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Common Response 17: Public Trust

Overview

This Common Response addresses the common themes and topics raised in public comments on the Delta Conveyance Project (project) Draft Environmental Impact Report (EIR) related to public trust. These themes include the California Department of Water Resources' (DWR) duty to take the public trust into account in considering whether to approve the proposed project or a project alternative; the relationship between the State Water Resources Control Board (State Water Board) 2010 report *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (2010 Flow Criteria Report) and public trust considerations; the relationship between public trust considerations and the California Environmental Quality Act (CEQA) project objectives and the selection of project alternatives; and the need to reconsider existing water quality objectives or DWR's existing water rights. To address the comments on these themes and topics, this Common Response provides an overview of the common law public trust doctrine, which is discussed more fully in Chapter 33, *Other CEQA-Required Analysis*, and further discusses the DWR's public trust considerations associated with the proposed project.

General Overview of Public Trust Law

The guiding principle of California's water law and policy is contained in Article X, Section 2 of the California Constitution, which provides, in relevant part:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.¹

This section requires that all uses of the state's water, including public trust uses, be both reasonable and beneficial.² This constitutional provision places a significant limitation on water rights by prohibiting the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water.³ In administering the state's water resources, state agencies must act "with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."⁴

National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 (*National Audubon*) is the seminal case articulating the common law public trust doctrine in California. There, the Supreme Court held that the State, as represented by the State Water Board, holds the waters of the State in trust for the benefit of all Californians, and therefore "[t]he state has an affirmative duty to take the public trust

¹ California Constitution, Article X, § 2.

² *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 ["All uses of water, including public trust uses, must now conform to the standard of reasonable use."] (*National Audubon*).

³ California Constitution, Article X, § 2.

⁴ *Ibid.*

1 into account in the planning and allocation of water resources, and to protect public trust uses
2 whenever feasible.”⁵ In addition to the “traditional triad” of public trust uses—navigation,
3 commerce and fishing—the California Supreme Court explained that public trust includes
4 “environmental and recreational values.”⁶ But the doctrine does not require state agencies with
5 public trust obligations over planning and allocation of water resources to give greater weight to
6 public trust values than other competing uses of such resources. The Supreme Court determined
7 that to protect the “prosperity and habitability of much of” California, the State Water Board has the
8 discretion to “grant nonvested usufructuary rights to appropriate water even if diversions harm
9 public trust uses.”⁷ Accordingly, in the *State Water Resource Control Board Cases* (2006) 136
10 Cal.App.4th 674, 778, the court held that the State Water Board was required to balance competing
11 interests to determine what level of protection for public trust resources was “feasible.”⁸ What
12 constitutes feasible protection for public trust resources is a determination made by the responsible
13 state agency after balancing public trust and competing interests and considering its statutory
14 authority and responsibilities.⁹

15 While “the public trust doctrine operates independently of CEQA[.]”¹⁰ requirements imposed by
16 regulatory schemes like CEQA can often satisfy the State’s obligations under the public trust
17 doctrine.¹¹ As demonstrated in this Common Response and in Chapter 33, DWR has exercised its
18 discretion to include public trust considerations in this EIR.

19 Public Trust Considerations Associated with the Proposed Project

20 As part of the proposed project and project alternatives, DWR is seeking a new point of diversion,
21 and is not seeking to increase the total quantity of water permitted for diversion under existing
22 DWR water rights. Diversions at the proposed north Delta intakes would be governed by new
23 operational criteria specific to these intakes, such as the fish screen approach velocity requirements,
24 bypass flow requirements, and pulse protection. These new criteria provide additional protections
25 to the fish species over and above the protections from the state-of-the-art positive barrier fish
26 screens included at the proposed intakes for the proposed project and the project alternatives.

27 DWR, as the lead agency, has gone to considerable lengths to address potential environmental
28 effects, and particularly those effects on public trust resources, of the proposed project and project
29 alternatives. The EIR provides sufficient analyses for DWR, as lead agency, to meaningfully consider
30 impacts on public trust resources and to make an informed decision on the proposed project.
31 Moreover, California Department of Fish and Wildlife and the State Water Board, as responsible
32 agencies, are expected to use the information in this EIR to consider the aspects of the proposed
33 project for which they are responsible and weigh the impacts of those aspects to satisfy their

⁵ *National Audubon, supra*, 33 Cal.3d at p. 446.

⁶ *Id.* at p. 425.

⁷ *Id.* at p. 426.

⁸ *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.* (2008) 166 Cal.App.4th 1349, 1369 [“[T]he public trust permits—indeed requires—the balancing of competing uses.”], quoting Stevens, *The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right* (1980) 14 U.C. Davis L.Rev. 195, 224.

⁹ *State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778–779 [explaining that “[w]hat is ‘feasible’ ... is a matter for the agency to determine” and rejecting that “conflicts between public trust values and competing water uses must, whenever possible, be resolved in favor of public trust protection”].

¹⁰ *World Bus. Acad. v. California State Lands Comm’n* (2018) 24 Cal.App.5th 476, 510.

¹¹ *Citizens for E. Shore Parks v. State Lands Com.* (2012) 202 Cal.App.4th 549, 577–578.

obligations under both the common law public trust doctrine and the statutory public trust doctrine.¹²

As discussed further in Chapter 33 of the EIR,¹³ DWR analyzed impacts on public trust resources in the environmental resource chapters of this EIR. The EIR proposes changes or alterations to the proposed project and project alternatives in the form of mitigation measures and compensatory mitigation to avoid or reduce most potential significant impacts of the proposed project and project alternatives, including all impacts on water quality, fish and aquatic resources, terrestrial biological resources, in-water recreational resources, and public lands, to a less-than-significant level.

Specifically, the EIR demonstrates that the proposed project and project alternatives as mitigated would not have any significant environmental effects with respect to the following resources.

- Flood Protection
- Hazards, Hazardous Materials, and Wildfire
- Groundwater
- Recreation
- Water Quality
- Public Services and Utilities
- Geology and Seismicity
- Energy
- Soils
- Air Quality and Greenhouse Gases
- Fish and Aquatic Resources
- Public Health
- Terrestrial Biological Resources
- Mineral Resources
- Land Use
- Growth Inducement

The EIR, however, concludes that the following 17 impacts would be significant and unavoidable for the proposed project and/or one or more of the project alternatives.

- Impact AG-1: *Convert a Substantial Amount of Prime Farmland, Unique Farmland, Farmland of Local Importance, or Farmland of Statewide Importance as a Result of Construction of Water Conveyance Facilities* (all project alternatives)

¹² *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 515 [courts look to statutes protecting wildlife to determine statutory public trust obligations of public agencies].

¹³ Delta Conveyance Project Draft EIR, Chapter 33, pp. 33-5–33-9.

- 1 • Impact AG-2: *Convert a Substantial Amount of Land Subject to Williamson Act Contract or under*
2 *Contract in Farmland Security Zones to a Nonagricultural Use as a Result of Construction of Water*
3 *Conveyance Facilities* (all project alternatives)
- 4 • Impact AES-1: *Substantially Degrade the Existing Visual Character or Quality of Public Views*
5 *(from Publicly Accessible Vantage Points) of the Construction Sites and Visible Permanent Facilities*
6 *and Their Surroundings in Nonurbanized Areas* (all project alternatives)
- 7 • Impact AES-2: *Substantially Damage Scenic Resources including, but Not Limited to, Trees, Rock*
8 *Outcroppings, and Historic Buildings Visible from a State Scenic Highway* (all project alternatives)
- 9 • Impact AES-3: *Have Substantial Adverse Impacts on Scenic Vistas* (all project alternatives)
- 10 • Impact CUL-1: *Impacts on Built-Environment Historical Resources from Construction and*
11 *Operation of the Project* (all project alternatives)
- 12 • Impact CUL-2: *Impacts on Unidentified and Unevaluated Built-Environment Historical Resources*
13 *Resulting from Construction and Operation of the Project* (all project alternatives)
- 14 • Impact CUL-3: *Impacts on Identified Archaeological Resources Resulting from the Project* (all
15 project alternatives)
- 16 • Impact CUL-4: *Impacts on Unidentified Archaeological Resources That May Be Encountered in the*
17 *Course of the Project* (all project alternatives)
- 18 • Impact CUL-5: *Impacts on Buried Human Remains* (all project alternatives)
- 19 • Impact TRANS-1: *Increased Average VMT Per Construction Employee versus Regional Average* (all
20 project alternatives)
- 21 • Impact AQ-5: *Result in Exposure of Sensitive Receptors to Substantial Localized Criteria Pollutant*
22 *Emissions* (all project alternatives)
- 23 • Impact AQ-6: *Result in Exposure of Sensitive Receptors to Substantial Toxic Air Contaminant*
24 *Emissions* (Alternatives 2a and 4a only)
- 25 • Impact NOI-1: *Generate a Substantial Temporary or Permanent Increase in Ambient Noise Levels*
26 *in the Vicinity of the Project in Excess of Standards Established in the Local General Plan or Noise*
27 *Ordinance, or Applicable Standards of Other Agencies* (all project alternatives)
- 28 • Impact PALEO-2: *Cause Destruction of a Unique Paleontological Resource as a Result of Tunnel*
29 *Construction and Ground Improvement* (all project alternatives)
- 30 • Impact TCR-1: *Impacts on the Delta Tribal Cultural Landscape Tribal Cultural Resource Resulting*
31 *from Construction, Operations, and Maintenance of the Project Alternatives* (all project
32 alternatives)
- 33 • Impact TCR-2: *Impacts on Individual Tribal Cultural Resources Resulting from Construction,*
34 *Operations, and Maintenance of the Project Alternatives* (all project alternatives)

35 None of the above significant and unavoidable impacts of the proposed project and/or project
36 alternatives constitute direct impacts on the “traditional triad” of public trust uses (navigation,
37 commerce, and fishing) or the protection of recreational and ecological values. However, DWR
38 recognizes that the significant and unavoidable impacts of the proposed project and/or project
39 alternatives may have indirect impacts on public trust values.

1 In consideration of the impacts of the proposed project and project alternatives on the public trust
2 and in recognition that DWR must preserve uses protected by the trust “so far as consistent with the
3 public interest[,]”¹⁴ DWR will consider the public interest in the proposed project and project
4 alternatives to “balance the diverse interests” associated with a project of this nature, prior to
5 making a decision on whether to approve the proposed project or project alternative.¹⁵

6 Under Governor Newsom’s leadership, California has proposed a broad new portfolio approach to
7 meeting California’s overall water supply challenges called the *California Water Resilience Portfolio*
8 (California Natural Resources Agency et al. 2020). One proposal within the overall portfolio is to
9 plan, permit, and build new diversion and conveyance facilities in the Delta.¹⁶ Here, the fundamental
10 purpose of the proposed project is to restore and protect the reliability of SWP water deliveries and,
11 potentially, CVP water deliveries south of the Delta, consistent with the State’s Water Resilience
12 Portfolio, which is why DWR is proposing to develop new diversion and conveyance facilities in the
13 Delta. The public interests in restoring and protecting the reliability of SWP water are vast. SWP
14 deliveries provide water to approximately 27 million Californians and 750,000 acres of irrigated
15 farmland (California Department of Water Resources 2021:1). Other SWP functions include flood
16 management, water quality maintenance, power generation, recreation, and fish and wildlife
17 enhancement.

18 While the provision of water to farmland and approximately two-thirds of the state’s population is
19 critical, the Delta’s public trust values are equally important to the state. The detailed evaluation of
20 the proposed project’s potential environmental impacts and the extensive environmental
21 commitments, best management practices, and mitigation measures were crafted in consideration of
22 the Delta’s public trust values. The mitigation measures set forth in the EIR will reduce the above-
23 listed significant and unavoidable impacts of the proposed project to the extent feasible, but no
24 feasible mitigation measures or alternatives have been identified that avoid or substantially lessen
25 these impacts. Should DWR exercise its discretion to certify the EIR and approve the proposed
26 project or a project alternative, DWR will prepare CEQA findings, a CEQA statement of overriding
27 considerations, as well as public trust findings. The public trust findings would consider whether
28 public trust values can be further protected consistent with the public interests that the proposed
29 project and project alternatives seek to advance.

30 The administrative process associated with this proposed project and the thorough evaluation being
31 undertaken by DWR is in stark contrast to the facts in *National Audubon*, *supra*, 33 Cal.3d 419. In
32 *National Audubon*, the State Water Board “believed it lacked both the power and the duty to protect
33 the Mono Lake environment” and, in 1940, awarded Los Angeles a permit to appropriate virtually
34 the entire flow of four of the five streams flowing into Mono Lake without any consideration of the
35 public trust and the diverse public interests involved.¹⁷ Unlike in *National Audubon*, and as
36 demonstrated herein, this EIR and associated administrative record provide DWR with the

¹⁴ *National Audubon*, *supra*, 33 Cal.3d at p. 446.

¹⁵ See, e.g., *World Bus. Acad. v. California State Lands Comm’n*, *supra*, 24 Cal.App.5th at p. 509 [upholding State Lands Commission’s consideration of its public trust obligations in approving lease extensions for a nuclear powerplant because the record showed that the Commission “balance[d] the public trust rights to navigation, fisheries, and environmental protection against the public need for efficient electrical production”].

¹⁶ See, e.g., *id.* at p. 17 [“The Administration is advancing a single-tunnel conveyance project under the Delta to protect this statewide source from levee collapse caused by flood or earthquake risk and saltwater intrusion as sea level rises.”].

¹⁷ *National Audubon*, *supra*, 33 Cal.3d at pp. 424, 447.

information and analysis necessary to balance the diverse interests involved and to make a fully informed decision in consideration of the public trust.

Public Trust Considerations and the State Water Board's 2010 Flow Criteria Report

Some comments suggest that the State Water Board's 2010 Flow Criteria Report (State Water Resources Control Board 2010) demonstrates that approval of the proposed project would be inconsistent with DWR's public trust obligations. DWR disagrees. The Delta Reform Act required the State Water Board to develop flow criteria for the Delta ecosystem necessary to protect public trust resources in the Delta, as specified in the Delta Reform Act "[f]or the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan."¹⁸ The Delta Reform Act specifically provides that "[t]he flow criteria shall not be considered predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP."¹⁹ Consistent with the Delta Reform Act, the 2010 Flow Criteria Report explains that the criteria are intended to inform the Delta Plan, the Bay Delta Conservation Plan, and the State Water Board's own "on-going and subsequent proceedings," including the planned update to the 2006 *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta WQCP, or Bay-Delta Plan) and any proceedings on a petition for a change in DWR's water rights permit for the SWP to change the authorized points of diversion.²⁰ The report emphasizes the artificially narrow scope of the criteria it was required to develop under the Delta Reform Act:

The State Water Board does not make any determination regarding the feasibility of the public trust criteria and consistency with the public interest in this report.

In this forum, the State Water Board has not considered the allocation of water resources, the application of the public trust to a particular water diversion or use, water supply impacts, or any balancing between potentially competing public trust resources (such as potential adverse effects of increased Delta outflow on the maintenance of coldwater resources for salmonids in upstream areas). Any such application of the State Water Board's public trust responsibilities, including any balancing of public trust values and water rights, would be conducted through an adjudicative or regulatory proceeding. Instead, the State Water Board's focus here is solely on identifying public trust resources in the Delta ecosystem and determining the flow criteria, as directed by Water Code section 85086.²¹

The report further explains that it is not predecisional with respect to a petition for a change in DWR's water rights permit to change or add new points of diversion:

If the DWR and/or the USBR in the future request the State Water Board to amend the water right permits for the State Water Project (SWP) and/or the Central Valley Project (CVP) to move the authorized points of diversion for the projects from the southern Delta to the Sacramento River, Water Code section 85086 directs the State Water Board to include in any order approving a change in the point of the diversion of the projects appropriate Delta flow criteria. At that time, the State Water Board will determine appropriate permit terms and conditions. That decision will be informed by the analysis in this report, but will also take many other factors into consideration, including any newly developed scientific information, habitat conditions at the time, and other policies of the State,

¹⁸ Water Code, § 85086, subd. (c)(1)

¹⁹ *Ibid.*

²⁰ State Water Board, 2010 Flow Criteria Report at pp. 3, 9–10.

²¹ *Id.* at p. 3.

including the relative benefit to be derived from all beneficial uses of water. The flow criteria in this report are not pre-decisional in regard to any State Water Board action.²²

Thus, while the State Water Board will consider the 2010 Flow Criteria Report in establishing Delta flow criteria as part of any order approving a change in the point of diversion for the SWP to add one or more new points of diversion on the Sacramento River, the 2010 Flow Criteria Report has no binding regulatory effect, includes express warnings that it does not take into account other beneficial uses of water or public interests, including flood control, upstream habitat, or human needs, and is not evidence that the proposed project or any project alternatives will have significant impacts on the environment or be inconsistent with the State's public trust obligations. See also Common Response 8, *Relationship to Other Plans, Projects, Policies, and Programs*, for further discussion regarding the development of flow criteria for the Delta ecosystem and the 2010 Flow Criteria Report.

Public Trust Considerations and CEQA Requirements

Some comments suggest that, to comply with public trust doctrine, the EIR must include restoring the Bay-Delta ecosystem as a project objective, evaluate an alternative that implements more generous flow objectives than required under existing regulatory requirements including the Bay-Delta Plan, and/or consider an environmental baseline that excludes existing operations. This is incorrect for several reasons.

First, CEQA provides that, "[g]enerally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published."²³ This "existing conditions baseline shall not include hypothetical conditions...."²⁴ Following CEQA Guidelines Section 15125(a), the CEQA baseline in the EIR was developed to assess the significance of impacts of the alternatives in relation to the existing facilities and ongoing programs and physical environmental conditions generally at the time of the 2020 Notice of Preparation release (which is described in Chapter 4, *Framework for the Environmental Analysis*, in the section titled *Baseline Assumptions and Alternative Comparisons*, and in Common Response 1, *CEQA Process, General Approach to Analysis, and Other Environmental Review Issues*).

Second, as explained more fully in Common Response 1, "CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives."²⁵ "Although a lead agency may not give a project's purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal."²⁶ "For example, if the purpose of the project is to build an oceanfront resort hotel [citation] or a waterfront aquarium [citation], a lead agency need not consider inland locations."²⁷ Thus, here, where the project purpose is to "restore and protect the reliability of SWP water deliveries[.]"²⁸ DWR need not

²² *Id.* at pp. 3–4, citing Wat. Code, § 85086, subd. (c)(1).

²³ CEQA Guidelines, § 15125, subd. (a)(1).

²⁴ CEQA Guidelines, § 15125, subd. (a)(3).

²⁵ *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 276–277.

²⁶ *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1166.

²⁷ *Ibid.*

²⁸ Delta Conveyance Project Draft EIR, Chapter 2, *Purpose and Project Objectives*, p. 2-2.

1 include a project objective or alternative that requires a reduction in quantities and reliability of
2 SWP water deliveries as compared to existing conditions.²⁹

3 Third, the significant and unavoidable impacts identified in the EIR are caused by the proposed
4 project's and project alternatives' impacts on agricultural resources, Tribal cultural resources,
5 cultural resources, and paleontological resources as well as aesthetics, noise, transportation, and air
6 quality. None of the proposed project's and project alternatives' significant and unavoidable impacts
7 are associated with the quantity of water that will be diverted if the proposed project or one of the
8 alternatives is approved. Thus, an alternative that implements more generous flow objectives than
9 required under the existing Bay-Delta Plan is not required to satisfy CEQA's objective for the lead
10 agency to identify potentially feasible alternatives that avoid or substantially lessen one or more of
11 the significant impacts of the proposed project.³⁰

12 Fourth, the proposed project and project alternatives seek to obtain authorization for, and to
13 construct, new points of diversion, but does not propose to increase the total quantity of water
14 permitted for diversion under existing DWR water rights. Moreover, DWR proposes to operate the
15 proposed project or project alternative consistent with the Bay-Delta Plan and any future updates
16 thereto.³¹ As the State Water Board considered its public trust obligations in approving the Bay-
17 Delta Plan,³² implementation of projects that are consistent with the Bay-Delta Plan's water quality
18 objectives likewise generally satisfy the state's public trust obligations addressed by the plan's
19 objectives.³³

20 DWR acknowledges that "the state, acting through the [State Water] Board, has continuing
21 jurisdiction over appropriation permits and is free to reexamine a previous allocation decision."³⁴ In
22 exercising its authority, the State Water Board must "consider water quality for the protection of

²⁹ See, e.g., *East Shore Parks*, *supra*, 202 Cal.App.4th at p. 578 [holding an EIR certified by the State Lands Commission considered public trust issues by considering whether the project would result in "significant new impacts" and rejecting an attempt to invoke the public trust doctrine in an effort to "override significant provisions of ... [CEQA], namely those pertaining to the baseline used to assess the environmental impacts of a proposed project, and those pertaining to project alternatives and mitigation measures"] (emphasis added).

³⁰ CEQA Guidelines § 15126.6.

³¹ See, e.g., Delta Conveyance Project Draft EIR, Appendix 3A, *Identification of Water Conveyance Alternatives*, p. 3A-46 [Operations of the proposed project "would be governed by the applicable regulatory requirements specified under the State Water Board's *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan), federal BiOps, CESA Incidental Take Permit for SWP, and USACE Clifton Court diversion limits" as well as "any additional requirements resulting from Delta Conveyance Project permitting."].

³² *State Water Res. Control Bd. Cases*, *supra*, 136 Cal.App.4th at pp. 778-779 [discussing the State Water Board's consideration of the public trust doctrine in adopting and implementing the Bay-Delta Plan].

³³ See, e.g., *Ibid.* at pp. 778-779 [rejecting that the State Water Board, in a water rights proceeding, "was obligated under the public trust doctrine to implement more generous flow objectives" than required by the Bay-Delta Plan. In adopting the Bay-Delta Plan, "[i]t was for the [State Water] Board in its discretion and judgment to balance all of the[] competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives."]; *El Dorado Irrigation Dist. v. State Water Res. Control Bd.* (2006) 142 Cal.App.4th 937, 967 [holding that because the State Water Board's existing Delta water quality objectives could be met without the Board imposing a challenged permit condition, the Board could not justify the permit condition "as necessary to ... protect public trust interests"].

³⁴ *United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 150, citing *National Audubon*, *supra*, 33 Cal.3d at p. 447; see also State Water Board Water Right Decision 1641, p. 148 ["The continuing authority of the [State Water] Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses."]; see also *Santa Clarita Water Co. v. Lyons* (1984) 161 Cal.App.3d 450, 462 [State Water "Board has exclusive control ... over appropriation of water"].

beneficial uses... which expressly includes ‘enhancement of fish and wildlife resources’” and impose standards that are “in the public interest, taking into account not only the needs of the fishery, but also the value of the projects.”³⁵ Neither the proposed project nor project alternatives, if approved by DWR, will interfere with the State Water Board’s ongoing regulatory authority to modify existing water quality objectives taking into consideration public trust values. Should the State Water Board modify the existing water quality objectives in the future in consideration of its public trust obligations or otherwise, the proposed project, if approved by DWR, would be required to operate consistent with the updated objectives.

Finally, in *National Audubon*, the California Supreme Court held that “[t]he case for reconsidering a particular decision... is even stronger when that decision failed to weigh and consider public trust uses.”³⁶ Here, both the State Water Board and DWR have previously considered their public trust obligations as it relates to the quantity of water permitted for diversion under existing DWR water rights.³⁷ In consideration of these prior public trust determination as well as the detailed analysis and mitigation commitments in the EIR, the record demonstrates that DWR is complying fully with its obligation to consider the proposed project’s potential impacts on public trust resources as part of this administrative process.

References Cited

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³⁵ *United States v. State Water Res. Control Bd.*, *supra*, 182 Cal.App.3d at p. 150.

³⁶ *National Audubon*, *supra*, 33 Cal.3d at pp. 424, 447; compare *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.* (1989) 207 Cal.App.3d 363, 379 [distinguishing *National Audubon* because “the decision in question is one in which a responsible body did weigh and consider the public trust uses of the lake”].

³⁷ See, e.g., *State Water Res. Control Bd. Cases*, *supra*, 136 Cal.App.4th 674, 772-779 [discussing the State Water Board’s consideration of the public trust doctrine in adopting and implementing the Bay-Delta Plan]; see also Department of Water Resources’ State Water Project Long-Term Operations Final EIR, Part II, pp. II.1.14-1 – II.1.14-6, available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Files/FEIR-Long-Term-Ops/Comments-and-Responses/Part-II-Comments-and-Responses_a.pdf.