Notice of Petition for Reconsideration of the State Water Resources Control Board's February 21, 2023 Approval of the Temporary Urgency Change Petition

Pursuant to sections 1122 and 1126 of the California Water Code, section 769 of title 23 of the California Code of Regulations, and related authorities, the Natural Resources Defense Council, Sierra Club California, San Francisco Baykeeper, Golden State Salmon Association, Save California Salmon, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Defenders of Wildlife, California Sportfishing Protection Alliance, the Bay Institute, and Restore the Delta hereby petition the State Water Resources Control Board ("Board") to reconsider the Executive Director's February 21, 2023 order ("Order") approving the Temporary Urgency Change Petition filed by the U.S. Bureau of Reclamation ("Reclamation") and California Department of Water Resources ("DWR") to waive requirements that the Central Valley Project and State Water Project Delta meet certain Delta water quality objectives (Port Chicago X2) from February 1 to March 31, 2023 ("2023 TUCP").

NRDC et al respectfully requests that the Board rescind the Order approving the 2023 TUCP because the approval is arbitrary and capricious, contrary to law, and is not supported by substantial evidence. The Executive Director's approval of the 2023 TUCP should be rescinded because: (1) approval of the 2023 TUCP will cause unreasonable impacts to fish and wildlife; (2) approval of the 2023 TUCP is not in the public interest; and (3) DWR and Reclamation have failed to exercise due diligence.

Petitioners are harmed by this action because, relative to water quality regulations that would normally apply under current hydrological conditions, operations under the Order will reduce the survival of juvenile winter-run Chinook salmon, Longfin Smelt, Delta Smelt, and reduce the viability of other aquatic organisms and productivity of the estuarine food web, causing irreparable environmental harm and loss of fish and wildlife beneficial uses. The issues presented in this petition were presented to the Board before the Executive Director approved the 2023 TUCP, except for new information that was not available to Petitioners at the time Petitioners submitted their Protest the 2023 TUCP, which therefore constitutes relevant evidence that could not have been produced with reasonable diligence.

As required, a copy of this petition has been transmitted to the U.S. Bureau of Reclamation and California Department of Water Resources.

1. Name and Address of Petitioners (23 Cal. Code Regs., § 769(a)(1)):

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Please direct communications to Petitioners regarding this petition to:

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2. **The specific board action of which petitioner requests reconsideration (23 Cal. Code Regs., § 769(a)(2)):**

The Executive Director's February 21, 2023 Order approving the 2023 TUCP.

3. **The date on which the order or decision was made by the board (23 Cal. Code Regs., § 769(a)(3)):**

The Executive Director issued the Order approving the 2023 TUCP on February 21, 2023.

4. **The reason the action was inappropriate or improper (23 Cal. Code Regs., § 769(a)(4)):**

As discussed in the attached petition, the Order approving the 2023 TUCP is arbitrary and capricious, contrary to law, and not supported by substantial evidence. In addition, new evidence has emerged, in the form of significant precipitation in the Bay-Delta watershed and increased water supply allocations, that obviates the stated needs for the temporary urgency change.

5. **The specific action which petitioner requests (23 Cal. Code Regs., § 769(a)(5)):**

Rescission of the Order approving the 2023 TUCP and enforcement of the requirements of the Bay-Delta Water Quality Control Plan and D-1641.

6. **A statement that copies of the petition and any accompanying materials have been sent to all interested parties (23 Cal. Code Regs., § 769(a)(6)):**

This petition and accompanying materials have been emailed to the U.S. Bureau of Reclamation and California Department of Water Resources at the following addresses:

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Conclusion

For the reasons set forth above and in the attached materials, Petitioners respectfully request that the Board grant reconsideration of the February 21, 2023 approval of the 2023 TUCP and immediately set aside that approval.

Date: March 6, 2023

Respectfully submitted,

Doug Obegi
Natural Resources Defense Council

MEMORANDUM OF POINTS AND AUTHORITIES

The Executive Director's approval of the 2023 TUCP is arbitrary and capricious, contrary to law, and not supported by substantial evidence.

I. The Order's Conclusion that Approval of the 2023 TUCP Would Not Cause Unreasonable Impacts to Fish and Wildlife is Arbitrary and Capricious

The Executive Director's order approving the 2023 TUCP concludes that the adverse impacts to fish and wildlife would not be unreasonable. *See* Order at 31. This conclusion is arbitrary and capricious. First, the Order fails to consider the State Water Resources Control Board's prior findings that the minimum water quality objectives of D-1641 fail to provide reasonable protection of fish and wildlife and that Delta outflow must be increased compared to the requirements of D-1641 in order reasonably protect native fish populations. Second, the Order fails to provide a reasoned explanation between the facts found – that several native fish species are declining in abundance and at high risk of extinction (which is per se unreasonable protection of fish and wildlife), and that approval of the 2023 TUCP will reduce survival and abundance of these species – and its conclusion. Each of these issues is discussed below.

Since 2008, when the Board formally began the regulatory process to update the Bay-Delta Water Quality Control Plan, the Board has repeatedly acknowledged the inadequacy of the existing fish and wildlife water quality objectives and the need to strengthen those objectives to provide reasonable protection of fish and wildlife, including in its 2010 Public Trust flows report and July 2018 Framework. Indeed, in Water Right Order 2022-0095, the Board acknowledges that,

> currently implemented flow and water quality requirements in D-1641 and the Bay-Delta Plan need to be strengthened based on current scientific information regarding the needs of fisheries and other instream beneficial uses.

Water Rights Order 2022-0095 at 51.

In addition, the Board and its Executive Director in 2015 and 2016 found that approval of TUCPs were unsustainable and leading to extinction of native fish. Then-Executive Director Tom Howard admitted, in the February 18, 2015 Board workshop, that his 2014 findings that these actions would not cause unreasonable effects on fish and wildlife "were just wrong."[1] In 2016, the Board issued an order addressing petitions for reconsideration of approval of TUCPs in 2015, which waived Delta water quality objectives through the year and failed to protect salmon from lethal water temperatures below Shasta Dam. In that Order, the Board concluded that,

[1] https://www.waterboards.ca.gov/board_info/media/feb2015/swrcb_brdwrkshp021815_1 (at 45-minute mark).

> the Executive Director's decisions were reasonable at the time they were made and therefore the petitions for reconsideration should be denied in large part. ***However, the State Water Board also determines that the status quo of the past two years is not sustainable for fish and wildlife and that changes to the drought planning and response process are needed to ensure that fish and wildlife are not unreasonably impacted in the future and to ensure that various species do not go extinct.***

Water Rights Order 2015-0043 (Corrected January 19, 2016), at 39 (emphasis added).

In particular, the Board has repeatedly concluded that, based on the best available science, existing Delta outflow requirements in the winter-spring months are inadequate to protect the environment, and increased Delta outflow during these months is critical to protect and restore the health of the Delta. For instance, in 2018 the Board concluded that, "**Existing regulatory minimum Delta outflows are too low to protect the ecosystem,** and without additional regulatory protections, existing flows will likely be reduced in the future as new storage and diversion facilities are constructed, and as population growth continues." 2018 Framework at 5 (emphasis added). In the 2018 Framework, the Board emphasized that,

> The Science Report also documents the needs for new and modified Delta outflow requirements to protect estuarine species and to contribute to protection of species in the Bay and near shore ocean. The survival and abundance of many of these native species is closely related to Delta outflows. **The dramatic declines in population size of these species, like longfin smelt, indicate that current Delta outflows are not sufficient to protect the ecosystem.** Freshwater outflow influences chemical, physical, and biological conditions through its effects on food, pollution, and the movement of flows not only in the Delta, but throughout the watershed and into the Bay and ocean. Outflows affect the location where freshwater from the rivers mixes with seawater from the ocean, referred to as the low salinity zone (the location of the 2 parts per thousand salinity isohaline or X2 position). The quality, location, and extent of habitat in the estuary fluctuates in response to outflows and other factors. Coastal and near-shore marine species also rely on flows to aid the migration of their young into the estuary. Generally, more downstream X2 locations past the confluence of the Sacramento and San Joaquin rivers benefit a wide variety of native species, including commercial seafood species, through improved habitat conditions for various life stages. These benefits extend all the way through the Bay and out into the ocean.

Id. at 8 (emphasis added); *see id*. at 16-17 (reiterating that, "As discussed above, current outflow volumes are inadequate to protect the ecosystem, and current outflow requirements are even lower and less protective."). The Board's peer-reviewed 2017 final Scientific Basis Report similarly concluded that existing Delta outflows are inadequate, identified Delta outflow thresholds for numerous native fish species and zooplankton, and proposed increased Delta

outflow requirements to adequately protect native fish and wildlife. *See, e.g.,* 2017 Scientific Basis Report at 1-21, 3-6 to 3-10, 3-55 to 3-66, 3-73, 3-82 to 3-92, 5-17 to 5-21, 5-24 to 5-34.

Other agencies share the Board's conclusion that existing water quality objectives are inadequate to protect the Bay-Delta ecosystem. For instance, in its 2010 report to the legislature, the California Department of Fish and Wildlife stated, "…current Delta water flows for environmental resources are not adequate to maintain, recover, or restore the functions and processes that support native Delta fish."

And just last year, in proposing to list Longfin Smelt under the federal Endangered Species Act, the U.S. Fish and Wildlife Service concluded that existing regulatory mechanisms, including D-1641 and the State Water Project's incidental take permit, are inadequate to prevent the extinction of the San Francisco estuary's population of this species. U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants: Endangered Status for the San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt, 87 Fed. Reg. 60957, 60970 (Oct. 7, 2022).

Yet despite repeatedly finding that existing water quality objectives fail to provide reasonable protection of fish and wildlife beneficial uses in the Delta, that prior TUCPs were unsustainable and leading to extinction, and that outflows greater than existing regulatory requirements are needed to protect the ecosystem, the Board is considering approval of this 2023 TUCP that would significantly reduce Delta outflow by waiving the Port Chicago X2 requirement for February 1 to March 31, 2023. Table 4 of the Bay-Delta Water Quality Control Plan explains that Delta outflow of 29,200 cfs is sufficient to meet the X2 objective at Port Chicago, whereas Delta outflow of 11,400 cfs is sufficient to meet the X2 objective at Chipps Island. As a result, approval of the TUCP would dramatically reduce Delta outflow and the availability of low salinity habitat in the highly productive regions of Suisun Bay and Suisun Marsh.

Despite the fact that native fish and wildlife are imperiled and are continuing to decline under status quo conditions, even Reclamation and DWR's analysis in the 2023 TUCP acknowledges that approval is likely to further harm native fish and wildlife including Longfin Smelt, winter-run Chinook salmon, spring-run Chinook salmon, Delta Smelt, fall-run Chinook salmon, and Central Valley steelhead, including: reducing through-Delta survival of already-imperiled[2] winter-run Chinook salmon, *see* TUCP at page 2-17; increasing the number of winter-run trapped and killed in the CVP and SWP pumps, *id*. at 2-19; reducing survival of spring-run Chinook salmon and steelhead through the Delta, *id*. at 2-26, 2-28, 2-36; harming Delta Smelt and therefore chances for the survival of this nearly extinct species, *id*. at 2-39–2-40; and reducing the abundance of Longfin Smelt, *id*. at 2-46.

[2] State and federal agencies have concluded that egg-to-fry survival of winter-run Chinook Salmon in 2022 was the lowest recorded in the past 25 years (2.17%), and in 2023 the U.S. Fish and Wildlife Service has documented the fewest numbers of juvenile winter-run Chinook salmon passing Red Bluff Diversion Dam in at least 20 years.

Moreover, the TUCP's biological analysis substantially underestimates the harm to Longfin Smelt from reduced Delta outflow under the TUCP, misleadingly claiming that the results are uncertain. The California Department of Fish and Wildlife ("CDFW") has previously rejected DWR's self-serving and statistically improper claims that the relationship between outflow and Longfin Smelt abundance is uncertain, concluding in its analysis of the State Water Project's Incidental Take Permit that DWR's analysis tends to "obscure" and "have the consistent effect of downplaying the effect" of reduced outflow. *See* California Department of Fish and Wildlife, Findings of Fact of the California Department of Fish and Wildlife Under the California Endangered Species Act, Attachment 7 (Effects Analysis, State Water Project Effects on Longfin Smelt and Delta Smelt, March 2020), at 74. In that analysis, CDFW also rejected a similar methodology for estimating impacts to Longfin Smelt as that presented in the TUCP.

Notwithstanding DWR's attempts to "obscure" the scientific consensus, numerous peer-reviewed scientific studies going back decades have consistently found that winter-spring Delta outflow is a driving factor in Longfin Smelt recruitment and population dynamics. *See, e.g.*, Nobriga and Rosenfield 2016; Thomson et al 2010; Mac Nally et al 2010; Kimmerer 2002; Kimmerer et al. 2009; Jassby et al 1995. The best available science indicates that the negative effects of decreasing Delta Outflow on Longfin Smelt are large and quite certain. In determining that Longfin Smelt should be listed under the federal Endangered Species Act last year, the Fish and Wildlife Service concluded that,

> We consider reduced and altered freshwater flows resulting from human activities and impacts associated from current climate change conditions (increased magnitude and duration of drought and associated increased temperatures) as the main threat facing the Bay-Delta longfin smelt due to the importance of freshwater flows to maintaining the life-history functions and species needs of the DPS. However, because the Bay-Delta longfin smelt is an aquatic species and the needs of the species are closely tied to freshwater input into the estuary, the impact of many of the other threats identified above are influenced by the amount of freshwater inflow into the system (i.e., reduced freshwater inflows reduce food availability, increase water temperatures, and increase entrainment potential).

Id. at 60963.

In addition, the TUCP results in much more negative OMR flows than if the projects were to comply with D-1641. *See* TUCP at 2-19 (for February, the analysis estimates -5,000 cfs OMR under the TUCP, as compared with +100 cfs under D-1641). This increases the risk of entraining and killing Delta Smelt at the pumps, and according to CDFW's fish salvage monitoring, Delta Smelt have been salvaged at the pumps on February 8 (expanded count of 4), February 12 (expanded count of 4), February 13 (expanded count of 8), and February 14 (expanded count of 4), which appears to be the highest number of Delta Smelt salvaged at the pumps since 2017.

The harms caused by the 2023 TUCP's reduction in Delta outflow are unreasonable and are inconsistent with the Board's obligations to protect beneficial uses identified in the Bay-Delta Water Quality Control Plan and to protect Public Trust resources. In addition, the TUCP provides no evidence that cutting Delta outflow in February and March would provide any environmental benefits later in time, and as discussed *infra* has no effect on reservoir storage levels north of the Delta.[3]

The Order further degrades conditions for fish and wildlife, precluding one of the increasingly rare opportunities under the current regulatory regime to support and restore the viability of imperiled fish populations and protect other beneficial uses of water. The Port Chicago X2 requirement is a fundamental element of the Bay-Delta WQCP designed to help restore and maintain estuarine populations to levels that are more likely to persist during subsequent poor years.

For all of these reasons, the approval of the 2023 TUCP will result in unreasonable impacts to fish and wildlife beneficial uses and the Public Trust, and the Executive Director's approval of the 2023 TUCP is arbitrary and capricious, contrary to law, and not supported by substantial evidence. As a result, the Board should grant Petitioners' motion for reconsideration.

II. The Order's Conclusion that Approval of the 2023 TUCP is in the Public Interest is Arbitrary and Capricious and Not Supported by Substantial Evidence

The Order's conclusion that approval of the 2023 TUCP is in the public interest, *see* Order at 32, is arbitrary and capricious and is not supported by substantial evidence.

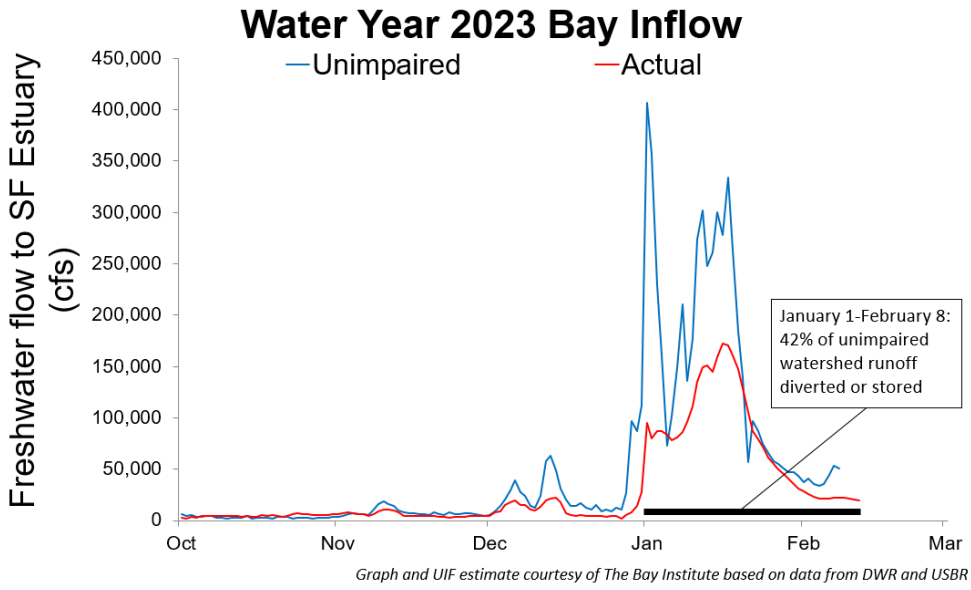
First, contrary to assertions in the TUCP and Order, modeling submitted by DWR demonstrates that the Order does not result in any meaningful changes to reservoir storage North or South of the Delta.[4] This modeling shows that end of September storage levels at Shasta and Oroville would be completely unchanged by the Order approving the 2023 TUCP, and that storage at Folsom would have very minimal changes. Moreover, contrary to findings in the Order, storage in San Luis Reservoir would be slightly higher ***without*** the Order approving the TUCP (782 TAF) than with the TUCP (778 TAF). The findings in the Order that approval of the TUCP would improve reservoir storage are not supported by substantial evidence.

[3] Moreover, to the extent it is relevant, the adverse impacts to fish and wildlife from the Order are even more unreasonable in light of the millions of acre feet of water allocated by the CVP and SWP to their contractors and significant precipitation throughout the Bay-Delta watershed since the TUCP was approved.

[4] This modeling was not publicly available until after NRDC et al had submitted their Protest to the Board. It is now posted online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/DCOModeledResults220217.pdf.

Second, the 2023 TUCP does not propose any reduction in SWP and CVP exports from the Delta or reductions in allocations to their contractors, even though the 2023 TUCP admits that reducing exports and reducing the SWP's and CVP's water supply allocations would eliminate the need for this TUCP. *See* 2023 TUCP at 2-2. Instead, as anticipated and discussed in NRDC et al's protest, the CVP and SWP have announced water supply allocations to their contractors totaling millions of acre feet of water this year, and the State Water Project allocation in particular appears likely to increase further.[5]

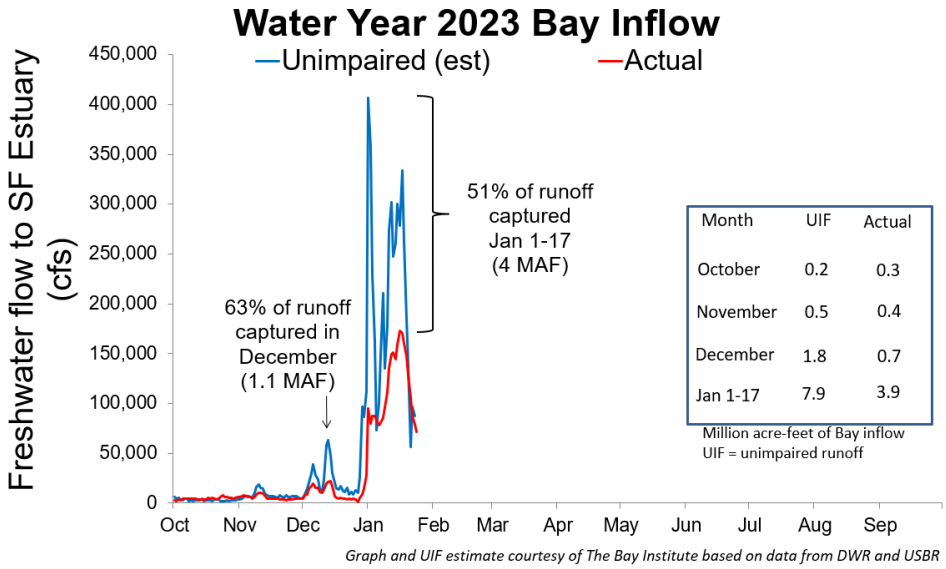
Water supply conditions have significantly improved compared to recent years, and millions of acre feet of water was stored in upstream reservoirs from the recent storms. In fact, analysis by the Bay Institute shows that between January 1, 2023 and February 8, 2023, approximately 42 percent of the unimpaired runoff in the Bay-Delta watershed has been stored or diverted.



The Bay Institute's analysis shows that an even higher percentage of unimpaired flow – 51 percent – was captured and stored between January 1 to January 17, as upstream reservoirs increased reservoir releases to maintain capacity for flood control purposes.

Water diverted to storage has resulted in major improvements in reservoir conditions across the state. Most of the Central Valley's major reservoirs are near or above their historic average levels as of March 2; indeed, Oroville Reservoir, Folsom Reservoir, and Don Pedro Reservoir are now above their historic average storage levels for this date and San Luis Reservoir is at 95% of its average for this date, and filling quickly. *See* https://cdec.water.ca.gov/resapp/RescondMain.

[5] These issues were raised in NRDC et al's protest, but the specific announcements from DWR and USBR regarding water supply allocations and modeling of future water supply allocations were unavailable at the time NRDC et al filed its protest.



In addition to the millions of acre feet of runoff that has already been captured and stored, snowpack this year is far above average and increasing due to ongoing storms. As of February 16, 2023, DWR estimated that statewide snowpack is 138 percent of the April 1 average and 186 percent of average for this date. DWR, Daily Statewide Summary of Snow Water Content, https://cdec.water.ca.gov/reportapp/javareports?name=DLYSWEQ. Since that time, the statewide snowpack has further increased by 7.5 inches of snow water equivalent, and as of March 2, 2023 DWR estimates the statewide snowpack is 170 percent of the April 1 average and 192 percent of average for this date. *Id*.

As a result, DWR has already publicly announced a discretionary 35% allocation for SWP contractors. Moreover, DWR's February operational analysis shows that under 90% exceedance forecast, the allocation for the SWP would be 50% or more. *See* DWR, Allocation Analysis for 2023 dated February 24, 2023, attached hereto as Exhibit A.[6] DWR's decision to announce a 35 percent allocation in February was inconsistent with DWR's practice of basing allocation decisions on the 90 percent exceedance forecast, and this modeling demonstrates that the SWP is likely to increase by approximately 500,000 acre feet of water, even before considering the storms in late February and early March. DWR has likewise confirmed in a February 15, 2023 letter that Feather River Settlement Contractors are not subject to a drought year under the terms of their contract, which will result in a 100% allocation in 2023 that is likely to be more than 1 million acre feet of water.[7]

Similarly, Reclamation announced 100 percent allocations for Sacramento River Settlement Contractors and San Joaquin River Exchange Contractors, 100 percent allocation for CVP contractors on the Stanislaus River, and 100 percent allocation for Friant Division contractors

[6] *See* footnote 5.
[7] This document was obtained via a Public Records Act request filed by NRDC to DWR, and it was not obtained until after NRDC et al filed their protest. *See* footnote 5.

(Class 1, and 20% class 2), and a 35 percent allocation for agricultural water service contractors South of the Delta.

Taken together, the CVP and SWP have announced water supply allocations for their contractors this year that are more than 8.9 million acre feet of water, and if DWR increases the allocation for SWP contractors to 50 percent, this would increase the total allocations to approximately 9.5 million acre feet of water.

Central Valley Project			
Service Area	**Allocation %**	**Maximum Contract Amount / Historical Use for M&I**	**Allocation (AF)**
North of Delta			
American River M&I	75%	184,357	138,268
Sac River Ag	35%	441,784	154,624
Sac River M&I	75%	27,206	20,405
Sac River Settlement Contractors	100%	2,115,620	2,115,620
1Refuge Level 2	100%	151,250	151,250
			-
South of the Delta			-
Ag water service	35%	1,974,766	691,168
M&I	75%	138,132	103,599
Exchange Contractors	100%	875,623	875,623
Refuge Level 2	100%	271,001	271,001
			-
Contra Costa M&I	75%	170,000	127,500
New Melones East Side	100%	155,000	155,000
East-Side Water Rights	100%	600,000	600,000
Friant Class I	100%	800,000	800,000
Friant Class II	20%	1,401,475	280,295
TOTAL	*68%*	9,508,607	**6,484,353**
State Water Project			
Contractor	**Allocation Percentage**	**Maximum Contract Amount**	**Allocation (AF)**
SWP Contractors	35%	4,172,786	1,477,369
Feather River Settlement Contractors	100%	955,906	955,906
TOTAL			**2,433,275**

Note: According to Bulletin 132-18, in 2017 the seven Feather River Settlement Contractors received 955,990 acre feet from DWR. However, in prior years they have diverted more water than this, so the allocation this year may be higher than shown in this table.

These water supply allocations are millions of acre feet more water than the allocations to CVP and SWP contractors in prior years when the State Water Board approved TUCPs to violate the minimum Delta water quality standards.

Increased snowpack, reservoir storage, and water supply allocations to contractors since the TUCP was approved have eliminated whatever urgency the Executive Director may have seen in the TUCP's argument for waiving Bay-Delta Water Quality standards and further demonstrates that compliance with D-1641 is feasible. The State Water Board has a legal duty to protect the Public Trust "whenever feasible." *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446 (1983). However, instead of protecting the Public Trust, the Order simply takes water from the environment without requiring reductions in water deliveries to the CVP and SWP contractors. Granting the TUCP without first requiring DWR and Reclamation to reduce allocations to their contractors in order to comply with D-1641, including reductions in allocations to settlement and exchange contractors, is not in the public interest.[8] Regardless of whether water deliveries under contracts may have been reasonable when they were entered into or whether they are reasonable in other years, the Board has a continuing duty to determine whether a use is reasonable under Article X, section 2 of the State Constitution. Given that the Bureau of Reclamation and DWR are violating their water rights obligations to the public under Decision 1641, and causing unreasonable impacts to Delta water quality, fisheries, and the Public Trust, maintaining contractual water allocations constitutes a waste and unreasonable use of water. Finally, the increased snowpack, reservoir storage, and water supply allocations constitute "changed circumstances" under term and condition 12 of the Order that justify modification and rescission of the approval of the 2023 TUCP. *See* Order at 36-37

Because the Order's finding that approving the 2023 TUCP is in the public interest are not supported by substantial evidence, are contrary to law, and are arbitrary and capricious, the Board should grant the motion to reconsider approval of the 2023 TUCP.

[8] As the Board is well aware, no one in California has a right to use water unreasonably, and all water rights are subject to the reasonable use and Public Trust doctrines, under which the Board has ample authority to regulate pre-1914 water rights to protect fish and wildlife. *See, e.g., Stanford Vina Ranch Irrigation District v. State of California*, 50 Cal.App.5th 976, 983, 1002-1003 (2020); *Light v. State Water Resources Control Board*, 226 Cal.App.4th 1463, 1482-85 (2014); *U.S. v. State Water Resources Control Board*, 182 Cal.App.3d 82, 106, 129-130 (1987).

III. The Order Approving the 2023 TUCP is Contrary to Law Because it Fails to Consider whether Petitioners have Exercised Due Diligence

Finally, the Order completely ignores the Board's legal obligation to determine whether the petitioners have exercised due diligence when considering the TUCP. The Water Code imposes a non-discretionary duty on the Board to find the petitioner's need for change is not urgent if the Board determines that "the petitioner has not exercised due diligence either (1) in petitioning for a change pursuant to provisions of this division other than this article, or (2) in pursuing that petition for change." Cal. Water Code § 1435(c). Because the Order fails to consider this legal obligation, and because it fails to consider the evidence demonstrating that DWR and Reclamation have failed to exercise due diligence, the Order is arbitrary and capricious and contrary to law.

Droughts are a fact of life in California. The water quality requirements of the Bay-Delta Water Quality Control Plan and D-1641 already account for variations in hydrology. After the last drought, the Board emphasized that "changes to the drought planning and response process are needed to ensure that fish and wildlife are not unreasonably impacted in the future and to ensure that various species do not go extinct." Water Rights Order 2015-0043. But instead of planning for drought, the CVP and SWP have wholly failed to plan for meeting water quality objectives under D-1641 and Water Rights Order 90-5 during drought conditions, as the Board acknowledged last year:

> Although the current violations are exacerbated by the extreme dry conditions, they are in part the result of the overallocation of Project water during dry conditions. Additionally, risk management and operational decisions by the Projects were made that appear to have discounted the need to maintain regulatory compliance.

Letter from State Water Resources Control Board to DWR and Reclamation dated April 30, 2021.[9] Instead, ever since the Board granted TUCPs in 2014 and 2015, Reclamation and DWR's "plan" for droughts appears to be using TUCPs in future droughts to waive the rules in order to allocate more water to their contractors; DWR and Reclamation have petitioned for, and the Board has granted, TUCPs in 2014, 2015, 2016, 2021, and 2022. *See also* Water Rights Order 2015-0043 (explaining that changes to the drought planning process are necessary).

In addition, only a few weeks ago, DWR publicly announced that a Temporary Urgency Change Petition was "unlikely" to be needed this year. DWR News Release, January 26, 2023, Recent Storms Allow State Water Project to Increase Expected Deliveries to 1.27 Million Acre Feet,

[9] This letter is available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/compliance_monitoring/sacramento_sanjoaquin/docs/2021/20210430_swbltr_bdcompliance.pdf. It is hereby incorporated by reference.

online at: https://water.ca.gov/News/News-Releases/2023/Jan-23/Recent-Storms-Allow-State-Water-Project-to-Increase-Expected-2023-Deliveries. Yet despite knowing that D-1641 would require compliance with Port Chicago X2 objective by at least early February, Reclamation and DWR did not submit the 2023 TUCP until after they had already violated D-1641, which further demonstrates the failure to exercise due diligence.

There is no evidence that DWR and Reclamation have petitioned the Board at any time since 2015 to change these requirements other than through TUCPs. Instead, DWR and Reclamation have sought to delay the Board's completion of the updated Bay-Delta Water Quality Control Plan and implementation of those updated water quality objectives through pursuit of voluntary agreements and by other means.[10] Reclamation, DWR and the Board have all failed to exercise due diligence, and the result is this ongoing pattern and practice of the Board waiving compliance with water quality objectives via TUCPs.

Indeed, the Order admits that "The repeat occurrence of extreme dry conditions over the last two decades and need for TUCPs over the last decade also points to longer term consideration of the impacts of climate change and need for associated longer term planning and implementation actions outside of TUCPs." Order at 30. However, the Order fails to connect this and prior findings with its conclusion, and it fails to consider the Board's legal obligation to evaluate whether the petitioners have exercised due diligence.

Finally, unlike TUCPs that were granted in prior years classified as Critically Dry, DWR's modeling shows that this year is extraordinarily unlikely to be classified as a Critically Dry year in either the Sacramento or San Joaquin River basins. DWR's February 1, 2023 water supply index forecast predicts that the 2023 water year for the Sacramento Basin will be classified as a Dry water year type under the 99 percent forecast and 90 percent forecast, a Below Normal year under 75 percent forecast, and an Above Normal year under the 50 percent forecast.[11] Similarly, DWR's February 1 forecast predicts the 2023 water year for the San Joaquin Basin would be classified as an Above Normal water year type under the 99% forecast.[12] Thus, approving this

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[10] In addition, we note that the voluntary agreement proposed by DWR and Reclamation proposes that "The VA flows described in Appendix 1 **will be additive to the Delta outflows required by Revised Water Rights Decision 1641 (Revised D-1641)** and resulting from the 2019 Biological Opinions, although the 2019 Biological Opinions may be modified, including to resolve litigation concerning those opinions." *See* Section 4.1 of the Term Sheet (emphasis added). Thus, not only is the TUCP inconsistent with the proposed voluntary agreement, but this further demonstrates that DWR and Reclamation have failed to exercise due diligence in seeking to modify these standards.

[11] https://cdec.water.ca.gov/reportapp/javareports?name=WSI

[12] Indeed, since the Executive Director approved the TUCP, intense snowstorms have occurred across the state, resulting in significant precipitation in the Bay-Delta's watershed – and significant additional precipitation is predicted to occur in the near future. Acknowledging the likelihood of intense storms, DWR explained before the TUCP was approved that these storms "should increase the yearly totals for an **already wet year."** DWR, Forecast Discussion,

TUCP would expand the pattern and practice of violating D-1641 from Critically Dry years to years that are likely to be classified as Dry or wetter.

Because the Order fails to consider whether Petitioners have exercised due diligence, does not consider the prior evidence demonstrating DWR and Reclamation have failed to exercise due diligence, and does not connect its findings with its conclusion, the Order is arbitrary and capricious, not supported by substantial evidence, and contrary to law. Therefore, the Board should grant the petition for reconsideration.

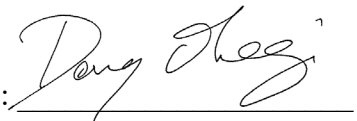
IV. Conclusion

The Executive Director's February 22, 2023 Order approving the 2023 TUCP is arbitrary and capricious, is not supported by substantial evidence, and is contrary to law. The Board should grant this petition for reconsideration and set aside approval of the 2023 TUCP.

February 14, 2023 Bulletin 120 Update, https://cdec.water.ca.gov/reportapp/javareports?name=WSFCastDiscussion.pdf (emphasis added).

DECLARATION OF DOUG OBEGI

Pursuant to section 769 of title 23 of the California Code of Regulations, I declare under penalty of perjury under the laws of the State of California that the new facts and evidence cited in this petition that were not previously presented to the State Water Resources Control Board in NRDC et al's February 17, 2023 protest and objections constitutes information that postdates NRDC's submission of its protest and objections: (1) data and information regarding CVP and SWP water supply allocations, including DWR's operational modeling; (2) DWR's modeling of reservoir storage levels with and without approval of the TUCP; (3) updated information regarding precipitation, snowpack and reservoir storage. This information and data could not have been produced with reasonable diligence by NRDC et al because it was not publicly available at the time that NRDC et al submitted their Protest and Objections to the TUCP.

Date: March 6, 2023 Signature: 

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