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Via Email

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State Water Resources Control Board

1001 I Street

Sacramento, CA 95814

Re: Petition for Rulemaking to Review and Revise Bay-Delta Water Quality Standards, Filed by Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, Save California Salmon, Little Manila Rising, and Restore the Delta

Dear State Water Board and Staff:

San Francisco Baykeeper submits this letter in support of the May 24, 2022 Petition of the Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, Save California Salmon, Little Manila Rising, and Restore the Delta, calling on the State Water Resources Control Board to open a rulemaking to timely review and update the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta Plan”). San Francisco Baykeeper (“Baykeeper”) submits these comments on behalf of approximately 5,000 members and supporters who live and recreate in and around the San Francisco Bay Area. Together, our mission is to defend San Francisco Bay, the Delta, and their watershed from the biggest threats and hold polluters and government agencies accountable to create healthy communities and help wildlife thrive. Our team of scientists and lawyers investigate pollution via aerial and water patrols, strengthen regulations through science and policy advocacy, and enforce environmental laws on behalf of the public.

Water Quality Standards in the Bay-Delta must be updated. The existing Bay-Delta Plan fails to protect the public trust, does not recognize or include any Tribal Beneficial Uses, does not protect other existing identified beneficial uses, and has caused the Bay-Delta and its watershed to be in crisis. In performing the necessary update of the Bay-Delta Plan, the State Water Board must ensure flows sufficient to protect the public trust and all identified beneficial uses, including Tribal Beneficial Uses. The State Water Board also must engage in a

scientifically based process to set freshwater flows into and out of the Delta, restrict exports of water from the Delta, and identify coldwater pool requirements upstream of the Delta. The State Water Board's ongoing failure to do each of these things not only leaves the Delta and its watershed in crisis, but perpetuates a history of exclusion of indigenous people and people of color.

In the process of updating the Bay-Delta Plan, the State Board must reconsider and reallocate the water rights that were born from racism and genocide. Water rights are not an end, and preservation of a discriminatory system for the sake of protecting existing water rights turns a blind eye to the State Water Board's obligation and stated desire to confront, reconsider, and ultimately dismantle those systems. The State Water Board should grant the Petition, should update the Bay-Delta Plan, and should do so by centering the reality and experience of tribal and local communities who have historically been harmed by and excluded from the process.

I. Water Quality Standards in the Bay-Delta Water Quality Control Plan Must be Updated to Provide Reasonable Protection to Identified Beneficial Uses and the Public Trust.

Water quality, fish and wildlife, and the people and communities that depend on them are in crisis throughout San Francisco Bay ("Bay"), the Sacramento-San Joaquin Delta ("Delta"), and their Central Valley watershed (collectively, the "Bay-Delta watershed"). The State Water Resources Control Board ("State Water Board") has clear duties under the law to responsibly manage California waters, including those of the Bay, Delta, and the Bay-Delta watershed. The State Water Board must review the Bay-Delta Plan every three years in accordance with the Clean Water Act and the Porter-Cologne Act. Water quality standards in the Bay-Delta Plan must provide reasonable protection for the full range of identified beneficial uses of Bay-Delta waters, safeguard the Public Trust, and prevent unreasonable diversion and use of water. The State Water Board has long conceded that current Bay-Delta Plan standards need to be updated because a vast body of science demonstrates that they are not meeting these basic requirements.

The current Bay-Delta Plan has failed to reasonably protect identified beneficial uses or public trust uses of the Bay-Delta. The State Water Board has repeatedly acknowledged this problem, stating in 2018:

Implementation of the current Bay-Delta Plan has failed to protect fish and wildlife that require protection throughout the watershed and throughout the year. The current Bay-Delta Plan requirements, as implemented, result in overburdening some streams to the detriment of all beneficial uses in that stream while at the same time failing to protect beneficial uses in other streams and the watershed. The Bay-

Delta Plan and its implementation require updating to address these and other issues.

(2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan [“2018 Framework”] at p. 5.)

Furthermore, the State Water Board “identified the need to update the Bay-Delta Plan and its implementation many years ago, and plans to complete that process without further delay.” 2018 Framework at p. 5. Almost, four years later, the State Water Board has made no detectable progress on updating and implementing the Bay-Delta Plan.

Despite repeatedly admitting the deterioration of aquatic environmental conditions throughout the Bay-Delta and its watershed and its obligations to provide reasonable protections for the public trust and identified beneficial uses of these waterways, the State Water Board has failed to meet its legal requirements; Bay-Delta water quality standards have not been comprehensively reviewed and/or updated for thirteen years. During that period, the State Water Board has waived and ignored violations of existing freshwater flow, salinity, and temperature requirements. These failures have occurred despite the Board’s own statements that increased freshwater flows into, through, and out of the Delta and improved temperature management upstream are essential to preventing extinction, restoring public fisheries, and limiting the impact of pollution (including, specifically, toxic algal blooms) on vulnerable communities.

A. Failure to Reasonably Protect Identified Beneficial Uses

By failing to update water quality standards in the Bay-Delta Plan, the State Water Board has failed to reasonably protect beneficial uses identified by the Central Valley and San Francisco Bay Basin Plans. Six native fish species are listed under the federal and/or state endangered species acts; commercial, recreational, and subsistence fisheries are in severe decline; toxic algae blooms with increasing regularity in several Delta waterways; and wildlife that depend on the fish produced in the Central Valley is also imperiled. The State Water Board summarized these issues in its 2018 Framework, declaring:

Native species in the Bay-Delta ecosystem are also experiencing an ecological crisis. For decades, valuable habitat has been converted to farmland and urban uses, the quality of water in the channels has been degraded, there has been a substantial overall reduction in flows and significant changes in the timing and distribution of those flows, and species have been cut off from natal waters. This has led to severe declines, and in some cases extinctions, of native fish and other aquatic species. The overall health of the estuary for native species is in trouble, and expeditious action is needed on the watershed level to address the crisis, including actions by

the State Water Board, fisheries agencies, water users, and others to address the array of issues impacting the watershed. The State Water Board is the primary agency responsible for addressing the flow and water quality issues.

(2018 Framework at p. 4.)

Specifically, existing identified beneficial uses that have not been reasonably protected include, but are not limited to: Spawning, Migration, and Freshwater Habitat for coldwater species, Recreation, and Commercial and Sport Fishing. Tribal Beneficial Uses (described below) have also not been reasonably protected.

B. Failure to Safeguard the Public Trust

In addition, the State Water Board has failed in its responsibility to safeguard public trust values in the Bay-Delta. The public trust doctrine exists for the benefit of the people of California so that its waters, wildlife, and ecosystems “may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life.” (*Eldridge v. Cowell* (1854) 4 Cal. 80, 87; see also *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260; *Colberg, Inc. v. State ex rel. Dep’t of Pub. Works* (1967) 67 Cal. 2d 408, 417; Cal. Water Code section 85023 [the public trust and reasonable use doctrines are the foundations of state water management policy].) Public benefits arise from management by the sovereign, in this case the State of California. Because it represents the state, the State Water Board is obligated by the public trust doctrine and the California Constitutional doctrine of waste and unreasonable use to consider the protection of public trust uses when making determinations regarding the allocation of water resources.

The public trust doctrine provides that “the sovereign owns ‘all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.’” (*National Audubon Society*, 33 Cal.3d at 434 [internal citations omitted].) The legal concept that certain resources (e.g., navigable waters) and resource uses (e.g., commerce, fishing) must be preserved for the benefit of the public dates back as far as early Roman and English law. (*Envtl. Law Found. v. State Water Res. Control Bd.* (“*Environmental Law Foundation*”) (2018) 26 Cal.App.5th 844, 856; see also *Audubon*, 33 Cal.3d at 433–34; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).)

The public trust doctrine is an “affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands,” enabled by its “authority as sovereign to exercise a continuous supervision and control.” (*Audubon*, 33 Cal.3d at pp. 441, 425.) The public trust doctrine extends beyond traditional interests in a waterway to require the

protection of ecological values including, but not limited to, the scenic beauty of a waterway, the purity of the air and waters, and the preservation of the tidelands and shoreline in their natural state. Such preservation is recognized as “one of the most important public uses of the tidelands.” (*National Audubon Society*, 33 Cal.3d at p. 434.)

The reasonable use doctrine is a partner to the public trust doctrine as a foundational principle of California water law. Article X, section 2 of the California Constitution, as well as the California Water Code, lay out the principles of the reasonable use doctrine. *See, e.g.*, Cal. Water Code sections 100, 275, and 1050; *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 994; *U.S. v. State Water Board*, 182 Cal. App. 3d at 105-106. “[F]ish survival is an appropriate consideration in determining what is or is not an ‘unreasonable use, unreasonable method of use, or unreasonable method of diversion’ of water in this state.” *Stanford Vina*, 50 Cal. App. 5th at 1003; *see also Light*, 226 Cal. App. 4th at 1482-86 (upholding regulations limiting diversions to protect instream fisheries); *see also U.S. v. State Water Board*, 182 Cal. App. 3d at 130 (uses that impair water quality may be deemed unreasonable). Therefore, like the public trust doctrine, the reasonable use doctrine not only authorizes, but requires, the State Water Board to protect fish.

Thus, the State Water Board has a continuing and ongoing duty to protect and manage public trust resources for the protection of fish and wildlife, and to review and change the management of those resources to protect public interests. This duty applies in particular to the protection of wild fish as trust resources. *See People v. Rinehart* (2016) 1 Cal. 5th 652, 661 (California is “trustee of the state’s waters” as well as “the fish in the state’s streams and lakes”); *People v. Murrison* (2002) 101 Cal. App. 4th 349, 360 (State owns fish in its streams in trust). This duty includes the obligation to “reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust,” *National Audubon*, 33 Cal. 3d at 447, where the underlying facts or circumstances have changed.

II. Tribal Beneficial Uses Must Be Identified and Protected

In addition to failing to protect existing identified beneficial uses, the Bay-Delta Plan fails to clearly identify, reasonably protect, or even recognize Tribal Beneficial Uses. In 2017, the State Water Board identified Tribal Subsistence Fishing (T-SUB), Tribal Tradition and Culture (CUL), and Subsistence Fishing (SUB), collectively termed “Tribal Beneficial Uses,” as beneficial uses of the state’s waters. (See State Water Board Resolution 2017-The State Water Board defines Tribal Beneficial Uses as “a group of beneficial uses that can help protect activities specific to Native American Cultures and their uses of California waters, including the consumption of non-commercial fish or shellfish.”¹ This category of beneficial use, also sometimes referred to as cultural uses of water, is intended to protect practices not already

¹ See https://www.waterboards.ca.gov/tribal_affairs/beneficial_uses.html.

covered by other beneficial uses – in other words, Tribal Beneficial Uses may require protections in addition to those provided by other identified beneficial uses.

The State Water Board, either directly or through the Regional Water Boards, must establish beneficial uses as part of Water Quality Control Plans, including the Bay-Delta Plan. (See Water Code § 13050(j).) However, designation of Tribal Beneficial Uses has not been completed for the Bay, Delta, or the Bay-Delta’s watershed.

Regional treatment of Tribal Beneficial Use designation varies widely. The current status of designation of Tribal Beneficial Uses throughout the state, five years after those uses were identified by the State Water Board, is disrespectful and continues a century and a half of racist and harmful conduct.

- Regions 2 (San Francisco Bay), 3 (Central Coast), 7 (Colorado River), 8 (Santa Ana) make no mention of Tribal Beneficial Uses in their Basin Plans.
- Region 4 (Los Angeles) defines Tribal Use as a beneficial use in their Basin Plan, describing it as “[u]ses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials.” However, no specific waterways have been identified for Tribal Beneficial Uses by Region 4. The situation is similar for Region 6 (Lahontan).
- Region 9 (San Diego) identifies two separate Tribal Beneficial Uses; however, no waterways have been assigned this designation at this time. Region 5 (Central Valley) identifies Tribal Tradition and Culture and Tribal Subsistence Fishing in a similar manner to Region 9 in its proposed updates to the Region 5 Basin Plan from February 2022.
- Region 1 (North Coast) Basin Plan demonstrates that it is possible for the other Regional Boards to have made far more progress in identifying Tribal Beneficial Uses that they have to date; out of 133 total waterways in the North Coast Basin Plan, 27 waterways have been assigned cultural designation, and eight waterways have been identified as as potentially suitable for this designation in the future.

The State Water Board must do better, either directly via the Bay-Delta Plan or by ensuring that Regional Boards are *actually* designating and protecting Tribal Beneficial Uses.

The partial update to the Bay-Delta Plan adopted in December 2018 (covering flows into the Delta from three tributaries of the San Joaquin River) does not mention Tribal Beneficial

Uses at any point. Likewise, standards and actions necessary to protect Tribal Beneficial Uses of the Delta are not mentioned in any of the Board’s planning documents for Phase II of its Bay-Delta Plan update (covering flows into the Delta from the Sacramento River and eastside tributaries, through the Delta, and out of the Delta into San Francisco Bay). The State Water Board must specify which waterways are expected to provide for Tribal Beneficial Uses. Until the relevant waterways for those beneficial uses are identified, updates to water quality standards in the Bay-Delta Plan must account for the need to reasonably protect Tribal Beneficial Uses.

The failure to properly acknowledge and incorporate Tribal Beneficial Uses perpetuates the structural racism that the State Water Board itself acknowledged in its Racial Equity Resolution,² accepting “responsibility for confronting structural and institutional racism and advancing racial equity” and that “the Water Boards’ programs were established over a structural framework that perpetuated inequities based on race.” The Racial Equity Resolution committed the State Water Board to “centering 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.”

Failing to incorporate Tribal Beneficial Uses into the formulation of Bay-Delta water quality standards represents a failure to meet this commitment and perpetuates the racist past rather than work to address it. As we wrote in our July 12, 2021 comments on the draft Racial Equity Resolution: “Beyond acknowledgment, the [State] Water Board must support its good intentions with tangible action. Adopting the Racial Equity Resolution without a commensurate change in related water policies would be inadequate. It would constitute a disservice to the very communities the Resolution is purporting to assist.”³

III. Water Quality Standards Must be Updated to Provide Increased Flows Into, Through, and Out of the Delta and Adequate Cold Water Below Central Valley Reservoirs

Safeguarding the public trust and providing reasonable protection for identified beneficial uses, including Tribal Beneficial Uses, will require a comprehensive set of water quality standards for the Bay-Delta and its watershed. In 2018, the State Water Board proposed a suite of standards that it intended to incorporate in its final update of the Bay-Delta Plan, including

² Resolution Number 2021-0050, Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism.

³ See SF Baykeeper Comment Letter, July 12, 2021, at p. 1, available at https://baykeeper.org/sites/default/files/image_upload/images/2021.07.12%20FINAL%20Baykeeper%20Comments%20on%20Racial%20Equity%20Resolution.pdf

improved freshwater flows, regulation of water exports within the Delta, and reservoir storage requirements intended to improve conditions for coldwater-dependent anadromous species that migrate and spawn upstream. Below, we describe the importance of each category of new standards that the State Water Board previously proposed.⁴

A. *Freshwater Flows*

The Board's own scientific analyses demonstrate overwhelmingly that flows into, through, and out of the Delta are critical to the health of anadromous and estuarine resident species and their habitats. Populations of numerous species display strong, durable, statistically significant relationships between attributes of viability (abundance, survival rates, life history diversity) and river flows into, through, and/or out of the Delta, including: Chinook Salmon (various runs and populations); Central Valley Steelhead; Longfin Smelt; Delta Smelt; White Sturgeon; Starry Flounder; Sacramento Splittail; Bay Shrimp, and others. In addition, river flow rates are inversely related to the frequency and magnitude of toxic algal blooms that plague Delta waterways, and communities of color in places like Stockton.



Figure 1: Toxic Algal Bloom. Downtown Stockton, June 9, 2021.

Image: San Francisco Baykeeper.

⁴ Identification of the categories of new standards proposed by the State Water Board in its 2018 Framework does not reflect an endorsement by Baykeeper of the details (e.g., quantitative levels) of the standards detailed in that Framework.

The State Water Board has repeatedly stated that current flow requirements are inadequate to protect identified beneficial uses or the Public Trust. For example, in 2010 it declared: “The best available science suggests that current flows are insufficient to protect public trust Resources.”⁵ In its 2018 Framework, the State Water Board reiterated this finding, stating:

“Populations of native aquatic species in the Bay-Delta watershed have shown significant signs of decline since the last major update and implementation of the Bay-Delta Plan in the 1990s. While natural conditions have not existed in the Bay-Delta watershed for more than a hundred years, many of the native fish and wildlife species that are now at the verge of extinction maintained healthy populations until the past several decades when water development intensified. While there are also other factors involved in the decline of these species, water diversions and the corresponding reduction in flows those diversions cause, are significant contributing factors. A significant and compelling amount of scientific information indicates that restoration of natural flow functions is needed now to halt and reverse these declines in an integrated fashion with physical habitat improvements.”

(2018 Framework at p. 5-6.)

The State Water Board’s 2018 Framework for updating the Bay-Delta Plan proposed new minimum Delta inflow and outflow standards that would increase seasonal freshwater flows over current conditions. Very simply, the State Water Board must analyze, consider, and adopt higher, more protective Delta inflow, through-flow, and outflow requirements to reverse the current crisis for fish, wildlife, and water quality in the Bay-Delta and to reasonably protect public trust uses and identified beneficial uses, including Tribal Beneficial Uses, of its waterways.

B. *Export Requirements*

In addition to improved Delta inflow and Delta outflow standards, the State Water Board proposed in 2018 to adopt standards mirroring endangered species act requirements of the federal Biological Opinions and the state Incidental Take Permit that existed at that time. The State Water Board correctly noted that it “has primary authority over the regulation of water diversions and has an independent obligation to reasonably protect beneficial uses separate and distinct from ESA and CESA requirements.” (2018 Framework at p. 20.) Nevertheless, the State Water Board failed to adopt these in-Delta flow safeguards and restrictions on Delta exports; thus, already inadequate protections for endangered species were weakened when the federal government issued new ESA Biological Opinions and the state government issued a new CESA Incidental Take Permit in 2019.

⁵ Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, State Water Board, August 3, 2010, at p. 2.

C. Coldwater Pool Requirements for Upstream Reservoirs.

Furthermore, in its 2018 Framework, the State Water Board correctly recognized that “Cold water habitat protection is a necessary companion to inflow objectives, and is important for maintaining salmon species in tributaries and protecting against exhaustion of coldwater pool resources from storage withdrawals that may occur with new inflow requirements.” (2018 Framework at p. 16). The Central Valley’s unique Chinook Salmon populations have been devastated repeatedly by release of water from upstream reservoirs. For example, the National Oceanic and Atmospheric Administration fisheries model estimates that during summer and fall of 2021, hot water released from Shasta Dam was responsible for killing approximately 75% of endangered winter-run Chinook Salmon eggs; this extremely high level of mortality does not include the additional impact of pre-spawning mortality among adult winter-run Chinook Salmon that were exposed to high temperature reservoir releases in 2021. Extreme levels of temperature dependent Chinook Salmon mortality in the Sacramento River have been common in recent years, despite construction of a temperature control device for Shasta Dam in the mid-1990’s. In 2014 and 2015, 77 and 86 percent of winter-run eggs died from high river temperatures, respectively.⁶ Temperature dependent Chinook Salmon mortality – a problem that affects fall-run and threatened spring-run Chinook Salmon, as well – is intimately connected to unsustainable deliveries of water that drain reservoirs in the early years of drought and the early months of each year.

None of the State Water Board’s proposed improvements to water quality and flow conditions in the Bay-Delta watershed have been formally analyzed in environmental documents or adopted. Indeed, the State Water Board has not released any updates to the Bay-Delta Plan since 2018 – and fish, wildlife, and water quality have continued to decline as a result. Unless Bay-Delta water quality standards and actual conditions improve dramatically and soon, there is a very real risk that harm to the Bay-Delta ecosystem and adjacent communities will be irreparable.

IV. The State Water Board Must Perform a Science-Based, Transparent, and Public Process to Update and Implement Water Quality Standards in the Bay-Delta Plan

The State Water Board has not completed its required review and update of the Bay-Delta Plan, nor has it implemented partial updates to San Joaquin River flow standards that it adopted in December 2018. Instead, the process has been frozen as the State Water Board has participated in and prioritized closed-door negotiation of voluntary instream flow commitments with water diverters. Negotiations of these “Voluntary Agreements” (VAs) have been ongoing

⁶ See NOAA, River Temperatures and Survival of Endangered California Winter-Run Chinook Salmon in the 2021 Drought, available at <https://www.fisheries.noaa.gov/west-coast/climate/river-temperatures-and-survival-endangered-california-winter-run-chinook-salmon>

since at least 2013. In 2018, Directors of California’s Departments of Water Resources and Fish and Wildlife appeared before the State Water Board to announce a package of VAs, negotiated in private between water districts and state agencies, and asked the State Water Board to incorporate these agreements into the Bay-Delta Plan update.

Throughout 2019, the Newsom Administration hosted meetings to discuss specifics of the 2018 package and engaged State Water Board staff to analyze its environmental effects⁷. In November 2019, State Water Board staff produced an incomplete evaluation of the 2018 VA package that revealed it to be woefully inadequate to protect the public trust or identified beneficial uses. This prompted new negotiations between the state and water districts from which NGOs were excluded.

Baykeeper has long raised concerns about the exclusionary process that has produced various iterations of VAs. Environmental, fishing, disadvantaged community, and Delta interests, as well as Tribes, have been excluded from substantive VA negotiations, while the state bargained only with water districts. To our knowledge, no Tribes or tribal advocates have ever been invited to participate in discussion of VAs. The preliminary analysis of the 2018 VA package did not include any mention of, or evaluation of impacts to, the Tribal Beneficial Uses. Similarly, neither representatives of Delta communities nor representatives from California’s commercial fishing industry participated in negotiation of VAs or discussion of their implementation or impacts.

Not surprisingly, the VA proposals that have emerged from this exclusionary, back-room negotiation ignored the overwhelming weight of scientific evidence which shows that large-scale flow augmentation will be an essential element of any restoration plan, even if not sufficient in isolation. Similarly, the VAs are completely silent on the need to protect and improve the cold water supplies that Central Valley salmonids depend upon.

The most recent VA Memorandum of Understanding, (MOU) announced in March 2022 claims that it will increase Delta outflows by 500 thousand acre feet (TAF) on average. This claim is vastly overstated. First, numerous water districts that are supposed to contribute water towards Delta outflow have not actually signed the MOU. Second, the current VA MOU compares itself to a baseline of flows that would occur under existing water quality requirements (D-1641) and the Trump administration’s 2019 Biological Opinion. This ignores the fact that the state successfully challenged the 2019 Biological Opinion in court because it allowed too much

⁷ A small number of environmental NGOs, including Baykeeper, were invited to these discussions to help evaluate the 2018 VA package; however, these meetings were explicitly *not* negotiations over the assets promised in that package – discussions were limited to scientific evaluation, terms of the governance, and adaptive management elements of that package.

water to be exported from the Delta and thus jeopardized the existence of several endangered species.

The State Water Board's 2018 proposal for Delta inflow from the Sacramento River plus its updated standards for inflow from the San Joaquin River were expected to generate approximately 1,600 TAF of additional Delta outflow in an average year compared to D-1641 and the 2008/2009 Biological Opinions (and ~1,200 TAF additional outflow in critically dry years). When compared to this same baseline, the 2022 VAs would produce only 310 TAF of additional outflow in an average year and would result in 70 TAF *less* Delta outflow than the baseline during critically dry years. And even these amounts assume that all the water the VA expects will be provided by water districts is actually delivered, including those users that have yet to agree to the MOU.

The 2022 VA also ignores that flow standards for the San Joaquin River were adopted by the State Water Board in 2018 – flows promised by this VA MOU are less than those that would occur if the State Water Board simply implemented its 2018 updates to flow standards for the San Joaquin River. Moreover, the 2022 VA MOU has no provision to improve (or even maintain) cold water stored in upstream reservoirs – thus it does not even pretend to address catastrophic temperature-dependent mortality of Chinook Salmon eggs and adults that we have witnessed in recent years.

In sum, resources offered in the 2022 VA MOU are completely inadequate to reasonably protect identified beneficial uses, unidentified tribal beneficial uses, or to safeguard the public trust. The current VA process is the tail wagging the dog. Rather than identify the uses that must be protected, and using science and evidence to determine how much water is necessary to protect and promote those uses, the VA process does the opposite—identify how much water can be “voluntarily” obtained and then pretend and hope that will be enough to protect beneficial uses and the public trust. Nevertheless, the State Water Board continues to delay its long-overdue triennial review and update of Bay-Delta water quality standards, which are required under state and federal law, in favor of negotiation and analysis of various VAs – this delay is neither necessary nor legal.

V. A Reallocation of Water Rights is Necessary and Justified

A reallocation of water rights to curtail and reduce the water that is taken from the tributaries and rivers throughout the Bay-Delta watershed is necessary to support the ecosystems, species, and people who rely on those waters. Continuing to delay and failing to protect the Bay-Delta's fish and wildlife or to restore equity and justice in the water allocation system due to fear of (or resistance from) water rights “owners” is a failure. The water rights system must be used as a mechanism of allocating water resources *after* public trust and beneficial uses have been

protected and balanced. The water rights system is not a beneficial use and cannot be a justification for failing to protect beneficial uses and the public trust.

The State Water Board's Racial Equity Resolution, represents an important expression of intent by the Board to confront structural and institutional racism and attempt to advance racial equity and environmental justice. According to that Resolution:

The 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. Watersheds 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. Historical land seizures, broken promises related to federal treaty rights, and failures to recognize and protect federal reserved rights have resulted in the loss of associated water rights and other natural resources of value, as well as cultural, spiritual, and subsistence traditions that Native American people have practiced since time immemorial.

(Racial Equity Resolution at p. 3.)

This is what happened to the indigenous people who lived in and around the Bay-Delta and throughout the watershed. Confronting the state's shameful history requires (1) reevaluation of a water rights system that pretends nobody lived in California before settlers "claimed" it and announced the water was "theirs" and (2) reallocation of existing water rights, as necessary to safeguard the public trust and reasonably protect beneficial uses, including Tribal beneficial Uses.

It is imperative that the State Water Board begin to reimagine our water rights system in light of its own Racial Equity Resolution and designation of Tribal Beneficial Uses. The Board should 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" through the vehicle of an updated Water Quality Control Plan for the Bay-Delta.

Communities of color throughout the Central Valley, in the Klamath River watershed, and along the California Coast are suffering from the collapse of subsistence fisheries, the loss of cultural cornerstones, and persistently degraded water quality due to chronically inadequate river flows that result from unsustainable rates of water diversion. The Water Board should take meaningful action to implement its resolution by restoring the flow of fresh water in the Bay-

Delta Watershed to levels necessary to resurrect the subsistence, recreational, cultural, and commercial fisheries relied upon by communities of color.

The State Water Board should also use an updated Bay-Delta Plan to begin to fulfill its commitment to uphold “California’s human right to water law, uphold[] the State Water Board’s human right to water resolution, and demonstrat[e] that every human being in California, including Black, Indigenous, and people of color, deserves safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitation purposes.” Racial Equity Resolution at p. 7.

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The State Board should complete and implement, as expeditiously as possible, updates to the Water Quality Control Plan for the Bay-Delta. The updated plan should meet public trust obligations, provide reasonable protection for fish, wildlife, and Tribal Beneficial Uses, and reallocate water rights as necessary to increase flows into, through, and out of the Delta, and improve temperature conditions upstream.

Respectfully submitted,



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cc:

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- Regina Chichizola, Save California Salmon
- Dillon Delvo and Matt Holmes, Little Manila Rising
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