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10 *California Sportfishing Protection Alliance, and*  
*California Water Impact Network*

11  
12 **IN THE SUPERIOR COURT OF CALIFORNIA**  
13 **ALAMEDA COUNTY**

14 CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE; CALIFORNIA  
15 WATER IMPACT NETWORK;  
AQUALLIANCE,

16  
17 Petitioners and Plaintiffs,

18 v.

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

21  
22 Respondents and Defendants,

23 CALIFORNIA DEPARTMENT OF WATER  
RESOURCES, UNITED STATES BUREAU  
24 OF RECLAMATION,

25 Real Parties in Interest.  
26  
27  
28

VERIFIED PETITION FOR WRIT OF  
MANDATE; COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

(Cal. Code Civ. Proc. §§ 526, 1060, 1085,  
1088.5, 1094.5; Cal. Water Code § 13330;  
California Public Trust Doctrine)





1 members have been involved in the administrative proceedings that have been provided to date for  
2 the TUCP Orders, including attending meetings and providing written and oral comments.

3 6. AQUALLIANCE (“AquAlliance”) is a California public benefit corporation organized to  
4 protect Northern California’s waters to sustain family farms, recreational opportunities, vernal  
5 pools, creeks, rivers, and the Bay-Delta estuary. AquAlliance has members who regularly use the  
6 waters of the Delta and its tributaries for recreation, including kayaking, paddling, fishing, and  
7 wildlife viewing. AquAlliance members also routinely participate in conservation activities in and  
8 around the Bay-Delta estuary and its tributary vernal pools, creeks, and rivers. AquAlliance and  
9 its members have been involved in the administrative proceedings that have been provided to date  
10 for the TUCP Orders, including attending meetings and providing written and oral comments.

11 7. Respondent and Defendant CALIFORNIA STATE WATER RESOURCES CONTROL  
12 BOARD (“SWRCB”) is a state agency created under the laws and regulations of the State of  
13 California to regulate water quality within the State of California. Respondent Thomas Howard is  
14 the Executive Director of the SWRCB. Mr. Howard, in his capacity as Executive Director is the  
15 official that issued the TUCP Orders. The Executive Director, among other duties, is responsible  
16 for reviewing and approving TUCPs, including the Order and TUCP Orders at issue herein. When  
17 requested, the SWRCB has authority to review and approve or disapprove, in whole or in part, the  
18 Executive Director’s decisions on a TUCP.

19 8. Real Party in Interest CALIFORNIA DEPARTMENT OF WATER RESOURCES  
20 (“DWR”) is a state agency created under the laws and regulations of the State of California. DWR  
21 operates the State Water Project in tandem with the federal Central Valley Project and jointly  
22 requested, with the Bureau, the TUCP Orders at issue in this action.

23 9. Real Party in Interest UNITED STATE BUREAU OF RECLAMATION (“Bureau”) is a  
24 subdivision of the Department of the Interior, an agency of the United States of America, operates  
25 the federal Central Valley Project, and jointly requested, with DWR, the TUCP Orders at issue in  
26 this action.

27 10. The true names and capacities, whether individual, corporate, associate, coconspirator,  
28 partner or alter-ego of those Defendants and Respondents sued herein under the fictitious names of

1 DOES 1 through 100, inclusive, are not known to Plaintiffs, who therefore sue those Defendants  
2 and Respondents by such fictitious names. Plaintiffs will ask leave of court to amend this  
3 Complaint and insert the true names and capacities of these defendants and respondents when the  
4 same have been ascertained. Plaintiffs are informed and believe and on that basis allege, that each  
5 of the Defendants and Respondents designated herein as a DOE defendant and respondent is  
6 legally responsible in some manner for the events and happenings alleged in this Complaint, and  
7 that Plaintiffs' alleged injuries were proximately caused by the defendants' conduct.

8 11. The true names and capacities, whether individual, corporate, associate, coconspirator,  
9 partner or alter-ego of those Real Parties in Interest sued herein under the fictitious names of  
10 DOES 101 through 200, inclusive, are not known to Plaintiffs, who therefore name those Real  
11 Parties in Interest by such fictitious names. Plaintiffs will ask leave of court to amend this  
12 Complaint and insert the true names and capacities of these Real Parties in Interest when the same  
13 have been ascertained.

#### 14 **LEGAL FRAMEWORK**

15 12. Petitioners' authority to challenge Respondents' decisions in this Court is provided under  
16 Water Code § 1126(b). Actions arising under § 1126(b) of the California Water Code are governed  
17 by California Code of Civil Procedure § 1094.5. (California Water Code § 1126, subd.(c).)

18 13. California Code of Civil Procedure § 1094.5(b) provides that "[t]he inquiry in such a case  
19 shall extend to the questions whether the respondent has proceeded without, or in excess of,  
20 jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of  
21 discretion. Abuse of discretion is established if the respondent has not proceeded in the manner  
22 required by law, the order or decision is not supported by the findings, or the findings are not  
23 supported by the evidence."

24 14. Any party aggrieved by an order of the State Board may obtain review of the order by  
25 filing a petition for writ of mandate not later than 30 days from the date on which the State Board  
26 issues the order. (California Water Code § 1126, subd. (b).)

27 15. Where a petition for reconsideration of the order is filed, the time for filing the writ of  
28 mandate is extended. (California Water Code § 1126(b).)

1 16. The Order is an order within the meaning of California Water Code § 1126(b).

2 17. Petitioners are “aggrieved part[ies]” within the meaning of California Water Code §  
3 1126(b). Petitioners actively participated in the issuance of the Order and TUCP Orders,  
4 including the timely submission of comments and oral testimony to the State Board’s Executive  
5 Officer and the State Board. Petitioners have a beneficial interest in an order requiring the  
6 Executive Director or the State Board to set aside the Orders in conformance with all requirements  
7 of the California Water Code. Petitioners are interested in having the laws properly executed and  
8 Respondents’ duties properly performed so that the public’s right to, and interest in, environmental  
9 protection is fully secured.

10 18. This Petition for Writ of Mandate is timely filed within 30 days of the State Board’s  
11 failing to act on the CSPA Protest and Restore the Delta Protest within 90 days of issuance of the  
12 Order.

13 19. By making findings pursuant to California Water Code Section 1435(b) that are not  
14 supported by evidence, and proceeding in a manner contrary to law, Respondents have committed  
15 an abuse of discretion in issuing the TUCP Orders.

16 CLEAN WATER ACT AND THE BAY-DELTA PLAN

17 20. The Federal Water Pollution Control Act (“Clean Water Act”) is a federal law that directs  
18 the states to adopt water quality standards to protect and enhance the quality of water within the  
19 state. (33 U.S.C. § 1313.)

20 21. The water quality standards must incorporate: 1) a designated use for each navigable  
21 body of water, and 2) water quality criteria needed to ensure the reasonable protection of each  
22 designated beneficial use. (33 U.S.C. § 1313(c)(2).) These water quality standards are found in  
23 water quality control plans.

24 22. State and Federal agencies are required to comply with water quality control plans.  
25 (California Water Code § 13247; CVPIA § 3402(b).)

26 23. California Water Code section 13247 requires state agencies, including the State Board  
27 and DWR, to comply with water quality control plans unless otherwise directed or authorized by  
28

1 statute. California Water Code section 13247 is inapplicable to federal agencies, including the  
2 United States Bureau of Reclamation (“Bureau”).

3 24. The Clean Water Act and the Central Valley Project Improvement Act require the Bureau  
4 to comply with all state water quality control plans. (33 U.S.C. § 1323(a); CVPIA § 3402(b).)

5 25. Pursuant to the Clean Water Act, the State Board adopted a Water Quality Control Plan  
6 for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary in 1978, and amended that plan  
7 in 1991, 1995, and again in 2006 (collectively, the “Bay-Delta Plan”).

8 26. The Bay-Delta Plan consists of: (1) beneficial uses to be protected; (2) water quality  
9 objectives for the reasonable protection of beneficial uses; and (3) a program of implementation  
10 for achieving the water quality objectives. The beneficial uses and water quality objectives  
11 established to reasonably protect the beneficial uses are called water quality standards under the  
12 Clean Water Act.

13 27. State Board Decision 1641 (“D-1641”), which was issued in December 1999 and revised  
14 in March 2000, is part of the State Board’s implementation of the Bay-Delta Plan, and provides  
15 additional directives for meeting the water quality objectives of the Bay-Delta Plan.

16 28. In addition to California-adopted water quality standards, 40 C.F.R. § 131.22(b) allows  
17 the EPA to promulgate new or revised water quality standards after determining that such a  
18 standard is necessary to meet the requirements of the Clean Water Act. Pursuant to that authority,  
19 EPA has promulgated standards that are more protective than the state law standards for the Bay-  
20 Delta Estuary (the “EPA Promulgated Bay-Delta Standards”). 40 C.F.R. 131.37.

#### 21 CENTRAL VALLEY PROJECT IMPROVEMENT ACT

22 29. The Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600, (1992),  
23 was passed in 1992 “[t]o address impacts of the Central Valley Project on fish, wildlife and  
24 associated habitats.” (Section 3402(b).)

25 30. Section 3406(b) of the CVPIA directs the Secretary of the Interior to operate CVP “to meet  
26 all obligations under state and federal law...and all decisions of the California State Water  
27 Resources Control Board establishing conditions on applicable licenses and permits for the  
28 project.” (Public Law 102-575, section 3406(b).)

1 31. Section 3406(b)(2) directs the Secretary of the Interior to “dedicate and manage annually  
2 800,000 acre-feet of Central Valley Project yield for the primary purpose of implementing the fish,  
3 wildlife, and habitat restoration purposes and measures authorized by this title” and “to assist the  
4 State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San  
5 Joaquin Delta Estuary.”

6 32. Pursuant to Section 3406(b)(7) of the CVPIA, the Secretary of the Interior is required to  
7 “[m]eet flow standards and objectives and diversion limits set forth in all laws and judicial  
8 decisions that apply to Central Valley Project facilities, including, but not limited to, provisions of  
9 this title and all obligations of the United States under the ‘Agreement Between the United States  
10 and the Department of Water Resources of the State of California for Coordinated Operation of  
11 the Central Valley Project and the State Water Project’ dated May 20, 1985, as well as Pub. L. 99-  
12 546.”

#### 13 DELTA PROTECTION ACT OF 1959

14 33. The Delta Protection Act of 1959 requires that salinity in the Delta be controlled before  
15 DWR and the Bureau can export any water from the Delta. (Water Code §§ 12200-12205.) The  
16 Delta Protection Act prohibits project exports from the Delta until necessary water is provided for  
17 salinity control. California Water Code §§ 12202, 12204; *U.S. v. State Water Res. Control Bd.*  
18 (1986) 182 Cal.App.3d 82, 139.

#### 19 PUBLIC TRUST DOCTRINE

20 34. The SWRCB must evaluate any allocation or diversion of a public trust resource in light of  
21 the impacts upon public trust interests and “avoid or minimize any harm to those interests.” (*Nat'l*  
22 *Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 426 (Cal. 1983).)

23 35. The SWRCB has a continuing and ongoing duty to protect and manage public trust  
24 resources for the benefit of the people of the State and to review and change the management of  
25 those resources to protect public interests. In light of new knowledge or needs, the SWRCB has  
26 the responsibility to “reconsider allocation decisions even though those decisions were made after  
27 due consideration of their effect on the public trust.” (*Nat'l Audubon*, 33 Cal. 3d at 447.)  
28

1 36. “The public trust doctrine serves the function in that integrated system of preserving the  
2 continuing sovereign power of the state to protect public trust uses, a power which precludes  
3 anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on  
4 the state to take such uses into account in allocating water resources.” (*Nat’l Audubon*, 33 Cal. 3d  
5 at 452.)

### 6 **PROCEDURAL BACKGROUND**

7 37. On January 17, 2014, Governor Brown issued a Drought Emergency Proclamation  
8 (“January 17, 2014 Proclamation”) that, among other things, directed the State Water Board to: (a)  
9 consider petitions requesting consolidation of the places of use of the State Water Project (“SWP”)  
10 and Central Valley Project (“CVP”); and (b) consider modifying requirements for reservoir  
11 releases or water diversion limitations, where existing requirements were established to implement  
12 a water quality control plan.

13 38. For purposes of carrying out the Governor’s directives, the January 17, 2014 Proclamation  
14 suspends California Water Code section 13247 and Division 13 (commencing with section 21000)  
15 of the Public Resources Code and regulations adopted pursuant to that Division on the basis that  
16 strict compliance with them will prevent, hinder, or delay the mitigation of the effects of the  
17 emergency.

18 39. On April 25, 2014, the Governor issued a Proclamation of a Continued State of  
19 Emergency (“April 25, 2014 Proclamation”). The April 25, 2014 Proclamation states that the  
20 provisions contained in the January 17, 2014 Proclamation remain in full force and effect.

21 40. On December 22, 2014, Governor Brown issued Executive Order B-28-14, which  
22 extended the suspension of California Water Code section 13247 contained in the January 17,  
23 2014 and April 25, 2014 Proclamations through May 31, 2016. SWRCB Order D-1641 regulates a  
24 number of Delta flow and water quality standards, including inflow, minimum Delta outflow,  
25 maximum exports through the pumps, the location of the X2, and the maximum ratio of exports to  
26 inflow.

27 41. In regard to the minimum Delta outflow to Suisun Bay, D-1641 requires that, during  
28 “critical water years”, the Net Delta Outflow Index be no less than a monthly average of 4,000

1 cubic feet per second (“cfs”) during July and no less than a monthly average of 3,000 cfs during  
2 August and September. The SWRCB has deemed the current 2014 water year a critical water year.

3 42. Order D-1641 provides that “ $\text{NDOI} = \text{Delta Inflow} - \text{Net Delta Consumptive Use} - \text{Delta}$   
4  $\text{Exports}$ .” (Order D-1641, p. 190, Figure 3.) Each of these flow values is calculated from a  
5 number of more specific values, some of which are direct measurements of flow, and others of  
6 which are estimates.

7 43. In regard to salinity, Order D-1641 relies on an electrical conductivity standard as a  
8 measure of the salinity level. Order D-1641 requires that, from April 1 through August 15 in a  
9 critical water year, electrical conductivity in the Sacramento River at a monitoring point located at  
10 Emmaton, California not exceed 2.78 EC.

11 44. In regard to Delta inflow and maximum exports, D-1641 provides that maximum exports  
12 from July through January not exceed 65 percent of Delta inflow. Delta inflow is determined  
13 based on combining flows into the Delta from the Sacramento River, the San Joaquin River, the  
14 Sacramento Regional Treatment Plant, the Yolo Bypass, Mokelumne River, Cosumnes River,  
15 Calaveras River and a number of other smaller sloughs and creeks that flow directly into the Delta.

16 45. Pursuant to the TUCP Orders, the SWRCB has allowed repeated violations of D-1641  
17 outflow and salinity requirements in 2014 and 2015. The effect of these changes is to cause the  
18 LSZ, normally located around the salinity compliance location at Emmaton, to move about three  
19 miles farther east and upstream than it would have been without the relaxation in standards. Thus,  
20 the LSZ ends up being closer to the CVP and SWP pumps and in the interior of the Delta and  
21 where the lower outflow will cause higher water temperatures in the summer. The violations in  
22 2014 operations failed to maintain temperature control, which led to the loss of ~95% of the 2014  
23 winter-run cohort and the loss of virtually all of the 2014 spring-run cohort (of fish that spawn in  
24 the Sacramento River).

25 46. When water quality standards for inflow, outflow, and salinity are relaxed and/or  
26 exceeded, the process is further aggravated.

27  
28

1 47. When emergency barriers across certain waterways are in place, the DCC gates are open,  
2 low inflows are occurring, and there are low outflows, further worsens conditions for fish and  
3 other aquatic life.

4 48. Water is released from multi-year storage, thus also limiting the amount of carry-over  
5 storage in the coming years that is needed to sustain fish and their habitat, as well as water  
6 supplies for public health and safety.

7 49. Due to the TUCP Orders, water is released from reservoirs in summer even where there  
8 may be limited cold-water pool to sustain downstream fish populations through the summer and  
9 fall.

10 50. Delta smelt are highly vulnerable in the summer of drought years because the entire  
11 population is within the Delta, where water temperatures are near or above lethal levels.

12 51. These Orders will result in additional impacts to in-stream water levels, water quality and  
13 circulation critical to the existence of these endangered and threatened species and their critical  
14 habitats. The Orders will lead to additional pumping in the south Delta, increasing take of delta  
15 smelt and other endangered and threatened species beyond those levels that would occur in a  
16 drought year absent the Orders.

17 52. On March 24, 2015 DWR and the Bureau jointly applied to the SWRCB for a Temporary  
18 Urgency Change Petition (“TUCP”) requesting temporary modification of requirements included  
19 in SWRCB D-1641 to meet water quality standards or objectives in the Water Quality Control  
20 Plan for the San Francisco Bay/Sacramento-San Joaquin Delta (“Bay-Delta Plan”) applicable to  
21 licenses and permits held by DWR and the Bureau. Specifically, the TUCP requests modifications  
22 to water right requirements to meet the Delta outflow, San Joaquin River flow, Delta Cross  
23 Channel (“DCC”) Gate closure, and water export limits objectives.

24 53. On April 6, 2015, the State Board issued an order granting in part and denying in part the  
25 March 24, 2015 TUCP (the “Order”).

26 54. The TUCP Orders cite as authority for relaxing water quality standards otherwise legally  
27 applicable to DWR and the Bureau, a waiver of California Water Code § 13247 by California  
28 Governor Edmund G. Brown, Jr. in his emergency proclamations and executive orders, stating

1 “[a]bsent suspension of section 13247, the State Water Board could not approve a change petition  
2 that modifies the permits and licenses in a way that does not provide for full attainment of water  
3 quality objectives in the Bay-Delta Plan, even during a drought emergency.”

4 55. California Water Code section 13247 only applies to state agencies, and therefore a  
5 waiver of section 13247 is inapplicable to federal agencies, such as the Bureau. Accordingly, the  
6 Bureau is under a legal obligation to continue to comply with all applicable water quality  
7 standards.

8 56. California Water Code section 1435 does not provide the SWRCB the ability to modify  
9 permitted water quality standards, nor to serially or in a piecemeal fashion modify adopted water  
10 quality standards over an extended period of time and as a matter of course.

11 57. The April 6, 2015 Order makes the following changes to D-1641 requirements:

12 (a) The Order extends the changes to Delta outflow and export requirements  
13 previously granted through June, and extends the change to DCC Gate requirements  
14 through May 20.

15 (b) The time period for the San Joaquin River at Vernalis pulse flow requirement was  
16 shifted from April 15 through May 15 to March 25 through April 25 already by the  
17 Executive Director. The Order reduces the required volume of the pulse flow during this  
18 time period from 3,110 cfs, depending on hydrology, to 710 cfs at Vernalis. In addition,  
19 the Order requires the Bureau to comply with the pulse flow requirement contained in the  
20 National Marine Fisheries Service’s (NMFS) Biological Opinion (BO) and Conference  
21 Opinion for the Long-Term Operations of the CVP and SWP.

22 (c) Until May 31, the Order modifies the minimum San Joaquin River flow  
23 requirement at Vernalis following the pulse flow period described above from 710 cfs or  
24 1,140 cfs, depending on hydrology, to 300 cfs. In June, the Order reduces the requirement  
25 to 200 cfs. The Order modifies the compliance point for the Western Delta agricultural  
26 salinity requirement at Emmaton on the Sacramento River to Three-Mile Slough on the  
27 Sacramento River from April through June.

28 58. On May 6, 2015, within 30 days of the April 6, 2015 Order as required under California

1 Water Code section 1126(b), Petitioners CSPA, C-WIN and AquAlliance filed with the State  
2 Board's Division of Water Rights a Protest, Objection, Petition for Reconsideration and Petition  
3 for Hearing ("CSPA Protest") challenging the TUCP based on environmental and public trust  
4 considerations. The CSPA Protest can be downloaded at  
5 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/comments\\_tucp2015/d](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/cspa_bjennings05062015.pdf)  
6 [ocs/cspa\\_bjennings05062015.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/cspa_bjennings05062015.pdf).

7 59. DWR and the Bureau continue to seek TUCPs extending modification to D-1641 granted  
8 in the Orders, most recently submitting a TUCP on May 21, 2015. Plaintiffs filed objections and  
9 protests to the May 21, 2015 TUCP on June 16, 2016 and June 17, 2015. On July 3, 2015 the State  
10 Board conditionally approved changes to D-1641 requested in the May 21, 2015 TUCP.

11 60. Pursuant to California Water Code section 1122 and 1126(b) the State Board had 90 days  
12 from the date of the April 6, 2015 Order to act on the CSPA Protest, and did not exercise its  
13 authority to do so. Accordingly, this Petition and Complaint is timely filed within 30 days  
14 following the expiration of the 90-day period for reconsideration.

### 15 **FACTUAL BACKGROUND**

16 61. The Central Valley Project ("CVP") is a federal water management project in California,  
17 under the supervision and operation of the Bureau. The CVP is located in and/or diverts water to  
18 and from the watershed of the Sacramento and Joaquin Rivers and tributaries.

19 62. The watershed of the Bay-Delta Estuary is a source of water for much of the State of  
20 California, providing water used for municipal, agricultural, and environmental purposes.

21 63. The State Water Project ("SWP"), operated by DWR, and the federally managed CVP,  
22 operated by the Bureau, are water management projects that work together to release previously-  
23 stored water into the Delta and divert natural flows. The water diverted by the SWP and CVP in  
24 the Delta is exported to areas south and west of the Delta through a system of water conveyance  
25 facilities including canals, aqueducts, and pump stations. Many of the CVP pumps are shared with  
26 the SWP.

27 64. The waterways that make up the Bay-Delta Estuary and its tributaries are also used by fish  
28 and wildlife, and have other public trust values. The Bay-Delta Estuary is one of the largest

1 ecosystems for fish and wildlife habitat and production in the United States. Many of the fish that  
2 live in or migrate through the estuary are protected under the state and federal Endangered Species  
3 Act.

#### 4 Long-standing Plight of the Bay-Delta's Anadromous and Pelagic Fisheries

5 65. Historical and current human activities have degraded the beneficial uses of the Bay-Delta  
6 estuary, as evidenced by the declines in populations of many of the biological resources of the  
7 Bay-Delta.

8 66. Species that are listed or proposed to be listed, pursuant to state and federal Endangered  
9 Species Acts, and that depend upon the Bay-Delta for all or a critical part of their life cycle  
10 include: southern Distinct Population Segment (DPS) of green sturgeon (*Acipenser medirostris*),  
11 federal threatened, candidate for federal endangered; Delta smelt (*Hypomesus transpacificus*),  
12 state endangered, federal threatened, Longfin smelt (*Spirinchus thaleichthys*), state threatened,  
13 candidate for federal threatened; Central Valley steelhead (*Oncorhynchus mykiss*), federal  
14 threatened; Sacramento winter-run Chinook salmon (*Oncorhynchus tshawytscha*), state  
15 endangered, federal endangered; Central Valley spring-run Chinook salmon (*Oncorhynchus*  
16 *tshawytscha*), state threatened, federal threatened; Central Valley fall/late-fall-run Chinook salmon  
17 (*Oncorhynchus tshawytscha*), federal species of concern, state species of special concern;  
18 Sacramento splittail (*Pogonichthys macrolepedotus*), state species of special concern; Pacific  
19 lamprey (*Entosphenus tridentate*), federal species of concern and river lamprey (*Lampetra ayresi*),  
20 state species of special concern. The CVP and SWP also have potential to adversely affect  
21 southern resident killer whales or Orcas (*Orcinus orca*), which are federal listed as endangered  
22 because they are dependent upon Chinook salmon for 70% of their diet, and a reduced quantity  
23 and quality of diet has been identified as one of the major causes of their decline.

24 67. The precipitous collapse of the Central Valley's pelagic and anadromous fish populations  
25 has been documented at considerable length. The CVP's water export facilities in the Delta began  
26 operation in 1951 and fisheries declined. Following construction of the SWP's Banks Pumping  
27 Plant, in 1967, the decline of fisheries accelerated. Since 1967, the California Department of Fish  
28 and Wildlife ("DFW") Fall Midwater Trawl abundance indices for striped bass, Delta smelt,

1 longfin smelt, American shad, splittail and threadfin shad have declined by 99.7, 97.8, 99.9, 91.9,  
2 98.5 and 97.8 percent, respectively.

3 68. In 2004, Delta pelagic species experienced a collapse in fish populations known as the  
4 “Pelagic Organism Decline.” Fish abundance indices for 2002 and 2004 were at record lows for  
5 Delta smelt and striped bass, and near record lows for longfin smelt and threadfin shad. These low  
6 abundance indices for pelagic species recorded during the 2002-2004 decline continued to the  
7 2012-2015 drought.

8 69. The SWRCB’s weakening and waiving of water quality standards through TUCP Orders  
9 during the ongoing drought period has greatly exacerbated conditions for the Delta smelt, causing  
10 another dramatic decline in the Delta smelt’s population.

11 70. The Delta smelt are now facing extinction. According to the 2014 Midwater Trawl,  
12 conducted monthly from September through December, between 2011 and 2014, abundance  
13 indices for Delta smelt and longfin smelt have declined an additional 97.4 and 96.7 percent,  
14 respectively, from already perilously low abundance levels. In the spring of 2015, DFW’s  
15 monthly Spring Kodiak Trawl, of spawning Delta smelt, collected only six Delta smelt in March,  
16 one Delta Smelt in April and eight in May.

17 71. The U.S. Fish & Wildlife Service’s (“USFWS”) Anadromous Fisheries Restoration  
18 Program, established pursuant to the CVPIA, documents that, since 1967, in-river natural  
19 production of Sacramento winter-run Chinook salmon and spring-run Chinook salmon have  
20 decline by 98.2 and 99.3 percent, respectively, and are only at 5.5 and 1.2 percent, respectively, of  
21 doubling levels mandated by the CVPIA, the California Water Code and California Fish & Game  
22 Code.

23 72. In 2014, SWRCB relaxed Sacramento River temperature criteria in 2014 by moving the  
24 temperature compliance point upstream and eliminated much of the spawning habitat for fall-,  
25 winter- and spring-run Chinook salmon. The delivery of 1.2 million acre-feet of water to the CVP  
26 Sacramento Valley water contractors between April and September depleted the cold-water pool  
27 behind Shasta Dam and the resulting lethal temperatures in the river caused the loss of an  
28 estimated 95% of eggs and emerging winter-run Chinook salmon, 98% of eggs and emerging fall-

1 run Chinook salmon and virtually all of emerging spring-run Chinook salmon. The SWRCB's  
2 relaxation of Delta outflow requirements in 2015 likely caused the loss of the majority of  
3 remaining survivors.

4 73. For 2015, the Bureau has proposed to actually increase deliveries to almost 1.6 million  
5 acre-feet to the CVP's Sacramento Valley contractors and has informed the SWRCB that it is  
6 unlikely that it will be able to meet temperature requirements in the Sacramento River below  
7 Shasta Dam. The loss of two consecutive year classes would be catastrophic to the species.

8 74. Central Valley agriculture has not experienced impacts comparable to the precipitous  
9 declines suffered by the Delta smelt during the present drought. According to the annual crop  
10 reports submitted by county agricultural commissioners to the California Department of  
11 Agriculture, crop production in the San Joaquin Valley increased in each of the last three years.  
12 Crop production increased from \$30.47 billion in the last wet year (2011) to \$32.53 billion in the  
13 first drought year (2012) and \$35.62 billion in the second drought year (2013). The same is true in  
14 the Sacramento Valley, where crop production increased from \$4.22 billion in 2011 to \$4.69  
15 billion in 2012, and \$5.33 billion in 2013. According to the California Economic Development  
16 Department, farm jobs also increased between 2012 and 2014, the first three years of the drought.

17 75. The latest indicators show near historic or historic low levels of abundance for all of the  
18 Delta's pelagic and anadromous species. All indications are that the populations that depend on  
19 the Delta are in extreme risk of added mortality under the present 2015 conditions.

20 76. The State Board conducted an extensive public hearing in 2010, pursuant to the  
21 Sacramento-San Joaquin Delta Reform Act. Senate Bill No. 1 (SB1) (Stats. 2009 (7<sup>th</sup> Ex. Sess.)  
22 ch 5), (commencing with Wat. Code, Section 85000). The Board concluded, in the Development  
23 of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem released in August 2010, that  
24 recent Delta flows are insufficient to support native Delta fishes for today's habitats and that  
25 significantly greater flows were necessary to protect public trust resources.

26 77. The DFW also conducted an extensive proceeding in 2010, pursuant to the Delta Reform  
27 Act, to develop Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial  
28 Species of Concern Dependent on the Delta. In the report released 23 November 2010, DFW

1 found that significantly greater flows and considerably stronger biological objectives were  
2 necessary to protect the public trust resources of the Delta. Yet the SWRCB and Executive  
3 Director Howard never implemented those enhanced flows or balanced the public trust with other  
4 beneficial uses, and they again failed to do so in evaluating the requests of the Bureau and DWR  
5 to relax Delta water quality standards.

6 78. According to DWR, California has experienced ten multi-year droughts of large-scale  
7 extent in the last one hundred years, spanning 41 years. Although the state experiences drought  
8 conditions more than forty percent of the time, the CVP and SWP continue to operate and deliver  
9 water without consideration of drought conditions. The CVP and SWP draw down reservoir  
10 storage under the assumption that the coming year will be wet, providing little reserve storage in  
11 the event the following year is dry. In the event of another dry year, the projects endeavor to  
12 maximize deliveries in the hope that it will rain next year. This pattern has repeated itself for  
13 decades, most recently during the 1987-1992, 2000-2002, 2007- 2009 and 2013-2015 droughts.

14 79. In a report on the 1976-1977 drought, DWR observed that “[t]he usual strategy described  
15 in discussions with Central Valley surface water project operators who are experiencing a below  
16 normal supply is to serve all the water possible on demand of the users, carrying little or no water  
17 over to guard against a dry 1977...” and “[t]his strategy is based on the belief that a good crop this  
18 year is desirable, since next year will probably be a near-normal or better water supply.” Nothing  
19 has changed since those observations were made nearly forty years ago.

20 80. During the summer of 2012, the CVP drew down 2.2 million acre-feet (“MAF”) of water  
21 from Shasta Reservoir. The following winter the reservoir gained 1.5 MAF but the Bureau drew  
22 down 2.24 MAF in the summer of 2013. Shasta reservoir gained approximately 758 thousand  
23 acre-feet (TAF) in the winter of 2014 but almost 1.4 MAF was drawn down the following  
24 summer. In the winter of 2015, Shasta reservoir gained almost 1.7 MAF but the Bureau proposes  
25 to deliver almost 1.6 MAF to Sacramento Valley contractors, plus whatever they are required to  
26 deliver to repel salinity and comply with water quality standards in the Delta. Should the coming  
27 winter be dry, water shortages in 2016 are likely to be even worse than 2015. The CVP and SWP  
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1 have refused to provide a margin of safety and adjusted operations to meet the state's  
2 Mediterranean climate and over-subscribed water delivery system.

3 81. The CVP and SWP projects rely on the SWRCB to bail them out by relaxing standards  
4 and reducing water flows crucial to water quality and healthy and reproducible fisheries, and the  
5 SWRCB has obliged the projects by relaxing standards thereby encouraging them to continue to  
6 operate on the edge of crisis while fisheries, hanging on the lip of extinction, pay the price.  
7 During the drought of 1987-1992, the SWRCB informed DWR and the Bureau that it would not  
8 take enforcement action for more than 245 violations of standards protecting Delta agriculture and  
9 fisheries, even though further violations were expected. In response to a 2013 request to weaken  
10 standards, SWRCB Executive Director Tom Howard informed DWR and the Bureau that he  
11 would take no action if the projects operated to meet critically dry year criteria, even though 2013  
12 was not a critically dry year. Last year, SWRCB Executive Director Tom Howard weakened Bay-  
13 Delta standards on nine different occasions and, in 2015, has already issued three orders  
14 modifying Bay-Delta standards, plus an order regarding temperature control in the Sacramento  
15 River. DWR and Bureau have a pending request before the State Board to modify Bay-Delta  
16 water quality standards for July through November 2015.

17 82. California water delivery system is increasingly a wet-year system that cannot meet the  
18 water demands of its customers in dry and drought years. In average water years, water rights  
19 claims throughout the Bay-Delta watershed exceed unimpaired flow by five and one-half times.  
20 As drier years occur, that factor increases dramatically as flows decrease and crisis ensues because  
21 the system is over-subscribed. Within years following their construction, the CVP and SWP  
22 signed contracts for the delivery of almost 14 million acre feet of water or almost half the average  
23 unimpaired runoff in the entire basin.

24 83. The Bay-Delta Water Quality Control Plan and the Central Valley Improvement Project  
25 Improvement Act, P.L. 102-575 § 3406, *et seq.*, and Cal. Fish & Game Code provide a narrative  
26 standard that “[w]ater quality conditions shall be maintained together with other measures in the  
27 watershed, sufficient to achieve a doubling of natural production of chinook salmon from the  
28 average production of 1967-1991, consistent with the provisions of State and federal law.”

1 84. Sacramento winter-run Chinook salmon declined 88.4% from the 54,439 counted during  
2 the Anadromous Fisheries Restoration Program (“AFRP”) Baseline Period of 1967 to 1991, to  
3 6,320 during the AFRP Doubling Period of 1992-2011. Levels of Sacramento winter-run Chinook  
4 salmon are only at 5.8% of the CVPIA mandated target, in continuous violation of the narrative  
5 standard.

6 85. Sacramento spring-run Chinook salmon declined 97.6% from the 29,412 counted during  
7 the Anadromous Fisheries Restoration Program (“AFRP”) Baseline Period of 1967 to 1991, to 718  
8 during the AFRP Doubling Period of 1992-2011. Levels of Sacramento spring-run Chinook  
9 salmon are only at 1.2% of the CVPIA mandated target, in continuous violation of the narrative  
10 standard.

11 Violations of Water Quality Objectives Outflow

12 86. The Bureau’s operation of the CVP is causing and contributing to rampant violations of  
13 the Bay-Delta Water Quality Control Plan and D-1641.

14 87. In a year designated as “critical,” such as 2015, the Bay-Delta Water Quality Control Plan  
15 and D-1641 require a Net Delta Outflow Index (“NDOI”) of 7,100 cubic feet per second (“cfs”)  
16 during the months of February through June, 4,000 cfs during July, 3,000 cfs during August,  
17 September and October, and 3,500 cfs during November and December.

18 88. The NDOI monthly averages fell below the standards of 7,100 cfs from February to June.  
19 For example, in May 2014, the NDOI monthly average was 3,805 cfs. The NDOI monthly  
20 average also fell below 7,100 in June 2014, and March, April and May 2015.

21 89. The NDOI monthly averages fell below the standard of 4,000 cfs in July 2014 when the  
22 NDOI monthly average was 3,286 cfs.

23 90. The NDOI monthly averages fell below the standard of 3,000 cfs in August 2014 when the  
24 NDOI monthly average was 2,965 cfs.

25 **JURISDICTION AND VENUE**

26 91. This Court has jurisdiction over this action pursuant to sections 526, 1060, 1085, 1088.5,  
27 and 1094.5 of the Code of Civil Procedure, and section 1126 of the Water Code.

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1 92. Venue is proper in this Court under Code of Civil Procedure sections 393, 395 and 401 as  
2 Respondent SWRCB is a state agency, Respondent SWRCB's principal offices are located in  
3 Sacramento, and the Attorney General has offices in Alameda County.

4 93. There exists now between the parties hereto an actual, justiciable controversy in which  
5 Plaintiffs are entitled to have a declaration of their rights and of the Defendants' obligations, and  
6 further relief, because of the facts and circumstances set forth below.

7 94. This complaint is timely filed within any and all applicable statutes of limitations.

8 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

9 95. Petitioners and Plaintiffs have performed all conditions precedent to this filing and  
10 participated in the administrative process. Petitioners and Plaintiffs actively participated in the  
11 administrative process by submitting comments, along with other public agencies, organizations,  
12 and members of the public, outlining the claims contained herein. As such, Petitioners and  
13 Plaintiffs have fully exhausted their administrative remedies, to the extent such remedies exist and  
14 to the extent that exhaustion of administrative remedies is legally necessary.

15 96. Petitioners and Plaintiffs possess no other remedy to challenge Respondents' and  
16 Defendants' abuses of discretion and failures to comply with applicable laws and regulations.

17 **PRIVATE ATTORNEY GENERAL DOCTRINE**

18 97. Petitioners and Plaintiffs bring this action as private attorneys general pursuant to  
19 California Code of Civil Procedure section 1021.5, and any other applicable legal theory, to  
20 enforce important rights affecting the public interest.

21 98. Issuance of the relief requested in this Petition and Complaint will confer significant  
22 benefits on the general public, and result in the enforcement of important rights affecting the  
23 public interest, by, among other benefits and rights, upholding existing protections for threatened,  
24 endangered, and imperiled species throughout the San Francisco-San Joaquin Bay-Delta.

25 99. The necessity and financial burden of enforcement are such as to make an award of  
26 attorneys' fees appropriate in this proceeding. Absent enforcement by Petitioners and Plaintiffs,  
27 the TUCP Orders might otherwise be deemed valid despite their legal and factual inadequacies,  
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1 and, as a result, cause significant, adverse environmental effects that might otherwise have evaded  
2 been prevented.

3 100. Petitioners' attorneys have served a copy of its Petition and Complaint on the  
4 Attorney General's office to give notice of Petitioners' intent to bring this proceeding as private  
5 attorneys general under Code of Civil Procedure section 1021.5 (attached as Exhibit A).

6 **INJUNCTIVE AND DECLARATORY RELIEF**

7 101. Injunctive relief is necessary to prevent Defendants from continuing to engage in  
8 the unlawful practices alleged herein. Defendants and persons acting in concert therewith have  
9 done, are now doing, and will continue to do or cause to be done, the above-described illegal acts  
10 unless restrained or enjoined by this Court. Plaintiffs have no plain, speedy, or adequate remedy at  
11 law, in that pecuniary compensation alone would not afford adequate and complete relief. Unless  
12 Defendants are restrained from committing further illegal acts, their above-described acts will  
13 cause great and irreparable damage to Plaintiffs.

14 102. An actual controversy now exists between Plaintiffs and Defendants concerning  
15 their rights, privileges, and obligations in that Plaintiffs contend that Defendants' above-  
16 mentioned actions have violated and will continue to violate their rights under federal and state  
17 law and Defendants contend in all respects to the contrary.

18 **FIRST CLAIM FOR RELIEF**

19 **VIOLATIONS OF CALIFORNIA WATER CODE**

20 103. Plaintiffs incorporate by reference each and every allegation contained in this  
21 Petition and Complaint as though fully set forth herein.

22 104. In order to approve the temporary urgency change petitions, the SWRCB and/or its  
23 Executive Officer was required to make the following findings: (1) that BOR and DWR have an  
24 urgent need to make the proposed change; (2) the proposed change may be made without injury to  
25 any other lawful user of water; (3) the proposed change may be made without unreasonable effect  
26 upon fish, wildlife, or other instream beneficial uses; and (4) the proposed change is in the public  
27 interest. (California Water Code, § 1435, subd. (b)(1-4).)

28 105. Petitioners are informed and believe, and thereupon allege, that the State Board

1 Executive Officer’s four findings for the April 6, 2015 Order, pursuant to California Water Code,  
2 § 1435, subd. (b) are “not supported by the evidence” and therefore constitute an abuse of  
3 discretion within the meaning of Cal. Code Civ. Proc. § 1094.5(b). It is not in the public interest or  
4 consistent with the Public Trust Doctrine to bring fisheries and other public trust resources to the  
5 brink of extinction by chronic relaxation of legally promulgated standards because DWR and the  
6 Bureau refuse to pursue reasonable measures to address drought scenarios that occur more than  
7 40% of time in California. The Order will have a devastating environmental impact by degrading  
8 water quality in the estuary and sending native fisheries that evolved and flourished over millennia  
9 into extinction by depriving them of water crucial to their survival.

10 106. Petitioners are informed and believe, and thereupon allege, that in issuing the  
11 Order, the Respondents have “not proceeded in the manner required by law” within the meaning  
12 of Cal. Code Civ. Proc. § 1094.5(b) because the Order violates applicable state and federal laws,  
13 including but not limited to:

- 14 (a) The Delta Protection Act of 1959;
- 15 (b) the federally promulgated Estuarine Habitat Criteria for the Bay/Delta estuary at 40  
CFR 131.37;
- 16 (c) the Striped Bass spawning criteria between 1 April and 31 May;
- 17 (d) the Suisun Marsh criteria;
- 18 (e) the Public Trust Doctrine and California case law;
- 19 (f) Article 10, Section 2 of the California Constitution;
- 20 (g) the California Water Code, Code § 1435;
- 21 (h) SWRCB D-1641;
- 22 (i) SWRCB D-990;
- 23 (j) the California Endangered Species Act;
- 24 (k) Section 5937 of the California Fish & Game Code;
- 25 (l) Section 7 of the Federal Endangered Species Act;
- 26 (m) the Federal Clean Water Act;
- 27 (n) the Federal CVPIA doubling standard for salmon and steelhead;
- 28 (o) the Governor’s 2014 Declaration of Drought Emergency; and,
- (p) Petitioners’ due process rights to any public evidentiary hearing under state and federal  
constitutions.

107. Water Code section 1435 does not provide the SWRCB the ability to alter water  
quality standards or compliance points for any permittee.

108. Petitioners are informed and believe, and thereupon allege, that Respondents have

1 proceeded without, or in excess of, jurisdiction and that the Orders therefore constitutes an abuse  
2 of discretion within the meaning of Cal. Code Civ. Proc. § 1094.5(b).

3 109. Petitioners are informed and believe, and thereupon allege, that the Orders are “not  
4 supported by the findings” and therefore constitutes an abuse of discretion within the meaning of  
5 Cal. Code Civ. Proc. § 1094.5(b).

6 110. Petitioners are informed and believe, and thereupon allege, that Respondents’  
7 findings in the Orders are “not supported by the evidence” and therefore constitute an abuse of  
8 discretion within the meaning of Cal. Code Civ. Proc. § 1094.5(b).

9 111. Accordingly, Respondents have prejudicially abused their discretion, failed to  
10 proceed in a manner required by law, and failed to support their findings and conclusions with  
11 analysis and facts by authorizing unsustainable and unreasonable water diversion leading to the  
12 imminent demise of Bay-Delta salmonids and pelagic species.

13 WHEREFORE, Petitioners and Plaintiffs pray for relief as hereinafter stated.

14 **SECOND CAUSE OF ACTION**

15 **PATTERN AND PRACTICE VIOLATIONS**

16 112. Petitioners incorporate by reference each and every allegation contained in this  
17 Petition and Complaint as though fully set forth herein.

18 113. Based upon information and belief, Petitioners allege that Respondents have  
19 adopted a de facto policy of approving TUCP Orders in excess of jurisdiction, not in accordance  
20 with law, without support of evidence, not in the public interest, and without procedural due  
21 process, as stated herein.

22 114. These ongoing disputes create an actual, clear, and present controversy as to the  
23 substantive and procedural legality of Respondents’ serial and piecemealed approval of consistent  
24 and ongoing violations of water quality and flow standards adopted to protect imperiled aquatic  
25 species.

26 115. In routinely approving a further worsening of water quality and habitat conditions  
27 throughout the Bay-Delta estuary, Respondents have adopted a de facto program that is arbitrary,  
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1 capricious, in excess of jurisdiction, contrary to law, lacking in procedural due process, not  
2 supported by evidence, and in abrogation of Public Trust duties.

3 116. Accordingly, Respondents have prejudicially abused their discretion, failed to  
4 proceed in a manner required by law, and failed to support their findings and conclusions with  
5 analysis and facts by adopting a pattern and practice of routinely authorizing unsustainable and  
6 unreasonable water diversions directly leading to the imminent demise of Bay-Delta salmonids  
7 and pelagic species.

8 WHEREFORE, Petitioners and Plaintiffs pray for relief as hereinafter stated.

9 **THIRD CAUSE OF ACTION**

10 **VIOLATIONS OF PUBLIC TRUST DOCTRINE**

11 117. Plaintiffs incorporate by reference each and every allegation contained in this  
12 Petition and Complaint as though fully set forth herein.

13 118. Respondents prejudicially abused their discretion, failed to proceed in a manner  
14 required by law, and failed to support their findings and conclusions with analysis and facts by  
15 authorizing illegal and unsustainable water diversion that interfere with, and result in the loss of  
16 imperiled Bay-Delta species, to the detriment of legitimate public trust uses including, but not  
17 limited to, fishing, fish and wildlife habitat, recreation, and tourism.

18 119. Respondents prejudicially abused their discretion, failed to proceed in a manner  
19 required by law, and failed to support their findings and conclusions with analysis and facts by  
20 authorizing illegal and unsustainable water diversions that will that will irreparably injure and  
21 deplete public trust resources, including but not limited to imperiled Bay-Delta species.

22 120. Respondents prejudicially abused their discretion, failed to proceed in a manner  
23 required by law, and failed to support their findings and conclusions with analysis and facts by  
24 failing to conduct any meaningfully analysis and balancing of public trust uses and resources  
25 against the unreasonable and unsustainable water diversion authorized by the TUCP Orders.

26 WHEREFORE, Petitioners and Plaintiffs pray for relief as hereinafter stated.

27 **PRAAYER FOR RELIEF**

28 Petitioners and Plaintiffs pray for relief as follows:

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1. Issue a peremptory writ of mandate commanding Respondents to vacate and set aside the April 6, 2015 TUCP Order, and any and all approvals rendered pursuant to and/or in furtherance of the implementation of said Order;
2. Preliminarily and permanently enjoin Respondents and Real Parties in Interest from any and all activities undertaken pursuant to the April 6, 2015 TUCP Order;
3. Enter a declaratory judgment that Respondents have engaged and are presently engaging in an illegal pattern and practice of adopting TUCP Orders in excess of jurisdiction, not in accordance with law, not supported by the evidence, not in the public interest, without required public due process, and inconsistent with procedural and substantive public trust requirements;
4. Preliminarily and permanently enjoin Respondents from further engaging in an illegal pattern and practice of adopting TUCP Orders in excess of jurisdiction, not in accordance with law, not supported by the evidence, not in the public interest, without required public due process, and inconsistent with procedural and substantive public trust requirements;
5. Award Plaintiffs the costs of this action, including their reasonable attorneys' fees; and,
6. Grant such other relief as the Court deems just and proper.

DATED: August 3, 2015

AQUA TERRA AERIS LAW GROUP



Jason R. Flanders  
Attorneys for Petitioners and Plaintiffs  
California Sportfishing Protection Alliance,  
AquAlliance, and California Water Impact Network

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**VERIFICATION**

I, Jason Flanders, am counsel of record for Petitioners and Plaintiffs AquAlliance, California Water Impact Network, and California Sportfishing Protection Alliance. I sign for these Petitioners and Plaintiffs absent from the county of counsel and/or because facts contained in the Petition and Complaint are within the knowledge of counsel. I have read the foregoing Petition and Complaint know the contents thereof. The same is true of my own knowledge, or upon information and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of August, 2015, in Oakland, California.

  
\_\_\_\_\_  
Jason R. Flanders