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Subject: Petition for Reconsideration of State Water Resources Control Board June 1, 2021 ORDER CONDITIONALLY APPROVING A PETITION FOR TEMPORARY URGENCY CHANGES TO LICENSE AND PERMIT TERMS of the Central Valley Project (CVP) and State Water Project (SWP)¹ AND CONDITIONS REQUIRING COMPLIANCE WITH DELTA WATER QUALITY OBJECTIVES IN RESPONSE TO DROUGHT CONDITIONS

To whom it concerns:

This letter transmits our petition for reconsideration to the State Water Resources Control Board (Water Board) of the above-named Temporary Urgency Change Order

¹ Specifically, for permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources (DWR) for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation (USBR) for the Central Valley Project.

(TUCO) issued by the Water Board on June 1, 2021. We submit this petition for reconsideration to comply with California Water Code section 1126(b), and California Code of Regulations Title 23.3, Chapter 2, Article 12, sections 768 through 770, which govern the place and procedures of the petition for reconsideration with respect to Water Board decisions and orders.

This petition for reconsideration from Restore the Delta, Little Manila Rising, and Save California Salmon (RTD et al) is based on the following causes:

- **Irregularity in proceedings:** Water Board Executive Director Eileen Sobeck issued the TUCO on June 1, 2021, without public hearing, and without waiting to receive all public comment on the proposed Temporary Urgency Change Petition submitted by the California Department of Water Resources and the United States Bureau of Reclamation due by June 4, 2021. RTD et al submitted objections timely on June 4.
- **Order not supported by substantial evidence:** The Water Board construes narrowly, and therefore improperly, the bases for the TUCO's findings supporting urgency, injury to lawful users of water, reasonable impacts to fish and wildlife and other ecosystem beneficial uses, and the public interest.
- **Error in law:** By construing the bases for its findings improperly, the Water Board's Order of June 1, 2021, violates:
 - Public trust protections for fish and wildlife and environmental justice communities in the Delta Estuary's watershed;
 - California Constitution Article X, Section 2 and California Water Code Section 106 stating that the waters of the state of California are to serve beneficial uses to the fullest extent they are capable, prohibiting waste and unreasonable use of water, and requiring that all uses, methods of use, and methods of diversion of water must be reasonable;
 - The "Co-Equal Goals" policy at California Water Code section 85054, seeking a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.
 - California Water Code section 85021, which mandates state policy to reduce reliance on the Delta for California's future water needs.
 - California Government Code [C.G.C.] Sec. 11135(a) which prohibits discrimination in the application of and benefits from state funds and programs.

- State environmental justice policy (California Government Code section 65040.12(e)) which protects fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

None of these policies were suspended in Governor Gavin Newsom's emergency declarations. But the Water Board's TUCO implicitly and improperly interprets the declarations as an opportunity to gut California's water policy, endangered species, and environmental justice and civil rights laws. A drought is, instead, precisely the time when burdens like scarce water must be shared, and these policies and laws guide how best to accomplish this.

Discussion of Causes

Irregularity in proceedings: As stated above, Executive Director Sobeck issued the Water Board's Order on June 1 three days before it closed the period provided in its amended May 19 notice announcing the Temporary Urgency Change Petition (TUCP) by DWR and USBR. Submitting a protest petition jointly and timely on June 4, RTD et al's protests and objections were not given consideration by the Water Board because the Board released its incompletely considered TUCO prior to receipt of our petition, as well as protest petitions from other parties. Because points we made have not been addressed in the TUCO, the Order is based on an incomplete consideration of important issues. We respectfully request that the Water Board timely and promptly reconsider its Order in light of our original protest and this petition for reconsideration.

Order not supported by substantial evidence: The Water Board construes narrowly, and therefore improperly, the bases for the TUCO's findings supporting urgency, injury to lawful users of water, reasonable impacts to fish and wildlife and other ecosystem beneficial uses, and the public interest.

The Water Board considered only those matters placed before it by petitioners DWR and USBR. These matters addressed project allocations, some project operational data and not others, fish and wildlife impacts focused on fish, some Delta water quality conditions and not others, and the relevance of endangering Winter-Run Chinook Salmon and Spring-Run Chinook Salmon in the Sacramento River Basin for salmon extinction and cultural genocide impacts to Northern California Indian Tribes whose spiritual lives center on these iconic fish.

RTD et al provided extended discussion of reservoir releases, stream flow data indicating diversions by senior CVP contractors along the Sacramento River, delivery data indicating Lake Oroville releases provided to Feather River contractors, and information about harmful algal blooms already fluorescing in Delta channels and posing public health risks. None of these relevant data have been addressed by the Water Board.

The TUCO acknowledges specific quantities of water allocated by DWR and USBR to their contractors. These allocations are not placed in context by the Water Board, thus the substantial evidence afforded by placing allocations by the SWP and CVP in context is foregone in the findings made by the Water Board in its TUCO. As Table 1 (below) shows, while reductions in allocations were made to senior water contractor groups Sacramento River Settlement Contractors, Feather River Settlement Contractors, San Joaquin River Exchange Contractors, and East Side Senior Contractors (i.e., Oakdale Irrigation District and South San Joaquin Irrigation District), their allocations account for over 75 percent of total allocation amounts (or 3.4 million acre-feet) announced by DWR and USBR this spring. Allocations to all other contractors come to 1.14 million acre-feet.

Table 1: Allocations of SWP and CVP Water to Senior Water Contractors	
Water Contractor Group	Allocation Amount (acre-feet)
State Water Project Contractors	210,266
Feather River Settlement Contractors (<i>Senior[Sr]</i>)	586,000
Sacramento River Settlement Contractors (<i>Sr</i>)	1,586,785
North of Delta Municipal/Industrial, In-Delta, North of Delta National Wildlife Refuges	328,885
South of Delta Municipal/Industrial, South of Delta National Wildlife Refuges	237,784
San Joaquin River Exchange Contractors (<i>Sr</i>)	656,717
Subtotal Planned Deliveries, North of Delta	3,606,437
New Melones East Side Contractors	155,000
East Side Senior Contractors (<i>Sr</i>)	600,000
Friant Water Authority Contractors	208,000
Subtotal Planned Deliveries, South of Delta	963,000
Total Planned Deliveries, North and South of Delta	4,569,437
Total Senior Water Contractors Share	3,429,502
Senior (<i>Sr</i>) Contractors as Percent of Total North and South	75.1%
All Other Contractors	1,139,935
Estimated TUCO Savings	60,000 to 120,000
TUCO Savings as Percent of Total Allocations	1.3% to 2.6%
Source: DWR; USBR; Water Board; RTD et al.	

These are staggering volumes of water given the dire predictions of poor temperature conditions in USBR and DWR reservoirs that must be preserved as long as possible for protection of baby salmon hatching in Sacramento River gravels this summer. The TUCO acknowledges further that urgency changes approved to the water quality and flow objectives of the 2009 Bay-Delta Plan and Water Right Decision 1641 (D-1641) will only yield about 60,000 to 120,000 acre-feet of savings. (TUCO at 27-28) These savings compared with the deliveries to be made from the SWP and CVP amount to 1.3 to 2.6 percent of all the deliveries being made in this second year of severe drought.

This is a miserly allocation of water to protect natural ecosystems in the Sacramento River Basin and the San Francisco Bay-Delta Estuary and the Water Board goes along with it. This misallocation demonstrates the contrived “urgency” that the Water Board accepted from DWR and USBR’s TUCP. In our protest of June 4, 2021, we asserted that at least 477,000 acre-feet of water had already been delivered by DWR and USBR to their senior-most contractors in the Sacramento Valley prior to submitting their TUCP to the Water Board in mid-May. This context for SWP and CVP operations was not addressed in determining the validity of petitioners’ claim of urgency.

In Table 2, we update estimates of this misallocation first provided in our protest letter: From Oroville, the Thermalito Afterbay diversion data from the California Data Exchange Center show that through June 20 about 230,400 acre-feet were delivered to Feather River Settlement Contractors. Using our calculation of the difference between flows at Sacramento at Bend to Sacramento River at Wilkins Slough, 635,695 acre-feet in what we call gross diversions occurred, much of that likely going to Sacramento River Settlement Contractors. These volumes combine to over 866,000 acre-feet of water delivered to date well-before, during, and after the processing of the TUCP and issuance of the premature TUCO by the Water Board.

Table 2: Diversions to Senior Water Contractors of the State Water Project and Central Valley Project, April through June 2021			
Month	Feather River Settlement Contractors’ Diversions from Thermalito Forebay	Sacramento River Settlement Contractors Gross Diversions between Bend and Wilkins Slough	Total Diversions
April	36,208	107,649	143,857
May	119,047	269,663	388,710

Table 2: Diversions to Senior Water Contractors of the State Water Project and Central Valley Project, April through June 2021			
Month	Feather River Settlement Contractors' Diversions from Thermalito Forebay	Sacramento River Settlement Contractors Gross Diversions between Bend and Wilkins Slough	Total Diversions
June	75,191	258,383	333,574
Total to Date	230,446	635,695	866,141

Note: Feather River deliveries are through June 20; Sacramento River gross diversions are through June 27.
Sources: California Data Exchange Center (Station TFR, Thermalito Forebay for April and May; Stations BND (Sacramento River at Bend) and WLK (Sacramento River below Wilkins Slough) for April through June 27); and California Department of Water Resources SWP Delta Operations June 1 through June 20.

This irrigation water is largely used to flood-irrigate rice. According to the California Department of Food and Agriculture’s most recent statistical report on California agricultural exports (Table 3 below), rice exports accounted for over 84 percent of rice receipts in 2019. Almonds and walnuts are also grown in the Sacramento Valley. About 80 percent of total almond receipts are earned via exports and 97 percent of walnut receipts are earned via exports as well. We conclude that agricultural commerce has been well served by project water deliveries this spring.

Table 3: Exports as Share of Total California Agricultural Receipts, 2019			
	Total Receipts, 2019 (\$ Millions)	Total Exports, 2019 (\$ Millions)	Export Share of Total California Agricultural Receipts
Total Output	50,116	21,707	43.3%
Dairy/Milk/Cream	7,341	1,805	24.6%

Table 3: Exports as Share of Total California Agricultural Receipts, 2019

	Total Receipts, 2019 (\$ Millions)	Total Exports, 2019 (\$ Millions)	Export Share of Total California Agricultural Receipts
Almonds	6,094	4,901	80.4%
Walnuts	1,286	1,250	97.2%
Rice	897	756	84.3%

Source: California Department of Food and Agriculture 2020.

On the basis of these data, operational actions and the economic context provided here, it was the demands of the senior water contractors that were treated as “urgent” by DWR and USBR, not their lawful environmental protection obligations and duties under the public trust and reasonable use doctrines, the temperature management plan, nor Delta water quality objectives. Nor does this allocation of water to project purposes and needs in the least represent a “co-equal” allocation on its face. Seventy-five percent of committed projects’ water supplies went to senior water contractors while the savings from reducing water quality obligations of the projects amount to just 1 to below 3 percent of supply allocations. This is nowhere near co-equal management of water supplies with ecosystem protection, restoration, or enhancement. The thumb of senior water rights has pressed the scale of justice toward water supplies over ecosystem protection and environmental justice in the Water Board’s TUCO.

On the matter of water allocation alone, the Water Board must timely reconsider its assessment that DWR and USBR really had urgent needs to have water quality objectives relaxed when far more water is allocated instead to serve agricultural export markets.

Our protest letter also contended that the TUCP and TUCO would have unreasonable environmental impacts in Delta channels. Please see our protest letter at pages 10 through 12 where we discuss the effects that reduced flows to and through the Delta will have on X2, the Bay-Delta Plan estuarine water quality objective; the nonnative invasive clam *Potamocorbula amurensis* (outcompeting Delta smelt and other pelagic species for phytoplankton in the water column, and increasing its range upstream); and increased fluorescing of harmful algal blooms and the effects they will have on air quality and public respiratory health, on anglers, on people seeking to recreate in the Delta this

summer; and on dissolved oxygen levels when blooms begin to die off later in the season.

Our protest letter also argued strenuously that the TUCP and TUCO are not in the public interest. While the public interest is undefined in state water law, it is clear that the Water Board has failed to consider a variety of relevant water, environmental justice, and civil rights policies and laws that collectively shape the public interest, and which were not suspended by the governor's drought emergency declarations. See pages 12 and 13 of our protest letter. The Water Board should timely reconsider its TUCO so that the issues environmental impact issues we raise in our protest letter are addressed, and the public interest be better served.

Finally, the Water Board has neither timely considered nor rejected our recommended conditions under which our protests/objections may be disregarded and dismissed once resolved. See pages 13 through 15 of our letter. The Water Board should timely reconsider its TUCO so that it reflects and considers how it will address our recommended conditions under which our protest concerns may be resolved and withdrawn.

We look forward to your efforts to timely reconsider your TUCO issued June 1. If you have questions, please contact Barbara Barrigan-Parrilla or Tim Stroshane at the contact information provided below.

Sincerely,



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