



**Notice of Petition for Reconsideration of the State Water Resources Control Board's
September 14, 2022 Denial of Petition for Emergency Rulemaking to Implement Lower
San Joaquin River Flow Objectives**

Pursuant to sections 1122 and 1126 of the California Water Code, section 769 of title 23 of the California Code of Regulations, and related authorities, the Natural Resources Defense Council, the Bay Institute, Tuolumne River Trust, San Francisco Baykeeper, and Golden State Salmon Association, hereby petition the State Water Resources Control Board (“Board”) to reconsider the Executive Director’s September 14, 2022 denial of NRDC et al’s petition for emergency rulemaking to implement Lower San Joaquin River flow objectives (“Denial Letter”).

NRDC et al respectfully requests that the Board withdraw the Denial Letter because the denial is arbitrary and capricious, contrary to law, and is not supported by substantial evidence. In particular, contrary to the Denial Letter, an emergency rulemaking would not eliminate or limit opportunities for public participation and comment on the development of a permanent regulation to implement the Bay-Delta Plan using the standard rulemaking process. In addition, the Denial Letter fails to address the Board’s legal obligation to “fully implement” the Lower San Joaquin River flow objectives “by 2022.” *See* Bay Delta Plan at 24; Cal. Water Code §§ 13147, 13247; *see also* Cal. Water Code § 13050(j). The Board’s adoption of an emergency regulation appears to be the only way for the Board to expeditiously implement the Lower San Joaquin River flow objectives in 2023, as required by the Bay-Delta Plan and State law, and to provide reasonable protection for salmon and other native fish in the Stanislaus, Tuolumne, and Merced Rivers next year.

Petitioners are harmed by this action because the Denial Letter will reduce the survival and abundance of spring-run Chinook salmon and fall-run Chinook salmon in the Stanislaus, Tuolumne, and Merced Rivers, causing irreparable environmental harm and loss of fish and wildlife beneficial uses and harming the livelihoods of thousands of people who fish for salmon and the businesses that depend on the salmon fishery. The issues presented in this petition were presented to the Board before the Executive Director issued the Denial Letter.

We request that the Board hold a public hearing to discuss and vote on whether to grant this petition for reconsideration.

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1. Name and Address of Petitioners (23 Cal. Code Regs., § 769(a)(1)):

Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6100

San Francisco Baykeeper
1736 Franklin Street, Suite 800
Oakland CA 94612
(510) 735.9700

The Bay Institute
Pier 39
The Embarcadero & Beach Street
San Francisco, CA 94113
(415) 262-4729

Tuolumne River Trust
P.O. Box 3727
Sonoma, CA 95370
(415) 882-7252

Golden State Salmon Association
P.O. Box 320096
San Francisco, CA 94132
(855) 251-4472

Please direct communications to Petitioners regarding this petition to:

Doug Obegi
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6100
dobegi@nrdc.org

2. The specific board action of which petitioner requests reconsideration (23 Cal. Code Regs., § 769(a)(2)):

The Executive Director's September 14, 2022 denial of NRDC et al's petition for emergency rulemaking to implement Lower San Joaquin River flow objectives in the Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta.

3. The date on which the order or decision was made by the board (23 Cal. Code Regs., § 769(a)(3)):

The Executive Director issued the Denial Letter on September 14, 2022.

4. The reason the action was inappropriate or improper (23 Cal. Code Regs., § 769(a)(4)):

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As discussed in the attached petition, the Denial Letter is contrary to law and is not supported by substantial evidence. The State Water Board's September 14, 2022 Denial Letter admits that the Board has authority to adopt emergency regulations to implement the Lower San Joaquin River flow objectives in the Bay-Delta Plan, states that the Board "remains committed to expeditiously implementing the 2018 updates to the Bay-Delta Plan," and denies the petition for emergency rulemaking to implement these flow objectives in order to "allow for greater public participation and project-specific environmental analysis." Contrary to the Denial Letter, granting NRDC et al's petition for emergency rulemaking: (1) would not eliminate or limit opportunities for public participation on the development of a permanent regulation to implement the Bay-Delta Plan; and (2) would expeditiously implement the 2018 amendments to the Bay Delta Plan as required by the Plan and State law, enabling the Board to ensure the flows that the Board has determined are necessary to provide reasonable protection for salmon and other native fish in the Stanislaus, Tuolumne, and Merced Rivers in 2023. Absent adoption of the emergency regulation, the Board likely would not implement the minimum required flows in 2023 or 2024, in violation of the Bay Delta Water Quality Control Plan, the Public Trust, and state law. *See* Bay Delta Plan at 24; Cal. Water Code §§ 13147, 13247; *see also* Cal. Water Code § 13050(j).

5. The specific action which petitioner requests (23 Cal. Code Regs., § 769(a)(5)):

Withdrawal of the Denial Letter and granting of a petition to adopt an emergency regulation to implement the Lower San Joaquin River flow objectives in the Bay-Delta Plan in 2023.

6. A statement that copies of the petition and any accompanying materials have been sent to all interested parties (23 Cal. Code Regs., § 769(a)(6)):

Because this is a petition for emergency rulemaking, no such notice is required.

Conclusion

For the reasons set forth above and in the attached materials, Petitioners respectfully request that the Board grant reconsideration of the September 14, 2022 denial of NRDC et al's petition for emergency rulemaking and immediately set aside that denial.

Date: September 29, 2022

Respectfully submitted,



Doug Obegi
Natural Resources Defense Council

MEMORANDUM OF POINTS AND AUTHORITIES

The Executive Director denied NRDC et al's petition for emergency rulemaking in order to allow for greater public participation and project-specific environmental analysis through the standard rulemaking process. This argument is contrary to law and lacks substantial evidence because, as discussed below, adoption of the petition for emergency rulemaking would not limit or affect public participation in the standard rulemaking process, nor would it eliminate or effect project-specific environmental analysis as part of the standard rulemaking process. The adoption of an emergency regulation to implement the Lower San Joaquin River flow objectives would not replace the standard rulemaking process, but instead would ensure substantive environmental protections while the Board conducts the standard rulemaking process, including environmental review and public participation.

The Denial Letter also asserts that the Board is committed to expeditiously implementing the 2018 amendments to the Bay-Delta Plan, and admits that the Board has authority to issue the emergency regulations that were the subject of this petition. However, the Denial Letter fails to provide substantial evidence that the standard rulemaking process will expeditiously implement the Lower San Joaquin River flow objectives, and it ignores the Board's mandatory legal duty to "fully implement" these flow objectives "by 2022." Bay Delta Plan at 24; Cal. Water Code §§ 13147, 13247; *see also* Cal. Water Code § 13050(j). Denial of the petition is almost certain to result in flows on the Stanislaus, Tuolumne, and Merced Rivers in 2023 and 2024 that the Board has determined fail to provide reasonable protection for salmon and other fish and wildlife, which the Denial Letter also failed to address.

I. Contrary to the Denial Letter, Granting the Petition for Emergency Rulemaking Would Not Eliminate or Affect Public Participation in the Standard Rulemaking Process to Implement the Lower San Joaquin River Flow Objectives

Contrary to the Executive Director's Denial Letter, adoption of an emergency regulation to implement the Lower San Joaquin River flow objectives would not limit or adversely affect public participation in the standard rulemaking process to implement the Lower San Joaquin River flow objectives. As the Board is aware, emergency regulations only last for a limited duration and are only available in certain circumstances. Cal. Water Code § 1058.5; Cal. Gov. Code § 11346.1. Adoption of an emergency regulation to implement the Lower San Joaquin River flow objectives in 2023 would not displace or eliminate the need for the Board to adopt a permanent regulation to implement the Lower San Joaquin River flow objectives using the standard rulemaking process, but instead would provide the substantive protections required by the Bay-Delta Plan in the interim while the Board adopts a permanent regulation using the standard rulemaking process. Indeed, as the petition for emergency rulemaking explained, the Board's experience implementing an emergency regulation would inform the Board's consideration of a permanent regulation and could improve the final permanent regulation as a

result of lessons learned through the development and implementation of an emergency regulation.

The State Water Board's 2018 Amendments to the Bay-Delta Plan were the result of a ten year long public process that included numerous public hearings, workshops, and opportunities for comment. *See also* State Water Resources Control Board, Resolution No. 2018-0059. Thousands of Californians who participated in that ten year long public process urged the Board to adopt and implement these flow objectives – or to require environmentally stronger regulations that required a higher percentage of unimpaired flow remain instream. Adoption of an emergency regulation would help to ensure minimum protections for fish and wildlife in 2023 – implementing the protections that thousands of Californians supported in their public statements and comments, and which the Board is legally obligated to “fully implement” “by 2022” – while the Board develops and adopts a permanent regulation using the standard rulemaking process. The Denial Letter's claim that adoption of an emergency regulation would somehow prevent public participation in the process of adopting an emergency regulation is arbitrary and capricious.

II. Granting the Petition for Emergency Rulemaking is Necessary to Expediently Implement the Lower San Joaquin River Flow Objectives and to Provide Reasonable Protection for Fish and Wildlife Before the Standard Regulation is Implemented

While the Denial Letter claims that the Board is committed to expediently implementing the Lower San Joaquin River flow objective, the Denial Letter ignores that the Board has a mandatory duty to “fully implement” the Lower San Joaquin River flow objectives “by 2022” and that absent the adoption of an emergency regulation, the Board will allow flows on the Stanislaus, Tuolumne, and Merced rivers to drop below levels that the Board has admitted fail to provide reasonable protection for fish and wildlife. The Denial Letter fails to provide any evidence that the Board will “fully implement” the Lower San Joaquin River flow objectives “by 2022,” as required by the Bay-Delta Plan, and fails to show how denial of this petition for emergency rulemaking is consistent with expediently implementing this flow objective.

As the petition for emergency rulemaking explains, in 2018 the Board adopted amendments to the Bay-Delta Plan that would maintain or increase instream flows on the Stanislaus, Tuolumne, and Merced rivers in order to protect fish and wildlife, and the Bay Delta Plan requires that the Board “fully implement” these flow objectives “by 2022.” Bay Delta Plan at 24; Cal. Water Code §§ 13147, 13247; *see also* Cal. Water Code § 13050(j). The Board has repeatedly found that these new instream flow requirements are necessary to provide reasonable protection of fish and wildlife. *See, e.g., id.* at 10, 23; State Water Resources Control Board, In the Matter of Turlock Irrigation District and Modesto Irrigation District Don Pedro Hydroelectric Relicensing Project and La Grange Relicensing Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14851, Water Quality Certification for Federal Permit or License, January 15, 2021, at

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13, 19, 22, and 25, available online at:

https://www.waterboards.ca.gov/docs/dplg_fwqc_complete_20210105.pdf.¹

However, despite this legal requirement, in the absence of the proposed emergency regulation, the Board would not “fully implement” the Lower San Joaquin River flow objectives in the Bay-Delta Plan in February through June of 2023, as the December 8, 2021 staff presentation indicates that the earliest the Board would consider a permanent regulation to implement the Lower San Joaquin River flow objectives using the standard rulemaking process would be Summer 2023. State Water Resources Control Board, Upcoming Actions to Update and Implement the Bay-Delta Plan, available online at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/20211207-slides-for-12-08-bay-delta-plan-inform-item_accessible.pdf. Given additional delays in the process since that 2021 presentation, it seems likely that the Board’s current approach will not implement the Lower San Joaquin River flow objectives in February to June 2024.

Even worse, as explained in the petition for emergency rulemaking, flows in 2023 are likely to be even less than the minimum requirements of the 1995 and 2006 Bay Delta Water Quality Control Plan, given the Bureau of Reclamation’s ongoing refusal to fully implement its water rights obligations under D-1641. The Board has repeatedly notified Reclamation that it is violating its water rights obligations under D-1641, but the Board has not taken enforcement action and flows have been far below the minimum requirements of D-1641 in most years. *See, e.g.*, Letter from State Water Resources Control Board to the U.S. Bureau of Reclamation dated March 7, 2022, available online at:

<https://www.waterboards.ca.gov/drought/tucp/docs/2022/20220307-letter-swrcb.pdf>. As the Board explained in its 2021 letter to Reclamation regarding the ongoing violations,

The declining population trend of San Joaquin River salmonids since the adoption of the 1995 Bay-Delta Plan demonstrates that the D-1641 flow requirements have been inadequate to support fish and wildlife beneficial uses. Continued non-compliance with D-1641 minimum flow requirements likely exacerbates declining salmon and steelhead populations and amplifies extirpation risks of these populations from the San Joaquin Valley. The continued decline or loss of San Joaquin River salmon and steelhead also threatens the resilience of the remaining Central Valley populations which are also in decline.

Letter from State Water Resources Control Board to the U.S. Bureau of Reclamation dated April 7, 2021, available online at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/compliance_monitoring/sacramento_sanjoaquin/docs/2021/20210407_swbltr.pdf. Similarly, in 2020 the Board recognized

¹ This document and all other citations to documents on specific agency webpages are incorporated by reference.

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that the Trump Administration's 2019 biological opinions significantly reduced flows in the Stanislaus River, worsening conditions for native fish and wildlife:

On October 21, 2019, NMFS and USFWS issued BOs (2019 BOs) that significantly reduce flows that were previously dedicated or available for the benefit of salmon and other native fish, including flows in the Stanislaus River, the Lower San Joaquin River, and flows through the Delta. The State Water Board staff has concerns about the adequacy of the 2019 BOs for long term operations of the Central Valley Project and water quality conditions in the Delta that go beyond the scope of this Order.

State Water Resources Control Board, In the Matter of License 1986 And Permits 11885, 11886, and 11887 of the U.S. Bureau of Reclamation, Order on Petitions for Temporary Change Involving the Temporary Transfer or Exchange of Up to 76,069 Acre-Feet of Water for Instream Flow Dedication and Rediversion, dated April 20, 2020.

Adoption of an emergency regulation would help prevent the ongoing degradation of the Stanislaus, Tuolumne, and Merced Rivers, their native salmon and other native fish and wildlife, and the fishing jobs and communities that depend on them. Absent emergency regulation, the Board will allow flows in the Stanislaus, Tuolumne, Merced, and Lower San Joaquin rivers to fall to levels that the Board has determined fails to provide reasonable protection of salmon and other fish and wildlife.

The Denial Letter completely fails to respond to the arguments in the petition for emergency rulemaking regarding the Board's legal obligation to "fully implement" the Bay Delta Plan "by 2022" and the failure to provide reasonable protection of fish and wildlife in 2023 absent an emergency regulation, and the Denial Letter's claim that the Board is "committed to expeditiously implement" the Lower San Joaquin River flow objectives is not supported by substantial evidence.

III. The Board Acknowledges that it has Authority to Issue the Requested Regulations

In the Denial Letter, the Executive Director agrees that the Board has authority to issue an emergency regulation to implement the Lower San Joaquin River flow objectives in 2023. We agree with this conclusion.

IV. Conclusion

The Executive Director's September 14, 2022 Denial Letter admits that the Board has the authority to issue emergency regulations to implement the Lower San Joaquin River flow objectives in 2023, ignores the Board's legal duty to "fully implement" the Lower San Joaquin River flow objectives "by 2022" and the failure to provide reasonable protection for salmon and other fish and wildlife in the Stanislaus, Tuolumne, and Merced Rivers in 2023, and wrongly claims that adoption of an emergency regulation would eliminate or adversely impact public participation and environmental review in the standard rulemaking process. Contrary to the Denial Letter, adoption of an emergency regulation would not impair public process and environmental review associated with the Board's consideration of a permanent regulation to implement the Lower San Joaquin River flow objectives through the standard rulemaking process, and adoption of an emergency regulation appears to be the only way to implement the Lower San Joaquin River flow objectives in 2023 as required by law.

Because the Denial Letter is arbitrary and capricious, is not supported by substantial evidence, and is contrary to law, the Board should grant this petition for reconsideration, withdraw the Denial Letter, and grant NRDC et al's petition for emergency rulemaking to implement the Lower San Joaquin River flow objectives in the Bay-Delta Water Quality Control Plan in 2023 while the Board continues to work on adoption of a permanent regulation to implement the Lower San Joaquin River flow objectives using the standard rulemaking process.

We request that the Board hold a public hearing to discuss and vote on whether to grant this petition for reconsideration.