance on prior analyses of the BARDP and the Carlsbad  
21 Desalination Project is misplaced because those analyses predate, and thus fail to take into account,  
22 State regulatory requirements enacted in 2015 that apply to all new desalination projects in  
23 California.

24 219. The SED also fails to analyze the economic impacts of a 56,000 acre-feet year  
25 desalination plant at Mallard Slough, thereby violating the requirements of the certified regulatory  
26 program for the Board's water quality control planning program and Public Resources Code section  
27 21159.



1           220. The SED fails to assess any potential rate impacts associated with the costs of  
2 constructing and operating a large-scale desalination plant. The Board does not even attempt to  
3 estimate the capital costs associated with the envisioned Mallard Slough facility, instead  
4 suggesting that construction costs would total somewhere within the broad range of \$168 million to  
5 \$1 billion. The SED also fails to consider annual energy costs, which, for the comparably sized  
6 Carlsbad Desalination Project, are approximately \$50 million/year.

7                   **C. The In-Delta Diversion Project Is Not Reasonably Foreseeable.**

8           221. Finally, the Board's assumption that San Francisco would be able to obtain  
9 replacement water through the development of an in-Delta diversion project identified in the SED  
10 unreasonably relies on the SFPUC's prior determination in the WSIP PEIR that the same project  
11 was *infeasible*. The SED offers no additional analysis, facts, or explanation as to why this project  
12 should now be considered feasible.

13           222. The SED also fails to analyze the economic impacts of the in-Delta diversion  
14 project that the Board envisions, and thereby violates the requirements of the certified regulatory  
15 program for the Board's water quality control planning program and Public Resources Code  
16 section 21159. For example, the SED fails to assess any potential rate impacts associated with the  
17 in-Delta diversion project, and does not even attempt to estimate the cost of compliance associated  
18 with the in-Delta diversion project envisioned by the Board.

19                   **7. The SED's Treatment of Municipal Water Service Providers is Inconsistent.**

20           223. The SED's inconsistent treatment of municipal water service providers also results  
21 in an unstable project description and deficient impact analysis.

22           224. The SED fails to present a clear description of the project because it fails to clarify  
23 the extent to which municipalities are responsible for complying with the Tributary UIF Objective.

24           225. The SED's explanation of whether and how various municipal water providers may  
25 be required to comply with the State Water Board's proposal is confusing, internally inconsistent,  
26 and impermissibly scattered throughout various chapters and appendices.

27           226. Although the SED posits that San Francisco may be responsible for implementing  
28 the proposed unimpaired flow requirement (SED at L-4), the impacts to San Francisco would be

1 “substantial” (*id.* at 13-60), and substantial reductions of existing surface water supplies constitute  
2 an adverse impact (*id.* at 13-49), the SED nevertheless fails to identify, let alone analyze, the  
3 adverse environmental and economic impacts to the Bay Area that could result from the Board’s  
4 implementation of the Phase 1 Amendments.

5 227. The SED thereby avoids any comprehensible, substantive discussion in the project  
6 description or elsewhere in the SED of how the Phase 1 Amendments may impact San Francisco—  
7 and many other potentially affected municipal water service providers—by leapfrogging over an  
8 analysis of the impacts that would result from the proposed draconian water supply reductions.

9 228. The SED simply assumes the SFPUC will not need to reduce deliveries to the RWS  
10 Service Area but instead will be able to replace the reduction in water supply from alternative  
11 sources. This approach avoids analyzing the predictable, adverse impacts to the Bay Area.

12 **8. The SFPUC Alternative to the Phase 1 Amendments.**

13 229. In its written comments to the Phase 1 Amendments and SED, San Francisco  
14 included a proposal for Tuolumne River ecosystem improvements that would meet fishery  
15 protection goals on the river without the significant environmental and economic impacts to the  
16 Bay Area that would result under the State Water Board’s proposal (“SFPUC Alternative”).

17 230. The SFPUC Alternative is a comprehensive proposal for the management of  
18 salmonids in the lower Tuolumne River based on Tuolumne River-specific studies and relevant  
19 scientific literature. San Francisco’s proposal is designed to expand the fall-run Chinook salmon  
20 and O.mykiss populations in the lower Tuolumne River and maintain water supply reliability for  
21 users of the Tuolumne River.

22 231. The SFPUC Alternative includes a schedule of instream flow releases from Don  
23 Pedro Reservoir designed to improve habitat conditions by serving specific ecological functions,  
24 e.g., spring pulse flows to increase outmigration success of fall-run Chinook salmon in the river,  
25 and proposes non-flow measures to improve existing physical habitats, reduce the detrimental  
26 effects of non-native predators on salmonids, and reduce undesirable effects of current hatchery  
27 practices on the lower Tuolumne River fall-run Chinook population.

1           232.   Following San Francisco’s submission of the SFPUC Alternative to the State Water  
2 Board in March 2017, San Francisco continued to work with MID and TID to improve the  
3 alternative. Consequently, on November 30, 2017, MID and TID filed an Amended Final License  
4 Application (“AFLA”) with FERC for the Don Pedro Hydroelectric Project which contains the  
5 “Tuolumne River Management Plan.” The Districts submitted the AFLA to the State Water Board  
6 as an attachment to their July 26, 2018 comments. The Districts provided the majority of the  
7 underlying studies to the State Water Board as attachments to their March 2017 comments.

8           233.   Similar to the SFPUC Alternative, the Tuolumne River Management Plan would  
9 strategically release water down the Tuolumne River to support critical salmonid life stages. These  
10 releases, which include functional flows like fall flushing flows, gravel mobilization flows, and  
11 snowmelt recession hydrograph shaping, would work in concert with other measures to help  
12 restore fish populations. The SFPUC Alternative and the Tuolumne River Management Plan are  
13 based on the same site-specific studies of the Tuolumne River fishery.

14           234.   The Board did not provide an adequate response that matched the level of detail of  
15 the SFPUC Alternative or the Tuolumne River Management Plan, or the numerous scientific  
16 studies that San Francisco, TID, and MID relied on to develop these proposals in the Board’s  
17 responses to comments on the Phase 1 Amendments and the SED.

18           235.   In fact, the Board completely ignored the evidence of the fishery benefits that would  
19 be attained under the SFPUC Alternative or the Tuolumne River Management Plan, as documented  
20 in the numerous scientific studies submitted by TID and MID, stating “*there is no evidence of the*  
21 *efficacy of non-flow measures to protect fish and wildlife beneficial uses*, the amount of water that  
22 would be saved through the non-flow measures, or how the non-flow measures would achieve the  
23 plan amendments’ goals and objectives described in Chapter 3, Alternatives Description.” (SED,  
24 Master Response 5.2 at 6 [emphasis added].)

25           **9.       Public Comments on the Phase 1 Amendments and SED**

26           236.   The SJTA and its member agencies provided extensive written comments on the  
27 SWB’s 2016 Proposed Amendments and 2016 Draft SED in March 2017.

1           237. The State Water Board also received approximately 3,100 letters, amounting to  
2 about 10,400 comments, from federal, state, and local agencies; elected officials; stakeholders; and  
3 members of the public. In total, the Board received approximately 19,050 pages of material during  
4 the public comment period. The comments covered an extensive range of topics, from the water  
5 quality control planning process itself, to the environmental analysis, to the Board's chosen  
6 alternatives, to the modeling (and the assumptions therein), to the results that showed a benefit of  
7 1,103 fish.

8           **10. SED, Final Phase 1 Amendments, and the State Water Board's**  
9           **Response to Public Comments**

10           238. In July 2018, the Board published its responses to the public comments in which the  
11 Board provided significant new information and analysis. Despite these changes, the Board would  
12 not accept any further written comments on the SED and response to comments.

13           239. In addition, the Board changed the Tributary UIF Objective from requiring a range  
14 between 30% and 50% unimpaired flow to requiring exactly 40% unimpaired flow with an  
15 adaptive range between 30% and 50%.

16           240. The Board also added a completely new narrative objective which requires that the  
17 flows provided to meet the 40% unimpaired flow objective from February through June be  
18 managed in a manner to avoid causing significant adverse impacts to fish and wildlife beneficial  
19 uses at other times of the year. This objective is referred to herein as the "Year-round Objective."  
20 The Board did not analyze the impacts of the Year-round Objective (which expands the temporal  
21 scope of the objectives from February-June to year-round) in the SED.

22           **11. State Water Board's Deficient Response to Public Comments**

23           241. Pursuant to the State Water Board's certified regulatory program, "[t]he board shall  
24 prepare written responses to the significant environmental issues raised in the comments received  
25 during the written comment period, including written comments, and oral comments received at  
26 the public hearing if the public hearing is held prior to the close of the written comment period."  
(Cal. Code Regs., tit. 23, § 3779.)

27           242. The State Water Board is required to respond to public comments on the SED.  
28 (Pub. Resources Code, § 21091(d)(1); Cal. Code Regs., tit. 14, § 15088; Cal. Code Regs., tit. 23, §

1 3779(d.)

2 243. The Board's July 6, 2018 response failed to provide a good faith, reasoned analysis  
3 in response to comments on the SED by the SJTA and its member agencies as required by CEQA.

4 244. Specifically, the final SED:

- 5 a. Fails to explain why the Tributary UIF Objectives only pertain to  
6 February-June, despite the Board's SalSim model showing the greatest  
7 increase in the number of fish when a significant portion of the February –  
8 June water is shifted to fall (September – December);
- 9 b. Fails to acknowledge that the results from SalSim undercut the Board's  
10 premise that more flow equals more fish;
- 11 c. Ignores the fact that the Tributary UIF Objectives will eliminate the ability  
12 to store water and operate reservoirs as they were designed to operate;
- 13 d. Fails to fully acknowledge that the operations depicted in its modeling (e.g.,  
14 carryover storage, flow shifting etc.) rely on a level of foresight that does not  
15 exist in real world reservoir operations;
- 16 e. Fails to analyze impacts to the Bay Area from increased water supply  
17 rationing;
- 18 f. Fails to use San Francisco's eight-and-a-half year design drought in its  
19 modeling of water supply impacts;
- 20 g. Fails to use the SFPUC's more precise hydrological modeling results of  
21 impacts to the RWS;
- 22 h. Fails to substantively consider the SFPUC's methodology for estimating  
23 socioeconomic impacts from increased rationing;
- 24 i. Erroneously relies on the SFPUC's long-term planning documents to  
25 establish the alleged availability of alternative water supplies in the near  
26 term;
- 27 j. Fails to support the three methods of compliance for San Francisco it  
28 identifies;

- 1 k. Fails to support its assumption that implementation of the Phase 1  
2 Amendments would result in minimal effects to economic growth and  
3 housing starts in the Bay Area; and  
4 l. Fails to substantively respond to the SFPUC Alternative. See Cal. Code  
5 Regs., tit. 14, § 15088(c) ("[c]onclusory statements unsupported by factual  
6 information will not suffice.".)

7  
8 **12. Framework Document**

9 245. At the same time that the State Water Board released the SED, the Final Phase 1  
10 Amendments, and the response to comments, it also released a document entitled "July 2018  
11 Framework for the Sacramento/Delta Update to the Bay-Delta Plan" ("Framework Document").

12 246. The Framework Document described the State Water Board's proposed process to  
13 update the remainder of the Bay-Delta Plan with a focus on the Sacramento River and its  
14 tributaries, the Delta eastside tributaries (including the Calaveras, Cosumnes, and Mokelumne  
15 rivers), Delta outflows, and interior Delta flows, known as Phase 2.

16 247. The Framework Document purports to explain how the Phase 1 update and the  
17 Phase 2 update relate to one another.

18 248. The Framework Document includes, among other things, an "Inflow-Based Delta  
19 Outflow Objective" that provides as follows: "The inflows required above, including for the  
20 Sacramento/Delta tributaries and San Joaquin River are required as outflows with adjustments for  
21 downstream natural depletions and accretions."

22 **13. State Water Board's Adoption of the SED and Bay-Delta Plan**

23 249. On December 12, 2018, the State Water Board adopted the SED and the Phase 1  
24 Amendments to the Bay-Delta Plan.

1 **FIRST CAUSE OF ACTION**

2 **Writ of Mandate - Adoption of the Phase 1 Amendments was arbitrary, capricious,**  
3 **and/or lacking in evidentiary support (Code of Civ. Proc., § 1085)**

4 **The SWB's determination that the Phase 1 Amendments provide reasonable**  
5 **protection – as required by Water Code § 13000 and § 13242 – was arbitrary,**  
6 **capricious, and lacking in evidentiary support**

7 250. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
8 preceding allegation, inclusive, of this Petition/Complaint.

9 251. The Porter-Cologne Water Quality Control Act (Wat. Code, § 13000, *et seq.*)  
10 (hereinafter “Porter-Cologne Act”) provides that the State Water Board shall regulate activities  
11 affecting water quality “to attain the highest water quality which is reasonable, considering all  
12 demands being made on those waters and the total values involved, beneficial and detrimental,  
13 economic and social, tangible and intangible.” (Wat. Code, § 13000.)

14 252. The mechanism provided to the State Water Board for protecting water quality is the  
15 “water quality control plan.” (Wat. Code, §§ 13170, 13240.)

16 253. A water quality control plan must include (1) the identification of beneficial uses to  
17 be protected by the plan; (2) a set of objectives that ensure the reasonable protection of those  
18 beneficial uses; and (3) a program of implementation needed for achieving those objectives. (Wat.  
19 Code, §§ 13050[j], 13241, 13242.)

20 254. When setting water quality objectives, the State Water Board must consider, at a  
21 minimum, the following factors: (1) past, present and probable future beneficial uses of water; (2)  
22 environmental characteristics of the hydrographic unit under consideration, including the quality of  
23 water available thereto; (3) water quality conditions that could reasonably be achieved through the  
24 coordinated control of all factors which affect water quality in the area; (4) economic  
25 considerations; (5) the need for developing housing within the region; and (6) the need to develop  
26 and use recycled water. (Wat. Code, § 13241.)

27 255. The Tributary UIF Objective requires the maintenance of 40% unimpaired flow, with  
28 an allowed adaptive range between 30% and 50%, on each of the Stanislaus, Tuolumne, and  
Merced Rivers from February through June, based upon a minimum 7-day running average.

1           256. The SWB relied on the modeling analysis and results in the SED to evaluate whether  
2 the Tributary UIF Objective provided reasonable protection to the identified beneficial uses in the  
3 Bay-Delta Plan considering all other demands being made on those waters affected by the Tributary  
4 UIF Objective, and the total values involved, beneficial and detrimental, economic and social,  
5 tangible and intangible, as required by Water Code section 13000.

6           257. The SWB relied on the modeling analysis and results in the SED to evaluate,  
7 pursuant to Water Code section 13241; (1) past, present and probable future beneficial uses of  
8 water; (2) environmental characteristics of the hydrographic unit under consideration, including the  
9 quality of water available thereto; (3) water quality conditions that could reasonably be achieved  
10 through the coordinated control of all factors which affect water quality in the area; (4) economic  
11 considerations; (5) the need for developing housing within the region; and (6) the need to develop  
12 and use recycled water.

13           258. The modeling results were developed through an iterative process that assumes the  
14 implementation of operational constraints and rules not required by the objectives in the Bay-Delta  
15 Plan, including flow shaping, flow shifting, minimum reservoir carryover storage, reservoir refill  
16 criteria, and minimum base flows.

17           259. In addition, the SED evaluates only monthly flows and water temperature results,  
18 despite the requirement that unimpaired flow be maintained on a minimum 7-day running average.

19           260. The State Water Board's determination that the objectives provided reasonable  
20 protection to the identified beneficial uses considering all other demands being made on the waters  
21 involved, and all other factors required by Water Code section 13000, was arbitrary, capricious, and  
22 entirely lacking in evidentiary support because the SED did not accurately depict implementation of  
23 the objectives due to the inclusion of operational assumptions that are not required by the  
24 objectives, and due to the use of monthly modeling for objectives that require daily changes.

25           261. The State Water Board's determination that the objectives were reasonable  
26 considering all the factors set forth in Water Code section 13241 was arbitrary, capricious, and  
27 entirely lacking in evidentiary support because the SED did not accurately depict the  
28 implementation of the objectives due to the inclusion of operational assumptions that are not



required by the objectives, and due to the use of monthly modeling for objectives that require daily changes.

262. Because the State Water Board’s decision to adopt the objectives was arbitrary, capricious, and/or entirely lacking in evidentiary support, this Court should issue a writ of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

## SECOND CAUSE OF ACTION

**Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)**

**The SWB's weighing and balancing of competing beneficial uses was arbitrary, capricious, and/or entirely lacking in evidentiary support because it was based upon models and analysis that ignored and/or artificially minimized negative impacts of the Tributary UIF Objective**

263. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

264. The SWB relied on the SED to assess whether the Tributary UIF Objective provided reasonable protection to the identified beneficial uses in the Bay-Delta Plan considering all other demands being made on the waters involved, and the total values involved, beneficial and detrimental, economic and social, tangible and intangible. (Wat. Code, § 13000.)

265. In adopting the Tributary UIF Objective, the SWB relied on the SED to estimate the impacts on all the factors required to be considered by Water Code section 13241.

266. The SED misstates the impact of the Tributary UIF Objective on municipal supply by assuming, among other things, that reductions in surface water supply caused by implementation of the Tributary UIF Objective would be negated by replacing lost surface water with water from other sources, such as groundwater, without accounting for the costs, feasibility, or legality of such replacement.

267. The SED misstates the impact of the Tributary UIF Objective on municipal and agricultural water supply by relying on the unsupported assumption “that municipal deliveries would not be cut in times of surface water shortage.” The SED provides no basis for this

1 assumption, and no analysis of reasonably foreseeable impacts if this assumption proves to be  
2 inaccurate. (*See e.g., SED, Appendix G-6.*)

3       268. The SED misstates the impact of the Tributary UIF Objective on agricultural supply  
4 by, among other things, assuming that reductions in surface water caused by implementation of the  
5 Tributary UIF Objectives would be negated by replacing lost surface water with groundwater at  
6 maximum pumping rates, without accounting for the costs, feasibility, or legality of such  
7 replacement.

8       269. The SED misstates the impact of the Tributary UIF Objective on agricultural supply  
9 by, among other things, optimizing available land and water so that net returns to farmers are  
10 maximized, by assuming that crops which use large amounts of water and generate low net revenue  
11 per acre will be automatically fallowed when water is scarce, by assuming that agricultural  
12 producers will act rationally and with perfect information in directing water amongst one another  
13 towards the highest value crops in times of shortage, and that reductions in surface water will be  
14 replaced by maximum groundwater pumping rates at 2009 capacity levels without accounting for  
15 the costs, feasibility, or legality of such replacement.

16       270. The SED misstates the impact of the Tributary UIF Objective on water storage by,  
17 among other things, assuming that storage in reservoirs will be maintained at certain levels  
18 irrespective of the amount of water that would otherwise be required by the Tributary UIF  
19 Objectives.

20       271. The SED misstates the impact of the Tributary UIF Objective on hydropower by  
21 assuming that storage in reservoirs will be maintained at certain levels irrespective of the amount of  
22 water that would otherwise be required by the Tributary UIF Objectives.

23       272. The SED did not provide sufficient information for the State Water Board to perform  
24 a cost-benefit assessment across resource topics, such as comparing the potential costs to  
25 agricultural production of the objectives against the potential benefits to fish and wildlife resources.

26       273. The State Water Board's determination that the Tributary UIF Objective provided  
27 reasonable protection to the identified beneficial uses in the Bay-Delta, considering all other  
28 demands being made on the waters involved, and all other factors required by Water Code section

1 13000, was arbitrary, capricious, and entirely lacking in evidentiary support because the SED  
2 misstated the impacts on, among other things, municipal supply, agricultural supply, water storage,  
3 and hydropower.

4 274. The State Water Board's determination that the Tributary UIF Objectives were  
5 reasonable considering all the factors set forth in Water Code section 13241 was arbitrary,  
6 capricious, and entirely lacking in evidentiary support because the SED misstated the impacts on,  
7 among other things, municipal supply, agricultural supply, water storage, and hydropower.

8 275. Because the State Water Board's decision to adopt the Tributary UIF Objectives was  
9 arbitrary, capricious, and/or entirely lacking in evidentiary support, this Court should issue a writ of  
10 mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and enjoin  
11 the State Water Board from taking any action to implement the Bay-Delta Plan.

### 12 **THIRD CAUSE OF ACTION**

#### 13 **Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, 14 and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)**

#### 15 **The SWB did not analyze whether the Phase 1 Amendments reasonably protected 16 the identified beneficial uses as required by Water Code § 13241 because the SWB used changes in temperature, floodplain inundation, and production of Chinook salmon as a proxy for the identified beneficial uses**

17 276. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
18 preceding allegation, inclusive, of this Petition/Complaint.

19 277. The State Water Board identified the following beneficial uses to be protected by the  
20 objectives in the Bay-Delta Plan: (1) Municipal and Domestic Supply [MUN]; (2) Industrial Service  
21 Supply [IND]; (3) Industrial Process Supply [PRO]; (4) Agricultural Supply [AGR]; (5) Ground  
22 Water Recharge [GWR]; (6) Navigation [NAV]; (7) Water Contact Recreation [REC-1]; (8) Non-  
23 Contact Water Recreation [REC-2]; (9) Shellfish Harvesting [SHELL]; (10) Commercial and Sport  
24 Fishing [COMM]; (11) Warm Freshwater Habitat [WARM]; (12) Cold Freshwater Habitat  
25 [COLD]; (13) Migration of Aquatic Organisms [MIGR]; (14) Spawning, Reproduction and/or Early  
26 Development [SPWN]; (15) Estuarine Habitat [EST]; (16) Wildlife Habitat [WILD]; and (17) Rare,  
27 Threatened, or Endangered Species [RARE] (collective, the "Beneficial Uses").  
28

1           278. The State Water Board must establish water quality objectives that ensure the  
2 reasonable protection of these identified Beneficial Uses. (Wat. Code, § 13241.)

3           279. The State Water Board did not assess whether these identified Beneficial Uses would  
4 be protected by the Inflow Narrative Objective, the Tributary UIF Objectives, the Vernalis Base  
5 Flow Objective, and/or the Year-round Objective.

6           280. The modeling and analysis relied upon by the State Water Board in adopting the  
7 Bay-Delta Plan purports to assess the impact of the Tributary UIF Objectives on water temperature  
8 and floodplain inundation on the Stanislaus, Tuolumne, and Merced rivers.

9           281. The State Water Board used the SalSim model in an attempt to estimate how the  
10 Tributary UIF Objective might impact production of Central Valley fall-run Chinook salmon.

11           282. By focusing exclusively on impacts to water temperature, floodplain inundation, and  
12 production of Central Valley fall-run Chinook salmon, the State Water Board failed to assess  
13 whether the identified Beneficial Uses would be protected by the objectives in the Phase 1  
14 Amendments.

15           283. The State Water Board did not provide reasoning or rationale for using changes in  
16 water temperature, floodplain inundation or production of Central Valley fall-run Chinook salmon  
17 as a proxy to assess whether all the identified Beneficial Uses would be protected by the objectives  
18 in the Phase 1 Amendments.

19           284. The State Water Board's implicit determination in its adoption of the Bay-Delta Plan  
20 that the objectives in the Phase 1 Amendments ensure the reasonable protection of the identified  
21 Beneficial Uses was arbitrary, capricious, and entirely lacking in evidentiary support because the  
22 Board failed to analyze the impact of those objectives on the identified Beneficial Uses.

23           285. The State Water Board's implicit determination in its adoption of the Bay-Delta Plan  
24 that the objectives in the Phase 1 Amendments ensure the reasonable protection of the identified  
25 Beneficial Uses was arbitrary, capricious, and entirely lacking in evidentiary support because the  
26 Board failed to provide reasoning or rationale for using changes in water temperature, floodplain  
27 inundation or production of Central Valley fall-run Chinook salmon as a proxy for assessing  
28 whether the identified Beneficial Uses would be protected by those objectives.

286. Because the State Water Board’s implicit determination that the objectives in the Phase 1 Amendments ensured reasonable protection of the identified Beneficial Uses was arbitrary, capricious, and/or entirely lacking in evidentiary support, this Court should issue a writ of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

#### FOURTH CAUSE OF ACTION

**Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)**

**The SWB's modeling and analysis fails to show that the Phase 1 Amendments reasonably protected the proxies that the SWB used for assessing whether the Beneficial Uses were reasonably protected as required by Water Code § 13000 and 13241**

287. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

288. The State Water Board used changes in water temperature, floodplain inundation and production of Central Valley fall-run Chinook salmon as a proxy for assessing whether the objectives in the Phase 1 Amendments provide reasonable protection of the identified Beneficial Uses.

289. The use of such a proxy fails to demonstrate whether the remaining identified Beneficial Uses will receive reasonable protection.

290. Even if the use of the temperature proxy were appropriate, the modeling and analysis demonstrates that the Tributary UIF Objective will not result in cooler water temperatures without operational constraints that are not required by the objectives, such as minimum reservoir carryover storage and flow shifting.

291. Even with the incorporation of carryover storage and flow shifting, the modeling results relied upon by the State Water Board fail to demonstrate that the objectives will improve water temperatures because the modeling in the SED uses monthly data instead of the 7-day minimum running average required by the Tributary UIF Objectives, thereby obscuring the true impact of the Tributary UIF Objectives on temperature conditions.

1           292. Even with the incorporation of carryover storage and flow shifting, the modeling  
2 results relied upon by the State Water Board fail to demonstrate that the Tributary UIF Objectives  
3 will improve water temperatures because there is no scientific basis for the State Water Board's  
4 conclusion that a 10% change in the amount of time that certain water temperatures are attained is a  
5 significant benefit.

6           293. Even assuming the floodplain inundation analysis is a proper proxy for assessing  
7 protection of the identified Beneficial Uses, the floodplain analysis relied upon by the State Water  
8 Board fails to demonstrate that the objectives will provide a benefit to floodplain habitat because,  
9 among other things, the modeling and analysis in the SED (1) does not properly distinguish between  
10 inundated land and habitat; (2) does not consider the quality of newly inundated areas insofar as it  
11 omits factors such as depth, flow rate, timing, duration, dissolved oxygen, temperature, and  
12 substrate; (3) does not integrate findings of the temperature assessment with the floodplain  
13 assessment to evaluate the expected thermal suitability of inundated areas; (4) does not consider  
14 other reasonable measures such as floodplain restoration to create more frequently inundated off-  
15 channel habitats; and (5) does not address empirical findings which demonstrate that wetted area  
16 does not always equate to usable habitat.

17           294. Even assuming the SalSim analysis is a proper proxy for assessing protection of the  
18 identified Beneficial Uses, the SalSim analysis relied upon by the State Water Board fails to  
19 demonstrate that the Tributary UIF Objective will improve production of Central Valley fall-run  
20 Chinook salmon because, among other things, the SalSim analysis shows that a requirement of 40%  
21 unimpaired flow, with additional operational constraints that are not required by the objectives, will  
22 increase average annual production over baseline by 1,103 Central Valley fall-run Chinook salmon.  
23 Given average annual production of Central Valley fall-run Chinook salmon from 1976 to 2014 of  
24 approximately 700,000, an increase in 1,103 fish amounts to an increase of less than a quarter of  
25 one percent.

26           295. The State Water Board's implicit determination that the objectives ensure the  
27 reasonable protection of the identified Beneficial Uses was arbitrary, capricious, and entirely  
28 lacking in evidentiary support because the modeling and analysis relied upon by the State Water

1 Board fails to show a benefit to water temperature, floodplain habitat, and/or production of Central  
2 Valley fall-run Chinook salmon, which the State Water Board used as proxies for the identified  
3 Beneficial Uses.

4 296. Because the State Water Board's implicit determination that the objectives ensured  
5 reasonable protection of the identified Beneficial Uses was arbitrary, capricious, and/or entirely  
6 lacking in evidentiary support, this Court should issue a writ of mandate directing the State Water  
7 Board to set aside its adoption of the Bay-Delta Plan and enjoin the State Water Board from taking  
8 any action to implement the Bay-Delta Plan.

9  
10 **FIFTH CAUSE OF ACTION**

11 **Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful and/or arbitrary, capricious,**  
12 **and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)**

13 **The SWB failed to consider water quality conditions that could**  
14 **reasonably be achieved through the coordinated control of all factors which**  
15 **affect water quality in the area (Water Code, § 13241)**

16 297. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
17 preceding allegation, inclusive, of this Petition/Complaint.

18 298. When setting water quality objectives, the State Water Board must consider water  
19 quality conditions that could reasonably be achieved through the coordinated control of all factors  
20 which affect water quality in the area. (Wat. Code, § 13241[c].)

21 299. In adopting the Phase 1 Amendments to the Bay-Delta Plan, the State Water Board  
22 failed to consider water quality conditions that could reasonably be achieved through the  
23 coordinated control of all factors which affect water quality in the area.

24 300. By limiting the Phase 1 Amendments to certain watersheds within the San Joaquin  
25 River Valley, the State Water Board failed to consider water quality conditions that could  
26 reasonably be achieved through the coordinated control of water quality across the entire  
27 Sacramento-San Joaquin Bay-Delta watershed.

28 301. By limiting the Phase 1 Amendments to the Stanislaus, Tuolumne, and Merced  
Rivers downstream of the rim dams on each of those rivers, the State Water Board failed to consider  
water quality conditions that could reasonably be achieved through the coordinated control of water

1 quality across the entire San Joaquin River Valley, including the San Joaquin River upstream of its  
2 confluence with the Merced River, the San Joaquin River downstream of its confluence with the  
3 Merced River, and the Stanislaus, Tuolumne, and Merced Rivers upstream of the rim dams on each  
4 of those rivers.

5       302. By limiting the Phase 1 Amendments to the Stanislaus, Tuolumne, and Merced  
6 Rivers downstream of the rim dams on each of those rivers, the State Water Board failed to consider  
7 water quality conditions that could reasonably be achieved through the coordinated control of water  
8 quality across the entire Bay-Delta watershed, including the Sacramento River watershed, and the  
9 Calaveras, Cosumnes, and Mokelumne River watersheds.

10       303. By ignoring the water users and resources in these areas in adopting the Phase 1  
11 Amendments, the State Water Board acted unlawfully and/or made a decision that was arbitrary,  
12 capricious, and/or lacking in evidentiary support insofar as it failed to satisfy its statutory obligation  
13 of considering water quality conditions that could reasonably be achieved through the coordinated  
14 control of all factors which affect water quality in the area.

15       304. By limiting the Phase 1 Amendments to flow-based objectives, the State Water  
16 Board failed to coordinate control of factors other than flow.

17       305. Because the State Water Board acted unlawfully and/or made a decision that was  
18 arbitrary, capricious, and/or lacking in evidentiary support, this Court should issue a writ of  
19 mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and enjoin  
20 the State Water Board from taking any action to implement the Bay-Delta Plan.

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1 **SIXTH CAUSE OF ACTION**

2 **Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful (Code of Civ. Procedure §**  
3 **1085)**

4 **The Program of Implementation is Unlawful Because it Does Not Describe the Actions**  
5 **Necessary to Achieve the Objectives as Required by Water Code Section 13242, but Rather**  
6 **Allows for Changes to the Objectives without a Properly Noticed Hearing, Without**  
7 **Evaluation of Environmental Impacts, and Without State Water Board Consideration and**  
8 **Determination of What Constitutes a Reasonable Level of Protection**

9 306. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
10 preceding allegation, inclusive, of this Petition/Complaint.

11 307. A water quality control plan must include a program of implementation necessary for  
12 achieving water quality objectives. (Wat. Code, § 13050[j].)

13 308. The program of implementation must include a description of the nature of the  
14 actions which are necessary to achieve the water quality objectives, a time schedule for the actions  
15 to be taken, and a description of the surveillance to be undertaken to determine compliance with  
16 objectives. (Wat. Code, § 13242.)

17 309. The adopted Program of Implementation is unlawful because it does not describe the  
18 actions necessary to achieve the Tributary UIF Objectives, the Vernalis Flow Objective, the Inflow  
19 Narrative Objective, and/or the Year-round Objective, but rather improperly serves as a mechanism  
20 for modifying the Tributary UIF Objectives.

21 310. The Program of Implementation is unlawful because it authorizes changes to the  
22 Tributary UIF Objectives without a properly noticed hearing required by Water Code section  
23 13244.

24 311. The Program of Implementation includes a set of “Adaptive Methods.”

25 312. The Adaptive Methods in the Program of Implementation allow for the percentage of  
26 unimpaired flow required by the Tributary UIF Objectives from February through June to be  
27 managed as a total volume of water and released on an adaptive schedule during an unspecified  
28 time period where scientific information indicates that a flow pattern different from what would  
occur by tracking the unimpaired flow percentage would better protect fish and wildlife beneficial

1 uses. This adjustment allows for an unlawful change to the unimpaired flow component and the  
2 minimum 7-day running average component of the Tributary UIF Objectives.

3 313. The Adaptive Methods in the Program of Implementation allow for delaying the  
4 release of a portion of the February through June unimpaired flow until after June to prevent  
5 adverse effects to fisheries. This adjustment unlawfully enlarges the time period applicable to the  
6 Tributary UIF Objectives.

7 314. The Program of Implementation unlawfully permits the Executive Director of the  
8 State Water Board to change the Tributary UIF Objectives by changing the compliance locations.

9 315. The Program of Implementation unlawfully requires the creation of reservoir  
10 carryover storage minimums that are not required by, and could conflict with, the Tributary UIF  
11 Objectives.

12 316. To the extent the Program of Implementation allows for changes to the objectives, it  
13 is unlawful. Water quality objectives must be established for the reasonable protection of beneficial  
14 uses after balancing and considering all beneficial uses of water. (Wat. Code, §§ 13000, 13241.)  
15 The required mechanism for amending water quality objectives includes a properly noticed hearing,  
16 evaluation of environmental and other impacts, and consideration of what constitutes a reasonable  
17 level of protection in light of all relevant and statutorily required factors. (Wat. Code, § 13244.) The  
18 Program of Implementation is unlawful because it establishes an alternative method for modifying  
19 water quality objectives without a properly noticed and conducted hearing, without evaluation of  
20 environmental and other impacts, and without approval by the State Water Board after due  
21 consideration of what constitutes a reasonable level of protection in light of all relevant and  
22 statutorily required factors.

23 317. Because the State Water Board's action was unlawful, this Court should issue a writ  
24 of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and  
25 enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

1 **SEVENTH CAUSE OF ACTION**

2 **Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful (Code of Civ. Procedure §**  
3 **1085)**

4 **The Program of Implementation is Unlawful Because it Requires Carryover Storage for the**  
5 **Purpose of Directly Protecting Beneficial Uses without a Balancing of Relevant Factors and**  
6 **Without Consideration of Other Beneficial Uses in Violation of Water Code Sections 13241**  
7 **and 13242**

8 318. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
9 preceding allegation, inclusive, of this Petition/Complaint.

10 319. The Porter-Cologne Act requires a three-step process for protecting water quality: (1)  
11 identify beneficial uses of water to be protected; (2) establish objectives that provide a reasonable  
12 level of protection for those beneficial uses considering all relevant factors and other beneficial  
13 uses; and (3) create a program of implementation that describes the actions necessary to achieve  
14 those objectives. (Wat. Code, §§ 13000, 13050[j], 13241, 13424.)

15 320. Pursuant to this mandatory three-step process, any requirements established for the  
16 purpose of protecting beneficial uses must be established as objectives subject to the balancing and  
17 consideration of, among other things, all beneficial uses of water. (Wat. Code, § 13000, 13241.)

18 321. The adopted Program of Implementation provides that, during the implementation  
19 phase, the State Water Board will require the development and implementation of minimum  
20 reservoir carryover storage targets for the purpose of protecting the beneficial uses from the  
21 objectives, and preventing significant adverse temperature or other impacts on fish and wildlife or,  
22 if feasible, on other beneficial uses.

23 322. As the stated purpose of the carryover storage requirements is to directly protect  
24 beneficial uses of water, those requirements must be established, if at all, as objectives subject to the  
25 balancing and consideration of, among other things, all beneficial uses of water. (Wat. Code, §  
26 13000, 13241.) A requirement designed to directly protect beneficial uses cannot be developed as  
27 part of the program of implementation, as doing so would skip the second step in the Porter-  
28 Cologne Act's mandatory process for protecting beneficial uses, and unlawfully subvert the  
required balancing that must be performed when establishing what level of protection is reasonable.  
By including actions in the program of implementation for the purpose of directly protecting

1 beneficial uses instead of for the purpose of achieving balanced objectives, the Board has violated  
2 the three-step process required by the Porter-Cologne Act.

3 323. Because the State Water Board's action was unlawful, this Court should issue a writ  
4 of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and  
5 enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

## 6 **EIGHTH CAUSE OF ACTION**

### 7 **Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful** 8 **(Code of Civ. Procedure § 1085)**

#### 9 **The Program of Implementation is Unlawful Because it Fails to Comply with the** 10 **Requirements of Water Code § 13242**

11 324. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
12 preceding allegation, inclusive, of this Petition/Complaint.

13 325. A program of implementation must include a description of the actions necessary to  
14 achieve the objectives. (Wat. Code, § 13242.)

15 326. The adopted Program of Implementation is unlawful because it does not include a  
16 description of the actions necessary to achieve the Inflow Narrative Objective.

17 327. The adopted Program of Implementation is unlawful because it does not include a  
18 description of the actions necessary to achieve the Year-round Objective.

19 328. The adopted Program of Implementation is unlawful because it does not include a  
20 description of the actions necessary to achieve the Tributary UIF Objective, and instead states that  
21 implementation of the Tributary UIF Objective will require the development of information and  
22 specific measures to achieve the flow objectives. The development of such measures was  
23 improperly delegated to the STM Working Group or State Water Board staff. The approval of such  
24 measures by the State Water Board itself was improperly deferred until after adoption of Phase 1  
25 Amendments, instead of being completed during the Phase 1 Amendment process.

26 329. The State Water Board has likewise failed to describe the actions necessary to  
27 implement the Vernalis Flow Objective. This objective provides that at all times, the flow at  
28 Vernalis shall be no lower than 1,000 cfs with an allowed adaptive management range between 800  
– 1,200 cfs, inclusive. (SED, Appendix K, at 18.) When the percentage of unimpaired flow required

1 on the Stanislaus, Tuolumne, and Merced Rivers is insufficient to meet the Vernalis Flow  
2 Objective, additional flow from those rivers will be required. (SED, Appendix K, at 29). However,  
3 the State Water Board has failed to describe the actions necessary to achieve the Vernalis Flow  
4 objective because it has failed to address how diverters situated downstream of the compliance  
5 points on the Stanislaus, Tuolumne, and Merced Rivers will be managed. Instead, the State Water  
6 Board vaguely asserts that it intends to “exercise its water right and water quality authority” to  
7 “help ensure” that required flows from the tributaries “are used for their intended purpose” and “not  
8 diverted for other purposes.” (SED, Appendix K, at 28.) This sentence falls far short of the State  
9 Water Board’s requirement to describe actions necessary to achieve the Vernalis Flow Objective.

10       330. The adopted Program of Implementation is unlawful because it does not include a  
11 description of the actions necessary to achieve the “salmon protection” objective requiring that  
12 “water quality conditions shall be maintained, together with other measures in the watershed,  
13 sufficient to achieve a doubling of natural production of Chinook salmon from the average  
14 projection of 1967-1991, consistent with the provisions of State and federal law.” (SED, Appx. K,  
15 p. 17.)

16       331. The program of implementation must include a description of the surveillance to be  
17 undertaken to determine compliance with the objectives. (Wat. Code, § 13242.)

18       332. The adopted Program of Implementation is unlawful because it does not include a  
19 description of the surveillance to be undertaken to determine compliance with the Inflow Narrative  
20 Objective.

21       333. The adopted Program of Implementation is unlawful because it does not include a  
22 description of the surveillance to be undertaken to determine compliance with the Year-round  
23 Objective.

24       334. The adopted Program of Implementation is unlawful because it does not include a  
25 description of the surveillance to be undertaken to determine compliance with the Inflow Narrative  
26 Objective. Specifically, it is unclear as to how regulated parties and the public will know if inflow  
27 conditions from the San Joaquin River watershed to the Delta at Vernalis are sufficient to support  
28

1 and maintain the natural production of viable native San Joaquin River watershed fish populations  
2 migrating through the Delta. (SED, Appendix K, at 18.)

3 335. The adopted Program of Implementation is unlawful because it does not include a  
4 description of the surveillance to be undertaken to determine compliance with the Tributary UIF  
5 Objective, and instead states that implementation of the Tributary UIF Objective will require the  
6 development of information and specific measures to monitor and evaluate compliance. The  
7 approval of such measures by the State Water Board itself was improperly deferred until after  
8 adoption of Phase 1 Amendments, instead of being completed during the Phase 1 Amendment  
9 process.

10 336. A program of implementation must include a time schedule for taking the actions  
11 necessary to achieve the objectives. (Wat. Code, § 13242.)

12 337. The Program of Implementation states that the State Water Board will fully  
13 implement the objectives through water right actions or water quality actions by 2022.

14 338. The proposal of a single deadline for implementation is not a sufficient time schedule  
15 for actions to be taken, as there are multiple actions required for compliance. The Program of  
16 Implementation fails to provide a path or schedule for creating or implementing carryover storage  
17 targets, for funding and development of water conservation efforts and regional water supply  
18 reliability projects, for requiring 40% unimpaired flow on the Stanislaus, Tuolumne, and Merced  
19 Rivers. The failure to include a time schedule for any of these actions is a violation of Water Code  
20 section 13242.

21 339. Because the State Water Board's action was unlawful, this Court should issue a writ  
22 of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and  
23 enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

1 **NINTH CAUSE OF ACTION**

2 **Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful**  
3 **(Code of Civ. Procedure § 1085)**

4 **The Program of Implementation Overstates the State Water Board's Authority to Implement**  
5 **the Objectives, Rendering the Program of Implementation Illusory and Constituting a**  
6 **Violation of the SWB's Obligation to Implement its Own Plan (Water Code, § 13247).**

7 340. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
8 preceding allegation, inclusive, of this Petition/Complaint

9 341. The State Water Board has no authority over pre-1914 water rights.

10 342. The SWB's authority to prevent waste and unreasonable use of water does not permit  
11 the Board to compel the use of water to meet a water quality objective that purports to protect a  
12 particular beneficial use.

13 343. The SWB has limited authority to implement water quality objectives through the  
14 public trust doctrine.

15 344. The SWB lacks authority to control reservoir operations by requiring carryover  
16 storage.

17 345. The SWB has limited authority to implement water quality objectives through Clean  
18 Water Act Section 401 and the FERC relicensing processes.

19 346. The SWB cannot use the Program of Implementation to protect flows past the  
20 Vernalis compliance point because there is no objective past Vernalis.

21 347. The SWB has no authority to establish, or compel the establishment of, the STM  
22 Working Group.

23 348. The Program of Implementation unlawfully delegates authority to the Executive  
24 Director.

25 349. The Program of Implementation's call for Annual Adaptive Operations Plans is not  
26 enforceable.

27 350. By relying on multiple methods of implementation that the SWB has no authority to  
28 enforce, the Board has rendered the Program of Implementation illusory insofar as it will be  
incapable of achieving the water quality objectives it was designed to achieve.

351. By developing an illusory program of implementation that will not achieve the water quality objectives, the Board has violated its obligation under Water Code section 13247 to implement its own plan.

352. Because the State Water Board’s action was unlawful, this Court should issue a writ of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan, and enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

### TENTH CAUSE OF ACTION

**Writ of Mandate - Adoption of the Bay-Delta Plan was unlawful  
(Code of Civ. Procedure § 1085)**

## The Adoption of the Program of Implementation was Unlawful Because it Requires the Development of Biological Goals after the Adoption and Approval of the Phase 1 Amendments and Bay-Delta Plan

353. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

354. The Program of Implementation requires the State Water Board to seek recommendations on biological goals from the STM Working Group, State Water Board staff, and other interested persons. Within 180 days after the Office of Administrative Law (“OAL”) approves the Bay-Delta Plan, the Board will consider approval of the biological goals. Approved biological goals will be used to inform the Adaptive Methods that are part of the Program of Implementation in the Bay-Delta Plan.

355. To the extent the Adaptive Methods allow for modifications to the Tributary UIF Objectives, and to the extent that the biological goals will be used to inform those modifications, the creation and use of the biological goals for such purpose is unlawful and procedurally improper.

356. Biological goals should have been considered by the State Water Board, if at all, in the process of setting water quality objectives. The *post-hoc* evaluation of biological goals and modification of the objectives as part of the Program of Implementation is unlawful.

357. The Program of Implementation does not call for the establishment of the biological goals until after the State Water Board adopts the Bay-Delta Plan, and after OAL approves the Bay-Delta Plan. The creation of the biological goals after the adoption and approval of the Bay-Delta



1 Plan, and the use of those biological goals to inform modification and/or management of the water  
2 quality objectives, is unlawful insofar as it allows for post-approval and post-adoption modification  
3 of the water quality objectives and program of implementation without a properly noticed hearing,  
4 and without consideration by the State Water Board as to what constitutes a reasonable level of  
5 protection for beneficial uses.

6 358. Because the State Water Board's action was unlawful, this Court should issue a writ  
7 of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan, and  
8 enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

9  
10 **ELEVENTH CAUSE OF ACTION**

11 **Writ of Mandate - Adoption of the Bay-Delta Plan was Unlawful**  
12 **(Code of Civ. Procedure § 1085)**

13 **The Program of Implementation Unlawfully Delegates Authority to the Executive Director**

14 359. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
15 preceding allegation, inclusive, of this Petition/Complaint.

16 360. A water quality control plan, and/or a revision thereto, does not become effective  
17 unless and until it is approved by the State Water Board. (Wat. Code, § 13245.)

18 361. The Executive Director does not have the authority under the Water Code to approve  
19 or adopt water quality control plans or amendments thereto.

20 362. The Executive Director is prohibited by State Water Board Resolution 2012-0061  
21 from adopting or approving water quality control plans or amendments thereto.

22 363. The Program of Implementation unlawfully grants authority to the Executive  
23 Director to amend the Tributary UIF Objectives by changing the compliance locations for those  
24 objectives.

25 364. The Program of Implementation unlawfully grants authority to the Executive  
26 Director to amend the Tributary UIF Objectives by changing them from a required percentage of  
27 unimpaired flow to a total volume of water released on an adaptive schedule different from that  
28 which would occur by tracking the unimpaired flow percentage.

365. The Program of Implementation unlawfully grants authority to the Executive Director to amend the Tributary UIF Objectives by delaying the release of a portion of the February through June unimpaired flow until after June.

366. The Program of Implementation unlawfully grants authority to the Executive Director to amend the Program of Implementation itself by developing implementation measures to achieve the Tributary UIF Objectives and Vernalis Base Flow Objectives.

367. The Program of Implementation unlawfully grants authority to the Executive Director to amend the Program of Implementation itself by developing measures to monitor and evaluate compliance with the objectives.

368. The Program of Implementation unlawfully grants authority to the Executive Director to amend the water quality control plan by approving annual adaptive operations plans that can effectively change the approved objectives.

369. Because the State Water Board's action was unlawful, this Court should issue a writ of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

## TWELFTH CAUSE OF ACTION

**Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or entirely lacking in evidentiary support (Code of Civ. Procedure, § 1085)**

**Under the State Water Board's Analysis, the Level of Protection Afforded to Fish and Wildlife Beneficial Uses by the Bay-Delta Plan is Unreasonable Given the Limited Expected Protection to Fish and Wildlife Beneficial Uses and the Significant Impact on Municipal and Agricultural Water Supplies and Other Beneficial Uses**

370. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

371. The State Water Board is required to set water quality objectives that provide a reasonable level of protection to the identified fish and wildlife Beneficial Uses considering, among other things, other beneficial uses of water.

372. Under the State Water Board's own analysis, the determination that the protection afforded to fish and wildlife beneficial uses by the Phase 1 Amendments is reasonable given the significant impacts to agricultural resources reported in the SED is arbitrary and capricious.

1           373. The Bay-Delta Plan’s Tributary UIF Objective was established to protect fish and  
2 wildlife beneficial uses. (SED, at 1-8; Appendix K, at 18.) The State Water Board asserts that its  
3 Tributary UIF Objective will “improv[e] flow conditions during the February through June time  
4 period so that they more closely mimic the natural hydrograph conditions *to which native fish*  
5 *species are adapted*, including the relative magnitude, duration, timing, and spatial extent of flows  
6 as they would naturally occur.” (SED, at 19-8) (emphasis added).)

7           374. The Board’s determination that the Tributary UIF Objective will protect fish and  
8 wildlife beneficial uses by mimicking the natural hydrograph was arbitrary and capricious. First,  
9 “unimpaired flow,” as defined in the SED, does not depict the natural, unaltered flow regime of the  
10 eastside tributaries or the Lower San Joaquin River. Instead, the “unimpaired flows” proposed by  
11 the State Water Board are theoretical in nature. These flows have never occurred in the Lower San  
12 Joaquin River or its contributing tributaries at their confluence with the Lower San Joaquin River.  
13 Thus, fish species (e.g., migrating salmon and steelhead) could never have become “adapted” to  
14 these flows.

15           375. The California Department of Water Resources (“DWR”) has stated that unimpaired  
16 flows represent poor substitutes for mimicking natural hydrographic conditions. In 2016, DWR  
17 released a report titled “*Estimates of Natural and Unimpaired Flows for the Central Valley of*  
18 *California: Water years 1922 – 2014*” (“DWR Flow Report”). There, DWR stated that  
19 “[u]nimpaired flow estimates are theoretical in that such conditions have not occurred historically.”  
20 (DWR Flow Report, at ES-1.) DWR concluded that, “the findings of this report show that  
21 *unimpaired flow estimates are poor surrogates for natural flow conditions.*” (*Id.* (emphasis  
22 added).)

23           376. Second, the Program of Implementation undermines any benefit that may be  
24 provided by attempting to mimic the natural hydrograph through adherence to an unimpaired flow  
25 requirement. Specifically, the Program of Implementation authorizes the State Water Board, or the  
26 Executive Director of the SWB to, amongst other things, make the following “adaptive  
27 adjustments” to the Tributary UIF Objective: (1) adjust the percent of unimpaired flow required; (2)  
28 manage the required percent of unimpaired flow for February through June as a total volume of

1 water released on an adaptive schedule different from what would occur by tracking the unimpaired  
2 flow (referred to by the SWB as “flow shaping”); and (3) release of a portion of the February  
3 through June unimpaired flow after June to prevent adverse effects to fisheries, including  
4 temperature, that would otherwise result from implementation of the February through June flow  
5 requirements (referred to by the SWB as “flow shifting”). To the extent that adherence to an  
6 unimpaired flow regime might crudely mimic a natural hydrograph, any expected benefits that may  
7 have been derived from such a flow regime would be lost due to the myriad of changes permitted to  
8 the Tributary UIF Objective.

9       377. Third, the State Water Board’s contention that natural flows benefit native fish  
10 species is unsupported. The record contains no evidence that an unimpaired flow objective provides  
11 any benefit, let alone protection, to any specific species of fish.

12       378. The State Water Board’s analysis of fish and wildlife protection also improperly  
13 focuses on Central Valley fall-run Chinook salmon to the exclusion of other identified Beneficial  
14 Uses in the Bay-Delta Plan.

15       379. The water temperature analysis, floodplain habitat analysis, and salmonid production  
16 analysis in the SED fail to demonstrate that the Phase 1 Amendments provide any significant  
17 benefit to the identified Beneficial Uses.

18       380. By contrast, implementation of the Phase 1 Amendments would have devastating  
19 consequences for water supply (both agricultural and municipal), environment, and economy and,  
20 as the SED recognizes, would result in significant impacts to agricultural water supply.

21       381. The State Water Board did not make findings regarding the balancing of competing  
22 beneficial uses. However, the Board’s adoption of the Phase 1 Amendments suggest the Board’s  
23 implicit conclusion that the benefits to fish and wildlife are reasonable despite the adverse impacts  
24 on agricultural water supply. Because the Board’s implicit determination that the water quality  
25 objectives provide a reasonable level of protection to identified fish and wildlife Beneficial Uses  
26 and in light of the impact of those objectives on other beneficial uses such as municipal and  
27 agricultural water supplies not being supported by the analysis in the SED, the Board’s decision was  
28 arbitrary, capricious, and lacking in evidentiary support.

382. Because the State Water Board’s decision was arbitrary, capricious, and entirely lacking in evidentiary support, this Court should issue a writ of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan and enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

### THIRTEENTH CAUSE OF ACTION

**Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking in evidentiary support (Code of Civ. Procedure § 1085)**

**The evidence in the record establishes the Phase 1 Amendments do not provide a reasonable level of protection to the identified Beneficial Uses as required by Water Code § 13241**

383. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

384. The State Water Board's implicit determination that the Phase 1 Amendments ensure reasonable protection of the identified Beneficial Uses was arbitrary, capricious, and entirely lacking in evidentiary support because such a determination was contradicted by the analysis presented by the SJTA, its member agencies, and public commenters.

385. The analysis presented by the SJTA, its member agencies, and other commenters demonstrated, among other things, that the implementation of the Phase 1 Amendments severely depleted reservoir storage levels, provided no benefit to instream water temperatures, resulted in a decrease in salmonid production numbers, and provided no protection to fall-run Chinook salmon in the month of June. The State Water Board ignored, or failed to properly consider, these analyses in concluding that the Phase 1 Amendments provided a reasonable level of protection to fish and wildlife Beneficial Uses.

386. Because the State Water Board's implicit determination that the Phase 1 Amendments ensured reasonable protection of the identified fish and wildlife Beneficial Uses was arbitrary, capricious, and/or entirely lacking in evidentiary support, this Court should issue a writ of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan, and enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

1 **FOURTEENTH CAUSE OF ACTION**

2 **Writ of Mandate - Adoption of the Bay-Delta Plan was arbitrary, capricious, and/or lacking**  
3 **in evidentiary support (Code of Civ. Procedure § 1085)**

4 **The SED fails to consider the economic impacts of implementation of the Phase 1**  
5 **Amendments (Water Code, § 13241)**

6 387. Water Code section 13241(d) requires the State Water Board to “consider the cost of  
7 compliance” when establishing water quality objectives (*City of Burbank v. State Water Resources*  
8 *Control Bd.* (Cal. 2005) 35 Cal. 4th 613, 625), and imposes “obligations that can be enforced by a  
9 writ of mandate.” (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th  
10 156, 176, *as modified on denial of reh’g* (Jan. 20, 2011).) The economic analysis in the SED lacks  
11 the necessary evidentiary support to demonstrate that the objectives are reasonable in light of their  
12 economic impact, and otherwise fails to show that there is a “rational connection” between the  
13 objectives chosen and the economic cost of attaining the benefits anticipated to be achieved by the  
14 objectives. (*Racanelli, supra*, 182 Cal.App.3d at 113.)

15 388. The economic analysis in the SED fails to evaluate the economic impact of  
16 implementing the objectives, and instead unlawfully defers that analysis to subsequent project-level  
17 proceedings. (Wat. Code, § 13050[j], 13241[d].)

18 389. The economic analysis in the SED fails to compare the costs of the newly adopted  
19 objectives to the anticipated benefits of those objectives, as is required under the Water Code when  
20 setting objectives to provide a reasonable level of protection to beneficial uses considering the  
21 economic impact of the objectives, as well as the other demands and beneficial uses of the water.  
(Wat. Code, §1300, 13241.)

22 390. The economic analysis in the SED also understates the impact of the objectives on  
23 the agricultural economy by unreasonably assuming across all farms that high-water use crops  
24 generating low net revenue per acre will be fallowed when water is more scarce, that farmers will  
25 act rationally and with perfect information in directing water towards the highest value crops in  
26 times of shortage, and that surface water reductions will be offset by maximum groundwater  
27 pumping rates at 2009 capacity levels without any analysis as to whether pumping at this rate would  
28 be sustainable or lawful under the Sustainable Groundwater Management Act.

391. The SED fails to consider, in violation of Water Code section 13241(d), that the Board's implementation of the Phase 1 Amendments could increase existing water shortages in the RWS Service Area during sequential-year droughts, and consequently result in severe economic impacts to San Francisco and its retail and wholesale customers in the Bay Area, including a significant loss of jobs and economic output throughout the region.

392. The SED avoids analyzing the predictable, adverse impacts to the Bay Area by assuming San Francisco will be able to completely replace the 116 mgd annual reduction in RWS water supplies during protracted droughts with the development of alternative sources, i.e., by purchasing the requisite volume of replacement water from the Districts, constructing a large-scale desalination plant in the Delta, and/or developing an in-Delta diversion project.

393. The SED fails to analyze the economic impacts associated with each of these proposed water supply alternatives. The SED's deficiencies include:

- a. Reliance on an assumed purchase price for water in support of its envisioned transfer of an unprecedented volume of water from the Districts to San Francisco during a sequential-year drought;
- b. Failure to analyze the economic impacts of the 56,000 acre-feet per year desalination plant at Mallard Slough envisioned in the Phase 1 Amendments;
- c. Failure to analyze the in-Delta diversion project proposed by the Board; and,
- d. Failure to consider that the Phase 1 Amendments would substantially decrease San Francisco's hydropower generation and result in a consequent loss in associated revenue.

## FIFTEENTH CAUSE OF ACTION

**Violations of California Environmental Quality Act (Pub. Resources Code § 21000, *et seq.*)**

## The State Water Board Failed to Proceed in a Manner Required by Law

394. Petitioners<sup>11</sup> reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

<sup>11</sup> MID is not participating as a member of the SJTA in this cause of action.

1           395.    The State Water Board’s adoption of the SED constitutes a prejudicial abuse of  
2 discretion in that the State Water Board failed to proceed in a manner required by law.

3           396.    The Board failed to proceed in a manner required by law because the SED fails to  
4 provide a proper description of the adopted project, as follows (Cal. Code Regs., tit. 23, §  
5 3777[b][1]):

6               a.       The SWB’s project description failed to disclose fundamental portions of the  
7 project that were included in the program of implementation, including, among other things,  
8 minimum reservoir storage levels, flow shifting, flow shaping, and reservoir refill criteria.

9               b.       The SED failed to present a clear description of the project because it fails to  
10 clarify the extent to which municipalities, including San Francisco, are responsible for complying  
11 with the LSJR Flow Objectives. The SED contains vague, conflicting statements regarding how  
12 the Tributary UIF Objective will apply to municipalities generally and San Francisco specifically.

13              c.       The SWB failed to identify or provide a consistent project horizon.

14              d.       The SWB failed to identify a preferred alternative.

15              e.       The SED’s incomplete, inconsistent, and internally contradictory statements  
16 regarding the project description violate the substantive standards of CEQA, and the requirements  
17 associated with the State Water Board’s certified regulatory program.

18           397.    The SWB unlawfully segmented the environmental review of the Bay-Delta Plan  
19 update into two phases and two separate programmatic environmental documents.

20              a.       The SWB’s water quality control planning program is a certified regulatory  
21 program that is exempt from the CEQA requirements of preparing an EIR and/or a negative  
22 declaration, but the Board must prepare a SED in lieu of an EIR. (Pub. Resources Code, § 21080.5;  
23 Cal. Code Regs., tit. 14, § 15251).

24              b.       CEQA requires that the cumulative impact of a proposed project be analyzed  
25 when determining whether the project will have a significant effect on the environment. (Pub.  
26 Resources Code, § 21083[b][2].)



1           c.       If an agency elects to phase or segment a large project that is intended to be  
2 completed as a whole, the agency must prepare a single programmatic SED that covers the entire  
3 project.

4           d.       The combined Phase 1 and Phase 2 revisions to the Bay-Delta Plan, along  
5 with the Phase 3 process proposed for implementing the revisions from Phases 1 and 2, must be  
6 analyzed together to determine whether the project, as a whole, will have significant environmental  
7 impacts; the SWB failed to conduct this analysis.

8           e.       The Inflow Narrative Objective requires that inflow from the San Joaquin  
9 River into the Delta be maintained so as to support and maintain the natural production of viable  
10 native San Joaquin River watershed fish populations migrating through the Delta. However, the  
11 analysis in the SED is confined to a certain section of the San Joaquin River watershed and does  
12 not extend through the Delta. The analysis fails to address whether any flows from the San Joaquin  
13 River watershed which reach the Delta contribute to Delta outflow in a way that would assist in  
14 migration through the Delta.

15          f.       In addition, the Framework Document issued by the Board explaining the  
16 interrelation of Phase 1 and Phase 2 demonstrates that certain objectives being developed during  
17 Phase 2 (such as the inflow-based Delta outflow objective) are dependent upon the objectives that  
18 were developed during Phase 1. Specifically, the Framework Document states that the inflow-  
19 based Delta Outflow objective will prescribe that “[t]he inflows required above, including from the  
20 Sacramento/Delta tributaries and San Joaquin River are required as outflows with adjustments for  
21 downstream natural depletions and accretions.”

22          g.       There is no analysis in the SED for Phase 1 that incorporates or otherwise  
23 considers the changes to the Bay-Delta Plan being contemplated as part of Phase 2.

24          h.       By dividing the revisions to the Bay-Delta Plan into two phases (Phase 1 for  
25 the San Joaquin River watershed and Phase 2 for the Sacramento River watershed and Delta), and  
26 by segmenting the environmental review of its actions into two (or potentially more) programmatic  
27 documents, the SWB has ignored the interconnected nature of the entire Bay-Delta estuary,  
28 eliminated reasonable alternatives that should be weighed against one another, excluded from

1 consideration certain mitigation measures, skewed the balance of the proposed project's benefits  
2 against its costs, and otherwise distorted the impact of the project, thereby proceeding in an  
3 unlawful manner and abusing its discretion.

4 398. The Board is required to consider the impacts of the project against a baseline of  
5 existing conditions. The Board failed to proceed in a manner required by law because the SED does  
6 not compare the project to a baseline of existing conditions, and instead employs an incorrect and  
7 unrealistic baseline.

8 a. The SED uses a baseline flow regime on the San Joaquin River (as measured  
9 at Vernalis) that includes the Vernalis Adaptive Management Program (VAMP). VAMP expired in  
10 2011 in accordance with Water Rights Decision 1641. The inclusion of VAMP in the baseline  
11 misrepresents (1) the existing responsibility for meeting flow requirements at Vernalis on the San  
12 Joaquin River, and (2) the existing amount of flow required at Vernalis on the San Joaquin River.

13 b. The SED uses a baseline that does not include flows being released as part  
14 of the San Joaquin River Restoration Program (SJRRP). The failure to include SJRRP flows in the  
15 baseline misrepresents existing conditions in which those flows are present.

16 399. The Board failed to proceed in a manner required by law because the SED does not  
17 analyze cumulative impacts. (See generally Cal. Code Regs., tit. 23 §§ 3777[b][2], 15130, 15355.)

18 a. The SED fails to analyze the cumulative impacts of the project on  
19 groundwater resources.

20 b. The SED fails to evaluate how the project will affect compliance with the  
21 Sustainable Groundwater Management Act ("SGMA").

22 c. The SED fails to analyze the cumulative impacts of the Phase 1  
23 Amendments with the related impacts from the Phase 2 Amendments of the State Water Board's  
24 update to the Bay-Delta Plan.

25 d. The SED fails to analyze the cumulative impacts of the project with impacts  
26 that would be caused by an approval of the California Waterfix change petition.

27 e. The SED fails to analyze the cumulative impacts of the project with impacts  
28 that would be caused by reasonably foreseeable water transfers between irrigation districts.

1           400. The SWB failed to proceed in a manner required by law in evaluating the project's  
2 significant or potentially significant impacts because the thresholds of significance in the SED are  
3 improper and uninformative. (Cal. Code Regs., tit. 23, § 3777[b][2].)

4           a. The SED analyzes the project's impact on agriculture by evaluating the  
5 amount of farmland that would be converted to non-agricultural use, but the analysis is limited to  
6 farmland that is already designated as prime, unique, or of statewide importance (AG1). By  
7 excluding farmland that does not meet these designations, the SED excludes approximately 17% of  
8 the plan area's total farming acreage and thereby significantly underestimates the impact of the  
9 project.

10           b. In analyzing the project's impact on agriculture, the SED fails to evaluate  
11 the impact of the project on cattle and dairy sectors, and thereby significantly underestimates the  
12 impact of the project.

13           401. The SWB failed to proceed in a manner required by law because the SED fails to  
14 evaluate the significant or potentially significant impacts of the project on the following resources  
15 (Cal. Code Regs., tit. 23, § 3777[b][2]):

16           a. Water supply, insofar as the WSE model does not accurately depict the  
17 project without the inclusion of mitigation measures such as carryover storage, reservoir refill  
18 criteria, flow shaping, flow shifting, and maximum groundwater pumping;

19           b. Water supply, insofar as the SED does not analyze impacts during dry and  
20 successive dry years;

21           c. Water supply, insofar as the analysis fails to analyze how the Tributary UIF  
22 Objective interacts with the Inflow Narrative Objective, the Vernalis Base Flow Objective, and the  
23 Year-round Objective;

24           d. Water supply, insofar as the analysis fails evaluate the changes to the  
25 October flow requirements;

26           e. Water supply, insofar as the analysis fails to evaluate the impact on  
27 municipal supplies;

28

1 f. Agricultural resources, insofar as the State Water Board's SWAP model  
2 does not model the project's effects on:

- 3 i. Air quality;
- 4 ii. Energy;
- 5 iii. Groundwater;
- 6 iv. Recreation;
- 7 v. Cultural resources; and
- 8 vi. Climate Change

9 402. The Board failed to proceed in a manner required by law because the SED fails to  
10 evaluate the significant or potentially significant impacts occurring outside the specified plan area.  
11 (Cal. Code Regs., tit. 23, § 3777[b][2].)

12 a. The SED assumes that the impacts within the plan area will be the same as  
13 those outside the plan area but fails to provide any explanation or analysis to support this  
14 assumption.

15 403. The Board failed to proceed in a manner required by law because the SED does not  
16 describe or analyze reasonable alternatives to the project and mitigation measures to avoid or reduce  
17 any significant or potentially significant adverse impacts. (Cal. Code Regs., tit. 23, § 3777[b][3].)

18 a. Mitigation measures such as minimum reservoir Carryover Storage,  
19 reservoir refill requirements, flow shaping, flow shifting, maximum groundwater pumping, and  
20 prioritization of municipal supply, among others, were incorporated into the SED analysis without  
21 being identified as a mitigation measures, leaving no grounds for comparison of the project  
22 impacts with and without these mitigation measures.

23 b. The SED did not consider reasonable alternatives to the project that were not  
24 premised upon unimpaired flow percentages from February through June, including, but not  
25 limited to, functional flows instead of unimpaired flow percentages, flow requirements from  
26 February through May instead of February through June, and/or addressing stressors such as ocean  
27 harvest numbers, hatchery practices, predation, water temperature, dissolved oxygen, nutrient  
28 depletion, toxics, turbidity, availability of food, and adverse impacts to habitat.

1           404. The Board failed to proceed in a manner required by law because the SED does not  
2 consider reasonably foreseeable methods of compliance. (Cal. Code Regs., tit. 23, § 3777[b] [(4)].)

3           a. The SED only considers a single and very specific method of compliance,  
4 which is set forth in the modeling assumptions and parameters and which includes, among other  
5 things, minimum reservoir Carryover Storage requirements that are not required by the objectives,  
6 reservoir refill criteria that are not required by the objectives, flow shifting that is not required by –  
7 and conflicts with – the objectives, and maximum groundwater pumping. Other reasonable  
8 methods of compliance exist and the SWB was required to consider those methods.

9           b. The only method of compliance analyzed in the SED, which is set forth in  
10 the modeling assumptions and parameters, is not reasonable because it includes, among other  
11 things, numerous modeling assumptions which are not required by the objectives.

12           405. The Board failed to proceed in a manner required by law because the SED failed to  
13 analyze the impacts of San Francisco’s most reasonably foreseeable method of compliance with the  
14 Plan Amendment.

15           a. The SED fails to analyze the environmental and economic impacts of San  
16 Francisco’s most reasonably foreseeable method of compliance with the Plan Amendment:  
17 reduction of water deliveries throughout the RWS Service Area.

18           b. San Francisco and other parties brought this failure to the Board’s attention  
19 several times, but the SED failed to address the comments.

20           c. In violation of both the requirements of the certified regulatory program  
21 associated with the State Water Board’s water quality control program and CEQA, the SED fails to  
22 consider that increased rationing throughout the RWS Service Area, and the consequent reduction  
23 in outdoor water use and resulting loss in park vegetation, landscaping and trees (the urban forest),  
24 would result in significant environmental impacts, including, but not limited to:

- 25                   i. adverse impacts to cultural, aesthetic and recreational resources;
  - 26                   ii. increased risk of urban wildfires;
  - 27                   iii. adverse impacts to habitat; and
- 28

1                   iv.       effects on energy consumption, human health, water quality, air  
2                               quality, and greenhouse gas emissions from the exacerbation of urban  
3                               heat islands.

4                   d.       The SED also fails to analyze the environmental impacts that significantly  
5 increased water rationing within the RWS Service Area would cause by restricting urban growth  
6 and increasing sprawl, including, but not limited to, the following:

- 7                           i.       increased emissions of greenhouse gases and other air pollutants;  
8                           ii.       loss of open space, forests, habitat, and agriculture; and water-related  
9                               impacts of bringing sprawling development into affected areas.

10                  e.       The SED also fails to disclose or consider that the Plan Amendment  
11 contradicts Plan Bay Area and other state and regional plans designed to promote green  
12 infrastructure and avoid adverse environmental impacts.

13                  f.       By failing to acknowledge that San Francisco would need to increase  
14 rationing throughout the RWS Service Area if the State Water Board implemented the Plan  
15 Amendment, the SED fails to consider severe economic impacts to San Francisco and its retail and  
16 wholesale customers in the Bay Area, including a significant loss of jobs and economic output, that  
17 increased rationing would cause.

18                  406.    The SED failed to evaluate reasonably foreseeable methods of compliance that  
19 would have less significant adverse environmental impacts. (Cal. Code Regs., tit. 23, §  
20 3777[b][4][C].)

21                  a.       The SED only analyzes one method of complying with the 40% unimpaired  
22 flow requirement.

23                  b.       The State Water Board acknowledged that the modeling shows how  
24 compliance with the water quality objectives could occur, but is not prescribing how it must occur.

25                  c.       The State Water Board acknowledged that compliance could clearly happen  
26 in other ways that would take less water, but the SED does not analyze those other ways.

1           407. The Board failed to proceed in a manner required by law because the SED does not  
2 describe the specific reasons for rejecting mitigation measures or project alternatives that have been  
3 deemed infeasible. (Cal. Code Regs., tit. 23, § 3777[d]; Cal. Code Regs., tit. 14, § 15091[c].)

4           408. The SWB failed to proceed in a manner required by law because it failed to adopt a  
5 sufficient statement of overriding considerations with the requisite balancing of economic, legal,  
6 social, technological, or other benefits. (Cal. Code Regs., tit. 23 § 3777[d]; Cal. Code Regs., tit. 14,  
7 § 15093.)

8           409. The SWB failed to proceed in a manner required by law because the No-Project  
9 Alternative is unlawful.

10               a. The No-Project Alternative in the SED includes operational requirements  
11 which would not exist if the State Water Board took no action, such as that OID and SSJID would  
12 share the responsibility with USBR of complying with D-1641.

13               b. The No-Project Alternative in the SED fails to accurately depict that USBR  
14 has not met the terms and conditions of its permits, as specified in D-1641, requiring certain flows  
15 at Vernalis, and has stated it will not operate to meet these requirements. The No-Project  
16 Alternative fails to acknowledge that numerous temporary urgency change orders have been issued  
17 by the State Water Board relaxing the terms and conditions of USBR's permits requiring certain  
18 flows at Vernalis, as specified in D-1641.

19           410. The State Water Board failed to provide a detailed, good-faith, and reasoned analysis  
20 in response to the numerous public comments that were submitted in violation of CEQA. (Pub.  
21 Resources Code § 21091(d)(1); Cal. Code Regs., tit. 14, § 15088; Cal. Code Regs., tit. 23, §  
22 3779(d).)

23           411. The State Water Board's conclusory responses to comments provided by other  
24 agencies, including by the STJA member agencies, which directly critiqued the adequacy of the  
25 data and methodology used by the State Water Board, rendered the SED legally deficient, and its  
26 adoption thereof an abuse of discretion.

27           412. The Board failed to provide a good-faith, reasoned analysis in response to comments  
28 on the SED. Notwithstanding the comments received in response to the Draft SED, the final SED:

- a. Fails to explain why the Tributary UIF Objectives only pertain to February - June, despite the Board's SalSim model showing the greatest increase in the number of fish when a significant portion of the February – June water is shifted to fall (September – December);
- b. Fails to acknowledge that the results from SalSim undercut the Board's premise that more flow equals more fish;
- c. Ignores the fact that the Tributary UIF Objectives will eliminate the ability to store water and operate reservoirs as they were designed to operate;
- d. Fails to fully acknowledge that the operations depicted in its modeling (e.g., carryover storage, flow shifting etc.) rely on a level of foresight that does not exist in real world reservoir operations;
- e. Fails to analyze impacts to the Bay Area from increased water supply rationing;
- f. Fails to use San Francisco's eight-and-a-half year design drought in its modeling of water supply impacts;
- g. Fails to use the SFPUC's more precise hydrological modeling results of impacts to the RWS;
- h. Fails to substantively consider the SFPUC's methodology for estimating socioeconomic impacts from increased rationing;
- i. Erroneously relies on the SFPUC's long-term planning documents to establish the alleged availability of alternative water supplies in the near term;
- j. Fails to support the three methods of compliance for San Francisco it identifies;
- k. Fails to support its assumption that implementation of the Plan Amendment would result in minimal effects to economic growth and housing starts in the Bay Area; and



- 1           l.       Fails to substantively respond to the SFPUC Alternative. (See Cal. Code  
2                       Regs., tit. 14, § 15088(c) (“[c]onclusory statements unsupported by factual  
3                       information will not suffice.”).)

4           413.   The Board failed to proceed in a manner required by law because the Notices of  
5 Preparation (NOP) distributed in 2009 and 2011 did not adequately describe the project adopted by  
6 the Board.

7                   a.       The 2009 NOP described the project as a review and update of the flow  
8 objectives on the San Joaquin River; it did not state that the Board would consider new numeric  
9 flow objectives on the Stanislaus, Tuolumne, and/or Merced Rivers.

10                  b.       The 2011 NOP described the proposed project as a review of, and potential  
11 amendments to, the San Joaquin River flow objectives for the protection of fish and wildlife  
12 beneficial uses, as well as the creation of a new narrative objective at the confluence of each of the  
13 Stanislaus, Tuolumne, and Merced Rivers; it did not provide notice of a project that would create  
14 new numeric flow objectives on the Stanislaus, Tuolumne, or Merced Rivers.

15                  c.       The SWB did not update or further revise the 2011 NOP in relation to the  
16 Phase 1 Amendments.

17                  d.       The Phase 1 Amendments contained new numeric flow objectives on the  
18 Stanislaus, Tuolumne, and Merced Rivers, minimum reservoir carryover storage targets, and  
19 reservoir refill requirements, among other things not specified in the 2009 NOP and 2011 NOP.

20           414.   The SWB failed to proceed in a manner required by law because the Board did not  
21 identify and consult with local agencies as responsible agencies. (Pub. Resources Code, § 21069.)  
22  
23  
24  
25  
26  
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28

1 **SIXTEENTH CAUSE OF ACTION**

2 **Violations of California Environmental Quality Act**  
3 **(Pub. Resources Code § 21000, *et seq.*)**

4 **The State Water Board's Decision to Adopt the SED Is Not Supported by Substantial**  
5 **Evidence**

6 415. Petitioners<sup>12</sup> reallege and incorporate herein, as if set forth in full, each and every  
7 preceding allegation, inclusive, of this Petition/Complaint.

8 416. The State Water Board's decision to adopt the SED, and the findings therein, was not  
9 supported by substantial evidence because the models relied upon by the SWB in the SED do not  
10 accurately depict the project.

11 a. In the SED, the effects of the project on reservoir operations, flood control  
12 releases, water supply diversions, and water quality in the SJR at Vernalis and in the southern  
13 Delta were analyzed using the SWB's Water Supply Effects ("WSE") model.

14 b. The WSE model assumes flows that are based on a static monthly average  
15 rather than the minimum 7-day running average that is required by the Phase 1 Amendments.

16 c. The WSE model assumes reservoir carryover storage requirements that are  
17 not required by the objectives, nor enforceable by the Board.

18 d. The WSE model assumes reservoir drawdown and refill criteria that are not  
19 required by the objectives.

20 e. The WSE model assumes that a percentage of total unimpaired flow from  
21 February through June will be shifted to other times of the year in a way that is not required by the  
22 objectives.

23 f. As the assumptions in the WSE model are not required by the objectives, the  
24 SWB's decision to adopt the SED and the project was not supported by substantial evidence  
25 because it was based on WSE modeling results that did not reflect the project.

26 g. In the SED, the effects of the project on agriculture were analyzed using the  
27 SWB's Statewide Agricultural Production ("SWAP") model.  
28 \_\_\_\_\_

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<sup>12</sup> MID is not participating as a member of the SJTA in this cause of action.

1           h.       The SWAP model incorporates the results and modeling from the WSE  
2 model.

3           i.       The SWAP model assumes that agricultural decisions will be market based,  
4 but it fails to include all reasonably foreseeable market factors. The SWAP model relies only on  
5 commodity pricing to form assumptions as to which crops will be fallowed, but it fails to consider  
6 the secondary value that crops such as alfalfa and pasture have on the cattle and dairy sectors.

7           j.       The SWAP model assumes that all lower value crops will be fallowed before  
8 higher value crops through intra-district water transfers. However, individual farmers rarely hold  
9 water rights separate and apart from irrigation districts. Certain irrigation districts do not allow  
10 intra-district water transfers. The SWAP model did not evaluate which irrigation districts permit  
11 such transfers and which preclude such transfers. The SWAP model did not assess how the  
12 agricultural community would be impacted given the restrictions on intra-district water transfers.

13          k.       The SWAP model does not disclose the commodity pricing and yield  
14 production numbers relied upon. Without such information, the SWB could not assess whether the  
15 model correctly valued crops, whether it properly determined which crops would be fallowed, or  
16 whether it properly assessed the number of acres fallowed.

17          l.       The SWAP model obscures the analysis of significant or potentially  
18 significant environmental impacts, and artificially inflates the benefits of the project by improperly  
19 assessing the impact on agriculture.

20          m.       As the assumptions in the SWAP model are inaccurate and do not reflect  
21 feasible or foreseeable responses to the proposed project, the SWB's decision to adopt the SED and  
22 the project was not supported by substantial evidence because it was based, in part, on the  
23 analytical results from the SWAP model.

24          n.       In addition, the SalSim model includes assumptions that are not required by  
25 the objectives, or otherwise supported, and the SWB's decision to approve the SED and the project  
26 was not supported by substantial evidence because it was based, in part, on estimates from the  
27 SalSim model.

28

1           o.       Because the SWB’s decision to adopt the SED was not supported by  
2 substantial evidence, the Board’s action was an abuse of discretion and its decision must be set  
3 aside. (Pub. Resources Code, § 21168.5, § 21168.9.)

4           417.    The Board’s decision to adopt the SED, and the findings therein, is not supported by  
5 substantial evidence because it is not reasonably foreseeable that San Francisco would be able to (1)  
6 effectuate a large-scale water transfer with the Districts, or any other potential seller in the Central  
7 Valley, during a protracted drought; (2) develop a large-scale desalination plant located at Mallard  
8 Slough; or (3) develop the proposed in-Delta diversion project. The Board’s analysis of these  
9 compliance methods is not supported by substantial evidence.

10           a.       First, the claim that the Districts, or any other entity, would willingly transfer  
11 an extraordinary volume of water to San Francisco in the midst of a protracted drought—and  
12 following implementation of the Plan Amendment, which will exacerbate dry year water supply  
13 reductions—is pure unsupported speculation.

14           b.       Second, the SED entirely failed to assess the feasibility, costs, and  
15 environmental impacts of a large-scale desalination plant in the Delta.

16           c.       Third, the State Water Board’s analysis of the contemplated in-Delta  
17 diversion project unreasonably cites San Francisco’s prior determination that the same project was  
18 infeasible, and then, without offering additional analysis, facts, or explanation, asserts the project  
19 should now be considered feasible.

20           d.       The SED also fails to provide an adequate analysis of the economic impacts  
21 of these three proposed alternative water supply sources. The SED fails to provide evidentiary  
22 support for its assumptions about the probable price of water available for a large-scale water  
23 transfer, and entirely fails to analyze the economic impacts of a large-scale desalination plant  
24 located at Mallard Slough, or the proposed in-Delta diversion project. (Cal. Code Regs., tit. 23, §  
25 3777(c); Pub. Res. Code § 21159(c); Cal. Code Regs., tit. 14, § 15187(d).)

26           418.    The State Water Board’s decision to adopt the SED, and the findings therein, was not  
27 supported by substantial evidence because the Board failed to properly analyze whether the  
28 thresholds of significance were met or exceeded.

1           a.       The SED fails to explain how the Board determined that agricultural land  
2 would be converted to non-agricultural uses, and instead generally asserted that a reduction in  
3 water supply was used as a proxy for the conversion of irrigated land to nonagricultural land.

4           b.       The analysis in the SED fails to evaluate the water demand for land that has  
5 been converted from agricultural to nonagricultural use and presumes that the land converted to  
6 nonagricultural use will have no water demand.

7           c.       The SWB's determination that the project will not cause seepage issues that  
8 result in significant conversion of farmland to nonagricultural use (AG2) is conclusory and not  
9 supported by substantial evidence.

10          d.       The SWB determined the project will not cause significant impacts to cattle  
11 and dairy farming sectors due to fallowing of pasture and alfalfa (AG2) because, among other  
12 things, the cattle/dairy sector can import feed. The determination is conclusory and not supported  
13 by substantial evidence.

14          e.       The SWB determined the project would not conflict with Williamson Act  
15 contracts which restrict enrolled parcels of land to agricultural or related open space use. This  
16 determination is conclusory and not supported by substantial evidence because, among other  
17 things, the SWB failed to identify the baseline quantity of acreage that is under Williamson Act  
18 contract.

19          f.       The SWB determined that the project would not conflict with existing land  
20 use plans or policies (AG4). This determination is conclusory and not supported by substantial  
21 evidence because, among other things, the SED failed to identify any land use plans or policies  
22 related to agriculture.

23       419.   The State Water Board's adoption of the SED, and the findings therein, was not  
24 supported by substantial evidence because the Board improperly used the project's impacts on fall-  
25 run Chinook salmon as a proxy for the project's impacts on all fish and wildlife beneficial uses.

26           a.       The SED does not analyze how the project will affect each of the fish  
27 species identified as protected by the Phase 1 Amendments.

28

1           b.       The SED explains that the fall-run Chinook salmon were used as a proxy  
2 due to their sensitivity to expected changes in environmental conditions in the plan area and their  
3 utility in evaluating broader ecosystem and community-level responses to environmental change.  
4 This explanation is not supported by any citation or scientific information demonstrating the  
5 propriety of selecting this species for the purpose of determining the impacts of the project.

6           c.       The SED focused almost entirely on the impacts to Central Valley Fall-run  
7 Chinook salmon. The adoption of the SED was not supported by substantial evidence because it  
8 was based, in part, on the analysis of a single species and the unsupported assumption this species  
9 could be used as a proxy for all other fish and wildlife beneficial uses.

10          d.       Because the adoption of the SED was not supported by substantial evidence,  
11 the Board's action was an abuse of discretion and its decision must be set aside. (Pub. Resources  
12 Code, § 21168.5, § 21168.9.)

13          420.     The SWB's decision to adopt the SED, and findings therein, was not supported by  
14 substantial evidence due to inadequacies in the floodplain inundation analysis.

15          a.       For the Stanislaus River, the SED relies on the USFWS model estimate  
16 inundation of floodplain areas by reach of river. The SED makes the general assumption, based on  
17 this model, that floodplain inundation on the Stanislaus River begins when flows are at 1,000 cubic  
18 feet per second. However, the USFWS model applies an inundation threshold ranging between  
19 1,000 and 1,500 cfs depending on the river reach. By setting the floodplain inundation threshold at  
20 the lowest point (1,000 cfs) the SED estimates there are 43 instances of inundation improvements  
21 of 10% or greater. If the inundation threshold is set at the more common threshold in the USFWS  
22 model, there are only 19 instances of inundation.

23          b.       For the Tuolumne River, the SED relies on floodplain modeling developed  
24 by USFWS in the FERC process. This model looks at only a specific reach of the river, from mile  
25 52 to mile 21.5. The SED analysis omits the lower 20 miles of the river, where floodplain  
26 thresholds are often higher and may reduce the amount of improved floodplain habitat per river  
27 mile.

1           c.       For the Merced River, no floodplain model or relationship has been  
2 developed. The SED estimates floodplain inundation by calculating water surface area and  
3 comparing the estimated surface area with flows. The SED omits an analysis of the lower 27 mile  
4 stretch of the river and the actual floodplain inundation that will result from the project is not clear  
5 and cannot be determined from the information disclosed in the SED.

6           d.       The floodplain analysis incorrectly assumes all out-of-bank flows are usable  
7 floodplain habitat. The SED does not assess whether floodplain inundation in particular areas will  
8 result in usable habitat. Specifically, the SED does not evaluate duration, depth, velocity, cover,  
9 connectivity, and water temperature, all of which are necessary to determine if inundated  
10 floodplain will make suitable habitat. Instead, the SED relies on the unsupported assumption that  
11 wetted acre days equals floodplain habitat, which vastly over-estimates the amount of floodplain  
12 habitat that will result from the Phase 1 Amendments.

13           e.       The SED evaluates floodplain improvement based upon a 30-day average,  
14 which is inconsistent with the Tributary UIF Objective requiring the maintenance of 40%  
15 unimpaired flow based upon a minimum 7-day running average.

16           f.       The SED also determines that a 10% increase in floodplain inundation will  
17 have a significant benefit. However, it also states that the 10% change in the frequency of  
18 floodplain inundation was selected because it accounts for a reasonable range of potential error  
19 associated with the assumptions used in the various analytical and modeling techniques. The SED  
20 fails to explain how the 10% change in the frequency of floodplain inundation equates to a  
21 significant benefit to fish and wildlife, especially given the margin of error in which a 10% change  
22 might equate to no additional floodplain.

23           g.       The SWB's decision to adopt the SED for the project was not supported by  
24 substantial evidence because it was based, in part, on inadequate and unsupported floodplain  
25 habitat analysis.

26           h.       Because the SWB's decision to adopt the SED was not supported by  
27 substantial evidence, the Board's action was an abuse of discretion and its decision must be set  
28 aside. (Pub. Resources Code, § 21168.5, § 21168.9.)

1           421. The SWB's decision to adopt the SED, and the findings therein, was not supported  
2 by substantial evidence due to inadequacies in the temperature analysis.

3           a. The SED's temperature thresholds are deficient and do not properly identify  
4 and evaluate the impacts of the project on aquatic species.

5           b. The SED measures temperature improvement by estimating the increase in  
6 the number of days in which the United States Environmental Protection Agency (USEPA)  
7 temperature criteria for the Pacific Northwest (EPA region 10) will be met.

8           c. The USEPA temperature criteria developed specifically for salmonids in the  
9 Pacific Northwest (Region 10) does not apply to the Plan Area in California's Central Valley  
10 where instream temperatures are much warmer. As the SWB's temperature analysis is based upon  
11 a set of temperature criteria that are not relevant to the Plan Area, SWB's decision to adopt the  
12 SED based, in part, on the benefits shown by that analysis is not supported by substantial evidence.

13           d. The SED relies on the monthly outputs obtained using the WSE Model,  
14 meaning that instream water temperatures remain constant for the entire month for modeling  
15 purposes. Because the Tributary UIF Objective requires daily fluctuations in flow based upon a  
16 minimum 7-day running average, the model's monthly flow fails to capture daily temperature  
17 fluctuations that will result from the objectives. As the SWB's decision to adopt the SED is based,  
18 in part, on a temperature analysis that fails to capture the temperature fluctuations that will be  
19 created by the objectives, the decision was not supported by substantial evidence.

20           e. The SWB's temperature analysis includes mitigation measures, such as  
21 minimum reservoir levels and flow shifting, that are not required by the objectives, and therefore  
22 the SWB's decision to adopt the SED based, in part, upon this temperature analysis is not  
23 supported by substantial evidence.

24           f. The SWB's own analysis submitted in response to public comments shows  
25 that the 40% unimpaired flow, without minimum reservoir storage, will increase water  
26 temperatures and adversely affect fall-run Chinook salmon. As the SWB refused to rely on this  
27 analysis in adopting the SED, its decision is not based upon substantial evidence.

28



1           g.       Because the SWB's decision to certify the SED was not supported by  
2 substantial evidence, the Board's action was an abuse of discretion and its decision must be set  
3 aside. (Pub. Resources Code, § 21168.5, § 21168.9.)

4           422.    The State Water Board's decision to adopt the SED, and the findings therein, was not  
5 supported by substantial evidence due to inadequacies in the reservoir impact analysis.

6           a.       The SED fails to evaluate the impact of the project on reservoir levels, and  
7 instead assumes that reservoir levels will not change because the modeling inputs were adjusted,  
8 through an iterative (i.e., trial and error) process to limit fluctuations in reservoir levels by  
9 declaring Carryover Storage rules and reservoir refill criteria. These model inputs or assumptions  
10 are not required by the objectives.

11           b.       The SED did not evaluate the project's impacts on reservoir levels in the  
12 absence of Carryover Storage rules and reservoir refill criteria that were designed through an  
13 iterative (i.e., trial and error) process to limit impacts.

14           c.       The SWB's decision to adopt the SED for the project was not supported by  
15 substantial evidence because it was based, in part, on this inadequate and inaccurate reservoir  
16 impact analysis.

17           d.       Because the SWB's decision to adopt the SED was not supported by  
18 substantial evidence, the Board's action was an abuse of discretion and its decision must be set  
19 aside. (Pub. Resources Code, § 21168.5, § 21168.9.)

20           423.    The SWB's decision to adopt the SED, and the findings therein, was not supported  
21 by substantial evidence due to inadequacies in the groundwater analysis.

22           a.       The SED's analysis of groundwater impacts has numerous flaws.

23           b.       The SED assumes that the project's reductions in available surface water  
24 will be offset on a one-to-one ratio with groundwater up to the point of the estimated maximum  
25 groundwater pumping that occurred in 2009.

26           c.       The SED does not disclose how the 2009 maximum pumping estimates were  
27 calculated.

1           d.       The assumption that groundwater pumping can or will occur at 2009 levels  
2 is not based upon any analysis or information. The assumption does not evaluate the impact of  
3 whether SGMA would allow 2009 level pumping.

4           e.       SGMA requires that high and medium priority groundwater basins be  
5 managed to achieve sustainability. Sustainability is based on the avoidance of six undesirable  
6 results. These six undesirable results include: decrease in groundwater storage, elevation,  
7 subsidence, degradation of water quality, intrusion of seawater, and depletion of interconnected  
8 surface waters. (Wat. Code, § 10721[m].)

9           f.       Simply because the SWB cannot determine “precise” implementation of  
10 SGMA, does not permit it to ignore SGMA and the reasonably foreseeable impacts from the  
11 implementation of SGMA. (Cal. Code Regs., tit. 14, § 15144.) While the specific groundwater  
12 sustainability plans are not yet available, at the very least, SGMA requires the State Water Board to  
13 evaluate the impact of the project on the six factors that define sustainability.

14          g.       The SED fails to evaluate the impacts to individual sustainability factors in  
15 any meaningful way.

16          h.       The SED also uses an unsupported metric to evaluate impacts. The SED  
17 estimates the decrease in groundwater by measuring each irrigation district’s groundwater balance  
18 and dividing by the acres in each corresponding basin. The impact of the project is estimated in the  
19 metric of inches of groundwater balance per acre. This groundwater balance inches metric is not an  
20 accepted measurement; it is not used by any other groundwater analysis and it is not accepted as  
21 valid by any groundwater experts. The SED offers an approximate conversion of each inch of  
22 groundwater balance equating to about 10 inches of groundwater elevation. However, the SWB  
23 fails to explain how it analyzed the impacts of the project on the groundwater elevation of each  
24 basin.

25          i.       The SWB fails to accurately describe baseline groundwater conditions and  
26 relies on flawed WSE Model impacts to estimate groundwater basin impacts.

27          j.       The SED identifies the four groundwater basins underlying the Plan Area,  
28 discloses the acres overlying each basin, denotes aquifer characteristics (e.g. formation and

1 deposits), and provides general information regarding water balance and groundwater movement.  
2 Yet, the SED fails to describe the actual baseline condition for each groundwater basin.

3 k. The SED explains that its analysis includes several “simplifying  
4 assumptions,” which include the assumptions that the four connected basins are separate pools of  
5 water and that each basin has no separation between shallow and deeper aquifers.

6 l. These assumptions simply misstate the characteristics, challenges and  
7 specific attributes of each groundwater basin. The SED fails to provide contour maps showing  
8 hydrogeologic features of each basin. The SED does not explain how water moves vertically or  
9 horizontally within each basin. The SED does not estimate or summarize the estimated recharge  
10 for each basin. The SED does not identify which basins have specific groundwater quantity or  
11 quality challenges.

12 m. Moreover, the impact analysis uses results from the WSE Model to estimate  
13 if the project would result in impacts on groundwater resources by increasing groundwater  
14 pumping and reducing groundwater recharge relative to baseline water balance for each of the four  
15 subbasins.

16 n. The SED’s threshold of significance for determining whether groundwater  
17 resources will be impacted due to subsidence is improper because, among other things, the SED  
18 assumes that subsidence will only be significant where such phenomenon has previously occurred.  
19 In addition, the SED concludes that subsidence is less likely to occur outside the Merced subbasin  
20 because there is little evidence that soils in these subbasins are subject to inelastic compaction.  
21 This conclusion is not supported by substantial evidence in the record.

22 o. The SWB’s decision to adopt the SED for the project was not supported by  
23 substantial evidence because it was based, in part, on inadequate and unsupported groundwater  
24 analysis.

25 p. Because the SWB’s decision to adopt the SED was not supported by  
26 substantial evidence, the Board’s action was an abuse of discretion and its decision must be set  
27 aside. (Pub. Resources Code, § 21168.5, § 21168.9.)  
28

1           424.    The SWB’s decision to adopt the SED, and the findings therein, was not supported  
2 by substantial evidence due to inadequacies in the hydropower analysis.

3               a.       The SED’s evaluation of the project’s impact on hydropower is based on the  
4 results from the WSE Model. (SED, at 14-30.)

5               b.       The WSE Model assumes any reduction from the project will be taken in  
6 water deliveries and therefore reservoir storage will remain unaffected. Based on this unsupported  
7 assumption, the SED concludes the project has almost no hydropower impact. (SED, at 14-39.)

8               c.       The SED also does not analyze the impact on hydropower of shifting the  
9 seasonal timing of water releases from reservoirs. The SED recognizes the project will decrease  
10 hydropower generation during the months of July and August because of reduction in reservoir  
11 releases during those months. The project will increase releases during the months of May and  
12 June. Because the SED only evaluates the projected annual hydropower impacts, it fails to analyze  
13 the impact of shifting hydropower generation from summer to spring. The transfer of summer  
14 hydropower generation to spring hydropower generation has the potential to result in increased  
15 costs, increased supply problems, and increased capacity issues.

16              d.       The SED also fails to evaluate the cost and/or availability of replacement  
17 energy. The loss of summer hydropower generation (high energy demand months) will require  
18 stakeholders to purchase energy when it is most expensive. The SED incorrectly assumes regional  
19 economic effects due to hydropower loss are “virtually imperceptible” when compared to annual  
20 statewide electricity production. (SED, at 18-22.) This is conjecture; the project affects  
21 hydropower sources that supply only regional customers and do not contribute to the statewide  
22 grid. Therefore, the impacts of the project will be much more substantial and concentrated in the  
23 Project Area. The SED improperly dilutes the regional effects by spreading the effects statewide.

24              e.       The SWB’s decision to adopt the SED for the project was not supported by  
25 substantial evidence because it was based, in part, on inadequate and unsupported hydropower  
26 analysis.

1 f. Because the SWB's decision to adopt the SED was not supported by  
2 substantial evidence, the Board's action was an abuse of discretion and its decision must be set  
3 aside. (Pub. Resources Code, § 21168.5, § 21168.9.)

4 425. The SWB's decision to adopt the SED, and the findings therein, was not supported  
5 by substantial evidence due to inadequacies in the flood risk analysis.

6 426. The SWB's decision to adopt the SED, and the findings therein, was not supported  
7 by substantial evidence due to inadequacies in the air quality analysis.

8 427. The SWB's decision to adopt the SED is not supported by substantial evidence  
9 because the SED does not evaluate environmental impacts outside the service areas of OID, SSJID,  
10 TID, MID, and Merced ID.

11 428. The SWB's decision to adopt the SED is not supported by substantial evidence  
12 because the SED failed to use the best available science.

13 **SEVENTEENTH CAUSE OF ACTION**

14 **Violations of California Environmental Quality Act**  
15 **(Pub. Resources Code § 21000, *et seq.*; 23 CCR 3779; 14 CCR 15088; 14 CCR 15088.5)**

16 **The Board Must Recirculate the SED**

17 429. Petitioners<sup>13</sup> reallege and incorporate herein, as if set forth in full, each and every  
18 preceding allegation, inclusive, of this Petition/Complaint.

19 430. California Code of Regulations, title 23, section 3779(e) requires the State Water  
20 Board to allow for additional public comment on a substitute environmental document if  
21 recirculation would be required for an environmental impact report under CEQA Guidelines Section  
22 15088.5.

23 431. CEQA Guidelines Section 15088.5 requires recirculation when significant new  
24 information is added to the environmental document.

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<sup>13</sup> MID is not participating as a member of the SJTA in this cause of action.

1           432. The State Water Board significantly changed the project by adding the Year-round  
2 Objective which was not previously included in the Phase 1 Amendments. The Year-round  
3 Objective was not analyzed in any version of the SED.

4           433. The State Water Board also changed the Tributary UIF Objective from requiring a  
5 range of unimpaired flow between 30% and 50% to requiring exactly 40% unimpaired flow with an  
6 adaptive range between 30% and 50% unimpaired flow.

7           434. The State Water Board also included significant new information and analysis of the  
8 project in a 22-chapter Master Response to comments.

9           435. The State Water Board notified the public that it would not accept any comments on  
10 the SED, and that the public comment period on the adequacy of that document concluded in March  
11 2017.

12           436. The State Water Board provided the public with 21 days to respond to the new  
13 changes to the Bay-Delta Plan itself, including the Year-round Objective.

14           437. In addition, California Code of Regulationis, title 14, section 15088.5(a)(4) provides  
15 that recirculation is required if “[t]he draft [Environmental Impact Report (“EIR”)] was so  
16 fundamentally and basically inadequate and conclusory in nature that meaningful public review and  
17 comment were precluded.” (See also Cal. Code. Regs., tit. 23, § 3779(e).)

18           438. The SED’s analysis of San Francisco’s methods of compliance with the Plan  
19 Amendment is “fundamentally and basically inadequate and conclusory in nature” because, among  
20 other reasons, it excludes any analysis of increased water supply rationing. Although recirculation  
21 was required on this basis, the Board did not issue a new notice or recirculate the SED in violation  
22 of CEQA.

23           439. The State Water Board violated its obligations under the Public Resources Code,  
24 CEQA Guidelines, and California Code of Regulations, title 23, Section 3779(e) by failing to  
25 recirculate the SED and new revisions to the Bay-Delta Plan for formal review and public comment.  
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1 **EIGHTEENTH CAUSE OF ACTION**

2 **Violations of Due Process Clauses of California and U.S. Constitutions**

3 **(Cal. Const. Art. 1, § 7; U.S. Const., 14<sup>th</sup> Amend., § 1)**

4 440. Petitioners<sup>14</sup> reallege and incorporate herein, as if set forth in full, each and every  
5 preceding allegation, inclusive, of this Petition/Complaint.

6 441. A person may not be deprived of life, liberty, or property without due process of law.  
7 (Cal. Const. Art. 1, § 7; U.S. Const. 14<sup>th</sup> Amend., § 1.)

8 442. The State Water Board's adoption of the Phase 1 Amendments violates the due  
9 process rights of SJTA member agencies OID, SSJID, TID, and San Francisco by effectively  
10 adjudicating their water rights.

11 443. The State Water Board performs "both adjudicatory and regulatory functions in  
12 allocating water rights and ensuring water quality." (*Racanelli*, 182 Cal.App.3d at 112 [citing  
13 Wat. Code, § 174].) "In performing its regulatory function of ensuring water quality by establishing  
14 water quality objectives, the Board acts in a legislative capacity. The Water Quality Control Plan  
15 itself is thus a quasi-legislative document." (*Racanelli*, 182 Cal.App.3d at 112.) "In contrast, in  
16 undertaking to allocate water rights, the Board performs an adjudicatory function." (*Racanelli*, 182  
17 Cal.App.3d at 113 [citing *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 100-  
18 106].)

19 444. Cognizant of the "distinct attributes" of the State Water Board's "two functions," in  
20 *Racanelli* the Court of Appeal reviewed challenges to the State Water Board's establishment of new  
21 water quality objectives in its adoption of the 1978 Plan under the standard set forth in Code of  
22 Civil Procedure section 1085, yet reviewed challenges to the Board's decision to implement the  
23 objectives "by modifying the [P]rojects' appropriation permits to compel the [P]rojects to maintain  
24 the established water quality standards" under the standard set forth in Code of Civil Procedure  
25 section 1094.5. (*Racanelli*, 182 Cal.App.3d at 112, 114; See *El Dorado Irr. Dist. v. State Water*  
26 *Resources Control Bd.* (2006) 142 Cal.App.4th 937, 960 [citing Wat. Code, § 1126] [explaining,  
27  
28

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<sup>14</sup> MID is not participating as a member of the SJTA in this cause of action.

1 “Code of Civil Procedure section 1094.5 applies to a writ proceeding seeking to challenge a water  
2 rights decision by the Board.”].)

3 445. The two distinct actions of regulation and implementation through adjudication  
4 cannot be combined.

5 446. The Plan Area included in the previous SWB Water Quality Control Plan  
6 proceedings for the Bay-Delta 1995 Water Quality Control Plan include the entire San Joaquin and  
7 Sacramento River watersheds. (Bay-Delta 1995 WQCP, Appx. 1 p. IV-6.). The Plan Area for  
8 Phase 1 Amendments is significantly more limited, and is confined to select portions of the San  
9 Joaquin River watershed. The geographic scope of the project and project Plan Area are set forth in  
10 SWB Figures ES-1 and ES-2. (SED, Executive Summary, p. ES-6 – ES-7)

11 447. The entire San Joaquin River Basin encompasses approximately 7,017,000 acres.  
12 (Bay-Delta 1995 WQCP, Appx.1, p. IV-23.) The San Joaquin River Basin has approximately five  
13 million irrigated acres. (United States Dept. of Agricultural, National Agricultural Statistics Service  
14 database, <https://quickstats.nass.usda.gov> [as of June 22, 2018].)

15 448. The San Joaquin River Basin is defined in the 1995 Water Quality Control Plan as:  
16 “Major tributaries to the San Joaquin include the Stanislaus, Tuolumne, Merced, Chowchilla, and  
17 Fresno rivers...[i]n the Delta, the Cosumnes, Mokelumne, and Calaveras rivers...flow into the San  
18 Joaquin River..” and “[o]n the west side of the basin, streams include Hospital, Del Puerto,  
19 Orestimba, San Luis, and Los Banos creeks.” (Bay-Delta 1995 WQCP, Appx. 1 p. IV-23.)

20 449. The five irrigation districts impacted by the State Water Board’s Phase 1  
21 Amendments that are limited to the Stanislaus, Tuolumne, and Merced Rivers comprise  
22 approximately 460,000 irrigated acres.

23 450. The SWB’s Phase 1 Amendments leave out the Calaveras, Mokelumne, and  
24 Cosumnes Rivers, as well as the upper San Joaquin River, Chowchilla, Fresno, Kings, and Westside  
25 Tributaries.

26 451. Once the Board has adopted a water quality control plan with objectives and a  
27 particular method of implementation, it must follow that plan. As relevant here, the Board must  
28 follow its plan for the San Joaquin River watershed that is limited to only a subset of water users in



1 that watershed. Because the Phase 1 Amendments focus only on a limited portion of the San  
2 Joaquin River watershed (and an even more limited portion of the Bay-Delta watershed) where only  
3 six water right holders will be impacted to the exclusion of numerous others, and because the State  
4 Water Board is required to follow that plan as adopted, the Board has effectively allocated  
5 responsibility for achieving the water quality objectives to those six water right holders, thereby  
6 improperly adjudicating their rights in a quasi-legislative proceeding. (*State Water Resources*  
7 *Control Bd. Cases, supra*, 136 Cal.App.4th at 732.) Any due process protections that may be  
8 offered during the implementation phase for the objectives (such as notice and a hearing during a  
9 water rights proceeding) would be ineffectual because the result would be a foregone conclusion in  
10 light of the adjudication already made by the Board in adopting the Phase 1 Amendments.

11 452. Prior to the State Water Board's *de facto* adjudication of these six water users' water  
12 rights, the State Water Board failed to comply with applicable procedural due process requirements,  
13 and specifically, the *Administrative Adjudication Bill of Rights*.<sup>15</sup> By not providing each water user  
14 "to which the agency action is directed notice and an opportunity to be heard, including the  
15 opportunity to present and rebut evidence," (Gov. Code, § 11425.10(a)(1)), the Board violated  
16 Government Code section 11425.10(a)(1), Code of Civil Procedure section 1094.5(b), and other  
17 procedural due process requirements.

18 453. As the regulation adopted by the State Water Board effectively adjudicated the water  
19 rights of a small, select group of water users in the San Joaquin River watershed, and thereby  
20 exempted from such regulation thousands of other similarly situated water users, the Court should  
21 apply Code of Civil Procedure section 1094.5, and, more specifically, the independent judgment test  
22 prescribed in Code of Civil Procedure section 1094.5(c), in its review of this specific challenge.

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26 <sup>15</sup> See Gov. Code § 11410.20(a) (applying Administrative Adjudication Bill of Rights "to all agencies of the state"); 23  
27 CCR § 648(b) (providing that "all adjudicative proceedings before the State Board . . . shall be governed by . . . the  
28 Administrative Procedures Act (commencing with section 11400 of the Government Code) (APA)" except for specific  
provisions of the APA that are inapplicable.) See 23 CCR § 648(c) (identifying the portions of the APA that are  
inapplicable to adjudicative proceedings before the Board.) As Title 23 California Code of Regulations section 648(c)  
does not identify the Administrative Adjudication Bill of Rights as being inapplicable to adjudicative proceedings  
before the Board, it applies to such proceedings.

454. Alternatively, the Court may review Petitioners’ due process challenge under Code of Civil Procedure section 1085. (See *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285 [recognizing that due process claims may be brought under a petition for traditional mandate or administrative mandate].)

455. Whether the Court reviews Petitioners' due process challenge under Code of Civil Procedure sections 1085 or 1094.5, the result should be the same. The Bay-Delta Plan must be set aside and remanded to the State Water Board for further proceedings that ensure adequate protection of the due process rights of the six water right holders in the San Joaquin River watershed to which the agency's action was indisputably directed, i.e., San Francisco, Modesto Irrigation District, Turlock Irrigation District, South San Joaquin Irrigation District, Oakdale Irrigation District, and Merced Irrigation District.

## NINETEENTH CAUSE OF ACTION

**The Water Quality Objectives in the Phase 1 Amendments do not comply with the standards of necessity, authority, clarity, consistency, reference, and nonduplication**

**(Government Code § 11353; Government Code § 11349.1)**

456. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

457. The Inflow Narrative Objective in the Phase 1 Amendments is unclear because it can be interpreted to have different meanings.

458. The Inflow Narrative Objective in the Phase 1 Amendments is unclear because it conflicts with the SWB's description of the effect of the regulation.

459. The Inflow Narrative Objective in the Phase 1 Amendments is unclear because it uses terms that do not have meaning generally familiar to those directly affected by the regulation.

460. The Inflow Narrative Objective in the Phase 1 Amendments is unclear because it is impermissibly vague.

461. The Year-round Objective in the Phase 1 Amendments is unclear because it can be interpreted to have different meanings.

462. The Year-round Objective in the Phase 1 Amendments is unclear because it conflicts with the SWB's description of the effect of the regulation.

463. The Year-round Objective in the Phase 1 Amendments is unclear because it uses terms that do not have meaning generally familiar to those directly affected by the regulation.

464. The Year-round Objective in the Phase 1 Amendments is unclear because it is impermissibly vague.

465. The Tributary UIF Objectives are unclear because their relationship to the other objectives is not explained.

466. The Tributary UIF Objectives are unclear because they do not explain how unimpaired flow is to be calculated.

467. The Tributary UIF Objectives are unclear because they do not clearly specify the quantity of water subject to regulation.

468. The Tributary UIF Objectives are unclear because they do not clearly specify the flow rate calculation.

469. The Tributary UIF Objectives are unclear because they include a reference to full natural flow, which is not defined or explained in the Bay-Delta Plan.

470. The Tributary UIF Objectives are unclear because they conflict with the SWB's description of the effect of the regulation through modeling.

471. The Tributary UIF Objectives are unclear because the time period of compliance is not clear.

472. The Tributary UIF Objectives are unclear because the compliance point locations are not clear.

## TWENTIETH CAUSE OF ACTION

## The Objectives in the Phase 1 Amendments are Unlawful Because They Violate the Rules of Water Right Priority

473. Petitioners<sup>16</sup> reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

<sup>16</sup> MID is not participating as a member of the SJTA in this cause of action.

1           474. California operates under a dual, or hybrid, system of water rights which recognizes  
2 both doctrines of riparian rights and appropriative rights.

3           475. As a general rule, appropriative rights are subordinate to riparian rights so that in  
4 times of shortage riparian water right holders are entitled to fulfill their needs before appropriators  
5 are entitled to any use of the water.

6           476. Between appropriators, the rule of priority is ‘first in time, first in right’ where the  
7 senior appropriator is entitled to fulfill his or her needs before a junior appropriator is entitled to use  
8 any water.

9           477. Every effort must be made by the SWB to respect and enforce the rule of priority.

10          478. The water quality objectives in the Phase 1 Amendments violate the rules of water  
11 right priority because they require flows from the Stanislaus, Tuolumne, and Merced Rivers, and  
12 thus the water users within those watersheds, for the purpose of protecting fish and wildlife in the  
13 Bay-Delta estuary without considering, and/or requiring, flows from other watersheds within the  
14 Bay-Delta estuary, and thus other water users in the Bay-Delta estuary who are junior to those water  
15 users on the Stanislaus, Tuolumne, and Merced Rivers.

16          479. Because the State Water Board’s action was unlawful, this Court should issue a writ  
17 of mandate directing the State Water Board to set aside its adoption of the Bay-Delta Plan, and  
18 enjoin the State Water Board from taking any action to implement the Bay-Delta Plan.

19  
20                                   **TWENTY-FIRST CAUSE OF ACTION**

21                                   **The Objectives in the Phase 1 Amendments are Unlawful**  
22                                   **Because They Constitute a Waste and Unreasonable Use of Water**

23                                   **(Cal. Const. Art. X, Section 2)**

24          480. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
25 preceding allegation, inclusive, of this Petition/Complaint.

26          481. Article X, section 2 of the California Constitution prohibits the “waste or  
27 unreasonable use or unreasonable method of use of water.” (Cal. Const., art. X, § 2.) Under this  
28 constitutional mandate, a water user is limited to taking “only such amount [of water] as he [or she]

1 reasonably needs for beneficial purposes.” (*Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925; see  
2 also *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241.)

3 482. This constitutional mandate knows no exceptions and applies to “the use of all water,  
4 under whatever right the use may be enjoyed.” (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367.) The  
5 rule must be followed by water users, the State Water Board, and the courts of this State.

6 483. The State Water Board is also statutorily bound to “to prevent waste, unreasonable  
7 use, unreasonable method of use, or unreasonable method of diversion of water,” and is thus  
8 prohibited from requiring water to be used unreasonably. (Wat. Code, § 275.)

9 484. The measure of what constitutes a “reasonable use” is a question of fact, to be  
10 determined according to the circumstances of each particular case. (*Environmental Defense Fund,*  
11 *Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194, [citing *Joslin v. Marin Municipal*  
12 *Water Dist.* (1967) 67 Cal.2d 132, 139-140]; see *Jordan v. City of Santa Barbara* (1996) 46  
13 Cal.App.4th 1245, 1268.) A reasonable beneficial use in areas where water is in excess may not be a  
14 reasonable beneficial use “in an area of great scarcity and great need.” (*Tulare Irrigation Dist. v.*  
15 *Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567.) Similarly, “[w]hat is a beneficial use  
16 at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare*  
17 *Irrigation Dist. supra*, 3 Cal.2d at 567.)

18 485. In analyzing whether the Phase 1 Amendments comport with Article X, section 2 of  
19 the Constitution, the first step requires an identification of the beneficial uses to be protected by the  
20 objectives, and the quantity of water being required by the objectives to protect those beneficial  
21 uses. Once the quantity of water required to protect each beneficial use is identified, the analysis  
22 shifts to whether using that quantity of water to protect that beneficial use is a reasonable use of that  
23 water under the circumstances.

24 486. The analysis in the SED, as well as the additional analysis provided during the public  
25 comment period, demonstrate that the Phase 1 Amendments are unreasonable. Specifically,  
26 requiring 40% unimpaired flow on the Stanislaus, Tuolumne, and Merced Rivers during the month  
27 of June, as required by the Tributary UIF Objectives, constitutes a waste and unreasonable use of  
28 water because there are few, if any, Central Valley Fall-run Chinook salmon present and migrating

1 in the system at that time which would benefit from the maintenance of 40% unimpaired flow. The  
2 analysis in the SED fails to address whether any of the other identified Beneficial Uses will be  
3 protected by the maintenance of 40% unimpaired flow during the month of June.

4 487. Because requiring the maintenance of 40% unimpaired flow on the Stanislaus,  
5 Tuolumne, and Merced Rivers during the month of June is not reasonably necessary to protect any  
6 identified Beneficial Uses, and because such a requirement will preclude that water from being put  
7 to other beneficial uses, the Tributary UIF Objectives constitute a waste and unreasonable use of  
8 water in violation of Article X, section 2 of the California Constitution.

9 488. Because the Tributary UIF Objectives constitute a waste and unreasonable use of  
10 water in violation of Article X, section 2 of the California Constitution, the State Water Board's  
11 adoption of the Bay-Delta Plan should be set aside in its entirety, and the State Water Board should  
12 be enjoined from taking any action to implement the Bay-Delta Plan.

## 13 14 **TWENTY-SECOND CAUSE OF ACTION**

### 15 **The Objectives in the Phase 1 Amendments are Unlawful Because They Violate Federal** 16 **Antidegradation Policy and SWRCB Resolution No. 68-16**

17 489. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
18 preceding allegation, inclusive, of this Petition/Complaint.

19 490. The Clean Water Act requires that a state's water quality standards include an  
20 antidegradation policy. (See 33 USCS § 1313[c][2][A]; 40 C.F.R. §§ 131.6; 131.11[a][1];  
21 131.11[b][1],[2]; 131.12.) The EPA's regulations require the state to "develop and adopt a statewide  
22 antidegradation policy" as well as "methods for implementing the antidegradation policy." (40  
23 C.F.R. § 131.12[a]-[d]; *Northwest Env'tl. Advocates v. United States EPA* (Or. Dist. Ct. 2003), 268  
24 F.Supp.2d 1255, 1264.) "Existing instream water users and the level of water quality necessary to  
25 protect the existing uses shall be maintained and protected." (40 C.F.R. § 131.12[a][1].)

26 491. The State Water Board adopted Resolution No. 68-16, entitled "Statement of Policy  
27 with Respect to Maintaining High Quality Waters in California." (SWRCB Resolution No. 68-16.)  
28 The Board interpreted this resolution as incorporating the federal anti-degradation policy wherever

1 federal policy applies under federal law. By its own terms, the resolution “is to be followed in any  
2 of its water right or water quality actions.” (*Central Delta Water Agency v. State Water Resources*  
3 *Control Bd.*, (2004) 124 Cal.App.4<sup>th</sup> 245, 265.) The resolution states, “[w]henver the existing  
4 quality of water is better than the quality established in policies as of the date on which such  
5 policies become effective, such existing high quality will be maintained until it has been  
6 demonstrated to the State that any change will be consistent, will not unreasonably affect present  
7 and anticipated beneficial use of such water and will not result in water quality less than that  
8 prescribed in the policies.” (SWRCB Resolution No. 68-16, ¶ 1.)

9       492. The State Water Board failed to perform the necessary analysis to determine whether  
10 the Phase 1 Amendments will comport with federal antidegradation requirements and Resolution  
11 No. 68-16.

12       493. The 2006 Bay-Delta Plan required base flows at Vernalis from February through  
13 June that range from 710 cfs to 3,420 cfs, depending on the water year classification. The 2006  
14 Bay-Delta Plan also required pulse flows at Vernalis during portions of April and May that range  
15 from 3,100 cfs to 8,620 cfs, depending on the water year classification.

16       494. Under the Phase 1 Amendments, the Vernalis flow requirements from the 2006 Bay-  
17 Delta Plan are no longer applicable. Instead, the minimum base flow at Vernalis from February  
18 through June is 800 to 1,200 cfs. The State Water Board failed to analyze whether the reduced flows  
19 required at Vernalis, together with the other Tributary UIF Objectives, would comply with the  
20 antidegradation requirements of the Clean Water Act and its implementing regulations, and with the  
21 antidegradation requirements of SWRCB Resolution No. 68-16.

22       495. The State Water Board conclusively determined that Phase 1 Amendments “will  
23 likely result in water quality improvements in the San Joaquin River (SJR) Watershed and the  
24 southern Delta.” (SED, at 23-2.) The only basis for this conclusion is the State Water Board’s  
25 assertion that “the flow objectives may be adjusted” as part of an adaptive management program if  
26 monitoring and “other best available scientific information indicates that such changes will be  
27 sufficient” to meet the narrative objective, i.e., that the changes will “support and maintain the  
28 natural production of viable native SJR Watershed fish populations migrating through the Delta . .

1 ..” (SED, at 23-4.) Rather than performing the scientific analysis necessary to ensure that the  
2 amendments do not result in a degradation of water quality, the State Water Board has taken the  
3 position that the scientific analysis will be performed later, and in real-time, as part of implementing  
4 the plan. The failure to perform an antidegradation analysis to ensure that the proposed objectives  
5 do not result in a degradation of water quality is a violation of the Clean Water Act and its  
6 implementing regulations, and Resolution No. 68-16.

7 496. In addition, the State Water Board has only modeled one of the many operational  
8 scenarios that are achievable under the broad range of flow scenarios permitted by the adaptive  
9 adjustments in the Program of Implementation. Many of the operations that could be implemented  
10 under the broad range of flow scenarios permitted by the adaptive adjustments in the Program of  
11 Implementation were never modeled or analyzed, and thus the Board failed to perform the  
12 antidegradation analysis that is necessary to ensure that the proposed objectives do not result in a  
13 degradation of water quality in violation of the Clean Water Act and its implementing regulations,  
14 and Resolution No. 68-16.

15 497. The State Water Board also relaxed the salinity requirements in the Phase 1  
16 Amendments as compared to the 2006 Bay-Delta Plan without conducting the necessary  
17 antidegradation analysis.

18 498. Finally, the Board’s failure to include an antidegradation policy in the Bay-Delta  
19 Plan itself is a violation of the Clean Water Act and its implementing regulations, and the provisions  
20 of the Porter-Cologne Act which compel the State Water Board to comply with the Clean Water  
21 Act.

22 499. Because the Phase 1 Amendments violate state and federal antidegradation  
23 requirements, the State Water Board’s adoption of the Bay-Delta Plan should be set aside in its  
24 entirety, and the State Water Board should be enjoined from taking any action to implement the  
25 Bay-Delta Plan.



1 **TWENTY-THIRD CAUSE OF ACTION**

2 **The State Water Board Failed to Conduct the Required Use Attainability Analysis**  
3 **(Clean Water Act and Porter-Cologne Act)**

4 500. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
5 preceding allegation, inclusive, of this Petition/Complaint.

6 501. Section 101(a)(2) of the Clean Water Act provides that, in order to “restore and  
7 maintain the chemical, physical, and biological integrity of the Nation’s waters,” it is “the national  
8 goal that wherever attainable, an interim goal of water quality which provides for the protection and  
9 propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be  
10 achieved by July 1, 1983.” (33 U.S.C., § 1251[a][2].)

11 502. The State Water Board is required to adopt designated uses that are consistent with  
12 the requirements of the Clean Water Act. (40 C.F.R., § 131.5[a][1].)

13 503. Whenever the State Water Board “wishes to remove a designated use that is  
14 specified in section 101(a)(2) of the Act, to remove a sub-category of such a use, or to designate a  
15 sub-category of such a use that requires criteria less stringent than previously applicable,” the Board  
16 must conduct a “use attainability analysis.” (40 C.F.R., § 131.10 [j][2].)

17 504. The State Water Board is required by the Porter-Cologne Act to comply with the  
18 Clean Water Act and its implementing regulations.

19 505. The Bay-Delta Plan provides that “[t]he fish and wildlife beneficial uses designated  
20 in the ‘Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin’  
21 [“SR/SJR Basin Plan”] for the Stanislaus River, Tuolumne River, Merced River, and San Joaquin  
22 River from the mouth of Merced River to Vernalis *remain in effect and this plan includes measures*  
23 *to protect those uses.*” (SED, Appx. K, at 10 [emphasis added].) However, by operation of law, the  
24 beneficial uses identified in the Bay-Delta Plan supersede those identified in the SR/SJR Basin Plan  
25 to the extent of any conflict, thereby eliminating any beneficial uses from the SR/SJR Basin Plan  
26 that are not included in the Bay-Delta Plan insofar as the plans overlap geographically. (Wat. Code,  
27 § 13170.) Since the Bay-Delta Plan does not include two fish and wildlife beneficial uses that are  
28 identified in the SR/SJR Basin Plan (“Preservation of Biological Habitats of Special Significance

1 [BIOL]” and “Aquaculture [AQUA]”), those two uses were effectively removed from the SR/SJR  
2 Basin Plan when the State Water Board adopted the superseding Bay-Delta Plan. The Board failed  
3 to conduct the required use attainability analysis when it removed BIOL and AQUA beneficial uses  
4 from the SR/SJR Basin Plan to the extent it overlaps geographically with the Bay-Delta Plan.

5       506. Furthermore, the Bay-Delta Plan and the SR/SJR Basin Plan both include “Warm  
6 Freshwater Habitat (WARM)” as a beneficial use. However, the Bay-Delta Plan defines this  
7 beneficial use as follows: “[u]ses of water that support warm water ecosystems including . . .  
8 preservation of aquatic habitats, vegetation, fish, or wildlife, including invertebrates.” (SED,  
9 Appendix K., 11.) The SR/SJR Basin Plan defines this beneficial use differently by adding the word  
10 “enhancement” to the definition: “[u]ses of water that support warm water ecosystems including . . .  
11 preservation **or enhancement** of aquatic habitats, vegetation, fish, or wildlife, including  
12 invertebrates.” (SR/SJR Basin WQCP, II-2.00 [emphasis added].) Therefore, by adopting the Bay-  
13 Delta Plan, the State Water Board superseded the more expansive definition of “Warm Freshwater  
14 Habitat” in the SR/SJR Basin Plan which included “enhancement” of habitat, vegetation, fish,  
15 and/or wildlife. (Wat. Code, § 13170.) In doing so, the State Water Board either removed a sub-  
16 category of the WARM beneficial use, or created a less stringent criteria than previously applicable,  
17 and thus was required to conduct a “use attainability analysis.” (40 C.F.R., § 131.10 [j][2].) By  
18 failing to conduct such an analysis, the State Water Board violated the Clean Water Act and its  
19 obligation under the Porter-Cologne Act to comply with the Clean Water Act.

20       507. Accordingly, the State Water Board’s adoption of the Bay-Delta Plan should be set  
21 aside in its entirety, and the State Water Board should be enjoined from taking any action to  
22 implement the Bay-Delta Plan.

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**TWENTY-FOURTH CAUSE OF ACTION**

**The State Water Board Failed to Adopt Water Quality Standards that  
Support the Most Sensitive Use**

**(Clean Water Act, 33 U.S.C. § 1251, *et seq.* and Porter-Cologne Act)**

508. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

509. The Clean Water Act’s implementing regulations require states to adopt water quality criteria that protect the designated use. “Such criteria 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].)

510. In adopting the Bay-Delta Plan, the State Water Board failed to use a sound scientific rationale in developing, supporting, and adopting its water quality objectives for the protection of fish and wildlife. Instead, the Board used the anticipated production numbers for Central Valley fall-run Chinook salmon as a proxy for assessing whether the beneficial uses identified in the plan were reasonably protected by the objectives. The Board failed to conduct any analysis by which it could determine the most sensitive use of the identified beneficial uses, and failed to otherwise analyze whether the objectives would support the most sensitive use. The Board did not provide any scientific rationale which would support a conclusion that production of Central Valley fall-run Chinook salmon constitute the most sensitive use.

511. Accordingly, the State Water Board’s adoption of the Bay-Delta Plan should be set aside in its entirety, and the State Water Board should be enjoined from taking any action to implement the Bay-Delta Plan.

1 **TWENTY-FIFTH CAUSE OF ACTION**

2 **The Objectives in the Phase 1 Amendments are Unlawful**  
3 **Because They Violate FERC's Exclusive Jurisdiction**

4 512. Petitioners<sup>17</sup> reallege and incorporate herein, as if set forth in full, each and every  
5 preceding allegation, inclusive, of this Petition/Complaint.

6 513. The Phase 1 Amendments are unlawful because the State Water Board does not have  
7 jurisdiction to set minimum stream flows on the Tuolumne and Merced Rivers.

8 514. As held by the United States Supreme Court, the United States District Court for the  
9 Ninth Circuit, and a California Appellate Court, under the Federal Power Act, FERC "occupies the  
10 field" of hydropower operations. (See *California v. FERC* (1990) 495 U.S. 490; See *Sayles Hydo*  
11 *Associates v. Maughan* (9th Cir. 1993) 985 F.2d 451 [hereafter *Sayles*]; See *Karuk Tribe of*  
12 *Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010)  
13 183 Cal.App.4th 330 [hereafter *Karuk*].) Under these holdings, all state regulation of hydropower  
14 operations is preempted except for that concerning proprietary rights to water. (*Sayles, supra*, 985  
15 F.2d 456; see also *Karuk, supra*, 183 Cal.App.4th at 350.)

16 515. The U.S. Supreme Court has held that state regulations for the protection of fish and  
17 wildlife resources do not concern proprietary rights and are thus preempted if applied to a FERC  
18 licensee. (*California v. FERC, supra*, 495 U.S. at 498.) Relevant here, *California v. FERC*  
19 specifically invalidated a State Water Board action that attempted to set minimum instream flows in  
20 excess of those set forth in a FERC license. (*Id.*, at 506.)

21 516. The Phase 1 Amendments present the same issue that was presented in *California v.*  
22 *FERC*. The State Water Board proposed to regulate minimum stream flows on rivers over which  
23 FERC has exclusive jurisdiction. (SED, at 1-8 ["The State Water Board is considering amending the  
24 Bay-Delta Plan to establish new flow objectives on the LSJR and its three eastside tributaries to  
25 protect fish and wildlife beneficial uses."].) As in *California v. FERC*, the State Water Board does  
26 not have the jurisdiction to set minimum instream flows on FERC regulated rivers through a state  
27 regulation.

28 \_\_\_\_\_  
<sup>17</sup> MID is not participating as a member of the SJTA in this cause of action.

517. Instead, the State Water Board is limited to its Clean Water Act (“CWA”) section 401 certification authority when it comes to FERC-regulated streams. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 712.) Under this authority, States may include requirements in a certification issued under section 401 of the CWA insofar as “necessary to enforce a designated use contained in a state water quality standard.” (*Id.*, at 723.) Section 401 certifications are an integral part of the FERC licensing process. (See *Id.*, at 708–709.) Despite possessing this authority, the State Board instead adopted minimum stream flows on the Tuolumne and Merced Rivers through the Phase 1 Amendments.

518. As the flows of the Tuolumne and Merced Rivers are under FERC jurisdiction, the State Water Board is limited to acting pursuant to its CWA section 401 authority and cannot set instream flow requirements through regulatory action. For this reason, the adoption of the Phase 1 Amendments is unlawful and preempted by the Federal Power Act.

519. Accordingly, the State Water Board's adoption of the Bay-Delta Plan should be set aside in its entirety, and the State Water Board should be enjoined from taking any action to implement the Bay-Delta Plan.

## TWENTY-SIXTH CAUSE OF ACTION

## The Salinity Standard is Unlawful Because it Improperly Allocates Responsibility for Salinity Control at Vernalis to Senior Right Holders on the Stanislaus, Tuolumne, and Merced Rivers

520. Petitioners<sup>18</sup> reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

521. The Phase 1 Amendments state that increased flow from the Stanislaus, Tuolumne, and Merced Rivers will assist in achieving the southern Delta salinity objective: “[i]n addition to the above requirements, the salinity water quality objective for the southern Delta will be implemented through the Lower San Joaquin River flow objectives, which will increase inflow of low salinity water into the southern Delta during February through June and thereafter under adaptive implementation to prevent adverse effects to fisheries. This will assist in achieving the southern Delta water quality objective.” (SED, Appx. K, at 45.)

<sup>18</sup> MID is not participating as a member of the SJTA in this cause of action.

1           522. The State Water Board recognized in Water Rights Decision 1641 that, in certain  
2 circumstances, it is not a reasonable use of water to require upstream water right holders to release  
3 or bypass extra water to dilute downstream salinity. The State Water Board determined that the  
4 diversion of water on the Stanislaus, Tuolumne, and Merced Rivers was not the primary cause of  
5 salinity problems, and that return flow from upstream diversions of water does not contribute  
6 significantly to the salt loading in the San Joaquin River. Instead, the Board recognized that  
7 approximately 35% of the salt load at Vernalis comes from the northwest side of the San Joaquin  
8 River, and approximately 37% of the salt load comes from the Grasslands area; those areas receive  
9 approximately 70% of their water supply from the Central Valley Project. The Board concluded that  
10 “the actions of the CVP are the principal cause of the salinity concentrations exceeding the  
11 objectives at Vernalis.” As such, the Board determined that, under the rule articulated in *Town of*  
12 *Antioch v. Williams Irrig. Dist.* (1922) 188 Cal. 451, it “would not be reasonable” to require a  
13 reduction in diversions by senior water right holders on the Stanislaus, Tuolumne, and Merced  
14 Rivers who put those diversions to beneficial uses such as irrigation, hydropower generation,  
15 recreation, and fish and wildlife enhancement, “since water quality objectives can and should be  
16 attained through regulation of other controllable factors.” (D-1641, at 80-82.)

17           523. The Bay-Delta Plan shifts the burden of salinity reduction to senior water right  
18 holders on the Stanislaus, Tuolumne, and Merced Rivers in contravention of the State Water  
19 Board’s prior conclusion that it would be an unreasonable use of water to reduce diversions by  
20 senior water right holders on those rivers for the purposes of managing salinity in the Delta and in  
21 violation of the rules of *Town of Antioch*.

22           524. Accordingly, the State Water Board’s adoption of the Bay-Delta Plan should be set  
23 aside in its entirety, and the State Water Board should be enjoined from taking any action to  
24 implement the Bay-Delta Plan.

1 **TWENTY-SEVENTH CAUSE OF ACTION**

2 **The State Water Board Unlawfully Incorporated its Delta Reform Act Obligations**  
3 **into Phase 1 of the Bay-Delta Plan Update**

4 525. Petitioners reallege and incorporate herein, as if set forth in full, each and every  
5 preceding allegation, inclusive, of this Petition/Complaint.

6 526. One of the purposes of the Delta Reform Act (“DRA”) (Wat. Code, § 85000 *et seq.*)  
7 is “to establish an accelerated process to determine instream flow needs of the Delta for the  
8 purposes of facilitating planning decisions that are required to achieve the objectives of the Delta  
9 Plan.” (Wat. Code, § 85086[b].) The term “Delta Plan” refers to “the comprehensive, long-term  
10 management plan for the Delta” developed by the Delta Stewardship Council. (Wat. Code, §  
11 85059.)

12 527. The legislature directed the SWB to “develop new flow criteria for the Delta  
13 Ecosystem necessary to protect public trust resources” using “the best available scientific  
14 information.” (Wat. Code, § 85086[c][1].) The new flow criteria was to be used to inform the  
15 planning decisions for two processes: (1) the newly required Delta Plan to be developed by the  
16 Delta Stewardship Council, and (2) the Bay Delta Conservation Plan, which is now known as  
17 California WaterFix and EcoRestore. (Wat. Code, § 85086[c][1].) The DRA does not identify the  
18 State Water Board’s Bay-Delta Plan as being one of the processes to be informed by the new flow  
19 criteria.

20 528. The DRA also directed the Board to provide the legislature with a “prioritized  
21 schedule and estimate of costs to complete instream flow studies for the Delta and for high priority  
22 rivers and streams in the Delta watershed, not otherwise covered by Section 85086.” (Wat. Code, §  
23 85087.) The SWB completed the “Prioritized Schedule and Estimate of Costs” in 2010 and  
24 submitted it to the legislature. The SWB identified the San Joaquin, Tuolumne, and Merced rivers  
25 as high priority rivers, not otherwise covered by Section 85086. Accordingly, the SWB was to  
26 conduct and complete instream flow studies for these rivers.

27 529. The Delta Stewardship Council’s Final Delta Plan (2013) directed the SWB to adopt,  
28 and as soon as reasonably possible, implement flow objectives for high-priority tributaries in the

1 Delta watershed that are necessary to achieve the coequal goals of the Delta Plan. To fulfill its  
2 obligations under the Delta Plan, the SWB created Phase 4 of the Bay-Delta water quality control  
3 plan update process. Consistent with the Board’s obligation to protect public trust resources, and in  
4 accordance with the adjudicatory nature of public trust proceedings, the Board initially stated that it  
5 would fulfill its obligations under the Delta Plan in Phase 4 through the adjudicatory process of  
6 conditioning water rights and other appropriate measures.

7         530. By the time the State Water Board adopted the Phase 1 Amendments, it eliminated  
8 Phase 4 and the adjudicatory process proposed to accompany it. Instead, the Board effectively  
9 incorporated the Phase 4 adjudicatory process of conditioning water rights on high-priority  
10 tributaries into Phase 1. Specifically, the Bay-Delta Plan states, “The 2018 update of the San  
11 Joaquin River flow objectives implements the Delta Stewardship Council’s Delta Plan  
12 recommendation for the State Water Board to adopt, and as soon as reasonably possible, implement  
13 flow objectives for high priority tributaries in the Delta watershed that are necessary to achieve the  
14 co-equal goals.” (SED, Appendix K, Revised Water Quality Control Plan, at 6.)

15         531. This process unlawfully subverts the quasi-adjudicatory public trust process that had  
16 been developed as part of Phase 4 by incorporating that process into the quasi-legislative water  
17 quality control plan update for Phase 1. By using a quasi-legislative process to accomplish the  
18 quasi-adjudicatory actions that had been outlined for Phase 4, the SWB has acted unlawfully and  
19 violated the DRA.

20         532. Accordingly, the State Water Board’s adoption of the Bay-Delta Plan should be set  
21 aside in its entirety, and the State Water Board should be enjoined from taking any action to  
22 implement the Bay-Delta Plan.



1 **TWENTY-EIGHTH CAUSE OF ACTION**

2 **The SWB Failed to Adopt a Sufficient Statement of Overriding Considerations with**  
3 **the Requisite Balancing of Economic, Legal, Social, Technological, or Other Benefits**

4 533. Petitioners<sup>19</sup> reallege and incorporate herein, as if set forth in full, each and every  
5 preceding allegation, inclusive, of this Petition/Complaint.

6 534. The SED concluded the adoption and implementation of the Phase 1 Amendments  
7 will have significant and unavoidable environmental impacts. Before the Board is able to approve a  
8 project with such impacts, the law requires it adopt a statement of overriding considerations. This  
9 statement must include an express determination that the project's benefits outweigh any potential  
10 environmental harm. (Pub. Resources Code, 21081(b); 14 CCR 15043, 15093.) The statement of  
11 overriding considerations is sufficient if it "demonstrate[s] the balance struck" by an agency in  
12 "weighing the benefits of the proposed project against its unavoidable adverse impacts."  
13 (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24  
14 Cal.App.4th 826, 849.) In addition, the statement of overriding considerations must be supported by  
15 substantial evidence contained in the record. (14 CCR 15093(b).)

16 535. The Board issued a statement of findings and overriding considerations ("OC  
17 Findings") that is insufficient. The OC Findings recognize the Phase 1 Amendments would result in  
18 several significant and unavoidable impacts. For several of the projected impacts, the OC Findings  
19 explained that mitigation could be taken by agencies other than the Board. However, the most  
20 critical part of the OC Findings – the part where the Board must explain how the benefits of the  
21 Phase 1 Amendments outweigh these projected impacts – does not exist. The Board does not  
22 provide an express finding or determination that the project's benefits outweigh any potential harm.

23 536. Because sufficient OC Findings are a pre-requisite to adopting the Phase 1  
24 Amendments and because the OC Findings are not sufficient, the adoption of the Bay-Delta Plan  
25 must be set aside, and the State Water Board should be enjoined from taking any action to  
26 implement the Bay-Delta Plan.

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<sup>19</sup> MID is not participating as a member of the SJTA in this cause of action.

1 TWENTY-NINTH CAUSE OF ACTION

2 **The Carryover Storage Requirement Violates the Constitution Because it**  
3 **Amounts to Unlawful Physical Taking without Compensation**

4 537. Petitioners<sup>20</sup> reallege and incorporate herein, as if set forth in full, each and every  
5 preceding allegation, inclusive, of this Petition/Complaint.

6 538. The Fifth Amendment to the United States Constitution provides that “private  
7 property” shall not be “taken for public use, without just compensation.” (U.S. Const., 5th Amend.)  
8 This provision is applicable to the states through the Fourteenth Amendment. (*Chicago, B. & Q.*  
9 *Railroad Co. v. Chicago* (1897) 166 U.S. 226.) “[A] permanent physical occupation authorized by  
10 government is a taking [per se] without regard to the public interests that it may serve.” (*Loretto v.*  
11 *Teleprompter Manhattan Catv Corp.* (1982) 458 U.S. 419, 426.) In other words, “when the  
12 physical intrusion reaches the extreme form of a permanent physical occupation, a taking has  
13 occurred.” (*Id.*)

14 539. The ability to store water in a reservoir is a property right. (*Marin Water & Power*  
15 *Co. v. Railroad Com. of California* (1916) 171 Cal. 706, 715 [to the extent that the railroad  
16 commission held that the ability of “water storage” derived from the features of the land “was not a  
17 property right, it was in error”].) Encompassed within the right to store water in a reservoir is the  
18 ability to draw down (i.e., deliver) stored water and fill the reservoir back up.

19 540. The U.S. Supreme Court has repeatedly found that physical occupation of property  
20 through flooding or inundation is a taking. (*Loretto, supra*, 458 U.S. at 428, citing *United States v.*  
21 *Lynah* (1903) 188 U.S. 445, 468-470; *Bedford v. United States* (1904) 192 U.S. 217, 225; *United*  
22 *States v. Cress* (1917) 243 U.S. 316, 327 – 328; *Sanguinetti v. United States* (1924) 264 U.S. 146,  
23 149; *United States v. Kansas City Life Ins. Co.* (1950) 339 U.S. 799, 809 – 810.) In this context, the  
24 physical taking must “constitute an actual, permanent invasion of the land, amounting to an  
25 appropriation of, and not merely an injury to, the property.” (*Sanguinetti, supra*, 264 U.S. at 149.)  
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<sup>20</sup> MID is not participating as a member of the SJTA in this cause of action.

1           541. The WSE model includes carryover storage requirements that restrict New Melones  
2 Reservoir (on the Stanislaus River), New Don Pedro Reservoir (on the Tuolumne River), and Lake  
3 McClure (on the Merced River) from being drawn below certain levels.

4           542. The Bay-Delta Plan's minimum carryover storage requirements require the SJTA  
5 member agencies – and any other water right holders – that own and operate New Melones  
6 Reservoir, New Don Pedro Reservoir, and Lake McClure to hold a certain minimum amount of  
7 water in their reservoirs, thereby permanently occupying physical space in the reservoirs. (SED, at  
8 Appx. F.1, p. F.1-36 – F.1-37.) The bottom of these reservoirs will be permanently occupied by the  
9 State of California because the SWB will have effectively taken possession of the storage space at  
10 the bottom of the reservoir and the right to use the water that is inundating the reservoir to satisfy  
11 the carryover storage requirement. The minimum storage requirement will prevent any SJTA  
12 member agency, or any other water right holder, from putting the water held in the bottom of a  
13 reservoir to beneficial use.

14           543. Consequently, by permanently occupying the bottom of these reservoirs, the  
15 carryover storage requirement shrinks the usable storage capacity of the impacted reservoirs.  
16 Shrinking the usable storage capacity of impacted reservoirs injures the reservoir operator in two  
17 ways.

18           544. First, the minimum carryover storage requirements will prevent reservoir operators  
19 from putting water stored at the bottom of the reservoir – below the minimum carryover storage  
20 targets (i.e., reservoir elevation) – to beneficial use. For example, take a scenario whereby an  
21 impacted reservoir has 750,000 acre-feet of water in storage. Without the Bay-Delta Plan's  
22 minimum carryover storage requirement, reservoir operators could, hypothetically, deliver 600,000  
23 acre-feet by releasing water to downstream users. After releasing 600,000 acre-feet of stored water,  
24 this reservoir would have 150,000 acre-feet remaining in storage.

25           545. However, the same scenario with a minimum carryover storage requirement of  
26 700,000 acre-feet would restrict delivery to 50,000 acre-feet. The reservoir operator could not  
27 release any portion of the remaining 700,000 acre-feet of stored water because 700,000 acre-feet is  
28 required by the SWB to meet the minimum carryover storage requirements. Consequently, the Bay-

1 Delta Plan’s minimum carryover storage requirement injures reservoir operators by shrinking the  
2 usable capacity of the reservoir and preventing operators from releasing water stored below the  
3 minimum carryover storage requirements.

4 546. In addition to reducing the usable capacity, the Bay-Delta Plan effectively raises the  
5 minimum pool level of reservoirs, restricting the ability to capture water during high-flow events. In  
6 the above no-minimum example, after releasing 600,000 acre-feet of water, reservoir operators  
7 would have available storage space equal to ‘maximum capacity’ minus (-) 150,000 acre-feet for  
8 capturing and storing new water.

9 547. However, with a minimum carryover storage requirement of 700,000 acre-feet,  
10 reservoir operators would have available storage space equal to ‘maximum capacity’ minus (-)  
11 700,000 for capturing and storing new water (i.e., 550,000 acre-feet less than the no-minimum  
12 example).

13 548. By permanently occupying physical space in reservoirs, the SWB commits a  
14 physical taking of reservoir space *per se* without providing just compensation.

15 549. Accordingly, the State Water Board’s adoption of the Bay-Delta Plan should be set  
16 aside in its entirety, and the State Water Board should be enjoined from taking any action to  
17 implement the Bay-Delta Plan.

### 18 **THIRTIETH CAUSE OF ACTION**

#### 19 **The Carryover Storage Requirements Constitute an Unlawful** 20 **Regulatory Taking without Compensation**

21 550. Petitioners<sup>21</sup> reallege and incorporate herein, as if set forth in full, each and every  
22 preceding allegation, inclusive, of this Petition/Complaint.

23 551. The Bay-Delta Plan’s minimum carryover storage requirement constitutes a  
24 regulatory taking. “While property may be regulated to a certain extent, if [a government]  
25 regulation goes too far it will be recognized as a taking.” (*Murr v. Wisconsin* (2017) 137 S. Ct.  
26 1933, 1942, quoting *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) This type of  
27 taking is known as a “regulatory taking.” (*Murr v. Wisconsin, supra*, 137 S. Ct. at 1942.) In  
28 \_\_\_\_\_

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<sup>21</sup> MID is not participating as a member of the SJTA in this cause of action.

1 essence, court in regulatory taking actions evaluate whether a regulatory action is functionally  
2 equivalent to the classic taking where government directly appropriates private property. (*MHC*  
3 *Fin. Ltd. P’ship v. City of San Rafael* (9th Cir. 2013) 714 F.3d 1118, 1127, quoting *Lingle v.*  
4 *Chevron* (2005) 544 U.S. 528, 539.)

5 552. When a regulation impedes the use of property without depriving the owner of all  
6 economically beneficial use, a regulatory taking still may be found based on “a complex of factors”  
7 including (1) the economic impact of the regulation on the claimant; (2) the extent to which the  
8 regulation has interfered with distinct investment-backed expectations; and (3) the character of the  
9 government action. (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617, citing *Penn Cent.*  
10 *Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.)

11 553. The Supreme Court has stressed that the first two factors are the most important.  
12 (*Colony Cove Props., LLC v. City of Carson* (9<sup>th</sup> Cir. 2018) 888 F.3d 445, fn. 9, citing *Lingle v.*  
13 *Chevron, supra*, 544 U.S. at 538-539 [“Primary among those factors are the economic impact of the  
14 regulation on the claimant and, particularly, the extent to which the regulation has interfered with  
15 distinct investment-backed expectations. (internal quotation marks and brackets omitted)”].) When  
16 evaluating whether a regulatory taking has occurred, Courts make an “ad hoc, factual inquiry.”  
17 (*Penn Cent. Transp. Co. v. New York City, supra*, 438 U.S. at 124.)

18 554. The WSE model includes carryover storage requirements that restrict New Melones  
19 Reservoir (on the Stanislaus River), New Don Pedro Reservoir (on the Tuolumne River, and Lake  
20 McClure (on the Merced River) from being drawn below certain levels.

21 555. The carryover storage requirement, and any objectives which may require a  
22 carryover storage requirement, will cause substantial interference with SJTA member investment-  
23 backed expectations. Specifically, the Bay-Delta Plan would interfere with the districts’  
24 expectations as to the amount of water they can capture in their reservoir and put to beneficial use.  
25 Each reservoir has a capacity limit, and that limit was chosen and invested in, in part, to  
26 accommodate the owners’ needs and water rights. It was not chosen to accommodate a carryover  
27 storage requirement by the Board. The SJTA member agencies have a substantial investment-  
28

1 backed expectation that they will be able to use and operate their reservoirs within their dead pool  
2 and flood-control capacity limits – rather than within artificial limits created by the Bay-Delta Plan.

3 556. Moreover, a significant economic impact will likely befall the SJTA member  
4 agencies, and other affected water right holders, because adjusting the capacity limit of a reservoir  
5 to maintain initial expectations regarding available storage would come at considerable financial  
6 expense, assuming such a modification were even feasible. Further, water deliveries will be  
7 impacted because carryover storage requirements will mandate that a minimum quantity of water  
8 remain in the reservoir. Relatedly, because the minimum carryover storage requirements will limit  
9 the amount of water SJTA members can store in the reservoir, SJTA members will at times have to  
10 bypass flows (i.e., release water) that otherwise could have been stored and later delivered to  
11 customers.

12 557. As to the third factor, the “character of the government action,” the Supreme Court  
13 has cautioned that a taking may more readily be found when the interference with property can be  
14 characterized as a physical invasion by government than when interference arises from some public  
15 program adjusting the benefits and burdens of economic life to promote the common good. (*Penn*  
16 *Cent. Transp. Co. v. New York City*, *supra*, 438 U.S. at 124.) Here, requiring SJTA member  
17 agencies to store a minimum amount of water in their reservoirs is akin to the SWB physically  
18 invading sections of SJTA member agencies’ land by permanently filling the bottom of the  
19 reservoirs. The bottom of the reservoirs will be physically occupied and the SWB will have taken  
20 the right to put that water to beneficial use. No SJTA member agency, nor any other water right  
21 holder, will be able to put the water held in the bottom of a reservoir to beneficial use.  
22 Consequently, the character of the government action is that it constitutes a physical invasion of  
23 SJTA member agencies’ property.

24 558. Thus, because the Bay-Delta plan will have an enormous economic impact on the  
25 SJTA member agencies, eviscerate the agencies’ investment-backed expectations, and amounts to a  
26 physical invasion by the government of property, a regulatory taking has occurred.

559. Accordingly, the State Water Board's adoption of the Bay-Delta Plan should be set aside in its entirety, and the State Water Board should be enjoined from taking any action to implement the Bay-Delta Plan.

### THIRTY-FIRST CAUSE OF ACTION

## Declaratory Relief

560. Petitioners reallege and incorporate herein, as if set forth in full, each and every preceding allegation, inclusive, of this Petition/Complaint.

561. Pursuant to Code of Civil Procedure section 1060, “[a]ny person . . . may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time.” (Code Civ. Proc., § 1060.)

562. Pursuant to Government Code section 11350, “[a]ny interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.” (Gov. Code, § 11350.)

563. Petitioners contend that the State Water Board’s adoption of the Phase 1 Amendments to the Bay-Delta Plan and the SED violate, among other things, the Porter-Cologne Act, CEQA and its implementing regulations, the U.S. and California Constitutions, and the rules of water right priority.

564. The State Water Board contends that it complied with all applicable laws, rules and regulations in adopting the Phase 1 Amendments to the Bay-Delta Plan and SED.

565. An actual controversy exists concerning the rights and duties of the Petitioners and the State Water Board.

566. A judicial determination of this controversy, and of the respective duties and obligations of Petitioners and Respondent is necessary and appropriate at this time.

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**PRAYER FOR RELIEF**

Wherefore, Petitioners pray for judgment against Respondent as follows:

1. For a writ of mandate directing Respondent to vacate and set aside its adoption of Resolution No. 2018-0059 that (a) approved and adopted the SED and, (b) adopted the Phase 1 Amendments to the Bay-Delta Plan;

3. For a temporary stay, temporary restraining order, and/or preliminary and permanent injunction enjoining Respondent and its agents, employees, officers, and representatives from implementing, administering, applying, enforcing, relying upon, amending permits or licenses in compliance with, issuing water quality certifications in accordance with, or otherwise acting upon the Phase 1 Amendments to the Bay-Delta Plan;

4. For a temporary stay, temporary restraining order, and/or preliminary and permanent injunction enjoining Respondent and its agents, employees, officers, and representatives from adopting any further revisions to the Bay-Delta Plan pending full compliance with the U.S. and California Constitutions, the Porter-Cologne Water Quality Control Act, CEQA, the CEQA Guidelines, all requirements for certified regulatory programs, and all other applicable laws, rules, and regulations;

5. For a writ of mandate directing the Respondent to comply with U.S. and California Constitutions, the Porter-Cologne Water Quality Control Act, CEQA, the CEQA Guidelines, the requirements for certified regulatory programs, and all other applicable laws, rules, and regulations;

6. For a judgment declaring that the Respondent's adoption of the Phase 1 Amendments to Bay-Delta Plan is void and invalid, and that the Bay-Delta Plan is void and unenforceable;

7. For an award of reasonable attorneys' fees and costs; and

8. For such other and further relief that the Court deems just and proper.



1 Dated: January 9, 2019

**O'LAUGHLIN & PARIS LLP**

2  
3 By:



4 TIM O'LAUGHLIN (SBN 116807)  
5 VALERIE C. KINCAID (SBN 231815)  
6 TIMOTHY J. WASIEWSKI (SBN 302306)  
7 Attorneys for Petitioner/Plaintiff,  
8 SAN JOAQUIN TRIBUTARIES AUTHORITY  
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1 Dated: January 9, 2019

**O'LAUGHLIN & PARIS LLP**

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4 By:



TIMOTHY J. WASIEWSKI (SBN 302306)  
Attorneys for Petitioner/Plaintiff,  
OAKDALE IRRIGATION DISTRICT

7 Dated: January 9, 2019

**MASON, ROBBINS, BROWNING & GODWIN**  
**SOUTH SAN JOAQUIN IRRIGATION DISTRICT**

9  
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11 By:



KEN ROBBINS (SBN 72389)  
MIA S. BROWN (SBN 242268)  
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SOUTH SAN JOAQUIN IRRIGATION DISTRICT

13 Dated: January 9, 2019

**ROBBINS, BROWNING, GODWIN & MARCHINI**

15  
16  
17 By:



ARTHUR F. GODWIN (SBN 143066)  
Attorneys for Petitioner/Plaintiff  
TURLOCK IRRIGATION DISTRICT

20 Dated: January 9, 2019

**SAN FRANCISCO CITY ATTORNEY'S OFFICE**

22  
23  
24 By:



ROBB KAPLA (SBN 238896)  
Deputy City Attorney  
Attorneys for Petitioner/Plaintiff  
CITY AND COUNTY OF SAN FRANCISCO

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9<sup>th</sup> day of January, 2019, in Sacramento, California.

TIM O'LAUGHLIN

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9<sup>th</sup> day of January, 2019, in Sacramento, California.

TIMOTHY J. WASIEWSKI

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9<sup>th</sup> day of January, 2019, in Sacramento, California.

KENNETH M. ROBBINS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of January, 2019, in Sacramento, California.

ARTHUR F. GODWIN

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of January, 2019, in Sacramento, California.

K2

ROBB KAPLA

# **EXHIBIT A**



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Public Agency Exception-*

26  
27 (ADDITIONAL COUNSEL ON THE FOLLOWING PAGE)  
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25 **a public agency**

*Exempt from filing fee per Gov. Code §6103  
Public Agency Exception*

26 SUPERIOR COURT OF THE STATE OF CALIFORNIA

27 IN AND FOR THE COUNTY OF TUOLUMNE

28 SAN JOAQUIN TRIBUTARIES  
AUTHORITY, a Joint Powers Authority;  
OAKDALE IRRIGATION DISTRICT, a  
public agency; SOUTH SAN JOAQUIN  
IRRIGATION DISTRICT, a public agency;  
TURLOCK IRRIGATION DISTRICT, a  
public agency; CITY AND COUNTY OF  
SAN FRANCISCO, a public agency.

Petitioners and Plaintiffs,  
vs.  
CALIFORNIA STATE WATER  
RESOURCES CONTROL BOARD, and  
DOES 1 through 100, inclusive,  
Respondents and Defendants.

) **CASE NO.:**

) **NOTICE OF ELECTION TO PREPARE**  
) **THE ADMINISTRATIVE RECORD**

) [Code of Civil Procedure § 1094.6(c); Public  
) Resources Code, § 21167.6(b)(2)]

) **FILED BY FAX**

1 Pursuant to Code of Civil Procedure § 1094.6(c) and Public Resources Code § 21167.6  
2 subdivisions (b)(2) & (e), Petitioners SAN JOAQUIN TRIBUTARIES AUTHORITY, OAKDALE  
3 IRRIGATION DISTRICT, SOUTH SAN JOAQUIN IRRIGATION DISTRICT, TURLOCK  
4 IRRIGATION DISTRICT, and CITY AND COUNTY OF SAN FRANCISCO hereby notify  
5 Respondent CALIFORNIA STATE WATER RESOURCES CONTROL BOARD that the  
6 Petitioners elect to prepare the record of administrative proceedings relating to this action.

7 Petitioners request that Respondent cooperate with Petitioners in producing for inclusion in  
8 the record all responsive materials comprising the complete "record of proceedings" as defined by  
9 Code of Civil Procedure § 1094.6 (c) and Public Resources Code § 21167.6 (e) (1) - (11). This  
10 shall include, but is not limited to: all documents, including all transcripts, minutes of meetings,  
11 notices, correspondence, e-mails, comments received in response to or in connection with the  
12 Respondent's environmental documents, reports, studies, proposed decisions, final decisions,  
13 findings, audio and/or video recordings of meetings, and any other documents or records in  
14 Respondent's possession relating to Respondent's determination to adopt Resolution 2018-0059,  
15 on December 12, 2018.

16  
17 Dated: January 9, 2019

**O'LAUGHLIN & PARIS LLP**

18  
19 By:



TIM O'LAUGHLIN (SBN 116807)  
VALERIE C. KINCAID (SBN 231815)  
TIMOTHY J. WASIEWSKI (SBN 302306)  
Attorneys for Petitioner/Plaintiff,  
SAN JOAQUIN TRIBUTARIES AUTHORITY

20  
21  
22  
23 Dated: January 9, 2019

**O'LAUGHLIN & PARIS LLP**

24  
25 By:



TIMOTHY J. WASIEWSKI (SBN 302306)  
Attorneys for Petitioner/Plaintiff,  
OAKDALE IRRIGATION DISTRICT

1 Dated: January 9, 2019

**MASON, ROBBINS, BROWNING & GODWIN  
SOUTH SAN JOAQUIN IRRIGATION DISTRICT**

2  
3 

4 By: KEN ROBBINS (SBN 72389)  
5 MIA S. BROWN (SBN 242268)  
6 Attorneys for Petitioner/Plaintiff  
SOUTH SAN JOAQUIN IRRIGATION DISTRICT

7 Dated: January 9, 2019

**ROBBINS, BROWNING, GODWIN & MARCHINI**

8  
9 

10 By: ARTHUR F. GODWIN (SBN 143066)  
11 Attorneys for Petitioner/Plaintiff  
12 TURLOCK IRRIGATION DISTRICT

13 Dated: January 9, 2019

**SAN FRANCISCO CITY ATTORNEY'S OFFICE**

14  
15  
16 

17 By: ROBB KAPLA (SBN 238896)  
18 Deputy City Attorney  
19 Attorneys for Petitioner/Plaintiff  
CITY AND COUNTY OF SAN FRANCISCO

1 Re: *San Joaquin Tributaries Authority, et al v. California State Water Resources Control Board*  
2 *Tuolumne County Superior Court Case No.: (TBD)*

---

3 **PROOF OF SERVICE BY MAIL**  
4 (Government Code §11440.20)

5 I, Linda L. Wood, declare that:

6 I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and  
7 not a party to the within cause. My business address is 2617 K Street, Suite 100, Sacramento, CA 95816. On  
8 this date, in the following manner, I served the foregoing document(s) identified as:

9 **NOTICE OF ELECTION TO PREPARE THE ADMINISTRATIVE RECORD**

10 ►►► **UNITED STATES MAIL** [CCP §1013]: I enclosed the documents in a sealed envelope addressed to  
11 the following persons and placed the envelope for collection and mailing, following our ordinary business  
12 practices. I am readily familiar with our practice for collection and processing correspondence for  
13 mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in  
the ordinary course of business with the United States Postal Service, in a sealed envelope with postage  
thereon fully prepaid at Sacramento, California addressed as below:

14 **FACSIMILE:** Based on prior consent, I caused the documents to be sent to the following persons  
via telecopier/facsimile machine a true copy thereof to the parties indicated below:

15 **OVERNIGHT DELIVERY** [CCP §1013(c)]: I enclosed the documents in a sealed envelope provided  
16 by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope  
for collection at a regularly utilized drop box of the overnight carrier.

17 **E-MAIL** [CCP §1010.6]: Based on pending consent of the parties, and/or court order or an agreement  
18 of the parties to accept service by e-mail, I caused the documents to be sent to the following persons  
19 at the following e-mail address(es), and did not receive, within a reasonable time after the  
transmission, any electronic message or other indication that the transmission was unsuccessful:

20 ►►► **PERSONAL DELIVERY** [CCP §415.10] I arranged to have the documents personally delivered to  
the office of the persons identified below on January 10, 2019:

21  
22 **STATE WATER RESOURCES CONTROL BOARD**  
23 **OFFICE OF THE CHIEF COUNSEL**  
**1001 I STREET**  
**SACRAMENTO, CA 95814**

24 **XAVIER BECERRA**  
25 **ATTORNEY GENERAL OF CALIFORNIA**  
26 **1300 I STREET, SUITE 125**  
27 **SACRAMENTO, CA 95814**  
28

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and  
2 correct, and that this declaration was executed on January 10, 2019, at Sacramento, California.

3  
4 

5 Linda L. Wood, Legal Assistant  
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# **EXHIBIT B**

1 Tim O'Laughlin (SBN 116807)  
Valerie C. Kincaid (SBN 231815)  
2 Timothy J. Wasiewski (SBN 302306)  
**O'LAUGHLIN & PARIS LLP**  
3 2617 K Street, Suite 100  
Sacramento, California 95816  
4 Telephone: (916) 993-3962  
Facsimile: (916) 993-3688  
5 Email: [towater@olaughlinparis.com](mailto:towater@olaughlinparis.com)  
[vkinaid@olaughlinparis.com](mailto:vkinaid@olaughlinparis.com)  
6 [tw@olaughlinparis.com](mailto:tw@olaughlinparis.com)

7 Attorneys for Petitioner/Plaintiff  
**SAN JOAQUIN TRIBUTARIES**  
8 **AUTHORITY, a Joint Powers Authority**

*Exempt from filing fee per Gov. Code §6103  
Public Agency Exception*

9 Timothy J. Wasiewski (SBN 302306)  
10 **O'LAUGHLIN & PARIS LLP**  
2617 K Street, Suite 100  
11 Sacramento, California 95816  
Telephone: (916) 993-3962  
12 Facsimile: (916) 993-3688  
Email: [tw@olaughlinparis.com](mailto:tw@olaughlinparis.com)

13 Attorneys for Petitioner/Plaintiff  
14 **OAKDALE IRRIGATION DISTRICT,**  
15 **a public agency**

*Exempt from filing fee per Gov. Code §6103  
Public Agency Exception*

16 Kenneth Robbins (SBN 72389)  
**MASON, ROBBINS, BROWNING & GODWIN LLP**  
17 700 Loughborough Drive, Suite D  
P.O. Box 2067  
18 Merced, CA 95344  
Telephone: (209) 383-9334 x16  
19 Facsimile: (209) 383-9386  
Email: [KMR@mrgb.org](mailto:KMR@mrgb.org)

20 Mia S. Brown (SBN 242268)  
21 **SOUTH SAN JOAQUIN IRRIGATION DISTRICT**  
P.O. Box 747  
22 Ripon, CA 95366-0747  
Telephone: (209) 249-4621  
23 Facsimile: (209) 249-4692  
Email: [mbrown@ssjid.com](mailto:mbrown@ssjid.com)

24 Attorneys for Petitioner/Plaintiff  
25 **SOUTH SAN JOAQUIN IRRIGATION**  
**DISTRICT, a public agency**

*Exempt from filing fee per Gov. Code §6103  
Public Agency Exception-*

26  
27 (ADDITIONAL COUNSEL ON THE FOLLOWING PAGE)  
28



1 Arthur F. Godwin (SBN 143066)  
2 **ROBBINS, BROWNING, GODWIN & MARCHINI LLP**  
3 700 Loughborough Drive, Suite D  
4 Merced, CA 95348  
5 Telephone: (209) 383-9334  
6 Facsimile: (209) 383-9386  
7 Email: [afg@rbgmlaw.com](mailto:afg@rbgmlaw.com)

8 Attorneys for Petitioner/Plaintiff  
9 **TURLOCK IRRIGATION DISTRICT,**  
10 **a public agency**

*Exempt from filing fee per Gov. Code §6103  
Public Agency Exception*

11 DENNIS J. HERRERA (SBN 139669)  
12 City Attorney  
13 Robb W. Kapla (SBN 238896)  
14 Jonathan P. Knapp (SBN 262830)  
15 Peter R. Miljanich (SBN 281826)  
16 Deputy City Attorneys  
17 **SAN FRANCISCO CITY ATTORNEY**  
18 City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234  
19 San Francisco CA 94102  
20 Telephone: (415) 554-4647  
21 Facsimile: (415) 554-4757  
22 Email: [Robb.Kapla@sfcityattorney.org](mailto:Robb.Kapla@sfcityattorney.org)

23 Attorneys for Petitioner/Plaintiff  
24 **CITY AND COUNTY OF SAN FRANCISCO**  
25 **a public agency**

*Exempt from filing fee per Gov. Code §6103  
Public Agency Exception*

26 SUPERIOR COURT OF THE STATE OF CALIFORNIA

27 IN AND FOR THE COUNTY OF TUOLUMNE

28 SAN JOAQUIN TRIBUTARIES  
AUTHORITY, a Joint Powers Authority;  
OAKDALE IRRIGATION DISTRICT, a  
public agency; SOUTH SAN JOAQUIN  
IRRIGATION DISTRICT, a public agency;  
TURLOCK IRRIGATION DISTRICT, a  
public agency; CITY AND COUNTY OF  
SAN FRANCISCO, a public agency,

Petitioners and Plaintiffs,  
vs.

CALIFORNIA STATE WATER  
RESOURCES CONTROL BOARD, and  
DOES 1 through 100, inclusive,

Respondents and Defendants.

) **CASE NO.: (TBD)**

) **NOTICE OF INTENT TO COMMENCE**  
) **ACTION AGAINST THE CALIFORNIA**  
) **STATE WATER RESOURCES**  
) **CONTROL BOARD**

) (California Environmental Quality Act, Pub.  
) Resources Code, §§ 21167, 21167.5)

1 **TO THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD:**

2 PLEASE TAKE NOTICE, pursuant to Public Resources Code sections 21167, 21167.5, and  
3 any analogous notice provisions for actions or proceedings commenced pursuant to Public Resources  
4 Code section 21168.5 and/or 21168, that Petitioners/Plaintiffs, SAN JOAQUIN TRIBUTARIES  
5 AUTHORITY (“SJTA”), OAKDALE IRRIGATION DISTRICT (“OID”), a public agency, SOUTH  
6 SAN JOAQUIN IRRIGATION DISTRICT (“SSJID”), TURLOCK IRRIGATION DISTRICT  
7 (“TID”), and CITY AND COUNTY OF SAN FRANCISCO (“CCSF”), intend to file a Petition for  
8 Writ of Mandate and Complaint for Declaratory and Injunctive Relief (hereinafter Petition) pursuant  
9 to, *inter alia*, the provisions of the California Environmental Quality Act (“CEQA”) against the  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD (“SWB” or “Respondent”)  
11 challenging, among other things, Respondent’s approval and adoption of the Final Substitute  
12 Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the  
13 San Francisco Bay-Sacramento San Joaquin Delta Estuary: San Joaquin River Flows and Southern  
14 Delta Water Quality (“SED”), including the Findings and Statement of Overriding Considerations,  
15 and the Mitigation and Monitoring Program and the mitigation measures set forth therein.

16 The Petition seeks, *inter alia*, a writ of mandate directing the SWB to vacate and set aside its  
17 adoption of Resolution No. 2018-0059 approving and adopting the SED and adopting amendments  
18 to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary  
19 (Bay-Delta Plan) based upon violations of CEQA and other applicable laws. The Petition also seeks  
20 a temporary restraining order and/or preliminary injunction and permanent injunction enjoining  
21 Respondent and its agents, employees, officers and representatives from implementing,  
22 administering, applying, enforcing, relying upon, amending permits or licenses in compliance with,  
23 issuing water quality certifications in accordance with, or otherwise acting upon the amendments to  
24 the Bay-Delta Plan. The exact nature of the allegations and relief sought is described in the Petition  
25 that will be filed by Petitioners.

26 ///

27 ///

28 ///

1 Dated: January 9, 2019

**O'LAUGHLIN & PARIS LLP**

2  
3 By:



TIM O'LAUGHLIN (SBN 116807)  
VALERIE C. KINCAID (SBN 231815)  
TIMOTHY J. WASIEWSKI (SBN 302306)  
Attorneys for Petitioner/Plaintiff,  
SAN JOAQUIN TRIBUTARIES AUTHORITY

7 Dated: January 9, 2019

**O'LAUGHLIN & PARIS LLP**

8  
9  
10 By:



TIMOTHY J. WASIEWSKI (SBN 302306)  
Attorneys for Petitioner/Plaintiff,  
OAKDALE IRRIGATION DISTRICT

13 Dated: January 9, 2019

**MASON, ROBBINS, BROWNING & GODWIN  
SOUTH SAN JOAQUIN IRRIGATION DISTRICT**

14  
15  
16  
17 By:



KEN ROBBINS (SBN 72389)  
MIA S. BROWN (SBN 242268)  
Attorneys for Petitioner/Plaintiff  
SOUTH SAN JOAQUIN IRRIGATION DISTRICT

19 Dated: January 9, 2019

**ROBBINS, BROWNING, GODWIN & MARCHINI**

20  
21  
22  
23 By:



ARTHUR F. GODWIN (SBN 143066)  
Attorneys for Petitioner/Plaintiff  
TURLOCK IRRIGATION DISTRICT

1 Dated: January 9, 2019

SAN FRANCISCO CITY ATTORNEY'S OFFICE

2  
3  
4 By:



ROBB KAPLA (SBN 238896)  
Deputy City Attorney  
Attorneys for Petitioner/Plaintiff  
CITY AND COUNTY OF SAN FRANCISCO

1 Re: *San Joaquin Tributaries Authority v. California State Water Resources Control Board*  
2 *Tuolumne County Superior Court Case No.: TBD*

---

3 **PROOF OF SERVICE BY MAIL**  
4 (Government Code §11440.20)

5 I, Linda L. Wood, declare that:

6 I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and  
7 not a party to the within cause. My business address is 2617 K Street, Suite 100, Sacramento, CA 95816. On  
8 this date, in the following manner, I served the foregoing document(s) identified as:

9 **NOTICE OF INTENT TO COMMENCE ACTION AGAINST THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

11 **UNITED STATES MAIL** [CCP §1013]: I enclosed the documents in a sealed envelope addressed to the  
12 following persons and placed the envelope for collection and mailing, following our ordinary business  
13 practices. I am readily familiar with our practice for collection and processing correspondence for mailing.  
14 On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary  
15 course of business with the United States Postal Service, in a sealed envelope with postage thereon fully  
16 prepaid at Sacramento, California addressed as below:

17 **FACSIMILE:** Based on prior consent, I caused the documents to be sent to the following persons  
18 via telecopier/facsimile machine a true copy thereof to the parties indicated below:

19 **▶▶▶ OVERNIGHT DELIVERY** [CCP §1013(c)]: I enclosed the documents in a sealed envelope provided  
20 by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope  
21 for collection at a regularly utilized drop box of the overnight carrier.

22 **E-MAIL** [CCP §1010.6]: Based on pending consent of the parties, and/or court order or an agreement  
23 of the parties to accept service by e-mail, I caused the documents to be sent to the following persons  
24 at the following e-mail address(es), and did not receive, within a reasonable time after the transmission,  
25 any electronic message or other indication that the transmission was unsuccessful:

26 **PERSONAL DELIVERY** [CCP §415.10] I arranged to have the documents personally delivered to the  
27 office of the persons identified below \_\_\_\_\_:

28 **State Water Resources Control Board**  
**Office of the Chief Counsel**  
**1001 I Street**  
**Sacramento, CA 95814**

**Xavier Becerra**  
**Attorney General of California**  
**1300 I Street, Suite 125**  
**Sacramento, CA 95814**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and  
correct, and that this declaration was executed on January 9, 2019, at Sacramento, California.



Linda L. Wood, Legal Assistant

# **EXHIBIT C**



O'Laughlin & Paris LLP

Attorneys at Law

January 10, 2019

Xavier Becerra  
Attorney General of California  
TRACY L. WINDSOR  
Supervising Deputy Attorney General  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550

**Re: *San Joaquin Tributaries Authority, et al v. State Water Resources Control Board  
Tuolumne County Superior Court***

To the Attorney General of the State of California:

Pursuant to the *California Code of Civil Procedure* § 388 and Public Resources Code § 21167.7, and any analogous notice requirements for actions and/or proceedings commenced pursuant to Public Resources Code sections 21168 and/or 21168.5, enclosed please find a copy of the *Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief*, filed on January 10, 2019, on behalf of the *San Joaquin Tributaries Authority, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District*, and the *City and County of San Francisco*, and against the *California State Water Resources Control Board*, alleging, among other things, violations of the California Environmental quality Act (CEQA).

The *Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief* challenges, among other things, the State Water Resources Control Board's approval and adoption of the Final Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water Quality ("SED"), including the Findings and Statement of Overriding Considerations, and adopting amendments to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary (Bay-Delta Plan) based upon violations of CEQA and other applicable laws.

Very truly yours,

---

Tim O'Laughlin

TO/llw

Enclosure: *Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief*

2617 K Street, Suite 100  
Sacramento, California 95816  
(916) 993-3962  
(916) 264-2040-fax

117 Meyers Street, Suite 110  
Chico, California 95928  
(530) 899-9755  
(530) 899-1367-fax

Mailing Address:  
2617 K Street, Suite 100  
Sacramento, California 95816

cc: *San Joaquin Tributaries Authority*  
*Oakdale Irrigation District*  
*South San Joaquin Irrigation District*  
*Turlock Irrigation District*  
*City and County of San Francisco*