

SOUTH DELTA WATER AGENCY

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February 23, 2023

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STATE WATER BOARD

1001 I Street
P.O. Box 100
Sacramento, CA 95812

Re: South Delta Water Agency and Central Delta Water Agency Objection to Temporary Urgency Change Petition Filed By The California Department Of Water Resources and The United States Bureau Of Reclamation Regarding Permits and a License of The State Water Project and The Central Valley Project

To Whom It May Concern:

The South Delta Water Agency (SDWA) and Central Delta Water Agency (CDWA) herein object to the above-referenced Temporary Urgency Permit (TUCP).

The Department of Water Resources (DWR) and US Bureau of Reclamation's (USBR) Urgency Change Petition dated February 13, 2023 (TUCP) reaches a new low in the protection of water quality, fisheries and in complying with the rule of law. After so many previous petitions and automatic approvals, we now have a TUCP which does not even pretend there is an emergency or an urgency. The Executive Director's casual approval of the TUCP which utterly fails to comply with the urgency petition requirements leaves little hope that the Bay-Delta can be saved. The USBR 's failure to even attend the SWRCB meeting wherein the TUCP was approved indicates just how irrelevant any participation is in the process. After previously promising to make sure any future urgency petitions would be an open process and maximize public input before being submitted or approved, the Director of DWR apologized to the SWRCB and the public that it was unfortunate they did not live up to their promise this time, but would so in the future.

The "public, open" process went as follows: Governor Newsom issues Executive Order No. N-3-23 on February 13, 2023; DWR and USBR file their TUCP on February 23, 2023; the SWRCB issues the Notice of the TUCP on February 23, 2023; CDFW issues a letter regarding a biological review of the TUCP on February 13, 2023 and a letter supporting the TUCP on February 20, 2023 and the SWRCB approves the TUCP on February 21, 2023. A less public process one cannot imagine.

It is also important to note that the TUCP itself states that DWR and USBR will begin operating under the change sought in the TUCP "starting this week." One wonders what authority from what source allows a petitioner to grant itself the petition without a peep from the SWRCB

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or its staff. Delta diverters look forward to using this incredible approach when the staff next tries to curtail them.

The underlying “urgency” for the TUCP is that the State has gone from extremely dry conditions, to extremely wet conditions and back to extremely dry conditions. However, the return to “extremely dry conditions” is a baseless convenience for the fact that after series of storms which inundated California, the rains stopped for a few weeks. Given the time it takes to get the Governor, SWRCB and CDFW all on the same page, this new crisis of drought conclusion happened about two weeks after the near historic rain and snow. Whatever the ultimate consequences of climate change are, having a few weeks of respite after a series of storms is not the indicator of any radical shift.

Water Code Sections 1435 et.seq. sets forth the requirements for a TUCP. The TUCP and the SWRCB Order approving it make no mention of key parts of the statute. Section 1435 (c) requires the SWRCB to conclude that the Petitioners (the projects) exercised due diligence in pursuing a change petition to address the issues under normal, non-emergency procedures. The purpose of this of course is to make sure a permit holder plans ahead for situations that can be anticipated and not simply sit around until it’s too late. This case is the classic example of a lack of due diligence. Urgency petitions are supposed to be used to address emergencies; unanticipated events for which prior planning could not have anticipated. Having a series of storms followed by a few weeks of no precipitation doth not an emergency make. Since neither the Petitioners nor SWRCB staff mentioned what the historic record shows regarding this situation (the historic record used in the modeling of D-1641) it’s a near certainty that this kind of erratic weather occurred in the past.

If the projects had modeled and developed operational plans of how they would meet or almost meet their permit requirements during episodic weather events, they would have known if lots of rain at one time somehow lessened their ability to meet their permit conditions. Based on that analysis, they could have then sought a regular change petition to address their concerns. That is what the “urgency” conditions in Section 1435 require. Petitioners did not plan ahead and, as such, fail to comply with the criteria of the statute.

But therein lies the rub. The TUCP does not seek to lessen water quality obligations/water right permit conditions because some extraordinary event has prevented them from meeting those obligations, rather the TUCP is to escape those obligations at the expense of those protected by the obligations. Nowhere in the TUCP or staff report or Order granting the TUCP is there any mention of not meeting any other water quality objectives in this year. To the contrary, the Director of DWR stated in the SWRCB meeting that DWR would be filing no other TUCP’s this year. Not that they “might not” or likely would not” but that they “would not.” Hence the current snowpack and reservoir storage is believed sufficient to meet all existing water quality objectives. [Of course this does not include the southern Delta salinity standards which DWR and USBR intend to violate each year.]

The relief from the Port Chicago standard being sought under the TUCP is of course to not maximize the ability to meet future year water quality objectives because the modeling supporting the TUCP indicates to real change in carryover with the TUCP or without. Rather the purpose of the TUCP is to increase south of Delta storage which is the euphemism for “increased exports.” Meeting the standards and NOT increasing exports would perhaps increase the ability to meet future year standards but that is nowhere contemplated by the Petitioners or the SWRCB. In not answering a question about the effects of the TUCP, the Director of DWR emphasized that the TUCP would help them “meet their goals” for (south of Delta) storage.

All the other “maybes” and “mights” and “coulds” in the TUCP are to suggest that the “saved” water under the TUCP perhaps might benefit fish or other Delta dependent beneficial uses are misdirection.

This brings us to the incredulous assertions by the Petitioners and SWRCB staff that the Port Chicago standard was adopted under the assumption that lots of rain in December or January would be followed by lots of rain in February and perhaps March. This unsupportable assertion falls apart under the lightest examination. First, if continued rain and snow was a precondition to the standard, there would be no need for the standard. High flows that protect and enhance fisheries are not a standard, they are a periodic occurrence and cannot be the responsibility of any party. No one thought at the time of the 1995 WQCP or D-1641 that we should “require the projects to maintain high flows when high flows are in the system.”

Second, D-1641 was adopted to recover various fish species and the overall health of the Delta. The 1995 Plan and the D-1641 analyses concluded that increased flows in that December through March period were needed to improve fish populations. Thus (as the Port Chicago standard requires) if there are high flows at the beginning of this important time frame, the SWRCB *wants those high flows to continue*. It is specifically the obligation of DWR and USBR to insure that when the opportunity arises that THEY make sure the high flows continue. D-1641 and the Port Chicago standard are the mechanism by which we improve conditions to help recover the fisheries. The Petitioner’s and SWRCB staff’s assertions that D-1641 only anticipates high flows when high flows continued naturally, is absurd and undermines both D-1641, SWRCB policy and common sense.

The illogic of the TUCP and staff’s approval thereof is also based on the false notion that the SWRCB is somehow “balancing needs” and trying to find the best allocation of water. That is of course wrong and unsupported in any statute, regulation, or policy. The required “balancing” of needs occurred when the SWRCB developed the 1995 WQCP and adopted D-1641. Choosing objectives and implementing them requires a balancing of needs and supplies such that we do not save fish and have humans die, or that humans can develop deserts and fish die. Once that balancing is done, the SWRCB is obligated to enforce the water quality objectives to achieve the previously determined protections and enhancement of the environment, especially Delta related fisheries. The only balancing thereafter is what to do when something unforeseen occurs and objectives are likely to be violated through no fault of any water right holder who is assigned

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responsibility for meeting the objectives. In this situation we have exited a drought and the water right holders assigned the responsibilities for meeting objectives are fully capable of meeting those obligations. Notwithstanding the universal lament that “the drought is not over” the drought is over. What remains is that various areas dependent on imported Delta water do not anticipate having all the water they need or want. That is not a drought, that is the normal circumstance in California; dry, arid areas do not have all the water they need.

Of course, it may not rain again for months or years and a new drought may have begun. We do not know if that will happen or will not. We do know that we do not know, so the TUCP cannot be justified by “well, we might be in a new drought.” Important to this point is the fact that the TUCP is specifically NOT constituted to meet future water quality needs, it is being requested to increase the supply of dry, arid regions. That may be a laudable goal but is not the goal of the 1995 WQCP or D-1641. The SWRCB’s goals (and mandates) are to protect water quality, especially Delta water quality. Easing fishery requirements during a time of historic low populations and after the SWRCB has found that existing protections are insufficient can only be described as an abandonment of the SWRCB’s obligations.

Both federal and state law require the doubling of fish populations. That cannot be done by relaxing already inadequate protections in order to increase export supplies. The exclamation point to this is of course that specific ruling in the *Racanelli Decision* so often quoted by the Delta agencies and always ignored by the SWRCB. Exports can only occur after Delta water rights are satisfied, water quality is maintained and an adequate supply for in-Delta uses is provided by the projects. (US vs. SWRCB 182 CalApp3d. (1986) at page 139). The TUCP results in water quality not being met and in-Delta supply not being provided.

For the above reasons, the TUCP should not have been approved and the approval order should be rescinded. SDWA incorporates herein the previous comments of SDWA and CDWA regarding the TUCP’s requested in 2021 and 2022. CDWA joins in these comments.

Respectfully Submitted,



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SOUTH DELTA WATER AGENCY

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