

1 Jason R. Flanders (State Bar No. 238007)
2 Sarah M. K. Hoffman (State Bar No. 308568)
3 Amanda M. Prasuhn (State Bar No. 306718)
4 AQUA TERRA AERIS LAW GROUP
5 828 San Pablo Ave. Ste. 115B
6 Albany, CA 94706
7 Telephone: (916) 202-3018
8 Emails: jrf@atalawgroup.com,
9 smkh@atalawgroup.com,
10 ap@atalawgroup.com

11 Adam Keats (State Bar No. 191157)
12 Cristina Stella (State Bar No. 305475)
13 CENTER FOR FOOD SAFETY
14 303 Sacramento Street, 2nd Floor
15 San Francisco, CA 94111
16 Telephone: (415) 826-2770
17 Fax: (415) 826-0507
18 Emails: akeats@centerforfoodsafety.org,
19 cstella@centerforfoodsafety.org

20 Attorneys for California Sportfishing Protection Alliance,
21 California Water Impact Network, and AquAlliance

22 SUPERIOR COURT OF THE STATE OF CALIFORNIA
23 COUNTY OF ALAMEDA

24 CALIFORNIA SPORTFISHING
25 PROTECTION ALLIANCE; CALIFORNIA
26 WATER IMPACT NETWORK;
27 AQUALLIANCE,

28 Plaintiffs,

29 v.

30 CALIFORNIA STATE WATER RESOURCES
31 CONTROL BOARD, and THOMAS HOWARD,
32 in his official capacity as State Water Resources
Control Board Executive Director,

Defendants.

Case No. RG15780498

**PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE,
SUMMARY ADJUDICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: October 10, 2017

Time: 9:30 a.m.

Dept: 24

Hon. Frank Roesch

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that, at 9:30 a.m. on October 10, 2017, or as soon thereafter as this
4 matter may be heard in Department 24 of the Alameda County Superior Court Plaintiffs will, and hereby
5 do, move this Court, pursuant to California Code of Civil Procedure section 437c, for summary judgment,
6 or, in the alternative, summary adjudication, on their claims under California Code of Civil Procedure
7 section 1060 for declaratory relief.

8 Plaintiffs seek an order holding that there are no triable issues of material fact and that Plaintiffs
9 are entitled to judgment as a matter of law on their claims that Defendants have adopted patterns and
10 practices of violating their mandatory duties under the Public Trust Doctrine and the federal Clean
11 Water Act to maintain minimum adequate flows and water quality for the protection of fisheries. This
12 motion is based on this Notice of Motion and Motion; supporting Memorandum of Points and
13 Authorities; Separate Statement of Undisputed Facts; supporting declarations of Bill Jennings and
14 Barbara Vlaxis, and the exhibits attached thereto; Request for Judicial Notice; the files and records in
15 this matter; and such argument as may be heard on this matter by the Court.

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL AND PROCEDURAL BACKGROUND1

A. THE BAY-DELTA1

B. BAY-DELTA WATER QUALITY STANDARDS2

C. SACRAMENTO RIVER TEMPERATURE MANAGEMENT6

III. LEGAL OVERVIEW7

A. THE PUBLIC TRUST DOCTRINE.....7

B. THE CLEAN WATER ACT9

C. DECLARATORY RELIEF FOR ILLEGAL PATTERNS AND PRACTICES10

D. SUMMARY JUDGMENT10

IV. ARGUMENT.....11

A. DEFENDANTS MAINTAIN AN ILLEGAL PATTERN AND PRACTICE POLICY OF PERMITTING WATER QUALITY REDUCTIONS BELOW FEDERAL STANDARDS....11

B. PATTERNS AND PRACTICES OF VIOLATING PUBLIC TRUST DUTIES14

a. SWRCB has failed to revise flow and temperature standards to affirmatively protect trust resources.14

b. SWRCB has failed to implement flow requirements to halt the collapse of Bay-Delta fisheries.14

c. SWRCB has failed to meaningfully balance trust resources in the public interest.15

d. SWRCB has failed to prioritize protection of trust resources in Bay-Delta fisheries.....17

C. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.....20

V. CONCLUSION20

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Bess v. Park*

4 (1955) 132 Cal.App.2d 4920

5 *California Trout, Inc. v. State Water Resources Control Board et al.*

6 (1989) 207 Cal.App.3d 585 (“*Cal Trout P*”)7, 8, 17, 19

7 *California Trout v. Superior Court*

8 (1990) 218 Cal.App.3d 187(“*Cal Trout IP*”).....8, 9, 17

9 *Californians for Native Salmon & Steelhead Association v.*

10 *Department of Forestry*

11 (1990) 221 Cal.App.3d 141910

12 *Center for Biological Diversity, Inc. v. FPL Group, Inc.*

13 (2008) 166 Cal.App.4th 13498, 20

14 *Citizens for Eastshore Parks v. State Lands Commission*

15 (2011) 202 Cal.App.4th 549 8

16 *City of Burbank v. State Water Resources Control Board*

17 (2005) 35 Cal.4th 61310, 12, 20

18 *Clovis Unified School District v Chiang*

19 (2010) 188 Cal.App.4th 79410

20 *EBMUD v. Cal. Department of Forestry*

21 (1996) 43 Cal.App.4th 111310

22 *Environmental Protection Information Center v. California Department*

23 *of Forestry & Fire Protection*

24 (2008) 44 Cal.4th 4598

25 *Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*

26 386 F.3d 1070 (“*FPIRG*”).....12, 13

27 *International Paper Company v. Ouellette*

28 (1987) 479 U.S. 48110

29 *K.G. v. Meredith*

30 (2012) 204 Cal.App.4th 16410

31 *National Audubon Society v. Superior Court*

32 (1983) 33 Cal.3d 419 7, *passim*

1		
2	<i>Northern Plains Resources Council v. Fidelity Exploration &</i>	
3	<i>Development Company</i>	
4	(9th Cir. 2003) 325 F.3d 1155	10
5	<i>Northwest Environmental Advocates v. EPA</i>	
6	(D. Or. 2012) 855 F.Supp.2d 1199	12, 13
7	<i>NRDC v. Patterson</i>	
8	(E.D. Cal. 2004) 333 F.Supp.2d 906.....	8, 9, 18
9	<i>People v. Monterey Fish Products Company</i>	
10	(1925) 195 Cal. 548	7
11	<i>Pronsolino v. Nastri</i>	
12	(9th Cir. 2002) 291 F.3d 1123	9
13	<i>PUD No. 1 of Jefferson County v. Washington Department of Ecology</i>	
14	(1994) 511 U.S. 700.....	9, 11, 12
15	<i>San Francisco Baykeeper, Inc. v California State Lands Commission</i>	
16	(2015) 242 Cal.App.4th 202	7, 8
17	<i>San Luis & Delta-Mendota Water Authority v. Jewell</i>	
18	(9th Cir. 2014) 747 F.3d 581 (“ <i>SLDMWA P</i> ”).....	1
19	<i>San Luis & Delta-Mendota Water Authority v. United States</i>	
20	(9th Cir. 2012) 672 F.3d 676 (“ <i>SLDMWA IP</i> ”)	2
21	<i>State Water Bd. Cases</i>	
22	(2006) 136 Cal.App.4th 674	2, 13
23	<i>United States v. State Water Resources Control Board</i>	
24	(1986) 182 Cal.App.3d 82	8, 9

Statutes

25		
26	Clean Water Act	
27	33 U.S.C., § 1251, subd. (a).....	9
28	33 U.S.C., § 1251, subd. (g)	12
29	33 U.S.C., § 1311, subd. (b)(1)(C)	9
30	33 U.S.C., § 1313, subd. (a).....	9
31	33 U.S.C., § 1313, subd. (c)(1).....	9
32	33 U.S.C., § 1313, subd. (c)(2)(A).....	9
	33 U.S.C., § 1313, subd. (c)(3)	9
	33 U.S.C., § 1313, subd. (d)4)(B).....	9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

33 U.S.C., § 1314, subd. (f)12
 33 U.S.C., § 1362, subd. (19)12
 33 U.S.C., § 1370, subd. (2)12

Code of Civil Procedure

§ 437c, subd. (a)(1)10, 11
 § 437c, subd. (c).....11
 § 437c, subd. (p)(1).....11
 § 1060.....10

Fish & Game Code

§ 5937..... 7, *passim*

Water Code

§ 13050, subd. (j)10
 § 13240.....10
 § 13160.....10
 § 13170.....10
 § 13369.....3
 § 13369, subd. (a).....10
 § 85084.5.....3
 § 85086, subd. (a).....3

Regulations

40 C.F.R., § 130.39
 40 C.F.R., § 131.10, subd. (g).....9, 12
 40 C.F.R., § 131.12, subd. (a)(1)9
 40 C.F.R., § 131.59
 40 C.F.R., § 131.69
 40 C.F.R., § 303, subds. (a)-(c).....9

Other

60 Fed. Reg. 4664, 4665 (Jan. 24, 1995)2

1 **I. INTRODUCTION**

2 There is no reasonable dispute that fish populations throughout the San Francisco Bay/Sacramento
3 – San Joaquin Delta Estuary (“Bay-Delta”) and its tributaries have been and are in a state of collapse. Nor
4 is there dispute that Defendant California State Water Resources Control Board (“SWRCB”) has the legal
5 authority *and* duty to regulate water quality in the Bay-Delta and its tributaries in a manner that protects
6 fish populations. The evidence is overwhelming that SWRCB has failed, and this lawsuit seeks declaratory
7 relief from SWRCB patterns and practices of abrogating its duties to protect Bay-Delta fisheries under the
8 Public Trust Doctrine, and federal Clean Water Act (“CWA”). SWRCB has known since at least 2010
9 that existing water quality standards regulating flow, salinity, temperature, and other factors in the Bay-
10 Delta and its tributaries are inadequate to protect public trust fisheries, yet rather than fulfill its affirmative
11 duties to protect public trust resources, and maintain adopted Clean Water Act standards, SWRCB has
12 repeatedly *lowered, relaxed, and waived* the very standards it has already deemed to be inadequate.

13 **II. FACTUAL AND PROCEDURAL BACKGROUND**

14 **A. THE BAY-DELTA**

15 The Bay-Delta is a 1600-square-mile estuary where the state’s two major river systems—the
16 Sacramento River and the San Joaquin River—converge and flow into San Francisco Bay. (Plaintiffs’
17 Separate Statement of Undisputed Material Facts and Evidence in Support of Motion for Summary
18 Judgment or, in the Alternative, Summary Adjudication [hereafter SSUF] No. 1.) Many Bay-Delta species
19 are endangered or threatened under the Federal or California Endangered Species Acts, including resident
20 species such as Delta smelt and migratory species such as winter-run and spring-run Chinook salmon.
21 (SSUF No. 2.) The precipitous collapse of the Bay-Delta’s pelagic and anadromous fish populations, such
22 as Delta smelt and chinook salmon, is well-documented, with species measured by the California
23 Department of Fish and Wildlife’s (“DFW”) Fall Midwater Trawl declining from 91.9 to 99.99 percent
24 since 1967 to present. (SSUF No. 3.)

25 The Delta is also the hub of California’s two major water distribution systems: the federal Central
26 Valley Project (“CVP”) and California’s State Water Project (“SWP”), operated by the U.S. Bureau of
27 Reclamation (“USBR”) and California Department of Water Resources (“DWR”), respectively, pursuant
28 to water rights licenses and permits issued by SWRCB. (SSUF No. 4.) The CVP and SWP comprise a vast
29 system of dams, pumps, reservoirs, canals, and related infrastructure that impounds and transfers water
30 throughout California’s Central Valley. (*San Luis & Delta-Mendota Water Auth. v. Jewell*, (9th Cir. 2014)
31 747 F.3d 581, 593-94 (hereafter *SLDMWA I*); SSUF No. 5.) USBR and DWR are by far the largest water
32

1 rights holders in the region, and their project operations of releasing and diverting water control when and
2 how much water is released from upstream dams along the Delta’s tributaries, as well as the quantity and
3 timing of water exported from the Delta. (SSUF No. 6; *San Luis & Delta-Mendota Water Auth. v. United*
4 *States*, 672 F.3d 676, 682-83 (9th Cir. 2012) (hereafter “*SLDMWA II*”).) As a result, SWRCB regulation
5 of the CVP and SWP has a direct and outsized effect on overall water quality in the Delta. (SSUF No. 7.)

6 **B. BAY-DELTA WATER QUALITY STANDARDS**

7 In January 1995, SWRCB’s mismanagement of the Bay-Delta forced the U.S. Environmental
8 Protection Agency (“EPA”) to promulgate federal water quality standards for the Bay-Delta. (60 Fed. Reg.
9 4664, 4665 (Jan. 24, 1995); SSUF No. 8.)¹ EPA noted the “serious environmental crisis for fish and
10 wildlife resources in the Bay/Delta” and set out the history of SWRCB failing to address this crisis. (*Id.*;
11 SSUF No. 9.) The EPA thus promulgated its own standards it believed were required by the Clean Water
12 Act. (SSUF No. 8.) SWRCB strongly opposed these protective measures, arguing that “[o]nly the state
13 can decide whether it is appropriate to regulate flow-caused pollution including salinity intrusion and
14 establish requirements for its regulations . . . Therefore, EPA cannot adopt the proposed criteria for
15 Estuarine Habitat and for Fish Migration and Cold-Water Habitat.” (SSUF No. 10.) EPA disagreed, stating
16 “EPA has ample authority under section 303 to specify the water quality standards that will enable the
17 Bay/Delta to attain its designated uses even if implementation of these standards by the state have
18 incidental effects on the allocation of water.” (SSUF No. 11.) “[M]ost of the implementation measures
19 that the state may take affect water quantity and the criteria can only be attained if the state implements
20 measures that affect water quantity.” (SSUF No. 12.)

21 Later that year, rather than challenge the EPA’s regulations head-on, SWRCB sought to instead
22 implement the CWA in California on its own, adopting the “Water Quality Control Plan for the San
23 Francisco Bay – San Joaquin Delta Estuary” (“Bay-Delta Plan,” as revised 2006). (SSUF No. 13.) With
24 some differences not relevant here, the Bay-Delta Plan paralleled the EPA regulations, including
25 implementation measures for flow, salinity, and operational controls, as necessary to meet the water
26 quality objectives and beneficial uses of the Bay-Delta, such as “cold freshwater habitat,” “spawning,
27 reproduction and/or early development,” and “rare, threatened or endangered species,” included in the
28 Plan. (SSUF No. 19.) Although the 1995 Bay-Delta plan provided that “the objectives and beneficial uses
29 in this plan that are water quality standards within the meaning of the Clean Water Act will be California’s
30

31 ¹ While not formally withdrawn, the Court of Appeal has ruled that, once approved by EPA, the Bay-
32 Delta Plan constitutes the operative standards. (*State Water Bd. Cases*, 136 Cal.App.4th, 674, 774-775.)

1 water quality standards for the purposes of the Clean Water Act,” SWRCB also reaffirmed its policy
2 position stated in opposition to EPA’s proposed regulations, arguing that “the objectives for flow and
3 operations are not subject to approval by the USEPA” since “the USEPA could not adopt standards for
4 these parameters under the Clean Water Act.” (SSUF Nos. 15-16, 20.) But SWRCB further admits that
5 the flow-based objectives of the Bay-Delta Plan were “established to ensure the reasonable protection of
6 fish and wildlife uses, including the ‘rare, threatened and endangered species’ beneficial use on page 9 of
7 the 2006 Bay Delta Plan.” (SSUF No. 21, 61.) Accordingly, EPA subsequently approved the Bay-Delta
8 Plan, and the water quality objectives contained therein, as compliant with CWA requirements, again
9 reasserting its disagreement with SWRCB’s position that the flow and operational standards contained
10 therein were not subject to the CWA. (SSUF Nos. 14, 17, 18.)

11 The Board has adopted subsequent orders to implement and ensure compliance with these
12 standards. Water Rights Decision 1641, issued in December 1999 and revised March 2000, includes
13 minimum Delta outflow and other regulatory limits for the CVP and SWP to meet 1995 Bay-Delta
14 requirements. (SSUF Nos. 25, 64.) Also, Resolution No. 2004-0030 adopted the Policy for the
15 Implementation and Enforcement of the Nonpoint Source Pollution Control Program (“NPS Plan”),
16 pursuant to California Water Code, section 13369, “to meet the requirements of . . . the Clean Water Act.”
17 (SSUF Nos. 26, 65.) The NPS Plan explicitly relies on the Bay-Delta Plan to protect water quality in the
18 region, and associated beneficial uses, and states that nonpoint source pollution regulation must “achieve[]
19 and maintain[] water quality objectives and beneficial uses, including any applicable antidegradation
20 requirements.” (SSUF No. 27.)

21 In 2009, SWRCB’s CWA “triennial review” acknowledged that “new or changed export limits
22 may be necessary to adequately protect beneficial uses in the Delta,” and that “further review and change
23 of Delta outflow objectives may be required.” (SSUF Nos. 29, 66.) Nevertheless, SWRCB failed to adopt
24 any revisions to the Bay-Delta Plan recommended in 2009, and has failed to conduct any other required
25 triennial reviews since adopting the 2006 Bay-Delta Plan. (SSUF Nos. 30, 67.)

26 In 2009, the Legislature, aware of the collapse and mismanagement of the Delta, adopted the Delta
27 Reform Act, commanding SWRCB, among other things, to, “pursuant to its public trust obligations,
28 develop new flow criteria for the Delta ecosystem necessary to protect public trust resources,” and
29 directing that, CDFW, “based on the best available science, shall develop and recommend to the board
30 Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern
31 dependent on the Delta” (Wat. Code, §§ 85084.5, 85086, subd. (a); SSUF Nos. 31, 68.) In turn, CDFW
32

1 found that significantly greater flows through the Bay-Delta were necessary to protect public trust
2 resources, (SSUF Nos. 32-33, 69-70 [“Recent Delta flows Are insufficient to support native Delta fishes
3 For today’s habitats”]), and SWRCB published its report, Development of Flow Criteria for the
4 Sacramento-San Joaquin Delta Ecosystem (hereafter Flow Criteria Report), also concluding that
5 significantly greater flows were necessary to protect Bay-Delta public trust fish resources, (SSUF Nos.
6 32-33, 69-70 [“. . . the flow Criteria developed in this proceeding are intended to halt population decline
7 and increase populations of certain species;” “Recent Delta flows Are insufficient to support native Delta
8 fishes For today’s habitats”]). The Flow Criteria Report acknowledged that “Flow is important to
9 sustaining the ecological integrity of aquatic ecosystems, including the public trust resources Flow
10 affects water quality, food resources, physical habitat, and biotic interactions. Alterations in the natural
11 flow regime affect aquatic biodiversity and the structure and function of aquatic ecosystems.” (SSUF Nos.
12 34, 71.) “Recent flow regimes in the Delta have contributed to the decline of native species and encouraged
13 non-native species. . . . [F]lows and habitat structure are often mismatched and now favor non-native
14 species. . . . Flow modification is one of the few immediate actions available to improve conditions to
15 benefit native species.” (SSUF Nos. 35, 72.) To date, SWRCB has implemented none of these
16 recommendations. (SSUF No. 135.)

17 On January 17, 2014, Governor Brown issued a Drought Emergency Proclamation directing
18 SWRCB to consider TUC Petitions (“TUCPs”) to modify requirements implementing water quality
19 control plans and suspending Water Code, section 13247, which requires state agencies to comply with
20 water quality control plans. (SSUF No. 36.) The following TUCP Orders and modifications approved by
21 SWRCB resulted in USBR and DWR not meeting the objectives required by D-1641, the Bay-Delta Plan,
22 and the Central Valley Basin Plan.

- 23 • **January 31, 2014:** Reduced the flow requirement for the upcoming month to a minimum of only
24 3,000 cfs—less than half that required by the Bay-Delta Plan. (SSUF Nos. 39, 81, 118.) Also allowed
25 USBR and DWR to open the Delta cross-channel gates (lowering Delta water quality) as frequently
26 as they deemed necessary from February 1 through May 20, where Bay-Delta Plan requires gates
27 remain closed during that period. (SSUF Nos. 37, 78, 110.)
- 28 • **April 9, 2014:** Extended the reduced flow objectives through April. (SSUF Nos. 38, 79, 111.)
- 29 • **April 11, 2014:** Reduced the base flow criteria to 700 cfs through April 14, and 500 cfs from May 15
30 to May 31, below the monthly average of 710 or 1,140 cfs (depending on the location of the mixing
31 zone, “X2”) required by the Bay-Delta Plan during “critical” water years such as 2014. (SSUF Nos.
32

1 39, 80, 112.) Also reduced the magnitude and duration of spring pulse flows to 16 days of flow at
2 3,300 cfs plus 15 days of flow at 1,500 cfs, from the 31-day spring pulse flow of 3,100 or 3,540 cfs
3 (depending on X2) required by the Bay-Delta Plan. (SSUF Nos. 39, 80, 112.)

4 • **May 2, 2014:** Reduced minimum Delta outflow to a monthly average of 3,000 cfs, despite Bay-Delta
5 Plan's requirement of 4,000 cfs for May (measured as a 14-day average) and July (measured as a
6 monthly average) during critical water years such as 2014. (SSUF Nos. 40, 81, 113.) Eliminated
7 additional May salinity outflow requirements at Chipps Island. (SSUF Nos. 40, 90.) Reduced monthly
8 Sacramento River flow criteria from September through November 15 to 2,000 cfs, despite Bay-Delta
9 requirements of 3,000 cfs in September and October, and 3,500 cfs in November during critical water
10 years. (SSUF Nos. 40, 81, 113.) Also moved the salinity measuring point three miles upstream from
11 May 2014 through January 2015, allowing a greater magnitude of salt concentration to intrude farther
12 into the Delta. (SSUF Nos. 40, 90.)

13 • **October 7, 2014:** Reduced the magnitude of the October pulse flow criteria to 800 cfs from Bay-Delta
14 Plan requirement of 1000 cfs. (SSUF Nos. 41, 82, 114.)

15 • **February 3, 2015:** Reduced the magnitude of the minimum Delta outflow from 7,100 cfs down to
16 4,000 cfs for February and March. (SSUF Nos. 42, 83, 115.) Reduced the magnitude of the minimum
17 San Joaquin River flow from the critical water year-level of 710 or 1,140 cfs down to 500 cfs for
18 February and March. (SSUF Nos. 42, 83, 115.) Also reduced the DCC gates closure requirement to
19 allow the gates to be opened as frequently in February and March as USBR deemed necessary. (SSUF
20 Nos. 42, 83, 115.)

21 • **April 6, 2015:** Extended the February order's outflow provisions through June, and extended the DCC
22 gates provision through May 20. (SSUF Nos. 43, 84, 116.) Also shifted the San Joaquin River spring
23 pulse flow criteria three weeks earlier and lowered its magnitude to 710 cfs, from 3,110 cfs or 3,540
24 cfs (depending on X2), effectively eliminating it. (SSUF Nos. 43, 84, 116.) Reduced the magnitude of
25 the San Joaquin base flow requirement from 710 or 1,140 cfs down to 300 cfs in April and May, and
26 down to 200 cfs in June. (SSUF Nos. 43, 84, 116.) Also shifted the salinity compliance point on the
27 Sacramento River about three miles upstream. (SSUF Nos. 45, 91.)

28 • **July 3, 2015:** Extended the April 6, 2015 TUCP order's change in salinity compliance location through
29 August 15. (SSUF Nos. 44, 92.) Also reduced the magnitude of the minimum Delta outflow in July
30 from 4,000 cfs to 3,000 cfs and reduced the magnitude of the minimum Sacramento River flow from
31 the critical year monthly average of 3,000 cfs in September and October and 3,500 cfs in November
32

1 to 2,500 cfs for all three months. (SSUF Nos. 44, 85, 117.)

- 2 • **August 4, 2015:** Reduced the magnitude of the Stanislaus River dissolved oxygen criteria to 5.0 mg/L
3 from 7.0 mg/L through November 30, 2015. (SSUF Nos. 45, 95.)
- 4 • **April 19, 2016:** Reduced the magnitude of the San Joaquin spring pulse flow from the “dry” water
5 year value of 4,880 cfs to 3,000 cfs. (SSUF Nos. 46, 86, 118.) Also reduced the magnitude of the San
6 Joaquin base flow requirement from the dry water year value of 2,280 cfs down to 1000 cfs from May
7 15 to May 31, and down to 500 cfs for June. (SSUF Nos. 46, 86, 118.)
- 8 • **December 15, 2015:** Denying in part and granting in part petitions for reconsideration, but extending
9 the July 3, 2015 Order for an additional 180 days, with added future planning requirements. (SSUF
10 Nos. 47.)

11 In sum, the issuance of sequential TUC Orders resulted in a cumulative failure to ensure
12 compliance with promulgated water quality standards, in turn reducing pelagic fish and salmonid—many
13 of which are listed pursuant to the State and Federal Endangered Species Acts—to historically low
14 numbers perilously close to extirpation. (SSUF No. 3.) Another drought sequence accompanied by
15 additional relaxation of standards is likely to push many of them over the brink.

16 C. SACRAMENTO RIVER TEMPERATURE MANAGEMENT

17 Regulating Sacramento and San Joaquin River flows into the Delta, the Central Valley Regional
18 Water Quality Control Board has adopted the Central Valley Basin Plan for the Sacramento River Basin
19 and the San Joaquin River Basin (“Central Valley Basin Plan”). (SSUF Nos. 22, 62.) The Central Valley
20 Basin Plan includes temperature criteria to protect beneficial uses, including a requirement that
21 temperature shall not be elevated above 56°F in the reach of the Sacramento River from Keswick Dam to
22 Hamilton City nor above 68°F in the reach from Hamilton City to the I Street Bridge during periods when
23 such temperature increases will be detrimental to the fishery. (SSUF Nos. 23, 63.) In 1990, SWRCB
24 adopted WR Order 90-5, “to consider enforcing certain water quality objectives in the upper Sacramento
25 River, which are contained in the [Central Valley Basin Plan],” and to enforce “the Public Trust Doctrine.”
26 (SSUF No. 50.) The Order noted that “[t]he operation of Shasta Dam affects downstream water quality,”
27 and that, “[i]n some years, during late summer and early fall, releases from Shasta Lake, where the water
28 has been heated by the sun during storage, have caused river water temperatures to exceed the levels
29 necessary to protect the fishery in the upper Sacramento River.” (*Id.*) The Order notes that the Sacramento
30 River temperature objectives are limited to “controllable factors” by USBR, and SWRCB WR Order 92-
31 2 clarifies that timing and quantities of deliveries by USBR are controllable factors. (*Id.*) Thus Order 90-
32

1 5 relaxed the Central Valley Basin Plan temperature requirement, moving the 56°F compliance 44 miles
2 upstream to Red Bluff (River Mile 243) from the Basin Plan 56°F requirement at Hamilton City (River
3 Mile 199). (*Id.*) Nevertheless, since at least 1996, USBR has never complied even with this relaxed
4 standard, even in wet years. (SSUF No. 51.) Instead, SWRCB has participated in a Temperature Task
5 Force that adopts an annual Sacramento River Temperature Management Plan (“TMP”) submitted by
6 USBR that shifts the temperature criteria compliance even farther upstream, further restricting the amount
7 of spawning habitat available to salmon. (SSUF Nos. 52.) SWRCB has recently approved TMPs that
8 establish the compliance point at Clear Creek, compressing salmon spawning to a mere 10-mile reach
9 below Keswick: a 90% reduction of Basin Plan and 83% reduction in Biological Opinion protected
10 spawning habitat. (SSUF Nos. 56, 98, 102.) In 2015, SWRCB Executive Officer unilaterally approved a
11 USBR request to raise the temperature standard above the Basin Plan daily 56°F criterion to a target of
12 57°F not to exceed 58°F. (SSUF No. 57.) Such temperatures devastate egg incubation, emergence, and fry
13 rearing, and multiple years of excessive temperatures and mortality places enormous stress on the survival
14 of a species dependent on three-year cycles. (SSUF No. 58.)

15 III. LEGAL OVERVIEW

16 A. THE PUBLIC TRUST DOCTRINE

17 The state’s navigable waterways are owned and held in trust by the state for the benefit of the
18 people of the state, and “title to and property in the fish within the waters of the state are vested in the
19 state of California and held by it in trust for the people of the state [citations].” (*People v. Monterey Fish*
20 *Products Co.* (1925) 195 Cal. 548, 563; SSUF No. 138.) The California Constitution guarantees that “[t]he
21 people shall have the right to fish upon and from the public lands of the State and in the waters thereof”
22 (Art. I, sec. 25), and the Legislature has codified a legal duty upon SWRCB to protect public trust fisheries
23 below dams by requiring that “sufficient water at all times to pass . . . around, or through the dam to keep
24 in good condition any fish . . . below the dam” (Fish & Game Code, § 5937; *Cal. Trout, Inc. v. State Water*
25 *Resources Control Bd. et al.* (1989) 207 Cal.App.3d 585, 626 (hereafter *Cal Trout I.*))

26 SWRCB has the authority *and* affirmative duty to consider the public trust when making water
27 allocation decisions, and to preserve and protect public trust resources that are affected by its decisions,
28 so far as consistent with the public interest. (*Nat. Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419,
29 426, 446-47; SSUF Nos. 106, 139.) “Any action which will adversely affect traditional public rights in
30 trust lands is a matter of general public interest and should therefore be made only if there has been full
31 consideration of the state’s public interest in the matter.” (*San Francisco Baykeeper, Inc. v California*
32

1 *State Lands Comm.* (2015) 242 Cal.App.4th 202, 234; SSUF No. 146.) Traditional public trust uses
2 include fisheries, navigation, and waterborne commerce, including wildlife and water levels that are
3 adequate to maintain wildlife habitat. (*Nat. Audubon, supra*, 33 Cal.3d at 426; see also *Center for*
4 *Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) Consumption of water
5 resources for other private and public uses, including agriculture and municipal supply, are not recognized
6 public trust uses. (See *Nat. Audubon, supra*, 33 Cal.3d at 446-447; *San Francisco Baykeeper, supra*, 242
7 Cal.App.4th at 237-238.) The State is free to choose among competing public trust uses, (*Citizens for*
8 *Eastshore Parks v. State Lands Comm.* (2011) 202 Cal.App.4th 549, 577), but is *not* free to completely
9 ignore or destroy trust resources in favor of non-trust uses, even legitimate public interests such as
10 agricultural and municipal supply. (*Id.*; *Center for Biological Diversity, supra*, 166 Cal.App.4th at 1366;
11 *Nat. Audubon, supra*, 33 Cal.3d at 436-437; SSUF Nos. 147-148.) In sum, the public trust doctrine
12 imposes a “significant limitation on water rights” (*United States v. State Water Resources Control Bd.*
13 (1986) 182 Cal.App.3d 82, 106), and SWRCB has an ongoing duty to reconsider past allocation decisions
14 that may be incorrect in light of new knowledge or needs—even those “made after due consideration of
15 their effect on the public trust” (*Nat. Audubon, supra*, 33 Cal.3d at 447; SSUF Nos. 142, 155).

16 SWRCB’s discretion to balance among competing uses is cabined by Fish and Game Code, section
17 5937, which “is a legislative expression of the public trust protecting fish as trust resources when found
18 below dams,” (*Cal Trout I, supra*, 207 Cal.App.3d at 626; SSUF Nos. 149.) “The Legislature, not the
19 Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of
20 water allocation”; where the Legislature has adopted a specific rule governing the public trust in Fish and
21 Game Code 5937, “the Water Board has no authority to disregard it.” (*Id.* at 631.) Here, “the Legislature
22 has already balanced the competing claims for water . . . and determined to give priority to the preservation
23 of their fisheries.” (*NRDC v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 918, citing *Cal Trout v.*
24 *Super. Ct.*, 218 Cal.App.3d 187, 201 (hereafter *Cal Trout II*); SSUF No. 151.) “Compulsory compliance
25 with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available
26 for appropriation for other uses. Where that effects a reduction in the amount that otherwise might be
27 appropriated, [section 5937] operates as a legislative choice among competing uses of water.” (*Cal Trout*
28 *I, supra*, 207 Cal.App.3d at 601; SSUF No. 150.) Thus, the Court can look to section 5937 to determine
29 the scope of SWRCB’s public trust duties. (See *Environmental Protection Information Center v. Cal.*
30 *Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 515 [explaining overlap between common law
31 and statutory public trust duties]; SSUF No. 152.) To comply fully with section 5937, enough water must
32

1 be released “to restore the historic fishery.” (*Cal Trout II, supra*, 218 Cal.App.3d at 210; see also
2 *Patterson, supra*, 333 F.Supp.2d at 924, 925 [violation of 5937 where “the historic fish populations have
3 been destroyed”]; SSUF No. 153.)

4 **B. THE CLEAN WATER ACT**

5 “[T]he Clean Water Act . . . is a comprehensive water quality statute designed to ‘restore and
6 maintain the chemical, physical, and biological integrity of the Nation’s waters.’” (*PUD No. 1 of Jefferson*
7 *County v. Wash. Dept. of Ecology* (1994) 511 U.S. 700, 704, quoting 33 U.S.C., § 1251, subd. (a).) The
8 CWA requires each State, subject to federal approval, to prepare water quality control plans that include
9 water quality standards, “designated uses” for each state waterway, and water quality criteria necessary to
10 protect those uses. (33 U.S.C., § 1313, subds. (a), (c)(2)(A); SSUF No. 172.) Standards must also include
11 an anti-degradation policy that, at a minimum, maintains “[e]xisting instream water uses . . . and the level
12 of water quality necessary to protect the existing uses.” (*Id.* §§ 1311, subd. (b)(1)(C), 1313, subd.
13 (d)(4)(B); 40 C.F.R., § 131.12, subd. (a)(1); SSUF No. 156.) While the CWA distinguishes between “point
14 source” and “non-point source” pollution, water quality standards reflect a state’s designated uses for a
15 water body and do not depend in any way upon the source of pollution. (40 C.F.R., § 303, subds. (a)-(c);
16 *Pronsolino v. Nastri*, (9th Cir. 2002) 291 F.3d 1123, 1137; *State Water Resources Control Bd., supra*, 182
17 Cal.App.3d at 108 [“water quality standards are retained under the Act as a supplement to the discharge
18 limitations”].) The purpose of water quality standards is to “provide federally-approved goals” to be
19 achieved by both the specific point-source mechanisms identified in the CWA, as well as “by state controls
20 and by federal strategies *other than* [those] point-source . . . limitations.” (*Pronsolino, supra*, 291 F.3d at
21 1132, citing 40 C.F.R., § 130.3.) A state may not revise any adopted water quality standard without
22 submission to and approval by EPA to ensure that the selected water quality criteria sufficiently protect
23 each waterway’s designated uses. (33 U.S.C., § 1313, subds. (c)(2)(A), (3); 40 C.F.R., §§ 131.5, 131.6;
24 SSUF No. 158.) In addition, a state may not remove or eliminate any previously adopted designated use
25 without first complying with strict CWA procedures demonstrating that the designated use cannot be
26 attained. (40 C.F.R. § 131.10, subd. (g).) Finally, “every state water pollution control agency must conduct
27 a triennial review of its water quality standards and submit proposed revisions to [EPA] for approval.”
28 (*State Water Resources Control Bd., supra*, 182 Cal.App.3d at 108, citing 33 U.S.C., § 1313, subd. (c)(1);
29 SSUF No. 159.)

30 The federal CWA, by and through the Supremacy Clause of the U.S. Constitution, preempts any
31 state regulation of water quality inconsistent with federal CWA standards. The U.S. Supreme Court has
32

1 explained that “Congress intended [the CWA] to establish an all-encompassing program of water pollution
2 regulation” (*Internat. Paper Co. v. Ouellette* (1987) 479 U.S. 481, 493-494.) The California Supreme
3 Court has held that, “under the federal Constitution's supremacy clause (art. VI), a state law that conflicts
4 with federal law is without effect,” and “[n]othing in the federal Clean Water Act suggests that a state is
5 free to disregard or to weaken the federal requirements for clean water” (*City of Burbank v. State*
6 *Water Resources Control Bd.* (2005) 35 Cal.4th 613, 626-627.) And the Ninth Circuit Court of Appeals
7 has held: “absent statutory authority in the CWA . . . it cannot possibly be urged that . . . state law in itself
8 can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution’s
9 Supremacy Clause. U.S. Const. art. VI, cl. 2.” (*N. Plains Resources Council v. Fidelity Exploration &*
10 *Dev. Co.* (9th Cir. 2003) 325 F.3d 1155, 1165, *cert. den.* (2003) 540 U.S. 967.)

11 California designates SWRCB, as well as Regional water boards overseen by SWRCB, as the
12 agencies responsible for adopting and implementing federal CWA water quality control plans. (Wat.
13 Code, §§ 13050, subd. (j), 13240, 13160, 13170.) In addition, the Water Code requires SWRCB to
14 “prepare a detailed program for the purpose of implementing the state’s nonpoint source management
15 plan,” addressing “all applicable provisions of the Clean Water Act.” (*Id.* § 13369, subd. (a).)

16 **C. DECLARATORY RELIEF FOR ILLEGAL PATTERNS AND PRACTICES**

17 This Court has held that Plaintiffs “may challenge a policy or practice of SWRCB through an
18 action for declaratory relief.” (SSUF No. 59.) California law states that “[a]ny person . . . who desires a
19 declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy
20 relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior
21 court” (Code Civ. Proc., § 1060.) Interpreting this statute, the courts have held that “an action
22 challenging an administrative agency policy of ignoring or violating applicable laws and regulations, but
23 not challenging any specific agency decision, [is] an actual, justiciable controversy for which declaratory
24 relief [is] available.” (*EBMUD v. Cal. Dept. of Forestry* (1996) 43 Cal.App.4th 1113, 1119, citing
25 *Californians for Native Salmon & Steelhead Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1428
26 [pattern and practice claim “allege[s] policies impermissibly made in violation of statutory mandates by
27 an administrative agency and concomitant conduct consistent with the policies, but in violation of law”];
28 see also *K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 177; *Clovis Unified Sch. Dist. v Chiang* (2010)
29 188 Cal.App.4th 794, 807-809.)

30 **D. SUMMARY JUDGMENT**

31 A plaintiff may move for summary judgment “if it is contended that . . . there is no defense to the
32

1 action or proceeding.” (Code Civ. Proc., § 437c, subd. (a)(1).) A court shall grant the motion if “there is
2 no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of
3 law.” (*Id.* § 437c, subd. (c).)

4 A plaintiff . . . has met his or her burden of showing that there is no defense to a cause of
5 action if that party has proved each element of the cause of action Once the plaintiff .
6 . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of
7 one or more material facts exists The defendant . . . shall not rely upon the allegations
8 or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a
9 triable issue of material fact exists as to the cause of action or a defense thereto.
10 (*Id.* § 437c, subd. (p)(1).)

11 **IV. ARGUMENT**

12 **A. DEFENDANTS MAINTAIN AN ILLEGAL PATTERN AND PRACTICE POLICY OF** 13 **PERMITTING WATER QUALITY REDUCTIONS BELOW FEDERAL STANDARDS.**

14 SWRCB has consistently maintained as a pattern and practice that the CWA does not require the
15 regulation of what SWRCB terms “flow-caused pollution,” meaning reductions in water quality such as
16 temperature, salinity, outflow, and dissolved oxygen, resulting from alterations in flows permitted by
17 SWRCB. (SSUF No. 73.) But SWRCB does not dispute that such standards were adopted by the state in
18 EPA-approved water quality control plans, and are required to protect the CWA designated uses therein.
19 (SSUF No. 74.) Consistent with the U.S. Supreme Court’s decision in *PUD Jefferson No. 1*, EPA has
20 opposed SWRCB’s view, taking the position that such standards are subject to the CWA. (SSUF No. 75.)

21 This pattern and practice policy has deep roots, but has most recently been borne out by
22 Defendants’ issuance of a series of fourteen orders between January 2014 and December 2015, largely
23 granting the TUCPs submitted by DWR and USBR. The TUC Orders effectively suspended and relaxed
24 specified water quality objectives from D-1641 and D-1422 such that Bay-Delta Plan designated uses
25 would no longer be met. (SSUF Nos. 76, 89, 94, 109 [“the requirements of D-1641 for DWR and [USBR]
26 to meet specified water quality objectives are amended as follows . . .”, “changes approved by this Order
27 are to requirements to meet water quality objectives designed to protect fish and wildlife beneficial
28 uses.”].)

29 Similarly, SWRCB has sanctioned noncompliance with temperature standards adopted in the
30 Central Valley Basin Plan and implemented through WR Order 90-95. (SSUF Nos. 104-105.) In recent
31 years, SWRCB has approved TMPs that establish the compliance point at Clear Creek, which compresses
32 spawning to a 10-mile reach below Keswick Dam: a 90% reduction of Basin Plan and 83% reduction of
Biological Opinion protected spawning habitat. (SSUF Nos. 56, 98, 102.) And, in 2015, SWRCB

1 Executive Officer unilaterally approved a USBR request to raise the Central Valley Basin Plan average
2 daily 56°F criterion temperature to a target of 57°F not to exceed 58°F. (SSUF Nos. 57, 103.)

3 The SWRCB has no authority to waive and/or relax water such quality standards that were adopted
4 as necessary to protect designated uses in a basin plan. (*City of Burbank, supra*, 35 Cal.4th at 627
5 “[n]othing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal
6 requirements for clean water . . .”.) SWRCB is wrong that the CWA is only concerned with water
7 “quality,” and cannot touch upon the regulation of water “quantity,” as affects flow, salinity, dissolved
8 oxygen, and temperature. (SSUF No. 10.) Although CWA sections 101, subdivision (g) and 510,
9 subdivision (2) preserve the authority of each State to allocate water quantity as between users, they do
10 not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant
11 to state law, a water allocation. (*PUD No. 1 of Jefferson City, supra*, 511 U.S. at 720.) The CWA itself
12 recognizes that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution,
13 defining pollution as “the man-made or man induced alteration of the chemical, physical, biological, and
14 radiological integrity of water” encompasses the effects of reduced water quantity. (33 U.S.C., § 1362,
15 subd. (19).) This broad conception of pollution belies any artificial distinction between the regulation of
16 water “quantity” and water “quality.” Moreover, section 304 of the CWA expressly recognizes that water
17 “pollution” may result from “changes in the movement, flow, or circulation of any navigable waters. . . ,
18 including changes caused by the construction of dams.” (*Id.* § 1314, subd. (f).) In aquatic ecosystems, the
19 regulation, timing, volume, withdrawal, and return of water flows often are critical factors in determining
20 the water quality condition of aquatic habitats, particularly in arid, low-flow areas. (See SSUF Nos. 6. 34,
21 35, 74.) The United States Supreme Court has thus held that the CWA allows for minimum stream flow
22 requirements from nonpoint sources of pollution to protect water quality standards, even where said
23 requirement may have an incidental effect upon water supply. (*PUD No. 1 of Jefferson City, supra*, 511
24 U.S. at 704.) Accordingly, SWRCB had no discretion to ignore or destroy a designated use adopted in a
25 CWA basin plan without adhering to strict CWA procedures that SWRCB has not followed here. (40
26 C.F.R. § 131.10, subd. (g); *City of Burbank, supra*, 35 Cal.4th at 626-627.)

27 EPA also explains that adopted provisions that have the effect of changing an existing water quality
28 standard include ones that “define, change, or establish magnitude, duration or frequency of water quality
29 criteria.” (Plaintiffs’ RJN Ex. 9; see also *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*,
30 386 F.3d 1070, 1090 (hereafter *FPIRG*) [EPA required to review state regulations that “had the practical
31 effect of loosening ... water quality standards”]; *Nw. Environmental Advocates v. EPA* (D. Or. 2012) 855
32

1 F.Supp.2d 1199, 1209, 1211 [EPA was require to review regulations that exempted industries from
2 meeting nonpoint-source water quality standards because the regulations “effectively supplant[ed]” those
3 standards].) Here, the TUC orders had the *effect* of changing existing Bay-Delta water quality criteria
4 because they changed the objectives in D-1641 and D-1422. (SSUF Nos. 76, 87, 88, 89, 93, 94, 97, 109.)
5 Under those water rights decisions, DWR and USBR have full responsibility for achieving the Bay-Delta
6 flow, salinity, oxygen, and DCC gates water quality objectives at issue here. (SSUF No. 87 “[o]nly the
7 DWR and the USBR can implement the objectives for operational constraints” on CVP and SWP facilities;
8 “The objectives for export pumping rates are the responsibility of each of the two projects at their
9 respective facilities. The objectives for Delta Cross Channel operation are the sole responsibility of its
10 owner, the USBR.”].) Similarly, SWRCB’s approval of USBR releases on the Sacramento River that fail
11 to maintain the Central Valley Basin Plan’s objective of 56°F at Keswick Dam, and further fail to maintain
12 the relaxed standards of WR 90-5, amount to a de facto amendment to the Basin Plan standard. (SSUF
13 No. 87.) As a result, changing DWR’s and USBR’s responsibilities under D-1641, D-1422, and WR Order
14 90-5, is cumulatively equivalent to changing the Bay-Delta and Central Valley Plan objectives themselves.
15 (See *SWRCB Cases*, 136 Cal.App.4th 674, 726-733 [it is a “de facto amendment” to the Bay-Delta Plan
16 to assign USBR and DWR a D-1641 pulse flow objective than is weaker than the Plan objective]; *FPIRG*,
17 *supra*, 386 F.3d at 1088-1090; *Nw. Environmental Advocates supra*, 855 F. Supp. 2d at 1209-1213; SSUF
18 No. 87.) As federally approved and required standards, SWRCB had no discretion to so amend, relax, or
19 waive the Bay-Delta Plan standards without formal revision to the Plan and approval from EPA.

20 SWRCB maintains this pattern and practice policy through the present day, and contemplates the
21 future use of TUCPs to relax water quality standards. The Draft Revised SED for Phase I of the Water
22 Quality Control Plan for the Bay-Delta Plan states, “[a]t its discretion, or at the request of any affected
23 responsible agency or person, the State Water Board may authorize a temporary change in the
24 implementation of the LSJR flow objectives in a water right proceeding . . .” (SSUF Nos. 48.) USBR and
25 DWR also contemplate the future of use of TUCPs; the July 2016 Biological Assessment for the California
26 WaterFix prepared by USBR and DWR states that a drought management team will assess hydrologic
27 conditions and recommend actions in a drought contingency plan and “[w]hile a drought contingency plan
28 may recommend adhering to the operations as identified in existing regulatory authorizations, in longer
29 periods of dry conditions, the plan could also propose other drought response actions.” (SSUF Nos. 49.)

30 In sum, there is no reasonable dispute that SWRCB has maintained a long-standing pattern and
31 practice of regulating what it has termed “flow-caused pollution” outside of the strictures of the CWA.
32

1 The flow, salinity, dissolved oxygen, and temperature standards, above, were all adopted pursuant to Basin
2 Plan objectives, and deemed necessary to protect designated uses such as “cold freshwater habitat,” and
3 “rare, threatened or endangered species.” (SSUF No. 19.) SWRCB has no discretion to unilaterally waive
4 water quality standards adopted pursuant to the CWA.

5 **B. PATTERNS AND PRACTICES OF VIOLATING PUBLIC TRUST DUTIES**

6 **a. SWRCB has failed to revise flow and temperature standards to affirmatively**
7 **protect trust resources.**

8 SWRCB has permitted and continues to permit releases of dammed waters upon the Sacramento
9 and San Joaquin Rivers, and concomitant diversions from the Bay-Delta watershed by DWR, USBR, and
10 other water rights holders, in a manner that is depriving adequate habitat to keep downstream fish
11 populations in good condition. And SWRCB is well-aware of this fact. Seeking all documents concerning
12 SWRCB Chairwoman’s admission that “we’ve simply diverted too much water for fish to be able to
13 survive,” Defendants point to their own 2010 Flow Criteria Report, along with their 2016 SED, as
14 evidence. (SSUF No. 108 [Defendants’ objections notwithstanding].)

15 Knowing that the flow and temperature standards established by the 2006 Bay-Delta Plan, the
16 Central Valley Basin Plan, D-1641, and WR Order 90-95 have been and are inadequate to protect
17 recognized trust resources in fish populations, SWRCB has maintained a pattern and practice of violating
18 their Public Trust Doctrine duties by nevertheless continuing to allocate water resources to private and
19 non-trust uses to the detriment and near-destruction of fisheries. (See *Nat. Audubon, supra*, 33 Cal.3d at
20 437, 440, 445-447, 452 [Board has mandatory duty to reconsider past allocation decisions]; SSUF Nos.
21 141, 154.) SWRCB has failed to take action to prevent dramatic declines and even the potential extinction
22 of multiple Bay-Delta species, and instead has taken actions that are increasing damage to public trust
23 fisheries, such as the relaxation of water quality standards adopted to protect fisheries, through TUC
24 Orders and TMPs.

25 **b. SWRCB has failed to implement flow requirements to halt the collapse of**
26 **Bay-Delta fisheries.**

27 SWRCB’s own documents prove it has known since *at least* the 2010 Flow Report that standards
28 established by the Bay-Delta Plan, Central Valley Basin Plan, D-1641, and WR Order 90-95, have been
29 and are insufficient to protect trust resource interests in fisheries. (SSUF No. 119 [“The best available
30 science suggests that current flows are insufficient to protect public trust resources”].) As required by the
31 State Legislature, the report includes the volume, quality and timing of water necessary to protect public
32

1 trust resources in the Delta ecosystem. Following the 2010 Flow Report, the Board has published for
2 public review and comment various proposals for revisions to Bay-Delta flow standards in 2011, 2012,
3 and 2016 (following the initiation of this lawsuit) (SSUF No. 120); however, SWRCB failed to complete
4 *any of these proceedings*, resulting in *no changes* in flow or temperature standards to protect trust fisheries.
5 (*Id.*). Similarly, SWRCB noted in the 2009 CWA triennial review that the Bay-Delta Plan should be
6 revised to protect fisheries, yet has failed to do so, and has failed to conduct regular triennial reviews
7 since. (SSUF No. 121.) In August 2015, Plaintiff here, CSPA, filed with SWRCB a “COMPLAINT:
8 Against SWRCB and USBR for Violations of Central Valley Basin Plan, WR Order 90-05, Clean Water
9 Act, Endangered Species Act, Public Trust Doctrine and California Constitution,” documenting pattern
10 and practice violations of each, reaching back decades. (SSUF No. 122.) SWRCB has failed to provide
11 any response. (*Id.*) And in August 2016, three environmental organizations jointly filed a petition for
12 emergency rulemaking to protect public trust resources. (SSUF No. 123.) SWRCB denied this petition on
13 the basis that “further review” of the science and feasibility of the requested measures was required. (*Id.*)
14 In contrast, discussed below, SWRCB approved the TUCPs without conducting a full public trust
15 balancing, arguing that exigent circumstances prevented further review. (SSUF Nos. 127-128.)

16 Plaintiffs seek declaratory relief from this court that SWRCB’s pattern and practice of failing to
17 revise water quality standards for nearly seven years (or, in fact, *weakening* water quality standards), in
18 the face of overwhelming information from environmental organizations, sister state and federal agencies,
19 and the Board’s own scientific panel report, roundly violates the Board’s affirmative duties under the
20 Public Trust Doctrine to protect fisheries.

21 **c. SWRCB has failed to meaningfully balance trust resources in the public**
22 **interest.**

23 Apparent in the Board’s failure to implement any changes in its outdated and ineffective standards
24 is the Board’s pattern and practice of failing to meaningfully balance impacts to trust fisheries with other
25 uses in the public interest. Plaintiffs assert, below, that the Legislature has already struck this balance, and
26 flows sufficient to protect fisheries must be implemented now. (See SSUF No. 131 [“Flows required under
27 section 5937 are not subject to National Audubon’s public trust integration requirements.”].) Nevertheless,
28 in the alternative, should the more general balancing articulated by the *National Audubon* court apply to
29 Bay-Delta water quality standards, SWRCB has evinced a pattern and practice of giving due consideration
30 to non-trust agricultural and municipal interests, while giving inadequate consideration to public trust
31 fisheries.

1 Most recently, approximately one year after Plaintiffs initiated this lawsuit, SWRCB released the
2 SED evaluating new flow standards for the San Joaquin River and South Delta Water Quality, and
3 proposing limits significantly less stringent than those recommended by the 2010 Flow Report, yet the
4 SED makes no statement or explanation of the method Board staff employed or that it recommends that
5 the Board employ to balance the public trust resources. (SSUF No. 124.) It appears that SWRCB considers
6 its authority to “balance” public trust resources with the public interest to be plenary. Indeed, SWRCB’s
7 statements supporting its TUC Orders that, “[u]nder the public trust doctrine, the Board has considerable
8 discretion to balance competing demands for water to protect fish and wildlife and to serve municipal,
9 industrial, and agricultural uses,” bears out the degree to which SWRCB misapprehends its public trust
10 doctrine duties. (SSUF Nos. 125, 134.) During the TUC proceedings, for example, Plaintiffs here

11 faulted the TUCP Orders for failing to balance water supplies for low value crops like
12 pasture and alfalfa with critically depressed public trust resources hovering on the brink of
13 extinction. Petitioners argued that the balancing of competing demands effectuated by the
14 TUCP Orders was invalid because it was not supported by detailed information concerning
15 which crops provide important employment and economic benefits, and which crops do
16 not, how much water was reasonably required to meet demands for agricultural, municipal,
17 and industrial uses, how much water was needed to meet health and safety needs, and
18 whether the Project supplies had been managed properly or not. Similarly, petitioners
19 argued that the use of water for flood irrigation in the Sacramento Valley and irrigation of
20 drainage impaired lands in the western San Joaquin Valley was unreasonable during the
21 drought.

22 (SSUF No. 126.) The Board demurred, arguing that:

23 Given the exigencies of the drought, it was not possible during the TUCP proceeding to
24 conduct a detailed analysis of the reasonableness of particular agricultural practices, taking
25 into consideration the relative values and impacts of particular agricultural uses, different
26 contractual priorities, and all other relevant factors. Similarly, we disagree with the
27 argument that more detailed information concerning the economic value of crops and
28 reasonable water demands for agricultural, municipal, and industrial purposes was
29 necessary in order to balance competing demands for purposes of acting on the TUCP.

30 (SSUF No. 127.) But the Board approved TUC Orders over a period of over two years, ample time to
31 conduct at least some rudimentary cost/benefit analysis balancing effects to fisheries with effects to other
32 uses; while SWRCB rejected, above, petitions for emergency protections for public trust species, citing a
33 need for further review. (SSUF Nos. 123.) SWRCB cites no basis in law for its failure to truly balance the
34 competing public interest by undertaking some level of assessment of the costs, benefits, and feasibility
35 of alternatives, as the Board did in its adoption of Water Rights Decision 1631 for Mono Lake following

1 court orders to do so in *National Audubon*, and *Cal Trout I and II*. (See, *infra*, section IV.B.d.) The Board’s
2 impermissible justification for failing to undertake any meaningful balancing for its TUC Orders is further
3 belied by the fact that its September, 2016 SED – *issued a full six years following the 2010 Flow Report*
4 – also fails to include any express analysis or any substantive information supporting any such analysis
5 regarding the costs, benefits, and alternatives to both fisheries and other affected beneficial uses, when
6 proposing new flow standards. (SSUF No. 128.)

7 Absent declaratory relief from this court as to what the law requires, SWRCB will continue its
8 pattern and practice of failing to provide any meaningful analysis, and comparable cost/benefit
9 information as to competing beneficial uses to support a meaningful analysis, when regulating flows in
10 the Bay-Delta.

11 **d. SWRCB has filed to prioritize protection of trust resources in Bay-Delta**
12 **fisheries.**

13 Under the public trust doctrine, the state is *generally* obligated to protect public trust resources to
14 the extent that doing so is consistent with the public interest. (*Nat. Audubon, supra*, 33 Cal. 3d at 447 at
15 446-447.) But California Fish and Game Code, section 5937 imposes the greater requirement that
16 “sufficient water at all times to pass . . . around, or through the dam to keep in good condition any fish
17 that may be planted or exist below the dam.” This provision compels SWRCB to permit adequate flows,
18 at a minimum, downstream of all Central Valley Rim Dams, including the SWP and the CVP rim
19 reservoirs, that effectively block upward migration of anadromous species to the cooler waters of their
20 historical spawning habitat. If not required by SWRCB, sufficient flows may be ordered by the court.
21 (SSUF Nos. 129, 130, citing *Cal Trout II* at 221, 266 [court “left determination of the precise long-term
22 flow rates to SWRCB and assigned the task of setting interim flow requirements to the Superior Court.”].)
23 For example, adopting Water Rights Decision 1631:

24 In accordance with the judicial decisions discussed above, SWRCB’s approach is to
25 determine what flows are needed for protection of fish. Then the decision addresses the
26 need for additional water and other measures to protect public trust resources at Mono Lake
and the surrounding area in view of the competing uses of water by Los Angeles.

27 (SSUF No. 129.) Accordingly, SWRCB *first* ensured that minimum flow standards would be required to
28 keep fish downstream of dams in good conditions. (*Id.* [e.g., “Based on the evidence presented we
29 conclude that the following flows below the Lee Vining conduit diversion facility will maintain fish in
30 good condition pursuant to Fish and Game Code Section 5937 and that the specified flows are needed to
31 reestablish and maintain a fishery.”].) Consistent with *National Audubon*, *Cal Trout I* and *Cal Trout II*,

1 and Fish and Game Code, section 5937, WRD-1631 provided *no balancing* of competing interests before
2 implementing flow requirements necessary to keep fish in good condition. (SSUF No. 131 [“Flows
3 required under section 5937 are not subject to National Audubon’s public trust integration
4 requirements.”].)

5 Regrettably, SWRCB has eschewed these principles as applied to the Bay-Delta, and has instead
6 engaged in a pattern and practice of failing to adhere to the public trust mandate included in Fish and
7 Game Code, section 5937 to keep fish downstream of CVP and SWP dams in good condition. Instead of
8 respecting this “legislative choice among competing uses of water,” SWRCB has evinced a pattern and
9 practice of treating fish populations simply as one of many competing claims it must consider and choose
10 between. SWRCB approach completely fails to respect that “the Legislature has already balanced the
11 competing claims for water . . . and determined to give priority to the preservation of their
12 fisheries.” (*Patterson, supra*, 333 F.2d at 918; SSUF No. 151.)

13 For instance, after the Legislature passed the Delta Reform Act of 2009, which required the Board
14 to develop new flow criteria to protect public trust interests in fisheries, the Board issued a 2010 Delta
15 Flow Criteria Report, which developed new flow criteria for the Delta ecosystem necessary to protect
16 public trust resources. (SSUF No. 132.) These criteria were intended to halt population decline and
17 increase populations of certain species and represented the best available fishery and hydrologic science
18 to be had in 2010. (*Id.*) Forcefully, however, SWRCB all but disavowed the utility of this report to protect
19 trust resources, inserting a sweeping disclaimer above the cover page:

20 [T]his report only presents a technical assessment of flow and operational requirements to
21 provide fishery protection under existing conditions. We know however, that there are
22 many other important beneficial uses that these waters support such as municipal and
23 agricultural water supply and recreational uses. The State Water Board is required by law
24 to establish flow and other objectives that ensure the reasonable protection of beneficial
25 uses. In order for any flow objective to be reasonable, the State Water Board must consider
26 and balance all competing uses of water in its decision-making. More broadly, the State
27 Water Board will factor in relevant water quality, water rights and habitat needs as it
28 considers potential changes to its Bay-Delta -objectives. Any attempts to portray the
recommendations contained in this report as an indicator of future State Water Board
decision-making ignores this critical, multi-dimensional balancing requirement and
misrepresents current efforts to analyze the water supply, economic, and hydropower
effects of a broad range of alternatives. . . .

29 (SSUF No. 133.) This sweeping caveat and disclaimer in large measure underpins SWRCB’s continuing
30 failure of its affirmative duty to preserve and protect public trust resources. (SSUF Nos. 106, 139.) The
31 public trust mandate of Fish and Game Code 5937 is clear: fish downstream of dams *must* be kept in good
32

1 condition, and jurisprudence on this point is equally unequivocal. (*Cal. Trout I, supra*, 207 Cal.App.3d at
2 631 [“The Legislature, not the Water Board, is the superior voice in the articulation of public policy
3 concerning the reasonableness of water allocation,” and “the Water Board has no authority to disregard
4 it.”]; SSUF No. 144.) Yet the Board, fully informed by the 2010 Flow Criteria Report of what flow limits
5 and requirements for the San Joaquin and Sacramento Rivers would be necessary to protect public trust
6 fisheries, has failed to implement these protections (or any), based largely upon the Board’s erroneous
7 belief it must *first* determine how to protect *other* competing beneficial uses of water, before determining
8 an appropriate allocation for fish populations.

9 This pattern and practice policy has repeated itself over the years. During SWRCB’s series of TUC
10 Orders, for example, SWRCB rejected environmental groups’ pleas for greater flows pursuant to 5937 to
11 protect fish populations on the brink of extinction. SWRCB justified its lowering of water quality
12 standards *below* standards prescribed by the 2006 Basin Plan, D-1641, and WR Order 90-05—standards
13 already proven by the 2010 Delta Flow Criteria Report to be inadequate to protect trust fisheries—arguing
14 simply that “[u]nder the public trust doctrine, the Board has considerable discretion to balance competing
15 demands for water to protect fish and wildlife and to serve municipal, industrial, and agricultural uses.”
16 (SSUF Nos. 125, 134.) Again, the Board failed to give due consideration to the Court of Appeal’s holding
17 that “[c]ompulsory compliance with a rule requiring the release of sufficient water to keep fish alive
18 necessarily limits the water available for appropriation for other uses. Where that effects a reduction in
19 the amount that otherwise might be appropriated, [section 5947] operates as a legislative choice among
20 competing uses of water.” (*Cal. Trout I, supra*, 207 Cal.App.3d at 601.)

21 Most recently, SWRCB has released a “Substitute Environmental Document” (“SED”) in support
22 of potential changes to San Joaquin River flow and southern Delta water quality objectives and program
23 of implementation included in the Bay-Delta Plan. (SSUF No. 135.) The proposal, again, fails to
24 implement the flow criteria recommended by the 2010 report as necessary to keep public trust fish
25 populations in good condition. As succinctly described by SWRCB’s staff presentation:

- 26 • State Water Board’s 2010 flow criteria report – a purely technical assessment and no
27 balancing – concluded that 60 percent of flow should be left in the LSJR for the benefit of
28 fish . . .
- 29 • Unlike the 2010 report, this staff proposal considers other uses and aims to strike a balance
30 among competing uses of water
- 31 • The staff proposal recommends a range of between 30 and 50 percent of unimpaired flow,
32 with a starting point of 40 percent – this is a big increase
- This is less than what environmental and commercial fishing interests favor, and more
 than agricultural and affected urban users want

- Balancing is hard, but is what we are called upon to do
- Because it is hard, State Water Board has a long history of encouraging settlements

(*Id.*) Considering SWRCB’s disclaimer to its 2010 Flow Report, its erroneous justification for lowering already-deficient water quality standards through its TUC orders, and its pending SED proposal to implement flow standards insufficient to protect trust resources, there is no reasonable dispute that SWRCB has engaged in a pattern and practice of failing to prioritize protection of public trust fisheries below dams, as required by Fish and Game Code, section 5937. SWRCB implemented minimum flow requirements sufficient to protect fish populations in Mono Lake and its tributaries only after two seminal court rulings compelled SWRCB to do so, and the evidence is clear that SWRCB’s pattern and practice of failing to implement minimum flow standards it knows are necessary to protect fish populations in the Bay-Delta estuary on the brink of extinction will only remedy by order of the court.

C. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

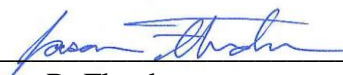
Plaintiffs submit the attached declarations supporting Plaintiffs’ standing for its claims for declaratory and injunctive relief for patterns and practices in violation of the Public Trust Doctrine and Clean Water Act. (See, e.g., *Bess v. Park* (1955) 132 Cal.App.2d 49, 52 [declaratory relief]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, (2008) 166 Cal. App. 4th 1349, 1364 [public trust]; *City of Burbank, supra*, 35 Cal.4th at 626, 627 [Clean Water Act]; SSUF Nos. 135, 136.)

V. CONCLUSION

Individually and collectively, these actions evince a definite pattern and practice by SWRCB of abrogating its duties under the Public Trust Doctrine and Clean Water Act by permitting diversions from the Bay-Delta watershed and water exports from within the legal Delta in a manner that is causing the imminent extinction of species that the Board is legally required to protect.

DATED: July 27, 2017

Respectfully Submitted,
AQUA TERRA AERIS LAW GROUP



Jason R. Flanders
Attorneys for Plaintiffs CSPA, C-WIN,
and AquAlliance