



January 7, 2022

Joaquin Esquivel, Chair
State Water Resources Control Board
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Transmitted via email

Re: Comments of California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance, *Draft Order Denying in Part and Granting in Part Petitions for Reconsideration and Addressing Objections, In the Matter of Petitions for Reconsideration of the Executive Director's June 1, 2021 Order Conditionally Approving a Petition For Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives In Response to Drought Conditions; and the Executive Director's June 10, 2021 Sacramento River Temperature Management Plan Approval Pursuant to Order 90-5*

Dear Chair Esquivel and Members of the Board:

The California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance (collectively, CSPA et al.) comment on the State Water Resources Control Board's (State Water Board or Board) December 15, 2021 *Draft Order Denying in Part and Granting in Part Petitions for Reconsideration and Addressing Objections, In the Matter of Petitions for Reconsideration of the Executive Director's June 1, 2021 Order Conditionally Approving a Petition For Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives In Response to Drought Conditions; and the Executive Director's June 10, 2021 Sacramento River Temperature Management Plan Approval Pursuant to Order 90-5* (hereinafter, Draft Order on Reconsideration or Draft Order).

The Board's actions in approving the 2021 Temporary Urgency Change Petition (TUCP) on Delta operations and the Sacramento River Temperature Management Plan (TMP) were unlawful. There is no sense in which they were reasonable. The effects to fish were not only unreasonable under the Water Code and the public trust doctrine, they were outrageous. The use of water they allowed was unreasonable under the reasonable use doctrine in the Water Code and the California Constitution.

Nonetheless, the Draft Order on Reconsideration argues that the orders approving the 2021 TUCP for Delta operations and the 2021 Sacramento River TMP were reasonable at the time, but that additional information is needed to make better decisions in the future.¹ The problems with the Board's actions did not stem from lack of information. They stemmed from lack of willingness to exercise the Board's authorities under the reasonable use and public trust doctrines to use available information to limit water deliveries and protect public trust resources.

I. By Limiting the Options it Considers, the Draft Order Approves the Unreasonable Use of Water and Unreasonable Impacts to Fish and Wildlife without Analysis.

CSPA et al.'s protest and objection of the 2021 TUCP stated that the crisis facing the fisheries and ecosystems of the Central Valley, and the Trinity River and lower Klamath River watersheds under a repeat of 2014 and 2015, was avoidable. It was not avoided. DWR and Reclamation in 2020 and early 2021 over-delivered water to SWP and CVP settlement contractors and CVP exchange contractors in preference to managing Delta operations and upstream reservoirs to protect public trust resources. DWR and Reclamation continued that practice in the remainder of 2021.

In the summer of 2020, Reclamation stonewalled the State Water Board in efforts to set up new defaults for water temperature management of the CVP's Shasta-Trinity Division. DWR and Reclamation dragged their way through the spring of 2021. The State Water Board, which needed a comprehensive approach to management of the Projects by April 1, still didn't have a plan on June 1. Meanwhile, in an enormous game of chicken, the Sacramento River Settlement Contractors (SRCS) and the San Joaquin Exchange Contractors planted to the levels of water deliveries they expected to get without any further action by the State Water Board to limit those deliveries.² In June of 2021, DWR and Reclamation cried crisis, promoting collective amnesia of Project mismanagement and overallocation, and deflecting all attention to the here and now.

When in June 2021 DWR and Reclamation sought approval of these actions and their continuation, the State Water Board granted it. The State Water Board approved the 2021 TUCP and 2021 Sacramento River Temperature Management Plan. On December 15, 2021, the State Water Board issued a Draft Order on Reconsideration denying reconsideration of these actions in virtually all respects, other than to require additional information from DWR and Reclamation regarding water accounting in 2021 and in their already-initiated pursuit of TUCP's in 2022.

The Draft Order accepts and perpetuates DWR and Reclamation's hands-off paradigm regarding deliveries to Sacramento River Settlement Contractors, Feather River Settlement Contractors, and San Joaquin Exchange Contractors. The approach of DWR and Reclamation is that any improvements to management of public trust resources during a dry or critically dry year with low storage is limited to trading off one public trust resource against another. Effectively, an improvement to management of Shasta Reservoir and Sacramento River water

¹ Draft Order on Reconsideration, p. 57.

² It was the State Water Board that blinked. As stated in the Board's December 15 Draft Order, p. 49: "[R]eductions in deliveries to settlement and exchange contractors after planting had occurred could have presented a significant hardship to those users and others who purchased water from those users."

temperatures was limited to water made available by shorting Delta water quality standards. It avoids the question of whether under the circumstances, deliveries to senior CVP and SWP contractors are reasonable and whether the effects of these deliveries on both Delta and Sacramento River fish and wildlife and other public trust resources are reasonable.

The Projects do not have a proprietary right to the unreasonable use of water. “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.” *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1485 (2014). But DWR and Reclamation act as though the water already in their reservoirs, as meager as it may be, is theirs to do with as they please, and that only water taken from the Delta hand of the public trust is rightfully used to wash the upstream hands of the public trust.

The Draft Order on Reconsideration faithfully reproduces this logic, arguing that the approval of the Board’s Executive Director of the 2021 TUCP and the 2021 Sacramento River TMP were reasonable. The Draft Order states:

Due in part to unexpected losses in runoff and other factors discussed further below, Reclamation did not meet the EOS storage target of 1,250,000 acre-feet in Shasta Reservoir and did not meet a temperature of 55 degrees F at the TMP compliance location starting August 19th. Shasta EOS storage in 2021 was 1,074,380 acre-feet (see Table 2, Section 2.3, SWP and CVP Water Supplies). Without the TUCP Order, absent any other changes in operations of Shasta Reservoir, EOS storage could have been less than 800,000 acre-feet and temperature control could have been lost sooner, likely resulting in near total temperature related mortality to this year’s cohort.³

While the Draft Order pays lip service to “any other changes in operations,” the Board made no movement whatsoever in that direction, not in 2021, not in 2014 or 2015. The failure of the 2021 TUCP order, in combination with the ineffective 2021 TMP, is dissimulated in the reminder that it all could have been worse: “While this level of TDM is far above optimal, it is likely better than the TDM that would be expected with EOS Shasta storage levels of less than 800,000 acre-feet.”⁴ The basis of comparison shows what the Board really considered as the world of the possible: backfilling Shasta with reduced Delta outflow, balancing of one public trust use against another, or nothing.

II. The Draft Order Does Not Show the Board’s Work.

In its 2020 Settlement Agreement with CSPA,⁵ 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*

³ Draft Order on Reconsideration, p. 17.

⁴ *Id.*, p. 18.

⁵ 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>

factors it balanced in making its determination.”⁶ In response, the Draft Order on Reconsideration states:

[T]he temporary changes to D-1641 and approval of the Sacramento River TMP were reasonable and consistent with the public trust doctrine given the extremely dry hydrology and low reservoir storage and the need to conserve critically low water supplies and minimize associated impacts to water quality and supply in downstream urban and rural communities, as well as minimize impacts to fish and wildlife. For the reasons above, we affirm that the TUCP Order achieved a reasonable balance of competing demands during the drought emergency, based on the information available at the time, consistent with the public trust and reasonable use doctrines.⁷

This affirmation makes no attempt to show *how* the Board balanced competing demands. It does not describe the “specific factors” the Board balanced. It does not, for example, state which water supplies to which urban and rural communities it balanced, or how the Board weighed supplies to each of these “communities.” It describes the general factors the Board balanced. In fact, it does not describe general factors so much as it describes general *categories*, because it does not describe how each category made a difference, or how, in other words, it was a “factor.”

Similarly, the Draft Order on Reconsideration does not respond to the arguments made in the petitions for reconsideration of CSPA et al. and NRDC et al., among others. Instead, the Draft Order lists the arguments as background, and then describes what the Executive Director decided. It does not explain how the Board balanced resources and needs. It does not explain the process by which it weighed whether effects to fish and wildlife were reasonable or whether use of water was reasonable. *See*, for example, the description of the effects of the TUCP on Fish and Wildlife (Draft Order, pp. 42-43) and the Sacramento River TMP (Draft Order, p. 44), and the following discussion of the TUCP (Draft Order, pp. 45-48) and of the TMP (Draft Order, pp. 48-51).

Rather than describe the balancing process or factors, the Draft Order deflects. It says that without the TUCP or the Order on the TMP, the conditions might have been worse. Of course, the basis for comparison does not consider water deliveries to settlement and exchange contractors as a variable, assuming that, absent the TUCP and the TMP, Reclamation would have drawn down Shasta Reservoir by the amount that the TUCP “conserved.” The Draft Order acknowledges petitioners’ argument regarding the long-term decline of fisheries even prior to recent droughts.⁸ But rather than analyzing the effects of the TUCP and TMP on fish and wildlife in this context, the Draft Order says that the Executive Director relied on the fact that the fisheries agencies did not object, as well as on the representations of DWR and Reclamation.⁹ Otherwise, the Draft Order at various points in the document blames the condition of fish in 2021 on the drought.¹⁰

⁶ *Id.*, p. 3. Emphasis added.

⁷ Draft Order on Reconsideration, p. 55.

⁸ *Id.*, p. 42.

⁹ *Id.*, p. 46-47. This deflection ignores the legal responsibility of the Board to make its own evaluations and findings.

¹⁰ *See, e.g.*, p. 46.

The Board's June 1, 2021 Order approving the 2021 TUCP touted its virtues as follows: "The changes approved in this Order balance the various uses of water now and in the future while preserving water right priorities and protecting the public interest."¹¹ What the Board did not explain, either in the June 1, 2021 Order or in the Draft Order on Reconsideration, is how the public interest was protected in "preserving water rights priorities" in this specific case. In other words, the Board did not describe how it balanced the public trust and water rights priorities, let alone how this balancing protected the public interest.

Nor does the Draft Order explain how the Executive Director found that DWR and Reclamation had exercised "diligence" as required by Water Code 1435. Here too, the Draft Order deflects: "In addition, the decision whether to find a lack of diligence is discretionary. Given the extraordinary circumstances presented by the current drought, the Executive Director appropriately found that an urgent need for the changes existed."¹² Because a finding of diligence is "discretionary" does not mean that it is *arbitrary*. Both CSPA et al. and NRDC et al. provided extensive argument as to why the Projects had not exercised diligence prior to submitting their TUCP. Yet here too, the Draft Order simply announces its conclusion without reasoned explanation.

The Draft Order cites to *Light* in saying, "What constitutes a reasonable water use depends on the entire circumstances presented and varies as conditions change."¹³ A rewritten Order needs to describe the tipping points and the factors that made a difference in determining whether water use and effects on fish and wildlife under the TUCP and TMP were reasonable.

III. The TUCP and the TMP Were Unreasonable Because the Board Did Not Require Them to Meet their Stated Objectives.

The Draft Order acknowledges that the TUCP and TMP did not achieve their stated objectives. "[T]emperature control on the Sacramento River was lost prior to the end of the temperature management season, the EOS storage target was not met, and early estimates of TDM for winter-run Chinook salmon are high."¹⁴ Reclamation failed to meet the approved 1,250,000 acre-foot storage target for Shasta Reservoir by about 175,000 acre-feet.¹⁵ In the Delta, even the modified water quality requirements were exceeded for much of June.

The stated purpose of the TUCP was, in substantial part, to preserve upstream storage. CSPA et al. has pointed out repeatedly that, considering Reclamation's releases from Shasta Reservoir to deliver water to Sacramento River Settlement Contractors, the actual effect of the TUCP was a water transfer from the public trust to those contractors. Yet even on its own terms, describing the amount of water shorted in the Delta as water "conserved" in Shasta Reservoir is a misnomer. The amount of water allegedly conserved by the TUCP was 289,000 acre-feet.¹⁶ However, there were 240,000 acre-feet of water transferred by the Sacramento River Settlement

¹¹ Board Order Approving 2021 TUCP (Jun. 1, 2021), p. 36.

¹² Draft Order, p. 39.

¹³ *Id.*, p. 55.

¹⁴ *Id.*, pp. 50-51.

¹⁵ *Id.*, p. 51.

¹⁶ *Id.*, p. 12.

Contractors from water stored in Shasta, mostly in September and October.¹⁷ It makes more sense to consider the gains from the TUCP as water that was re-operated to delay its delivery by one or two months.

The following statement in the Draft Order is thus doubly incorrect:

While conditions were generally poor due to the drought and to some extent reduced Delta outflows, the additional 300,000 acre-feet of storage in Shasta Reservoir resulting from the changes from the TUCP Order and the Sacramento River TMP likely provided for some improvements in temperatures benefiting migrating spring-run Chinook salmon to some extent this year and possible improvements next year if the hydrology remains dry.¹⁸

There was no demonstrable benefit to spring-run in 2021, because spring-run migrated before the TUCP and TMP took effect. More on point, most of the “additional” water that was stored in Shasta Reservoir has already been released. There is virtually no carryover benefit into 2022, for anyone or anything, from the TUCP and the TMP.

IV. The Board Should Rewrite the Draft Order to Acknowledge its Errors in 2021

The central deflection of the Draft Order is to avoid acknowledging unreasonable use of water and unreasonable effects on fish and wildlife in 2021 by, instead, ordering future actions to improve the information available for decision making. Additional information may be helpful. But the main lack in 2021, as in 2014 and 2015, was the Board’s failure to exercise its responsibility to look at what their citation from *Light* characterizes as “the entire circumstances” in determining reasonable use of water.

A related form of deflection in the Draft Order is to say that conditions, practices and requirements in general must be improved in the future.¹⁹ While needed, that simply sets up the general as the solution for inappropriate particular choices, remembering as well that it is in dry conditions that one truly appreciates the value of water.

The State Water Board must issue a new Order that acknowledges the unreasonable use of water and resulting unreasonable effects on fish and wildlife under the TUCP and TMP in 2021. The Board must set new procedures for:

- Determining the reasonable use of water in dry year sequences, including the first dry year when there is water available to manage;
- Limiting water deliveries consistent with reasonable use; and
- Protecting public trust resources consistent with legal responsibilities.

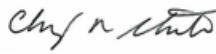
Thank you for the opportunity to comment on the Draft Order on Reconsideration.

¹⁷ *Id.*, p. 49.

¹⁸ *Id.*, p. 18

¹⁹ *See id.*, p. 47 (regarding updates to the Bay-Delta Plan), p. 50 (regarding potential changes to Sacramento River temperature management).

Respectfully submitted,



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