

ENVIRONMENTAL WATER CAUCUS RESPONSE
TO THE SAN JOAQUIN RIVER FLOW AND SOUTHERN DELTA
SALINITY REQUIREMENTS DRAFT SED
MARCH 26, 2013





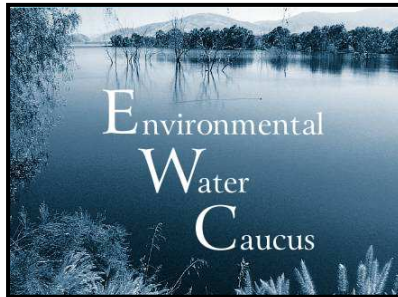
Santa Clarita Organization of Planning and the Environment (SCOPE)



Tuolumne River Trust



SIERRA NEVADA ALLIANCE



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814

Via Email: commentletters@waterboards.ca.gov and Fax: 916-341-5620

March 26, 2013

Subject: Comments on San Joaquin River Flows and Southern Delta Water Quality SED

Dear Ms. Townsend and Members of the Board:

The Environmental Water Caucus is pleased to comment on the above document. The State Water Board has failed to carry out its Public Trust responsibilities to the people of California. There is a lack of actions that achieves the goal of restoration of fisheries and protection of the Delta ecosystem, inadequate attention to remedying years of water quality violations both in the San Joaquin River and the South Delta and a failure to ensure sufficient flows to restore salmon and steelhead populations in the San Joaquin River. Here are the observed deficiencies:

Failure to Apply the State Water Board's Public Trust Responsibilities:

Under the public trust doctrine, the State Water Board must take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.) In determining whether it is "feasible" to protect public trust values like fish and wildlife in a particular instance, the [State Water] Board must determine whether protection of those values, or what level of protection, is "consistent with the public interest." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778.) In the development of the State Water Board's 2010 Delta Flow Criteria Report the inadequacy of the current San Joaquin River flows was established and recognized: "*In order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows. These criteria include(d)..... 60% of*

unimpaired San Joaquin River inflow from February through June.” While it may have been appropriate in this previous report (2010) not to make any determination regarding the feasibility of Public Trust recommendations, it is wholly inappropriate to now recommend in the SED a specific flow criteria for the Lower San Joaquin River (LSJR) without evidence that public trust values have balanced the export water with fishery and habitat benefits from improved flows. Furthermore, the SED selection of only 35% of unimpaired flows during February through June for the three main tributaries to the LSJR is not based on data, , scientific analysis, or biological analysis of the flow needed to preserve and protect public trust values including but not limited beneficial uses such as fish, wildlife, recreation, and navigation. . the selection of a 35% flow criteria will do little to reverse the decline of the fisheries and fails to protect other public trust values and beneficial uses. This selection fails to “balance” the flow needs of these beneficial public trust uses and those who would argue they should receive all the flow in the river because their uses are somehow superior to these public trust values. The courts and the law require adequate flow in the river to ensure the safe spawning, migration and riverine habitat, including temperatures and water quality that will ensure these public trust resources are preserved and protected. The 60% figure flow requirement established by State Water Board scientific review and adopted by this Board, is much closer to what is necessary to recover fish species.

Since the landmark application of the Public Trust Doctrine by the State Water Board in the Mono Lake case the principle of how extractive water demands can be alternatively met while ensuring public trust values are protected is well established. In fact the Los Angeles Department of Water and Power, who vociferously objected to relinquishing export flows, now extols the virtue of their water efficiency program that has resulted in meeting public trust values that require sufficient water remain in the river to protect these values. This established principle of ensuring adequate flows, habitat, temperature and water quality to meet public trust responsibilities while seeking other alternatives such as water use efficiency to meet extractive demands is not only cost effective it is the law. We urge the Board to apply similar Public Trust balancing in order to arrive at a more equitable and effective flow for the San Joaquin River and the Sacramento San Joaquin Delta and San Francisco Bay. Adequate flows for the San Joaquin River serve not only to ensure the public trust values of this watershed and its tributaries, they are essential to a healthy estuary and bay. Failure to provide these fresh water flows ensures almost a permanent regulatory drought for the estuary and bay and the economies that depend on this healthy ecosystem for their livelihoods, jobs, and economy. The proposed flow of just 35% is inadequate to protect these values.

Segmenting of the San Joaquin River.

The SED arbitrarily limits the plan area of the San Joaquin River to the confluence between the Merced and the Stanislaus Rivers. Left out of the flow consideration is the river’s unimpaired flow above the confluence with the Merced up to the Friant Dam. This main stem San Joaquin River portion can generate 28% of the unimpaired inflows to the river, yet is not considered a part of the river for the purposes of this river restoration SED. There is no data or scientific justification for this arbitrary limit to restoration flows needed for the river habitat, estuary, and bay. The ongoing San Joaquin River

Restoration Program on this stretch of river does not preclude the State Water Board from including such an important amount of flow for the health and protection of these public trust values. It seems only logical that the exporters who receive the bulk of the San Joaquin River water out of the operation of the Central Valley Project Friant Dam diversion participate in mitigating the impacts of their diversion and ensure adequate flows to achieve this recovery program as well. Since the objective of the plan amendment is to increase river flows on the San Joaquin, it is arbitrary to exclude the impacts of such a large diversion of river flow and fail to require these diverters participation in ensuring sufficient flows in the San Joaquin River, Delta Estuary and Bay for not only recovery of species, but the other beneficial uses of flows needed to maintain the health of this watershed ecosystem.

In the South Delta part of the plan area, the flows must be able to reach the confluence with the Sacramento River and flow to the Suisun Bay for both water quality and flow improvements. That's fundamental to the health of the river and bay. The flows in this plan amendment will only be able to reach the export pumps, nullifying those benefits to the South Delta and Suisun Bay.

No Net Loss to Exports.

The Board has formulated a plan that puts maintenance of yield for the federal Central Valley Project and the State Water Project over all other beneficial uses and over the more senior rights of diverters on the three tributary rivers – the Merced, Tuolumne, and Stanislaus. In essence, the Board constructed its flow criteria and water quality control planning for the implicit outcome of “no net loss to exports,” per the failed CALFED mantra, and has ignored its responsibilities to evaluate the competing needs of all beneficial uses in the process of developing flow and water quality objectives. This arbitrary selection to value one user group over other public trust values also violates the Delta Reform Act requirements to reduce reliance on the Delta in meeting California's future water supply needs. Failure to adequately consider these public trust beneficial uses and continuing this de facto policy of benefiting one user group thru a “no net loss to Delta exports” fails to compel and implement state requirements that those who export water from the Delta estuary and bay must adhere and demonstrate increased regional self-sufficiency.

Weakened Salinity Standards in the South Delta.

The Clean Water Act and the Porter-Cologne Act clearly intend that water quality control plans are intended to improve water quality, not merely to maintain it. They are intended to make change in the direction of making water quality better. The proposed plan by relaxing salinity standards in the Delta estuary and bay will harm beneficial uses and does not meet statutory requirements to ensure water quality objectives and standards are met. The proposed plan attempts to meet standards by sanctioning the present violations of safe water quality objectives. Without data or scientific justification this plan appears to be based on the hope that continued violations of these standards will be sanctioned and the US Environmental Protection Agency will somehow agree that this plan complies with federal water quality law. The proposed SED hopes that by relaxing water quality standards and sanctioning violations of the Clean Water Act that this will meet the law and the Board's

responsibility to materially improve water quality in the South Delta and the lower San Joaquin River.

Federal Clean Water Act regulations require that water quality objectives be set so as to protect the most sensitive beneficial uses in the water body. The proposed SED will not meet these federal obligations. Instead, the Board actions propose to sanction existing water quality violations that have and continue to impact beneficial uses both in the river and downstream. Scientific evidence, biological opinions and data show that the proposed flows will merely continue the decline and sanction existing conditions that fail to protect the pelagic and migratory beneficial uses of fish and wildlife, rather than improve or increase the protection for these beneficial uses.

Both state and federal antidegradation policies demand more. National water quality policy since 1987 requires satisfaction of antidegradation requirements that EPA established in Clean Water Act regulations. Under the federal Clean Water Act antidegradation policy, the State Water Board is abusing its discretion by undertaking a planning process to relax salinity water quality protection standards and objectives in the South Delta. Federal and state law require that prior to any such change in water protective standards adequate data, scientific analysis and public review be conducted to document that such standards will protect the beneficial uses of the river and downstream users along with the protection of public trust values..

More detailed information to support these above conclusions is shown in the [Attachment to this SED Comment Letter](#).



Co-Facilitator



Co-Facilitator