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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

**DECLARATION OF BILL JENNINGS IN
SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE SUMMARY
ADJUDICATION**

[Cal. Rules of Court, Rule 3.1350, subd. (h)]

1 **Declaration of Bill Jennings**

2 I, BILL JENNINGS, declare as follows:

3 1. I make this declaration in support of Plaintiffs’ Motion for Summary Judgment, or, in the
4 alternative, Summary Adjudication, in the above-entitled matter. I have personal knowledge of the
5 matters set for herein and, if called as a witness, could and would testify competently thereto.

6 2. I am a resident of Stockton, California.

7 3. I am a member of Plaintiff California Sportfishing Protection Alliance (“CSPA”) and
8 currently serve as its Executive Director.

9 4. CSPA is a nonprofit, public benefit corporation organized under the law of the State of
10 California. The purposes of the organization include promoting the conservation, restoration and
11 enhancement of the State’s fishery resources and the aquatic and terrestrial habitats on which these
12 resources depend, promoting the preservation of land and aquatic habitat for scientific, historic,
13 recreational, educational, agricultural, scenic and open space opportunities, and promoting the social
14 welfare through the protection, enhancement and restoration of the quality of sportfishing and related
15 recreational pursuits in California.

16 5. CSPA has approximately 2,000 members who use the Sacramento-San Joaquin Delta
17 (“the Delta”) and its upstream waters, including the San Joaquin River and its tributaries including Mud
18 Slough, Salt Slough, and the Mendota Pool, for recreational, scientific, educational, and conservation
19 purposes, including fishing, boating, kayaking, sailing, wildlife observation, photography, hiking, and
20 aesthetic enjoyment on a continuing and ongoing basis.

21 6. CSPA’s Board of Directors, in formal meetings and frequent conference calls, meet and
22 confer about issues important to the organization. CSPA produces a newsletter that is distributed to its
23 members and a website, including the California Fisheries Blog, that is updated regularly.

24 7. CSPA has long been involved in protecting the water quality, flows, and species of the
25 Delta and its rivers and tributaries. CSPA acts on behalf of its members to protect their interests in using
26 and enjoying the Delta and its tributaries including the San Joaquin and Sacramento Rivers.

27 8. To this end, CSPA regularly communicates with state and federal agencies, including the
28 California State Water Resources Control Board (“State Board”), Central Valley Regional Water
29 Quality Control Board (“Regional Board”), the California Department of Water Resources (“DWR”),
30 the U.S. Bureau of Reclamation (“Bureau”), the U.S. Environmental Protection Agency (“U.S. EPA”),
31 the U.S. Army Corps of Engineers (“COE”), the Federal Energy Regulatory Commission (“FERC”),
32

1 California Department of Fish and Wildlife (“DFW”), the U.S. Fish & Wildlife Service (“U.S. FWS”),
2 and the National Marine Fisheries Service (“NMFS”). CSPA’s activities include providing comments on
3 proposed regulatory actions and gathering and disseminating information regarding the health of the
4 Delta, its tributaries, its fisheries, and other wildlife resources.

5 9. For example, CSPA regularly submits formal comments, complaints, protests, and
6 petitions and participates in evidentiary proceedings concerning water rights, water transfers, public trust
7 resources, water quality control plans and unreasonable use and method of diversion of public waters
8 before the State Board. CSPA has filed more than twenty-five formal “public trust” and “unreasonable
9 use” complaints with the State Board against numerous water agencies including BOR and DWR. CSPA
10 was also an original plaintiff in the eighteen-year lawsuit against the U.S. BOR and Friant water
11 agencies for drying up the San Joaquin River and depriving the Delta of necessary high quality water,
12 and is currently engaged in CEQA proceedings against the BOR and regional water agencies regarding
13 their proposed 10-year water transfer plan.

14 10. For example, CSPA submitted extensive comments and testimony to the State Board
15 regarding protection of in-stream resources during the Emergency Drought Hearings and Bay-Delta
16 Hearing (1995-1999 and 2005) and successfully litigated the State Board’s D-1641 decision that
17 purported to implement the 1995 Water Quality Control Plan for the Delta. CSPA also submitted
18 comments and expert testimony during the State Board’s 2010 Delta Flow Hearings. CSPA is currently
19 a party of record and active participant in the State Board’s ongoing multi-year evidentiary proceeding
20 regarding modifications to DWR and Bureau’s water rights and licenses for the proposed California
21 WaterFix project. CSPA has also submitted extensive comments on the State Board’s ongoing three-
22 phase effort to update the Water Quality Control Plan for Bay-Delta.

23 11. CSPA also participated as a party of record in the 2005 and 2010 State Board Cease and
24 Desist Orders against DWR and the Bureau for violating salinity objectives in the South Delta. CSPA’s
25 successful lawsuit against the State Board for its failure to develop sediment quality objectives for the
26 Delta resulted in the State Board allocating more than six million dollars to develop sediment objectives.

27 12. CSPA also engaged in the submission of comments and participation in both
28 administrative and court proceedings involving the Delta Stewardship Council’s proposed Delta Plan
29 and in DWR’s proposed WaterFix (formerly, the Bay Delta Conservation Plan) that proposes to divert
30 up to nine thousand cubic feet per second (“cfs”) from the Sacramento River through the proposed Twin
31 Tunnels to be constructed underneath the Delta, and COE’s parallel proposals for potentially approving
32

1 the Twin Tunnels under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors
2 Act of 1899.

3 13. CSPA regularly reviews, analyzes and submits detailed comments on California
4 Environmental Quality Act (“CEQA”) and National Environmental Policy Act (“NEPA”) documents
5 pertaining to projects affecting the Sacramento-San Joaquin Delta and tributary waterways. For
6 example, CSPA submitted extensive comments on the Environmental Impact Report (“EIR”) and
7 Environmental Impact Statement (“EIS”) for DWR’s South Delta Improvement Project and Monterey
8 Plus Agreement Project, and commented on BOR’s Two Gates Project. CSPA submitted detailed
9 comments on and successfully litigate the Regional Board’s EIR for the revised irrigated lands program,
10 which led the Board to issue waste discharge requirements in place of the former conditional waivers.
11 CSPA ~~and has~~ submitted extensive comments on and successfully litigated the Delta Stewardship
12 Council’s Delta Plan, which led the Council to begin revising the Delta Plan. CSPA also submitted
13 extensive comments on the 2015 Draft EIS for Coordinated Long Term Operation of the Central Valley
14 Project and State Water Project.

15 14. CSPA also reviews and submits comments on biological opinions, critical habitat
16 designations, streambed alterations and Clean Water Act Section 404 dredging permits issued by NMFS,
17 U.S. FWS, COE and DFW. For example, CSPA submitted extensive comments on NMFS’s draft
18 Biological Opinion for the FERC’s proposed re-licensing of DWR’s Oroville Project on the Feather
19 River, a tributary of the Delta.

20 15. Additionally, CSPA monitors resource management actions related to the San Francisco
21 Bay-Sacramento-San Joaquin Delta Estuary. CSPA has been intimately involved in virtually every
22 proceeding involving the Bay Delta from the evidentiary hearings in the 1980s through CalFed, Delta
23 Vision, the Bay Delta Conservation Plan, California WaterFix, and the Delta Stewardship Council’s
24 recent development of a Delta Plan.

25 16. On behalf of CSPA, I have extensively commented on numerous water projects involving
26 the SWRCB, BOR and other water agencies, including by corresponding with SWRCB staff and filing
27 objections in respect of several of the Temporary Urgency Change (“TUC”) Petitions submitted to the
28 SWRCB. These objections include the Protests, Objections and Petitions for Reconsideration and Public
29 Hearing submitted by CSPA et al. on 3 March 2014, 28 April 2014, 13 May 2014 and June 17, 2015.
30 For example, CSPA’s Objection dated June 17, 2015 raised concerns about the DWR and BOR’s TUC
31 Petition dated May 21, 2015, particularly the adverse effects on endangered and threatened fish species.

1 17. On July 21, 2015, I submitted a complaint on behalf of CSPA against the SWRCB, BOR
2 and DWR for violations of Bay-Delta Plan, D-1641 Bay-Delta Plan Requirements, Clean Water Act,
3 Endangered Species Act, Public Trust Doctrine and California Constitution (Exhibit 57). The complaint
4 asked the SWRCB to act expeditiously in responding, and requiring USBR and DWR to respond to, the
5 allegations and to immediately reestablish D-1641's critical year requirements for the protection of fish
6 and wildlife.

7 18. On August 2, 2015, I submitted a complaint on behalf of CSPA against SWRCB and
8 BOR for Violations of Central Valley Basin Plan, WR Order 90-05, Clean Water Act, Endangered
9 Species Act, Public Trust Doctrine and California Constitution. (Exhibit 37.) This complaint alleged that
10 the SWRCB had failed to implement crucial Basin Plan water temperature criteria and CWA
11 requirements protecting water quality and fish and wildlife beneficial uses, and identified habitual
12 violations of the Basin Plan by the BOR. This complaint requested, among other things, that reduce
13 water deliveries to low valued crops that are further depleting already inadequate cold water reserves, to
14 require USBR to modify operations to ensure that sufficient carryover reserves of cold water necessary
15 to comply with CWA and Basin Plan temperature criteria remain in Shasta Reservoir, and to issue
16 sanctions against USBR for its willful disregard for public trust resources and beneficial uses.

17 19. Where necessary, CSPA initiates legal action to protect its members' interests. The Board
18 of Directors has delegated the authority to initiate legal actions on behalf of CSPA's members in the
19 Sacramento region to CSPA's President Jim Crenshaw and me. Jim Crenshaw and I often discuss
20 problems that affect the Sacramento River and the Sacramento-San Joaquin Delta, including possible
21 pollution sources and potential streamflow depletions.

22 20. Given CSPA's interests and activities, CSPA is seriously concerned about the SWRCB's
23 long-standing practice of waiving, relaxing, suspending, contradicting, or otherwise rejecting and
24 ignoring their duty to regulate water pollution in the state of California in a manner consistent with
25 water quality standards established under and required by the Clean Water Act. Based upon its extensive
26 history of participating in numerous administrative proceedings regarding projects affecting the San
27 Francisco Bay-Delta and other California waterways, and observing the continuing degradation of the
28 Delta ecosystem, CSPA members believe that the SWRCB's failure to regulate flow-caused pollution
29 has harmed, and will continue to harm, protected species that live in the Delta, such as Chinook salmon
30 and delta smelt.

1 21. Because CSPA members regularly use and will continue to use the Delta’s waters and
2 surrounding lands for fishing, boating, wildlife observation, photography, hiking, and other professional,
3 scientific, and personal activities, impacts to the flow and quality of these waters and the species that
4 reside in them will adversely affect CSPA members’ use and enjoyment of the Delta. CSPA members
5 depend on adequate streamflows and healthy ecosystems for these activities.

6 22. Personally, I live in Stockton, California, near the confluence of the Calaveras River and
7 the San Joaquin River within the Delta. For approximately thirty years I have regularly used, and will
8 continue to use, the Sacramento-San Joaquin Delta for fishing, boating, wildlife observation, and
9 scientific and professional endeavors.

10 23. One of the reasons I moved to Stockton in 1981 was to pursue my love of fishing in the
11 hundreds of miles of braided channels that comprise the Delta. For a time, I owned and operated a fly
12 fishing shop for local fishermen. Eventually, due to a decline in local fishing activity, I sold the shop. As
13 a businessman with an interest in the health of the local fishery, I educated myself about the polluted
14 state of the Delta and its tributaries.

15 24. I joined CSPA in 1985 and became an active member to actively work to protect,
16 conserve and restore the natural environment of the Delta and its tributaries. I believe that pollution,
17 poor management and over-allocation of the state’s surface and ground waters, and the effects of climate
18 change, have degraded and continue to considerably degrade the beauty and other values of these
19 waters, curtailing the enjoyment and use of them by me and others like me, including members of
20 CSPA, who use, enjoy, and appreciate the natural environment.

21 25. Over the last three decades, I have observed a significant decline in fisheries and fishing
22 activities throughout the Central Valley, particularly in the Sacramento and San Joaquin rivers and their
23 Delta. An increasing number of species, such as Delta smelt, steelhead, Winter-run and Spring-run
24 Chinook salmon, and green sturgeon have been identified as endangered or threatened pursuant to state
25 and federal endangered species acts. Fall-run Chinook salmon populations, although not yet listed, have
26 likewise collapsed in recent years. Populations of resident pelagic species such as Delta and longfin
27 smelt, threadfin and American shad, striped bass, and splittail are at or near historic lows. Much of these
28 species’ native food supply—phytoplankton and zooplankton—has been reduced by one to two orders of
29 magnitude (90-99%) during the past three decades.

30 26. On a personal level, I am concerned about the impact of the SWRCB’s failure to
31 adequately regulate water quality on the continued existence of these species. Fish populations have
32

1 already declined, and the reduced streamflows and potentially worse water quality caused by the
2 successive TUC Orders threatens to do more harm to the Delta’s species. My enjoyment of the Delta
3 depends on healthy fish populations. Thus, the SWRCB’s actions have affected, and will continue to
4 adversely affect, my personal and professional interests.

5 27. A ruling prohibiting the SWRCB from continuing to allow the violation of water quality
6 standards and the public trust doctrine would prevent harm to the species and waters of the Delta and to
7 me, CSPA, and CSPA’s members.

8 28. I have attached hereto true and correct copies of each Exhibit referenced herein.

9 29. The Bay-Delta is a 1600-square-mile estuary where the state’s two major river systems—
10 the Sacramento River and the San Joaquin River—converge and flow into San Francisco Bay. (Exhibit 1
11 [Revised Decision 1641] at 6, Ex. 2 [2006 Bay-Delta Plan] at 1, 2.)

12 30. Many Bay-Delta species are endangered or threatened under the Federal or California
13 Endangered Species Acts, including resident species such as Delta smelt and migratory species such as
14 winter-run and spring-run Chinook salmon. (Exhibit 1 [Revised Decision 1641] at 6; Exhibit 2 [2006
15 Bay-Delta Plan] at 1, 2; Exhibit 30 [April 6, 2015 TUCP Order] at 15-24; Exhibit 9 [NMFS BiOp] at
16 72.)

17 31. The collapse of the Bay-Delta’s pelagic fish populations is well-documented, with
18 species measured by the California Department of Fish and Wildlife’s Fall Midwater Trawl declining
19 between 91.9 and 99.99 percent since 1967. (Exhibits 4-8.) The collapse of the Sacramento River
20 anadromous fish populations is also well-documented. The USFWS Anadromous Fisheries Restoration
21 Program, mandated by the Central Valley Project Improvement Act, documents the decline of in-river
22 natural production of Sacramento winter-run, spring-run, fall-run and late fall-run Chinook salmon.
23 (Exhibit 67.)

24 32. The Delta is also the hub of California’s two major water distribution systems: the federal
25 Central Valley Project and California’s State Water Project, operated by the U.S. Bureau of Reclamation
26 and California Department of Water Resources, respectively, pursuant to water rights licenses and
27 permits issued by SWRCB. (Exhibit 9 [NMFS BiOp] at 72.)

28 33. The CVP and SWP comprise a vast system of dams, pumps, reservoirs, canals, and
29 related infrastructure that impounds and transfers water throughout California’s Central Valley. (*San*
30 *Luis & Delta-Mendota Water Auth. v. Jewell* (9th Cir. 2014) 747 F.3d 581, 593-594 (“*SLDMWA I*”).)
31

1 34. USBR and DWR are by far the largest water rights holders in the region, and their project
2 operations control when and how much water is released from upstream dams along the Delta’s
3 tributaries, as well as the quantity and timing of water exported from the Delta. (Exhibit 9 [NMFS BiOp]
4 at 72, 432-33; Ex. A [D-1641] at 5-6; *San Luis & Delta-Mendota Water Auth. v. United States* (9th Cir.
5 2012) 672 F.3d 676, 682-683 (“*SLDMWA II*”).)

6 35. As a result, how water moves into, through, and out of the Delta is largely coordinated by
7 USBR and DWR, and the operations of the CVP and SWP have a direct and outsized effect on water
8 quality and quantity in the Delta. (*SLDMWA II*, 672 F.3d at 683; Exhibit 2 [2006 Bay-Delta Plan] at 1,
9 38, Exhibit 10 [FWS BiOp] at 19-20.)

10 36. In January 1995, the EPA was forced to promulgate federal water quality standards for
11 the Bay-Delta. (60 Fed. Reg. 4664, 4665 (Jan. 24, 1995).)

12 37. EPA noted the “serious environmental crisis for fish and wildlife resources in the
13 Bay/Delta” and set out the history of SWRCB failing to address this crisis. (Exhibit 50 [60 Fed. Reg.
14 4664, 4665 (Jan. 24, 1995)].)

15 38. The SWRCB opposed EPA’s proposed regulations, arguing that “[o]nly the state can
16 decide whether it is appropriate to regulate flow-caused pollution including salinity intrusion and
17 establish requirements for its regulations . . . Therefore, EPA cannot adopt the proposed criteria for
18 Estuarine Habitat and for Fish Migration and Cold-Water Habitat.” (Exhibit 11 [SWRCB comments to
19 Jan. 6, 1994 draft EPA standards].)

20 39. EPA disagreed, stating “EPA has ample authority under section 303 to specify the water
21 quality standards that will enable the Bay/Delta to attain its designated uses even if implementation of
22 these standards by the state have incidental effects on the allocation of water.” (Exhibit 12 [EPA
23 Response to SWRCB Comments (1994)].) “[M]ost of the implementation measures that the state may
24 take affect water quantity and the criteria can only be attained if the state implements measures that
25 affect water quantity.” (Id.)

26 40. Later that year, SWRCB adopted the “Water Quality Control Plan for the San Francisco
27 Bay – San Joaquin Delta Estuary” (“Bay-Delta Plan”, subsequently revised through 2006). (Exhibit 2.)

28 41. EPA approved the Bay-Delta Plan, and the water quality objectives contained therein, as
29 compliant with CWA requirements. (Exhibit 13 [EPA, Approval of the 1995 Bay-Delta Plan (Sept. 26,
30 1995)] at 2.)

1 42. The 1995 Bay-Delta plan provides that “the objectives and beneficial uses in this plan
2 that are water quality standards within the meaning of the Clean Water Act will be California’s water
3 quality standards for the purposes of the Clean Water Act.” (Exhibit 14 [1995 Bay Delta Plan] at 10.)

4 43. SWRCB again asserted that “the objectives for flow and operations are not subject to
5 approval by the USEPA” since “the USEPA could not adopt standards for these parameters under the
6 Clean Water Act”. (Id. at 10-11, reiterated as re-adopted in 2006.)

7 44. EPA again disagreed. (Exhibit 13 [EPA, Approval of the 1995 Bay-Delta Plan (Sept. 26,
8 1995)] at 2.)

9 45. “EPA recognizes that there is a difference in opinion about the scope of EPA’s authority
10 under the Clean Water Act to review and/or to promulgate certain measures included in the 1995
11 Bay/Delta Plan. EPA further recognizes that the State Board has explicitly reserved its arguments on
12 these issues. See 1995 Bay/Delta Plan at pp. 10-11. For the reasons outlined in its preambles to the
13 proposed and final federal rule, as well as in its response to comments received during the public
14 comment period, EPA believes that its review of the 1991 and 1995 Bay/Delta Plans and its
15 promulgation of the criteria included in its final rule are fully in accord with the Clean Water Act. EPA
16 also reserves its arguments as to these issues.” (Id.)

17 46. The Bay-Delta Plan consists of (1) beneficial uses to be protected; (2) water quality
18 objectives for the reasonable protection of beneficial uses; and (3) a program of implementation for
19 achieving the water quality objectives. Several beneficial uses pertain to fish species and habitat,
20 including “cold freshwater habitat”, “spawning, reproduction and/or early development”, and “rare,
21 threatened or endangered species.” (Exhibit 2 [2006 Bay-Delta Plan] at 9; Ex. N [1995 Bay-Delta Plan]
22 at 13.)

23 47. In order to protect beneficial uses, the Bay-Delta Plan specifies flow and water quality
24 objectives. (Exhibit 2 [2006 Bay-Delta Plan] at 12-17; Ex. N [1995 Bay-Delta Plan] at 16-26.)

25 48. SWRCB admits that the flow-based objectives set out in Table 3 of the Bay-Delta Plan
26 were “established to ensure the reasonable protection of fish and wildlife uses, including the ‘rare,
27 threatened and endangered species’ beneficial use on page 9 of the 2006 Bay Delta Plan” (Exhibit 15
28 [RFA No. 6].)

29 49. Similarly, the Central Valley Basin Plan for the Sacramento River Basin and the San
30 Joaquin River Basin (“Central Valley Basin Plan”) includes temperature criteria to protect beneficial
31 uses. (Exhibit 16 [Central Valley Basin Plan] at III-8.00.)

1 50. In particular, temperature shall not be elevated above 56°F in the reach from Keswick
2 Dam to Hamilton City nor above 68°F in the reach from Hamilton City to the I Street Bridge during
3 periods when temperature increases will be detrimental to the fishery. (Id.)

4 51. Water Rights Decision 1641 (“D-1641”), issued in December 1999 and revised March
5 2000, includes minimum Delta outflow and other regulatory limits for the Central Valley Project
6 (“CVP”) and State Water Project (“SWP”) operations to meet 1995 Bay-Delta requirements. (Exhibit 1
7 [D-1641] at 181-187.)

8 52. Resolution No. 2004-0030 adopted the Policy for the Implementation and Enforcement of
9 the Nonpoint Source Pollution Control Program (“NPS Plan”), pursuant to California Water Code,
10 section 13369, “to meet the requirements of . . . section 319 of the Clean Water Act.” (Exhibit 17 [Res.
11 2004-0030] at 1; Exhibit 18 [California Nonpoint Source Program Implementation Plan, 2014-2020].)

12 53. The NPS Plan explicitly relies on the Bay-Delta Plan to protect water quality in the
13 region, and associated beneficial uses. (Exhibit 18 [California Nonpoint Source Program
14 Implementation Plan, 2014-2020] at 6, 45-46.)

15 54. SWRCB Resolution No. 68-16 contains California’s anti-degradation policy, and requires
16 that high water quality be maintained, consistent with applicable policy prescriptions. In particular, the
17 policy provides “that the granting of permits and licenses for unappropriated water and the disposal of
18 wastes into the waters of the State shall be so regulated as to achieve highest water quality consistent
19 with maximum benefit to the people of the State” (Exhibit 19 [State Water Resources Control Bd. Res.
20 No. 68-16 (Oct. 28, 1968)].)

21 55. DFW found that significantly greater flows through the Bay-Delta were necessary to
22 protect public trust resources. (Exhibit 21 [Cal. Dept. of Fish & Game, Quantifiable Biological
23 Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta
24 (Nov. 23, 2010)] at 94 [“Recent Delta flows Are insufficient to support native Delta fishes For today’s
25 habitats . . .”].)

26 56. SWRCB published the Development of Flow Criteria for the Sacramento-San Joaquin
27 Delta Ecosystem released in August 2010, also concluding that significantly greater flows were
28 necessary to protect Bay-Delta public trust fish resources. (Exhibit 3 [SWRCB, Development of Flow
29 Criteria for the Sacramento-San Joaquin Delta Ecosystem (Aug. 3, 2010)] at 5 (hereafter “Flow Criteria
30 Report”) [“. . . the flow Criteria developed in this proceeding are intended to halt population decline and
31

1 increase populations of certain species;” “Recent Delta flows Are insufficient to support native Delta
2 fishes for today’s habitats”].)

3 57. The Flow Criteria Report acknowledged that “Flow is important to sustaining the
4 ecological integrity of aquatic ecosystems, including the public trust resources Flow affects water
5 quality, food resources, physical habitat, and biotic interactions. Alterations in the natural flow regime
6 affect aquatic biodiversity and the structure and function of aquatic ecosystems.” (Id. at 39.)

7 58. Recent flow regimes in the Delta have contributed to the decline of native species and
8 encouraged non-native species. . . . [F]lows and habitat structure are often mismatched and now favor
9 non-native species. . . . Flow modification is one of the few immediate actions available to improve
10 conditions to benefit native species.” (Id. at 40.)

11 59. On January 17, 2014, Governor Brown issued a Drought Emergency Proclamation
12 directing SWRCB to consider TUC Petitions (“TUCPs”) to modify requirements implementing water
13 quality control plans and suspending Water Code, section 13247, which requires state agencies to
14 comply with water quality control plans. (Exhibit 34 [Governor Brown, A Proclamation of a State of
15 Emergency (Jan. 17, 2014).])

16 60. On January 31, 2014, SWRCB issued a TUC order that: Reduced the flow requirement
17 for the upcoming month to a minimum of only 3,000 cfs—less than half that required by the Bay-Delta
18 Plan. (Exhibit 23 [Jan. 31, 2014 TUCP Order] at 13; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3 n.11.)
19 Also allowed USBR and DWR to open the gates as frequently as they deemed necessary from February
20 1 through May 20, in contrast to the Bay-Delta Plan’s requirements that the gates remain closed during
21 that period. (Exhibit 23 [Jan. 31, 2014 TUCP Order] at 5, 14; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3.)

22 61. On April 9, 2014, SWRCB issued a TUC Order that: Extended the reduced flow
23 objectives through April. (Exhibit 24 [April 9, 2014 TUCP Order] at 8.)

24 62. On April 11, 2014, SWRCB issued a TUC Order that: Reduced the base flow criteria to
25 700 cfs through April 14, and 500 cfs from May 15 to May 31, below the monthly average of 710 or
26 1,140 cfs (depending on the location of the mixing zone, X2) required by the Bay-Delta Plan during
27 “critical” water years such as 2014. (Exhibit 33 [April 11, 2014 TUCP Order] at 3-5, 8; Exhibit 2 [2006
28 Bay-Delta Plan] at Tbl. 3, n.14.) Also reduced the magnitude and duration of spring pulse flows to 16
29 days of flow at 3,300 cfs plus 15 days of flow at 1,500 cfs, from the 31-day spring pulse flow of 3,100 or
30 3,540 cfs (depending on X2) required by the Bay-Delta Plan. (Id.)

1 63. On May 2, 2014, SWRCB issued a TUC Order that: Reduced minimum Delta outflow to
2 a monthly average of 3,000 cfs, despite Bay-Delta Plan’s requirement of 4,000 cfs for May (measured as
3 a 14-day average) and July (measured as a monthly average) during critical water years such as 2014.
4 (Exhibit 25 [May 2, 2014 TUCP] at 7; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3, n.11-12.) Eliminated
5 additional May salinity outflow requirements at Chipps Island. (Id.; see also Exhibit 2 [2006 Bay-Delta
6 Plan] at Tbl. 4.) Reduced monthly Sacramento River flow criteria from September through November
7 15 to 2,000 cfs, despite Bay-Delta requirements of 3,000 cfs in September and October, and 3,500 cfs in
8 November during critical water years. (Exhibit 25 [May 2, 2014 TUCP Order] at 8, 12; Exhibit 2 [2006
9 Bay-Delta Plan] at Tbl. 3.) Also moved the salinity measuring point three miles upstream from May
10 2014 through January 2015, allowing a greater magnitude of salt concentration to intrude farther into the
11 Delta. (Exhibit 25 [May 2, 2014 TUCP Order] at 7, 8 n.5, 12; Exhibit 2 [2006 Bay-Delta Plan] at Tbl.
12 2.)

13 64. On October 7, 2014, SWRCB issued a TUC Order that: Reduced the magnitude of the
14 October pulse flow criteria to 800 cfs from Bay-Delta Plan requirement of 1000 cfs. (Exhibit 2 [2006
15 Bay-Delta Plan] at Tbl. 3; Exhibit 26 [Oct. 7, 2014 TUCP Order] at 6, 11.)

16 65. On February 3, 2015, SWRCB issued a TUC Order that: Reduced the magnitude of the
17 minimum Delta outflow from 7,100 cfs down to 4,000 cfs for February and March. (Exhibit 27 [Feb. 3,
18 2015 TUCP Order] at 2, 21; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3, n.11.) Reduced the magnitude of
19 the minimum San Joaquin River flow from the critical water year-level of 710 or 1,140 cfs down to 500
20 cfs for February and March. (Exhibit 29 [Feb. 3, 2015 TUCP Order] at 2, 21; Exhibit 2 [2006 Bay-Delta
21 Plan] at Tbl. 3.) Also reduced the DCC gates closure requirement to allow the gates to be opened as
22 frequently in February and March as USBR deemed necessary. (Exhibit 29 [Feb. 3, 2015 TUCP] at 2,
23 21.)

24 66. On April 6, 2015, SWRCB issued a TUC Order that: Extended the February order’s
25 outflow provisions through June, and extended the DCC gates provision through May 20. (Exhibit 30
26 [April 6, 2015 TUCP Order] at 37-39.) Also shifted the San Joaquin River spring pulse flow criteria
27 three weeks earlier and lowered its magnitude to 710 cfs, from 3,110 cfs or 3,540 cfs (depending on X2),
28 effectively eliminating it. (Exhibit 30 [April 6, 2015 TUCP Order] at 27, 37; Exhibit 2 [2006 Bay-Delta
29 Plan] at Tbl. 3, n.14.) Reduced the magnitude of the San Joaquin base flow requirement from 710 or
30 1,140 cfs down to 300 cfs in April and May, and down to 200 cfs in June. (Exhibit 28 [April 6, 2015
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1 TUCP Order] at 27, 38.) Also shifted the salinity compliance point on the Sacramento River to about
2 three miles upstream. (See id. at 39.)

3 67. On July 3, 2015, SWRCB issued a TUC Order that: Extended the April 6, 2015 TUCP
4 order's change in salinity compliance location through August 15. (Exhibit 29 [July 3, 2015 TUCP] at 2,
5 26.) Also reduced the magnitude of the minimum Delta outflow in July from 4,000 cfs to 3,000 cfs and
6 reduced the magnitude of the minimum Sacramento River flow from the critical year monthly average
7 of 3,000 cfs in September and October and 3,500 cfs in November to 2,500 cfs for all three months. (Id.;
8 see Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3.)

9 68. On August 4, 2015, SWRCB issued a TUC Order that: Reduced the magnitude of the
10 Stanislaus River dissolved oxygen criteria to 5.0 mg/L from 7.0 mg/L through November 30, 2015.
11 (Exhibit 30 [Aug. 4, 2015 TUCP Order] at 1-2, 12; Exhibit 16 [Central Valley Plan] at II-8.00, III-5.00.)

12 69. On April 19, 2016, SWRCB issued a TUC Order that: Reduced the magnitude of the San
13 Joaquin spring pulse flow from the "dry" water year value of 4,880 cfs to 3,000 cfs. (Exhibit 32 [April
14 19, 2016 TUCP] at 3, 4, 18.) Also reduced the magnitude of the San Joaquin base flow requirement from
15 the dry water year value of 2,280 cfs down to 1000 cfs from May 15 to May 31, and down to 500 cfs for
16 June. (Id.; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3.)

17 70. SWRCB also approves temperature management plans that have a negative impact on
18 fish and wildlife and result in violations of the Central Valley Basin Plan. (See, e.g., Exhibit 42
19 [SWRCB, Approval of the 2016 Sacramento River Temperature Management Plan Approval (July 8,
20 2016)]; Exhibit 41 [SWRCB, Approval of the 2015 Sacramento River Temperature Management Plan
21 (July 7, 2015)].)

22 71. The Central Valley Basin Plan requires that the Bureau meet a daily average water
23 temperature of 56°F in the Sacramento River at Red Bluff Diversion Dam during periods when higher
24 temperatures will be detrimental to the fishery. (Exhibit 16 [Central Valley Basin Plan] at III-8.00.)

25 72. SWRCB approves the yearly Sacramento River Temperature Management Plans
26 ("TMPs") submitted by the Bureau that shift the temperature criteria compliance point upstream, further
27 restricting the amount of spawning habitat available to salmon. (See, e.g., Exhibit 43 [U.S. Bureau of
28 Reclamation, Revised Sacramento River Water Temperature Management Plan (June 2015)]; Exhibit 41
29 [SWRCB, Approval of the 2015 Sacramento River Temperature Management Plan (July 7, 2015)].)

1 73. And in 2015, SWRCB violated its average daily 56°F criterion when the Executive
2 Officer unilaterally approved a Bureau request to raise the temperature standard to a target of 57°F not to
3 exceed 58°F. (Id.)

4 74. In order to protect beneficial uses, the Bay-Delta Plan specifies flow and water quality
5 objectives. (Exhibit 2 [2006 Bay-Delta Plan] at 12-17.)

6 75. The SWRCB has consistently maintained that the CWA does not require the regulation of
7 what SWRCB terms “flow-caused pollution,” meaning reductions in water quality such as temperature,
8 salinity, outflow, and dissolved oxygen, resulting from alterations in flows permitted by SWRCB.
9 (Exhibit 11 [SWRCB comments to Jan. 6, 1994 draft EPA standards]; Ex. B [Bay-Delta Plan]; Ex. 2
10 [Bay-Delta Plan]; Ex. 44 [RFAs Set One, Responses Two and Three].)

11 76. SWRCB does not dispute that such standards were adopted by SWRCB in EPA-approved
12 water quality control plans, and are required to protect the designated uses therein. (Exhibit 45 [RFAs
13 Set One, Responses Five and Six].)

14 77. EPA has taken the position, consistent with the Supreme Court’s decision in *PUD*
15 *Jefferson No. 1*, that such so called “flow-related” standards adopted in a basin plan to meet designated
16 uses, are subject to the CWA. (Exhibit 12 [EPA responses to comments (1994) at 6-18]; Ex. M [EPA
17 approval of 1995 Bay-Delta Plan].)

18 78. Defendants issued a series of fourteen orders between January 2014 and December 2015,
19 largely granting the TUCPs submitted by the DWR and Reclamation. The TUC Orders effectively
20 suspended and relaxed specified water quality objectives from D-1641 and D-1422. (See Exhibit 23
21 [Jan. 31, 2014 TUCP Order] at 1, 4, 13, [“the requirements of D-1641 for DWR and [USBR] to meet
22 specified water quality objectives are amended as follows . . .”, “changes approved by this Order are to
23 requirements to meet water quality objectives designed to protect fish and wildlife beneficial uses.”].)

24 79. As EPA previously acknowledged, California’s water quality objectives, including those
25 in the Bay-Delta Plan, constitute water quality criteria for purposes of the CWA. (Exhibit 50 [60 Fed.
26 Reg. 4664, 4665 (Jan. 24, 1995)].)

27 80. On January 31, 2014, SWRCB issued a TUC order that: Reduced the flow requirement
28 for the upcoming month to a minimum of only 3,000 cfs—less than half that required by the Bay-Delta
29 Plan. (Exhibit 23 [Jan. 31, 2014 TUCP Order] at 13; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3 n.11.)
30 Also allowed USBR and DWR to open the gates as frequently as they deemed necessary from February
31

1 1 through May 20, in contrast to the Bay-Delta Plan’s requirements that the gates remain closed during
2 that period. (Exhibit 23 [Jan. 31, 2014 TUCP Order] at 5, 14; Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3.)

3 81. On October 7, 2014, SWRCB issued a TUC Order that: Reduced the magnitude of the
4 October pulse flow criteria to 800 cfs from Bay-Delta Plan requirement of 1000 cfs. (Exhibit 2 [2006
5 Bay-Delta Plan] at Tbl. 3; Exhibit 26 [Oct. 7, 2014 TUCP Order] at 6, 11.)

6 82. On July 3, 2015, SWRCB issued a TUC Order that: Reduced the magnitude of the
7 minimum Delta outflow in July from 4,000 cfs to 3,000 cfs and reduced the magnitude of the minimum
8 Sacramento River flow from the critical year monthly average of 3,000 cfs in September and October
9 and 3,500 cfs in November to 2,500 cfs for all three months. (Exhibit 29 [July 3, 2015 TUCP] at 2, 26;
10 Exhibit 2 [2006 Bay-Delta Plan] at Tbl. 3.)

11 83. The TUC orders “had the effect” of changing existing Bay-Delta water quality criteria
12 because they changed the objectives in D-1641 and D-1422. Under those water rights decisions, DWR
13 and USBR have full responsibility for achieving the Bay-Delta flow, salinity, oxygen, and DCC gates
14 water quality objectives at issue here. (See Exhibit 1 [D-1641] at 131-32; Exhibit 46 [SWRCB, Decision
15 1422 (Apr. 1973) (hereafter D-1422)] at 31; Exhibit 23 [Jan. 31, 2014 TUCP] at 2; Exhibit 30 [April 6,
16 2015 TUCP at 6]; Exhibit 47 [U.S. Environmental Protection Agency, Water Quality Standards
17 Handbook (Sept. 2014) § 1.5.1, subd. (4)].)

18 84. On May 2, 2014, SWRCB issued a TUC Order that: Eliminated additional May salinity
19 outflow requirements at Chipps Island. (Exhibit 25 [May 2, 2014 TUCP] at 7; Exhibit 2 [2006 Bay-
20 Delta Plan] at Tbl. 3, n.11-12; Tbl. 4.) Also moved the salinity measuring point three miles upstream
21 from May 2014 through January 2015, allowing a greater magnitude of salt concentration to intrude
22 farther into the Delta. (Exhibit 25 [May 2, 2014 TUCP Order] at 7, 8 n.5, 12; Exhibit 2 [2006 Bay-Delta
23 Plan] at Tbl. 2.)

24 85. From 2014 to 2016, the TUCP orders amending D-1641 and D-1422 expressly changed
25 the numerical values of Bay-Delta objectives, establishing CVP and SWP operations’ requirements that
26 allowed for increased salinity in direct contravention of the Bay-Delta objectives USBR and DWR are
27 charged with maintaining. The resulting sanctioned noncompliance with adopted Bay-Delta Plan
28 standards was the same as if the orders had directly amended the Bay-Delta standards themselves.
29 (Exhibit 47 [EPA Handbook] § 1.5.1, subd. (4).)

30 86. In 1990, SWRCB adopted WR Order 90-5, “to consider enforcing certain water quality
31 objectives in the upper Sacramento River, which are contained in the [Central Valley Basin Plan],” and
32

1 to enforce “the Public Trust Doctrine.” (Exhibit 51 [WR Order 90-5 at 2].) The Order noted that “[t]he
2 operation of Shasta Dam affects downstream water quality,” and that, “[i]n some years, during late
3 summer and early fall, releases from Shasta Lake, where the water has been heated by the sun during
4 storage, have caused river water temperatures to exceed the levels necessary to protect the fishery in the
5 upper Sacramento River.” (Exhibit 51 [WR Order 90-5 at 2-3].) The Order notes that the Sacramento
6 River temperature objectives are limited to “controllable factors” by USBR, and SWRCB WR Order 92-
7 2 clarifies that timing and quantities of deliveries by USBR are controllable factors. (Id. at 6; Exhibit 52
8 [WR Order 92-2 at 9].) Thus Order 90-5 relaxed the Central Valley Basin Plan temperature requirement,
9 moving the 56°F compliance point 44 miles upstream to Red Bluff (RM243) from the Basin Plan 56°F
10 requirement at Hamilton City (RM199).

11 87. In recent years SWRCB has approved TMPs that establish the compliance point at Clear
12 Creek, which compresses spawning to a 10-mile reach below Keswick: a 90% reduction of Basin Plan
13 and 83% reduction in Biological Opinion protected spawning habitat. (See, e.g., Exhibit 43 [U.S. Bureau
14 of Reclamation, Revised Sacramento River Water Temperature Management Plan (June 2015)]; Exhibit
15 41 [SWRCB, Approval of the 2015 Sacramento River Temperature Management Plan (July 7, 2015)].)

16 88. SWRCB also approves temperature management plans that have a negative impact on
17 fish and wildlife and result in violations of the Central Valley Basin Plan. (Id.)

18 89. The Central Valley Basin Plan requires that the Bureau meet a daily average water
19 temperature of 56°F in the Sacramento River at Hamilton City (RM 199) during periods when higher
20 temperatures will be detrimental to the fishery. (Exhibit 16 [Central Valley Basin Plan] at III-8.00.)

21 90. SWRCB approves the yearly Sacramento River Temperature Management Plans
22 (“TMPs”) submitted by the Bureau that shift the temperature criteria compliance point upstream, further
23 restricting the amount of spawning habitat available to salmon. (Id.)

24 91. In 2015, SWRCB violated its average daily 56°F criterion when the Executive Officer
25 unilaterally approved a Bureau request to raise the temperature standard to a target of 57°F not to exceed
26 58°F. (Id.)

27 92. Since at least 1996, USBR has never complied even with this relaxed standard, even in
28 wet years. (Exhibit 53.)

29 93. Raising the temperature from 56°F to a target of 57°F not to exceed 58°F devastates egg
30 incubation, emergence, and fry rearing. (Exhibit 55 [National Marine Fisheries Service, Comments on
31 the Sacramento River Temperature Management Plan (June 28, 2016)]; Ex. 56 [National Marine
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1 Fisheries Service, Evaluation of Alternatives for Sacramento River Water Temperature Compliance for
2 Winter-Run Chinook Salmon (Apr. 15, 2015)].) The SWRCB has the authority and affirmative duty to
3 consider the public trust when making water allocation decisions, and to preserve and protect public
4 trust resources that are affected by its decisions. (Nat. Audubon Society v. Super. Ct. (1983) 33 Cal.3d
5 419, 426, 446-447.)

6 94. The SWRCB has permitted and continues to permit releases of dammed waters upon the
7 Sacramento and San Joaquin Rivers, and concomitant diversions from the Bay-Delta watershed by
8 DWR, the Bureau, and other water rights holders, in a manner that is depriving adequate habitat to keep
9 downstream fish populations in good condition. And the SWRCB is aware of this fact. Seeking all
10 documents concerning SWRCB Chairwoman’s admission that “we’ve simply diverted too much water
11 for fish to be able to survive” (Exhibit 22 [Defendants' Responses to Plaintiffs’ First Set of Special
12 Interrogatories, No. 7].)

13 95. In 2009, SWRCB triennial review acknowledged that “new or changed export limits may
14 be necessary to adequately protect beneficial uses in the Delta,” and that “further review and change of
15 Delta outflow objectives may be required” (Exhibit 20 [SWRCB, Periodic Review of the 2006 Water
16 Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2009)] at 19-
17 21.)

18 96. SWRCB failed to adopt any revisions recommended to the Bay-Delta Plan recommended
19 in 2004 or 2009, and has failed to conduct any other required triennial reviews since adopting the Bay-
20 Delta Plan.

21 97. DFW has found that significantly greater flows through the Bay-Delta were necessary to
22 protect public trust resources. (Exhibit 21 [Cal. Dept. of Fish & Game, Quantifiable Biological
23 Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta
24 (Nov. 23, 2010)] at 94 [“Recent Delta flows Are insufficient to support native Delta fishes For today’s
25 habitats . . .”].)

26 98. SWRCB published the Development of Flow Criteria for the Sacramento-San Joaquin
27 Delta Ecosystem released in August 2010, also concluding that significantly greater flows were
28 necessary to protect Bay-Delta public trust fish resources. (Exhibit 3 [Flow Criteria Report] at 5 [“. . .
29 the flow Criteria developed in this proceeding are intended to halt population decline and increase
30 populations of certain species;” “Recent Delta flows Are insufficient to support native Delta fishes for
31 today’s habitats . . .”].)

1 99. The Flow Criteria Report acknowledged that “Flow is important to sustaining the
2 ecological integrity of aquatic ecosystems, including the public trust resources Flow affects water
3 quality, food resources, physical habitat, and biotic interactions. Alterations in the natural flow regime
4 affect aquatic biodiversity and the structure and function of aquatic ecosystems.” (Id. at 39.)

5 100. Recent flow regimes in the Delta have contributed to the decline of native species and
6 encouraged non-native species. . . . [F]lows and habitat structure are often mismatched and now favor
7 non-native species. . . . Flow modification is one of the few immediate actions available to improve
8 conditions to benefit native species.” (Id. at 40.)

9 101. On April 6, 2015, SWRCB issued a TUC Order that: Extended the February order’s
10 outflow provisions through June, and extended the DCC gates provision through May 20. (Exhibit 30
11 [April 6, 2015 TUCP Order] at 37-39.) Also shifted the San Joaquin River spring pulse flow criteria
12 three weeks earlier and lowered its magnitude to 710 cfs, from 3,110 cfs or 3,540 cfs (depending on X2),
13 effectively eliminating it. (Exhibit 30 [April 6, 2015 TUCP Order] at 27, 37; Exhibit 2 [2006 Bay-Delta
14 Plan] at Tbl. 3, n.14.) Reduced the magnitude of the San Joaquin base flow requirement from 710 or
15 1,140 cfs down to 300 cfs in April and May, and down to 200 cfs in June. (Exhibit 30 [April 6, 2015
16 TUCP Order] at 27, 38.)

17 102. The SWRCB’s own documents prove it has known since at least the 2010 Flow Report
18 that standards established by the Bay-Delta Plan, Central Valley Basin Plan, D-1641, and WR Order 90-
19 95, have been and are insufficient to protect trust resource interests in fisheries. (Exhibit 3 [Flow Criteria
20 Report].)

21 103. The Board has published for public review and comment various proposals for revisions
22 to Bay-Delta flow standards in 2011, 2012, and 2016 (following the initiation of this lawsuit) (Exhibit
23 35 [SWRCB, Recirculated Draft: Substitute Environmental Document in Support of Potential Changes
24 to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary
25 (Sept. 2016)] at ES 66-67); however, SWRCB failed to complete any of these proceedings, resulting in
26 no changes in flow or temperature standards to protect trust fisheries.

27 104. SWRCB noted in the CWA triennial review that the Bay-Delta Plan should be revised to
28 protect fisheries, yet has failed to do so, and has failed to conduct regular triennial reviews. (Exhibit 36
29 [SWRCB, Periodic Review of the 2006 Water Quality Control Plan for the San Francisco
30 Bay/Sacramento-San Joaquin Delta Estuary (2009)] at 19-21; Ex. JJ [SWRCB, Recirculated Draft:
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1 Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan
2 for the San Francisco Bay-Sacramento San Joaquin Delta Estuary (Sept. 2016)] at ES-8.)

3 105. In August 2015, Plaintiff here, CSPA, filed with SWRCB a “COMPLAINT: Against
4 SWRCB and USBR for Violations of Central Valley Basin Plan, WR Order 90-05, Clean Water Act,
5 Endangered Species Act, Public Trust Doctrine and California Constitution,” documenting pattern and
6 practice violations of each, reaching back decades. (Exhibit 37 [CSPA, Complaint (Aug. 2, 2015)].)
7 SWRCB has failed to provide any response.

8 106. And in August 2016, three environmental organizations jointly filed a petition for
9 emergency rulemaking to protect public trust resources. (Exhibit 38 [Defenders of Wildlife, the Natural
10 Resources Defense Council, and The Bay Institute, Request for Emergency Regulations to Comply with
11 Public Trust Obligation to Prevent Extinction for Delta Smelt (Aug. 9, 2016)].) SWRCB denied this
12 petition on the basis that “further review” of the science and feasibility of the requested measures was
13 required. (Exhibit 39 [SWRCB Response to TBI et al., Sept. 8, 2016].)

14 107. Most recently, approximately one year after Plaintiffs initiated this lawsuit, SWRCB
15 released the SED evaluating new flow standards for the San Joaquin River and South Delta Water
16 Quality, and proposing limits significantly less stringent than those recommended by the 2010 Flow
17 Report, yet the SED makes no statement or explanation of the method Board staff employed or that it
18 recommends that the Board employ to balance the public trust resources. (Exhibit 35 [SWRCB,
19 Recirculated Draft: Substitute Environmental Document in Support of Potential Changes to the Water
20 Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary (Sept. 2016), Ch.
21 2, 7, 19]; Ex. 40 [CSPA Comments to SED, at 2-4].)

22 108. SWRCB’s statements supporting its TUC Orders that, “[u]nder the public trust doctrine,
23 the Board has considerable discretion to balance competing demands for water to protect fish and
24 wildlife and to serve municipal, industrial, and agricultural uses,” bears out the degree to which SWRCB
25 misapprehends its public trust doctrine duties. (Exhibit 31 [December 15, 2015 TUC Order].)

26 109. The Board has argued that:

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

1 demands for purposes of acting on the TUCP. (Exhibit 31 [December 15, 2015 TUCP Order at
2 51].)

3 110. SWRCB’s September, 2016 SED—issued 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. (Exhibit 35 [SWRCB, Recirculated Draft: Substitute Environmental
7 Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-
8 Sacramento San Joaquin Delta Estuary (Sept. 2016), Ch. 2, 7, 19]; Ex. 40 [CSPA Comments to SED, at
9 2-4].)

10 111. In adopting Water Rights Decision 1631, SWRCB stated: “In accordance with the
11 judicial decisions discussed above, SWRCB's approach is to determine what flows are needed for
12 protection of fish. Then the decision addresses the need for additional water and other measures to
13 protect public trust resources at Mono Lake and the surrounding area in view of the competing uses of
14 water by Los Angeles.” (Exhibit 48 [SWRCB WRD-1631 at 12].)

15 112. Accordingly, SWRCB first ensured that minimum flow standards to Mono Lake would
16 be required to keep fish downstream of dams in good conditions. (Exhibit 48 [WRD-1631 at 12, 21, 33,
17 e.g., “Based on the evidence presented we conclude that the following flows below the Lee Vining
18 conduit diversion facility will maintain fish in good condition pursuant to Fish and Game Code Section
19 5937 and that the specified flows are needed to reestablish and maintain a fishery.”])

20 113. WRD-1631 provided no balancing of competing interests before implementing flow
21 requirements necessary to keep fish in good condition. (Id.)

22 114. After the Legislature passed the Delta Reform Act of 2009, which required the Board to
23 develop new flow criteria to protect public trust interests in fisheries, the Board issued a 2010 Delta
24 Flow Criteria Report, which developed new flow criteria for the Delta ecosystem necessary to protect
25 public trust resources. (Exhibit 3 [State Water Resources Control Board, Development of Flow Criteria
26 for the Sacramento-San Joaquin Delta Ecosystem (Aug. 3, 2010).]) These criteria were intended to halt
27 population decline and increase populations of certain species and represented the best available fishery
28 and hydrologic science to be had in 2010. (Id.)

29 115. SWRCB all but disavowed the utility of this report to protect trust resources, inserting a
30 sweeping disclaimer above the cover page of the Flow Criteria Report: “This report, required by Water
31 Code section 85086(c) (2009 Delta Reform Act) in 2010, suggests the flows that would be needed in the
32

1 Delta ecosystem if fishery protection was the sole purpose for which its waters were put to beneficial
2 use. In keeping with the narrow focus of the legislation, this report only presents a technical assessment
3 of flow and operational requirements to provide fishery protection under existing conditions. We know
4 however, that there are many other important beneficial uses that these waters support such as municipal
5 and agricultural water supply and recreational uses. The State Water Board is required by law to
6 establish flow and other objectives that ensure the reasonable protection of beneficial uses. In order for
7 any flow objective to be reasonable, the State Water Board must consider and balance all competing
8 uses of water in its decision-making. More broadly, the State Water Board will factor in relevant water
9 quality, water rights and habitat needs as it considers potential changes to its Bay-Delta -objectives. Any
10 attempts to portray the recommendations contained in this report as an indicator of future State Water
11 Board decision-making ignores this critical, multi-dimensional balancing requirement and misrepresents
12 current efforts to analyze the water supply, economic, and hydropower effects of a broad range of
13 alternatives. This report represents only one of many factors that will need to be balanced by the State
14 Water Board as it updates the Bay-Delta Water Quality Control Plan.”

15 116. SWRCB has also justified its lowering of water quality standards below standards
16 prescribed by the 2006 Basin Plan, D-1641, and WR Order 90-05—standards already proven by the
17 2010 Delta Flow Criteria Report to be inadequate to protect trust fisheries—arguing simply that “[u]nder
18 the public trust doctrine, the Board has considerable discretion to balance competing demands for water
19 to protect fish and wildlife and to serve municipal, industrial, and agricultural uses.” (Exhibit 31
20 [December 15, 2015 TUC Order].)

21 117. Most recently, SWRCB has released a “Substitute Environmental Document” 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 Water Quality Control Plan for the San Francisco Bay/Sacramento-
24 San Joaquin Delta Estuary (Bay-Delta Plan). (Exhibit 35 [SWRCB, Recirculated Draft: Substitute
25 Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San
26 Francisco Bay-Sacramento San Joaquin Delta Estuary (Sept. 2016)].) The proposal, again, fails to
27 implement the flow criteria recommended by the 2010 report as necessary to keep public trust fish
28 populations in good condition. (Exhibit 35 [SWRCB, Recirculated Draft: Substitute Environmental
29 Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-
30 Sacramento San Joaquin Delta Estuary (Sept. 2016), Ch. 2, 7, 19]; Ex. 40 [CSPA Comments to SED, at
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1 2-4]; Ex. 49 [State Water Resources Control Board, Bay-Delta Water Quality Control Plan Update: San
2 Joaquin River Flow and Salinity Objectives (Oct. 4, 2016)].)

3 118. The SWRCB maintains this pattern and practice policy through the present day, and
4 contemplates the future use of TUCPs to relax water quality standards. The Draft Revised SED for
5 Phase I of the Water Quality Control Plan for the Bay-Delta states, “[a]t its discretion, or at the request
6 of any affect responsible agency or person, the State Water Board may authorize a temporary changed in
7 the implementation of the LSJR flow objectives in a water right proceeding...” (Ex. 35 [SED] App. K,
8 at 35.)

9 119. USBR and DWR also contemplate the future use of TUCPs; the July 2016 Biological
10 Assessment for the California WaterFix prepared by USBR and DWR states that a drought management
11 team will assess hydrologic conditions and recommend actions in a drought contingency plan and
12 “[w]hile a drought contingency plan may recommend adhering to the operations as identified in existing
13 regulatory authorizations, in longer periods of dry conditions, the plan could also propose other drought
14 response actions.” (Ex. 66 [Biological Assessment for California WaterFix] Ch. 3, at 3-241.)

15
16
17 I declare under penalty of perjury under the laws of the State of California that the above is true and
18 correct and that this declaration is executed on July 27, 2017, at Stockton, California.

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21 

22
23 Bill Jennings