State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterboards.ca.gov/waterrights

PROTEST– PETITION

This form may also be used for objections

PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT CHANGE OR TRANSFER ON

APPLICATION See Attachment **PERMIT** _____ **LICENSE** _____

OF USBR/DWR

I (We) have carefully read the notice (state name): Doug Obegi

Address, email address and phone number of protestant or authorized agent:

NRDC, 111 Sutter Street, 20th Floor, San Francisco, CA 94104
(415) 875-6100

Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS (Prior right protests should be completed in the section below):

- the proposed action will not be within the State Water Resources Control Board's jurisdiction ☐
- not best serve the public interest ☒
- be contrary to law ☐
- have an adverse environmental impact ☒

State facts which support the foregoing allegations See attachment

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

See Attachment

Protest based on INJURY TO PRIOR RIGHTS:

To the best of my (our) information and belief the proposed change or transfer will result in injury as follows: _____

Protestant claims a right to the use of water from the source from which petitioner is diverting, or proposes to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative or riparian right):: _____

List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree).

_____

Where is your diversion point located?__¼ of ____ ¼ of Section _____, T ___, R____, ___B&M

If new point of diversion is being requested, is your point of diversion downstream from petitioner's proposed point of diversion? _____

The extent of present and past use of water by protestant or his predecessors in interest is as follows:

a. Source _____
b. Approximate date first use made _____
c. Amount used (list units) _____
d. Diversion season _____
e. Purpose(s) of use _____

Under what conditions may this protest be disregarded and dismissed? _____

All protests must be signed by the protestant or authorized representative:

Signed: Doug Thorpe Date: 3-30-15

All protests must be served on the petitioner. Provide the date served and method of service used:

Service via email 3/30/15

NRDC NATURAL RESOURCES DEFENSE COUNCIL

The Bay Institute

March 30, 2015

Rich Satkowski
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Sent via email to Rich.Satkowski@waterboards.ca.gov

RE: Protest and Objections to the TUCP filed on March 24, 2015 by the Bureau of Reclamation and Department of Water Resources

Dear Mr. Satkowski:

On behalf of the Natural Resources Defense Council and the Bay Institute, we are writing to protest and object to the Temporary Urgency Change Petition filed on March 24, 2015 by the Bureau of Reclamation and Department of Water Resources ("TUCP").[1] The drought is causing significant hardship to rural communities, farms, and fish and wildlife across the State, and we recognize the need to conserve scarce water resources during the drought and ensure that health and safety needs for water are met. For these reasons we do not object to maintaining minimum 1,500 cfs CVP/SWP exports for health and safety purposes when the projects are otherwise failing to comply with existing water quality standards. Nor do we object to the very limited use of the midstep export exception solely for critical public health and safety purposes, consistent with the Executive Director's prior TUCP order.

However, continued drought conditions – and the State's management responses to the drought – are significantly increasing the risk of driving several of California's native fisheries extinct, and of doing lasting damage to the health of the Bay-Delta estuary. As discussed in our prior protests and objections over the past year and a half, the best available science shows that continued waiver of D-1641 standards during drought conditions is likely to lead to further population declines for several species whose abundance is at some of the lowest levels ever recorded. The reduction in Delta outflow, in particular, is causing significant adverse effects on numerous fish species and the long term health of the estuary. Moreover, the water temperature modeling

[1] The petition was filed for Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources 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 for the Central Valley Project.

recently submitted by the Bureau of Reclamation indicates that water diversions for senior contractors and other operations this year will reduce the coldwater pool in Shasta dam, and that operators are likely to again lose temperature control at Shasta Dam, which last year resulted in greater than 95% mortality of endangered winter run Chinook salmon. TUCP, Attachment A at 36 (acknowledging that temperature modeling forecasts "suggest similar impacts as described during the late summer of WY 2014"); *see* Bureau of Reclamation submittal to SWRCB related to Condition 6b of the March 5, 2015 TUCP Order ("Condition 6b Submittal").

For these reasons, and as discussed further below, we object to and protest the following modifications of D-1641 standards proposed in the TUCP:

1. Modification of the export limit to permit exports greater than 1,500 cfs when D-1641 standards are not being met (except to meet health and safety needs);
2. Modification of the Vernalis pulse flow standard from 3,100 cfs to 710 cfs;
3. Failure to achieve reasonable temperature control to protect endangered winter run Chinook salmon below Shasta Dam in light of proposed operations, including operations for upstream deliveries in April and May.

We urge the SWRCB to deny these elements of the TUCP and to condition approval of the TUCP upon compliance with an operational plan that adequately protects endangered winter run Chinook salmon.[2]

1. <u>The SWRCB Should Deny Modification of the Export Limit to Permit Exports Greater than 1,500 cfs When D-1641 Standards are not being met (Except for Health and Safety Purposes) because the Reduction in Delta Outflow Will Cause Unreasonable Effects on Fish and Wildlife:</u>

The Executive Director has already concluded that approval of increased exports as proposed in the TUCP would cause unreasonable impacts to fish and wildlife. *See* Revised Order dated March 5, 2015 at 6, 27; Order dated February 3, 2015; Executive Director's Presentation to the SWRCB on February 18, 2015. We agree with the SWRCB's conclusion in the March 5, 2015 Order that increased exports, except as strictly necessary for health and safety uses, cause unreasonable effects on fish and wildlife.[3]

Not only would approval of increased exports as proposed in the TUCP increase the risk of entrainment, as discussed in that order, but more importantly, it substantially reduces Delta outflow. We renew our protests and objections filed January 27, 2015 and February 13, 2015. Further reducing Delta outflow, when the minimum D-1641 outflow and X2 standards are not being met, will cause unreasonable effects on fish and wildlife. The TUCP documents that drought conditions, including significantly reduced outflow, in the past few years are already

[2] In addition, TBI protests and objects to the continuing relaxation of D-1641 objectives for Delta outflow given the dire consequences for numerous resident and migratory estuarine species described in our protest of the 1/23 TUCP and objections to the 2/3 SWRCB Executive Director's Order.

[3] As the SWRCB's prior orders explain, the fishery agencies' concurrences under the ESA does not address the SWRCB's legal obligations under the Water Code, and despite those agency concurrences, the SWRCB appropriately concluded that increased exports would cause unreasonable effects on fish and wildlife. See Revised Order dated March 5, 2015 at 5-6, 24-27.

causing higher abundance of nonnative predators like black bass and expansion of *Corbicula* (an invasive clam species whose grazing of plankton substantially reduces important parts of the food chain for native fisheries), as well as promoting harmful algal blooms, reduced reproductive success for native fisheries, and parasitic outbreaks. TUCP, Attachment A at 69. These are many of the same concerns that we have raised in our prior protests.

Yet inexplicably, the biological analysis included in the TUCP largely ignores the impact of reduced outflow on Delta Smelt (focusing instead on entrainment) and it wholly fails to consider analysis in the recent MAST Report showing that reduced spring outflow has a significant adverse effect on delta smelt recruitment and subsequent abundance. With respect to longfin smelt, the TUCP acknowledges that because "increased outflow is one of the best predictors of Longfin Smelt year class strength, … it is likely the proposed action will exacerbate poor Longfin Smelt recruitment and survival already expected in 2015 due to the severity of the drought." TUCP, Attachment A at 80. The TUCP acknowledges that reduced outflow will likely reduce survival of threatened and endangered salmon and steelhead as well. *Id*. at 38-40, 46, 48. In addition, the TUCP wholly ignores the impacts of reduced Delta outflow on other species whose survival and abundance is significantly and adversely affected by reduced Delta outflow, including fall run Chinook salmon, Starry Flounder, and Crangon Shrimp. Delta outflow is one of the most dominant drivers of the health of the estuary, and the TUCP (including the proposal for increased exports) will dramatically reduce Delta outflow below the requirements of D-1641. And of course, independent scientists, the SWRCB, California Department of Fish and Wildlife, and other agencies have concluded that the existing outflow and X2 standards of D-1641 are inadequate to fully protect public trust fishery resources. *See* SWRCB 2010; CDFW 2010, 2012.

The best available science shows that the reduction in Delta outflow proposed in the TUCP will cause reduced survival and abundance of numerous fish and wildlife in the Bay-Delta estuary and upstream. This is not something that can be addressed with real time operations, but instead is a function of increased exports at the expense of Delta outflow. The TUCP unreasonably reduces Delta outflow, particularly the proposal to increase exports when D-1641 outflow and X2 standards are not being met. As in our prior protests and objections, we urge the SWRCB to maintain the existing prohibition on CVP/SWP exports in excess of 1,500 cfs when D-1641 water quality standards are not being met, except as necessary for human health and safety, and deny this element of the TUCP.

2. <u>The SWRCB Should Deny Modification of the Vernalis Pulse Flow Standard from 3,100 cfs to 710 cfs Because it will Cause Unreasonable Effects on Fish and Wildlife:</u>

In this TUCP, the agencies propose to reduce the Vernalis pulse flow standard from 3,100 cfs, which is the minimum pulse flow standard that applies only in Critically Dry water year types, to 710 cfs, which is the minimum base flow that applies only in Critically Dry water year types. This effectively eliminates the pulse flow and dramatically worsens conditions for salmon and steelhead in the Lower San Joaquin River and its tributaries as compared to operations approved 2014, which required 15 days of 3,300 cfs and 15 days of 1,500 cfs during the pulse flow period. *See* TUCP Order dated April 11, 2014. As the SWRCB has noted, what constitutes unreasonable effects on fish and wildlife must be considered in the context of other beneficial uses. *See* Revised Order dated March 5, 2015 at 3, 22, 24. And in contrast to Reclamation's proposal to largely eliminate the Vernalis pulse flow, media reports indicate that the Bureau of Reclamation

will deliver 450,000 acre feet of water to senior water rights holders on the Stanislaus River. See Steve Knell and Jeff Shields, *Irrigation Districts: State could derail delicate Stanislaus water deal*, Modesto Bee, March 28, 2015. In light of the likely impacts to salmon and other fish and wildlife by reducing the Vernalis pulse flow while delivering 450,000 acre feet of water for agricultural beneficial uses, the SWRCB should reject this element of the TUCP because it will cause unreasonable effects on fish and wildlife.

First, the dramatically reduced Vernalis pulse flow proposed in the TUCP will cause unreasonable effects on San Joaquin basin salmon and steelhead. The TUCP acknowledges that reduced flows will reduce survival of migrating steelhead in the San Joaquin River. TUCP, Attachment A at 66. However, the TUCP wholly ignores the effects on fall run Chinook salmon. As the SWRCB is well aware, the best available science demonstrates that lower flows at Vernalis are very likely to cause substantially reduced survival and subsequent abundance of salmon. *See* SWRCB 2010, 2012; CDFW 2012; NMFS 2012; NRDC and the Bay Institute 2013. The low levels are likely to have devastating effects on survival and subsequent abundance of San Joaquin basin salmon and steelhead.

Second, waiver of the Vernalis pulse flow also reduces Delta outflow by several thousand cubic feet per second during the month of April. As discussed above, and in more detail in our prior protests and objections, reduced Delta outflow significantly harms native fish and wildlife. Rejection of this element of the TUCP would likely reduce or avoid unreasonable effects on salmon and steelhead upstream, and the increased outflow benefitting salmon and pelagic species in the Delta would reduce or avoid the effects downstream. It could also result in additional conserved storage at Shasta Dam, if Keswick releases are reduced in light of increased San Joaquin inflow. For all of these reasons, the SWRCB should reject the TUCP proposal to reduce Vernalis pulse flows to 710 cfs.

3. <u>The SWRCB Should Impose Additional Conditions on CVP/SWP to Provide Reasonable Temperature Control to Protect Endangered Winter Run Chinook Salmon Below Shasta Dam in light of Proposed Operations, Including Operations to make Upstream Deliveries in April:</u>

We request that the SWRCB impose additional conditions on CVP/SWP operations that adequately protect winter run Chinook salmon, which likely will need to include reductions in deliveries to senior contractors. The TUCP states that the intent of the proposed modifications to D-1641 water quality standards protecting fish and wildlife is to conserve upstream storage. TUCP at 2. However, the TUCP itself acknowledges that temperature forecasts suggest a repeat of 2014's disastrous conditions for winter run Chinook salmon, *see* TUCP, Attachment A at 36, which resulted in more than 95% mortality of juvenile winter run Chinook salmon. More recent temperature and operational modeling submitted by the Bureau of Reclamation to the SWRCB indicates that operators are unlikely to maintain temperature control this year. *See* Condition 6b Submittal. It is important to recall that Reclamation's temperature model is biased and likely underestimates the resulting water temperatures this fall. *See* NMFS 2014; March 5, 2015 TUCP order at 17, 26, 32; NMFS letter to Reclamation dated January 29, 2015 at 4. The resulting water temperatures this year are likely to cause unreasonable effects to fish and wildlife, including winter run Chinook salmon and other salmon runs spawning below Keswick dam.

That modeling also indicates that Shasta operations, including operations in April and May, are likely to result in reservoir releases that are substantially higher than that needed for temperature control, impacting end of September reservoir storage and the size of the coldwater pool for winter run and other salmonids. *See* Condition 6b Submittal. Contrary to assertions made at prior SWRCB hearings, it is clear from this modeling that reservoir releases are greater than what are necessary to meet temperature compliance. For instance, in April, the Bureau of Reclamation proposes that reservoir releases would 5,600 cfs (Scenario 6b(1) and Scenario 6b(4)), whereas the water temperature focused Scenario 6b(2) and Scenario 6b(3) would result in releases of 3,250 cfs. *Id*. at 4. Reclamation's proposed operations for April 2015 would result in substantially higher reservoir releases than in April 2014 and indicate that reservoir releases to meet senior water rights are greater than necessary to meet temperature control. The same appears to be true with respect to meeting the outdated Wilkins Slough standard under Reclamation's proposed operations, as well as the magnitude of releases in the summer months. *Id*. As a result, it is clear that CVP/SWP deliveries, including water deliveries to senior contractors, are substantially contributing to unreasonable effects on fish and wildlife below Shasta Dam. We note in this regard that the Bureau of Reclamation proposes to deliver more than 2.6 million acre feet of water to senior agricultural contractors,[4] in addition to DWR's 20% State Water Project allocation and deliveries to DWR settlement contractors on the Feather River.

The SWRCB has a continuing obligation to protect winter run Chinook salmon and other species spawning below Shasta Dam, and the prior TUCP Order directs Reclamation "to ensure that temperature control on the Sacramento River for salmonids is maintained throughout the year and that issues encountered last year with temperature control are factored into that planning." *See* March 5, 2015 TUCP Order at 22. That TUCP Order also explicitly reserves authority of the SWRCB to require modifications to the order to protect fish and wildlife. *Id*.; *see id*. at 25-26 (acknowledging that Order WR-95 requires Reclamation to operate its facilities on the Sacramento River to achieve temperature control for salmon). In light of the temperature modeling that has been provided, the SWRCB should immediately order Reclamation to modify proposed Shasta Dam operations to ensure adequate temperature control later in the year, including the following measures:

- Limit Shasta Dam releases in April and May to minimum reservoir releases (3,250 cfs) unless necessary for temperature control or health and safety purposes;
- Reduce flows at Wilkins Slough below 3,800 cfs unless necessary for temperature control or for health and safety purposes;
- Reduce releases from Shasta in the summer months unless necessary for temperature control or for health and safety purposes, and consider increased reliance on reservoir releases from Oroville.

The SWRCB should not approve the TUCP without imposition of additional conditions that ensure Shasta operations adequately protect winter run Chinook salmon and other salmon runs spawning below Shasta Dam.

[4] *See* Bureau of Reclamation, Central Valley Project (CVP) Water Quantities with 2015 Allocation, available online at: http://www.usbr.gov/mp/PA/water/docs/1_CVP_Water_Quantities_Allocation.pdf (last visited March 30, 2015).

Conclusion:

California's drought, currently in its fourth year, continues to cause significant hardship and impacts to rural communities, agriculture, and the State's fish and wildlife. However, if granted in its current form, implementing the TUCP will exacerbate the impacts of four years of drought to a level that causes unreasonable effects on fish and wildlife. The SWRCB should reject those elements noted above and impose additional conditions to ensure that temperature control below Shasta Dam can be maintained.

We greatly appreciate the SWRCB's consideration of our views.

Sincerely,

Doug Obegi
Natural Resources Defense Council

Gary Bobker
The Bay Institute

cc: James Mizell, Department of Water Resources, James.Mizell@water.ca.gov;
Amy Aufdemberge, Regional Solicitor's Office, Amy.Aufdemberge@sol.doi.gov