

July 6, 2022

*Via Electronic Mail*

Eileen Sobeck  
Executive Director  
State Water Resources Control Board  
Eileen.Sobeck@waterboards.ca.gov

**RE: Decision on Petition to Revise Bay-Delta Water Quality Standards**

Dear Director Sobeck:

We write on behalf of Little Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians, and Winnemem Wintu Tribe (“Petitioners”) to express Petitioners’ serious concerns with the State Water Resources Control Board’s (“Board”) June 24, 2022 Rulemaking Decision Denying the May 24, 2022 Petition to Review and Revise Bay-Delta Water Quality Standards (“Decision”). As discussed below and on behalf of our clients, we also respectfully decline your request for a meeting with Petitioners Winnemem Wintu Tribe and Shingle Springs Band of Miwok Indians to discuss engagement with California tribes in protecting Tribal Beneficial Uses in the Bay-Delta. We ask that the Board instead recognize and fulfill its legal obligations to initiate formal government-to-government consultation with tribes culturally and traditionally affiliated with the Bay-Delta and its headwaters, beginning by sending a formal notice and request for a government-to-government meeting to all affected tribes.

While Petitioners appreciate the Board’s statement that updating the Bay-Delta Plan is a “high priority” for the agency, the Board’s actions do not bear this out. The Decision fails to acknowledge that the Board has been in clear violation *for nearly twelve years* of its statutory duties under both the Clean Water Act and California’s Porter Cologne Act to review and update water quality standards for the Bay-Delta. Nor does the Board acknowledge the urgency of redressing these violations or suggest any intent to act with the speed that the law and the crisis in the Bay-Delta require. Rather, the Board falls back on the same tired narrative that it is “preparing a Staff Report” with “options for updating the Bay-Delta Plan,” which the agency has been suggesting since at least July 2018.<sup>1</sup> The Board provides no greater reason now to believe that it will voluntarily follow the law than it did four years ago.

The Decision further fails to acknowledge that, while the Board sits on its heels on the Bay-Delta Plan, the State is forging ahead with actions that will predetermine the results of an eventual update of the Bay-Delta water quality standards. As the Decision concedes, the Board has given its blessing to the State’s backroom negotiation of flow commitments with major water users through the so-called voluntary agreements (“VAs”). But while the Board suggests that the VAs would be used only for “implementation” of

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<sup>1</sup> See Petition at p. 35; State Water Resources Control Bd., *July 2018 Framework for the Sacramento/Delta Update of the Bay-Delta Plan* (July 2018).

Bay-Delta and Lower San Joaquin River (“LSJR”) flow objectives, it fails to acknowledge that adoption of the flow commitments in the VAs would necessarily determine the flow-based water quality standards themselves. Using the VAs in this manner would substitute an open, participatory, and science-based process for setting flow-based standards for closed-door bartering between the State and entrenched industry and water rights claimants, perpetuating the marginalization of tribes and communities of color and continuing to trammel on their rights to the water and to meaningful participation in agency decision-making. It would also result in serious damage to the Bay-Delta ecosystem and vulnerable communities, as the March 29, 2022 VA Term Sheet would provide annual outflows for the Sacramento River basin that are dramatically lower than proposed in the Board’s 2018 Phase 2 Framework and only a fraction of what the Board has concluded would be required to protect public trust resources.<sup>2</sup> In the same vein, the Decision fails to acknowledge that impending review and approval of the planned Delta Conveyance Project would put the major plumbing infrastructure for the southern Delta in place ahead of an update to water quality standards and rulemaking on water rights, limiting any possibility of meaningful improvement to Bay-Delta flows.

Equally flawed is the Board’s rejection of Petitioners’ request to initiate a rulemaking to regulate all recognized rights to Bay-Delta water. The fact is, the Board is already regulating water rights, albeit on a piecemeal basis, through its emergency curtailment orders limiting diversions under the 1995 water quality standards and by selectively waiving these standards through Temporary Urgency Change Orders to legalize violations. And contrary to the Board’s suggestion that a rulemaking is just one option among many for implementation of water quality standards, it is clear that without comprehensive regulation of water diversions, updated standards would do nothing to prevent the collapse of native salmon fisheries and protect other beneficial uses. Further, the Board’s suggestion that it will consider the VAs as an implementation pathway in lieu of regulation would mean paying off large water users with taxpayer funds, thereby transferring more capital and control to illegitimate water rights claimants.<sup>3</sup>

While disputing the need for the requested rulemaking, the Decision is entirely silent on the stakes. As discussed at length in the Petition and as repeatedly acknowledged by the Board, the Bay-Delta is in a state of perilous crisis. Multiple native Delta fish species populations are on the verge of collapse. The Board has acknowledged the prospect of permanent loss of Delta salinity control. And harmful algal blooms are increasingly proliferating year over year, turning water and air toxic to riparian plants and animals and to people who live, work, and recreate near the water. The Decision appropriately does not dispute that, as outlined in the Petition, the Board’s failure to meet its statutory obligations to update the water quality standards (and its failure to enforce existing objectives) is resulting in severe, adverse, and disproportionate harm to tribes in

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<sup>2</sup> The March 29, 2022 VA outflow commitments for the San Joaquin River Basin would also provide significantly less instream water than required by the 2018 LSJR amendments to the Bay-Delta Plan.

<sup>3</sup> See, e.g., Petition at p. 11, 45-46, Ex. B (Decl. of Gary Mulcahy) at ¶¶ 8-11, & Ex. F (Amicus Br.) at pp. 21-36.

the Delta and its headwaters – whose spiritual and cultural survival are compromised by their inability to access salmon, riparian plant species, and even the water itself for ceremonial and cultural practices. Nor does it dispute that these failures are resulting in severe, adverse, and disproportionate harm to communities of color in the Delta, who are alienated from and injured by the polluted and largely dewatered waterways, and to residents who suffer from asthma and other respiratory disabilities worsened by the now common inhalation of aerosolized toxins from harmful algal blooms.

Finally, the Board falls well short in its suggestion that it would “like to meet with Petitioners” to discuss the Petition’s request to designate Tribal Beneficial Uses and to discuss “how to improve engagement with California Native American Tribes” on these issues. As outlined in the Petition, the Board is legally obligated to formally consult with tribes traditionally and culturally affiliated with the geographic areas affected by the Bay-Delta Plan (which include the Bay-Delta, its headwaters, and hydrologically connected watersheds like the Trinity and Klamath watershed) under AB 52<sup>4</sup> and its own Tribal Consultation Policy. Petitioners are not in a position to speak for all culturally affiliated tribes, nor is a “meeting” a substitute for the robust government-to-government consultation with sovereign tribal nations that the law requires. Petitioners also object to the Board’s suggestion that designation of Tribal Beneficial Uses in the Bay-Delta Plan would need to await action by the Regional Boards. While Petitioners recognize that the Regional Boards are in different stages of considering Tribal Beneficial Use designations in *their* basin plans, the State Board has assumed sole authority and responsibility for making beneficial use designations under the Bay-Delta Plan but has thus far evinced no interest in expanding its 1995 designations to encompass Tribal Beneficial Uses.

The Board must take immediate action to recognize and fulfill its obligations to consult with tribes on a government-to-government basis on management of Bay-Delta waters. The Board cannot undo its past failures to respect tribal sovereignty. But it can take meaningful action to repair this relationship going forward, through deeds and not only words. The Board should begin by immediately issuing a formal notice to all tribes culturally and traditionally affiliated with areas affected by the Bay-Delta Plan with an invitation to a government-to-government meeting to establish the consultation process.

With the Board’s denial of the Petition, it is clear that the Board will not act on its own to meet its obligations under the law to protect the public trust and beneficial uses in the Bay-Delta or to rectify the adverse and disparate impacts of its failures on tribes, Delta communities of color, and other protected and marginalized groups. Petitioners intend to formally seek reconsideration of the Board’s denial pursuant to Government Code section 11340.7(c) and will seek redress elsewhere if the Board does not meaningfully modify its Decision.

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<sup>4</sup> See, e.g., Pub. Resources Code §§ 21080.3.1(b), 21084.3.

Sincerely yours,



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