

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

PROTEST – (Petitions)
OBJECTION

Temporary Urgency Change Petition for
Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation for the Central Valley Project.

We, Chris Shutes, Executive Director, California Sportfishing Protection Alliance (CSPA), 1608 Francisco St., Berkeley, CA 94703, blancapaloma@msn.com, (510) 421-2405; Barbara Vlamis, Executive Director, AquAlliance, P.O. Box 4024, Chico, CA 95927, barbarav@aqualliance.net, (530) 895-9420; Carolee Krieger, Executive Director, California Water Impact Network (CWIN), 808 Romero Canyon Rd., Santa Barbara, CA 93108, caroleekrieger7@gmail.com, (805) 969-0824; and Michael Jackson, counsel to CSPA, CWIN and AquAlliance, P.O. Box 207, 20 Crescent St., Quincy, CA 95971, mjatty@sbcglobal.net, (530) 283-0712 (Protestants)

have read carefully the State Water Resources Control Board's (State Water Board or Board) notice dated February 13, 2023 relative to a petition for Temporary Urgency Change (TUCP) of the Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation or USBR), dated February 13, 2023 for the above-cited water rights licenses and permits.

The proposed TUCP and the State Water Board's Order will:

- Not best serve the public interest,
- Be contrary to law, and
- Have an adverse environmental impact.

We protest and object to the TUCP. **We state the facts that support our allegations, our reasons for the objection, and our terms for withdrawing the objection, in the attached document entitled "Protest and Objection of CSPA et al."**

A true copy of this protest has been served upon the petitioners by e-mail (see below).

Date: February 23, 2023

Chris Shutes, Executive Director
California Sportfishing Protection Alliance



Barbara Vlamis, Executive Director
AquAlliance



Carolee Krieger, Executive Director
California Water Impact Network



Michael Jackson
Counsel to California Sportfishing Protection Alliance,
AquAlliance, and
California Water Impact Network

/s/ Michael Jackson

We have filed this protest with: Bay-Delta@waterboards.ca.gov and
Craig.Williams@waterboards.ca.gov

Pursuant to requirements that all protests must be served on the petitioners, we have filed this protest and objection via e-mail to:

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

PROTEST AND OBJECTION OF CSPA ET AL.

The California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance (collectively, CSPA et al.) protest and object to the February 13, 2023 Temporary Urgency Change Petition (TUCP)¹ of the Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) relative to the February and March 2023 operation of the State Water Project (SWP) and the Central Valley Project (CVP; collectively, the Projects), with the license, permit and application numbers cited above. CSPA et al. also protest and object to the Temporary Urgency Change Order (TUCO) approving the TUCP; the Executive Director of the State Water Resources Control Board (State Water Board) issued the TUCO on February 21, 2023, two days before the end of the pitiful ten-day comment period for the TUCP.²

The TUCP and TUCO are a wholesale expropriation of water allocated to public trust resources in favor of south-of-Delta exports. This expropriation will severely limit the ability of Delta fisheries to recover from three years of drought and the attendant Project failure in two of those years to meet the minimal fisheries protections offered by Water Rights Decision 1641 (D-1641).

Hydrologic conditions in late 2022 and early 2023 offer a mandated requirement of D-1641, the “Port Chicago Trigger,” that requires high Delta outflows in February 2023, into March. These outflows provide some opportunity to improve survival of juvenile fish. These juvenile fish belong to species that were decimated in the last three years and that have experienced decades of decline. Under cover of Governor Newsom’s Executive Order N-3-23, the Projects’ TUCP will allow the Projects to, instead, divert the Port Chicago Trigger water south.

In the TUCP and TUCO, DWR and Reclamation, and the State Water Board, each duly catalogue the benefits to fish of the Port Chicago Trigger, and the potential harms to fish that will occur by not implementing it. DWR and Reclamation justify their requests as “unlikely to appreciably increase entrainment,” and “protective” because other requirements will remain in place. California Department of Fish and Wildlife (CDFW), in a two-page letter that relies on DWR and Reclamation’s “biological review” in the TUCP characterize the harms as “incremental.”³ The State Water Board’s TUCO cites this characterization and contrasts those understated harms with the more readily quantifiable (though likely overstated) amount of water the TUCP will allow the Projects to store. Finally, the Projects set out to take the water, and CDFW and the State Water Board rubber-stamp the taking.

¹ TUCP:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/20230213_tucp.pdf

² TUCO: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/20230221-final-tuco.pdf

³ Letter from Brooke Jacobs, Chief, Water Branch, CDFW to Diane Riddle, Assistant Deputy Director, Water Rights, State Water Board, “2023 February Through March Temporary Urgency Change Petition” (Feb. 13, 2023), p. 2. https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/cdfwletter-re-wy2023-tucp-2-13-23.pdf.

I. Incorporation by reference of documents previously submitted.

CSPA et al. acknowledges and incorporates by reference the February 17, 2023 “Comments on and Protest of Temporary Urgency Change Petition Regarding Delta Water Quality” of National Resources Defense Council et al.

CSPA et al. also incorporates by reference the Settlement Agreement between CSPA et al. and the State Water Board (July 17, 2020): <https://calsport.org/news/wp-content/uploads/2020.07.17-CSPA-v.-SWRCB-Settlement-Fully-Executed-1.pdf>.

II. The only stated purpose the TUCP and TUCO will achieve is increased water exports.

Quoting the Governor’s Executive Order, the Projects’ TUCP alleges potential benefits of waiving the Port Chicago Trigger in 2023 as allowing them to:

- (i) conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead,
- (ii) enhance instream conditions for fish and wildlife,
- (iii) improve water quality,
- (iv) protect carry-over storage,
- (v) ensure minimum health and safety water supplies, or
- (vi) provide opportunities to maintain or to expand water supplies north and south of the Delta.⁴

Numbers (i)-(iv) have no basis in fact. They are greenwashing. Robbing Delta outflow or other flows won’t achieve any of those things. Any benefit to water quality and fish from storing the Delta’s water in reservoirs is completely at the mercy of water managers.

Regarding #(i) above, “conserved” water stored upstream is completely at the mercy of water deliveries. As discussed CSPA et al.’s comments on TUCPs for Delta operations in 2021, water thus conserved as a general matter is water taken from public trust protections and repurposed as water deliveries, particularly to agriculture.⁵

Regarding #(ii) above, this is part of the mythology that there is some great benefit to fish from taking large amounts of water away from them and then giving a small amount of the water back to fish another time. Generally, this accompanies the further mythology that conveyance water is primarily a fisheries benefit (*see* the “Environmental Water Account, or the fate of CVPIA (b)(2) water). Any subsequent enhancement of instream flow is completely

⁴ *See* TUCP, pp. 1-9, 1-10.

⁵ *See e.g.*, CSPA et al., Protest, Objection, Petition for Reconsideration of 2021 TUCP of Permit 16478 et al. of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315 of the Bureau of Reclamation, and Responding Order (June 4, 2021), pp. 9-10: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2021/20210604_shutes_objection_petition%20for%20reconsideration.pdf

discretionary on the part of a reservoir operator, and could be accomplished without TUCP operations in the Delta.

Regarding #(iii) above, this is part of the mythology that there is some great benefit to water quality from taking large amounts of water away from water quality management and then devoting a small amount of water back to water quality management another time. This too generally accompanies the mythology that conveyance water is primarily for the benefit of water quality. Any subsequent enhancement of instream flow or salinity conditions is completely discretionary on the part of a reservoir operator, and could be accomplished without TUCP operations in the Delta.

Regarding #(iv) above, any action to “protect carry-over storage” is discretionary on the part of reservoir operators, in the sense that carryover benefits in any given reservoir are dependent on the level of deliveries from storage, including water sales, later in the year. To the degree that there will be spill or flood releases from Project reservoirs later in water year 2023, there is not even an option to preserve Port Chicago Trigger water for upstream storage. DWR Bulletin 120 for the American River shows 90% exceedance for April-July unimpaired runoff at 1.015 MAF. This level of runoff would cause substantial flood releases from Folsom reservoir later in the spring. Any flood releases from Folsom Reservoir later this year will be water that must be debited from the overall potential carryover benefit of the TUCP. The real benefit will first go to south-of-Delta water exports when that water is released and captured at the export pumps. Bay-Delta water quality and outflow get the leftovers. This is the paradigm: the environment gets whatever water the projects cannot capture, with no regard for timing or consistency. Oroville Reservoir may also see flood releases later this year, although that is less certain. What is certain is that the benefits to water quality and to fish and wildlife of February and March flows via the Port Chicago Trigger will not occur.

Number (v) above also has no basis in fact. The SWP and CVP will deliver far more water, some of it as exports, in water year 2023 than water for health and safety. *See* announced SWP and CVP water allocations, increased on February 22, 2023.⁶

The only stated purpose the TUCP will achieve is number (vi), to “maintain or expand water supplies,” *i.e.*, to increase water deliveries to SWP and CVP contractors, predominantly south-of-Delta.

III. Approving the TUCP Will Have Unreasonable Effects to Fish and Wildlife.

The TUCP contends that it will not if approved have unreasonable effects on fish and wildlife. The TUCP argues that waiving the Port Chicago Trigger in February and March 2023 is “unlikely to appreciably increase entrainment,” primarily because the 2019 Biological Opinions for Delta operation would continue to be in effect.⁷

⁶ *See* <https://mavensnotebook.com/2023/02/22/this-just-in-reclamation-announces-initial-2023-water-supply-allocations-for-central-valley-project-contractors/>. *See also* <https://mavensnotebook.com/2023/02/22/this-just-in-dwr-announces-modest-increase-in-state-water-project-allocation-now-35/>.

⁷ TUCP, p. 1-11.

Though the TUCP does not use the term incremental, a perfunctory two-page letter from CDFW's on February 13 states: "CDFW agrees with DWR and Reclamation's assessment that impacts to fish and wildlife resources from the proposed changes would be no more than incremental, and we do not have additional information to add to the biological review."⁸ For its part, the State Water Board's TUCO quotes CDFW on "incremental changes."⁹

In our Objection to the 2021 TUCP,¹⁰ CSPA et al. pointed out how DWR and Reclamation's flawed methodology of incremental comparison with a degraded baseline pervades the TUCP's analysis of effects to fish and wildlife. This incremental comparison fails to account for the following factors:

- The extremely fragile condition of fisheries in the Delta and the Central Valley, and their inability to endure more adversity.
- The inability of fisheries to recover during "non-drought" years due to lack of ecosystem recovery and lack of hydrological recovery. The ecosystem and the fisheries don't have the opportunity to recover before the next drought hits.
- The semi-permanent condition of man-made drought in the Bay-Delta watershed due to the overappropriation of water resources.
- The inadequacy of flow and other protections for fisheries during droughts, which occur about 40% of the time in California.
- The fact that the current condition of Delta and Central Valley fisheries is not simply a function of drought.
- The TUCP treats baseline conditions as simply meteorological and single-year hydrology. It does not consider cascading effects of droughts combined with the failure to protect fisheries and riverine and estuarine ecology. The same actions in the 2014 and 2015 drought are still having unreasonable effects on fish and wildlife. The fish and ecosystems have not recovered from the last series of TUCPs and Orders.

All of these factors apply to the (instant) 2023 TUCP. In addition, there are additional factors more specifically related to conditions in February 2023.

Periods of high unregulated flows generally, and high Delta outflows in particular, are one of the few remaining opportunities for fish populations to rebound and to partially recover. The difference in the survival of outmigrating juvenile salmon during winter-spring flows controlled by minimum flow requirements and large unregulated outflows is not incremental. It is qualitative. In rivers that flow into the Delta, juvenile survival can be as much as an order of magnitude greater than during flows controlled by required minimums.

For example, rotary screw trap (RST) monitoring conducted by East Bay Municipal Utility District (EBMUD) fisheries staff in drought year 2021 found that January survival

⁸ Feb. 13, 2023 letter from Brooke Jacobs, Chief, Water Branch, CDFW to Diane Riddle, *op. cit.*, p. 2.
https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/cdfwletter-re-wy2023-tucp-2-13-23.pdf.

⁹ TUCO, p. 31.

¹⁰ CSPA 2021 Objection to TUCP for Delta operations, *op. cit.*

between Vino and Golf RSTs on the Mokelumne River was about 0.03%. RST monitoring in wet conditions in mid-January to mid-February 2023 was about 9.2%.¹¹ While the comparisons are not exact, the order of magnitude in juvenile outmigration success tells an important story.

Similarly, RST monitoring on the Tuolumne River, reported in the figure below, shows dramatic increases in juvenile survival in previous wet years 2011 and 2017, which were characterized by prolonged flood release flows, over years without such flows.¹²

Table 7. Survival indices through the lower Tuolumne River between Waterford and Grayson.

Year	Total Survival Index	Fry Survival Index	Peak Fry Daily Avg. Flow at MOD	Smolt Survival Index	Peak Smolt Daily Avg. Flow at MOD
2007	-	-	957	2.9	1,020
2008	6.2	6.5	1,690	6.4	1,320
2009	7.9	0.3	1,300	14.2	1,020
2010	3.0	0.8	767	3.4	3,300
2011	24.9	23.1	7,490	31.2	8,180
2012	3.8	0.2	599	9.7	1,950
2013	1.7	0.03	510	4.0	1,140
2014	- ¹	- ¹	279	- ¹	1,100
2016	- ¹	- ¹	2,200	6.3	2,170
2017	94.8	95.8	15,500	60.6	10,400

¹ Survival index not calculated due to incomplete sampling at Grayson.

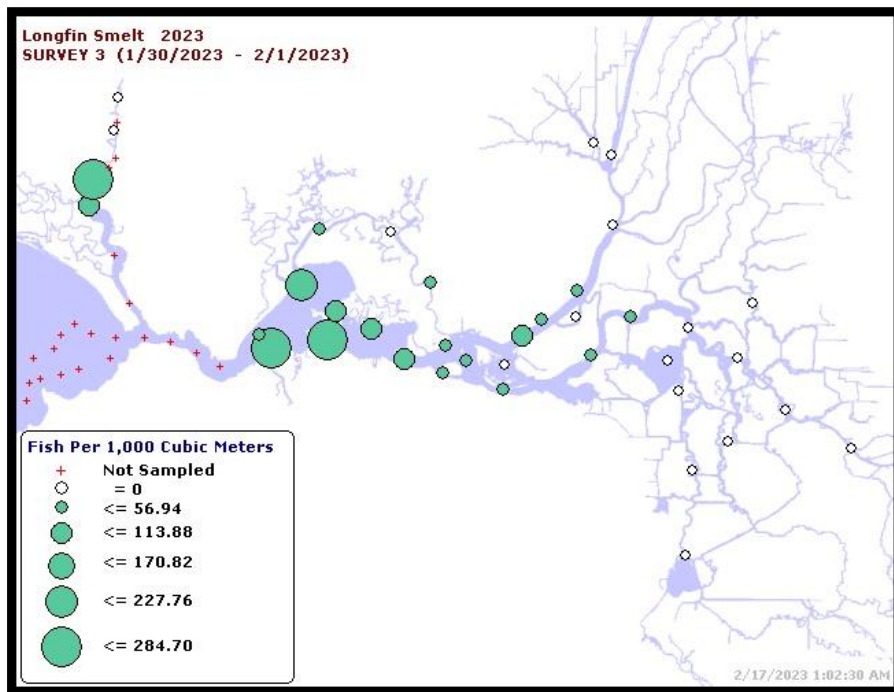
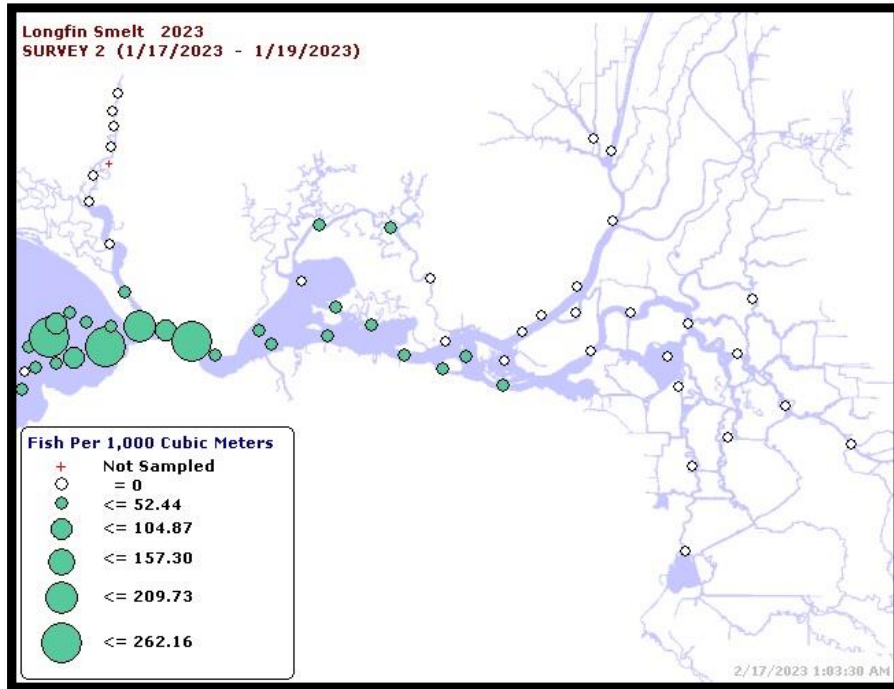
There is no analysis in the TUCP or the TUCO of the order of magnitude difference of the relative numbers of juvenile salmon that enter the Delta during large unregulated flow events versus under conditions with minimal unregulated flow. A major benefit of the Port Chicago Trigger is that large numbers of outmigrating fish successfully make it into the Delta, and the Trigger’s flow requirements help those fish move through Suisun Bay and beyond.

Salmon and steelhead outmigrating from the Mokelumne are a case in point. Because of the proximity of the mouth of the Mokelumne to the Delta pumps, much of the Mokelumne’s natural production is lost between Prisoners Point and Tracy. Entities like EBMUD that believe in and work hard to produce salmon and steelhead should have the opportunity for their outmigrants to swim through Suisun Bay and not have their work massively exported.

Meanwhile, smelt have already begun migrating eastward as the Port Chicago flows have not been met and exports have ramped up. *See* figures below. The TUCP and TUCO document the importance to smelt of the location of X2. The issue is not that harm is unacknowledged. The issue is that the State Water Board and the fish agencies have apparently decided that the harm doesn’t matter.

¹¹ Data provided by EBMUD to the Mokelumne River Technical Advisory Committee, Feb. 2, 2021 and Feb. 15, 2023.

¹² Source: Turlock Irrigation District and Modesto Irrigation District, 2017 Lower Tuolumne River Annual Report. “Table 7” is part of original figure. Available at: <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14857850>



Longfin smelt larvae distribution in mid-January 2023 and end-of-January 2023 smelt-larvae surveys, with more eastward distribution of larvae in end-of-January survey.

Based on the TUCP and TUCO, there appears to be no level of effect on fish and wildlife that for DWR, Reclamation, or the State Water Board would qualify as an unreasonable effect.

They simply say that giving the water to the exporters is more important. Since giving the water to the exporters is “in the public interest,” the level of harm to public resources is irrelevant:

Public trust uses include navigation, commerce, fishing, recreation, and the preservation of fish and wildlife habitat. Disapproving the TUCP to avoid the potential impacts of the proposed change on fish and wildlife is not considered to be in the public interest for the reasons given in sections 6.2, 6.4, and 6.6 of this Order.¹³

In its 2020 Settlement Agreement with CSPA, as cited *supra*, the Board agreed, when considering TUCPs, to make “[a]n express determination whether protecting public trust resources through conditions of approval would be feasible and in the public interest, taking into consideration all relevant factors . . . The State Water Board shall explain its findings and describe the *specific factors it balanced* in making its determination.”¹⁴ In response, the TUCP simply makes an affirmation that it will not “adversely affect” and that it would be “protective of” public trust resources.¹⁵

For its part, the Board in its TUCO makes no attempt to show *how* it balanced competing demands. It does not describe the “specific factors” the Board balanced. Indeed, ***it doesn’t balance any public trust factors at all.*** It simply describes its *a priori* conclusion that public trust resources don’t matter.

Thus, in the TUCO, ***the public trust suffers death by definition.*** The State Water Board has decided that when public trust resources compete for water with water supply, giving the water to developmental purposes is “in the public interest.” One can catalogue harms to public trust fish and wildlife resources, but following the recitation, there is nothing more to discuss.

The TUCO states that it does not authorize take of species listed under the federal or state endangered species acts.¹⁶ CSPA et al. continues to request that the Board clarify how presiding over the extinction or near extinction of Delta smelt during the pendency of the 2014 and 2015 TUCPs, despite repeated and desperate written and verbal entreaties from CSPA et al., took place with no take of listed species. CSPA et al. requests that the Board clarify just what the *practical* meaning of the prohibition of “take” in its orders approving TUCPs actually is.

As stated, the TUCO requires DWR and Reclamation to get an incidental take permit (ITP) if a take may occur.¹⁷ This would be an ITP issued by the California Department of Fish and Wildlife (CDFW), the National Marine Fisheries Service (NMFS), or the US Fish and Wildlife Service (USFWS). On February 20, 2023 CDFW Director Charlton Bonham sent a letter regarding a potential minor amendment to CDFW’s existing overarching ITP for the operation of the SWP stating that “in the course of our review thus far, we have not seen that the

¹³ TUCO, p. 32.

¹⁴ CSPA et al. – State Water Board Settlement, *supra*, p. 3. Emphasis added.

¹⁵ TUCP, p. 1-13.

¹⁶ TUCO, Ordering ¶ 13, p. 37.

¹⁷ *Id.*

change would result in any substantial impact to fish and wildlife.”¹⁸ To date, neither NMFS and USFWS have bothered to respond to the TUCP.

It is entirely reasonable to assume that any incidental take permit for the TUCP issued by any of these fishery agencies would be a rubber stamp for the TUCP.

IV. DWR, Reclamation, and the State Water Board have not exercised due diligence.

DWR, Reclamation, and the State Water Board have not performed a clear evaluation and analysis of the water supply benefits of the proposed change to D-1641. They simply assume that diverting more water is good. Just as the analysis of effects on fish and wildlife in the TUCP and TUCO is perfunctory, so too is the analysis of the relative benefits to developmental uses against which the harms to fish and wildlife are purportedly balanced.

DWR, Reclamation, and the State Water Board have made no evident progress in determining how the Projects can comply with flow and water quality requirements in dry year sequences. Stated differently, they have no plan and have taken no evident action to provide future water supply reliability for fish and wildlife. Not only do they continue to serially rely on TUCPs in dry year sequences, they have now extended reliance on TUCPs to wetter water years.

DWR, Reclamation, and the State Water Board have made no evident progress in making a technically sound and well thought out regulatory plan to respond to changing hydrology under climate change. Instead, they have defaulted to expropriating water dedicated to instream purposes in order to inadequately and inequitably mitigate risk. The reflexive default to a greater level of risk aversion, combined with placing all new risk on instream resources, is a formula for conflict and failure. As a general matter, instream resources need more water, not less.¹⁹ DWR, Reclamation, and the State Water Board need to begin the difficult project of systematically and systemically reducing and managing demand and seriously expanding water re-use.

The State Water Board has unlawfully relied on a conclusory and perfunctory analysis by DWR and Reclamation, and an even more conclusory and perfunctory analysis by CDFW. The State Water Board needs to conduct its own independent analysis of the TUCP, consistent with the mandates of reasonable use and protection of the public trust.

V. The TUCP Is Not in the Public Interest.

The TUCP promotes a strategy of “when in doubt, divert.” That strategy is not in the public interest. The natural world is hemorrhaging, and it cannot shoulder all the risk. It is not in the public interest to deprive already decimated fisheries of already inadequate flow protections. It is not in the public interest to deliver all water “conserved” to unspecified SWP

¹⁸ See https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/cdfw-to-swrceb-re-swp-itp-minor-amendment-request-2023-tucp.pdf.

¹⁹ See, e.g., State Water Board 2018 Framework document for update of the Bay-Delta Plan: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

and CVP contractors. It is not in the public interest to transfer management of water taken from fish and wildlife to the complete discretion of the managers of DWR and Reclamation.

It is not in the public interest to substitute reporting and monitoring for actions to protect fish and wildlife resources. While as a general matter transparency has value, transparency regarding bad decisions does not make those decisions good decisions.

The extreme risk aversion of the TUCP is also not in the public interest. For all of its many defects, D-1641 seeks to provide fish and wildlife with a share of the early season benefits of wet weather. The Port Chicago Trigger times out if conditions turn dry in subsequent months. That adjustment is baked into D-1641. It is not in the public interest to gut the early season fishery protections of D-1641 and completely rewrite its risk calculus *ad hoc*.

The TUCP is not in the public interest because it does not place mandatory restrictions on water allocations by the CVP and SWP in 2023. If indeed the need is “urgent,” the Projects should be as conservative in their allocations as they are in requiring water to be stored and not released as Delta outflow.

Depriving fisheries means depriving the people and the economies that depend on them. Those who depend on fish for livelihoods and sustenance are going to take a terrible hit in 2023, as they did in 2021 and 2022, and not just in the immediate geographic area that the proposed TUCP addresses. These include commercial and recreational anglers, whose very industries are in jeopardy. They also include tribes for whom salmon are integral to their ways of life. They also included local economies dependent on recreation and tourism dollars.

VI. The TUCP and TUCO Are Contrary to Law.

A. The TUCP and TUCO Violate the Public Trust Doctrine and the Requirement under the California Constitution that Use of Water Be Reasonable.

As described above, the TUCP and TUCO seek to eviscerate the public trust by definition: defining the public interest in such a narrow way that when the public trust and exports collide, the public interest is in exports.

Public trust uses are superior to uses under a water right, including senior rights and riparian rights. These principles are clearly spelled out in *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1489 (2014):

[T]he Board has the ultimate authority to allocate water in a manner inconsistent with the rule of priority, when doing so is necessary to prevent the unreasonable use of water. (El Dorado, supra, 142 Cal.App.4th 937, 966.) Because "no one can have a protectible interest in the unreasonable use of water" [citation] . . . when the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail." (Ibid.) {Slip Opn. Page 23}

This case, moreover, involves more than traditional water rights. As the Supreme Court held in *Audubon Society*, no party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has "an affirmative duty" to take the public trust into account in regulating water use by protecting public trust uses whenever feasible. (*Audubon Society*, supra, 33 Cal.3d at pp. 446--447.) Although the *Audubon Society* court considered the public trust doctrine only in relation to permitted appropriative water rights, subsequent decisions have assumed the doctrine applies as well in the context of riparian and pre-1914 appropriator rights. (*United States*, supra, 182 Cal.App.3d at p. 106 [in *Audubon Society*, "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado*, supra, 142 Cal.App.4th at p. 966 ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].)

B. Summary of Why the TUCP and TUCO Are Contrary to Law.

The TUCP and TUCO contravene the public trust doctrine by failing to balance a relatively healthy Central Valley agricultural sector that represents somewhat less than 2% of the state's gross domestic product with critically depressed public trust resources hovering on the brink of extinction. Extinction cannot be balanced! They also violate the public trust doctrine by prioritizing water rights priority over public trust uses and the doctrine of reasonable use.

The TUCP and TUCO violate the requirements of the federal Clean Water Act, because they have the effect of nullifying the applicable water quality objectives and standards without the concurrence of the US Environmental Protection Agency. The Board has previously argued that its implementation decisions do not alter the established standard, and thus, even if the Board fails to enforce the standard, it has complied with the Clean Water Act.²⁰ Thus the Board would elevate the illusion of compliance with the Clean Water Act over the reality of loosened standards and backsliding. The TUCP and TUCO contravene the federal Clean Water Act by arbitrarily weakening criteria without following mandated processes and ignoring federally promulgated water quality criteria.

The TUCP and TUCO violate the state and federal Endangered Species Acts. Notwithstanding the letters from CDFW, they will harm and result in the take of listed species.

VII. Conditions under Which this Protest and Objection May Be Disregarded.

The State Water Board should overrule the Executive Director, rescind the TUCO, and deny the TUCP. The State Water Board should order DWR and Reclamation to immediately provide flows required by the Port Chicago Trigger for an equivalent number of days that they would have occurred had the Projects complied with D-1641.

The State Water Board should order staff to develop, with appropriate public input, rules for operation of the SWP and CVP during droughts, including mandatory deficiencies to all SWP and CVP contractors in any dry or critically dry year.

²⁰ See Water Rights Order 2022-0095, pp. 57-58.