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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

**PLAINTIFFS' SEPARATE STATEMENT OF
UNDISPUTED MATERIAL FACTS AND
EVIDENCE IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE SUMMARY
ADJUDICATION [Cal. Rules of Court, Rule
3.1350, subd. (h)]**

[Notice of Motion; Memorandum of Points and
Authorities in Support Thereof; Declaration of
William Jennings; and [Proposed] Order filed
concurrently herewith]

Date: October 10, 2017
Dept. 24
Hon. Frank Roesch

Pursuant to California Code of Civil Procedure section 437c, subdivision (b) and California Rule of Court, rule 3.1350, Plaintiffs hereby submit, for purposes of these motion proceedings only, the following Separate Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, or in the alternative, Summary Adjudication regarding Plaintiffs’ claims asserted in its Second Amended Complaint.

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SEPARATE STATEMENT OF UNDISPUTED FACTS

<i>Moving Parties’ Undisputed Material Facts and Supporting Evidence:</i>	<i>Opposing Parties’ Response and Supporting Evidence:</i>
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Background Facts and Supporting Evidence

<p>1. The Bay-Delta is a 1600-square-mile estuary where the state’s two major river systems—the Sacramento River and the San Joaquin River—converge and flow into San Francisco Bay. (Jennings Decl. at ¶¶ 29, 30, 51, 83, Ex. 1 [Revised Decision 1641 at 6], Ex. 2, <i>passim</i>, [2006 Bay-Delta Plan at 1, 2].)</p>	
<p>2. Many Bay-Delta species are endangered or threatened under the Federal or California Endangered Species Acts, including resident species such as Delta smelt and migratory species such as winter-run and spring-run Chinook salmon. (Jennings Decl. at ¶¶ 29, 30, 51, 83, Ex. 1 [Revised Decision 1641 at 6]; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan at 1, 2]; Jennings Decl. at ¶ 66, Ex. 28 [April 6, 2015 TUCP Order at 15-24]; Jennings Decl. at ¶¶ 30, 32, 34, Ex. 9 [NMFS BiOp at 72].)</p>	
<p>3. The collapse of the Bay-Delta’s pelagic and anadromous fish populations is well-documented, with species measured by the California Department of Fish and Wildlife’s Fall Midwater Trawl declining between 91.9 and 99.99 percent since 1967. (Jennings Decl. at ¶ 31, Ex. 4-8, 36.)</p>	
<p>4. The Delta is also the hub of California’s</p>	

<p>1 two major water distribution systems: the 2 federal Central Valley Project and 3 California’s State Water Project, operated by 4 the U.S. Bureau of Reclamation and 5 California Department of Water Resources, 6 respectively, pursuant to water rights licenses 7 and permits issued by SWRCB. (Jennings 8 Decl. at ¶¶ 30, 32, 34, Ex. 9 [NMFS BiOp at 9 72].)</p>	
<p>10 5. The CVP and SWP comprise a vast system 11 of dams, pumps, reservoirs, canals, and 12 related infrastructure that impounds and 13 transfers water throughout California’s 14 Central Valley. (<i>San Luis & Delta-Mendota</i> 15 <i>Water Auth. v. Jewell</i> (9th Cir. 2014) 747 16 F.3d 581, 593-594 (“<i>SLDMWA I</i>”).)</p>	
<p>17 6. USBR and DWR are by far the largest 18 water rights holders in the region, and their 19 project operations control when and how 20 much water is released from upstream dams 21 along the Delta’s tributaries, as well as the 22 quantity and timing of water exported from 23 the Delta. (Jennings Decl. at ¶¶ 30, 32, 34, 24 Ex. 9 [NMFS BiOp at 72, 432-33]; ¶¶ 29, 30, 25 51, 83, Ex. 1 [D-1641 at 5-6]; <i>San Luis &</i> 26 <i>Delta-Mendota Water Auth. v. United States</i> 27 (9th Cir. 2012) 672 F.3d 676, 682-683 28 (“<i>SLDMWA II</i>”).)</p>	
<p>29 7. As a result, how water moves into, through, 30 and out of the Delta is largely coordinated by 31 USBR and DWR, and the operations of the 32</p>	

<p>1 CVP and SWP have a direct and outsized 2 effect on water quality and quantity in the 3 Delta. (<i>SLDMWA II</i>, 672 F.3d at 683; 4 Jennings Decl., <i>passim</i>, Ex. 2 [2006 Bay- 5 Delta Plan] at 1, 38; ¶ 35, Ex. 10 [FWS BiOp 6 at 19-20].)</p>	
<p>7 8. In January 1995, the EPA was forced to 8 promulgate federal water quality standards 9 for the Bay-Delta. (Jennings Decl. at ¶¶ 37, 10 79, 111, 112, Ex. 50 [60 Fed. Reg. 4664, 11 4665 (Jan. 24, 1995)].)</p>	
<p>12 9. EPA noted the “serious environmental 13 crisis for fish and wildlife resources in the 14 Bay/Delta” and set out the history of SWRCB 15 failing to address this crisis. (Jennings Decl. 16 at ¶¶ 37, 79, 111, 112, Ex. 50 [60 Fed. Reg. 17 4664, 4665 (Jan. 24, 1995)].)</p>	
<p>18 10. The SWRCB opposed EPA’s proposed 19 regulations, arguing that “[o]nly the state can 20 decide whether it is appropriate to regulate 21 flow-caused pollution including salinity 22 intrusion and establish requirements for its 23 regulations . . . Therefore, EPA cannot adopt 24 the proposed criteria for Estuarine Habitat 25 and for Fish Migration and Cold-Water 26 Habitat.” (Jennings Decl. at ¶¶ 38, 75, Ex. 11 27 [SWRCB comments to Jan. 6, 1994 draft 28 EPA standards].)</p>	
<p>29 11. EPA disagreed, stating “EPA has ample 30 authority under section 303 to specify the 31 water quality standards that will enable the 32</p>	

<p>1 Bay/Delta to attain its designated uses even if 2 implementation of these standards by the state 3 have incidental effects on the allocation of 4 water.” (Jennings Decl. at ¶¶ 39, 77, Ex. 12 5 [EPA Response to SWRCB Comments 6 (1994)].)</p>	
<p>7 12. “[M]ost of the implementation measures 8 that the state may take affect water quantity 9 and the criteria can only be attained if the 10 state implements measures that affect water 11 quantity.” (<i>Id.</i>)</p>	
<p>12 13. Later that year, SWRCB adopted the 13 “Water Quality Control Plan for the San 14 Francisco Bay – San Joaquin Delta Estuary” 15 (“Bay-Delta Plan”, subsequently revised 16 through 2006). (Jennings Decl. <i>passim</i>, Ex. 17 2.)</p>	
<p>18 14. EPA approved the Bay-Delta Plan, and the 19 water quality objectives contained therein, as 20 compliant with CWA requirements. (Jennings 21 Decl. at ¶¶ 41, 44, Ex. 13 [EPA, Approval of 22 the 1995 Bay-Delta Plan (Sept. 26, 1995)] at 23 2.)</p>	
<p>24 15. The 1995 Bay-Delta plan provides that “the 25 objectives and beneficial uses in this plan that 26 are water quality standards within the 27 meaning of the Clean Water Act will be 28 California’s water quality standards for the 29 purposes of the Clean Water Act.” (Jennings 30 Decl. at ¶ 42, Ex. 14 [1995 Bay Delta Plan] at 31 10.)</p>	

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

7 17. EPA again disagreed. (Jennings Decl. at
8 ¶¶ 41, 44, Ex. 13 [EPA, Approval of the 1995
9 Bay-Delta Plan (Sept. 26, 1995)] at 2.)

10 18. “EPA recognizes that there is a difference
11 in opinion about the scope of EPA’s authority
12 under the Clean Water Act to review and/or
13 to promulgate certain measures included in
14 the 1995 Bay/Delta Plan. EPA further
15 recognizes that the State Board has explicitly
16 reserved its arguments on these issues. See
17 1995 Bay/Delta Plan at pp. 10-11. For the
18 reasons outlined in its preambles to the
19 proposed and final federal rule, as well as in
20 its response to comments received during the
21 public comment period, EPA believes that its
22 review of the 1991 and 1995 Bay/Delta Plans
23 and its promulgation of the criteria included
24 in its final rule are fully in accord with the
25 Clean Water Act. EPA also reserves its
26 arguments as to these issues.” (*Id.*)

27 19. The Bay-Delta Plan consists of (1)
28 beneficial uses to be protected; (2) water
29 quality objectives for the reasonable
30 protection of beneficial uses; and (3) a
31 program of implementation for achieving the
32

<p>1 water quality objectives. Several beneficial 2 uses pertain to fish species and habitat, 3 including “cold freshwater habitat”, 4 “spawning, reproduction and/or early 5 development”, and “rare, threatened or 6 endangered species.” (Jennings Decl. at 7 <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at 9; Ex. 8 14 [1995 Bay-Delta Plan] at 13.)</p>	
<p>9 20. In order to protect beneficial uses, the Bay- 10 Delta Plan specifies flow and water quality 11 objectives. (Jennings Decl. at <i>passim</i>, Ex. 2 12 [2006 Bay-Delta Plan] at 12-17; ¶ 42, Ex. 14 13 [1995 Bay-Delta Plan] at 16-26.)</p>	
<p>14 21. SWRCB admits that the flow-based 15 objectives set out in Table 3 of the Bay-Delta 16 Plan were “established to ensure the 17 reasonable protection of fish and wildlife 18 uses, including the ‘rare, threatened and 19 endangered species’ beneficial use on page 9 20 of the 2006 Bay Delta Plan” (Jennings Decl. 21 at ¶ 48, Ex. 15 [RFA No. 6].)</p>	
<p>22 22. Similarly, the Central Valley Basin Plan for 23 the Sacramento River Basin and the San 24 Joaquin River Basin (“Central Valley Basin 25 Plan”) includes temperature criteria to protect 26 beneficial uses. (Jennings Decl. at ¶¶ 49, 68, 27 71, 89, Ex. 16 [Central Valley Basin Plan] at 28 III-8.00.)</p>	
<p>29 23. In particular, temperature shall not be 30 elevated above 56°F in the reach from 31 Keswick Dam to Hamilton City nor above 32</p>	

<p>1 68°F in the reach from Hamilton City to the I 2 Street Bridge during periods when 3 temperature increases will be detrimental to 4 the fishery. (<i>Id.</i>)</p>	
<p>5 24. EPA explains that adopted provisions that 6 have the effect of changing an existing water 7 quality standard include ones that “define, 8 change, or establish magnitude, duration or 9 frequency of water quality criteria.” (Jennings 10 Decl. Ex. 49 [Environmental Protection 11 Agency, What Is a New or Revised Water 12 Quality Standard Under CWA 303(c)(3)? 13 Frequently Asked Questions (Oct. 2012)].)</p>	
<p>14 25. Water Rights Decision 1641 (“D-1641”), 15 issued in December 1999 and revised March 16 2000, includes minimum Delta outflow and 17 other regulatory limits for the Central Valley 18 Project (“CVP”) and State Water Project 19 (“SWP”) operations to meet 1995 Bay-Delta 20 requirements. (Jennings Decl. at ¶¶ 29, 30, 21 51, 83, Ex. 1 [D-1641] at 181-187.)</p>	
<p>22 26. And Resolution No. 2004-0030 adopted the 23 Policy for the Implementation and 24 Enforcement of the Nonpoint Source 25 Pollution Control Program (“NPS Plan”), 26 pursuant to California Water Code, section 27 13369, “to meet the requirements of . . . 28 section 319 of the Clean Water Act.” 29 (Jennings Decl. at ¶ 52, Ex. 17 [Res. 2004- 30 0030] at 1; Jennings Decl. at ¶¶ 52, 53, Ex. 18 31 [California Nonpoint Source Program 32</p>	

<p>1 Implementation Plan, 2014-2020].)</p>	
<p>2 27. The NPS Plan explicitly relies on the Bay- 3 Delta Plan to protect water quality in the 4 region, and associated beneficial uses. 5 (Jennings Decl. at ¶¶ 52, 53, Ex. 18 6 [California Nonpoint Source Program 7 Implementation Plan, 2014-2020] at 6, 45- 8 46.)</p>	
<p>9 28. Finally, SWRCB Resolution No. 68-16 10 contains California’s anti-degradation policy, 11 and requires that high water quality be 12 maintained, consistent with applicable policy 13 prescriptions. n particular, the policy provides 14 “that the granting of permits and licenses for 15 unappropriated water and the disposal of 16 wastes into the waters of the State shall be so 17 regulated as to achieve highest water quality 18 consistent with maximum benefit to the 19 people of the State” (Jennings Decl. at ¶ 54, 20 Ex. 19 [State Water Resources Control Bd. 21 Res. No. 68-16 (Oct. 28, 1968)].)</p>	
<p>22 29. Similarly, in 2009, SWRCB triennial 23 review acknowledged that “new or changed 24 export limits may be necessary to adequately 25 protect beneficial uses in the Delta,” and that 26 “further review and change of Delta outflow 27 objectives may be required” (Jennings Decl. 28 at ¶ 95, Ex. 20 [SWRCB, Periodic Review of 29 the 2006 Water Quality Control Plan for the 30 San Francisco Bay/Sacramento-San Joaquin 31 Delta Estuary (2009)] at 19-21.)</p>	

<p>1 30. Nevertheless, SWRCB failed to adopt any 2 revisions recommended to the Bay-Delta Plan 3 recommended in 2004 or 2009, and has failed 4 to conduct any other required triennial 5 reviews since adopting the Bay-Delta Plan. 6 (Jennings Decl. ¶ 96)</p>	
<p>7 31. In 2009, the Legislature adopted the Delta 8 Reform Act, commanding SWRCB, among 9 other things, to, “pursuant to its public trust 10 obligations, develop new flow criteria for the 11 Delta ecosystem necessary to protect public 12 trust resources,” and directing that, CDFW, 13 “based on the best available science, shall 14 develop and recommend to the board Delta 15 flow criteria and quantifiable biological 16 objectives for aquatic and terrestrial species 17 of concern dependent on the Delta” (Wat. 18 Code, §§ 85084.5, 85086, subd. (a).)</p>	
<p>19 32. DFW found that significantly greater flows 20 through the Bay-Delta were necessary to 21 protect public trust resources. (Jennings Decl. 22 at ¶ 95, Ex. 21 [Cal. Dept. of Fish & Game, 23 Quantifiable Biological Objectives and Flow 24 Criteria for Aquatic and Terrestrial Species of 25 Concern Dependent on the Delta (Nov. 23, 26 2010)] at 94 [“Recent Delta flows Are 27 insufficient to support native Delta fishes For 28 today’s habitats . . .”].)</p>	
<p>29 33. SWRCB published the Development of 30 Flow Criteria for the Sacramento-San Joaquin 31 Delta Ecosystem released in August 2010, 32</p>	

1 also concluding that significantly greater
2 flows were necessary to protect Bay-Delta
3 public trust fish resources. (Jennings Decl. at
4 ¶¶ 56, 98, 102, 114, Ex. 3 [SWRCB,
5 Development of Flow Criteria for the
6 Sacramento-San Joaquin Delta Ecosystem
7 (Aug. 3, 2010)] at 5 (hereafter “Flow Criteria
8 Report”) [“. . . the flow Criteria developed in
9 this proceeding are intended to halt
10 population decline and increase populations
11 of certain species;” “Recent Delta flows Are
12 insufficient to support native Delta fishes for
13 today’s habitats”].)

14 34. The Flow Criteria Report acknowledged
15 that “Flow is important to sustaining the
16 ecological integrity of aquatic ecosystems,
17 including the public trust resources Flow
18 affects water quality, food resources, physical
19 habitat, and biotic interactions. Alterations in
20 the natural flow regime affect aquatic
21 biodiversity and the structure and function of
22 aquatic ecosystems.” (*Id.* at 39.)

23 35. Recent flow regimes in the Delta have
24 contributed to the decline of native species
25 and encouraged non-native species. . . .
26 [F]lows and habitat structure are often
27 mismatched and now favor non-native
28 species. . . . Flow modification is one of the
29 few immediate actions available to improve
30 conditions to benefit native species.” (*Id.* at
31 40.)
32

1 36. On January 17, 2014, Governor Brown
2 issued a Drought Emergency Proclamation
3 directing SWRCB to consider TUC Petitions
4 (“TUCPs”) to modify requirements
5 implementing water quality control plans and
6 suspending Water Code, section 13247,
7 which requires state agencies to comply with
8 water quality control plans. (Jennings Decl. at
9 ¶ 59, Ex. 34 [Governor Brown, A
10 Proclamation of a State of Emergency (Jan.
11 17, 2014)
12 <[https://www.gov.ca.gov/news.php?id=1836
13 8](https://www.gov.ca.gov/news.php?id=18368)>].)

14 37. On January 31, 2014, SWRCB issued a
15 TUC order that: Reduced the flow
16 requirement for the upcoming month to a
17 minimum of only 3,000 cfs—less than half
18 that required by the Bay-Delta Plan.
19 (Jennings Decl. at ¶¶ 60, 78, 80, 83, Ex. 23
20 [Jan. 31, 2014 TUCP Order at 13]; Jennings
21 Decl. *passim*, Ex. 2 [2006 Bay-Delta Plan] at
22 Tbl. 3 n.11.) Also allowed USBR and DWR
23 to open the gates as frequently as they
24 deemed necessary from February 1 through
25 May 20, in contrast to the Bay-Delta Plan’s
26 requirements that the gates remain closed
27 during that period. (Jennings Decl. at ¶¶ 60,
28 78, 80, 83, Ex. 23 [Jan. 31, 2014 TUCP
29 Order] at 5, 14; Jennings Decl. *passim*, Ex. 2
30 [2006 Bay-Delta Plan] at Tbl. 3.)

31 38. On April 9, 2014, SWRCB issued a TUC
32

<p>1 Order that: Extended the reduced flow 2 objectives through April. (Jennings Decl. Ex. 3 24 [April 9, 2014 TUCP Order] at 8.)</p>	
<p>4 39. On April 11, 2014, SWRCB issued a TUC 5 Order that: Reduced the base flow criteria to 6 700 cfs through April 14, and 500 cfs from 7 May 15 to May 31, below the monthly 8 average of 710 or 1,140 cfs (depending on the 9 location of the mixing zone, X2) required by 10 the Bay-Delta Plan during “critical” water 11 years such as 2014. (Jennings Decl. at ¶ 62, 12 Ex. 33 [April 11, 2014 TUCP Order] at 3-5, 13 8; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay- 14 Delta Plan] at Tbl. 3, n.14.) Also reduced the 15 magnitude and duration of spring pulse flows 16 to 16 days of flow at 3,300 cfs plus 15 days 17 of flow at 1,500 cfs, from the 31-day spring 18 pulse flow of 3,100 or 3,540 cfs (depending 19 on X2) required by the Bay-Delta Plan. (<i>Id.</i>)</p>	
<p>20 40. On May 2, 2014, SWRCB issued a TUC 21 Order that: Reduced minimum Delta outflow 22 to a monthly average of 3,000 cfs, despite 23 Bay-Delta Plan’s requirement of 4,000 cfs for 24 May (measured as a 14-day average) and July 25 (measured as a monthly average) during 26 critical water years such as 2014. (Jennings 27 Decl. at ¶ 61, Ex. 25 [May 2, 2014 TUCP] at 28 7; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay- 29 Delta Plan] at Tbl. 3, n.11-12.) Eliminated 30 additional May salinity outflow requirements 31 at Chipps Island. (<i>Id.</i>; see also Jennings Decl. 32</p>	

<p>1 <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 2 4.) Reduced monthly Sacramento River flow 3 criteria from September through November 4 15 to 2,000 cfs, despite Bay-Delta 5 requirements of 3,000 cfs in September and 6 October, and 3,500 cfs in November during 7 critical water years. (Jennings Decl. at ¶ 61, 8 Ex. 25 [May 2, 2014 TUCP Order] at 8, 12; 9 Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay- 10 Delta Plan] at Tbl. 3.) Also moved the 11 salinity measuring point three miles upstream 12 from May 2014 through January 2015, 13 allowing a greater magnitude of salt 14 concentration to intrude farther into the Delta. 15 (Jennings Decl. at ¶ 61, Ex. 25 [May 2, 2014 16 TUCP Order] at 7, 8 n.5, 12; Jennings Decl. 17 <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 18 2.)</p>	
<p>19 41. On October 7, 2014, SWRCB issued a TUC 20 Order that: Reduced the magnitude of the 21 October pulse flow criteria to 800 cfs from 22 Bay-Delta Plan requirement of 1000 cfs. 23 (Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay- 24 Delta Plan] at Tbl. 3; Jennings Decl. ¶ 64, 81, 25 Ex. 26 [Oct. 7, 2014 TUCP Order] at 6, 11.)</p>	
<p>26 42. On February 3, 2015, SWRCB issued a 27 TUC Order that: Reduced the magnitude of 28 the minimum Delta outflow from 7,100 cfs 29 down to 4,000 cfs for February and March. 30 (Jennings Decl. at ¶ 27, Ex. 27 [Feb. 3, 2015 31 TUCP Order] at 2, 21; Jennings Decl. at 32</p>	

1 *passim*, Ex. 2 [2006 Bay-Delta Plan] at Tbl.
2 3, n.11.) Reduced the magnitude of the
3 minimum San Joaquin River flow from the
4 critical water year-level of 710 or 1,140 cfs
5 down to 500 cfs for February and March.
6 (Jennings Decl. at ¶ 65, Ex. 27 [Feb. 3, 2015
7 TUCP Order] at 2, 21; Jennings Decl. at
8 *passim*, Ex. 2 [2006 Bay-Delta Plan] at Tbl.
9 3.) Also reduced the DCC gates closure
10 requirement to allow the gates to be opened
11 as frequently in February and March as
12 USBR deemed necessary. (Jennings Decl. at
13 ¶ 65, Ex. 27 [Feb. 3, 2015 TUCP] at 2, 21.)

14 43. On April 6, 2015, SWRCB issued a TUC
15 Order that: Extended the February order's
16 outflow provisions through June, and
17 extended the DCC gates provision through
18 May 20. (Jennings Decl. at ¶ 66, Ex. 28
19 [April 6, 2015 TUCP Order] at 37-39.) Also
20 shifted the San Joaquin River spring pulse
21 flow criteria three weeks earlier and lowered
22 its magnitude to 710 cfs, from 3,110 cfs or
23 3,540 cfs (depending on X2), effectively
24 eliminating it. (Jennings Decl. ¶ 66, Ex. 28
25 [April 6, 2015 TUCP Order] at 27, 37;
26 Jennings Decl. *passim*, Ex. 2 [2006 Bay-Delta
27 Plan] at Tbl. 3, n.14.) Reduced the magnitude
28 of the San Joaquin base flow requirement
29 from 710 or 1,140 cfs down to 300 cfs in
30 April and May, and down to 200 cfs in June.
31 (Jennings Decl. ¶ 66, Ex. 28 [April 6, 2015
32

<p>1 TUCP Order] at 27, 38.) Also shifted the 2 salinity compliance point on the Sacramento 3 River to about three miles upstream. (See <i>id.</i> 4 at 39.)</p>	
<p>5 44. On July 3, 2015, SWRCB issued a TUC 6 Order that: Extended the April 6, 2015 TUCP 7 order’s change in salinity compliance location 8 through August 15. (Jennings Decl. at ¶¶ 65, 9 67, 82, Ex. 29 [July 3, 2015 TUCP] at 2, 26.) 10 Also reduced the magnitude of the minimum 11 Delta outflow in July from 4,000 cfs to 3,000 12 cfs and reduced the magnitude of the 13 minimum Sacramento River flow from the 14 critical year monthly average of 3,000 cfs in 15 September and October and 3,500 cfs in 16 November to 2,500 cfs for all three months. 17 (<i>Id.</i>; see Jennings Decl. <i>passim.</i>, Ex. 2 [2006 18 Bay-Delta Plan] at Tbl. 3.)</p>	
<p>19 45. On August 4, 2015, SWRCB issued a TUC 20 Order that: Reduced the magnitude of the 21 Stanislaus River dissolved oxygen criteria to 22 5.0 mg/L from 7.0 mg/L through November 23 30, 2015. (Jennings Decl. at ¶¶ 30, 66, 68, 83, 24 101, Ex. 30 [Aug. 4, 2015 TUCP Order] at 1- 25 2, 12; Jennings Decl. at ¶¶ 49, 68, 71, 89, Ex. 26 16 [Central Valley Plan] at II-8.00, III-5.00.)</p>	
<p>27 46. On April 19, 2016, SWRCB issued a TUC 28 Order that: Reduced the magnitude of the San 29 Joaquin spring pulse flow from the “dry” 30 water year value of 4,880 cfs to 3,000 cfs. 31 (Jennings Decl. at ¶ 69, Ex. 32 [April 19, 32</p>	

<p>2016 TUCP] at 3, 4, 18.) Also reduced the magnitude of the San Joaquin base flow requirement from 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 June. (<i>Id.</i>; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3.)</p>	
<p>47. On December 15, 2015, SWRCB issued a TUC Order that: Denied in part and granted in part petitions for reconsideration, but extending the July 3, 2015 Order for an additional 180 days, with added future planning requirements. (Jennings Decl. at ¶¶ 108, 109, 116, Ex. 31.)</p>	
<p>48. SWRCB maintains this pattern and practice policy through the present day, and contemplates the future use of TUCPs to relax water quality standards. The Draft Revised SED for Phase I of the Water Quality Control Plan for the Bay-Delta Plan states, “[a]t its discretion, or at the request of any affected responsible agency or person, the State Water Board may authorize a temporary change in the implementation of the LSJR flow objectives in a water right proceeding . . .” (Jennings Decl. Ex. 35 [SED] App. K, at 35.)</p>	
<p>49. SBR and DWR also contemplate the future of use of TUCPs; the July 2016 Biological Assessment for the California WaterFix prepared by USBR and DWR states that a</p>	

1 drought management team will assess
2 hydrologic conditions and recommend actions
3 in a drought contingency plan and “[w]hile a
4 drought contingency plan may recommend
5 adhering to the operations as identified in
6 existing regulatory authorizations, in longer
7 periods of dry conditions, the plan could also
8 propose other drought response actions.”
9 (Jennings Decl. Ex. 65 [Biological
10 Assessment for California Water Fix] Ch. 3,
11 at 3-241.)

12 50. In 1990, SWRCB adopted WR Order 90-5,
13 “to consider enforcing certain water quality
14 objectives in the upper Sacramento River,
15 which are contained in the [Central Valley
16 Basin Plan],” and to enforce “the Public Trust
17 Doctrine.” (Jennings Decl. at ¶ 86, Ex. 51
18 [WR Order 90-5 at 2].) The Order noted that
19 “[t]he operation of Shasta Dam affects
20 downstream water quality,” and that, “[i]n
21 some years, during late summer and early
22 fall, releases from Shasta Lake, where the
23 water has been heated by the sun during
24 storage, have caused river water temperatures
25 to exceed the levels necessary to protect the
26 fishery in the upper Sacramento River.” (Id.
27 [WR Order 90-5 at 2-3].) The Order notes
28 that the Sacramento River temperature
29 objectives are limited to “controllable
30 factors” by USBR, and SWRCB WR Order
31 92-2 clarifies that timing and quantities of
32

1 deliveries by USBR are controllable factors.
2 (Id. at 6; Exhibit 52 [WR Order 92-2 at 9].)
3 Thus Order 90-5 relaxed the Central Valley
4 Basin Plan temperature requirement, moving
5 the 56°F compliance 44 miles upstream to
6 Red Bluff (RM 243) from the Basin Plan
7 56°F requirement at Hamilton City (RM199).
8 (Jennings Decl. ¶ 86.)

9 51. Nevertheless, since at least 1996, USBR has
10 u complied even with this relaxed standard,
11 even in wet years. (CITE Jennings Decl. at
12 ¶ 92, Ex. 53 [Cal. Data Exchange Center,
13 Chronological Reconstructed Sacramento and
14 San Joaquin Valley Water Year Hydrologic
15 Classification Indices]; see also USBR,
16 Sacramento River Temperature Report (last
17 updated Apr. 19, 2017)
18 <<https://www.usbr.gov/mp/cvo/temp.html>>.)

19 52. Instead, SWRCB has participated in a
20 Temperature Task Force that adopts an
21 annual Sacramento River Temperature
22 Management Plan (“TMP”) submitted by
23 USBR that shifts the temperature criteria
24 compliance even farther upstream, further
25 restricting the amount of spawning habitat
26 available to salmon. (See, e.g., Jennings Decl.
27 at ¶ 70, Ex. 42 [SWRCB, Approval of the
28 2016 Sacramento River Temperature
29 Management Plan Approval (July 8, 2016)];
30 Jennings Decl. at ¶¶ 70, 72, 87, Ex. 41
31 [SWRCB, Approval of the 2015 Sacramento
32

<p>1 River Temperature Management Plan (July 7, 2 2015)].)</p>	
<p>3 53. SWRCB approves temperature management 4 plans that have a negative impact on fish and 5 wildlife and result in violations of the Central 6 Valley Basin Plan. (See, e.g., Jennings Decl. 7 at ¶ 70, Ex. 42 [SWRCB, Approval of the 8 2016 Sacramento River Temperature 9 Management Plan Approval (July 8, 2016)]; 10 Jennings Decl. at ¶ 70, 72, 87, Ex. 41 11 [SWRCB, Approval of the 2015 Sacramento 12 River Temperature Management Plan (July 7, 13 2015)].)</p>	
<p>14 54. SWRCB WR Order 90-05 requires that the 15 Bureau meet a daily average water 16 temperature of 56°F in the Sacramento River 17 at Red Bluff Diversion Dam during periods 18 when higher temperatures will be detrimental 19 to the fishery. (Jennings Decl. at ¶ 86, Ex. 51 20 [WR Order 90-5].)</p>	
<p>21 55. SWRCB approves the yearly Sacramento 22 River Temperature Management Plans 23 (“TMPs”) submitted by the Bureau that shift 24 the temperature criteria compliance point 25 upstream, further restricting the amount of 26 spawning habitat available to salmon. (See, 27 e.g., Jennings Decl. at ¶ 72, 87, Ex. 43 [U.S. 28 Bureau of Reclamation, Revised Sacramento 29 River Water Temperature Management Plan 30 (June 2015)]; Jennings Decl. at ¶¶ 70, 72, 78, 31 Ex. 41 [SWRCB, Approval of the 2015 32</p>	

<p>1 Sacramento River Temperature Management 2 Plan (July 7, 2015)].)</p>	
<p>3 56. In recent years SWRCB has approved 4 TMPs that establish the compliance point at 5 Clear Creek, which compresses spawning to a 6 10-mile reach below Keswick: a 90% 7 reduction of Basin Plan and 83% reduction in 8 Biological Opinion protected spawning 9 habitat. (<i>Id.</i>, ¶ 92, Ex. 53.)</p>	
<p>10 57. And in 2015, SWRCB violated its average 11 daily 56°F criterion when the Executive 12 Officer unilaterally approved a Bureau 13 request to raise the temperature standard to a 14 target of 57°F not to exceed 58°F. (<i>Id.</i>)</p>	
<p>15 58. Raising the temperature from 56°F to 16 a target of 57°F not to exceed 58°F 17 devastates egg incubation, emergence, 18 and fry rearing, and multiple years of 19 excessive temperatures and mortality 20 places enormous stress on the survival 21 of a species dependent on three-year 22 cycles. (See Jennings Decl. at ¶ 93, 23 Ex. 55 [National Marine Fisheries 24 Service, Comments on the 25 Sacramento River Temperature 26 Management Plan (June 28, 2016)] 27 [“Best available scientific data 28 indicate that water temperatures up to 29 50°F . . . are optimal for winter-run 30 egg and fry survival and development 31 [U.S. Environmental Protection 32</p>	

1 Agency (EPA) 2003²] . . . The
2 previous approach of managing to
3 56°F daily average temperature (DAT)
4 at the location of the redds was not
5 supported, as it is not sensitive to
6 extreme high or low water
7 temperatures within a given day.
8 NMFS’ Southwest Fisheries Science
9 Center’s (SWFSC) new temperature-
10 dependent mortality model . . .
11 identified 53.7°F as the critical
12 temperature at which-related winter-
13 run egg and fry mortality increases
14 significantly with increasing water
15 temperatures . . .”]; see also Jennings
16 Decl. at ¶ 93, Ex. 56 [National Marine
17 Fisheries Service, Evaluation of
18 Alternatives for Sacramento River
19 Water Temperature Compliance for
20 Winter-Run Chinook Salmon (Apr.
21 15, 2015)].)

22 59. This Court has held that Plaintiffs
23 “may challenge a policy or practice of
24 SWRCB through an action for
25 declaratory relief.” (Jennings Decl.
26 Ex. 54 [Order Sustaining Demurrer
27 with Leave to Amend, RG15-780498,
28 Mar. 15, 2016].)

29 **Issue No. 1:**

30 **Plaintiffs are Entitled to Judgment on their First Cause of Action for Pattern and Practice**
31 **Violations of the Clean Water Act**

Defendants maintain a pattern and practice of regulating Bay-Delta flow as a state standard not bound by CWA requirements.

60. In order to protect beneficial uses, the Bay-Delta Plan specifies flow and water quality objectives. (Jennings Decl. *passim*, Ex. 2 [2006 Bay-Delta Plan] at 12-17.)

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

62. Similarly, the Central Valley Basin Plan for the Sacramento River Basin and the San Joaquin River Basin (“Central Valley Basin Plan”) includes temperature criteria to protect beneficial uses (Jennings Decl. ¶ 49, 68, 71, 89, Ex. 16 [Central Valley Basin Plan] at III-8.00.)

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

64. Water Rights Decision 1641 (“D-1641”), issued in December 1999 and revised March

<p>2000, includes minimum Delta outflow and other regulatory limits for the Central Valley Project (“CVP”) and State Water Project (“SWP”) operations to meet 1995 Bay-Delta requirements. (Jennings Decl. at ¶¶ 29, 30, 51, 83, Ex. 1 [D-1641].)</p>	
<p>65. And Resolution No. 2004-0030 adopted the Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program (“NPS Plan”), pursuant to California Water Code, section 13369, “to meet the requirements of . . . section 319 of the Clean Water Act.” (Jennings Decl. at ¶ 52, Ex. 17 [Res. 2004-0030] at 1; Jennings Decl. at ¶¶ 52, 53, Ex. 18 [California Nonpoint Source Program Implementation Plan, 2014-2020].)</p>	
<p>66. Similarly, in 2009, SWRCB triennial review acknowledged that “new or changed export limits may be necessary to adequately protect beneficial uses in the Delta,” and that “further review and change of Delta outflow objectives may be required” (Jennings Decl. at ¶ 95, Ex. 20 [SWRCB, Periodic Review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2009)] at 19-21.)</p>	
<p>67. Nevertheless, SWRCB failed to adopt any revisions recommended to the Bay-Delta Plan recommended in 2004 or 2009, and has failed to conduct any other required triennial</p>	

<p>1 reviews since adopting the Bay-Delta Plan. 2 (Jennings Decl. ¶ 96.)</p>	
<p>3 68. In 2009, the Legislature adopted the Delta 4 Reform Act, commanding SWRCB, among 5 other things, to, “pursuant to its public trust 6 obligations, develop new flow criteria for the 7 Delta ecosystem necessary to protect public 8 trust resources,” and directing that, CDFW, 9 “based on the best available science, shall 10 develop and recommend to the board Delta 11 flow criteria and quantifiable biological 12 objectives for aquatic and terrestrial species 13 of concern dependent on the Delta” (Wat. 14 Code, §§ 85084.5, 85086, subd. (a).)</p>	
<p>15 69. DFW found that significantly greater flows 16 through the Bay-Delta were necessary to 17 protect public trust resources. (Jennings Decl. 18 at ¶ 55, 97, Ex. 21 [Cal. Dept. of Fish & 19 Game, Quantifiable Biological Objectives 20 and Flow Criteria for Aquatic and Terrestrial 21 Species of Concern Dependent on the Delta 22 (Nov. 23, 2010)] at 94 [“Recent Delta flows 23 Are insufficient to support native Delta fishes 24 For today’s habitats”].)</p>	
<p>25 70. SWRCB published the Development of 26 Flow Criteria for the Sacramento-San Joaquin 27 Delta Ecosystem released in August 2010, 28 also concluding that significantly greater 29 flows were necessary to protect Bay-Delta 30 public trust fish resources. (Jennings Decl. at 31 ¶¶ 56, 98, 102, 115, Ex. 3 [Flow Criteria 32</p>	

<p>1 Report] at 5 [“. . . the flow Criteria developed 2 in this proceeding are intended to halt 3 population decline and increase populations 4 of certain species;” “Recent Delta flows Are 5 insufficient to support native Delta fishes for 6 today’s habitats”].)</p>	
<p>7 71. The Flow Criteria Report acknowledged 8 that “Flow is important to sustaining the 9 ecological integrity of aquatic ecosystems, 10 including the public trust resources Flow 11 affects water quality, food resources, physical 12 habitat, and biotic interactions. Alterations in 13 the natural flow regime affect aquatic 14 biodiversity and the structure and function of 15 aquatic ecosystems.” (<i>Id.</i> at 39.)</p>	
<p>16 72. Recent flow regimes in the Delta have 17 contributed to the decline of native species 18 and encouraged non-native species. . . . 19 [F]lows and habitat structure are often 20 mismatched and now favor non-native 21 species. . . . Flow modification is one of the 22 few immediate actions available to improve 23 conditions to benefit native species.” (<i>Id.</i> at 24 40.)</p>	
<p>25 73. The SWRCB has consistently maintained 26 that the CWA does not require the regulation 27 of what SWRCB terms “flow-caused 28 pollution,” meaning reductions in water 29 quality such as temperature, salinity, outflow, 30 and dissolved oxygen, resulting from 31 alterations in flows permitted by SWRCB. 32</p>	

<p>1 (Jennings Decl. at ¶¶ 75, Ex. 44 [RFAs Set 2 One, Responses Two and Three].)</p>	
<p>3 74. SWRCB does not dispute that such 4 standards were adopted by SWRCB in EPA- 5 approved water quality control plans, and are 6 required to protect the designated uses 7 therein. (Jennings Decl. at ¶ 76, Ex. 45 [RFAs 8 Set One, Responses Five and Six].)</p>	
<p>9 75. EPA has taken the contrary position, and 10 the Supreme Court’s decision in <i>PUD</i> 11 <i>Jefferson No. 1</i> supports the EPA and 12 Plaintiffs’ view that such so called “flow- 13 related” standards adopted in a basin plan to 14 meet designated uses, are subject to the 15 CWA. (Jennings Decl. at ¶ 39, 77, Ex. 12 16 [EPA responses to comments (1994)] at 6- 17 18.)</p>	
<p>18 76. Defendants issued a series of fourteen 19 orders between January 2014 and December 20 2015, largely granting the TUCPs submitted 21 by the DWR and Reclamation. The TUC 22 Orders effectively suspended and relaxed 23 specified water quality objectives from D- 24 1641 and D-1422. (See Jennings Decl. at 25 ¶¶ 60, 78, 80, 83, Ex. 23 [Jan. 31, 2014 TUCP 26 Order] at 1, 4, 13, [“the requirements of D- 27 1641 for DWR and [USBR] to meet specified 28 water quality objectives are amended as 29 follows . . .”, “changes approved by this 30 Order are to requirements to meet water 31 quality objectives designed to protect fish and 32</p>	

wildlife beneficial uses.”].)	
<p>77. As EPA previously acknowledged, California’s water quality objectives, including those in the Bay-Delta Plan, constitute water quality criteria for purposes of the CWA. (Jennings Decl. at ¶¶ 37, 79, 111, 112, Exhibit 50 [60 Fed.Reg. 4664, 4665, “In California, designated uses are equivalent to state law ‘beneficial uses’” and criteria are equivalent to state law ‘water quality objectives.’”])</p>	
<p>78. On January 31, 2014, SWRCB issued a TUC order that: Reduced the flow requirement for the upcoming month to a minimum of only 3,000 cfs—less than half that required by the Bay-Delta Plan. (Jennings Decl. at ¶¶ 60, 78, 80, 83, Ex. 23 [Jan. 31, 2014 TUCP Order] at 13; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3 n.11.) Also allowed USBR and DWR to open the gates as frequently as they deemed necessary from February 1 through May 20, in contrast to the Bay-Delta Plan’s requirements that the gates remain closed during that period. (Id. [Jan. 31, 2014 TUCP Order] at 5, 14; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3.)</p>	
<p>79. On April 9, 2014, SWRCB issued a TUC Order that: Extended the reduced flow objectives through April. (Jennings Decl. Ex. 24 [April 9, 2014 TUCP Order] at 8.)</p>	

1 80. On April 11, 2014, SWRCB issued a TUC
2 Order that: Reduced the base flow criteria to
3 700 cfs through April 14, and 500 cfs from
4 May 15 to May 31, below the monthly
5 average of 710 or 1,140 cfs (depending on the
6 location of the mixing zone, X2) required by
7 the Bay-Delta Plan during “critical” water
8 years such as 2014. (Jennings Decl. at ¶ 62,
9 Ex. 33 [April 11, 2014 TUCP Order] at 3-5,
10 8; Jennings Decl. *passim*, Ex. 2 [2006 Bay-
11 Delta Plan] at Tbl. 3, n.14.) Also reduced the
12 magnitude and duration of spring pulse flows
13 to 16 days of flow at 3,300 cfs plus 15 days
14 of flow at 1,500 cfs, from the 31-day spring
15 pulse flow of 3,100 or 3,540 cfs (depending
16 on X2) required by the Bay-Delta Plan. (*Id.*)

17 81. On May 2, 2014, SWRCB issued a TUC
18 Order that: Reduced minimum Delta outflow
19 to a monthly average of 3,000 cfs, despite
20 Bay-Delta Plan’s requirement of 4,000 cfs for
21 May (measured as a 14-day average) and July
22 (measured as a monthly average) during
23 critical water years such as 2014. (Jennings
24 Decl. at ¶ 61, Ex. 25 [May 2, 2014 TUCP] at
25 7; Jennings Decl. *passim*, Ex. 2 [2006 Bay-
26 Delta Plan] at Tbl. 3, n.11-12.) Reduced
27 monthly Sacramento River flow criteria from
28 September through November 15 to 2,000
29 cfs, despite Bay-Delta requirements of 3,000
30 cfs in September and October, and 3,500 cfs
31 in November during critical water years.
32

<p>(Jennings Decl. at ¶ 61, Ex. 25 [May 2, 2014 TUCP Order] at 8, 12; Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3.)</p>	
<p>82. On October 7, 2014, SWRCB issued a TUC Order that: Reduced the magnitude of the October pulse flow criteria to 800 cfs from Bay-Delta Plan requirement of 1000 cfs. (Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3; Jennings Decl. at ¶¶ 64, 81, Ex. 26 [Oct. 7, 2014 TUCP Order] at 6, 11.)</p>	
<p>83. On February 3, 2015, SWRCB issued a TUC Order that: Reduced the magnitude of the minimum Delta outflow from 7,100 cfs down to 4,000 cfs for February and March. (Jennings Decl. at ¶ 27, Ex. 27 [Feb. 3, 2015 TUCP Order] at 2, 21; Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3, n.11.) Reduced the magnitude of the minimum San Joaquin River flow from the critical water year-level of 710 or 1,140 cfs down to 500 cfs for February and March. (Jennings Decl. at ¶ 65, Ex. 27 [Feb. 3, 2015 TUCP Order] at 2, 21; Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3.) Also reduced the DCC gates closure requirement to allow the gates to be opened as frequently in February and March as USBR deemed necessary. (Jennings Decl. at ¶ 65, Ex. 27 [Feb. 3, 2015 TUCP] at 2, 21.)</p>	

1 84. On April 6, 2015, SWRCB issued a TUC
2 Order that: Extended the February order's
3 outflow provisions through June, and
4 extended the DCC gates provision through
5 May 20. (Jennings Decl. at ¶ 66, Ex. 28
6 [April 6, 2015 TUCP Order] at 37-39.) Also
7 shifted the San Joaquin River spring pulse
8 flow criteria three weeks earlier and lowered
9 its magnitude to 710 cfs, from 3,110 cfs or
10 3,540 cfs (depending on X2), effectively
11 eliminating it. (Jennings Decl. at ¶66, Ex. 28
12 [April 6, 2015 TUCP Order] at 27, 37;
13 Jennings Decl. at *passim*, Ex. 2 [2006 Bay-
14 Delta Plan] at Tbl. 3, n.14.) Reduced the
15 magnitude of the San Joaquin base flow
16 requirement from 710 or 1,140 cfs down to
17 300 cfs in April and May, and down to 200
18 cfs in June. (Jennings Decl. at ¶ 66, Ex. 28
19 [April 6, 2015 TUCP Order] at 27, 38.)

20 85. On July 3, 2015, SWRCB issued a TUC
21 Order that: Reduced the magnitude of the
22 minimum Delta outflow in July from 4,000
23 cfs to 3,000 cfs and reduced the magnitude of
24 the minimum Sacramento River flow from
25 the critical year monthly average of 3,000 cfs
26 in September and October and 3,500 cfs in
27 November to 2,500 cfs for all three months.
28 (Jennings Decl. at ¶¶ 65, 67, 82, Ex. 29 [July
29 3, 2015 TUCP] at 2, 26; Jennings Decl. at
30 *passim*, Ex. 2 [2006 Bay-Delta Plan] at Tbl.
31 3.)
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1 86. On April 19, 2016, SWRCB issued a TUC
2 Order that: Reduced the magnitude of the San
3 Joaquin spring pulse flow from the “dry”
4 water year value of 4,880 cfs to 3,000 cfs.
5 (Jennings Decl. at ¶ 69, Ex. 32 [April 19,
6 2016 TUCP] at 3, 4, 18.) Also reduced the
7 magnitude of the San Joaquin base flow
8 requirement from the dry water year value of
9 2,280 cfs down to 1000 cfs from May 15 to
10 May 31, and down to 500 cfs for June. (*Id.*;
11 Jennings Decl. at *passim*, Ex. 2 [2006 Bay-
12 Delta Plan] at Tbl. 3.)

13 87. The TUC orders “had the effect” of
14 changing existing Bay-Delta water quality
15 criteria because they changed the objectives
16 in D-1641 and D-1422. Under those water
17 rights decisions, DWR and USBR have full
18 responsibility for achieving the Bay-Delta
19 flow, salinity, oxygen, and DCC gates water
20 quality objectives at issue here. (See Jennings
21 Decl. at ¶¶ 29, 30, 51, 83, Ex. 1 [D-1641] at
22 131-32 “[o]nly the DWR and the USBR can
23 implement the objectives for operational
24 constraints” on CVP and SWP facilities; “The
25 objectives for export pumping rates are the
26 responsibility of each of the two projects at
27 their respective facilities. The objectives for
28 Delta Cross Channel operation are the sole
29 responsibility of its owner, the USBR.”);
30 Jennings Decl. at ¶ 83, Ex. 46 [SWRCB,
31 Decision 1422 (Apr. 1973) (hereafter D-
32

1 1422)] at 31; Jennings Decl. at ¶¶ 60, 78, 80,
2 83, Ex. 23 [Jan. 31, 2014 TUCP] at 2;
3 Jennings Decl. at ¶¶ 66, Ex. 28 [April 6, 2015
4 TUCP] at 6.) As a result, changing DWR’s
5 and USBR’s responsibilities under D-1641
6 and D-1422 is equivalent to changing the
7 Bay-Delta objectives themselves. (See
8 *SWRCB Cases*, 136 Cal.App.4th 674, 726-
9 733 [it is a “de facto amendment” to the Bay-
10 Delta Plan to assign USBR and DWR a D-
11 1641 pulse flow objective than is weaker than
12 the Plan objective].)

13 88. From 2014 to 2016, the TUCP orders
14 amending D-1641 and D-1422 expressly
15 changed the numerical values of Bay-Delta
16 objectives, establishing CVP and SWP
17 operations’ requirements that allowed for
18 reduced river and Delta flows and DCC gates
19 openings in direct contravention of the Bay-
20 Delta objectives USBR and DWR are charged
21 with maintaining. The resulting sanctioned
22 noncompliance with adopted Bay-Delta Plan
23 standards was the same as if the orders had
24 directly amended the Bay-Delta standards
25 themselves. (*Fla. Pub. Interest Research*
26 *Group Citizen Lobby, Inc. v. EPA*, 386 F.3d
27 1070, 1088-1090 (hereafter *FPIRG*; *Nw.*
28 *Environmental Advocates v. EPA* (D. Or.
29 2012) 855 F.Supp.2d 1199, 1209-1213;
30 Jennings Decl. at ¶¶ 83, 85, Ex. 47 [U.S.
31 Environmental Protection Agency, Water
32

1 Quality Standards Handbook (Sept. 2014)
2 (hereafter EPA Handbook)] § 1.5.1, subd.
3 (4.)

4 **Defendants maintain a pattern and practice of**
5 **regulating Bay-Delta salinity as a state standard**
6 **not bound by CWA requirements.**

7 89. Defendants issued a series of fourteen
8 orders between January 2014 and December
9 2015, largely granting the TUCPs submitted
10 by the DWR and Reclamation. The TUC
11 Orders effectively suspended and relaxed
12 specified water quality objectives from D-
13 1641 and D-1422.

14 90. On May 2, 2014, SWRCB issued a TUC
15 Order that: Reduced minimum Delta outflow
16 to a monthly average of 3,000 cfs, despite
17 Bay-Delta Plan's requirement of 4,000 cfs for
18 May (measured as a 14-day average) and July
19 (measured as a monthly average) during
20 critical water years such as 2014. (Jennings
21 Decl. at ¶ 61, Ex. 25 [May 2, 2014 TUCP] at
22 7; Jennings Decl. *passim*, Ex. 2 [2006 Bay-
23 Delta Plan] at Tbl. 3, n.11-12.) Eliminated
24 additional May salinity outflow requirements
25 at Chipps Island. (*Id.*; see also Jennings Decl.
26 *passim*, Ex. 2 [2006 Bay-Delta Plan] at Tbl.
27 4.) Reduced monthly Sacramento River flow
28 criteria from September through November
29 15 to 2,000 cfs, despite Bay-Delta
30 requirements of 3,000 cfs in September and
31 October, and 3,500 cfs in November during
32

<p>critical water years. (Jennings Decl. at ¶ 61, Ex. 25 [May 2, 2014 TUCP Order] at 8, 12; Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3.) Also moved the salinity measuring point three miles upstream from May 2014 through January 2015, allowing a greater magnitude of salt concentration to intrude farther into the Delta. (Jennings Decl. at ¶ 61, Ex. 25 [May 2, 2014 TUCP Order] at 7, 8 n.5, 12; Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 2.)</p>	
<p>91. On April 6, 2015, SWRCB issued a TUC Order that: Shifted the salinity compliance point on the Sacramento River to about three miles upstream. (Jennings Decl. at ¶¶ 66, Ex. 28 [April 6, 2015 TUCP Order] at 39.)</p>	
<p>92. On July 3, 2015, SWRCB issued a TUC Order that: Extended the April 6, 2015 TUCP order’s change in salinity compliance location through August 15. (Jennings Decl. at ¶¶ 65, 67, 82, Ex. 29 [July 3, 2015 TUCP] at 2, 26.)</p>	
<p>93. From 2014 to 2016, the TUCP orders amending D-1641 and D-1422 expressly changed the numerical values of Bay-Delta objectives, establishing CVP and SWP operations’ requirements that allowed for increased salinity in direct contravention of the Bay-Delta objectives USBR and DWR are charged with maintaining. The resulting sanctioned noncompliance with adopted Bay-</p>	

<p>1 Delta Plan standards was the same as if the 2 orders had directly amended the Bay-Delta 3 standards themselves. (<i>FPIRG, supra</i>, 386 4 F.3d at 1088-1090; <i>Nw. Environmental</i> 5 <i>Advocates supra</i>, 855 F. Supp. 2d at 1209- 6 1213; Jennings Decl. at ¶¶ 83, 85, Ex. 47 7 [EPA Handbook] § 1.5.1, subd. (4).)</p>	
<p>8 Defendants maintain a pattern and practice of 9 regulating dissolved oxygen as a state standard 10 not bound by CWA requirements.</p>	
<p>11 94. Defendants issued a series of fourteen 12 orders between January 2014 and December 13 2015, largely granting the TUCPs submitted 14 by the DWR and Reclamation. The TUC 15 Orders effectively suspended and relaxed 16 specified water quality objectives from D- 17 1641 and D-1422.</p>	
<p>18 95. On August 4, 2015, SWRCB issued a TUC 19 Order that: Reduced the magnitude of the 20 Stanislaus River dissolved oxygen criteria to 21 5.0 mg/L from 7.0 mg/L through November 22 30, 2015. (Jennings Decl. at ¶¶ 108, 109, 116, 23 Ex. 30 [Aug. 4, 2015 TUCP Order] at 1-2, 12; 24 Jennings Decl. at ¶¶ 49, 68, 71, 89, Ex. 16 25 [Central Valley Plan] at II-8.00, III-5.00.)</p>	
<p>26 96. SWRCB has consistently maintained that 27 the CWA does not require the regulation of 28 what SWRCB terms “flow-caused pollution,” 29 meaning reductions in water quality such as 30 temperature, salinity, outflow, and dissolved 31 oxygen, resulting from alterations in flows 32</p>	

<p>permitted by SWRCB. (Jennings Decl. at ¶ 75, Ex. 44 [RFAs Set One, Responses Two and Three].)</p>	
<p>97. From 2014 to 2016, the TUCP orders amending D-1641 and D-1422 expressly changed the numerical values of Bay-Delta objectives, establishing CVP and SWP operations’ requirements that allowed for increased salinity in direct contravention of the Bay-Delta objectives USBR and DWR are charged with maintaining. The resulting sanctioned noncompliance with adopted Bay-Delta Plan standards was the same as if the orders had directly amended the Bay-Delta standards themselves. (<i>FPIRG, supra</i>, 386 F.3d at 1088-1090; <i>Nw. Environmental Advocates supra</i>, 855 F. Supp. 2d at 1209-1213; Jennings Decl. at ¶¶ 83, 85, Ex. 47 [EPA Handbook] § 1.5.1, subd. (4).)</p>	
<p>Defendants maintain a pattern and practice of regulating temperature as a state standard not bound by CWA requirements.</p>	
<p>98. In recent years SWRCB has approved TMPs that establish the compliance point at Clear Creek, which compresses spawning to a 10-mile reach below Keswick: a 90% reduction of Basin Plan and 83% reduction in Biological Opinion protected spawning habitat. (See, e.g., Jennings Decl. at ¶¶ 72, 87, Ex. 43 [U.S. Bureau of Reclamation, Revised Sacramento River Water Temperature</p>	

<p>1 Management Plan (June 2015)]; Jennings 2 Decl. at ¶¶ 70, 72, 87, Ex. 41 [SWRCB, 3 Approval of the 2015 Sacramento River 4 Temperature Management Plan (July 7, 5 2015)].)</p>	
<p>6 99. SWRCB also approves temperature 7 management plans that have a negative 8 impact on fish and wildlife and result in 9 violations of the Central Valley Basin Plan. 10 (<i>Id.</i>)</p>	
<p>11 100. The Central Valley Basin Plan requires that 12 the Bureau meet a daily average water 13 temperature of 56°F in the Sacramento River 14 at Red Bluff Diversion Dam during periods 15 when higher temperatures will be detrimental 16 to the fishery. (Jennings Decl. at ¶¶ 49, 68, 17 71, 89, Ex. 16 [Central Valley Basin Plan] at 18 III-8.00.)</p>	
<p>19 101. SWRCB approves the yearly Sacramento 20 River Temperature Management Plans 21 (“TMPs”) submitted by the Bureau that shift 22 the temperature criteria compliance point 23 upstream, further restricting the amount of 24 spawning habitat available to salmon. (<i>Id.</i>)</p>	
<p>25 102. In recent years SWRCB has approved 26 TMPs that establish the compliance point at 27 Clear Creek, which compresses spawning to a 28 10 mile reach below Keswick: a 90% 29 reduction of Basin Plan and 83% reduction in 30 Biological Opinion protected spawning 31 habitat. (<i>Id.</i>)</p>	

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

6 104. SWRCB has sanctioned noncompliance
7 with temperature standards adopted in the
8 Central Valley Basin Plan and implemented
9 through WR Order 90-95. (Jennings Decl. at
10 XX, Ex. NNN [Sacramento River
11 Temperature Report Spreadsheet].)

12 105. SWRCB has sanctioned noncompliance
13 with temperature standards adopted in the
14 Central Valley Basin Plan and implemented
15 through WR Order 90-95. (Jennings Decl. Ex.
16 64 [Sacramento River Temperature Report
17 Spreadsheet].)

18 **Issue No. 2:**
19 **Plaintiffs are Entitled to Judgment on their First Cause of Action for Pattern and Practice**
20 **Violations of the Public Trust Doctrine**

21 **Defendants maintain a pattern and practice of**
22 **failing to ensure adequate flows to protect public**
23 **trust fisheries in the Bay-Delta and its tributaries.**

24 106. SWRCB has the authority and affirmative
25 duty to consider the public trust when making
26 water allocation decisions, and to preserve
27 and protect public trust resources that are
28 affected by its decisions. (*Nat. Audubon*
29 *Society v. Super. Ct.* (1983) 33 Cal.3d 419,
30 426, 446-447.)

31 107. SWRCB must “preserve, so far as
32

<p>1 consistent with the public interest, the uses 2 protected by the trust.” (<i>Id.</i>)</p>	
<p>3 108. The SWRCB has permitted and continues to 4 permit releases of dammed waters upon the 5 Sacramento and San Joaquin Rivers, and 6 concomitant diversions from the Bay-Delta 7 watershed by DWR, the Bureau, and other 8 water rights holders, in a manner that is 9 depriving adequate habitat to keep 10 downstream fish populations in good 11 condition. And the SWRCB is aware of this 12 fact. Seeking all documents concerning 13 SWRCB Chairwoman’s admission that 14 “we’ve simply diverted too much water for 15 fish to be able to survive” (Jennings Decl. at 16 ¶ 94, Ex. 22 [Defendants’ Responses to 17 Plaintiffs’ First Set of Special Interrogatories, 18 No. 7].)</p>	
<p>19 109. Defendants issued a series of fourteen 20 orders between January 2014 and December 21 2015, largely granting the TUCPs submitted 22 by the DWR and Reclamation. The TUC 23 Orders effectively suspended and relaxed 24 specified water quality objectives from D- 25 1641 and D-1422. (Jennings Decl. at ¶¶ 60, 26 78, 80, 83, 94, Ex. 23-33.)</p>	
<p>27 110. On January 31, 2014, SWRCB issued a 28 TUC order that: Reduced the flow 29 requirement for the upcoming month to a 30 minimum of only 3,000 cfs—less than half 31 that required by the Bay-Delta Plan. 32</p>	

1 (Jennings Decl. at ¶¶ 60, 78, 80, 83, Ex. 23
2 [Jan. 31, 2014 TUCP Order] at 13; Jennings
3 Decl. at *passim*, Ex. 2 [2006 Bay-Delta Plan]
4 at Tbl. 3 n.11.) Also allowed USBR and
5 DWR to open the gates as frequently as they
6 deemed necessary from February 1 through
7 May 20, in contrast to the Bay-Delta Plan’s
8 requirements that the gates remain closed
9 during that period. (Jennings Decl. at ¶¶ 60,
10 78, 80, 83, Ex. 23 [Jan. 31, 2014 TUCP
11 Order] at 5, 14; Jennings Decl. at *passim*, Ex.
12 2 [2006 Bay-Delta Plan] at Tbl. 3.)

13 111. On April 9, 2014, SWRCB issued a TUC
14 Order that: Extended the reduced flow
15 objectives through April. (Jennings Decl., Ex.
16 24 [April 9, 2014 TUCP Order] at 8.)

17 112. On April 11, 2014, SWRCB issued a TUC
18 Order that: Reduced the base flow criteria to
19 700 cfs through April 14, and 500 cfs from
20 May 15 to May 31, below the monthly
21 average of 710 or 1,140 cfs (depending on the
22 location of the mixing zone, X2) required by
23 the Bay-Delta Plan during “critical” water
24 years such as 2014. (Jennings Decl. at ¶ 62,
25 Ex. 33 [April 11, 2014 TUCP Order] at 3-5,
26 8; Jennings Decl. at *passim*, Ex. 2 [2006 Bay-
27 Delta Plan] at Tbl. 3, n.14.) Also reduced the
28 magnitude and duration of spring pulse flows
29 to 16 days of flow at 3,300 cfs plus 15 days
30 of flow at 1,500 cfs, from the 31-day spring
31 pulse flow of 3,100 or 3,540 cfs (depending
32

<p>1 on X2) required by the Bay-Delta Plan. (<i>Id.</i>)</p>	
<p>2 113. On May 2, 2014, SWRCB issued a TUC 3 Order that: Reduced minimum Delta outflow 4 to a monthly average of 3,000 cfs, despite 5 Bay-Delta Plan’s requirement of 4,000 cfs for 6 May (measured as a 14-day average) and July 7 (measured as a monthly average) during 8 critical water years such as 2014. (Jennings 9 Decl. at ¶ 61, Ex. 25[May 2, 2014 TUCP] at 10 7; Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay- 11 Delta Plan] at Tbl. 3, n.11-12.) Reduced 12 monthly Sacramento River flow criteria from 13 September through November 15 to 2,000 14 cfs, despite Bay-Delta requirements of 3,000 15 cfs in September and October, and 3,500 cfs 16 in November during critical water years. 17 (Jennings Decl. at ¶ 61, Ex. 25 [May 2, 2014 18 TUCP Order] at 8, 12; Jennings Decl. at 19 <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 20 3.)</p>	
<p>21 114. On October 7, 2014, SWRCB issued a TUC 22 Order that: Reduced the magnitude of the 23 October pulse flow criteria to 800 cfs from 24 Bay-Delta Plan requirement of 1000 cfs. 25 (Jennings Decl. at <i>passim</i>, Ex. 2 [2006 Bay- 26 Delta Plan] at Tbl. 3; Jennings Decl. at ¶¶ 64, 27 81, Ex. 26 [Oct. 7, 2014 TUCP Order] at 6, 28 11.)</p>	
<p>29 115. On February 3, 2015, SWRCB issued a 30 TUC Order that: Reduced the magnitude of 31 the minimum Delta outflow from 7,100 cfs 32</p>	

1 down to 4,000 cfs for February and March.
2 (Jennings Decl. at ¶ 27, Ex. 27 [Feb. 3, 2015
3 TUCP Order] at 2, 21; Jennings Decl. at
4 *passim*, Ex. 2 [2006 Bay-Delta Plan] at Tbl.
5 3, n.11.) Reduced the magnitude of the
6 minimum San Joaquin River flow from the
7 critical water year-level of 710 or 1,140 cfs
8 down to 500 cfs for February and March.
9 (Jennings Decl. at ¶ 65, Ex. 27 [Feb. 3, 2015
10 TUCP Order] at 2, 21; Jennings Decl. at
11 *passim*, Ex. 2 [2006 Bay-Delta Plan] at Tbl.
12 3.) Also reduced the DCC gates closure
13 requirement to allow the gates to be opened
14 as frequently in February and March as
15 USBR deemed necessary. (Jennings Decl. at
16 ¶ 65, Ex. 27 [Feb. 3, 2015 TUCP] at 2, 21.)

17 116. On April 6, 2015, SWRCB issued a TUC
18 Order that: Extended the February order's
19 outflow provisions through June, and
20 extended the DCC gates provision through
21 May 20. (Jennings Decl. at ¶ 66, Ex. 28
22 [April 6, 2015 TUCP Order] at 37-39.) Also
23 shifted the San Joaquin River spring pulse
24 flow criteria three weeks earlier and lowered
25 its magnitude to 710 cfs, from 3,110 cfs or
26 3,540 cfs (depending on X2), effectively
27 eliminating it. (Jennings Decl. ¶ 66, Ex. 28
28 [April 6, 2015 TUCP Order] at 27, 37;
29 Jennings Decl. *passim*, Ex. 2 [2006 Bay-Delta
30 Plan] at Tbl. 3, n.14.) Reduced the magnitude
31 of the San Joaquin base flow requirement
32

1 from 710 or 1,140 cfs down to 300 cfs in
2 April and May, and down to 200 cfs in June.
3 (Jennings Decl. ¶ 66, Ex. 28 [April 6, 2015
4 TUCP Order] at 27, 38.) Also shifted the
5 salinity compliance point on the Sacramento
6 River to about three miles upstream. (See *id.*
7 at 39.)

8 117. On July 3, 2015, SWRCB issued a TUC
9 Order that: Extended the April 6, 2015 TUCP
10 order’s change in salinity compliance location
11 through August 15. (Jennings Decl. at ¶¶ 65,
12 67, 82, Ex. 29 [July 3, 2015 TUCP] at 2, 26.)
13 Also reduced the magnitude of the minimum
14 Delta outflow in July from 4,000 cfs to 3,000
15 cfs and reduced the magnitude of the
16 minimum Sacramento River flow from the
17 critical year monthly average of 3,000 cfs in
18 September and October and 3,500 cfs in
19 November to 2,500 cfs for all three months.
20 (*Id.*; see Jennings Decl. *passim.*, Ex. 2 [2006
21 Bay-Delta Plan] at Tbl. 3.)

22 118. On April 19, 2016, SWRCB issued a TUC
23 Order that: Reduced the magnitude of the San
24 Joaquin spring pulse flow from the “dry”
25 water year value of 4,880 cfs to 3,000 cfs.
26 (Jennings Decl. at ¶ 69, Ex. 32 [April 19,
27 2016 TUCP] at 3, 4, 18.) Also reduced the
28 magnitude of the San Joaquin base flow
29 requirement from the dry water year value of
30 2,280 cfs down to 1000 cfs from May 15 to
31 May 31, and down to 500 cfs for June. (*Id.*;
32

<p>Jennings Decl. <i>passim</i>, Ex. 2 [2006 Bay-Delta Plan] at Tbl. 3.)</p>	
<p>119. The SWRCB’s own documents prove it has known since <i>at least</i> the 2010 Flow Report that standards established by the Bay-Delta Plan, Central Valley Basin Plan, D-1641, and WR Order 90-95, have been and are insufficient to protect trust resource interests in fisheries. (Jennings Decl. at ¶¶ 56, 98, 102, 114, Ex. 3 [Flow Criteria Report].)</p>	
<p>120. The Board has published for public review and comment various proposals for revisions to Bay-Delta flow standards in 2011, 2012, and 2016 (following the initiation of this lawsuit) (Jennings Decl. at ¶¶ 103, 107, 110, 117, Ex. 35 [SWRCB, Recirculated Draft: Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary (Sept. 2016)] at ES 66-67); however, SWRCB failed to complete <i>any of these proceedings</i>, resulting in <i>no changes</i> in flow or temperature standards to protect trust fisheries. (Id.)</p>	
<p>121. SWRCB noted in the CWA triennial review that the Bay-Delta Plan should be revised to protect fisheries, yet has failed to do so, and has failed to conduct regular triennial reviews. (Jennings Decl. at ¶ 95, Ex. 20 [SWRCB, Periodic Review of the 2006 Water</p>	

<p>1 Quality Control Plan for the San Francisco 2 Bay/Sacramento-San Joaquin Delta Estuary 3 (2009)] at 19-21; ¶¶ 103, 107, 110, 117, Ex. 4 35 [SWRCB, Recirculated Draft: Substitute 5 Environmental Document in Support of 6 Potential Changes to the Water Quality 7 Control Plan for the San Francisco Bay- 8 Sacramento San Joaquin Delta Estuary (Sept. 9 2016)] at ES-8.)</p>	
<p>10 122. In August 2015, Plaintiff here, CSPA, filed 11 with SWRCB a “COMPLAINT: Against 12 SWRCB and USBR for Violations of Central 13 Valley Basin Plan, WR Order 90-05, Clean 14 Water Act, Endangered Species Act, Public 15 Trust Doctrine and California Constitution,” 16 documenting pattern and practice violations 17 of each, reaching back decades. (Jennings 18 Decl. at 18, 105, Ex. 37 [CSPA, Complaint 19 (Aug. 2, 2015)].) SWRCB has failed to 20 provide any response. (Jennings Decl. at ¶ 18, 21 105.)</p>	
<p>22 123. And in August 2016, three environmental 23 organizations jointly filed a petition for 24 emergency rulemaking to protect public trust 25 resources. (Jennings Decl. at 106, Ex. 38 26 [Defenders of Wildlife, the Natural Resources 27 Defense Council, and The Bay Institute, 28 Request for Emergency Regulations to 29 Comply with Public Trust Obligation to 30 Prevent Extinction for Delta Smelt (Aug. 9, 31 2016)].) SWRCB denied this petition on the 32</p>	

1 basis that “further review” of the science and
2 feasibility of the requested measures was
3 required. (Jennings Decl. at ¶ 106, Ex. 39
4 [SWRCB Response to TBI et al. (Sept. 8,
5 2016)].)

6 **Defendants maintain a pattern and practice of**
7 **failing to meaningfully balance public trust**
8 **fisheries in the Bay-Delta and its tributaries in the**
9 **public interest.**

10 124. Most recently, approximately one year after
11 Plaintiffs initiated this lawsuit, SWRCB
12 released the SED evaluating new flow
13 standards for the San Joaquin River and
14 South Delta Water Quality, and proposing
15 limits significantly less stringent than those
16 recommended by the 2010 Flow Report, yet
17 the SED makes no statement or explanation
18 of the method Board staff employed or that it
19 recommends that the Board employ to
20 balance the public trust resources. (Jennings
21 Decl. at ¶¶ 103, 107, 110, 117, Ex. 35
22 [SWRCB, Recirculated Draft: Substitute
23 Environmental Document in Support of
24 Potential Changes to the Water Quality
25 Control Plan for the San Francisco Bay-
26 Sacramento San Joaquin Delta Estuary (Sept.
27 2016)] Ch. 2, 7, 19; Jennings Decl. at ¶¶ 107,
28 110, 117, Ex. 40 [CSPA Comments to SED]
29 at 2-4.)

30 125. SWRCB’s statements supporting its TUC
31 Orders that, “[u]nder the public trust doctrine,
32

1 the Board has considerable discretion to
2 balance competing demands for water to
3 protect fish and wildlife and to serve
4 municipal, industrial, and agricultural uses,”
5 bears out the degree to which SWRCB
6 misapprehends its public trust doctrine duties.
7 (Jennings Decl. ¶¶ 108, 109, 116, Exhibit 31
8 [December 15, TUCP Order].)

9 126. During the TUC proceedings, for
10 example, Plaintiffs here:
11 faulted the TUCP Orders for failing to
12 balance water supplies for low value
13 crops like pasture and alfalfa with
14 critically depressed public trust
15 resources hovering on the brink of
16 extinction. Petitioners argued that the
17 balancing of competing demands
18 effectuated by the TUCP Orders was
19 invalid because it was not supported
20 by detailed information concerning
21 which crops provide important
22 employment and economic benefits,
23 and which crops do not, how much
24 water was reasonably required to meet
25 demands for agricultural, municipal,
26 and industrial uses, how much water
27 was needed to meet health and safety
28 needs, and whether the Project
29 supplies had been managed properly
30 or not. Similarly, petitioners argued
31 that the use of water for flood
32 irrigation in the Sacramento Valley
and irrigation of drainage impaired
lands in the western San Joaquin
Valley was unreasonable during the
drought.
(Jennings Decl. at ¶¶ 108, 109, 116, Ex 31 [Dec. 15,
2015 TUCP Order] at 50-51.)

127. The Board has argued that:

1 Given the exigencies of the drought, it was
2 not possible during the TUCP proceeding to
3 conduct a detailed analysis of the
4 reasonableness of particular agricultural
5 practices, taking into consideration the
6 relative values and impacts of particular
7 agricultural uses, different contractual
8 priorities, and all other relevant factors.
9 Similarly, we disagree with the argument that
10 more detailed information concerning the
11 economic value of crops and reasonable water
12 demands for agricultural, municipal, and
13 industrial purposes was necessary in order to
14 balance competing demands for purposes of
15 acting on the TUCP. (Id.)

16 128. SWRCB’s September 2016 SED—issued
17 six years following the 2010 Flow Report—
18 also fails to include any express analysis or
19 any substantive information supporting any
20 such analysis regarding the costs, benefits,
21 and alternatives to both fisheries and other
22 affected beneficial uses, when proposing new
23 flow standards. (Jennings Decl. at ¶¶ 103,
24 107, 110, 117, Ex. 35 [SWRCB, Recirculated
25 Draft: Substitute Environmental Document in
26 Support of Potential Changes to the Water
27 Quality Control Plan for the San Francisco
28 Bay-Sacramento San Joaquin Delta Estuary
29 (Sept. 2016)] Ch. 2, 7, 19; Jennings Decl. at
30 ¶¶ 107, 110, 117, Ex. 40 [CSPA Comments to
31 SED] at 2-4.)

Defendants maintain a pattern and practice of failing to keep fish downstream of dams in the Bay-Delta and its tributaries in good condition.

129. In adopting Water Rights Decision 1631, SWRCB stated:

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

(Jennings Decl. at ¶ 111, 112, 113, Ex. 48 [WRD-1631] at 12.) Accordingly, SWRCB *first* ensured that minimum flow standards would be required to keep fish downstream of dams in good conditions. (*Id.* at 12, 21, 33 [e.g., “Based on the evidence presented we conclude that the following flows below the Lee Vining conduit diversion facility will maintain fish in good condition pursuant to Fish and Game Code Section 5937 and that the specified flows are needed to reestablish and maintain a fishery.”])

130. If not required by SWRCB, sufficient flows may be ordered by the court. (Jennings Decl. Ex. 48 [WRD-1631] at 9, citing *Cal. Trout II* at 221, 266 [court “left determination of the precise long-term flow rates to SWRCB and assigned the task of setting interim flow requirements to the Superior Court.”].)

1 131. WRD-1631 provided no balancing of
2 competing interests before implementing flow
3 requirements necessary to keep fish in good
4 condition. (*Id.*; see also Jennings Decl. at XX;
5 Ex. GGG [Koehler, C.J., *Water Rights and*
6 *the Public Trust Doctrine: Resolution of the*
7 *Mono Lake Controversy*, 22 Ecology Law
8 Quarterly (1995) 451] at 574, fn. 204 [“Flows
9 required under section 5937 are not subject to
10 National Audubon’s public trust integration
11 requirements.”].)

12 132. After the Legislature passed the Delta
13 Reform Act of 2009, which required the
14 Board to develop new flow criteria to protect
15 public trust interests in fisheries, the Board
16 issued a 2010 Delta Flow Criteria Report,
17 which developed new flow criteria for the
18 Delta ecosystem necessary to protect public
19 trust resources. (Jennings Decl. at ¶¶ 56, 98,
20 102, 114, Ex. 3.) These criteria were intended
21 to halt population decline and increase
22 populations of certain species and represented
23 the best available fishery and hydrologic
24 science to be had in 2010. (*Id.* at p. 5.)

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

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

(*Id.*; Jennings Decl. Ex. 60.)

134. SWRCB has also justified its lowering of water quality standards *below* standards

1 prescribed by the 2006 Basin Plan, D-1641,
2 and WR Order 90-05—standards already
3 proven by the 2010 Delta Flow Criteria
4 Report to be inadequate to protect trust
5 fisheries—arguing simply that “[u]nder the
6 public trust doctrine, the Board has
7 considerable discretion to balance competing
8 demands for water to protect fish and wildlife
9 and to serve municipal, industrial, and
10 agricultural uses.” (E.g., Jennings Decl. at
11 ¶¶ 108, 109, 116, Exhibit 31.)

12 135. Most recently, SWRCB has released a
13 “Substitute Environmental Document” in
14 support of potential changes to San Joaquin
15 River flow and southern Delta water quality
16 objectives and program of implementation
17 included in the *Water Quality Control Plan*
18 *for the San Francisco Bay/Sacramento-San*
19 *Joaquin Delta Estuary* (Bay-Delta Plan).
20 (Jennings Decl. at ¶¶ 103, 107, 110, 117, Ex.
21 35 [SWRCB, Recirculated Draft: Substitute
22 Environmental Document in Support of
23 Potential Changes to the Water Quality
24 Control Plan for the San Francisco Bay-
25 Sacramento San Joaquin Delta Estuary (Sept.
26 2016)] Ch. 2, 7, 19; Jennings Decl. at ¶¶ 107,
27 110, 117, Ex. 40 [CSPA Comments to SED]
28 at 2-4.) The proposal, again, fails to
29 implement the flow criteria recommended by
30 the 2010 report as necessary to keep public
31 trust fish populations in good condition. As
32

1 succinctly described by SWRCB’s staff
2 presentation:

3 This is Hard, Requires Balancing

- 4 • State Water Board’s 2010 flow
5 criteria report – a purely technical
6 assessment and no balancing –
7 concluded that 60 percent of flow
8 should be left in the LSJR for the
9 benefit of fish
10 • Current uses (agriculture, drinking
11 water) rely on up to 80 percent or
12 more of the unimpaired flow
13 • Unlike the 2010 report, this staff
14 proposal considers other uses and
15 aims to strike a balance among
16 competing uses of water
17 • The staff proposal recommends a
18 range of between 30 and 50 percent of
19 unimpaired flow, with a starting point
20 of 40 percent – this is a big increase
21 • This is less than what environmental
22 and commercial fishing interests
23 favor, and more than agricultural and
24 affected urban users want
25 • Balancing is hard, but is what we are
26 called upon to do
27 • Because it is hard, State Water
28 Board has a long history of
29 encouraging settlements

30 (Jennings Decl. Ex. 61 [State Water
31 Resources Control Board, Bay-Delta Water
32 Quality Control Plan Update: San Joaquin
River Flow and Salinity Objectives (Oct. 4,
2016)].)

33 **Issue No. 3:**

34 **Plaintiffs Have Standing to Bring this Action**

35 136. Vlamis Decl.

36 137. Jennings Decl. ¶¶ 1-15.

1 **SWRCB’s Duties**

2 138. The state’s navigable waterways are owned
3 and held in trust by the state for the benefit of
4 the people of the state, and “title to and
5 property in the fish within the waters of the
6 state are vested in the state of California and
7 held by it in trust for the people of the state
8 [citations].” (*People v. Monterey Fish*
9 *Products Co.* (1925) 195 Cal. 548, 563;
10 *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-
11 260.)

12 139. SWRCB has the authority and affirmative
13 duty to consider the public trust when making
14 water allocation decisions, and to preserve
15 and protect public trust resources that are
16 affected by its decisions. (*Nat. Audubon,*
17 *supra*, 33 Cal.3d at 426, 446-447.)

18 140. SWRCB must “preserve, so far as
19 consistent with the public interest, the uses
20 protected by the trust.” (*Id.*)

21 141. Because this duty is ongoing, SWRCB is
22 not confined by past allocation decisions that
23 may be incorrect in light of new knowledge
24 or needs: SWRCB has responsibility to
25 reconsider past allocation decisions, even
26 those “made after due consideration of their
27 effect on the public trust.” (*Id.* at 447.)

28 142. The public trust doctrine imposes a
29 “significant limitation on water rights”
30 (*United States v. State Water Resources*
31 *Control Board* (1986) 182 Cal.App.3d 82,
32

<p>1 106), such that “[p]arties acquiring rights in 2 trust property generally hold those rights 3 subject to the trust, and can assert no vested 4 right to use those rights in a manner harmful 5 to the trust” (<i>Nat. Audubon, supra</i>, 33 Cal.3d 6 at 437, 440, 445, 452).</p>	
<p>7 143. Similarly, “the grant of the right to erect a 8 dam” must “be construed to be under the 9 implied condition to keep open the 10 fishways.” (<i>People v. Glenn-Colusa</i> 11 <i>Irrigation District</i> (1932) 127 Cal.App. 30, 12 36-37.)</p>	
<p>13 144. The public trust mandate of Fish and Game 14 Code 5937 is clear: fish downstream of dams 15 <i>must</i> be kept in good condition, and 16 jurisprudence on this point is equally 17 unequivocal. (<i>Cal. Trout I, supra</i>, 207 18 Cal.App.3d at 631 [“The Legislature, not the 19 Water Board, is the superior voice in the 20 articulation of public policy concerning the 21 reasonableness of water allocation,” and “the 22 Water Board has no authority to disregard 23 it.”].)</p>	
<p>24 145. In general, when “determining whether it is 25 ‘feasible’ to protect public trust values like 26 fish and wildlife in a particular instance, the 27 Board must determine whether protection of 28 those values, or what level of protection, is 29 ‘consistent with the public interest.’” (<i>State</i> 30 <i>Water Resources Control Board Cases</i>, 31 (2006) 136 Cal.App.4th 674, 778.)</p>	

<p>1 146. “Any action which will adversely affect 2 traditional public rights in trust lands is a 3 matter of general public interest and should 4 therefore be made only if there has been full 5 consideration of the state’s public interest in 6 the matter.” (<i>San Francisco Baykeeper, Inc.,</i> 7 <i>supra</i>, 242 Cal.App.4th at p. 234.)</p>	
<p>8 147. The State is free to choose among 9 competing public trust uses, even to the 10 complete detriment of another public trust 11 use, as advancement of any public trust use is 12 consistent with the purpose of the trust. 13 (<i>Coburg, Citizens for Eastshore Parks.</i>)</p>	
<p>14 148. However, the State is not free to completely 15 ignore or destroy trust resources in favor of 16 non-trust uses, even legitimate public 17 interests such as agricultural and municipal 18 supply. (<i>Id., Center for Biological Diversity,</i> 19 <i>supra</i>, 166 Cal.App.4th at p. 1366; <i>Nat.</i> 20 <i>Audubon, supra</i>, 33 Cal.3d at 446-447.)</p>	
<p>21 149. Fish and Game Code “section 5937 is a 22 legislative expression of the public trust 23 protecting fish as trust resources when found 24 below dams.” (<i>Cal. Trout I, supra</i>, 207 25 Cal.App.3d at 626.)</p>	
<p>26 150. “Compulsory compliance with a rule 27 requiring the release of sufficient water to 28 keep fish alive necessarily limits the water 29 available for appropriation for other uses. 30 Where that effects a reduction in the amount 31 that otherwise might be appropriated, [section 32</p>	

<p>1 5937] operates as a legislative choice among 2 competing uses of water.” (<i>Id.</i> at 601.)</p>	
<p>3 151. “[T]he Legislature has already balanced the 4 competing claims for water . . . and 5 determined to give priority to the preservation 6 of their fisheries.” (<i>NRDC v. Patterson</i> (E.D. 7 Cal. 2004) 333 F.Supp.2d 906, 918, <i>citing</i> 8 <i>Cal Trout II, supra</i>, 218 Cal.App.3d at 201.)</p>	
<p>9 152. Thus, the Court can look to section 5937 to 10 determine the scope of SWRCB’s public trust 11 duties. (<i>Environmental Protection</i> 12 <i>Information Center v. Cal. Department of</i> 13 <i>Forestry and Fire Protection</i> (2008) 44 14 Cal.4th 459, 515 [explaining the overlap 15 between common law and statutory public 16 trust duties].)</p>	
<p>17 153. To comply fully with section 5937, enough 18 water must be released “to restore the historic 19 fishery.” (<i>Cal. Trout II, supra</i>, 218 20 Cal.App.3d at 210; see also <i>Patterson, supra</i>, 21 333 F.Supp.2d at 924, 925 [violation of 5937 22 where “the historic fish populations have 23 been destroyed”].)</p>	
<p>24 154. SWRCB has an ongoing responsibility to 25 reconsider past allocation decisions that may 26 be incorrect in light of new knowledge or 27 needs—even those “made after due 28 consideration of their effect on the public 29 trust.” (<i>Nat. Audubon, supra</i>, 33 Cal.3d at 30 447.)</p>	
<p>31 155. The public trust doctrine imposes a 32</p>	

<p>1 “significant limitation on water rights” 2 (<i>United States v. State Water Resources</i> 3 <i>Control Bd.</i> (1986) 182 Cal.App.3d 82, 4 106), such that “[p]arties acquiring rights in 5 trust property generally hold those rights 6 subject to the trust, and can assert no vested 7 right to use those rights in a manner harmful 8 to the trust” (<i>Nat. Audubon, supra</i>, 33 Cal.3d 9 at 437, 440, 445, 452.)</p>	
<p>10 156. The CWA requires each State, subject to 11 federal approval, to prepare water quality 12 control plans that include water quality 13 standards, “designated uses” for each state 14 waterway, and water quality criteria 15 necessary to protect those uses. (33 U.S.C., 16 § 1313, subds. (a), (c)(2)(A).)</p>	
<p>17 157. Standards must also include an anti- 18 degradation policy that, at a minimum, 19 maintains “[e]xisting instream water uses . . . 20 and the level of water quality necessary to 21 protect the existing uses.” (<i>Id.</i> §§ 1311, subd. 22 (b)(1)(C), 1313, subd. (d)(4)(B); 40 C.F.R., 23 § 131.12, subd. (a)(1)).</p>	
<p>24 158. A state may not revise any adopted water 25 quality standard without submission to and 26 approval by EPA to ensure that the selected 27 water quality criteria sufficiently protect each 28 waterway’s designated uses. (33 U.S.C., 29 § 1313, subds. (c)(2)(A), (3); 40 C.F.R., 30 §§ 131.5, 131.6.)</p>	
<p>31 159. Finally, “every state water pollution control 32</p>	

1 agency must conduct a triennial review of its
2 water quality standards and submit proposed
3 revisions to the Environmental Protection
4 Agency for approval.” (*United States v. State*
5 *Water Resources Control Bd.*, 182
6 Cal.App.3d 82, 108, citing 33 U.S.C., § 1313,
7 subd. (c)(1).)

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9 Respectfully submitted,

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