



State Water Resources Control Board

September 7, 2023

Anhthu Hoang
Acting Director
Office of External Civil Rights Compliance
United States Environmental Protection Agency
Washington, DC 20460

Re: EPA File No. 01RNO-23-R9

Dear Director Hoang:

On August 8, 2023, the State Water Resources Control Board (State Water Board or Board) received the United States Environmental Protection Agency (USEPA) Office of External Civil Rights Compliance (OECRC) letter accepting for investigation the Complaint submitted on December 16, 2022, by the Mills Legal Clinic, Stanford Law School (Stanford Legal Clinic). The Complaint is on behalf of multiple clients (Complainants) and alleges disparate impacts from State Water Board policies and practices in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta). Specifically, the Complaint alleges that the State Water Board's process to update the Bay-Delta Water Quality Control Plan (Bay-Delta Plan) discriminates against members of California Native American tribes¹ and Black, Asian, and Latino persons residing in the Bay-Delta region in violation of Title VI of the Civil Rights Act of 1964 (Title VI) and USEPA nondiscrimination regulations. (42 U.S.C. § 2000d et seq; 40 C.F.R. Part 7.)

The alleged actions and omissions of the State Water Board cited in the Complaint do not violate civil rights laws. In tandem with advancing California's human right to water, updating the Bay-Delta Plan has been the Board's highest priority action. The State Water Board last updated the Bay-Delta Plan in 2018, and for more than a year, the Board has been targeting this summer to release a staff report to support the next

¹ Although the Complaint uses the phrase "Native tribes," this response uses the term California Native American tribes throughout for consistency with the Water Boards' Tribal Consultation Policy, existing regulatory documents, and Executive Orders. The term California Native American tribes is inclusive of both federally recognized tribes and non-federally recognized tribes.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

iteration of Bay-Delta Plan amendments.² This is a challenging endeavor, and there is no water quality control plan like it anywhere in the United States. In considering the update, the State Water Board has and will comply with and exceed the tribal consultation requirements of California law and the public participation requirements of USEPA regulations codified at Part 25 of title 40 of the Code of Federal Regulations and the civil rights requirements of Title VI and USEPA nondiscrimination regulations.

To the extent Complainants allege they have been excluded from processes, they do not identify a State Water Board decision-making process from which they have been excluded or any other process to which the State Water Board is a party. In fact, over the last eight months, in advance of releasing the first public draft of the staff analysis supporting further Bay-Delta Plan updates, the State Water Board has offered consultation to 92 California Native American tribes, held two tribal listening sessions, held a public Board meeting on tribal beneficial uses within the Bay-Delta watershed, and held two listening sessions for environmental justice organizations. These actions inform the soon-to-be released staff analysis, and they are all supplementary to the transparent public processes the Board will use to complete its Bay-Delta Plan update. These processes will include public dissemination of reports, public notices, workshops, hearings, written comment opportunities, and ultimate action by the State Water Board members at a public meeting as required by California's open meeting laws. Consistent with longstanding Board practices and notices, public meetings will provide simultaneous interpretation translation services and translation of related materials, when requested, to promote access to the Board's proceedings.

Once completed, the Bay-Delta Plan update will require new actions to improve conditions for California native fish, benefiting the fishery, the ecosystem, California Native American tribes, and others that rely on California native fish populations. The Complainants do not allege intentional discrimination by the Board. And while these complex, resource-intensive, and public processes can take time, no allegations in the Complaint give rise to a claim of disparate treatment or impact.

Indeed, the extensive process undertaken by the State Water Board in updating the Bay-Delta Plan reflects its deep, ongoing commitment to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses for all people, including California Native American tribes and Black, Indigenous, and people of color (BIPOC) communities. Unfortunately, the relief sought by petitioners—which could include the suspension or termination of USEPA assistance to the State Water Board³ could exacerbate harms to vulnerable people, including BIPOC persons from economically

² Currently, the release is expected within the month. Upon release of the report and accompanying notice inviting public comment, the State Water Board will notify OECRC and provide the posted information as a supplement to this response.

³ 40 C.F.R. § 7.130(a) (“If compliance with this part cannot be assured by informal means, [USEPA] may terminate or refuse to award or to continue assistance”).

disadvantaged communities and California Native American tribes by reducing federal funds used to supplement state funds that assist these communities.

USEPA Acceptance of the Complaint, Issues for Investigation, and Summary Responses

As your letter indicates, initial acceptance of the Complaint is not a determination of its merits but a recognition that it met four jurisdictional requirements. The requirements are (1) that it is in writing, (2) describes “an alleged discriminatory act,” (3) is filed within 180 days of the alleged discriminatory act, and (4) is filed against a recipient of USEPA financial assistance that “allegedly committed the discriminatory act.” USEPA’s acceptance letter identifies two areas subject to investigation:

1. Whether the State Water Board’s administration of the water quality standard setting program with respect to the Bay-Delta, including timeliness of rulemaking and opportunities for public participation, subjects members of California Native American tribes and Black, Asian and Latino residents of the Bay-Delta Region, particularly the South Stockton community, to discrimination based on race, color, and national origin; and
2. Whether the State Water Board has in place and is appropriately implementing procedural safeguards required under 40 C.F.R. Parts 5 and 7, that all recipients of USEPA financial assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to the Board’s services, programs, and activities for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether the Board has a public participation policy and process that is consistent with Title VI and other federal civil rights laws, including USEPA’s implementing regulation at 40 C.F.R. Parts 5 and 7.

Response to Investigation Area 1

The thrust of Complainants’ allegations pertain to the first investigation question, and can be summarized as assertions that the State Water Board has taken significant time to update the Bay-Delta Plan to increase instream flows for the protection of fish and wildlife beneficial uses, that the Complainants are adversely impacted by the delay, that the lack of increased flows causes freshwater and estuarine harmful algal blooms (FHABs), and that Complainants have been excluded from a parallel effort related to the Bay-Delta Plan called the Voluntary Agreement (VA) process.

As explained below, while the State Water Board respectfully understands Complainants would like the Bay-Delta Plan updates completed as expeditiously as possible, any delays in completing the ongoing process do not implicate any State Water Board policies or practices based on race, color, or national origin or otherwise

cognizable under Title VI. Indeed, the State Water Board's actions demonstrate the converse: a broad, purposeful, robust, and ongoing commitment to updating the Bay-Delta Plan, to equity, and to environmental justice.

The Board's conduct does not give rise to a claim of disparate impact discrimination for four reasons.

First, the delay in updating the Bay-Delta Plan is attributable to the scientific and legal review necessary and appropriate for a plan of this complexity and consequence. The Board's process for updating the Bay-Delta Plan, while lengthy, is not the kind of "inaction" that constitutes an actionable policy or practice within the meaning of Title VI.

Second, the Board acknowledges the very real harms suffered by California Native American tribes and BIPOC communities from the impacts of reduced flows in the Bay Delta. This is among the reasons the State Water Board has structured extensive engagement with California Native American tribes and BIPOC, disadvantaged, and environmental justice communities in advance of public release of the Bay-Delta update environmental analysis. It is also why the State Water Board will continue consultation with the California Native American tribes and engagement with the affected communities throughout the public consideration and final decision on a Bay-Delta Plan update. But the impacts of reduced flows in the Bay Delta's watershed cause harms that have statewide impact on communities throughout California and that are not borne disproportionately within the meaning of Title VI by protected classes.

Third, these impacts were not caused by the State Water Board. More than 160 years of development, climate change, and other factors outside of the State Water Board's control have caused low instream flows, harm to native fish species, impaired access to waterways, and led to the formation of FHABs. These environmental and societal harms are real. The State Water Board has multiple activities underway designed to ameliorate these harms, including the update to the Bay-Delta Plan. Ultimately, though, these impacts cannot be attributed to actions of the State Water Board.

Fourth, even if OECRC were to find a prima facie case of disparate impact, which it should not, the State Water Board has a substantial legitimate justification for the lengthy time that updating the Bay-Delta Plan has taken. The Board has not intentionally delayed the update. The update is a top priority for the State Water Board; the update proceedings are exceedingly complex; the update proceedings have occurred during three prolonged drought emergencies which have diverted resources and staff; and the Board is on the cusp of commencing the public processes to complete the update. The process undertaken by the Board ensures the environmental analysis and scientific and legal foundations support the final action to protect native fish and improve conditions in the Bay-Delta watershed.

In addition, Complainants' claims regarding the VA process do not support a Title VI claim against the State Water Board. The State Water Board is not a party to the VA

process. The parties who entered into a Memorandum of Agreement to develop the VAs are federal, state, and local agencies, private mutual water companies, and a trade association (collectively “VA Parties”) outside the scope of the Complaint and USEPA’s Title VI authorities with respect to the Board.⁴ As such, claims regarding the VAs fall outside the definition of a State Water Board “program or activity receiving Federal financial assistance” that would be subject to Title VI. (42 U.S.C. § 2000d.)

In the State Water Board’s December 12, 2018 Resolution adopting amendments to the Bay-Delta Plan for the Lower San Joaquin River and Southern Delta (LSJR/SD update), the State Water Board recognized there were “ongoing negotiations between interested stakeholders and various other state agencies to achieve [VAs] to implement [amendments to the Bay-Delta Plan].” The State Water Board encouraged stakeholders to “continue to work together to reach [VAs] that incorporate a mix of flow and non-flow measures that meet or exceed the new and revised water quality objectives” and “to present those [VAs] to the State Water Board for its review as soon as feasible.”⁵ Subsequently, the VA Parties submitted various components of a proposed VA to the State Water Board as a potential alternative for environmental review in the Staff Report for the proposed Bay-Delta Plan update for the Sacramento River watershed and interior Delta (Sacramento/Delta update). The State Water Board strongly believes that analyzing an alternative proposed by other governmental entities is insufficient to attach Title VI liability to the State Water Board’s consideration of the alternative. However, if OECRC determines that the State Water Board’s intent to include a description and analysis of the VA Parties’ work products in a draft staff report is sufficient to establish Title VI jurisdiction over the State Water Board with respect to the VAs, the State Water Board has engaged in extensive and open public engagement. The State Water Board’s public release of a draft Staff Report will facilitate review of the VAs by interested parties outside of the VA process, thus increasing transparency and enabling Complainants and others to raise comments and objections to the Board both orally and in writing.

⁴ Signatories to the *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* (March 29, 2022), were the California Natural Resources Agency (CNRA), the California Environmental Protection Agency, the California Department of Water Resources (DWR), the California Department of Fish and Wildlife (CDFW), the Yuba Water Agency, the Garden Highway Mutual Water Company, the Metropolitan Water District of Southern California, River Garden Farms, State Water Contractors, Sutter Mutual Water Company, Glenn-Colusa Irrigation District, Westlands Water District, Regional Water Authority, Kern County Water Agency, the United States Bureau of Reclamation (Reclamation), and the Western Canal Water District. (See <https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/Voluntary-Agreement-Package-March-29-2022.pdf>.)

⁵ State Water Board Resolution No. 2018-0059, *Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and Final Substitute Environmental Document*, at p. 5 (available at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/rs2018_0059.pdf).

Moreover, the State Water Board has not yet considered or acted on the VA Parties proposal, which is still under development. This is described in more detail below in the section *Voluntary Agreement Process*.

Response to Investigation Area 2

With respect to the second investigation question, the State Water Board has extensive public participation procedures and opportunities that comply with Title VI and USEPA nondiscrimination regulations, as well as state administrative and civil rights law requirements. These procedures for the Bay-Delta Plan update include, among other protections:

- Public notice of the potential action;
- Consultation with affected California Native American tribes during the preparation of documents and in advance of Board consideration of the final action;
- Email notification to all persons and entities requesting information related to Bay-Delta proceedings;
- An opportunity to request notification via alternative means such as U.S. Mail;
- An opportunity to submit written comments on the proposed action and alternatives considered;
- Staff level workshops for interested stakeholders to interact with staff directly, have questions addressed, and provide feedback to staff;
- An opportunity to participate in meetings and provide comment either in person, via telephone, or via the Zoom application on a computer, phone, or other electronic device;
- The opportunity in advance of public meetings to request simultaneous language interpretation services, translation of meeting materials, sign language interpretation, or other accommodations to facilitate understanding, participating, and commenting on the Board action;
- The opportunity to review changes made by Board staff and the Board in response to public comments;

- The opportunity to review a responsiveness summary before final action by the Board; and
- The opportunity to address Board Members directly as part of hearings during the consideration of the proposed action and directly during final action to update the Bay-Delta Plan.
- And as the first major water quality control planning activity by the State Water Board since the adoption of its November 16, 2021 Resolution No. 2021-0050, *Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism*, the Bay-Delta Plan update will supplement these processes with additional opportunities for meaningful civil engagement and engagement through a racial equity lens, asking impacted communities how the actions the Board is considering may affect them, and incorporating this feedback into decision-making processes. (Resolution 2021-0050, Resolved ¶ 11(e).)⁶

Many of these actions exceed the baseline requirements of USEPA's Part 25 public participation requirements and Title VI, and exceed USEPA's own public processes. For example, USEPA does not circulate a responsive summary before final action and does not allow the public, including Native American tribes, to directly address the decisionmaker in a public setting as a final decision is made.

In addition, if all these public participation processes fail or a person believes they have been discriminated against based on a protected status, the State Water Board provides an explicit policy and guidance on anti-discrimination policies for external civil rights complaints and a process for submitting and resolving such complaints.⁷ These policies have been posted on the State Water Board's website since at least June 2017 and provide appropriate procedural safeguards to comply with Title VI and USEPA nondiscrimination regulations.

In sum, as demonstrated by this response and the State Water Board's actions, the Board has not violated Title VI and has appropriate safeguards in place to adhere to general nondiscrimination obligations in the Board's public participation processes. In addition to providing this response, the State Water Board welcomes the opportunity to

⁶ Available at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2021/rs2021-0050.pdf.

⁷ See https://www.waterboards.ca.gov/docs/anti_discrimination_policy_guidance.pdf. In addition, a similar notification and disclosure identifies the State Water Board's reasonable accommodation policy and guidance. (See https://www.waterboards.ca.gov/docs/reasonable_accommodation_policy_guidance.pdf.) Both have been available through the Board's "Board Information" webpage available at: https://www.waterboards.ca.gov/board_info/.

meet with USEPA and the Complainants as part of the OECRC informal resolution agreement-plus (IRA+) process.

I. Background

A. Condemning Racism, Xenophobia, Bigotry, and Racial Injustice

The State Water Board and the nine Regional Water Quality Control Boards (Regional Water Boards and, together with the State Water Board, Water Boards) have been leaders in combating racial injustice and historic inequities. For example, in 2015, former California Governor Jerry Brown signed Assembly Bill 92 into law establishing the Office of Sustainable Water Solutions within the State Water Board. The Office was the first of its kind and a recognition that one of the most challenging problems with water supply reliability and water quality throughout the state is the lack of help offered to small cities, rural, counties, and unincorporated areas, many of them majority BIPOC communities. In 2019, Governor Gavin Newsom signed Senate Bill 200 creating the Safe and Affordable Drinking Water Fund administered as the Safe and Affordable Fund for Equity and Resilience drinking water program (SAFER). SAFER's stated purpose is to set "in motion the legal structure to remedy past failures, address current shortcomings and bring true environmental justice to all Californians" and "provide safe water to drink, cook and bathe for an estimated 1 million people in disadvantaged communities throughout the state."⁸ SAFER is a demonstration of how the State Water Board effectuates California's statutorily codified Human Right to Water,⁹ strives to minimize "the disproportionate environmental burdens experienced by some communities," and advances "justice for people of all incomes, races and cultures."¹⁰

The State Water Board's affirmative steps to ensure that its actions do not encourage, entrench, subsidize, or result in racial discrimination or perpetuate the repercussions of past discrimination are broader than its drinking water programs. The State Water Board has been forthright in recognizing that while California is a place of great beauty, innovation, and the fifth largest economy in the world, historic governmental policies and structures, such as the "redlining" of neighborhoods based on race, continue to deliver disparate outcomes to California Native American tribes and BIPOC communities, as in much of the United States, including in the areas of wealth, health, education, and environment. To combat these historic inequities, in 2018 the State Water Board joined the Government Alliance on Race and Equity, a national network working to achieve racial equity and advance opportunities for all. After significant engagement with both the public and Water Boards employees, on November 16, 2021, the State Water Board members unanimously adopted Resolution No. 2021-0050, *Condemning Racism*,

⁸ See https://www.waterboards.ca.gov/water_issues/programs/grants_loans/sustainable_water_solutions/docs/fs20200407_safer_policy_implementation.pdf.

⁹ Wat. Code, § 106.3.

¹⁰ See <https://www.waterboards.ca.gov/safer/>.

*Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism.*¹¹

Resolution No. 2021-0050 directed the State Water Board's Executive Office to develop and implement a *Racial Equity Action Plan* (REAP) to address "systems that perpetuate racial inequities while establishing new, resilient systems." The State Water Board developed the REAP with the participation, support, and engagement of over 400 community members, California Native American tribes, and over 200 State Water Board staff and finalized it for 2023-2025 on January 2023. Resolution No. 2021-0050 and the REAP reflect the State Water Board's ongoing commitment to a future where race no longer predicts a person's access to, or quality of, water resources. The REAP reaches into all State Water Board programs, includes actions such as identifying waters in BIPOC and disadvantaged communities, a comprehensive review of surface water quality and impaired waterbodies, fostering a culture of inclusion and belonging, and removing barriers for community access and participation in water decision-making.

Since the creation of the REAP, the Water Boards have developed a three-part course titled "Advancing Racial Equity at the Water Boards" and have developed a Racial Equity Train-the-Trainer program to equip employees with the skills to deliver this racial equity course to Water Boards employees. The "Advancing Racial Equity at the Water Boards" course is an opportunity to engage with peers who are exploring and developing a shared understanding of fundamental racial equity concepts, a model of change to become an antiracist organization, and an overview of racial equity tools. Ten staff were certified as trainers in the first cohort, and an additional ten staff are currently in the process of becoming trainers. Over 270 Water Boards staff have taken the "Advancing Racial Equity at the Water Boards" course and approximately 800 staff will take the course over the next year. The Water Boards will also be delivering a three-part Results Based Accountability course as a complement to the Advancing Racial Equity course. Results-Based Accountability is a method for learning, planning, and taking action to improve the quality of life for communities. It is a disciplined way of thinking and acting to improve entrenched and complex social problems. Results Based Accountability is a set of practices that allow an organization to define what it is trying to achieve and how to measure performance. Through these training opportunities, the Water Boards aim to equip staff with the tools and knowledge to implement the REAP and be better able to apply a racial equity lens into all aspects of their programmatic work.

The REAP is an on-going, iterative process, and the State Water Board recognizes that much work remains. Moreover, the Board also recognizes that actions must align with the words in the racial equity resolution and REAP. Ongoing actions, including the Bay-Delta Plan update recognize and build off this work, but one action alone will not be able

¹¹ https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2021/rs2021-0050.pdf.

to technically or legally remedy the historical actions laid out in Resolution No. 2021-0050.

B. Bay-Delta Planning Process

Complainants request that the State Water Board expeditiously update the Bay-Delta Plan and allege that its “actions and inactions” in the Bay-Delta disproportionately harm California Native American tribes and communities of color in violation of Title VI.¹² These allegations ignore the fact that updating the Bay-Delta Plan is one of the State Water Board’s highest priorities and an effort of unparalleled complexity spanning multiple, urgent, and ongoing actions. The update and actions are motivated, in part, to address the prolonged and precipitous declines of native aquatic species and the ecosystems they depend upon.

1. Water Quality Control Planning

The State Water Board and the nine Regional Water Boards administer the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (Wat. Code, § 13000 et seq.) to achieve an effective water quality control program for the state and are responsible for the regulation of activities and factors that may affect the quality of the waters of the state. (Wat. Code, §§ 13000, 13001.) The State Water Board is authorized to adopt a water quality control plan in accordance with the provisions of Water Code sections 13240 through 13244, insofar as they are applicable, for waters subject to federal Clean Water Act jurisdiction. (Wat. Code, § 13170.)

California’s Porter-Cologne Act envisions that most water quality control planning will be accomplished on a regional, hydrologic basis by the Regional Water Boards. (Wat. Code, §§ 13000, 13240-13245.) In fact, there are multiple water quality control plans governing the Bay-Delta watershed, but the two most foundational and arguably the most important are the Central Valley Water Board’s Water Quality Control Plan for the Sacramento and San Joaquin River Basins¹³ and the San Francisco Bay Water Board’s Water Quality Control Plan for the San Francisco Bay Region.¹⁴ These two water quality control plans (basin plans) designate the uses of all the water bodies within the two regions, including the water bodies within the Bay-Delta watershed, which encompasses portions of both regions. For waters subject to the Clean Water Act, the beneficial uses designated in these two basin plans serve as designated uses under the Clean Water Act and the water quality objectives to protect those uses serve as criteria under the Clean Water Act. (33 U.S.C. § 1313(c); 40 C.F.R. §§ 131.2, 131.4.) Put

¹² Stanford Legal Clinic, *Title VI Complaint and Petition for Rulemaking for Promulgation of Bay-Delta Water Quality Standards* (Dec. 16, 2022), at p. 32.

¹³ https://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/sacsjr_2019_02.pdf.

¹⁴ https://www.waterboards.ca.gov/sanfranciscobay/basin_planning.html#basinplan.

another way, the water quality standards for the Bay-Delta watershed are largely established in these two basin plans.

While the two regional basin plans serve the bedrock water quality standards-setting function of the Porter-Cologne Act and the federal Clean Water Act, the State Water Board has adopted an additional water quality control plan, the Bay-Delta Plan,¹⁵ that overlays these two other plans in the Bay-Delta watershed. The State Water Board's Bay-Delta Plan is a recognition that discharges of waste, including discharges regulated through national pollutant discharge elimination system (NPDES) permits and waste discharge requirements for non-point sources of pollution, are not the only sources of pollution affecting the Bay-Delta ecosystem. Water diversions from the Bay-Delta's rivers and streams, including large export diversions from the Delta by the Central Valley Project (CVP) and the State Water Project (SWP), have degraded the ecosystem, contributing to the decline of native fish populations. The State Water Board developed the initial Bay-Delta Plan and subsequent updates to focus on impacts from, and regulatory actions potentially available to address, the water quality and beneficial use impacts from water diversions in the Bay-Delta watershed. The State Water Board could do so because, unlike the Regional Water Boards, it has some ability to regulate diversions of water, including through its permitting and licensing of post-1914 appropriative water rights. (Wat. Code, §§ 174, subd. (c), 1200-1851, and 13170.)

The three basin plans work together to provide the foundational requirements for protecting beneficial uses of the Bay-Delta watershed. NPDES permits issued within the Bay-Delta watershed by the State Water Board, Central Valley Water Board, and San Francisco Bay Water Board all include provisions to require compliance with applicable water quality standards. (33 U.S.C. § 1311(b)(1)(C).) Each of these plans and the regulatory actions taken to implement these plans require the extensive scientific and legal processes required for plan amendments, as well as attendant tribal consultation and public participation processes. Likewise, waste discharge requirements and conditional waivers issued under the Porter-Cologne Act (which governs all discharges of waste—not just from point sources—to all waters of the state—not just waters of the United States) by the three Water Boards protect beneficial uses identified within the three basin plans. (Wat. Code, §§ 13263, 13269). The three water boards also issue water quality certifications to implement section 401 of the Clean Water Act and assure compliance with state water quality standards and other applicable provisions of state law, including those specified in the three basin plans. (33 U.S.C. § 1341; Wat. Code, § 13160.) Put simply, the Water Boards have a comprehensive program for water quality protection that draws on the three distinct basin plans and myriad authorities to implement them. No one basin plan provides all the solutions, and actions are taken under a variety of authorities to implement the three basin plans and to protect beneficial uses of water.

¹⁵ https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf.

2. *The Bay-Delta Plan Update*

Updating the Bay-Delta Plan is a tremendous undertaking in terms of scale and intricacy because of the size, complexity, and statewide importance of the watershed. The Delta receives runoff from about 40 percent of the land area of California and about 50 percent of total streamflow.¹⁶ The watershed spans over 45,000 square miles (30 million acres),¹⁷ emerging from high in the north at the headwaters of the Sacramento River in the Shasta Cascade Mountains above Redding and extending as far south as the headwaters of the San Joaquin River in the Ansel Adams Wilderness of the south-central Sierra Nevada below Yosemite National Park. In between, it is fed by over twenty tributary streams. This breadth of geographic diversity, along with some significant distinctions between the northern and central watersheds, is why the State Water Board has been engaged in two major planning processes for the Bay-Delta: the update process for the Lower San Joaquin River and Southern Delta (LSJR/SD update) and the Sacramento/Delta update process.

In the LSJR/SD process, the Board adopted updated water quality objectives and an updated program of implementation in 2018 and is now moving forward with a proposed regulation assigning responsibility to water right holders to implement the update. Just yesterday, September 6, 2023, the State Water Board approved the final biological goals to assess the progress of protective measures being implemented in accordance with the LSJR/SD update. In the Sacramento/Delta update process the Board is preparing to publicly release an environmental document in support of updated objectives and an updated program of implementation.

* * *

(a) The Interplay Between the Bay-Delta Ecosystem and California Water Supply Infrastructure

The Delta¹⁸ is one of the largest freshwater estuaries on the west coast, the location of many historic towns and communities, and home to almost half a million acres of agricultural land. It is also the crossroads for California's major water infrastructure. The export facilities for the CVP and SWP are both located in the southern Delta near Tracy. The CVP is managed by Reclamation, within the U.S. Department of the Interior. The CVP's main reservoirs are the Shasta Dam and Reservoir at the headwaters of the Sacramento River, Folsom Dam and Reservoir on the American River, and New Melones Dam and Reservoir on the Stanislaus River. Water released from these CVP reservoirs is used locally, exported to the San Joaquin Valley from the C. W. "Bill" Jones

¹⁶ United States Geological Survey, *Delta Subsidence in California: the sinking heart of the State* (April 2000). (See <https://pubs.usgs.gov/fs/2000/fs00500/pdf/fs00500.pdf>.)

¹⁷ Delta Stewardship Council, *Delta Plan* (2013), at p. 3 (available at: <https://deltacouncil.ca.gov/pdf/delta-plan/2013-ch-01.pdf>).

¹⁸ Wat. Code, § 12220.

pumping plant via the 117-mile-long Delta-Mendota Canal, or allowed to remain as outflow to the San Francisco Bay. Because of contractual commitments that obligate the CVP to provide Delta water in exchange for water withheld by the CVP's Friant Dam, CVP Delta export operations can also influence the operation of the Friant Unit at the headwaters of the San Joaquin River, and the areas serviced by the 39-mile-long Madera Canal into Madera County and the 152-mile-long Friant-Kern Canal into the Tulare Lake watershed, which extends all the way to the Kern River near Bakersfield.

The SWP is managed by DWR, within the CNRA. The SWP's main reservoir is Lake Oroville on the Feather River, a tributary to the Sacramento River. Water released from Lake Oroville via Oroville Dam is used in the Sacramento Valley, or captured in the Clifton Court Forebay, exported via the Harvey O. Banks Pumping Plant, and either conveyed via the 400-mile-long California Aqueduct to the Central Valley, the Santa Barbara Coast, Los Angeles, and as far south as San Diego or, to a lesser extent, diverted to the 40-mile-long South Bay Aqueduct to serve the eastern part of the San Francisco Bay Area. Collectively, the CVP and SWP convey water from north to south as part of the drinking water supplies for over 27 million Californians and part of the irrigation water for almost over 4.5 million acres of agricultural land.¹⁹ Between municipal, commercial, and agricultural output, hundreds of billions of dollars of economic activity are dependent on water diverted from the Bay-Delta watershed.

(b) The Regulatory Landscape

In addition to the vast geographic reach of the Bay-Delta Plan, the process for developing environmental documentation is more complex than that required of almost any other project under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and the Guidelines for Implementation of the California Environmental Quality Act (CEQA Guidelines) (Cal. Code Regs., tit. 14, § 15000 et seq.).²⁰ Basin planning (which includes the Bay-Delta Plan) is certified by the CNRA as a regulatory program for the protection of the environment requiring specified written documentation consistent with the environmental protection purposes of the regulatory program. (CEQA, § 21080.5; CEQA Guidelines, § 15251, subd. (g).) Since

¹⁹ See <https://water.ca.gov/programs/state-water-project> and <https://www.usbr.gov/projects/index.php?id=506>.

²⁰ CEQA is analogous to the National Environmental Policy Act (NEPA), and requires governmental decision-making informed by the potential environmental impacts. Unlike NEPA, though, CEQA has both procedural and substantive requirements. (Compare *Winter v. Natural Resources Defense Council, Inc.* 555 U.S. 7, 23 (2008) [NEPA is procedural only] with *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* 29 Cal.App.4th 1597, 1601 (1994), as modified on denial of reh'g (Nov. 29, 1994) [CEQA has procedural and substantive requirements].) Also, unlike USEPA actions under the Clean Water Act, which are largely exempt from NEPA, the Water Boards' water quality control planning actions must comply with CEQA. (Compare 33 U.S.C. § 1371(c) [Clean Water Act NEPA exemption] with *City of Arcadia v. State Water Resources Control Bd.* 135 Cal.App.4th 1392, 1421 (2006) [Water Boards' basin planning subject to CEQA].)

the basin planning program is a certified regulatory program, the State Water Board does not need to prepare environmental review documents with the titles or form prescribed by CEQA; however, the documents prepared in the basin planning process must still provide the analysis to fulfill CEQA's policies and substantive mandates.²¹ Moreover, the analyses for the Bay-Delta Plan updates not only evaluate the potentially significant physical impacts of an action in accordance with CEQA, they also document the State Water Board's required analyses under the Porter-Cologne Act. These analyses include an evaluation of how the proposed revised objectives will provide reasonable protection of the beneficial use, how the proposed program of implementation will achieve the objectives, and articulate the State Water Board's consideration of other factors as required by the Porter-Cologne Act including, but not limited to, past, present, and future probable uses of water; water quality considerations that could reasonably be achieved through the control of all factors; and economic considerations. (Wat. Code, § 13241.)

The hydraulic connection of so many rivers and streams to the Bay-Delta, the reach of the CVP and SWP from the top of the state almost to the border with Mexico, and the Porter-Cologne Act requirements for the Board's analyses to go beyond the environmental analysis requirements of a CEQA Environmental Impact Report (EIR) and include other sophisticated components, mean these analyses are some of the most complex water-related analysis attempted in California and likely anywhere else in the nation.

To provide an illustration: the LSJR/SD update – which revised the flow objectives for the protection of fish and wildlife beneficial uses in the LSJR and the salinity objective for the protection of southern Delta agriculture – involves a much smaller geographic area than the proposed Sacramento/Delta update. Nevertheless, the LSJR/SD update staff report and record in support of the adoption of the Bay-Delta Plan update in December 2018 spans 8 binders, each 3½” wide, containing 24 chapters of analyses, 13 technical appendices, and 4 chapters of response to comment. The LSJR/SD update Administrative Record is over 750,000 pages, not including modeling data that could not be reduced to a printed format. The administrative record index alone is 747 pages of single-space text. Following the LSJR/SD update, the State Water Board was required to divert staff and resources to defend the action when over a dozen separate lawsuits were filed, including two by the United States on behalf of Reclamation (one in Sacramento Superior Court and a second in Federal District Court).²² Nearly five years

²¹ See *City of Arcadia v. State Water Resources Control Bd.* 135 Cal.App.4th 1392, 1421 (2006) and Cal. Code Regs., tit. 23, §§ 3775-3781.

²² *California Farm Bureau Federation v. State Water Resources Control Board et al.* (Sacramento Superior Court Case No. 34-2019-80003076), *California Sportfishing Protection Alliance et al., v. State Water Resources Control Board (CSPA)* (Sacramento Superior Court Case No. 34-2019-80003108), *City of Modesto v. State Water Resources Control Board et al.* (Sacramento Superior Court Case No. 34-2019-80003051), *Merced Irrigation District v. State Water Resources Control Board et al.*

after adoption of the LSJR/SD update in December 2018, the multiweek trial challenging the update commenced last Monday, August 28, 2023, in Sacramento Superior Court. Bay-Delta Plan updates are critical to protect beneficial uses, complex technically, complex legally, challenging as a matter of policy, and certain to be subject to lawsuits. As a result, the update process is time-consuming: in part to address the complexity, in part to ensure the updates are legally defensible.

(c) External Factors Affecting the Bay-Delta Plan Update

Adding to the State Water Board's challenge in updating the Bay-Delta Plan is that, thus far, three periods of extreme drought overlapped the planning period: 2006-2010 (partially in 2009-2010), 2012-2017, and 2020-2022. Each time, significant State Water Board staff resources were diverted to address emergencies in drinking water access and surface water allocations, including curtailments to protect dwindling Bay-Delta water supplies for both human uses and the environment, and the inevitable legal challenges that many of these actions bring.

(Merced Superior Court Case No. 18CV-05111), *Modesto Irrigation District v. State Water Resources Control Board et al.* (Sacramento Superior Court Case No. 34-2019-80003052), *North Coast Rivers Alliance, et al., v. State Water Resources Control Board* (North Coast Rivers Alliance) (Sacramento Superior Court Case No. 34-2019-80003063), *San Francisco Baykeeper, et al., v. State Water Resources Control Board et al.* (Baykeeper) (Sacramento Superior Court Case No. 34-2019-80003127), *San Joaquin Tributaries Authority et al., v. State Water Resources Control Board.* (Tuolumne Superior Court Case No. CV62094), *Santa Clara Valley Water District v. State Water Resources Control Board* (Santa Clara Superior Court Case No. 19CV342090), *South Delta Water Agency et al., v. State Water Resources Control Board et al.*, (San Joaquin Superior Court Case No. STK-CV-UWM-2019-4461), *Stockton East Water District v. State Water Resources Control Board* (San Joaquin Superior Court Case No. STK-CV-UWM-2019-472), *United States of America v. State Water Resources Control Board* (Sacramento Superior Court Case No. 34-2019-80003108), and *Westlands Water District v. State Water Resources Control Board* (Fresno Superior Court Case No. 19CECG00165). The Judicial Council coordinated these actions in Sacramento Superior Court as the State Water Board Cases (Judicial Council Coordination Proceeding No. 5013). The Court subsequently dismissed Santa Clara Valley Water District and California Sportfishing Protection Alliance from the State Water Board Cases and allowed the State Water Contractors to intervene. The litigation is ongoing with oral argument beginning August 28, 2023, and scheduled to extend over 11 full days during three separate weeks in August, September, and October. The second case filed by the United States is *United States v. State Water Resources Control Board et al.* (Eastern District of California Case No. 2:19-CV-00547-LJO-EPG)).

(d) The Diversity of Interests Impacted by Declining Native Fish and Engaged in the Bay-Delta Proceedings

The State Water Board is mindful that the length of time it is taking to complete and implement its Bay-Delta Plan updates impacts many different communities and stakeholders. These impacted persons include California Native American tribal members and subsistence fishers. Recreational anglers and commercial fishers who rely on robust salmon populations for their livelihoods are also impacted. In addition, any delays impact all those who desire a healthy Bay-Delta for many reasons including, but not limited to, aesthetic, scientific, cultural, and recreational ones. The declining native fish populations and the many groups interested in a viable native fish population are among the reasons the Bay-Delta Plan update has been among the Board's highest priorities for so long.

For example, multiple parties challenging the adequacy of the Bay-Delta Plan LSJR/SD update cited as their basis for participation in the litigation the tens of thousands of Californians they collectively represent and who they claim could be adversely impacted by the Board's Bay-Delta action. As an illustration of the diverse interests advancing claims in that litigation, San Francisco Baykeeper stated it "has more than 5,000 members and supporters, most of whom reside in the Bay-Delta watershed." Natural Resources Defense Council, in the same complaint, asserted it is "a non-profit environmental organization with more than 513,000 members nationwide, including 97,000 members in California." The Bay Institute noted it is a non-profit conservation organization whose "members mostly live around the Bay or its watershed, regularly visit and use the Bay, the Delta, and California's Central Valley for recreational experience, aesthetic enjoyment, and/or livelihood in the commercial fishing, sportfishing, and boating industries and have a direct interest in the survival and perpetuation of fish species and other aquatic resources."²³

Similarly, the North Coast Rivers Alliance asserts it is "a non-profit unincorporated association with members throughout Northern California...its members use and enjoy California's rivers and watersheds for recreational, aesthetic, scientific study, and related non-consumptive uses." Institute for Fisheries Resources stated "IFR and its members will be directly and indirectly injured by the Board's ... approval and its failure to adequately protect and restore the imperiled fisheries of the Delta and the San Joaquin River and their tributaries." Pacific Coast Federation of Fishermen's Associations alleges it is "composed of more than 14 separate commercial fishing and vessel owners' associations situated along the West Coast of the United States...[a] combined membership of approximately 750 fishermen and women" that would be harmed by "continued excessive water diversions from the San Joaquin River and its tributaries, resulting in continued harm to their water quality and public trust resources

²³ Baykeeper, *Verified Petition for Writ of Mandate and Complaint for Declaratory Relief*, pp. 4-5.

and uses, including their commercial fisheries, which depend on sustainable management of the Delta and its connected ecosystems.”²⁴

California Sportfishing Protection Alliance alleged that “[m]embers of CSPA reside along the Central Valley watershed and Bay-Delta where they view, enjoy, and routinely use the ecosystem for boating, fishing, and wildlife viewing. CSPA’s members derive significant and on-going use and enjoyment from the aesthetic, recreational, and conservation benefits of California’s rivers.” California Water Impact Network stated it “has members who reside in, use, and enjoy the Bay-Delta for nature study, recreation, and aesthetic enjoyment.” AquAlliance asserted its members include “farmers, scientists, business, educational, and conservation interests in the aquatic and terrestrial environments that rely on waters of the Sacramento River Watershed and Bay-Delta estuary” and that the “hydrologic system provides water for orchards, homes, gardens, businesses, wetlands, streams, rivers, terrestrial habitat, and myriad species, which in turn allows AquAlliance members to live, farm, study, fish, hunt, cycle, photograph, camp, swim, and invest in northern California.”²⁵

These are only a subset of the parties affected by the decline of native fish or diminished recreational or fishing opportunities in or affected by the Bay-Delta watershed. Further, there is a rich mix of communities, including economically disadvantaged and BIPOC communities, who are dependent on the water diverted from the Bay-Delta watershed to support jobs and drinking water for their communities. A Bay-Delta Plan update that increases river flows has the potential to reduce water deliveries to these communities. The impacts of reduced flows affect a breadth of communities, but the impacts of increased flows do so as well, and it is the State Water Board’s broad responsibility to consider and to address these concerns in water quality control planning.

3. Efforts to Increase Outreach to California Native American Tribes and Environmental Justice Representatives and Tribal Beneficial Uses

Contrary to the assertions in the Complaint, the State Water Board’s actions demonstrate that it has conducted significant and targeted outreach to inform and include California Native American tribes and Delta environmental justice advocates in the Bay-Delta Planning process.

²⁴ North Coast Rivers Alliance, First Amended Verified Petition for Writ of Mandate and Complaint for Injunctive Relief and for Attorneys’ Fees, pp. 3-4.

²⁵ CSPA, *Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, and for Attorneys’ Fees*, pp. 3-4.

(a) Responses to Petitioners and Acknowledgment of On-Going Bay-Delta Planning Efforts

For example, in response to the May 24, 2022 petition the Stanford Legal Clinic submitted to the State Water Board on behalf of Little Manilla Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians, and the Winnemem Wintu Tribe requesting, among other relief, that the Board undertake and complete review of the Bay-Delta Plan updates,²⁶ the State Water Board advised:

The State Water Board recognizes, respects, and shares the concerns of Petitioners regarding the urgent need to further revise and implement updated standards for the Bay-Delta Plan, including to protect California's iconic salmon species who are integral to the identity, culture, spirituality, and way of life of Petitioners Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and other tribal nations who have lived in this place we now call California since time immemorial. Providing reasonable protection for native fishes, including salmon, across the entire Delta watershed is a core objective of the State Water Board's ongoing work to update the Bay-Delta Plan, which is already a high priority project for the Board.

Foundational aspects of your request are part of the State Water Board's quasi-legislative action to update the Bay-Delta Plan. In light of this ongoing effort and for the reasons stated in this letter, the State Water Board denies the Petition. However, that denial does not foreclose further meaningful consideration of the important issues that Petitioners raise. Specifically ... the State Water Board would like to meet with Petitioners Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and other interested tribal representatives to further discuss the inclusion of tribal beneficial uses in the Bay-Delta Plan as well as explore ways to provide additional opportunities for meaningful participation by other impacted Delta communities.

(State Water Board Executive Director Eileen Sobeck, letter to Deborah A. Sivas, et al., June 24, 2022, at p. 2.) After dismissing the rulemaking petition because the State Water Board was at that time already undergoing a process to review and update the Bay-Delta Plan, the letter specified that while seeking government-to-government consultation was not an appropriate remedy under the specific Government Code section that Petitioners cited as the basis for their relief, the State Water Board welcomed further tribal engagement. The letter stated:

The State Water Board is committed to meaningful engagement with affected tribes and meaningful participation by other impacted Delta communities in the Bay-Delta Plan review and revision process. In furtherance of that goal, I would

²⁶ Deborah A. Sivas et al., Stanford Legal Clinic, letter to Adrianna M. Crowl, State Water Board, Office of the Chief Counsel, May 24, 2022.

like to start with a meeting next month to discuss how to improve engagement with California Native American Tribes in protecting and recognizing tribal beneficial uses. As part of this process and consistent with the Tribal Consultation Policy, the State Water Board will follow its stated best practice 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. (Tribal Consultation Policy, p. 10.)

In addition, and consistent with State Water Board Resolution 2021-0050 [*Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism*] the State Water Board remains interested in exploring ways to further address environmental justice and inequity, including through funding opportunities for projects in disadvantaged and severely disadvantaged communities.

(*Id.*, at p. 7.) On August 22, 2022, Petitioners requested that the State Water Board reconsider the denial of their petition. In denying the request for reconsideration, the State Water Board reiterated that it is already “investing extraordinary time and resources to implement the 2018 Bay-Delta Plan update and to update the water quality control objectives and program of implementation for the reasonable protection of fish and wildlife beneficial uses in the Sacramento River watershed and interior Delta....” The State Water Board further noted that “since the time of the original petition, it has made even further progress to update the Bay-Delta Plan, issuing a *Notice of Preparation and California Environmental Quality Act Scoping Meeting for a 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* on July 15, 2022” and that this notice triggered the beginning of the CEQA environmental review process for a proposed regulation and two different opportunities for tribal consultation under Executive Order B-10-11²⁷ and Assembly Bill 52 (AB 52).²⁸ (State Water Board Executive Director Eileen Sobeck, letter to Deborah A. Sivas, et al., September 21, 2022, pp. 2-3.)

(b) State Water Board Consultation with the California Native American Tribes

Executive Order B-10-11 commits “to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” AB 52 added CEQA requirements for consultation among California Native

²⁷ Governor’s Exec. Order No. B-10-11 (September 19, 2011). (See <https://www.ca.gov/archive/gov39/2011/09/19/news17223/index.html>.)

²⁸ Assembly Bill 52 (Gatto), Ch. 532, Stats. of 2014. (See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52.)

American tribes and lead agencies to protect tribal cultural resources. (Pub. Resources Code, § 21084.3.) Importantly, however, AB 52 applies to any “project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.” (AB 52, § 11.) This means that agencies and California Native American tribes consulting on projects with CEQA notices of preparation filed before July 1, 2015, can utilize the Executive Order B-10-11 process and those with CEQA notices of preparation filed on or after July 1, 2015, utilize both Executive Order B-10-11 and AB 52.

On July 27, 2022, the State Water Board mailed out letters to interested California Native American tribes soliciting AB 52 consultation on the proposed regulation to implement the 2018 LSJR/SD Bay-Delta Plan update. This was followed on August 4, 2022, by letters also inviting consultation under Executive Order B-10-11. These were supplemented by consultation letters to additional California Native American tribes identified by the California Native American Heritage Commission (NAHC), which is the primary government agency responsible for identifying and cataloging Native American cultural resources. On September 30, 2022, Joaquin Esquivel, State Water Board Chair, hosted a government-to-government consultation with tribal representatives on Bay-Delta Planning consistent with the State Water Board’s offer in its June 24, 2022 letter to the Stanford Law Clinic. Thereafter, on January 13, 2023, State Water Board staff mailed Executive Order B-10-11 letters offering formal consultation on both the Sacramento/Delta Bay-Delta Plan update process and the LSJR/SD update implementation process to approximately 92 California Native American tribes identified within the Bay-Delta and Trinity River watersheds. Tribal contacts were made using the tribal consultation list maintained by the State Water Board’s Office of Public Participation, which relies on information from the NAHC.

(c) Consideration of Incorporating Tribal Beneficial Uses into the Bay-Delta Plan

On March 15, 2023, and May 4, 2023, the State Water Board held tribal listening sessions via the Zoom meeting platform and sent direct invitations to 92 California Native American tribes located in the Bay-Delta and Trinity River watersheds.²⁹ State Water Board staff also attempted to call listed tribal contact persons to alert them to the opportunity to participate. One issue raised by tribal representatives during those listening sessions and in prior correspondence was their desire that Tribal Tradition and Culture (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing (SUB) beneficial use (collectively, TBUs) definitions be added to the Bay-Delta Plan.

²⁹ Besides the California Native American tribes identified on the NAHC list, the State Water Board also circulated the invitations to broader distribution lists targeted for tribal and environmental justice interests. These distributions included 363 tribal email addresses identified by the Division of Water Rights for the May 4, 2023 tribal listening session, and separately more than 1,300 subscribers to the State Water Board’s tribal notification list and 1,400 subscribers to the State Water Board’s environmental justice notification list.

During its process for developing an amendment to its Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan), the State Water Board received substantial input from California Native American tribes and representatives of tribal interests regarding the frequent use of water unique to tribal culture, tradition, ceremonies, and lifeways and from environmental justice representatives concerning subsistence fishing by other individuals or cultures associated with their respective cultural customs or economic circumstances.³⁰ In 2017, and as a result of that collaboration, the State Water Board adopted the collaboratively developed beneficial uses “Tribal Tradition and Culture (CUL),” “Tribal Subsistence Fishing (T-SUB),” and “Subsistence Fishing (SUB),” into the Final Part 2 of the ISWEBE Plan.³¹

On June 7, 2023, the State Water Board meeting included an Informational Item exploring adding the TBU definitions as described in the ISWEBE Plan to the Bay-Delta Plan. Although the ISWEBE Plan and the Bay-Delta Plan are separate plans, the State Water Board recognized the significant investment of tribal representatives in developing the precise language used in the ISWEBE Plan. This investment was further recognized when, during the public meeting, Board Members listened to a staff presentation on the TBU definitions and then a tribal panel consisting of four individuals representing three Bay-Delta area tribes (Winnemem Wintu, Shingle Springs Band of Miwok Indians, and Buena Vista Rancheria of Me-wuk Indians) and one non-profit (Save California Salmon) who all strongly advocated for the addition. The potential addition of TBUs to the Bay-Delta Plan was also supported by other speakers during the public comment period.

(d) Environmental Justice Listening Sessions

In addition to its tribal outreach efforts, on March 27 and June 7, 2023, the State Water Board held two environmental justice listening sessions intended to receive input from representatives of disadvantaged communities, BIPOC organizations, and environmental interests and to provide a forum for staff to answer their questions. The listening sessions were focused on efforts to update and implement the Bay-Delta Plan, including consideration of the proposed VAs. The listening sessions were convened by

³⁰ Res. No. 2017-0027, at p. 1. (Available at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/rs2017_0027.pdf.) The ISWEBE Plan is another State Water Board water quality control plan that overlays all the water quality control plans in the State of California. It provides requirements, including water quality standards, to be implemented for California’s inland surface waters and enclosed bays and estuaries, but the ISWEBE Plan does not designate beneficial uses and in most instances is supplementary to requirements in the Regional Water Boards’ basin plans. Likewise, it does not have any immediate, self-implementing impacts on water diversion.

³¹ See https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/hg_prov_final.pdf, at p. A-3.

the Chair Joaquin Esquivel and included presentations by State Water Board staff on Bay-Delta planning and implementation and included staff from the CDFW and DWR involved in VA planning to answer VA questions.

The State Water Board's outreach efforts and consideration of adding TBUs to the Bay-Delta Plan demonstrate its ongoing commitment to facilitating meaningful input from and engagement with California Native American tribes and BIPOC, disadvantaged, and environmental justice communities and stand in contrast to allegations that the Board gives disparate treatment to California Native American tribes and Black, Asian, and Latino persons residing in the Bay-Delta in violation of Title VI.

C. Voluntary Agreement Process

As described earlier, a key criticism leveled by the Complainants is that the process for developing VAs has excluded California Native American tribes, environmental justice representatives, and others. However, the VA development process is not a State Water Board process. Instead, the VAs are a proposal for reversing the decline of native fish that has been presented to the State Water Board for its consideration as an alternative pathway to implement updated water quality objectives. The State Water Board is not a party or signatory to the VA memorandum of understanding (MOU). Instead, as set forth above and below, the State Water Board is a regulator that is evaluating and considering – in a transparent, public process – the VA proposal submitted by other government entities as a possible mechanism for implementing updated water quality objectives.

1. Resolution 2018-0059 and Encouragement for Voluntary Solutions

The State Water Board's commitment with regard to the VAs is expressed in paragraph 21 of State Water Board Resolution 2018-0059 adopting the LSJR/SD amendments and reiterated here:

The State Water Board encourages stakeholders to continue to work together to reach [VAs] that meet or exceed the new and revised water quality objectives and protect fish and wildlife beneficial uses, and to present those [VAs] to the State Water Board for its review as soon as feasible....

Regardless of whether the current negotiations ultimately result in an agreement, the State Water Board will consider voluntary agreements as part of its proceedings to implement the Plan Amendments, consistent with its obligations under applicable law. In evaluating any proposal, the State Water Board will consider whether the agreement will help achieve the water quality objectives, help protect the beneficial use, and be enforceable through Board action.

Resolution 2018-0059 further directs State Water Board staff to provide “appropriate technical and regulatory information to assist CNRA in completing a Delta watershed-wide agreement.”

2. *Consideration of the Voluntary Agreements*

The VA process is not the State Water Board’s process but a voluntary process by other federal, state, and local agencies, private entities, and a trade association to present an alternative approach to implementing the objectives of the Bay-Delta Plan and promote the restoration of native fish.³² The State Water Board has no role in deciding who participates in that process, or what proposal or proposals result from that process. The State Water Board committed to consider any completed VA presented to it, but any such consideration would be as an alternative that would be considered in conformance with all applicable laws, including CEQA and the Porter-Cologne Act. (Resolution 2018-0059, whereas ¶ 21.b & resolved ¶ 7.) The State Water Board staff is releasing an environmental analysis of various alternatives, including the VA alternative, in the upcoming Staff Report for the Sacramento/Delta update to the Bay-Delta Plan. The public, Complainants, VA parties, and others will have an opportunity under state and federal public participation laws to comment on the legal, technical, and policy merits of the alternatives, including a VA alternative. The State Water Board has made no determinations as to whether it would approve the submitted proposal as an alternative form of implementation in the Bay-Delta Plan. At bottom, the VA process that is composed of and driven by other entities does not form the basis of a cognizable Title VI claim against the State Water Board.

In fact, at the first stage at which the State Water Board does play a role – in considering the VA as one of several alternatives – the Board will oversee an inclusive process as required under state law. The State Water Board intends to include the VA proposal in the public release of its Staff Report for the Sacramento/Delta Bay-Delta Plan update as part of its transparent, public process that will allow interested parties, including Complainants, the opportunity to review and comment on proposed alternatives, including both the Staff Framework proposal of unimpaired flows, and the VA proposal. Accordingly, the State Water Board’s public process will create the opportunity for Complainants and the public to weigh in directly on any VA proposal before the Board takes any action. Thus, the only VA-related process over which the Board has control will *ensure* the sought transparency and space for Complainants to participate as opposed to hindering it. These processes commenced earlier this year with a preliminary, draft update to a scientific basis report assessing the VA,³³ which will be updated and finalized as part of the impending staff report.

³² See text, *supra*, footnotes 4-5.

³³ https://www.waterboards.ca.gov/public_notices/comments/docs/2023/notice_va_sbr.pdf.

D. Freshwater and Estuarine Harmful Algal Blooms (FHABs)

Finally, Complainants assert that they are disparately impacted by the State Water Board's alleged actions or inactions because of FHABs. FHABs, defined as an overgrowth of cyanobacteria or eukaryotic algae, occur throughout California inland waters. As stated on the State Water Board's Surface Water Ambient Monitoring Program (SWAMP) web page, the occurrence of FHABs is a pernicious challenge in California dating back almost 100 years. FHABs:

continue to occur in lakes, reservoirs, and rivers throughout the state and during all months of the year. Blooms occur in high elevation lakes in the Sierra Nevada down to coastal estuaries, where cyanotoxins are exported into the marine environment. They also occur in sensitive desert landscapes where water is already a scarce resource. In parts of the state, environmental conditions, particularly drought conditions, promote cyanobacterial blooms that persist through the winter, making FHABs a year-round issue.³⁴

1. Background and FHABs Program Inception

FHABs are negatively impacting beneficial uses in California surface waters, including drinking water, recreation, tribal and cultural practices/uses, agriculture, and aquatic life. The degradation of these uses has broad and sustained economic impacts. Nutrient pollution, hydromodification, and physical habitat alteration that occur through human activities are the principal drivers, exacerbated by climate change through warming, higher CO₂ levels, and changing precipitation regimes. So far, there does not appear a single or simple solution to prevent FHABs.

Moreover, little is understood about the extent of FHAB risks to core beneficial uses because many inland surface waters are not routinely monitored for these impacts. Severe and chronic FHAB impacts have been documented in communities in the Klamath River, Clear Lake watersheds, Central Coast, Central Valley, and Inland Empire, among others. Additionally, the Board recognizes that FHAB impacts compound other adverse conditions in tribal communities and economically disadvantaged communities, including limited access to recreational opportunities, clean water, adequate sanitary infrastructure, health care, and affordable and safe housing.

Until 2016, there were no organized efforts by the State Water Board to address FHABs through new or existing programs. To begin addressing the issue of the increasing occurrence and prevalence of FHABs in surface waters, the Water Boards' SWAMP developed the FHAB Strategy. SWAMP also began coordinating efforts and temporarily diverted resources in 2016 from existing SWAMP programmatic areas to address

³⁴ See https://www.waterboards.ca.gov/water_issues/programs/swamp/freshwater_cyanobacteria.html.

FHABs. SWAMP's effort that began in 2016 accomplished several key milestones that have enabled the State Water Board to begin protecting public health by informing citizens of risks associated with FHABs and identifying water quality conditions degraded by FHABs. Although an improvement from past conditions, the State Water Board's initial effort was not formally staffed or funded and lacked support to fully address the complexity and growing prevalence of FHAB incidents across the state.

Governor Newsom signed Assembly Bill 834 (AB 834) on September 27, 2019, requiring the State Water Board to establish a Freshwater and Estuarine Harmful Algal Bloom Program to protect water quality and public health from FHABs. The fiscal year 2020/2021 budget act authorized five new staff positions and \$750,000 in annual contracting funds. The staff positions were filled by June 2021 and are distributed among the State Water Board (2 positions) and one position each at the North Coast Water Board, the Lahontan Water Board, and the Central Valley Water Board. These positions provide the initial resources for effective regional incident response, data collection, coordination with relevant agencies, advisory posting, and communication of public and environmental health data. The other six Regional Water Boards voluntarily respond to FHAB incidents when they are able, although it often impacts other priority Water Boards programs and projects.

2. State Water Board FHABs Initiatives

The State Water Board is also supporting novel efforts to partner with local community organizations, including one of the Complainants, to mitigate the risks of FHABs. In April 2021, staff from the State Water Board's Office of Information Management and Analysis (OIMA) supported the development of and judging of a hackathon event organized by Restore the Delta on the topic of FHABs. The event featured students in the K-12 grades and asked them to address the challenge of FHABs using technology and data. This partnership between OIMA and the organizers persists to this day. In 2022 and 2023, the FHAB program staff led public workshops to educate and train Restore the Delta staff to monitor for FHABs in local waterways. Prior to this time, the FHAB Program hosted in-person and web-based training with other organizations that manage recreational sites in the Delta; these organizations included East Bay Regional Parks, State Parks, marinas, and participating county environmental health departments. Participants that were willing to partner with the FHAB Program were provided sampling supplies and kits, as well as some funding to cover laboratory testing of their sampling at the state contracted laboratory in Sacramento. Likewise, the FHAB Program has been printing durable health advisory signs and distributing them annually to local managers and health departments through the California CyanoHAB Network, a workgroup under the Water Council.

In addition, the FHAB Program has been updating and modernizing the database that is used to track and respond to FHABs in California. This process has included developing partnerships with The Internet of Water, The Commons, California Native American tribes, and non-governmental organizations to develop a process to ingest non-state

FHAB monitoring data into the State Water Board's FHAB database. The partnership developed a framework that has the following four recommendations:

1. Implement a cost-effective, tiered process for gathering data that considers the capacity of the partnering California Native American tribes and community science organizations;
2. Improve how data are accessed and used by external partners and the public through the development of data products (e.g. interactive dashboards) that better communicate the status of reported FHABs in California and the levels of risk associated with associated FHAB data;
3. Create an open FHAB data framework that offers the ability to export data in a machine-readable format; and
4. Develop alert systems that notify participating members of the public on FHAB events.³⁵

Furthermore, the State Water Board manages the Harmful Algal Bloom Reports Map. The map displays locations where FHABs are reported through the online report form or from water monitoring data that is submitted to the Water Boards. Reports can come from freshwater, estuarine, or marine locations. Voluntary on-line submitted reports may include suspected bloom locations that are later verified as not a bloom. Updates based on investigations are noted on the map.³⁶

All these actions show on-going efforts by the State Water Board to protect the public from the adverse effects of FHABs, but the ultimate goal for the Water Boards is to minimize the formation of FHABs in the first instance.

3. Bay-Delta Plan Actions and Uncertainties Regarding FHABs

Despite this uncertainty and complexity, the State Water Board is actively working on multiple fronts to address FHABs issues in the Delta, as well as statewide. With respect to the Bay-Delta Plan, the actions to complete the Sacramento/Delta update (which analyzes Sacramento River and Delta tributary inflows, Delta outflows, and other provisions) and to implement the 2018 LSJR/SD directly implicate FHABs. As part of these processes, the State Water Board is evaluating and considering how Delta FHABs may be affected by different alternatives for updating and implementing the Bay-Delta Plan and actions that should be taken to reasonably protect beneficial uses of

³⁵ <https://internetofwater.org/wp-content/uploads/2020/09/FHAB-Data-Ingestion-Model-Recommendation-Document1.pdf>; see also,

https://www.waterboards.ca.gov/resources/oima/tribal_water_data_initiatives/.

³⁶ https://mywaterquality.ca.gov/habs/where/freshwater_events.html.

water. Specifically, the upcoming draft staff report for the Sacramento/Delta update assesses the possible impacts of different alternatives on FHABs as well as possible mitigation measures and actions that the State Water Board will pursue with other agencies, Delta communities, California Native American tribes, and other interested parties to address FHAB concerns in the Delta. As discussed earlier, the draft staff report will be subject to extensive public processes, including workshops and other outreach with California Native American tribes, disadvantaged communities, Delta communities, and others to explain the draft staff report, and receive public input. That public input will inform the final staff report's evaluation of FHABs issues in the Delta.

The draft staff report specifically documents current understanding of the complex environmental drivers of FHABs but recognizes that there are substantial gaps in Delta FHAB monitoring, data, and predictive models that presently preclude understanding of possible methods to effectively manage FHAB formation.³⁷ Although it is understood that FHAB occurrence is related to flow such that FHABs can benefit from lower flows and higher residence times, the relative importance of flow versus other drivers, such as climate change, is unknown. In addition, there is presently not a predictive or mechanistic model of Delta FHAB occurrence to effectively evaluate different management options for preventing or mitigating FHABs.³⁸ Simply put, the science supporting effective management options is still developing.

Possible alternatives to updating the Bay-Delta Plan would increase Delta inflow and outflow during winter and spring. Ongoing research is investigating whether higher winter and spring flows could potentially lead to some reduction in Delta FHABs by increasing spring scouring flows that could reduce the density of overwintering cyanobacterial cells in the sediment that are believed to seed summer and fall blooms.³⁹ However, with higher winter and spring flows there would also be less inflow to the Delta expected in the summer and fall and less exports of water in the southern Delta that would increase residence times. Current inflows to the Delta in the summer and fall are frequently in excess of unimpaired flows (flows without water diversions) as water is conveyed through the Delta for export. Higher inflows in the winter and spring would reduce water supplies available for exports in the summer and fall that could to some degree exacerbate summer and fall FHABs by increasing residence time during those seasons. However, more information is needed to more accurately predict how possible alternatives for updating the Bay-Delta Plan, and other possible management options within the Water Boards' authorities, may affect Delta FHABs.

Similarly, the State Water Board is presently preparing the environmental analysis to implement the flows required by the 2018 LSJR/SD update. That effort will consider

³⁷ Kudela, R.M., M.D.A. Howard, and S. Monismith. 2023. Status Trends, and Drivers of Harmful Algal Blooms Along the Freshwater-to-Marine Gradient in the San Francisco Bay-Delta System. *San Francisco Estuary and Watershed Science* 20(4).

³⁸ *Ibid.*

³⁹ Preece, E.P., T.G. Otten, and J. Cooke. In prep report. Mapping benthic overwintering *Microcystis* sp. within the Sacramento-San Joaquin Delta.

further impacts of altered flow regimes in the San Joaquin tributaries on FHABs in the Delta. Potential FHABs formation in the South Stockton community, a community of concern identified in the Complaint, would most directly be affected by implementation of the 2018 LSJR/SD update, which already requires enhanced flows from the main tributaries to the lower San Joaquin River. As with FHABs formation being analyzed in the Sacramento/Delta Update and staff report, there is uncertainty. More information is needed to better predict how possible alternatives for implementing the required increased flows could affect the formation of FHABs and a need to ensure that increased flows at certain times of year will not exacerbate FHABs formation at other times.

The State Water Board has contracted with the U.S. Geological Survey (USGS) to identify FHABs monitoring needed to answer management questions. The State Water Board is also using available funding to conduct additional monitoring and is working with the Central Valley and San Francisco Bay Water Boards and other state and federal agencies to coordinate monitoring and investigate where monitoring gaps may exist and possible mechanisms to fill those gaps. The draft staff report also identifies that the State Water Board will work with the Delta Stewardship Council to convene a collaborative group comprised of divisions and offices at the State Water Board, the Central Valley and San Francisco Bay Water Boards, DWR, USGS, California Native American tribes, Delta community groups, and others to work together on efforts related to FHABs in the long term. The goal of this activity will be to ensure that information is developed to understand FHABs and to inform available management actions, and that the knowledge and perspectives of affected stakeholders are part of that process.

As recognized above, the State Water Board actions are not in isolation. They are joined with actions by the Central Valley and San Francisco Bay Water Boards, which are working not only to predict, monitor, and warn about FHABs, but also consider regulatory actions that would address waste discharges and other water quality factors besides reduced flow that contribute to FHABs formation. Fundamentally, it is the evolving science, uncertainty about potential mitigation actions, and myriad factors contributing to FHABs formation (including their presence in unaltered water bodies and increasing prevalence in a changing climate) that has delayed concrete regulatory actions to prevent FHAB formation.

Complainants assert that FHABs interfere with their ability to perform cultural, religious, and subsistence practices in the Bay-Delta and call for the State Water Board to develop FHAB "criteria" for the Bay-Delta Plan. The State Water Board and its partner agencies are working to use the best available science and advance the state of science to better understand and manage FHAB formation. Complainants fail to establish how the State Water Board's alleged actions or inactions regarding FHABs in the Bay-Delta watershed, an overwhelming statewide problem and a growing national problem, disproportionately impact Complainants based on their race, color, or national origin. In fact, too-early action that fails to consider the potential impacts of shifting the timing or location of FHAB formation may magnify the impacts on these communities or others.

E. Additional Procedural Nondiscrimination Safeguards

OECRC's second inquiry in its August 8, 2023 letter seeks assurance that the State Water Board "has in place and is appropriately implementing procedural safeguards ... to comply with ... general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to the Board's services, programs, and activities ... consistent with Title VI and other federal civil rights laws, including EPA's implementing regulation at 40 C.F.R. Parts 5 and 7."

The Water Boards have zero tolerance for discrimination of any kind related to their activities, programs, and funding agreements. The Water Boards' Anti-Discrimination Policy and Guidance make clear that the Water Boards "may take corrective action in response to even a single incident of discrimination or harassment related to a Water Boards' activity, program or funding agreement."⁴⁰ The State Water Board has in place policies and procedures for the Water Boards, through both the Office of Public Participation (OPP) and the Equal Employment Opportunity (EEO) Office, to provide all employees and members of the public full and equal accommodations and access to the Water Boards' facilities, meetings, and services.⁴¹ These policies and procedures are in place to prohibit discrimination on the basis of all federally and state-protected characteristics and ensure equal access to all Water Boards' activities, programs and funding agreements. These policies apply, to the fullest extent authorized by law, to entities, including contractors, subcontractors, or grantees that the Water Boards utilize to provide benefits and services to members of the public. To this end, the State Water Board conditions all loans, grants, and other financial assistance on compliance with a multitude of social policy authorities including Title VI and other federal civil rights laws.⁴²

In addition to the Water Boards' legally required safeguards against discrimination, the Water Boards' outward-facing⁴³ Anti-Discrimination Policy and Guidance expresses the Water Boards' commitment to go above and beyond existing non-discrimination obligations. Some examples of this include the steps described above taken to ensure full and transparent public participation in the Bay-Delta Plan process, along with the Water Boards' practice of "providing appropriate program and meeting materials in languages other than English, where applicable, and providing services to promote environmental justice concerns and assisting economically disadvantaged communities." The Water Boards, upon request, provide appropriate aids and services

⁴⁰ https://www.waterboards.ca.gov/docs/anti_discrimination_policy_guidance.pdf.

⁴¹ See https://www.waterboards.ca.gov/about_us/public_participation/participation_and_accommodation/.

⁴² https://www.waterboards.ca.gov/water_issues/programs/grants_loans/srf/docs/forms/ap_plicinstructions.pdf.

⁴³ The Water Boards have a separate Anti-Harassment Policy administered through the EEO Office for purposes of providing a work environment free from harassment, discrimination, and retaliation, that applies to all Water Boards employees, job applicants, vendors, customers, and other persons interacting with the Water Boards.

for qualified persons with disabilities, including qualified sign language interpreters, documents in Braille, and other ways of making information and communications accessible to people who have speech, hearing, or vision impairments. The State Water Board also, through its dedicated Office of Public Participation, has a robust interpretation and translation program.⁴⁴ All the State Water Board's meeting agendas include a notification for how to request language services and accessibility options for hearing impaired persons.⁴⁵ In addition, all State Water Board meeting agendas and most notices are provided in Spanish.⁴⁶ Pursuant to California law, the State Water Board only meets in accessible locations that are non-discriminatory. (Gov. Code, § 11131.) All these public processes and safeguards are in addition to the tribal consultation and tribal engagement processes identified earlier.

In addition, if a member of the public has requested language services and did not receive them, the State Water Board provides a process for members of the public to submit a language services complaint.⁴⁷ The form to submit a language services complaint is located on main Water Boards website and is available in English, Spanish, Simplified Chinese, Korean, Vietnamese, and Punjabi. In addition to submitting a language access complaint, members of the public can also use this form to request written translation of materials, oral interpretation services for a meeting, sign language interpretation, or request a phone call with an employee who speaks their language. Requests are responded to within 24 hours of receipt.

Although the Complaint focuses on the Bay-Delta Plan update, the second investigation area speaks generally to the State Water Board's nondiscrimination safeguards and opportunities to ensure meaningful access to the Board's activities. In this respect, the State Water Board has also begun implementing AB 2108 (2022, Rivas) which became operative January 1, 2023. In relevant part, the law amended the Water Code to require "[o]utreach to identify issues of environmental justice needs to begin as early as possible in [State Water Board] or [Regional Water Board] planning, policy, and permitting processes" and require the State Water Board to:

[e]ngage in equitable, culturally relevant community outreach to promote meaningful civil engagement from potentially impacted communities of proposed discharges of waste that may have disproportionate impacts on water quality in disadvantaged communities or tribal communities and ensure that outreach and

⁴⁴ See https://www.waterboards.ca.gov/about_us/public_participation/.

⁴⁵ See, e.g., https://www.waterboards.ca.gov/board_info/agendas/2023/sep/09_06-07_2023_agenda_links.pdf at p. 2 (current Board meeting agenda identifying language services and accessibility options).

⁴⁶ See, e.g., https://www.waterboards.ca.gov/board_info/agendas/2023/sep/09_06-07_2023_agenda_links_sp.pdf.

⁴⁷ https://forms.office.com/pages/responsepage.aspx?id=JWoY_kl95kGZQQXSKB02weK0qg8yprhDkaNWK3voyE5UM0dPUTEyRk03QIBBFq1VUo3MjIUUTgwNC4u.

engagement shall continue throughout the waste discharge planning, policy, and permitting processes.

(Wat. Code, § 189.7, subd. (a)(1).) The Office of Public Participation and Office of Chief Counsel have been assisting the Water Boards in implementing these new requirements which will promote greater access to Water Boards' activities. While section 189.7 is not applicable to the Bay-Delta Plan update, because the Bay-Delta Plan does not regulate discharges of waste or propose discharges of waste, the State Water Board has nonetheless commenced equitable and culturally relevant community outreach through its tribal consultations and environmental justice listening sessions. Further, the State Water Board believes its framework is consistent and appropriate with the Board's own commitments to analyze "through a racial equity lens; asking impacted Black, Indigenous, and people of color communities how the actions we are considering may affect them; and incorporating this feedback into our decision-making processes." (Resolution 2021-0050, Resolved ¶ 11(e).) These activities will be on-going through the amendment and adoption processes with the goal of promoting meaningful civic engagement and action aligned with State Water Board Resolution 2021-0050 and the REAP.

II. The Title VI Complaint Should Be Dismissed

The foregoing demonstrates the State Water Board's acknowledgment of the wide-ranging, significant impacts associated with low flows, native fish decline, and FHABs in the Bay-Delta watershed. At the same time, the foregoing also shows the State Water Board's purposeful, multipronged effort to address these impacts and their causes. No actions of the State Water Board support a claim of intentional discrimination against the Complainants or any protected class; the Complaint acknowledges as much. To the extent any Title VI claim may lie against the State Water Board it must be based on a claim that State Water Board actions caused harm that disproportionately impacts the Complainants. That is not the case.

USEPA is well-versed in applying its External Civil Rights Compliance Office Compliance Toolkit (Toolkit),⁴⁸ and the State Water Board accepts that it provides an appropriate lens to investigate disparate impact claims. At the same time, the State Water Board notes the Toolkit at no time discusses the situation presented in this Complaint: a recipient of federal funds is diligently undertaking a high-priority, wide-ranging, quasi-legislative regulatory action to address the proclaimed harms and because of circumstances associated with complexity and resources, the action is delayed. Finding a Title VI violation in the context of these actions and associated scientific and legal challenges would bring a nearly boundless range of delayed agency actions by USEPA and state and local recipients within the realm of Title VI or analogous antidiscrimination laws and policies. Put simply, any delay of action by the

⁴⁸ https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

State Water Board does not amount to a “policy or practice” that has a sufficiently adverse and disproportionate effect based on race, color, or national origin. (USEPA Toolkit, at p. 8.)

A. Necessary Elements of Disparate Impact Claim

USEPA’s Toolkit identifying the essential elements for establishing a Title VI violation based on disparate impact. USEPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;[]
- (3) establish disparity;[] **and**
- (4) establish causation.[]

(Toolkit, at p. 8 [citations omitted, original emphasis supplied].) To find disparate impact, all four of the elements must be satisfied. USEPA must find the preponderance of the evidence supports each finding. (Toolkit FAQs, at p. 3.)

1. Any Delays Updating the Bay-Delta Plan, Despite Persistent Extraordinary Efforts by the State Water Board, Do Not Constitute a Policy or Practice Amenable to Title VI Relief

The relevant federal Title VI materials and caselaw do not support a finding that any State Water Board delays constitute a policy or practice necessary to establish the first element of Title VI claim. USEPA’s Toolkit addresses one instance of inaction, and it was the abdication of local sheriff’s department responsibility to provide language access procedures for persons with limited English proficiency. (Toolkit, at p. 9 [citing *U.S. v. Maricopa County, Ariz.* 915 F.Supp.2d 1073, 1081 (D. Ariz. 2012)].) There, the court found the sheriff’s department denied any responsibility to provide language assistance, despite clear federal agency requirements to do so. (*U.S. v. Maricopa County, supra*, at p. 1080). The U.S. Department of Justice (USDOJ), Title VI Manual, similarly relies on the *Maricopa County* case as its lone example of inaction supporting a Title VI complaint. (USDOJ Civil Rights Division, Title VI Legal Manual, § VII, at p. 12).⁴⁹

While the State Water Board agrees with USDOJ’s characterization that “*inaction* can exert disproportionate adverse effect” (*ibid.*), the Board’s conduct cannot be characterized as inaction and the delays in updating the Bay-Delta Plan are not a policy or procedure. First, the State Water Board’s policy and ongoing procedure is in fact to update the Bay-Delta Plan as expeditiously as possible, in a scientifically and legally defensible manner. The Bay-Delta Plan was last updated in 2018. Since that time, the State Water Board has devoted significant program and legal staffing to further updates

⁴⁹ <https://www.justice.gov/media/1121301/dl?inline>.

of the Bay-Delta Plan and implementation of LSJR/SD update. The Bay-Delta Plan update and implementation is a high-priority action item within the State Water Board's strategic workplans.⁵⁰ Further, as demonstrated above in "Efforts to Increase Outreach to California Native American Tribes and Environmental Justice Representatives and Tribal Beneficial Uses" section, the State Water Board has invested significant resources over the last eight months to consult with California Native American tribes and environmental justice communities in advance of the public release of the environmental analysis supporting the Bay-Delta Plan update. The State Water Board's actions in this regard, even though not yet complete, show a purposeful policy of updating the plan.

Second, these actions stand in stark contrast to the lone inaction example provided in the Toolkit and USDOJ Manual. Unlike the Maricopa County Sheriff, the State Water Board is not denying an obligation and failing to implement a clear Title VI obligation. Instead, the State Water Board has acknowledged the systemwide harms for native fish, prioritized further Bay-Delta Plan updates to address those harms, begun implementing actions for its 2018 LSJR/SD update, is actively consulting with California Native American tribes and BIPOC, disadvantaged, and environmental justice communities, and is addressing FHABs through a multitude of regulatory actions while continuing to develop the science for meaningful control. The State Water Board's practices and policies are to update and implement the Bay-Delta Plan, and to do so in a manner that is scientifically and legally justified and that is the product of robust stakeholder engagement. Doing so will cause delay in the ultimate adoption of a new Bay-Delta Plan, but the Board's conduct is not the type of "inaction" recognized under Title VI.

2. The Impacts of Reduced Flows Affect a Range of Ecosystem Functions and People and Do Not Establish Disparity

To support a disparity finding, USEPA analyzes whether a disproportionate share of the harm is borne by individuals based on a protected status. (Toolkit, pp. 8, 18.) The harms cited by Complainants are concrete, but the harms affect populations throughout the Bay-Delta watershed and nearly the entire State of California. (See above, "The Bay-Delta Plan Update" and "The Diversity of Interests Impacted by Declining Native Fish and Engaged in the Bay-Delta Proceedings.") The State Water Board does not deny that the harms to Complainants may even be acute. But Complainants fail to demonstrate that the harms are uniquely or disproportionately borne by them or on members of any particular race, color, or national origin group. Rather, those harms are felt regionwide and nearly Statewide, and those harms are among the reasons the State Water Board has undertaken the expansive Bay-Delta Plan update process – a process that includes structured extensive engagement with the California Native American

⁵⁰ See https://www.waterboards.ca.gov/board_info/priorities/ (providing the last four Strategic Work Plans and identifying completing the Bay-Delta Plan update and implementing the LSJR/SD amendments as a highest-priority action item—red asterisks, § 3.6.1).

tribes and BIPOC, disadvantaged, and environmental justice communities in advance of public release of the Bay-Delta update environmental analysis. This engagement is designed to ensure the State Water Board centers its decision-making around these harms.

3. The Impacts of Reduced Flows Are Not Caused by Actions of the State Water Board

USEPA's Title VI regulations prohibit criteria or methods of administering programs "which have the effect of subjecting individuals to discrimination . . ." (40 C.F.R. § 7.35(b).) This language requires that there be a causal connection between the actions of the State Water Board and the alleged discriminatory impacts. (*New York City Environmental Justice Alliance v. Giuliani* 214 F.3d 65, 69 (2d Cir. 2000).) Here, there is no causal connection.

Fundamentally, reduced stream flows and rising temperatures in California's rivers and streams reflect a changing climate and more than 160 years of development. These changes have had deleterious impacts on native fish populations and contributed to increasing FHAB formation throughout California. In turn, these impacts have affected California Native American tribes and BIPOC, disadvantaged, and environmental justice communities, recreational and commercial fishers, and millions of other Californians. The State Water Board acknowledges these harms and is working to ameliorate them through the Bay-Delta Plan update and other FHABs activities, including in partnership with other state, local, and federal agencies. However, the State Water Board's actions, certainly not those identified in the Complaint or within the 180-day-window for a Title VI complaint,⁵¹ did not cause these conditions and the attendant harms.

To the extent the lengthy update process for the Bay-Delta Plan may have allowed some of these harms to continue, it is not because the Board has intentionally delayed the update. The update remains a top priority for the State Water Board as set forth above. Further, the update process itself is not the cause of the underlying harms.

B. The Complexity of the Proceeding and Need to Provide a Scientific and Legally Defensible Bay-Delta Update Provide a Substantial Legitimate Justification for Any Delays

Title VI caselaw and USEPA's Toolkit recognize that even if the evidence supports a prima facie case of adverse disparate impact, Title VI is not violated where there is a substantial legitimate justification. (Toolkit, Ch. 1, at p. 9 [citations omitted].) The substantial legitimate justification can rebut a disparate impact claim. (*Georgia State Conference of Branches of NAACP v. State of Ga.* 775 F.2d 1403, 1417 (11th Cir. 1985).) As stated by USEPA, "[i]f the evidence establishes a prima facie case of adverse disparate impact, ... [US]EPA must then determine whether the recipient has

⁵¹ 40 C.F.R. § 7.120(b)(2).

articulated a ‘substantial legitimate justification.’” (Toolkit, at p. 9.) Further, “[t]he analysis requires balancing recipients’ interests in implementing their policies with the substantial public interest in preventing discrimination.” (*Ibid.*) The inquiry is fact-specific and USEPA “will generally consider whether the recipient can show that the challenged policy was ‘necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.’” (*Ibid.*)

The State Water Board has a substantial legitimate justification in taking the necessary time to develop a scientifically and legally defensible Bay-Delta Plan update. The Board’s policy is to update the Bay-Delta Plan, and it is among the Board’s highest priorities as identified above. The Complainants share that interest. The area of disagreement is the length of time the update is taking. However, the State Water Board has to justify the Bay-Delta Plan update and ultimately defend it in court against inevitable litigation. That takes time and resources.

The State Water Board must ensure that the Bay-Delta Plan update complies with the Clean Water Act, Porter-Cologne Act, CEQA, and public participation processes. Each of these requires extensive scientific and environmental analysis, and the Porter-Cologne Act requires substantial consideration of economic and other societal factors. (Wat. Code, § 13241.) The scientific basis for the Bay-Delta Plan update must also undergo independent scientific peer review. (Health & Saf. Code, § 57001.) These analyses are occurring in an extraordinarily large, diverse, interconnected, and complex watershed as demonstrated in the above sections on “The Bay-Delta Plan Update” and “The Interplay Between the Bay-Delta Ecosystem and California Water Supply Infrastructure.” As discussed in the “The Regulatory Landscape” section, the 2018 LSJR/SD update required a voluminous administrative record and modeling, and resulted in litigation so complex that trial is only now commencing, nearly five years after State Water Board action.

Acting lawfully and appropriately is a “legitimate, important, and integral” part of the State Water Board’s responsibilities. Taking the time to act lawfully and appropriately is necessary to satisfying those responsibilities. Given the scientific and legal complexities, the significance of the interests affected (including both the harms to native fish and potential impacts on California’s water supplies), and the inevitable litigation, the State Water Board has a substantial legitimate interest in taking the necessary time to develop a lawful Bay-Delta Plan update.

C. Other Areas of Investigation Do Not Warrant Title VI Relief Against the State Water Board

Remaining issues raised in the Complaint and USEPA’s acceptance do not support any Title VI violation by the State Water Board. First, as demonstrated above in both the “Response to Investigation Area 1” and “Voluntary Agreement Process” sections, the allegations surrounding VA development and alleged exclusion of groups from the VAs is not attributable to the State Water Board. The VAs are not a State Water Board

process. The State Water Board is not a party to the VAs. The State Water Board is now thoroughly analyzing the VAs as one alternative in its impending staff report. To the extent any Complainants or other protected group did not participate in the VA's development, the State Water Board's Bay-Delta Plan update will provide the State Water Board, Complainants, and others a transparent, full, public process to comment on and consider the proposed VA alternative. Quite simply, the VA process is not an action of the State Water Board, and the VA process cannot form the basis of an adverse Title VI finding against the State Water Board.

Second, the State Water Board has robust public participation procedures and procedural safeguards that comply with Title VI and USEPA nondiscrimination regulations. These safeguards exceed the requirements of USEPA's regulations in Parts 5, 7, and 25 of Title 40 of the Code of Regulations. The basic elements of the practices and procedures, especially as applied to the Bay-Delta Plan update, are set forth above in the sections entitled "Response to Investigative Area 2," "Condemning Racism, Xenophobia, Bigotry, and Racial Injustice," "Efforts to Increase Outreach to California Native American Tribes and Environmental Justice Representatives and Tribal Beneficial Uses," and "Additional Procedural Nondiscrimination Safeguards." These safeguards include not only non-discriminatory public participation options, but also consultation with California Native American tribes that remains on-going, targeted engagement with BIPOC, disadvantaged, and environmental justice communities, language services, opportunities to file complaints regarding alleged violations of language services or nondiscrimination policies, but also a continuing commitment to bring an environmental justice lens to State Water Board decision-making. Collectively, these practices, procedures, and actions provide an example of a robust, nondiscriminatory, inclusive decision-making framework in full compliance with Title VI requirements.

Conclusion

The State Water Board urges the OECRC to recognize that the State Water Board is making appropriate progress to update the Bay-Delta Plan that specifically includes affirmative, enhanced outreach to California Native American tribes and BIPOC, disadvantaged, and environmental justice communities in the Delta, and that there is no evidence that the State Water Board has engaged in intentional or disparate treatment of Complainants in violation of Title VI. In fact, the State Water Board has demonstrated a robust ongoing commitment in its programs and actions to advance justice for people of all incomes, races, and cultures and to ensure that its actions do not encourage, entrench, subsidize, or result in racial discrimination or perpetuate the repercussions of past discrimination. Contrary to Complainant's contentions, the Board is working diligently to complete appropriate, legally defensible actions in the Bay-Delta. Ultimately, the State Water Board endeavors to complete these Bay-Delta Plan updates to protect water quality and beneficial uses of water in the watershed, informed by all interests and stakeholders, grounded in science and law, and supported by a record that allows it to withstand inevitable judicial challenges.

The State Water Board also takes anti-discrimination obligations seriously in all activities and programs, and has put in place and implemented a number of civil rights and related policies and procedures to that end.

For these reasons the State Water Board requests that OECRC conclude that the complaint should be dismissed with no adverse findings of non-compliance. Regardless, the State Water Board welcomes the opportunity to meet with USEPA and the Complainants as part of the OECRC informal resolution agreement-plus (IRA+) process.

Sincerely,



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