

1 Jason R. Flanders (SBN 238007)
AQUA TERRA AERIS LAW GROUP
2 409 45th Street
Oakland, CA 94609
3 Phone: 916-202-3018
4 Email: jrf@atalawgroup.com

5 Michael B. Jackson (SBN 53808)
P.O. Box 207
6 75 Court Street
Quincy, CA 95971
7 Phone: 530-283-1007
8 Email: mjatty@sbcglobal.net

9 *Attorneys for Plaintiffs AquAlliance,*
California Sportfishing Protection Alliance, and
10 *California Water Impact Network*

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

13
14 CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE; CALIFORNIA
15 WATER IMPACT NETWORK;
AQUALLIANCE,

16
17 Plaintiffs,

18 v.

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

22 Defendants,

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

25 Real Parties in Interest.

Case No. RG 15780498

SECOND AMENDED VERIFIED
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(Cal. Code Civ. Proc. §§ 526, 1060; Public
Trust Doctrine)

Hayward Hall of Justice
Department 511

26
27
28

1 Plaintiffs California Sportfishing Protection Alliance, California Water Impact Network,
2 and AquAlliance (collectively “Plaintiffs”) hereby allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs seek declaratory and injunctive relief invalidating the State Water
5 Resources Control Board’s (“SWRCB”), and its Executive Director’s, long-standing illegal
6 pattern and practice of waiving, relaxing, suspending, contradicting, or otherwise rejecting and
7 ignoring their duty to, at all times, regulate water pollution in the state of California in a manner
8 consistent with water quality standards established under and required by the Clean Water Act
9 (“CWA”), 33. U.S.C. § 1251 et. seq., and state law implementing the CWA; and in violation of the
10 common law Public Trust Doctrine.

11 2. Plaintiffs seek this declaratory and injunctive relief to prevent the demise of
12 threatened, endangered, and critically imperiled aquatic species, including but not limited to
13 striped bass, Delta smelt, longfin smelt, American shad, splittail and threadfin shad, Sacramento
14 winter-run Chinook salmon and spring-run Chinook, each of which faces imminent jeopardy of
15 extinction as a direct result of the approval of the SWRCB’s pattern and practice of weakening
16 water quality standard protections adopted for the benefit of these species, and the SWRCB’s
17 pattern and practice of abrogating its Public Trust duties to conserve these trust resources.

18 **PARTIES**

19 3. CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (“CSPA”) is a
20 California non-profit public benefit organization with its principal place of business in Stockton,
21 California. CSPA’s organizational purpose is the protection, preservation, and enhancement of
22 fisheries and associated aquatic and riparian ecosystems of California’s waterways, including
23 Central Valley rivers leading into the Bay-Delta. This mission is implemented through active
24 participation in water rights and water quality processes, education and organization of the fishing
25 community, restoration efforts, and vigorous enforcement of environmental laws enacted to
26 protect fisheries, habitat and water quality. Members of CSPA reside along the Central Valley
27 watershed and in the Bay-Delta where they view, enjoy, and routinely use the Delta ecosystem for
28 boating, fishing, and wildlife viewing. CSPA’s members derive significant and ongoing use and

1 enjoyment from the aesthetic, recreational, and conservation benefits of the Bay-Delta
2 ecosystem. CSPA and its members have been involved in the administrative proceedings that
3 have been provided to date for the successive Temporary Urgency Change (“TUC”) Orders, and
4 temperature standard modifications, each discussed, below, including attending meetings and
5 providing written and oral comments.

6 4. CALIFORNIA WATER IMPACT NETWORK (“C-WIN”) is a California non-
7 profit public benefit organization with its principal place of business in Santa Barbara, California.
8 C-WIN’s organization purpose is the protection and restoration of fish and wildlife resources,
9 scenery, water quality, recreational opportunities, agricultural uses, and other natural
10 environmental resources and uses of the rivers and streams of California, including the Bay-Delta,
11 its watershed and its underlying groundwater resources. C-WIN has members who reside in, use,
12 and enjoy the Bay-Delta and inhabit and use its watershed. They use the rivers of the Central
13 Valley and the Bay-Delta for nature study, recreation, and aesthetic enjoyment. C-WIN and its
14 members have been involved in the administrative proceedings that have been provided to date for
15 the TUC Orders, and temperature standard modifications, each discussed, below, including
16 attending meetings and providing written and oral comments.

17 5. AQUALLIANCE (“AquAlliance”) is a California public benefit corporation
18 organized to protect Northern California’s waters to sustain family farms, recreational
19 opportunities, vernal pools, creeks, rivers, and the Bay-Delta estuary. AquAlliance has members
20 who regularly use the waters of the Delta and its tributaries for recreation, including kayaking,
21 paddling, fishing, and wildlife viewing. AquAlliance members also routinely participate in
22 conservation activities in and around the Bay-Delta estuary and its tributary vernal pools, creeks,
23 and rivers. AquAlliance and its members have been involved in the administrative proceedings
24 that have been provided to date for the TUC Orders, and temperature standard modifications, each
25 discussed, below, including attending meetings and providing written and oral comments.

26 6. Defendant CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
27 (“SWRCB”) is a state agency created under the laws and regulations of the State of California to
28 regulate water quality within the State of California. Defendant Thomas Howard is the Executive

1 Director of the SWRCB. Mr. Howard, in his capacity as Executive Director is the official that has
2 issued successive TUC Orders relaxing water quality requirements. The Executive Director,
3 among other duties, is responsible for reviewing and approving TUC Petitions, and requested
4 temperature standard modifications, and temperature management plans. When requested, the
5 SWRCB has authority to review and approve or disapprove, in whole or in part, these decisions of
6 the Executive Director.

7 7. Real Party in Interest CALIFORNIA DEPARTMENT OF WATER RESOURCES
8 (“DWR”) is a state agency created under the laws and regulations of the State of California. DWR
9 operates the State Water Project in tandem with the federal Central Valley Project and jointly
10 requested, with the Bureau, the TUC Orders, temperature standard modifications, and temperature
11 management plans, in part giving rise to the evidence of SWRCB’s illegal pattern and practice
12 policies in this action.

13 8. Real Party in Interest UNITED STATES BUREAU OF RECLAMATION
14 (“Bureau”) is a subdivision of the Department of the Interior, an agency of the United States of
15 America, operates the federal Central Valley Project, and jointly requested, with DWR, the TUC
16 Orders, temperature standard modifications, and temperature management plans, in part giving
17 rise to the evidence of SWRCB’s illegal pattern and practice policies in this action.

18 9. The true names and capacities, whether individual, corporate, associate,
19 conspirator, partner or alter-ego of those Defendants sued herein under the fictitious names of
20 DOES 1 through 100, inclusive, are not known to Plaintiffs, who therefore sue those Defendants
21 by such fictitious names. Plaintiffs will ask leave of court to amend this Complaint and insert the
22 true names and capacities of these defendants and respondents when the same have been
23 ascertained. Plaintiffs are informed and believe and on that basis allege, that each of the
24 Defendants designated herein as a DOE defendant and respondent is legally responsible in some
25 manner for the events and happenings alleged in this Complaint, and that Plaintiffs’ alleged
26 injuries were proximately caused by the defendants’ conduct.

27 10. The true names and capacities, whether individual, corporate, associate,
28 conspirator, partner or alter-ego of those Real Parties in Interest sued herein under the fictitious

1 names of DOES 101 through 200, inclusive, are not known to Plaintiffs, who therefore name those
2 Real Parties in Interest by such fictitious names. Plaintiffs will ask leave of court to amend this
3 Complaint and insert the true names and capacities of these Real Parties in Interest when the same
4 -have been ascertained.

5 LEGAL FRAMEWORK

6 THE FEDERAL CLEAN WATER ACT AND PORTER-COLOGNE

7 11. The Federal Water Pollution Control Act, commonly known as the Clean Water
8 Act ("CWA"), 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, is a comprehensive water
9 quality statute designed to "restore and maintain the chemical, physical, and biological integrity of
10 the Nation's waters." § 1251(a). The CWA also seeks to attain "water quality which provides for
11 the protection and propagation of fish, shellfish, and wildlife." § 1251(a)(2).

12 12. The CWA commands the states to prepare water quality control plans and to review
13 them periodically. 33 U.S.C. § 1313(a), (c)(1).

14 13. California implements the Clean Water Act through the Porter-Cologne Act
15 Wat.Code, § 13000 *et seq.* Under the Porter-Cologne Act, nine regional boards regulate the quality
16 of waters within their regions under the purview of the State Board. Wat.Code, §§ 13000, 13100,
17 13200, 13241, 13242.

18 14. California Water Code § 13160 provides that "[t]he state board is designated as the
19 state water pollution control agency for all purposes stated in the Federal Water Pollution Control
20 Act and any other federal act, heretofore or hereafter enacted, and is . . . authorized to exercise any
21 powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et*
22 *seq.*) and acts amendatory thereto."

23 15. The CWA, in turn, provides that "[t]he term 'State water pollution control agency'
24 means the State agency designated by the Governor having responsibility for enforcing State laws
25 relating to the abatement of pollution" (33 U.S.C. § 1362(1)), and defines "pollution" as "the man-
26 made or man-induced alteration of the chemical, physical, biological, and radiological integrity of
27 water" (33 U.S.C. § 1362(19)).

1 16. Regional boards must formulate and adopt water quality control plans, commonly
2 called basin plans, which designate the beneficial uses to be protected, water quality objectives
3 and a program to meet the objectives. Wat.Code, §§ 13050, subd. (j), 13240.

4 17. In addition, “[t]he state board may adopt water quality control plans . . . for waters
5 for which water quality standards are required by the Federal Water Pollution Control Act”
6 Wat. Code § 13170.

7 18. Water Code section 13247 requires that state agencies comply with adopted water
8 quality control plans, unless otherwise directed or authorized by statute.

9 19. The CWA requires adoption of water quality standards that “shall consist of the
10 designated uses of the navigable waters involved and the water quality criteria for such waters
11 based upon such uses.” CWA § 303(c)(2)(A); Wat. Code § 13050, subd. (h).

12 20. The standards must include: designated uses, such as recreation, navigation or the
13 propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated
14 uses; and an anti-degradation policy. 40 C.F.R. §§ 131.6, 131.10-131.12.

15 21. State water quality standards included in state water quality control plans are
16 subject to EPA review and approval.

17 22. In order to approve a state’s water quality criteria, EPA must determine that the
18 state has adopted “water quality criteria sufficient to protect the designated uses.” 40 CFR
19 131.6(c). “For waters with multiple use designations, the criteria shall support the most sensitive
20 use.” 40 CFR 131.11(a)(1). “Such criteria must be based on sound scientific rationale and must
21 contain sufficient parameters or constituents to protect the designated use.” 40 CFR § 131.11.

22 23. State water quality standards must also include an antidegradation policy.

23 24. Federal regulations provide that, at a minimum, a state’s antidegradation policy
24 must maintain “[e]xisting instream water uses [those existing in the waterbody at any time on or
25 after November 28, 1975] and the level of water quality necessary to protect the existing uses.” 40
26 CFR 131.12(a)(1).

27 25. California’s antidegradation policy is contained in SWRCB Resolution No. 68-16,
28 and requires that high quality water be maintained, consistent with applicable policy prescriptions.

1 26. SWRCB Resolution No. 68-16 further provides that, “[i]n implementing this
2 policy, the Secretary of the Interior will be kept advised and will be provided with such
3 information as he will need to discharge his responsibilities under the Federal Water Pollution
4 Control Act.”

5 27. Water quality "standards serve the dual purposes of establishing the water quality
6 goals for a specific water body and serving as the regulatory basis for establishment of water
7 quality-based treatment controls and strategies beyond the technology-based level of treatment
8 required. . . ." 40 C.F.R. § 130.3.

9 28. Water quality standards reflect a state's designated uses for a water body and do not
10 depend in any way upon the source of pollution. *See* § 303(a)-(c); *Pronsolino v. Nastri*, 291 F.3d
11 1123, 1137 (9th Cir. 2002).

12 29. CWA § 319(b) requires that “[t]he Governor of each State . . . shall . . . prepare and
13 submit to the [EPA] Administrator for approval a management program which such State proposes
14 to implement . . . for controlling pollution added from nonpoint sources to the navigable waters
15 within the State and improving the quality of such waters.”

16 30. The California Water Code, in turn, states that “[t]he state board . . . shall prepare a
17 detailed program for the purpose of implementing the state’s nonpoint source management plan.
18 The board shall address all applicable provisions of the Clean Water Act, including Section 319
19 (33 U.S.C. Sec. 1329).” Wat.Code § 13369.

20 31. On May 20, 2004, the SWRCB adopted Resolution No 2004-0030, adopting the
21 Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control
22 Program in accordance with California Water Code section 13369.

23 32. Resolution No 2004-0030 provides that “[t] he NPS Program Plan was developed .
24 . . to meet the requirements of . . . section 319 of the Clean Water Act.”

25 33. “A nonpoint source (NPS) pollution control implementation program is a program
26 developed to comply with,” among other things, “basin plan prohibitions. . . . A NPS control
27 implementation program's purpose must be explicitly stated, and must be designed to achieve and
28

1 maintain water quality objectives and beneficial uses, including any applicable antidegradation
2 requirements.” 23 Cal. Code Regs. § 2915.

3 34. In 2014, the SWRCB submitted, and in 2015, EPA approved, California’s current
4 Nonpoint Source Implementation Plan, as required by CWA § 319(b).

5 35. To meet all applicable requirements of the CWA, including those of CWA section
6 319, California’s current Nonpoint Source Implementation Plan expressly relies upon “[t]he Bay-
7 Delta Plan [to] protect[] water quality in the region and include[] water quality objectives to
8 protect municipal and industrial, agricultural, and fish and wildlife beneficial uses.”

9 36. California has thus expressly committed to complying with Bay-Delta Plan
10 standards by and through its implementation of its nonpoint source program.

11 37. In aquatic ecosystems, the regulation, timing, volume, withdrawal, and return of
12 water flows often are critical factors in determining the water quality condition of aquatic habitats,
13 particularly in arid, low-flow areas.

14 38. The United States Supreme Court has thus held that the CWA allows for minimum
15 stream flow requirements from nonpoint sources of pollution to protect water quality standards,
16 even where said requirement may have an incidental effect upon water supply. *P.U.D. No. 1 of
17 Jefferson City, and City of Tacoma v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994).

18 39. A fair reading of the statute as a whole makes clear that, where both the state's
19 interest in allocating water and the federal government's interest in protecting the environment are
20 implicated, Congress intended an accommodation.

21 40. While it is true that CWA sections 101(g) and 510(2) preserve the authority of each
22 State to allocate water quantity as between users; they do not limit the scope of water pollution
23 controls that may be imposed on users who have obtained, pursuant to state law, a water
24 allocation. *P.U.D. No. 1 of Jefferson City, supra*, 511 U.S. at 720.

25 41. The CWA itself recognizes that reduced stream flow, *i. e.*, diminishment of water
26 quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or
27 man induced alteration of the chemical, physical, biological, and radiological integrity of water"
28 encompasses the effects of reduced water quantity. 33 U. S. C. § 1362(19). This broad conception
of pollution belies any artificial distinction between the regulation of water "quantity" and water

1 "quality." Moreover, § 304 of the CWA expressly recognizes that water "pollution" may result
2 from "changes in the movement, flow, or circulation of any navigable waters. . . , including
3 changes caused by the construction of dams." 33 U. S. C. § 1314(f).

4 42. This concern with the flowage effects of dams and other diversions is also
5 embodied in the EPA regulations, which expressly require existing dams and other diversions to
6 be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

7 43. In addition, section 313 of the CWA requires federal facilities to comply with state
8 water quality controls. 33 U.S.C. § 1323(a).

9 44. Thus, both State and Federal law provide Defendants with the responsibility and
10 authority to protect the designated uses of a waterbody regardless of whether a source of
11 degradation of said water comes from point sources or nonpoint sources.

12 45. The federal CWA, by and through the Supremacy Clause of the U.S. Constitution,
13 preempts state regulation of water quality in waters of the United States.

14 46. The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, invalidates
15 state laws that interfere with, or are contrary to, federal law.

16 47. CWA § 510 provides that, "if an effluent limitation, or other limitation, effluent
17 standard, prohibition, pretreatment standard, or standard of performance is in effect under this
18 chapter, such State or political subdivision or interstate agency may not adopt or enforce any
19 effluent limitation or other limitation, effluent standard, or standard of performance which is less
20 stringent than the effluent limitation, or other limitation, effluent standard, prohibition,
21 pretreatment standard, or standard of performance under this chapter."

22 48. State water quality standards adopted pursuant to CWA § 303 are among the "other
23 limitations" with which a State may not adopt or enforce any other limitation which is less
24 stringent than the water quality standard adopted.

25 49. In 2005, the California Supreme Court held that, "[t]o comport with the principles
26 of federal supremacy, California law cannot authorize this state's regional boards to allow the
27 discharge of pollutants into the navigable waters of the United States in concentrations that would
28 exceed the mandates of federal law," reasoning that, "under the federal Constitution's supremacy

1 clause (art. VI), a state law that conflicts with federal law is without effect.” *City of Burbank v.*
2 *State Water Res Control Bd.* (2005) 35 Cal.4th 613, 626. “Nothing in the federal Clean Water Act
3 suggests that a state is free to disregard or to weaken the federal requirements for clean water . . .
4 .” *Id.* at 627.

5 50. Similarly, in *Int’l Paper Co. v. Ouellette*, the U.S. Supreme Court explained that:
6 “Congress intended [CWA] to establish an all-encompassing program of water pollution
7 regulation. . . . [C]ongressional views on the comprehensive nature of the legislation were
8 practically universal. . . .” 479 U.S. 481, 493-494 (1987).

9 THE BAY-DELTA WATER QUALITY CONTROL PLAN AND D-1641

10 51. In 1995, and as subsequently revised through 2006, the SWRCB adopted the
11 “Water Quality Control Plan for the San Francisco Bay-San Joaquin Delta Estuary” (“Bay-Delta
12 Plan”).

13 52. The Bay-Delta Plan states it was adopted “in accordance with Water Code section
14 13170.”

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

24 54. Accordingly, EPA has taken the position that the State’s Bay-Delta Plan’s water
25 quality objectives for temperature, EC, flow, salinity, and other pollutants, are required by, and are
26 sufficient to meet and constitute, federal standards.

27
28

1 55. Indeed, based on the Bay-Delta Plan’s inclusion of such standards, the U.S. EPA,
2 upon approving the Bay-Delta Plan, committed to repealing its regulations at 40 C.F.R. 131.37,
3 containing parallel standards necessary to ensure compliance with the CWA.

4 56. The 1995 Bay-Delta Plan, pp. 10-11, states, “To the extent that this plan addresses
5 matters outside the scope of the Clean Water Act, this plan will be provided to the USEPA for its
6 consideration as a matter of State/federal comity. . . . [T]he objectives and beneficial uses in this
7 plan that are water quality standards within the meaning of the Clean Water Act will be
8 California’s water quality standards for purposes of the Clean Water Act.” “Even though the
9 SWRCB will submit this plan to the USEPA for approval, the SWRCB does not concede that it is
10 required under the Clean Water Act to submit all parts of this plan to the USEPA. In the view of
11 the SWRCB, the objectives for flow and operations are not subject to USEPA approval, but the
12 USEPA may disagree. Assuming USEPA has authority under the Clean Water Act to approve
13 these objectives, the SWRCB believes that the USEPA could not adopt standards for these
14 parameters under the Clean Water Act [fn]. If the USEPA attempted to adopt such standards, it
15 could fundamentally interfere with the State’s water allocation authority under section 101(g) of
16 the Clean Water Act [fn].” “The USEPA’s approval of this water quality control plan will not give
17 the USEPA authority to enforce the plan’s flow, operations, and salinity intrusion objectives. . . .
18 None of the flow, operations, and salinity intrusion objectives in this plan can be attained by
19 regulating discharges from point sources.” Finally, footnote 5 states that “[t]he SWRCB reserves
20 its arguments regarding the USEPA’s authority to adopt standards for flow and operations,
21 including standards for salinity intrusion. The SWRCB’s legal comments regarding the USEPA’s
22 authority are set forth in the SWRCB’s comments on the USEPA’s January 6, 1994 draft standard
23”

24 57. Similarly, in comments on USEPA’s January 6, 1994 draft water quality standards
25 for the Delta, the SWRCB expressed the opinion that “[o]nly the state can decide whether it is
26 appropriate to regulate flow-caused pollution including salinity intrusion and establish
27 requirements for its regulation. California can without question adopt such requirements under
28 state law. But EPA has no authority to adopt standards for flow or for pollution caused by

1 reductions of fresh-water flow under its standard-setting authority for water quality planning.
2 Therefore, EPA cannot adopt the proposed criteria for Estuarine Habitat and for Fish Migration
3 and Cold-Water Habitat.”

4 58. Defendants maintain a pattern and practice policy that the CWA is only concerned
5 with water "quality," and does not require the regulation of water "quantity." This is an artificial
6 distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering
7 of the water quantity in a body of water could destroy all of its designated uses, be it for drinking
8 water, recreation, agriculture, or a fishery.

9 59. Indeed, USEPA’s responses to the SWRCB’s comments on USEPA’s January 6,
10 1994 draft standards state, among other things, that “EPA has ample authority under section 303 to
11 specify the water quality standards that will enable the Bay/Delta to attain its designated uses even
12 if implementation of these standards by the state have incidental effects on the allocation of
13 water.” “[M]ost of the implementation measures that the state may take affect water quantity and
14 the criteria can only be attained if the state implements measures that affect water quantity.”

15 60. The SWRCB reiterates the objections included in the 1995 Bay-Delta plan in its
16 adopted 2006 Bay-Delta plan.

17 61. The Bay-Delta Plan consists of: (1) beneficial uses to be protected; (2) water
18 quality objectives for the reasonable protection of beneficial uses; and (3) a program of
19 implementation for achieving the water quality objectives.

20 62. The Bay-Delta Plan establishes water quality objectives for which implementation
21 can be fully accomplished only if the State Water Board assigns some measure of responsibility to
22 water right holders and water users to mitigate for the effects on the designated beneficial uses of
23 their diversions and use of water.

24 63. Among other requirements to satisfy the CWA, the Basin Plan must include a
25 statement of existing and potential beneficial uses to be protected and water quality objectives that
26 protect beneficial uses.

27 64. Many beneficial uses relate to fish species and habitat. For example, the Central
28 Valley Water Quality Control Plan (which covers the Sacramento River and San Joaquin River

1 Basins), includes “Rare, Threatened, or Endangered Species,” “Estuarine Habitat,” “Cold
2 Freshwater Habitat” and many others.

3 65. The Bay-Delta Plan, which covers the Bay-Delta Estuary and is adopted by the
4 State Water Board rather than the region, includes such uses as “cold freshwater habitat,”
5 “spawning, reproduction, and/or early development,” “rare, threatened, or endangered species,”
6 and other uses related to aquatic health.

7 66. In California, federal designated uses are equivalent to state law “beneficial uses”
8 and federal criteria are equivalent to state law “water quality objectives.”

9 67. Thus, the water quality objectives and beneficial use designations adopted under
10 the California Water Code serve as water quality standards for purposes of section 303 of the
11 CWA.

12 68. In approving the 1995 Bay-Delta Plan, U.S. EPA expressly rested upon this
13 interpretation, treating the 1995 Bay/Delta Plan’s “beneficial uses” and “objectives” as
14 “designated uses” and “criteria,” respectively, for all purposes under the CWA.

15 69. State Water Board Water Rights Decision 1641 (or “D-1641”), issued in December
16 1999 and revised March 2000, includes minimum Delta outflow and other regulatory limits for
17 Central Valley Project (“CVP”) and State Water Project (“SWP”) operations to meet 1995 Bay-
18 Delta Plan requirements.

19 70. As noted, the Bay-Delta Plan specifies water quality objectives for the protection of
20 beneficial uses of water in the Bay-Delta, including fish and wildlife, agricultural, and municipal
21 and industrial uses. The permit terms and conditions contained in D-1641 were derived from the
22 flow and water quality objectives contained in the Bay-Delta Plan. In part, D-1641 assigns
23 responsibility for meeting the water quality objectives included in the Bay-Delta Plan. D-1641
24 places responsibility on DWR and Bureau for measures to ensure that specified water quality
25 objectives are met, in addition to other requirements. The flow objectives are intended to assist
26 with fish migration, and also to keep the Delta and water exported from the Delta from getting too
27 salty for municipal and agricultural uses.

28

1 71. The Delta Outflow objective is intended to protect estuarine habitat for anadromous
2 fish and other estuarine dependent species. Delta outflows affect migration patterns of both
3 estuarine and anadromous species and the availability of habitat. Freshwater flow is an important
4 cue for upstream migration of adult salmon and is a factor in the survival of smolts moving
5 downstream through the Delta. The populations of several estuarine-dependent species of fish and
6 shrimp vary positively with flow as do other measures of the health of the estuarine ecosystem.
7 Freshwater inflow also has chemical and biological consequences through its effects on loading of
8 nutrients and organic matter, pollutant concentrations, and residence time.

9 72. The Delta Outflow objective includes requirements for calculated minimum net
10 flows from the Delta to Suisun and San Francisco Bays (the Net Delta Outflow Index or “NDOI”)
11 and maximum salinity requirements (measured as electrical conductivity or “EC”). Since salinity
12 in the Bay-Delta system is closely related to freshwater outflow, both types of objectives are
13 indicators of the extent and location of low salinity estuarine habitat.

14 73. The Delta outflow objectives vary by month and water year type. With some
15 flexibility provided through a limited set of compliance alternatives, the basic outflow objective
16 sets minimum outflow requirements that apply year round.

17 74. The Delta Cross Channel (“DCC”) gate objective was designed to protect fish and
18 wildlife beneficial uses (specifically Chinook salmon) while simultaneously recognizing the need
19 for fresh water to be moved through the interior Delta to the southern Delta for SWP and CVP
20 uses. The current objective states that the DCC gates shall be closed for a total of up to 45 days for
21 the November through January period, stay closed from February through May 20, and be closed
22 for a total of 14 days for the May 21 through June 15 period. Closure of the DCC gates is
23 important for the protection of salmon survival. Opening the DCC gates during winter and spring
24 months can negatively affect juvenile Chinook salmon survival by causing straying into the
25 interior and then southern Delta where survival is much lower than for fish that stay in the
26 mainstem of the Sacramento River. Opening the DCC gates significantly improves water quality
27 (e.g. lowers salinity) in the interior and southern Delta including at the SWP and CVP export
28 facilities and Contra Costa Water District’s diversions, particularly when Delta outflow is low.

1 75. Water quality objectives contained in the Bay-Delta Plan include salinity standards
2 to protect agricultural beneficial uses. Table 2 objectives include electrical conductivity (“EC”)
3 requirements of 2.78 mmhos/cm in the Sacramento River at Emmatton between 1 April and 15
4 August of critical dry years; EC requirements of 2.20 mmhos/cm in the San Joaquin River at
5 Jersey Point between 1 April and 15 August of critical dry years and EC requirements of 0.7
6 mmhos/cm (April-August) and 1.0 mmhos/cm (September-March) at four locations in the South
7 Delta (Vernalis, Brandt Bridge, Old River near Middle River and Old River at Tracy Road) in all
8 years.

9 WATER QUALITY CONTROL PLAN FOR CENTRAL VALLEY: SACRAMENTO RIVER
10 BASIN AND SAN JOAQUIN RIVER BASIN

11 76. The storage and diversion of water can impact downstream beneficial uses because
12 of changes in temperature.

13 77. The Central Valley Basin Plan for the Sacramento River Basin and the San Joaquin
14 River Basin (“Central Valley Basin Plan”) includes temperature criteria adopted to protect
15 beneficial uses.

16 78. The Central Valley Basin Plan requires that temperature shall not be elevated above
17 56°F in the reach from Keswick Dam to Hamilton City nor above 68°F in the reach from Hamilton
18 City to the I Street Bridge during periods when temperature increases will be detrimental to the
19 fishery.

20 79. These standards are required by the CWA to protect designated uses.

21 80. The SWRCB implemented the Central Valley Basin Plan temperature criteria in
22 USBR’s permits and licenses in WR Order 90-05.

23 81. WR Order 90-95, however, failed to implement the Central Valley Basin Plan
24 requirement to meet the 56°F temperature requirement in the reach between Red Bluff and
25 Hamilton City.

26 82. Water necessary to meet water quality criteria is often not available for delivery for
27 consumptive purposes.

28

1 83. Consequently, the SWRCB has approved successive temperature management
2 plans that have moved the temperature compliance points required by the Central Valley Basin
3 Plan to locations farther upstream from Red Bluff.

4 84. The SWRCB-approved temperature management plans have allowed for
5 temperatures to be elevated above 56°F in the river reaches below designated temperature
6 compliance points to Hamilton City.

7 85. The SWRCB-approved temperature management plans have also allowed
8 temperatures to be elevated above 56°F at designated temperature compliance points.

9 86. Despite relocation of these temperature compliance points, and an increase in
10 maximum temperature allowed, the Bureau has repeatedly exceeded the temperature criteria.

11 THE PUBLIC TRUST DOCTRINE

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

15 88. The SWRCB has a continuing and ongoing duty to protect and manage public trust
16 resources for the benefit of the people of the State and to review and change the management of
17 those resources to protect public interests. The State is not confined by past allocation decisions
18 which may be incorrect in light of new knowledge or needs. The SWRCB therefore has the
19 responsibility to “reconsider allocation decisions even though those decisions were made after due
20 consideration of their effect on the public trust.” *Nat'l Audubon*, 33 Cal. 3d at 447.

21 89. “The public trust doctrine serves the function in that integrated system of
22 preserving the continuing sovereign power of the state to protect public trust uses, a power which
23 precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing
24 duty on the state to take such uses into account in allocating water resources.” *Nat'l Audubon*, 33
25 Cal. 3d at 452.

26 90. Fishing, environmental values, recreation, navigation, and waterborne commerce,
27 each constitute established Public Trust uses.

28

1 100. Nevertheless, the TUC Orders do regularly suspend water quality standards, and
2 impair or eliminate designated uses, that are established and required by law under the CWA,
3 including those established by the Bay-Delta Plan, the Central Valley Basin Plan, and 40 CFR
4 131.37.

5 101. The SWRCB and its Executive Director have issued a series of Orders granting in
6 part and denying in part TUCPs submitted by the Bureau and DWR, including but not limited to,
7 on December 15, 2015, August 4, 2015, July 3, 2015, April 6, 2015, March 5, 2015, February 3,
8 2015, October 7, 2014, May 2, 2014, April 18, 2014, April 9, 2014, March 18, 2014, February 28,
9 2014, February 7, 2014, January 29, 2014 (“TUC Orders”).

10 102. On January 29, 2014, DWR and Bureau jointly filed a TUCP to temporarily modify
11 requirements in their water right permits and license for the State Water Project (“SWP”) and
12 Central Valley Project (“CVP”), including temporary modification of requirements included in D-
13 1641 to meet water quality objectives in the Bay-Delta Plan.

14 103. Specifically, the January 29, 2014 TUCP requested modifications to the Delta
15 Outflow and DCC gate closure objectives. The SWRCB Executive Director’s January 31, 2014
16 TUC Order allowed DWR and Reclamation to meet a lower Delta outflow level of 3,000 cubic
17 feet per-second (cfs) in February and allowed the DCC Gates to be operated flexibly from
18 February 1 through May 20.

19 104. The SWRCB Executive Director modified the TUC Order on February 7, 2014,
20 February 28, 2014, March 18, 2014, April 9, 2014, April 11, 2014, April 18, 2014, and May 2,
21 2014, to extend and change the conditions of the TUC Order. In the May 2, 2014 TUC Order, the
22 SWRCB Executive Director renewed the TUC Order, to expire on January 27, 2015.

23 105. The February 7, 2014 modification to the TUC Order clarified requirements related
24 to exports that would apply when DWR and Bureau were meeting Decision 1641 requirements.
25 The February 7 modification of the TUC Order adjusted the temporary export limitations when
26 precipitation events occurred that enabled DWR and Bureau to comply with the Delta outflow and
27 DCC Gate closure requirements contained in Decision 1641. In these circumstances, exports
28 greater than 1,500 cfs were allowed up to the export limits contained in Decision 1641, except that

1 any SWP and CVP exports greater than 1,500 cfs were required to be limited to natural or
2 abandoned flows, or transfers. The TUC Order did not require DWR and Bureau to meet the
3 Decision 1641 Delta outflow requirements unless exports, other than transfers, were greater than
4 1,500 cfs. All other provisions of the January 31, 2014 TUC Order were continued.

5 106. The February 28, 2014 modification to the TUC Order continued the modified
6 Delta outflow levels of 3,000 cfs originally approved on January 31, 2014, through the month of
7 March. All other provisions of the TUC Order continued to be in effect.

8 107. The March 18, 2014 modification of the TUC Order provided additional flexibility
9 to export water while Delta inflows were elevated following precipitation events by adding an
10 alternate set of compliance requirements for the end of March that would be in effect while higher
11 Delta inflows persisted. Specifically, when precipitation and runoff events occurred that allowed
12 the DCC Gates to be closed and compliance with the flow or salinity requirements included in
13 footnote 10 of Table 3 in Decision 1641, but the additional Delta outflow requirements contained
14 in Table 4 of Decision 1641 were not being met, the Order permitted exports of natural and
15 abandoned flows up to the Export Limits contained in Table 3 of Decision 1641.

16 108. The April 9, 2014 modification of the TUC Order extended the Delta outflow and
17 Export modifications of the March 18 TUC Order into April. All other provisions of the TUC
18 Order continued to be in effect.

19 109. The April 11, 2014 modification of the TUC Order allowed Bureau to meet
20 modified San Joaquin River flow requirements from April 11 through June as proposed in the
21 DOP. Specifically, from April 11 until the start of the 31-day pulse flow period beginning in mid-
22 April, minimum San Joaquin River flows at Vernalis were required to be no less than 700 cfs on a
23 3 day average. During the pulse flow period from mid-April through mid-May, the Order required
24 that minimum flows be no less than 3,300 cfs for 16 days and 1,500 cfs for the remaining 31-day
25 pulse flow period, or any pulse or pulses with an equivalent flow volume that was approved by the
26 fisheries agencies. From the end of the pulse flow period through May, flows were required to be
27 no less than 500 cfs.

28

1 110. The April 18, 2014 modification allowed DWR and Bureau to export additional
2 supplies while inflows to the Delta were increased during the April and May San Joaquin River
3 pulse flow period. Specifically, the modifications to the TUC Order allowed for exports of 100
4 percent of the 3-day average of San Joaquin River flows at Vernalis or 1,500 cfs, whichever is
5 greater, during the pulse flow period. These export limits were not constrained by meeting D-1641
6 Delta outflow conditions, including Footnote 10 of Table 3 in Decision 1641.

7 111. The May 2, 2014 Order extended the modification of the Delta outflow requirement
8 to 3,000 cfs into May and July. The requirement to meet the Sacramento River flow objective at
9 Rio Vista for the protection of fish and wildlife, was modified from September through November
10 15 to 2,000 cfs on a monthly average, with a 7-day running average of no less than 1,500 cfs. The
11 compliance point for the requirement to meet the Western Delta electrical conductivity (EC – a
12 measure of salinity) objective for the protection of agriculture at Emmaton on the Sacramento
13 River was moved to Threemile Slough on the Sacramento River from May through August 15.
14 The TUC Order also included additional deadlines for reporting amounts of water conserved and
15 submittal of updated water balance information. The Export Limits in the TUC Order were also
16 modified to reflect the current status of the ordering conditions.

17 112. On September 24, 2014, the SWRCB issued Order WR 2014-0029 Denying
18 Petitions for Reconsideration and Addressing Objections as to each of the 2014 TUC Orders.

19 113. On February 3, 2015, the Executive Director issued an Order approving the
20 following temporary changes to D-1641 requirements during February and March:

- 21 a. The minimum daily average net Delta outflow requirement of 7,100 cfs or
22 equivalent salinity specified in footnote 10 of D-1641, plus the requirement to meet
23 higher flows of 11,400 cfs or equivalent salinity at Chipps Island for a certain
24 number of days specified in Table 4 of D-1641, was reduced to a minimum Delta
25 outflow requirement of 4,000 cfs;
- 26 b. When D-1641 requirements were not being met, the maximum rate of export from
27 the Delta was limited to: (a) 1,500 cfs when Delta outflow was between 4,000 cfs
28 and 7,100 cfs or the DCC Gates were open, or (b) up to the D-1641 limits when the

1 DCC Gates were closed and Delta outflow was above 7,100 cfs but the additional
2 requirements included in Table 4 were not being met except that those diversions
3 were limited to natural and abandoned flows;

4 c. The requirement to close the DCC Gates was changed to allow the gates to be open
5 under certain circumstances; and,

6 d. The minimum San Joaquin River flow requirement at Vernalis was reduced from
7 710 or 1,140 cfs, depending on hydrology, to 500 cfs.

8 114. The March 5, 2015, Order modified the February 3, 2015, Order by specifying that:

9 a. DWR and the Bureau should use the conserved water pursuant to the TUCP in
10 accordance with their 2015 DCP and Temperature Management Plan for the
11 Sacramento River;

12 b. Water transfers were exempted from the export provisions; and,

13 c. The intermediate export rate of 3,500 cfs was approved when Delta outflow was
14 between 5,500 cfs and 7,100 cfs, the DCC gates were closed, and DWR or
15 Reclamation determined that additional water was necessary to meet minimum
16 public health and safety needs after notifying the Executive Director.

17 115. The Executive Director issued an Order on April 6, 2015, that approved changes
18 through June. The April 6 Order extended the changes to Delta outflow and export requirements
19 described above through June, and extended the change to DCC Gate requirements through May
20 20. In addition, the April 6 Order made the following changes:

21 a. The April 6 Order reduced the required volume of the pulse flow from April 15
22 through May 15 from 3,110 cfs, depending on hydrology, to 710 cfs.

23 b. The April 6 Order required Reclamation to comply with the pulse flow requirement
24 contained in the NMFS Biological Opinion.

25 c. The minimum San Joaquin River flow requirement at Vernalis was changed
26 following the pulse flow period described above and until May 31 from 710 cfs or
27 1,140 cfs, depending on hydrology, to 300 cfs. In June, the requirement was
28 reduced to 200 cfs; and,

1 d. The compliance point for the Western Delta agricultural salinity requirement at
2 Emmaton on the Sacramento River was moved to Threemile Slough on the
3 Sacramento River from April through June.

4 116. The July 3, 2015 TUC Order provided:

5 a. During July, the minimum Delta outflow level specified in Table 3 of Decision
6 1641 as measured by the Net Delta Outflow Index (NDOI) described in Figure 3 of
7 Decision 1641 shall be no less than 3,000 cubic-feet per second (cfs) on a monthly
8 average. The 7-day running average shall be no less than 1,000 cfs below the
9 monthly average.

10 b. During September, October and November the minimum Sacramento River at Rio
11 Vista flow rate specified in Table 3 of Decision 1641 shall be no less than 2,500 cfs
12 on a monthly average. The 7-day running average shall be no less than 2,000 cfs.

13 c. Through August 15, 2015, the Western Delta, Sacramento River at Emmaton
14 electrical conductivity (EC) compliance location specified in Table 2 of Decision
15 1641 is moved to Threemile Slough on the Sacramento River.

16 d. Through November 30, 2015, the maximum Export Limits specified in Table 3 of
17 Decision 1641 are modified as follows:

18 i. When Decision 1641 Delta outflow, Rio Vista flow, and Emmaton EC
19 requirements in Tables 2 and 3 of Decision 1641 are not being met, the
20 combined maximum exports at the SWP Banks Pumping Plant and the CVP
21 Jones Pumping Plant shall be no greater than 1,500 cfs.

22 ii. During the effective period of the July 3 Order, if precipitation events occur
23 that enable DWR and Reclamation to fully comply with the above
24 referenced requirements, then Decision 1641 requirements shall be
25 operative, except that any SWP and CVP exports greater than 1,500 cfs
26 shall be limited to natural or abandoned flow, or transfers as specified in
27 condition 1.d.iii.
28

1 iii. These export limitations do not apply to water transfers. Based on
2 additional information or changed circumstances, the export limits imposed
3 pursuant to this Order may be modified through the consultation process
4 described in condition 2, below.

5 e. Pursuant to the requirements of the July 3, 2015 Order, and State Water Board
6 Order WR 90-5, Reclamation, in consultation with the fisheries agencies, shall
7 implement the Sacramento River Temperature Management Plan with any changes
8 required by the Executive Director, subject to key elements of the Plan specified in
9 the Order.

10 117. The August 4, 2015 TUC Order lowered the minimum dissolved oxygen
11 concentration requirement on the Stanislaus River below Goodwin Dam that Reclamation is
12 required to meet, from 7.0 milligrams per liter (mg/l) to 5.0 mg/l through November 30, 2015.

13 118. The SWRCB and Executive Director have repeatedly stated that absent suspension
14 of Water Code section 13247 by the Governor’s Drought Proclamation, the SWRCB and
15 Executive Director could not have legally approved these TUC Orders that modify permits and
16 licenses in ways that do not provide for full attainment of water quality objectives that are required
17 by a basin plan, even during a drought emergency.

18 119. While Defendants regularly justify the TUC Orders on the basis that reduced flows
19 will allow for greater upstream storage to be utilized for temperature control, minimum instream
20 flow requirements, and salinity needs later in the season, reducing excessive water deliveries
21 earlier in the year would provide greater benefits to protect aquatic species that had been pushed to
22 the brink of extinction.

23 120. Estuarine fish populations now are at record low levels and cannot be considered
24 resilient at all.

25 121. Anadromous salmonid populations have also experienced significant impacts over
26 the past four years associated with the drought.

27 122. The changes included in the TUC Orders are likely to have negative effects on
28 these and other fish and wildlife species.

1 123. In particular, the importance of Delta outflow to estuarine resource protection is
2 well documented in the Bay-Delta and in estuaries around the world.

3 124. Adequate instream flows are also important to salmonids to provide appropriate
4 habitat conditions, including temperatures and dissolved oxygen levels. The TUC Orders reduce
5 Delta outflows (and the associated river flows that provide these outflows) and San Joaquin River
6 flows to the detriment of fish and wildlife. The opening of the Delta Cross Channel Gates and
7 export operations with reduced outflows and river flows also potentially increases impacts to
8 fishery resources.

9 125. On January 19, 2016, the SWRCB issued corrected Order WR 2015-0043, denying
10 in part and granting in part various petitions and objections submitted regarding the Executive
11 Director's February 3, 2015 TUC Order, and subsequent modifications thereto.

12 126. Order WR 2015-0043 reiterates the SWRCB's long-held position, pattern, and
13 practice of disputing any CWA obligation to ensure water quality standards are maintained when
14 considering limitations on allocated water supplies.

15 127. Order WR 2015-0043 argues "absent restraints imposed by the State Water Board
16 itself (see Water Code section 13247, discussed below), the State Water Board has discretion to
17 decide how to implement objectives in the context of statutory and common water rights law."
18 "This was an implementation action under state law authority. The TUCP Order did not change
19 the water quality objectives themselves in a manner inconsistent with the Clean Water Act."

20 FACTUAL BACKGROUND

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

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

26 130. The State Water Project ("SWP"), operated by DWR, and the federally managed
27 CVP, operated by the Bureau, are water management projects that work together to release
28 previously-stored water into the Delta and divert natural flows. The water diverted by the SWP

1 and CVP in the Delta is exported to areas south and west of the Delta through a system of water
2 conveyance facilities including canals, aqueducts, and pump stations. Many of the CVP pumps are
3 shared with the SWP.

4 131. The waterways that make up the Bay-Delta Estuary and its tributaries are also used
5 by fish and wildlife, and have other public trust values. The Bay-Delta Estuary is one of the
6 largest ecosystems for fish and wildlife habitat and production in the United States. Many of the
7 fish that live in or migrate through the estuary are protected under the state and federal
8 Endangered Species Act.

9 132. Portions of the Delta are presently listed as “impaired” due to pollution associated
10 with electrical conductivity, resulting in those areas failing to continuously support the designated
11 uses of said waters.

12 Long-standing Plight of the Bay-Delta’s Anadromous and Pelagic Fisheries

13 133. Historical and current human activities have degraded the beneficial uses of the
14 Bay-Delta estuary, as evidenced by the declines in populations of many of the biological resources
15 of the Bay-Delta.

16 134. Species that are listed or proposed to be listed, pursuant to state and federal
17 Endangered Species Acts, and that depend upon the Bay-Delta for all or a critical part of their life
18 cycle include: southern Distinct Population Segment (DPS) of green sturgeon (*Acipenser*
19 *medirostris*), federal threatened, candidate for federal endangered; Delta smelt (*Hypomesus*
20 *transpacificus*), state endangered, federal threatened, Longfin smelt (*Spirinchus thaleichthys*),
21 state threatened, candidate for federal threatened; Central Valley steelhead (*Oncorhynchus*
22 *mykiss*), federal threatened; Sacramento winter-run Chinook salmon (*Oncorhynchus tshawytscha*),
23 state endangered, federal endangered; Central Valley spring-run Chinook salmon (*Oncorhynchus*
24 *tshawytscha*), state threatened, federal threatened; Central Valley fall/late-fall-run Chinook salmon
25 (*Oncorhynchus tshawytscha*), federal species of concern, state species of special concern;
26 Sacramento splittail (*Pogonichthys macrolepedotus*), state species of special concern; Pacific
27 lamprey (*Entosphenus tridentate*), federal species of concern and river lamprey (*Lampetra ayresi*),
28 state species of special concern.

1 135. The CVP and SWP also have potential to adversely affect southern resident killer
2 whales or Orcas (*Orcinus orca*), which are federal listed as endangered because they are
3 dependent upon Chinook salmon for 70% of their diet, and a reduced quantity and quality of diet
4 has been identified as one of the major causes of their decline.

5 136. The precipitous collapse of the Central Valley’s pelagic and anadromous fish
6 populations has been documented at considerable length. The CVP’s water export facilities in the
7 Delta began operation in 1951 and fisheries declined. Following construction of the SWP’s Banks
8 Pumping Plant, in 1967, the decline of fisheries accelerated. Since 1967, the California
9 Department of Fish and Wildlife (“DFW”) Fall Midwater Trawl abundance indices for striped
10 bass, Delta smelt, longfin smelt, American shad, splittail and threadfin shad have declined by 99.7,
11 97.8, 99.9, 91.9, 98.5 and 97.8 percent, respectively.

12 137. In 2004, Delta pelagic species experienced a collapse in fish populations known as
13 the “Pelagic Organism Decline.” Fish abundance indices for 2002 and 2004 were at record lows
14 for Delta smelt and striped bass, and near record lows for longfin smelt and threadfin shad. These
15 low abundance indices for pelagic species recorded during the 2002-2004 decline continued to the
16 2012-2015 drought.

17 138. The SWRCB’s weakening and waiving of water quality standards through TUC
18 Orders during the ongoing drought period has greatly exacerbated conditions for the Delta smelt,
19 causing another dramatic decline in the Delta smelt’s population.

20 139. The Delta smelt are now facing extinction. According to the 2014 Midwater Trawl,
21 conducted monthly from September through December, between 2011 and 2014, abundance
22 indices for Delta smelt and longfin smelt have declined an additional 97.4 and 96.7 percent,
23 respectively, from already perilously low abundance levels.

24 140. In the spring of 2015, DFW’s monthly Spring Kodiak Trawl, of spawning Delta
25 smelt, collected only six Delta smelt in March, one Delta Smelt in April and eight in May.

26 141. The U.S. Fish & Wildlife Service’s (“USFWS”) Anadromous Fisheries Restoration
27 Program, established pursuant to the CVPIA, documents that, since 1967, in-river natural
28 production of Sacramento winter-run Chinook salmon and spring-run Chinook salmon have

1 decline by 98.2 and 99.3 percent, respectively, and are only at 5.5 and 1.2 percent, respectively, of
2 doubling levels mandated by the CVPIA, the California Water Code and California Fish & Game
3 Code.

4 142. In 2014, SWRCB relaxed Sacramento River temperature criteria in 2014 by
5 moving the temperature compliance point upstream and eliminated much of the spawning habitat
6 for fall-, winter- and spring-run Chinook salmon. The delivery of 1.2 million acre-feet of water to
7 the CVP Sacramento Valley water contractors between April and September depleted the cold-
8 water pool behind Shasta Dam and the resulting lethal temperatures in the river caused the loss of
9 an estimated 95% of eggs and emerging winter-run Chinook salmon, 98% of eggs and emerging
10 fall-run Chinook salmon and virtually all of emerging spring-run Chinook salmon.

11 143. The SWRCB's relaxation of Delta outflow requirements in 2015 likely caused the
12 loss of the majority of remaining survivors.

13 144. The loss of two consecutive year classes would be catastrophic to the species.

14 145. For 2015, the Bureau proposed to increase deliveries to almost 1.6 million acre-
15 feet to the CVP's Sacramento Valley contractors, and informed the SWRCB that it is unlikely that
16 it will be able to meet temperature requirements in the Sacramento River below Shasta Dam.

17 146. The Bureau schedules water deliveries in the spring based on assumptions of future
18 rainfall and not what was stored from the preceding wet season.

19 147. The adverse consequences of this policy are magnified during drought sequences.
20 Delivering excessive quantities of water and draining reservoirs to the point of not being able to
21 comply with water quality standards is not a defensible excuse for the failure to provide adequate
22 cold water to protect fisheries.

23 148. Cold water is depleted to offset the hotter water the SWRCB has permitted to be
24 released.

25 149. Failure to adopt and enforce defensible temperature criteria has been a key factor in
26 the continued decline of Sacramento Chinook salmon to the point where winter-run and spring-run
27 are now threatened with extinction and California's commercial salmon fishery is wholly
28 dependent on grow-and-truck hatchery production for survival.

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

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

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

19 153. The DFW also conducted an extensive proceeding in 2010, pursuant to the Delta
20 Reform Act, to develop Quantifiable Biological Objectives and Flow Criteria for Aquatic and
21 Terrestrial Species of Concern Dependent on the Delta. In the report released 23 November 2010,
22 DFW found that significantly greater flows and considerably stronger biological objectives were
23 necessary to protect the public trust resources of the Delta. Yet the SWRCB and Executive
24 Director Howard never implemented those enhanced flows or balanced the public trust with other
25 beneficial uses, and they again failed to do so in evaluating the requests of the Bureau and DWR
26 to relax Delta water quality standards.

27 154. According to DWR, California has experienced ten multi-year droughts of large-
28 scale extent in the last one hundred years, spanning 41 years. Although the state experiences

1 drought conditions more than forty percent of the time, the CVP and SWP continue to operate and
2 deliver water without consideration of drought conditions. The CVP and SWP draw down
3 reservoir storage under the assumption that the coming year will be wet, providing little reserve
4 storage in the event the following year is dry. In the event of another dry year, the projects
5 endeavor to maximize deliveries in the hope that it will rain next year. This pattern has repeated
6 itself for decades, most recently during the 1987-1992, 2000-2002, 2007- 2009 and 2013-2015
7 droughts.

8 155. In a report on the 1976-1977 drought, DWR observed that “[t]he usual strategy
9 described in discussions with Central Valley surface water project operators who are experiencing
10 a below normal supply is to serve all the water possible on demand of the users, carrying little or
11 no water over to guard against a dry 1977...” and “[t]his strategy is based on the belief that a good
12 crop this year is desirable, since next year will probably be a near-normal or better water supply.”

13 156. This remains the pattern and practice today.

14 157. During the summer of 2012, the CVP drew down 2.2 million acre-feet (“MAF”) of
15 water from Shasta Reservoir. The following winter the reservoir gained 1.5 MAF but the Bureau
16 drew down 2.24 MAF in the summer of 2013. Shasta reservoir gained approximately 758
17 thousand acre-feet (“TAF”) in the winter of 2014 but almost 1.4 MAF was drawn down the
18 following summer. In the winter of 2015, Shasta reservoir gained almost 1.7 MAF but the Bureau
19 proposes to deliver almost 1.6 MAF to Sacramento Valley contractors, plus whatever they are
20 required to deliver to repel salinity and comply with water quality standards in the Delta.

21 158. Should the coming winter be dry, water shortages in 2016 are likely to be even
22 worse than 2015.

23 159. The CVP and SWP have refused to provide a margin of safety and adjusted
24 operations to meet the state’s Mediterranean climate and over-subscribed water delivery system.

25 160. The CVP and SWP projects rely on the SWRCB to bail them out by relaxing
26 standards and reducing water flows crucial to water quality and healthy and reproducible fisheries,
27 and the SWRCB has obliged the projects by relaxing standards thereby encouraging them to
28

1 continue to operate on the edge of crisis while fisheries, hanging on the lip of extinction, pay the
2 price.

3 161. During the drought of 1987-1992, the SWRCB informed DWR and the Bureau that
4 it would not take enforcement action for more than 245 violations of standards protecting Delta
5 agriculture and fisheries, even though further violations were expected. In response to a 2013
6 request to weaken standards, SWRCB Executive Director Tom Howard informed DWR and the
7 Bureau that he would take no action if the projects operated to meet critically dry year criteria,
8 even though 2013 was not a critically dry year. Last year, SWRCB Executive Director Tom
9 Howard weakened Bay-Delta standards on nine different occasions and, in 2015, has already
10 issued additional orders modifying Bay-Delta standards, plus an order regarding temperature
11 control in the Sacramento River.

12 162. California water delivery system is increasingly a wet-year system that cannot
13 meet the water demands of its customers in dry and drought years.

14 163. In average water years, water rights claims throughout the Bay-Delta watershed
15 exceed unimpaired flow by five and one-half times. As drier years occur, that factor increases
16 dramatically as flows decrease and crisis ensues because the system is over-subscribed. Within
17 years following their construction, the CVP and SWP signed contracts for the delivery of almost
18 14 million acre feet of water or almost half the average unimpaired runoff in the entire basin.

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

25 165. Sacramento winter-run Chinook salmon declined 88.4% from the 54,439 counted
26 during the Anadromous Fisheries Restoration Program (“AFRP”) Baseline Period of 1967 to
27 1991, to 6,320 during the AFRP Doubling Period of 1992-2011. Levels of Sacramento winter-run
28

1 Chinook salmon are only at 5.8% of the CVPIA mandated target, in continuous violation of the
2 narrative standard.

3 166. Sacramento spring-run Chinook salmon declined 97.6% from the 29,412 counted
4 during the Anadromous Fisheries Restoration Program (“AFRP”) Baseline Period of 1967 to
5 1991, to 718 during the AFRP Doubling Period of 1992-2011. Levels of Sacramento spring-run
6 Chinook salmon are only at 1.2% of the CVPIA mandated target, in continuous violation of the
7 narrative standard.

8 167. While the SWRCB has substantially relied on impacts to the agricultural economy
9 of the State of California as justification for suspending water quality standards and further
10 impairing threatened and endangered fish species, the evidence shows that California agriculture
11 has in fact recorded increasing profits during the timeframe in which the TUC Orders have been
12 granted.

13 168. The Bureau’s operation of the CVP, and DWR’s operation of the SWP,
14 respectively and together are causing and contributing to rampant violations of the Bay-Delta
15 Water Quality Control Plan and D-1641, including but not limited to standards for salinity,
16 outflow, and temperature.

17 169. Defendants have committed to a pattern and practice of allowing these violations to
18 occur, in direct contravention of the CWA, and Public Trust Doctrine.

19 **JURISDICTION AND VENUE**

20 170. This Court has jurisdiction over this action pursuant to sections 526 and 1060 of the
21 California Code of Civil Procedure.

22 171. There exists now between the parties hereto an actual, justiciable controversy in
23 which Plaintiffs are entitled to have a declaration of their rights and of the Defendants’
24 obligations, and further relief, because of the facts and circumstances set forth herein.

25 172. Plaintiffs are interested in having the laws properly executed and Defendants’
26 duties properly performed so that the public’s right to, and interest in, environmental protection is
27 fully secured.

28 173. This complaint is timely filed within any and all applicable statutes of limitations.

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

4 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

5 175. Plaintiffs have performed all conditions precedent to this filing, and have actively
6 participated in Defendants' administrative processes by submitting comments, along with other
7 public agencies, organizations, and members of the public, asserting the claims contained herein.
8 As such, Plaintiffs have fully exhausted their administrative remedies, to the extent such remedies
9 exist and to the extent that exhaustion of administrative remedies is legally necessary.

10 176. Plaintiffs possess no other remedy to challenge Defendants' abuses of discretion
11 and failures to comply with applicable laws and regulations.

12 **PRIVATE ATTORNEY GENERAL DOCTRINE**

13 177. Plaintiffs bring this action as private attorneys general pursuant to California Code
14 of Civil Procedure section 1021.5, and any other applicable legal theory, to enforce important
15 rights affecting the public interest.

16 178. Issuance of the relief requested in this Complaint will confer significant benefits on
17 the general public, and result in the enforcement of important rights affecting the public interest,
18 by, among other benefits and rights, upholding existing protections for threatened, endangered,
19 and imperiled species throughout the San Francisco-San Joaquin Bay-Delta.

20 179. The necessity and financial burden of enforcement are such as to make an award of
21 attorneys' fees appropriate in this proceeding. Absent enforcement by Plaintiffs, Defendants'
22 pattern and practice policies might otherwise be deemed valid despite their legal and factual
23 inadequacies, and, as a result, cause significant, adverse environmental effects that might
24 otherwise have evaded been prevented.

25 180. Plaintiffs' attorneys have served a copy of its Complaint, First Amended
26 Complaint, and Second Amended Complaint, on the Attorney General's office to give notice of
27 Plaintiffs' intent to bring this proceeding as private attorneys general under Code of Civil
28 Procedure section 1021.5 (attached as Exhibit A).

1 **INJUNCTIVE AND DECLARATORY RELIEF**

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

9 182. An actual controversy now exists between Plaintiffs and Defendants concerning
10 their rights, privileges, and obligations in that Plaintiffs contend that Defendants' above-
11 mentioned actions have violated and will continue to violate their rights under federal and state
12 law and Defendants contend in all respects to the contrary.

13 **FIRST CLAIM FOR RELIEF**

14 **ILLEGAL PATTERN AND PRACTICE OF ALLOWING WATER QUALITY**
15 **REDUCTIONS IN DISREGARD OF ADOPTED WATER QUALITY STANDARDS**

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

18 184. The Defendants maintain, and have maintained, a long-standing illegal pattern and
19 practice of waiving, relaxing, suspending, contradicting, or otherwise rejecting and ignoring their
20 duty to, at all times, regulate water pollution in the state of California in a manner consistent with
21 minimum water quality objectives, the state and federal antidegradation policies, and designated
22 beneficial uses established under and required by the Clean Water Act, and state statutes,
23 regulations, and resolutions implementing the Clean Water Act.

24 185. The Defendants maintain, and have maintained, a long-standing illegal pattern and
25 practice policy of regulating what they believe to be “flow-caused pollution” outside of the
26 requirements of the Clean Water Act, and outside of state statutes, regulations, and resolutions,
27 implementing the Clean Water Act.

28 186. Evidence of this long-standing illegal pattern and practice includes, but is not

1 limited to, the SWRCB's stated position in the 1995 and 2006 Bay-Delta Plan, adoption and
2 implementation of WR Order 90-95, the SWRCB's repeated relaxation and modification of
3 temperature standards in the Sacramento River, and the SWRCB's serial relaxation of flow,
4 salinity, and dissolved oxygen standards by and through successive TUC Orders.

5 187. These ongoing disputes create an actual, clear, and present controversy as to the
6 substantive and procedural legality of Defendants' serial allowance of consistent and ongoing
7 degradation of water quality, contrary to law, and in excess of jurisdiction.

8 WHEREFORE, Plaintiffs pray for relief as hereinafter stated.

9 **SECOND CAUSE OF ACTION**

10 **PATTERN AND PRACTICE VIOLATION OF PUBLIC TRUST DOCTRINE**

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

13 189. Defendants have abridged and abrogated their Public Trust duties by authorizing
14 the Real Parties' illegal and unsustainable water diversions that interfere with, and result in the
15 irreparable loss of, imperiled Bay-Delta species, to the detriment of legitimate public trust uses
16 including, but not limited to, fishing, fish and wildlife habitat, recreation, and tourism.

17 190. Defendants have abridged and abrogated their Public Trust duties by failing to
18 conduct a proper Public Trust analysis to protect Public Trust uses and resources against the
19 unreasonable and unsustainable water diversion authorized by, among other things, the TUC
20 Orders, and SWRCB Order 90-05.

21 191. These ongoing disputes create an actual, clear, and present controversy as to the
22 substantive and procedural legality of Defendants' serial approval of consistent and ongoing
23 worsening of water quality and habitat conditions throughout the Bay-Delta estuary, directly
24 leading to the imminent demise of Bay-Delta salmonids and pelagic species.

25 192. Defendants' pattern and practice disregard of the Public Trust Doctrine in issuing
26 the TUC Orders, and allowing for excessively high temperatures in the Sacramento River, is
27 arbitrary, capricious, not supported by findings or evidence, contrary to law, and in excess of
28 jurisdiction.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WHEREFORE, Plaintiffs pray for relief as hereinafter stated.

PRAYER FOR RELIEF

Plaintiffs pray for relief as follows:

1. Enter a declaratory judgment that Defendants have engaged in an illegal pattern and practice of allowing water quality reductions in disregard of adopted water quality standards;
2. Enter a declaratory judgment that Defendants have engaged in an illegal pattern and practice of failing to meaningfully consider the Public Trust Doctrine, and failing to conserve Public Trust resources, in violation of the Public Trust Doctrine;
3. Preliminarily and permanently enjoin Defendants from their illegal pattern and practice of allowing water quality reductions in disregard of adopted water quality standards;
4. Preliminarily and permanently enjoin Defendants from their illegal pattern and practice of failing to meaningfully consider the Public Trust Doctrine, and failing to conserve Public Trust resources, in violation of the Public Trust Doctrine;
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: April 1, 2016

AQUA TERRA AERIS LAW GROUP

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, Jason Flanders, am counsel of record for Plaintiffs AquAlliance, California Water Impact Network, and California Sportfishing Protection Alliance. I sign for these Plaintiffs absent from the county of counsel and/or because facts contained in the Complaint are within the knowledge of counsel. I have read the foregoing 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 1st day of April, 2016, in Oakland, California.

Jason R. Flanders