



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

State Water Resources Control Board
Division of Water Rights
Attn: San Joaquin Unit State Water Resources Control Board
P.O. Box 100
Sacramento, California 95814-0100

By email: LSJR-SD-Comments@waterboards.ca.gov

RE: Comment Letter – 2018 Bay-Delta Plan Implementation NOP

Dear State Water Resources Control Board,

The U.S. Environmental Protection Agency (EPA) strongly supports the State Water Resources Control Board (Water Board) efforts to implement the revised Lower San Joaquin River Flow and Southern Delta Salinity Objectives in the 2018 Bay-Delta Plan through adoption of an Implementation Regulation. EPA is reviewing the Water Board's 2018 Bay-Delta Plan pursuant to our CWA section 303(c) responsibilities and is encouraged that the Water Board is scoping implementation regulations. As a co-regulator charged with oversight of the Clean Water Act, EPA continues to stress the need for the Water Board to expeditiously adopt and implement updates to the Bay-Delta Plan to increase freshwater flows to help struggling fish populations recover and support all beneficial uses.¹ Regulations that allocate responsibility to water rights holders and claimants for specific implementation actions can be an effective part of the State's multi-pronged approach to protect and restore water quality.

Further, while the Water Board has historically relied on quasi-judicial water rights hearings as its primary implementation mechanism for the Bay-Delta Plan, full participation in the formal water rights hearing process can present considerable resource challenges for some tribal and community-based groups. The collapse of native fish populations is highly correlated to flow and impacts both important tribal beneficial uses and Delta subsistence fishers from low-income communities of color. In recognition of this impact, EPA encourages the Water Board to engage in meaningful dialogue with California Native American Tribes in accordance with the Water Board's 2019 Tribal Consultation Policy.

EPA acknowledges that the Water Board is committing significant resources to develop a Racial Equity Plan to address inequities described in its Racial Equity Resolution, including the recognition that “low or non-existent in-stream flows, and associated water quality problems, impair or prevent water-related cultural, spiritual, and subsistence practices.”² EPA applauds

¹ See, March 28, 2013. EPA comment letter on the Bay-Delta Water Quality Control Plan; Phase 1; SED

² Water Board [Resolution No. 2021-0050, Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism](#) (November 16, 2021)

these efforts and urges the Water Board to go beyond procedural inclusion and consider whether and how the issues raised by tribal and community-based groups can be *substantively* addressed by a regulation.³ The regulatory development process can provide more equitable access and opportunities for tribal interests and disadvantaged communities to participate, laying a firm foundation for the Water Board to consider equity impacts during the decision-making process.

Any regulatory development process should also acknowledge that drought can and has altered hydrology in the Delta. Contingency procedures for severe droughts should be addressed, including the frequent use of Temporary Urgency Change Petitions. In previous droughts, multiple water quality objectives were not met for several years, resulting in a substantial impact on beneficial uses. EPA clarifies that if implementation mechanisms (including but not limited to regulations, voluntary agreements, or other efforts) effectively change the water quality standards in effect for CWA purposes, EPA has the authority and duty to approve or disapprove such water quality standards pursuant to CWA section 303(c). EPA's review must include consultation with affected tribes and consultation with the federal fisheries agencies pursuant to Section 7 of the Endangered Species Act. As such, EPA intends to follow the Water Board's revision and implementation of the Bay Delta Plan to ensure compliance with the CWA.

EPA appreciates the opportunity to inform the Water Board's rulemaking process and remains committed to our partnership to protect and restore water quality in the Bay-Delta watershed. Please contact me at torres.tomas@epa.gov if you would like to discuss our comments.

Sincerely,

Tomás Torres
Director, Water Division

³ Title VI of the Civil Rights Act of 1964 prohibits discriminating on the basis of race, color, and national origin. As a recipient of EPA financial assistance, in administering its water quality standards program, the Water Board must ensure that its actions do not cause a disparate impact against individuals based on their race, color, or national origin.