



March 12, 2021

Joaquin Esquivel, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Transmitted via email

RE: Request for Immediate Action to Ensure Reasonable Protection of Fish and Wildlife Under Water Rights Order 90-5 and Full Implementation of Bay-Delta Water Quality Objectives

Dear Chair Esquivel and Members of the Board:

On behalf of the Natural Resources Defense Council, The Bay Institute, California Sportfishing Protection Alliance, Defenders of Wildlife, Friends of the River, Golden State Salmon Association, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Restore the Delta, San Francisco Baykeeper, Save California Salmon, Sierra Club California, Tuolumne River Trust, and the Winnemem Wintu Tribe, we are writing to request that the State Water Resources Control Board ("Board") take immediate action to avoid a repeat this year of the disastrous conditions that occurred in 2014 and 2015, when the U.S. Bureau of Reclamation ("Reclamation") lost temperature control below Shasta Dam, devastating endangered salmon populations and commercially valuable salmon runs, and Reclamation and the California Department of Water Resources ("DWR") were granted waivers from complying with numerous water quality objectives in the Bay-Delta Water Quality Control Plan ("Plan"), degrading water quality and causing significant harm to communities and fish and wildlife in this imperiled estuary. Specifically, the Board should require that Reclamation and DWR submit by March 31 alternative operational scenarios for 2021 that fully implement the relevant water

quality objectives and maintain water temperatures below Shasta Dam that protect salmon under Water Rights Order 90-5.

The current operations plans prepared by DWR and Reclamation, based on the 90 percent exceedance forecast, will fail to provide reasonable protection for fish and wildlife, and will leave California badly unprepared if 2022 is also dry. First, the proposed operations of the State Water Project (“SWP”) and federal Central Valley Project (“CVP”) would drain upstream reservoirs to storage levels similar to those in 2014 and 2015, when Reclamation lost control of water temperatures and killed 77 percent and 85 percent, respectively, of the endangered winter-run Chinook salmon below Shasta Dam and caused similarly devastating impacts to fall run Chinook salmon in the Sacramento River. In addition, Reclamation has stated that the agency is likely to submit Temporary Urgency Change Petitions (“TUCPs”) – which, if granted, would allow DWR and Reclamation to violate water quality objectives in the Plan, which were specifically designed to consider the full range of hydrological conditions – if March remains dry. Yet even as they propose to waive compliance with water quality objectives and inflict lethal temperatures on endangered winter-run Chinook salmon, DWR and Reclamation have announced water supply allocations from the SWP and CVP of more than 5 million acre feet of water this year.

It is necessary and appropriate for the Board to immediately require Reclamation and DWR to submit by March 31 alternative operations plans that improve upstream storage and fully meet the relevant water quality objectives by evaluating actions, including the use of hydropower bypasses at Shasta Dam and other upstream reservoirs and reducing water supply allocations to the Sacramento River Settlement Contractors and other water contractors as needed to comply with the Plan and Water Rights Order 90-5.¹ The Board should evaluate these proposed operations through a public and transparent process before early April, in order to ensure that the Board can take action to protect the Public Trust. Any further delay runs the risk of foreclosing options this year, as DWR and Reclamation will begin making irrigation water deliveries in earnest in April and will reduce reservoir storage and make other operational modifications accordingly.

Absent such an order from the Board in the very near future, it appears that California is on track to repeat the crisis of 2014-2015. The Board has acknowledged that fish and wildlife beneficial uses were harmed by the actions taken in 2014-2015, and many of these fish populations have not recovered from the actions taken during the last drought, leaving them at an even greater risk of extinction than before. The time to act is now if California is to avoid a replay of that same fiasco.

¹ In light of the mandates of section 3406(d) of the Central Valley Project Improvement Act and the Board’s obligation to protect public trust resources, the Board should ensure that wildlife refuges receive at least 75 percent of their Level 2 water supplies this year.

First, Reclamation does not intend to submit a temperature management plan to the Board until May, pursuant to Order 90-5. However, waiting until May is too late, as the Board and other agencies have repeatedly recognized. For instance, last year the Board explained to Reclamation that, “Although Reclamation proposes to submit a draft plan in April and a final plan in May, depending on the circumstances in any given year, submittal of a draft plan in April may not satisfy Reclamation’s obligations under Order WR 90-05. Particularly when the hydrology is dry, planning starting earlier in the water year will be required.” Similarly, the National Marine Fisheries Service (“NMFS”) explained in February 2018 that it is critical to “use a conservative forecast as early as possible to protect the cold water pool in Shasta Reservoir so that suitable spawning and egg/alevin incubation habitat can be maintained in the Sacramento River during the summer and fall.”

It is crucial to plan for temperature management before May because the volume of water releases from Shasta Reservoir in April and May – largely for deliveries to the Sacramento River Settlement Contractors – can significantly deplete the coldwater pool and the ability to maintain adequate water temperatures, as NMFS has previously found.² This year, the Glenn Colusa Irrigation District (the largest Sacramento River Settlement Contractor) plans to ramp up diversions in mid- to late-April 2021.³ Water deliveries to Settlement and Exchange Contractors are within Reclamation’s control under Order 90-5, and as the Board insisted in its April 3, 2020 letter, Reclamation must evaluate different water supply assumptions to these contractors in order to improve water temperature and carryover storage.⁴

Second, Reclamation and DWR have already announced their intention to deliver more than 5 million acre feet of water to contractors this year, despite acknowledging that they may be unable to meet the relevant water quality objectives later this year. Reclamation and DWR’s contractual obligations do not take precedence over Reclamation and DWR’s water rights and permit

² For example, in its July 1, 2019 jeopardy biological opinion, NMFS states that, “the volume and stability of cold water throughout the temperature management season can be adversely affected not only by April and May deliveries but also by deliveries in June and early July.”

³ See Glenn Colusa Irrigation District, presentation, GCID Landowner and Water User Meeting, March 3, 2021, slides 8-9, available online at: https://912afe62-5b11-482e-8c47-c2358db4f96b.filesusr.com/ugd/c88b6b_cd579d4970274ac2a741995b067163c3.pdf.

⁴ See letter from the SWRCB to Reclamation dated April 3, 2020 (“Actions within Reclamation’s control include deliveries of water diverted under Reclamation’s water rights, including deliveries to settlement and exchange contractors. Reclamation should evaluate different water supply delivery assumptions to provide for improved cold water pool maintenance, including evaluation of lower releases from Shasta Reservoir during the spring and summer that meter out the cold water pool resources in order to provide for improved temperature control throughout the temperature control season and improved cold water pool levels going into next year.”).

obligations, including obligations under Decision 1641.⁵ The Board has recognized that, with respect to Order 90-5,

Reclamation's position is that scenarios with different operational assumptions would be inconsistent with its contractual obligations, and are therefore beyond Reclamation's reasonable control. The State Water Board disagrees. **To the extent that Reclamation delivers water under its own water rights, Reclamation's obligation to deliver water to its contractors does not take precedence over its permit obligations.** Order WR 90-5 requires Reclamation to reduce releases to the extent reasonable and necessary to control water temperature. **This permit condition is not and cannot be nullified by a contractual obligation. Reclamation's water supply contractors are not entitled to more water under their contracts than Reclamation is authorized to deliver consistent with the terms and conditions of its water right permits and licenses.**

State Water Resources Control Board, June 2, 2020 letter to Reclamation (emphasis added). The same is true with respect to D-1641: DWR and Reclamation's contractual obligations do not take precedence over meeting minimum water quality standards that protect communities in the Delta and the Public Trust. The courts have reaffirmed the Board's authority to curtail pre-1914 water rights during a drought through emergency regulations to protect salmon and the Public Trust. *See, e.g., Stanford Vina Ranch Irrigation District v. State of California*, 50 Cal. App. 5th 976 (2020).

Finally, despite the regular and entirely predictable occurrence of critically dry years in California, DWR and Reclamation have repeatedly refused requests by many of the signatories to this letter and other stakeholders to plan for droughts and evaluate the effects of TUCPs like those in 2014 and 2015 during future droughts. Reclamation also rejected proposals from NMFS in 2017 and 2019 to require minimum end of September carryover storage levels at Shasta Dam, which would help to ensure temperature compliance in subsequent years and improve drought preparedness. Instead of planning for drought in advance, DWR and Reclamation have consistently deferred the development of drought contingency plans, thus creating an "urgency" situation that may have been entirely avoided had they planned in advance for foreseeable drought conditions.

The drought response in 2014 and 2015 was a travesty for fish and wildlife, driving Delta Smelt and other estuarine fishes further towards extinction, wiping out two year classes of endangered

⁵ State law requires DWR and the Board to fully implement these water quality standards. Cal. Water Code § 13247. However, in 2014 Governor Brown invoked authority under the California Emergency Services Act to waive the requirements of section 13247 and CEQA, thereby allowing for serial violations of water quality standards in the Delta. We urge the Governor to avoid issuing a similar proclamation to allow DWR and Reclamation to violate water quality standards in the Delta.

winter-run Chinook salmon, reducing survival and abundance of the fall run Chinook salmon that form the backbone of the state's salmon fishery, and leading to increased harmful algal blooms in the years that followed. For state and federal agencies to allow a similar approach this year would be nothing short of a failure of leadership. In 2016, the Board concluded that,

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.

State Water Resources Control Board, Water Rights Order 2015-0043, at 39. The Board must do better this time around.

If the Board fails to act now, it seems likely that 2021 will turn into a repeat of 2014 and 2015, devastating salmon below Shasta Dam and the fishing communities that depend upon healthy salmon runs, worsening water quality in the Delta to the detriment of vulnerable communities and fish and wildlife, and leaving California unprepared if 2022 remains dry. But that outcome is not inevitable, and California has other options if it acts quickly. Therefore, we request that the Board immediately requires that by March 31 Reclamation and DWR provide updated, alternative operational scenarios, including use of hydropower bypasses and reduction of water deliveries as appropriate, that improve upstream storage at Shasta and Oroville and fully implement the Bay-Delta Water Quality Control Plan.

Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



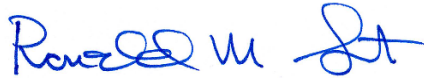
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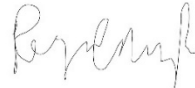
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