



January 7, 2022

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

Sent via email to: Bay-Delta@waterboards.ca.gov, James.Mizell@water.ca.gov,
Amy.Aufdemberge@sol.doi.gov, knwhite@usbr.gov

**RE: Comments on and Protest of Temporary Urgency Change Petition
Regarding Delta Water Quality**

Dear Chair Esquivel and Members of the Board:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, The Bay Institute, San Francisco Baykeeper, Sierra Club California, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Research, Golden State Salmon Association, California Sportfishing Protection Alliance, Northern California Council Fly Fishers International, Restore the Delta, Tuolumne River Trust, Tuolumne River Conservancy, and Wholly H2O, we are writing to urge the State Water Resources Control Board ("Board") to reject the Temporary Urgency Change Petition filed by the U.S. Bureau of Reclamation ("Reclamation") and the California Department of Water Resources ("DWR") to waive or weaken requirements that the Central Valley Project ("CVP") and State Water Project ("SWP") meet Delta water quality

objectives from February 1 to April 30, 2022 (“2022 TUCP”). The Board should deny the 2022 TUCP as proposed because: (1) granting the 2022 TUCP will cause unreasonable effects on fish and wildlife; (2) granting the 2022 TUCP is not in the public interest; and (3) Reclamation, DWR and the Board have failed to exercise due diligence. Instead of approving the 2022 TUCP as requested, the Board should first require DWR and Reclamation to curtail water allocations for, water deliveries to, and water diversions by all of their contractors, including settlement and exchange contractors (except for water diversions needed for human health and safety and water diversions for wildlife refuges) and eliminate the 1,500 cfs minimum pumping rate in the 2022 TUCP because it does not represent, and far exceeds, what is necessary for human health and safety. In addition, before considering the 2022 TUCP, the Board should adopt an emergency curtailment regulation and order that declares any water diversions in the Bay-Delta watershed to be an unreasonable use of water when Delta water quality standards protecting fish and wildlife beneficial uses in Decision 1641 are not being met, except for water diversions necessary for human health and safety and for wildlife refuges.

I. The Board Should Deny Approval of the 2022 TUCP as Proposed Because Approval Will Cause Unreasonable Effects to Fish and Wildlife

The Board should deny the 2022 TUCP because it will result in unreasonable effects on fish and wildlife. 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 the Board’s December 15, 2021 Draft Order on Reconsideration (“Draft Order”),¹ 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.

Draft Order at 46; *see id.* at 47 (noting that “updates to Sacramento/Delta components of the Bay-Delta Plan are expected to provide for improved protections for fish and wildlife in the long term that would allow species to better withstand drought effects”).

In addition, the Board and its Executive Director in 2015 and 2016 found that approval of TUCPs that are very similar to the 2022 TUCP was unsustainable and was leading to extinction

¹ Draft Order Denying in Part and Granting in Part Petitions for Reconsideration of the Executive Director’s June 1, 2021 Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought; and the Executive Director’s June 10, 2021 Sacramento River Temperature Management Plan Approval Pursuant to Order 90-5 (“Draft Order”), available online at: <https://www.waterboards.ca.gov/drought/tucp/docs/2021/2021-12-15-draft-order-on-reconsideration.pdf>. The Draft Order is incorporated by reference.

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.”² 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

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).

Yet despite repeatedly finding that existing water quality objectives fail to provide reasonable protection of fish and wildlife, and that prior TUCPs were unsustainable and were leading to extinction, the 2022 TUCP would greatly weaken or waive those Delta water quality objectives for February 1 to April 30, 2022.³ The 2022 TUCP itself demonstrates that approval would significantly harm native fish and wildlife including Delta Smelt, Longfin Smelt, winter-run Chinook salmon, spring-run Chinook salmon, fall run Chinook salmon, and Central Valley steelhead. Similarly, the expert declaration by Jonathan Rosenfield, Ph.D., attached hereto as Exhibit A, further demonstrates that approval of the 2022 TUCP would cause unreasonable effects on fish and wildlife. See Exhibit A at ¶¶ 70-90. Rosenfield concludes that:

Weakening water quality standards of the Bay-Delta Plan during the 2022 water year will significantly diminish the likelihood of both the survival and recovery in the wild of the threatened and endangered species covered by the 2019 BiOps. Given the extremely precarious conservation status of some of these species ... the damage resulting from environmental conditions proposed in the TUCP is likely to be irreparable.

Id. at ¶ 88. The harms caused by the 2022 TUCP (including but not limited to extinction) are unreasonable, not in the public interest, and 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.

² https://www.waterboards.ca.gov/board_info/media/feb2015/swrcb_brdwrkshp021815_1 (at 45-minute mark).

³ DWR and Reclamation have contemplated additional TUCPs in the spring and summer months, based on modeling that they disclosed to NRDC and other parties in ongoing litigation.

Moreover, to the extent that the TUCP claims that weakening Delta water quality objectives is a tradeoff that will result in adequate protection of salmon below Shasta Dam, *see* 2022 TUCP at 1-14, the TUCP provides no modeling or evidence to support this claim, nor does it impose conditions that would satisfy this goal. Without any evidence, there is simply no basis for the Board to rely on this assertion. This is particularly true since it has been repeatedly shown that approval of TUCPs do not result in adequate temperature protection for salmon upstream of the Delta. For instance, the Board found that while the TUCP in 2015 was intended to improve Shasta storage and temperature management for salmon,

the actions taken this year to protect winter-run, while reasonable at the time, were unsuccessful. Significant changes to the temperature management process must be implemented immediately to ensure that winter-run do not go extinct, to avoid further serious indirect impacts, and to ensure that there is timely, transparent and accurate information provided to inform temperature management decisions.

Water Rights Order 2015-0043 at 40. The Draft Order likewise shows that the TUCP in 2021 failed to protect salmon below Shasta Dam from the lethal effects of high river temperatures. Draft Order at 17 (stating that increased upstream storage “was not adequate to avoid significant temperature related mortality given other reservoir releases.”); *id.* at 33. In fact, the California Department of Fish and Wildlife recently found that egg-to-fry survival of winter-run Chinook salmon in 2021 was the lowest recorded in the past 25 years (2.56%), largely as a result of Reclamation’s 2021 temperature management operations that caused 75% temperature-dependent mortality. *See* Exhibit B. In light of the experiences in 2014, 2015, and 2021, there is no reasonable basis to conclude that approval of the 2022 TUCP would conserve upstream reservoir storage sufficient to adequately protect salmon from deleterious water temperatures. *See also* Exhibit A at ¶¶ 79-80, 89. Instead, recent experience demonstrates that Reclamation will continue to make excessive water deliveries from Shasta, even while failing to meet downstream water quality standards, causing harm to both upstream and downstream fish habitat. In addition, granting the 2022 TUCP to purportedly increase upstream storage levels – without first requiring Reclamation to curtail water allocations to its settlement and exchange contractors – is inconsistent with the Board’s obligations to provide reasonable protection of fish and wildlife and protect the public trust, and with the Board’s obligations under Order 90-5, which requires Reclamation to reduce water supply allocations to its contractors in order to meet temperature protections for salmon below Shasta Dam.

Finally, the Shasta Reservoir storage and water temperature targets in the Interim Operations Plan (“IOP”), which are proposed as terms and conditions for coordinated operations of the CVP and SWP in 2022 in the Board’s Draft Order, are woefully inadequate. The National Marine Fisheries Service (“NMFS”) has acknowledged in Court filings that the operations proposed under the IOP are likely to result in temperature-dependent egg mortality of winter-run Chinook salmon ranging from 34-73% if 2022 is a dry or critically dry year. *See* Declaration of Howard

Brown, Dkt. 314-3, at ¶ 32. These levels of mortality exceed the thresholds for authorized incidental take in the Trump administration’s 2019 biological opinion and the maximum allowable threshold for egg mortality identified in NMFS’ 2017 draft RPA amendment. *See also* Exhibit A at ¶¶ 18, 33. Approval of the 2022 TUCP and the Shasta temperature storage and temperature targets proposed in the woefully inadequate IOP would result in unreasonable effects on fish and wildlife in the Delta and would unreasonably harm the salmon fishery below Shasta Dam, as discussed in Dr. Rosenfield’s declaration. *See* Exhibit A at ¶¶ 29-43. Because approval of the 2022 TUCP would cause unreasonable effects on fish and wildlife, the Board should deny the 2022 TUCP.

II. The Board Should Deny Approval of the TUCP as Proposed Because Approval Is Not in the Public Interest

The Board should also deny approval of the 2022 TUCP because approval is contrary to the public interest, given that: (1) the 1,500 cfs minimum exports proposed in the TUCP far exceed what is necessary for human health and safety; and, (2) the 2022 TUCP does not require Reclamation and DWR to first eliminate water supply allocations, water deliveries, and water diversions by their contractors, including settlement and exchange contractors, except for: (a) human health and safety,⁴ *see* Cal. Code Regs., tit. 23, § 871.1; and (b) wildlife refuges (Level 2) as required by federal law, *see* section 3406 of P.L. 102-575. Reducing exports below 1,500 cfs and reducing the SWP and CVP’s water supply allocations would significantly reduce or avoid the need for TUCPs that will cause unreasonable effects on fish and wildlife.

The minimum export rate of 1,500 cfs proposed in the 2022 TUCP far exceeds what is necessary for human health and safety, and the Board should reject this arbitrary minimum export rate. During the prior drought in 2014-2015, DWR and Reclamation identified approximately 400 cfs as the minimum Delta export pumping needed for human health and safety. *See* DWR and Reclamation, Updated Report to SWRCB on Export Amounts to Maintain Health and Safety During Drought, April 8, 2014.⁵ In addition, the Board recognized in 2015 that the 1,500 cfs export rate included water deliveries to agricultural contractors and was not limited to human health and safety. *See, e.g.,* State Water Resources Control Board, Order Approving TUCP, February 3, 2015, at 16; State Water Resources Control Board, March 18, 2014 Order Modifying TUCP Order, at 7 (striking human health and safety as the justification for the 1,500 cfs export limit). Instead, the proposed export rate of 1,500 cfs is primarily to make water deliveries to the San Joaquin River Exchange Contractors (with some deliveries for wildlife refuges), as Reclamation admitted in 2019. *See* Reclamation, 2019 Final Biological Assessment, at 4-55 (“In order to meet health and safety needs, critical refuge supplies, ***and obligations to senior water***

⁴ All references to water diversions for human health and safety refer to these cited regulations of the Board and do not include water diversions for commercial or agricultural uses (including water diversions for the CVP and SWP’s settlement or exchange contractors).

⁵ This document is available online at

https://www.waterboards.ca.gov/drought/docs/tucp/031814order_urgchg_swcv/20140408_dwrusbr_to_swrcb_updated_minhs.pdf. It is hereby incorporated by reference.

rights holders, the combined CVP and SWP export rates at Jones Pumping Plant and Banks Pumping Plant will not be required to drop below 1,500 cfs” (emphasis added)).⁶ Neither the existing Water Quality Control Plan nor D-1641 include a minimum export rate of 1,500 cfs, and Delta exports by the CVP and SWP routinely are less than 1,500 cfs during dry conditions when D-1641 is controlling their operations. There are no infrastructure limitations that justify this 1,500 cfs pumping rate; for instance, the Projects can share a single SWP pump to enable 375 cfs of pumping, or use both SWP pumps rated at 375 cfs for a total of 750 cfs of Delta pumping, without having to cycle pumps on or off during part of the day. The Board should therefore reject the 1,500 cfs minimum export rate proposed in the 2022 TUCP.

The 2022 TUCP is also not in the public interest because it does not require Reclamation and DWR to curtail or eliminate water supply allocations to, water deliveries to, and/or water diversions by all of their contractors, including settlement and exchange contractors, except for: (a) human health and safety, *see* Cal. Code Regs., tit. 23, § 871.1; and (b) wildlife refuges (Level 2) as required by federal law, *see* section 3406 of P.L. 102-575. Instead, DWR is currently assuming a 50% allocation to its Feather River Settlement Contractors under dry conditions and a 100% allocation under median hydrological conditions. *See* DWR, Allocation Analysis for 2022, December 1, 2021 (Attached hereto as Exhibit C).⁷ Similarly, the proposed IOP could possibly delay and/or reduce allocations to Sacramento River Settlement Contractors, but it does not require Reclamation to eliminate water allocations to these settlement contractors, nor does the IOP affect water supply allocations to the San Joaquin River Exchange Contractors.

Requiring Reclamation and DWR to reduce or eliminate these water supply allocations (except those necessary for (a) human health and safety and (b) wildlife refuges, as required by federal law) would significantly improve the ability of Reclamation and DWR to meet Delta water quality standards and improve upstream storage and water temperatures. For instance, modeling done by NMFS’s Southwest Fisheries Science Center in 2021 showed that reducing Shasta releases for contractor deliveries by 500,000 acre feet in the late spring and summer would have significantly reduced temperature dependent mortality and increased end of September Shasta storage,⁸ and modeling by DWR to support the IOP shows that eliminating allocations to Feather River Settlement Contractors and Sacramento River Settlement Contractors would significantly increase Shasta storage compared to storage with 50% allocations to these contractors.

⁶ This document is available online at: <https://www.usbr.gov/mp/bdo/docs/ba-chapter-4-proposed-action.pdf>. It is hereby incorporated by reference.

⁷ In addition, the SWP is planning water deliveries for human health and safety that are significantly greater than the 2021 SWP allocation.

⁸ This document was distributed to the Sacramento River Temperature Task Group’s April 28, 2021 meeting, and it is available from the SWRCB’s FTP site at: https://ftp.waterboards.ca.gov/Sacramento%20Temperature/Sacramento%20Temperature%202021/SRTTG%20Meeting%20Materials/WY%202021/April/4.28%20Ad-Hoc%20TMP%20Discussion/Full_Model_SWFSC_Summary_DRAFT_4_27_2021.pdf. It is hereby incorporated by reference.

Granting the 2022 TUCP without first reducing water allocations for DWR and Reclamation's settlement and exchange contractors would not be in the public interest.⁹ 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 Reclamation and DWR are violating their water rights obligations to the public under Order 90-5 and Decision 1641, causing unreasonable impacts to Delta water quality, fisheries, and the Public Trust, the Board should declare under the particular circumstances of this year that delivering the quantities of water specified in these contracts, while Reclamation and DWR violate their water rights obligations to the public under D-1641 and Water Rights Order 90-5, constitutes a waste and unreasonable use of water.

It is also unclear whether, given the substantial precipitation and initial snowpack in Northern California at the end of December 2021, Reclamation and DWR still believe there is an urgent need for the 2022 TUCP. Because DWR and Reclamation provided no modeling of coordinated operations of the CVP and SWP in support of the 2022 TUCP, the Board lacks adequate information on which to make these determinations. In order to make these determinations, the Board should require DWR and Reclamation to provide operational modeling under 50% and 90% exceedance forecasts based on water storage and hydrological forecasts as of January 1, 2022, including: (1) modeling assuming that the proposed 2022 TUCP(s) are granted; (2) modeling assuming that the 2022 TUCP(s) are not granted and that Reclamation and DWR eliminate water allocations to all contractors, including settlement and exchange contractors, except for water allocations to wildlife refuges and for human health and safety.

Because granting the 2022 TUCP as proposed is not in the public interest, the Board should deny approval of the 2022 TUCP.

III. The Board Should Deny Approval of the TUCP as Proposed Because DWR, Reclamation and the Board Have Failed to Exercise Due Diligence

The Board should also deny approval of the 2022 TUCP because Reclamation and DWR, and the Board itself, have not exercised due diligence.

Droughts are a fact of life in California, and the science is clear that climate change is increasing the frequency and magnitude of droughts. 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."

⁹ 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).

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, 2021.¹⁰ 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, and 2021.

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); see Draft Order at 25-26, 39. 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. 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 and failing to adequately protect the salmon fishery from deleterious water temperatures below Shasta Dam.

Because DWR and Reclamation have failed to exercise due diligence, the Board should deny approval of the 2022 TUCP.

IV. The Board Should Only Consider Approving the TUCP if It Requires Reclamation and DWR to Curtail Water Allocations, Water Deliveries, and Water Diversions by All Settlement and Exchange Contractors, Except as Necessary for Human Health and Safety and Wildlife Refuges.

¹⁰ 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.

The Board should deny the 2022 TUCP unless the Board also requires, as a condition of approval in its Water Rights Order, that DWR and Reclamation curtail water allocations, water diversions, and water deliveries to all of their contractors, including settlement and exchange contractors (except as necessary for human health and safety or wildlife refuges). If it does so, the Board must also eliminate the minimum 1,500 cfs Delta export limit in the 2022 TUCP and limit water diversions by the CVP and SWP to what is necessary for human health and safety and for wildlife refuges, unless the Projects are fully complying with D-1641. These proposed terms and conditions would greatly reduce or eliminate the need for TUCPs in 2022 and improve upstream storage and temperatures compared to the wholly inadequate measures proposed in the IOP, thereby minimizing the unreasonable effects on fish and wildlife that would result from approval of the 2022 TUCP.

Given the dire status of numerous Bay-Delta species, the unreasonable effects on fish and wildlife that would result from the 2022 TUCP, and the decisions by Reclamation and DWR to prioritize water deliveries for their contractors over protection of the environment (including planned water allocations for 2022), the Board has the authority and duty to act, including pursuant to the Public Trust doctrine and Article X, section 2 of the State Constitution. As discussed *supra*, granting the 2022 TUCP without first requiring DWR and Reclamation to reduce or eliminate their water supply allocations (except for human health and safety and for wildlife refuges) would not be in the public interest and would constitute an unreasonable use of water. In 2021, Reclamation and DWR provided water supply allocations to their settlement and exchange contractors that far exceeded what they could reasonably claim under their alleged water rights. *See* NRDC et al, Protest and Objections to Temporary Urgency Change Petition Involving the Transfer/Exchange From Department of Water Resources Permit 16479 (Application 14443) and the Specified License and Permits of the U.S. Bureau of Reclamation, June 4, 2021.¹¹ There is no reasonable basis to allow Reclamation and DWR to violate their water rights obligations to the public again while upholding their water contracts to private beneficiaries, largely corporate agribusinesses.¹²

The Board should require DWR and Reclamation to reduce or eliminate all water supply allocations, water deliveries, and water diversions to the contractors of the SWP and CVP, including settlement and exchange contractors, except those necessary for (a) human health and

¹¹ This document is available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2021/20210604_obegi_protest_objection_pet%20for%20recon.pdf. It is hereby incorporated by reference.

¹² As discussed below, the Board has curtailed water diversions by senior water rights holders during drought conditions in the recent past. Yet, the Board's curtailment regulations have not required reduced water diversions by those settlement and exchange contractors, unlike other water rights holders in other watersheds, because of their unsustainable water contracts with DWR and Reclamation. There is no valid reason to give preferential treatment to purported senior water rights holders who hold contracts with the CVP and SWP.

safety and (b) wildlife refuges (Level 2), and prohibit the 1,500 cfs minimum export rate, as a condition of approving any TUCP in 2022.

V. **The Board Should Adopt an Emergency Regulation Prohibiting Water Diversions in the Bay-Delta Watershed, Except as Necessary for Human Health and Safety, as an Unreasonable Use of Water when Delta Water Quality Objectives Are Violated**

Finally, in addition to requiring DWR and Reclamation to curtail all water allocations to their contractors (except for human health and safety and wildlife refuges), the Board should also issue an emergency curtailment regulation and order prohibiting water diversions as an unreasonable use of water when Delta water quality objectives included in D-1641 are not being met. While the Board and other agencies have previously acknowledged that meeting the water quality objectives implemented in D-1641 is not sufficient to ensure reasonable protection of native fish (SWRCB 2010, 2018), the Board should find that water diversions that cause flows to violate these water quality objectives constitute an unreasonable use of water.

The Board has the authority to issue such emergency regulations pursuant to section 1058.5 of the California Water Code. The Board has previously issued similar emergency regulations on the Russian River, Mill and Deer Creek, and Scott and Shasta Rivers, all of which declare that water diversions are per se unreasonable and require curtailment if these diversions cause flows to drop below minimum specified levels necessary to protect salmon. *See, e.g.,* Cal. Code Regs., tit. 23, § 876.5 (emergency curtailment regulation for Mill and Deer Creek). The Board's emergency curtailment regulation and order that requires curtailing diversions to protect minimum flows necessary for salmon on Mill and Deer Creeks has been fully upheld by the courts. *Stanford Vina Ranch Irr. Dist. v. State of California*, 50 Cal.App.5th 976 (2000) (upholding similar emergency regulations issued by the Board in 2014 and 2015).

Issuing a similar emergency regulation in the Bay-Delta, which requires curtailment of all water diversions when Delta water quality objectives for fish and wildlife beneficial uses that are implemented through Decision 1641 are not being met (except water diversions for human health and safety and wildlife refuges) is necessary to ensure that fish and wildlife are not unreasonably impacted and ensure that species do not go extinct. Moreover, the Board's current emergency curtailment regulation for the Bay-Delta fails to adequately protect fish and wildlife; as discussed *supra*, Reclamation and DWR did not reduce water allocations to their settlement and exchange contractors in 2021 despite the emergency curtailment regulation, nor did the regulation require reduced water diversions by these settlement and exchange contractors in 2021,¹³ which resulted

¹³ Indeed, the Glen-Colusa Irrigation District (the largest Sacramento River Settlement Contractor) indicated that the Board's curtailment order would not require them to reduce water diversions in 2021. *See* GCID, Letter to GCID Landowners and Water Users, August 5, 2021, available online at: https://912afe62-5b11-482e-8c47-c2358db4f96b.filesusr.com/ugd/c88b6b_cf8cf1200dfd4c55ad2266e939d0a035.pdf. This document is hereby incorporated by reference.

in the purported need for TUCPs in 2021 and 2022 and the ecological devastation from the loss of temperature control below Shasta Dam. In addition, even if DWR and Reclamation eliminate water allocations to these contractors, they and other water rights claimants will likely divert millions of acre feet of water under their claimed water rights, which could prevent compliance with the Delta water quality objectives and water storage levels necessary to maintain adequate temperature control for salmon below upstream reservoirs.

VI. Conclusion

For the foregoing reasons, the Board should deny the 2022 TUCP as proposed and find that granting the 2022 TUCP would result in unreasonable effects on fish and wildlife and is not in the public interest, and that DWR and Reclamation have failed to exercise due diligence. Instead, the Board should require Reclamation and DWR to curtail water allocations to all of their contractors, including settlement and exchange contractors (except as necessary for human health and safety and for wildlife refuges), and eliminate the 1,500 cfs minimum export rate, as a condition of approval for any TUCP in 2022. In addition, the Board must issue a revised emergency curtailment regulation and order that prohibits water diversions in the Bay-Delta watershed (except as necessary for human health and safety or for wildlife refuges) whenever Delta water quality objectives for fish and wildlife beneficial uses are not being met.

Thank you for consideration of our views.

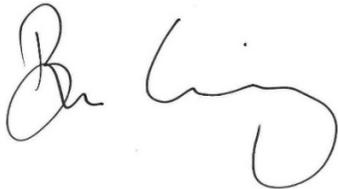
Sincerely,



Doug Obegi
Natural Resources Defense Council



Rachel Zwillinger
Defenders of Wildlife



Ben Eichenberg
San Francisco Baykeeper



Gary Bobker
The Bay Institute



Erin Wooley
Sierra Club California



Mike Conroy
Pacific Coast Federation of Fishermen's
Associations and Institute for Fisheries Research



John McManus
Golden State Salmon Association



Chris Shutes
California Sportfishing Protection Alliance



Mark Rockwell
Northern California Council, Fly Fishers
International



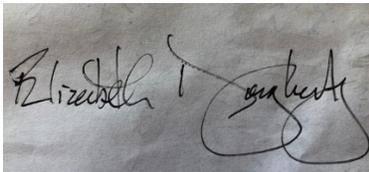
Barbara Barrigan-Parrilla
Restore the Delta



Peter Drekmeier
Tuolumne River Trust



Alison Boucher
Tuolumne River Conservancy



Elizabeth Dougherty
Wholly H2O

Enclosures

Exhibit A: Declaration of Jon Rosenfield, Ph.D.

Exhibit B: Memorandum from California Department of Fish and Wildlife regarding
Draft Winter-Run Juvenile Production Estimate (JPE) for Brood Year 2021 dated
December 31, 2021

Exhibit C: DWR Allocation Analysis for 2022 dated December 1, 2021