

**BEFORE THE CALIFORNIA STATE WATER  
RESOURCES CONTROL BOARD**

**REQUEST FOR RECONSIDERATION  
OF RULEMAKING DECISION OF  
THE STATE WATER RESOURCES  
CONTROL BOARD DENYING  
PETITION TO REVIEW AND REVISE  
BAY-DELTA WATER QUALITY  
STANDARDS**

**Pursuant to Gov. Code § 11340.7(c)**

**INTRODUCTION**

Pursuant to Government Code section 11340.7, subd. (c), Little Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians, and Winnemem Wintu Tribe (“Petitioners”), request that the State Water Resources Control Board (“Board”) reconsider its June 23, 2022 Rulemaking Decision Denying the May 24, 2022 Petition to Review and Revise Bay-Delta Water Quality Standards (“Decision”).

The Decision fails to acknowledge and address multiple violations outlined in the Petition for Rulemaking to Review and Revise the Bay-Delta Water Quality Standards (“Petition”). In particular, the Board fails to address its ongoing violation of its statutory obligations to review the Bay-Delta Plan every three years pursuant to the federal Clean Water Act and California’s Porter-Cologne Act. Further, the Board’s offer to meet with affected tribes does not constitute compliance with the requirement that the Board conduct formal government-to-government consultation pursuant to Assembly Bill (“AB”) 52. The Decision also fails to address the Board’s violation of its statutory duties to protect public trust interests and beneficial uses for affected tribes and Delta communities. Finally, the Board does not dispute that its mismanagement of the Delta waters is resulting in disparate impacts to Indigenous Peoples, communities of color, and other vulnerable groups in violation of federal and state civil rights laws under Title VI of the Civil Rights Act of 1964 and California Government Code section 11135, as well as its own commitments to promoting racial equity in agency decision-making. At the same time, the Board does not indicate any actions that it will take to redress these ongoing harms, as the law requires.

Addressing these statutory violations is necessary to safeguard the health and safety of both Delta waterways and the communities that depend on them; and it is necessary to fulfill the Board’s commitments to anti-racism, equity, and repair of centuries of oppression and marginalization of tribes and communities of color. As the Board has recognized, the Bay-Delta ecosystem has been in a state of crisis for decades.<sup>1</sup> Because of the Board’s mismanagement of

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<sup>1</sup> See State Water Resources Control Bd., *Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and Its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitats, and Interior Delta Flows* at p. 1-4 (2017) (hereafter, “Phase II Scientific Basis Report”); State Water Resources Control Bd., *Summary of Proposed Amendments to Bay-Delta Plan* at p. 1 (July 6, 2018).

Bay-Delta water quality, harms to the Delta have been exacerbated, including drastic reductions to flow levels and resulting ecological and community impacts. Among the manifold impacts, multiple native fish species are now on the verge of extinction. The collapse of native fish populations represents a profound and irreparable injury to tribes and other fish-dependent communities, who rely on native fish species for social, cultural, economic, and religious practices and for sustenance. Further, insufficient instream flows, changes to water circulation patterns, warm water temperatures, and nutrient discharge have contributed to the emergence and spread of harmful algal blooms throughout Delta waterways. The dangerous effects of harmful algal blooms are borne disproportionately by members of vulnerable and disadvantaged communities who live near polluted or largely dewatered waterways or rely on them for subsistence fishing, bathing, sanitation, and recreation. Tribes and other Delta communities are increasingly alienated from the stagnant and toxic Delta waterways, unable to access riparian plant and animal species essential to the cultural and spiritual survival of Northern California tribes as well as the aesthetic, recreational, health, and environmental benefits of clean waterways.

To address the Board's statutory violations and prevent further harm, Petitioners urge the Board to: (1) comprehensively update and implement the Bay-Delta water quality standards codified at California Code of Regulations, Title 23, sections 3002 and 3002.1 no later than December 31, 2023 and suspend approvals for new water permits or water infrastructure projects until the 1995 standards have been updated, (2) issue formal notice of opportunity for government-to-government consultation on the Bay-Delta Plan update to tribes in the Bay-Delta, its headwaters, and hydrologically connected waterways like the Trinity and Klamath Rivers pursuant to Public Resources Code section 21080.3.1, subd. (d) and the Board's Tribal Consultation Policy and initiate meaningful consultation with requesting tribes, and (3) initiate a rulemaking to regulate and restructure Bay-Delta water rights to preserve instream flow and public trust resources and prevent ongoing harms to disadvantaged and vulnerable Delta communities.

## LEGAL ARGUMENTS

### **I. The Decision fails to address the Board's ongoing violation of its statutory obligations to review the Bay-Delta Plan triennially pursuant to the Clean Water Act and California's Porter-Cologne Act**

The Board has a statutory duty under the federal Clean Water Act and California's Porter-Cologne Act to review the Bay-Delta Plan at least once every three years for the purpose of determining whether to modify adopted water quality standards. (33 U.S.C. § 1313; Wat. Code, § 13240.) California courts have repeatedly affirmed the Board's responsibility to conduct this triennial review of water quality standards. (*See e.g., City of Arcadia v. State Water Resources Control Bd.* (2011) 191 Cal.App.4th 156, 175; *City of Duarte v. State Water Resources Control Bd.* (2021) 60 Cal.App.5th 248, 265; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 108; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 632 (Brown, J., concurring).) The Board has itself affirmed that

“[t]he Bay-Delta Plan will be reviewed every three years in compliance with Water Code section 13240 and federal Clean Water Act section 303(c) (33 U.S.C. § 1313(c)).”<sup>2</sup>

The Board does not dispute that it has been in violation of these statutory timelines for over *twelve years*. The Board last conducted a comprehensive review of the Bay-Delta Plan in 2006, and even then, it declined to make any substantive changes to the 1995 water quality standards. As a consequence, Bay-Delta waters are still subject to water quality standards adopted twenty-six years ago, under significantly different ecological, biological, climatic, and demographic conditions. Further, although the 1995 water quality standards anticipated and accommodated drought conditions, the Board has in recent years repeatedly waived the existing Bay-Delta water quality standards, substituting an ad hoc approach to water quality regulation for the comprehensive and publicly-informed review and update of water quality standards that state and federal law require.<sup>3</sup>

The Board falls back on two tired narratives to paper over its failure to meet the statutory timelines. First, it points out that it completed a review of Bay-Delta water quality standards in 2018 when it amended water quality standards covering Lower San Joaquin River flows and southern Delta salinity objectives. Second, the Board asserts that it is preparing a staff report to support an update for reasonable protection of fish and wildlife beneficial uses for the remainder of the Bay-Delta system (including flows and cold-water habitat in the Sacramento River, its tributaries and tributaries to the Delta, Delta outflows, and water project operations in the interior Delta). Neither cures the Board’s ongoing violations of the statutory timelines.

First, while the Board completed a partial review of standards for the Lower San Joaquin River and southern Delta salinity in 2018, the Board has yet to implement such standards despite already exceeding its three-year statutory deadline to reinstate a review of standards in this portion of the watershed. Further, the implementation of these Phase I amendments to the Bay-Delta Plan is contingent on additional reports and regulatory actions, as well as future development of implementation pathways. Significantly, the Board only recently released the Notice of Preparation for proposed regulations to implement Phase I on July 15, 2022<sup>4</sup>, four years after adoption of the amendments and despite the requirement that the Board “fully implement” the instream flow requirements “by 2022”<sup>5</sup>, highlighting the Board’s pattern of consistent delays in maintaining up-to-date water quality standards for the Bay-Delta.<sup>6</sup>

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<sup>2</sup> State Water Resources Control Bd., Resolution 2018-0059 at p. 5.

<sup>3</sup> See, e.g., State Water Resources Control Bd., *State Water Project and Central Valley Project Temporary Urgency Change Petition*, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/tucp/index.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.html) (last visited May 3, 2022).

<sup>4</sup> State Water Resources Control Bd., Revised Notice of Preparation and California Environmental Quality Act Scoping Meeting: Proposed Regulation to Implement Lower San Joaquin River Flows and Southern Delta Salinity Objectives in the Water Quality Control Plan for the San Francisco Bay/ Sacramento-San Joaquin Delta (Aug. 8, 2022) (revising Notice of Preparation issued July 15, 2022) (hereafter, “Phase I Implementing Regulation NOP”), available at [https://www.waterboards.ca.gov/public\\_notices/notices/revised\\_notice\\_ceqa\\_baydelta\\_nop.pdf](https://www.waterboards.ca.gov/public_notices/notices/revised_notice_ceqa_baydelta_nop.pdf)

<sup>5</sup> State Water Resources Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delt Estuary* at p. 24 (Dec. 12, 2018), available at [https://www.waterboards.ca.gov/plans\\_policies/docs/2018wqcp.pdf](https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf).

<sup>6</sup> Likewise, the Board is still in the process of developing biological goals for the Lower San Joaquin River. See, e.g., State Water Resources Control Bd., *Second Revised Notice of Availability of Revised Draft Initial Biological Goals for Lower San Joaquin River Objectives* (July 22, 2022), available at

Second, while Petitioners appreciate that the Board has deemed completing its update of the Bay-Delta Plan an agency “priority,” the Board offers no assurances that it will complete a Phase II update of the Plan on any reasonable timeline. To the contrary, since 2018, the Board has made statements that it would release a staff report with a comprehensive Phase II amendment analysis.<sup>7</sup> Four years later, the Board has yet to release the promised staff report or further information regarding the Phase II amendments. The Board’s continued promises to release a staff report and conduct public hearings on a Phase II review have proved illusory.

To solidify its commitments to complete a comprehensive Bay-Delta Plan update, the Board should specify a timeline for completion and provide assurances that it will be met. Petitioners request the Board adopt a timeline consistent with Assembly Bill 2639 (introduced on February 18, 2022), which would require the Board to adopt a final update to the 1995 water quality standards and to implement the Phase II amendments no later than December 31, 2023.<sup>8</sup> Further, because the Board’s obligations to review the water quality standards recur triennially, the Board should notice and commit to a timeline for initiating and completing the next round of periodic reviews to ensure that its statutory derelictions are not repeated.

To provide assurances that this timeline will be met and as specified in Assembly Bill 2639, no new or changes to existing permits or significant infrastructure for Delta water conveyance should be approved until the Board comes into compliance with statutory requirements to review and update the 1995 standards. Significantly, the Department of Water Resources (“DWR”) is moving ahead with review and approval of a planned Delta Conveyance Project. DWR issued a draft Environmental Impact Report for the project, which proposes construction of a new tunnel conveying up to 6,000 cfs of water from two new north Delta intake facilities to the south Delta for use as part of State Water Project and potentially Central Valley Project water export and delivery infrastructures. Moving ahead with this significant new water diversion infrastructure puts the cart before the horse: it would establish the major plumbing for water exports from the Delta before water quality standards governing those exports are put in place. Protecting public trust resources and meeting beneficial uses in the Delta will require a significant increase in Delta outflows, necessitating associated reductions to water diversions. The project contours cannot be appropriately tailored to or reviewed for consistency with legally sound water quality objectives until the 1995 water quality standards have been reviewed and updated. DWR itself has suggested as much, indicating that when it “bring[s] the Delta Conveyance Project to the State Board, [it] will be pointing to the Water Quality Control Plan or [voluntary agreements] to establish the outflow requirements that the project will need to comply with.”<sup>9</sup>

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[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/docs/biological\\_goals/20220722-biogoals-noa-second-revised.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/biological_goals/20220722-biogoals-noa-second-revised.pdf).

<sup>7</sup> See e.g., State Water Resources Control Bd., *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan*, p. 5 (July 2018).

<sup>8</sup> Assem. Bill No. 2639 (2022).

<sup>9</sup> See Petition, Attachment E, Decl. of Barbara Barrigan-Parrilla, Ex. A, Email from Carolyn Buckman, Department of Water Resources, to Diane Riddle, State Water Resources Control Board, RE Delta Conveyance/VA Discussion (Nov. 4, 2021).

While the Board continues to delay its review of the Bay-Delta Plan, the State is forging ahead with actions that will predetermine the results of an eventual update to the Bay-Delta water quality standards. As discussed in the Petition, through closed-door negotiations of the VAs without participation of Indigenous Peoples, communities of color, and other vulnerable groups in the Delta, the State is considering flow commitments that, if incorporated into the Bay-Delta Plan, will constrain water quality standards. The Board argues that the VAs would be used only for “implementation” of water quality standards, but it fails to acknowledge that adoption of the flow commitments in the VAs would necessarily determine the flow-based water quality standards themselves. The March 29, 2022 Memorandum of Understanding for the Phase II Voluntary Agreements makes this clear, setting forth specific flow measures that the parties would agree to meet for Delta tributaries and outflows.<sup>10</sup> Given that the VAs define the obligations of the largest claimants of Delta water (e.g., the State Water Contractors), the flow-based standards in the Bay-Delta Plan will likely need to be organized around the VAs to make any implementation plan feasible. Any opportunity for public participation at a pre-adoption hearing would thus be too little and come too late to meaningfully inform the standards.

As discussed further below, the proposed VAs would also result in wholly inadequate flow-based standards that disregard the needs of Delta ecosystems, native fish and wildlife species, and communities. The Board’s obligation is to adopt standards that protect beneficial uses and public trust resources, not the economic interests of purported water rights holders.

## **II. The Board is required to conduct government-to-government consultation pursuant to Assembly Bill 52 and the Board’s Tribal Consultation Policy**

In the Decision, the Board does not contest that its update of the Bay-Delta Plan is subject to the requirements for government-to-government consultation with traditionally and culturally affiliated tribes under Assembly Bill (“AB”) 52, as well as under the Board’s own Tribal Consultation Policy and its November 2021 Anti-Racism Resolution. Nor does it contest that it has failed to initiate or satisfy the government-to-government consultation requirements for any Bay-Delta Plan environmental reviews. At the same time, the Decision errs by failing to specify any actions that the Board will take to redress these ongoing harms. At best, the Board offers to meet with Petitioners Shingle Springs Band of Miwok Indians and Winnemem Wintu Tribe for the limited purpose of discussing recognition of tribal beneficial uses, but such a meeting would be a far cry from the meaningful government-to-government consultation with sovereign tribal nations that is required under AB 52 and the California Environmental Quality Act (“CEQA”) to ensure protection of tribal cultural resources.

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 and its own Tribal Consultation Policy. While the Board reviews the Bay-Delta Plan through substitute environmental documents (“SED”) under a certified regulatory program pursuant to Public Resources Code section 21080.5 (23 Cal. Code Regs. § 3775), exemptions for

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<sup>10</sup> State Water Resources Control Bd., *Proposals for Voluntary Agreements to Update and Implement the Bay-Delta Plan*, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/proposed\\_voluntary\\_agreements.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/proposed_voluntary_agreements.html) (last updated May 2, 2022).

certified regulatory programs only embrace Chapters 3 and 4 and section 21167 of CEQA. (Pub. Resources Code, § 21080.5(c).) The Board’s operation under a certified regulatory program does not exempt the agency from complying with AB 52 requirements in its environmental reviews, which are codified in chapters 2.5 and 2.6 of CEQA. (See Pub. Resources Code, §§ 21073, 21074, 21080.3.1, 21084.3.) In addition, environmental reviews under the Board’s certified regulatory program “remain[] subject to the broad policy goals and substantive requirements of CEQA.” (*Pesticide Action Network N. Am. v. Dept. of Pesticide Regulation* (2017) 16 Cal. App. 5th 224, 243.) In AB 52, the Legislature expanded CEQA’s substantive requirements and policy goals to include consideration of impacts on tribal cultural resources and incorporation of tribes’ unique expertise in environmental assessments. (Assem. Bill No. 52 (2014) ch. 532 § 1(b)(4), (5).) The Legislature intended for these substantive requirements to be fulfilled early in the environmental review process. (*Id.* § 1(b)(7).)

The Board’s own Tribal Consultation Policy contains no indication that SEDs have distinct or lesser tribal consultation requirements.<sup>11</sup> To the contrary, the Policy affirms the importance of tribal consultation even if it were not directly mandated by AB 52: “In the absence of legal consultation requirements, a best practice is to consult with tribes out of respect for their status as sovereign governments or based on the unique tribal interests that may be affected by a proposed action, policy, or set of activities.”<sup>12</sup> The Board has also memorialized through its Anti-Racism Resolution its specific commitments to meaningfully consult with affected tribes as well as communities most directly impacted by water quality and water management decisions.<sup>13</sup>

To comply with CEQA’s substantive requirements and policy goals, including AB 52’s tribal consultation requirements, the Board must conduct tribal consultation on all Bay-Delta Plan environmental reviews, including the Board’s SED for the Bay-Delta Plan Phase II update and its environmental impact report (“EIR”) for Phase I implementation. Tribal consultation for Bay-Delta SEDs is especially important given that the NOP for the proposed regulation to implement LSJR flows and southern Delta salinity objectives proposes an EIR that will tier from the SED supporting the 2018 Phase I update to the Bay-Delta Plan.<sup>14</sup> Without tribal consultation on the SED itself, violations of tribes’ sovereign rights to government-to-government consultation and assaults to tribal cultural resources and interests may replicate through these subsequent environmental reviews.

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<sup>11</sup> See State Water Resources Control Bd., Tribal Consultation Policy (June 2019), available at [https://www.waterboards.ca.gov/about\\_us/public\\_participation/tribal\\_affairs/docs/california\\_water\\_board\\_tribal\\_consultation\\_policy.pdf](https://www.waterboards.ca.gov/about_us/public_participation/tribal_affairs/docs/california_water_board_tribal_consultation_policy.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> See State Water Resources Control Bd. Resolution No. 2021-0050, *Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism*, available at [https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2021/rs2021-0050.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2021/rs2021-0050.pdf) (hereinafter “Anti-Racism Resolution”); Gov. Code, § 65040.12(e)(2)(D) (defining “environmental justice” to include “[a]t a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions”); see generally, e.g., Pub. Resources Code, § 21080.3.1 (codifying tribal consultation requirements under CEQA).

<sup>14</sup> State Water Resources Control Bd., Phase I Implementing Regulation NOP.

In addition to being legally mandated under AB 52, government-to-government consultation with affected tribes is necessary to address the decades of environmental racism experienced by tribal communities in the Delta. As the Board's recent Anti-Racism Resolution recognizes, "colonization, displacement, and genocide of Native American people in the United States have contributed to the loss of water resource and watershed management practices that supported Native American people's traditional food sources and ways of life" and to failure to recognize inherent tribal water rights.<sup>15</sup> Multiple tribal nations, including Petitioners Winnemem Wintu and Shingle Springs Band of Miwok Indians, have deep ancestral ties to the Delta watershed, its headwaters, and hydrologically connected waterways like the Trinity River. Myriad landscapes, sites, and species that are fundamental to these Tribes' identity, culture, spirituality, and economy fall within the scope of tribal cultural resources impacted by State water quality mismanagement.<sup>16</sup> Complying in good faith with AB 52 consultation requirements is the least the Board must do to address the racism and dispossession baked into the California water rights regime and the Board's history of water resources management. The Board should begin by immediately issuing formal notice of opportunity for government-to-government consultation pursuant to Public Resources Code section 21080.3.1, subd. (d) to ensure that it can conduct robust consultation within the timeline for review, update, and implementation of the standards set forth above.

Further, consistent with the Board's Tribal Consultation Policy and Anti-Racism Resolution, the Board should revise beneficial uses in the Bay-Delta Plan to incorporate Tribal Beneficial Uses. As stated in the Board's Anti-Racism Resolution, the Board must "center[] its work and decision-making on Black, Indigenous, and people of color who are disproportionately represented in the most vulnerable communities and in unsheltered populations, while ensuring the full benefits of the Water Boards' programs for all people."<sup>17</sup> To date, the Board has yet to take tangible action to effectuate its Anti-Racism Resolution in the Delta. Since the 1995 Bay-Delta Plan update, the Board has recognized the same seventeen beneficial uses, which fail to include beneficial uses that directly recognize and protect tribal interests.<sup>18</sup> Failing to properly incorporate Tribal Beneficial Uses perpetuates the environmental racism the Board has committed to addressing. Contrary to the Board's suggestion that designation of Tribal Beneficial Uses in the Bay-Delta Plan is premature and dependent on actions by regional boards, the Board does not need to wait for authority or further action from the regional boards to include Tribal Beneficial Uses in the Bay-Delta Plan. Given that the Board has assumed sole authority to make beneficial use designations under the Bay-Delta Plan, it has also assumed the responsibility to rectify this failure.

### **III. The Board must regulate and restructure Bay-Delta water rights**

The Board's rejection of Petitioners' request to initiate a rulemaking to regulate recognized use and diversion of Bay-Delta water is flawed. The Board has a specific statutory duty to take "all appropriate proceedings or actions before executive, legislative, or judicial

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<sup>15</sup> State Water Resources Control Bd., Anti-Racism Resolution at ¶ 7(b).

<sup>16</sup> See Pub. Resources Code, § 21074(a).

<sup>17</sup> State Water Resources Control Bd., Anti-Racism Resolution at p. 7.

<sup>18</sup> State Water Resources Control Bd., *Water Quality Control Plan for the San Francisco Bay/ Sacramento-San Joaquin Delta Estuary*, pp. 8-9 (Dec. 13, 2006).

agencies to prevent . . . unreasonable use of . . . water in this state.” (Wat. Code, § 275; *see also id.* § 100.) The public trust doctrine too imposes an affirmative obligation on the Board to ensure that there are sufficient instream flows to safeguard existence and enjoyment of public trust resources now and in the future.<sup>19</sup> The State has express authority to “determine what water of the State, surface or underground, can be converted to public use or controlled for public protection,” irrespective of any water rights claims. (Wat. Code, § 104.) The Board’s authorities and duties extend not only to permitted water rights, but also to pre-1914 and riparian rights, which are equally subject to the constitutional proscription on unreasonable use of water and to public trust protections.<sup>20</sup> The Board itself has repeatedly recognized its authority to implement Bay-Delta water quality controls through regulation of water rights.<sup>21</sup> The California Supreme has also recognized the Board’s continuing jurisdiction over the allocation of water resources and authority to reconsider prior allocation decisions.<sup>22</sup>

The Board indicates that granting a request to initiate such a rulemaking would be premature. But the Board ignores that it is already regulating Delta water rights de facto, on a piecemeal basis, through its emergency curtailment orders, which limit diversions under the 1995 water quality standards, and by selectively waiving those standards through Temporary Urgency Change Orders to legalize violations. And in rejecting Petitioners’ request to initiate a rulemaking to regulate all recognized rights to Bay-Delta water, the Board leaves in place a water rights regime that undisputedly fails to protect public trust interests and beneficial uses -- including tribal cultural resources, fish and wildlife protection, safe drinking water, and recreational use of waterways – and that perpetuates centuries of violence to tribes and communities of color in the Delta.<sup>23</sup>

Utilizing the VAs as an implementation pathway in lieu of regulation would only further these harms. As discussed in the Petition, tribes, community and environmental organizations, and Delta residents in communities most directly impacted by the ecological crisis in the Delta were not allowed to participate in negotiation of the VAs.<sup>24</sup> As a result, the proposed VAs include inadequate water quality standards that disregard the needs of Delta ecosystems, native fish and wildlife species, and communities. In particular, the VAs would reduce the amount of additional Delta outflow that would be required from a 2017 proposal of 1.3-million-acre feet to less than 500,000 acre feet per year on average, which is a far cry from the increased outflows

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<sup>19</sup> *See, e.g., Nat. Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, 434.

<sup>20</sup> *See, e.g., Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1487, 1489.

<sup>21</sup> *See, e.g., State Water Resources Control Bd., Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, p. 22 (Dec. 12, 2018) (“The State Water Board may implement the objectives by conducting water right proceedings, which may include adopting regulation, conducting adjudicative proceedings, or both, that take into consideration the requirements of the Public Trust Doctrine and the California Constitution, article X, section 2.”)

<sup>22</sup> *Nat. Audubon Society*, 33 Cal.3d at 447; *see also United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 149-150.

<sup>23</sup> For example, the Board itself has recognized that the best available science demonstrates that current flow conditions will, if not corrected, result in permanent impairment of the Delta’s native fish and wildlife populations and to other public trust resources. *See e.g., Phase II Scientific Basis Report* at p. 1-5 (“The best available science . . . indicates that [existing legal requirements in Revised Water Rights Decision 1641 and biological opinions addressing Delta smelt and salmonids] are insufficient to protect fish and wildlife.”)

<sup>24</sup> *See, e.g., Petition* at pp. 36-39.

that the Board has indicated are necessary to protect beneficial uses and the public trust.<sup>25</sup> The VAs are also silent on Trinity River Division (“TRD”) diversions into the Delta and Trinity River releases, even though the TRD is a major artificial supplier into the Bay-Delta. Despite this silence, the regulation of Bay-Delta inflows and outflows necessarily implicates flows through the Trinity River and the federally reserved rights of tribes in the Trinity and Lower Klamath basins. In exchange for these limited reductions, the VA framework would provide for the unnecessary and unwarranted payment of hundreds of millions of dollars of taxpayer funds to water rights claimants to compensate for diversion of water that is manifestly unreasonable and thus beyond the scope of any state water right.<sup>26</sup> The Board’s consideration of the VAs is improper and risks further injury to tribes, Delta communities, and Delta ecosystems.

To satisfy its statutory duties and address the inequities within the State’s current water rights regime, the Board will need to meaningfully regulate all water rights claims in the Delta rather than transferring more public capital to the most powerful and entrenched interests. Initiating the scoping process for a proposed regulation to implement the Phase I standards is necessary, but it is not sufficient. The Board needs to reimagine the water rights system in alignment with its own Anti-Racism Resolution, focusing on undoing the decades of institutionalized racism and oppression of Indigenous Peoples, communities of color, and other vulnerable groups in the Delta. As the Board has acknowledged, “[t]he colonization, displacement, and genocide of Native American people in the United States have contributed to the loss of water resource and watershed management practices that supported Native American people’s traditional food sources and ways of life,” and instead, “[w]atersheds are now primarily managed through large-scale diversion of water for municipal, industrial, agricultural, and commercial beneficial uses to the detriment of traditional, local, and cultural uses and without compensation, recognition, or replacement.”<sup>27</sup> To address this long history of oppression and marginalization, the Board will need a new regulatory framework that significantly curtails out-of-Delta water diversions and returns the water to Bay-Delta ecosystems, the tribes that stewarded the waterways for millennia, and the communities that depend on a living Delta.

#### **IV. The Board’s failure to address disparate impacts caused by mismanagement of Bay-Delta waters violates federal and state civil rights statutes**

The Board’s Decision appropriately does not dispute that its failures to review and update the Bay-Delta Plan and to appropriately manage Bay-Delta water quality are resulting in disparate impacts to tribes and disadvantaged communities in the Delta. Nevertheless, it again fails to specify any actions that it will take to address these harms, as the law requires.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) and the U.S. Environmental Protection Agency’s (“EPA”) implementing regulations (40 C.F.R. Part 7)

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<sup>25</sup> See Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions, at Term Sheet App. 1 (Table 1a detailing proposed new contributions to Delta outflow) (hereafter, “*2022 VA Memorandum of Understanding*”); see generally Doug Obegi, *Honey, the VAs Shrank the Delta Flows*, Natural Resources Defense Council, <https://www.nrdc.org/experts/doug-obegi/honey-i-shrank-delta-flows-aka-voluntary-agreements> (Apr. 11, 2022).

<sup>26</sup> See *2022 VA Memorandum of Understanding* at Term Sheet App. 3 (outlining \$2,589 million in voluntary agreement implementation costs).

<sup>27</sup> State Water Resources Control Bd., *Anti-Racism Resolution* at p. 3.

prohibit entities that receive federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin. Agencies violate Title VI by carrying out activities that either have discriminatory intent or create a disparate impact on protected groups (40 C.F.R. § 7.35(b)), including tribes and other communities of color (*id.* § 7.25). This includes adoption or administration of policies, programs, and regulations that are neutral on their face but have the effect of discriminating against protected groups. (*Id.* § 7.35(b).) Title VI disparate impact protections prevent “public funds, to which all taxpayers of all races contribute, [from being] spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.” (H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).) Agencies that have previously discriminated against protected classes must “take affirmative action to provide remedies to those who have been injured by the discrimination.” (40 C.F.R. § 7.35(a)(7).)

As a recipient of federal funds from the EPA, the Board must adhere to these Title VI requirements with respect to all of its programmatic and regulatory activities, including regulation of Bay-Delta water quality. Similarly, California Government Code section 11135 prohibits discriminatory activities in programs administered by state agencies, including the Board. (*See e.g., Darensburg v. Metropolitan Transportation Com.* (9th Cir. 2011) 636 F.3d 511, 519.) Section 11135 applies to discrimination in environmental matters. (*See Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal. App. 4th 1116, 1137 (conc. & dis. opn. of Rubin, J.).)

The Board’s mismanagement of Delta waters, including its failure to review and update the Bay-Delta water quality standards, disparately impacts tribes and other communities of color in violation of these federal and state statutes. For instance, the collapse of native fish populations severely impacts tribes and low-income communities of color in the Delta and its headwaters. Native fish species are an irreplaceable cultural, religious, and subsistence resource for the watershed’s Indigenous communities. From time immemorial, Petitioner Winnemem Wintu Tribe has held the Chinook salmon sacred in their spirituality and religion. These species are woven into Winnemem culture, identity, and spirituality and are essential to the Winnemem way of life. For the Winnemem Wintu, the extinction of the salmon would amount to cultural genocide.<sup>28</sup> Petitioner Shingle Springs Band of Miwok Indians likewise reports that native fish species that were traditionally a staple of the diets of tribal members are no longer available in the waterways. The unavailability of these species has eroded the Tribes’ food sovereignty and contributed to health issues among tribal members, including obesity, type 2 diabetes, and cardiovascular disease.<sup>29</sup> The loss of fish species also impairs access to safe food sources by Delta subsistence fishers, who are predominantly Indigenous Peoples and people of color.<sup>30</sup>

Further, the proliferation of harmful algal blooms most severely affects communities living in the vicinity of Delta waterways and tribes whose access to traditionally important and valuable waterways and water-based practices is impaired. In Stockton, where Petitioners Little

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<sup>28</sup> Petition, Attachment B, Decl. of Gary Mulcahy ¶ 5.

<sup>29</sup> *See, e.g., DeBruyn et al., Integrating Culture and History to Promote Health and Help Prevent Type 2 Diabetes in American Indian/Alaska Native Communities: Traditional Foods Have Become a Way to Talk About Health*, 17(12) Preventing Chronic Disease 1 (2020); *see also* Petition, Decl. of Gary Mulcahy ¶ 31.

<sup>30</sup> Petition, Attachment E, Decl. of Barbara Barrigan-Parrilla ¶¶ 7, 16, 21.

Manila Rising and Restore the Delta are located, communities residing near polluted and largely dewatered Delta waterways are disproportionately low-income communities of color who were segregated into disinvested neighborhoods through discriminatory real estate and lending policies. Members of these communities may be directly exposed to the hazardous blooms through contact with adjacent waterways or breathe in aerosolized toxins from the blooms. Air quality impacts from aerosolized blooms layer on top of some of the heaviest levels of air pollution in the state, which already put these communities at serious health risk.<sup>31</sup> These algal blooms pose a particularly acute risk for unhoused residents living near and even in polluted waterways in Stockton.<sup>32</sup> Harmful algal blooms also alienate Indigenous Peoples, communities of color, and other vulnerable groups living near Stockton waterways from these resources, depriving them of the economic development and recreational benefits the waterways would otherwise afford.<sup>33</sup> Additionally, the blooms prevent tribes from accessing and utilizing cultural and spiritual resources in and around waterways, from practicing subsistence fishing, and from otherwise exercising water-based traditional practices, further entrenching the State's long history of alienating tribes from Delta waters and headwaters.<sup>34</sup>

These disproportionate effects compound environmental and health burdens that already heavily plague Stockton's communities of color. Stockton communities are overburdened with air pollution and respiratory distress. Multiple Stockton census tracts within a half-mile of Delta waterways rank worse than 99 percent of the rest of the state for pollution burdens, as defined by the California Office of Environmental Health Hazard Assessment's mapping tool, CalEnviroScreen.<sup>35</sup> Southwest Stockton, where Little Manila Rising is located, was selected in 2019 by the California Air Resources Board for community air monitoring and the development of the air emissions reduction plan pursuant to Assembly Bill 617. Southwest Stockton was selected given the "high cumulative exposure burden, a significant number of sensitive receptors and the census tracts of the entire community have been designated as disadvantaged communities."<sup>36</sup>

Finally, the Board's failure to ensure that tribes and other protected groups are able to meaningfully participate in the decision-making process for the Bay-Delta Plan violates both Title VI and Government Code section 11135. Non-participatory processes like negotiation of the VAs further entrench exclusion of protected classes and their interests, in violation of Title VI's purpose of preventing the use of public funds to "entrench" racial discrimination. (*See* H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).)

To correct these disparate impacts, the Board will need to timely and comprehensively review and update the Bay-Delta Plan through open, participatory processes that center the

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<sup>31</sup> Petition, Attachment D, Decl. of Dillon Delvo ¶ 14.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Petition, Attachment A, Decl. of Malissa Tayaba ¶ 16; Attachment B, Decl. of Gary Mulcahy ¶ 32.

<sup>35</sup> *See* Cal. Office of Env'tl. Health Hazard Assessment, *CalEnviroScreen Version 4.0*, <https://oehha.ca.gov/calenviroscreen>.

<sup>36</sup> California Air Resources Board, *2019 Community Recommendations Staff Report*, p. 20 (Nov. 2019), available at [https://ww2.arb.ca.gov/sites/default/files/2019-12/2019\\_community\\_recommendations\\_staff\\_report\\_november\\_8\\_acc\\_3.pdf](https://ww2.arb.ca.gov/sites/default/files/2019-12/2019_community_recommendations_staff_report_november_8_acc_3.pdf).

voices, interests, and needs of communities most heavily burdened by the ecological crisis. The Board will also need to follow through on its commitments to engage in government-to-government consultation with tribes affected by Bay-Delta water quality controls. It will need to regulate use and diversion of Bay-Delta waters to return water to the ecosystem and ensure protection of the full range of beneficial and public trust uses. And it will need to engage impacted communities to determine how best to remedy the many years of harm they have endured.

## CONCLUSION

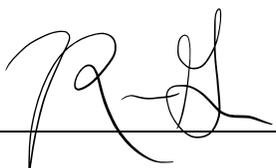
For the reasons set forth above, Petitioners request that the Board reconsider its denial of the Petition. The Board is undisputedly out of compliance with its triennial review obligations for the Bay-Delta Plan. And the Board is required to protect the public trust and beneficial uses in the Bay-Delta and rectify the adverse and disparate impacts of its failures on Indigenous Peoples, communities of color, and other vulnerable groups in the Delta. To begin to repair these failures, the Board should update and implement the Bay-Delta Plan by the deadlines set forth above, and it must ensure proper tribal consultation and meaningful participation of protected and marginalized groups in the process. The Board must also regulate water use and diversion accordingly to ensure that Delta waters can once again sustain the lands, communities, and species that they have supported since time immemorial. For these reasons, we request the Board reconsider its denial of the Petition.

Respectfully submitted,

DATED: August 22, 2022

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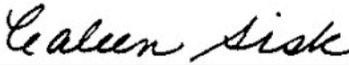
DATED: August 22, 2022

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Malissa Tayaba

DATED: August 22, 2022

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DATED: August 22, 2022

Save California Salmon

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Regina Chichizola

DATED: August 22, 2022

Little Manila Rising

By:   
Dillon Delvo

DATED: August 22, 2022

Restore the Delta

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