



AQUALLIANCE
DEFENDING NORTHERN CALIFORNIA WATERS



March 23, 2023

Clerk to the Board
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000
Board.Clerk@waterboards.ca.gov
Bay-Delta@waterboards.ca.gov
Via electronic filing

Re: Petition for reconsideration of the State Water Resources Control February 21, 2023 Order Approving Temporary Urgency Change Petition, and the March 9, 2023 Order modifying the February 21 Order.

Dear Madam or Sir:

The California Sportfishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), and AquAlliance (collectively, CSPA et al.) respectfully submit a timely petition for reconsideration of the State Water Resources Control Board's February 21, 2023 Order Approving Temporary Urgency Change Petition (TUCO) for the Delta operations of the State Water Project (SWP) and the Central Valley Project (CVP). The California Department of Water Resources (DWR) and the US Bureau of Reclamation (Reclamation) submitted their Temporary Urgency Change Petition (2023 TUCP) to the State Water Resources Control Board (State Water Board or Board) on February 13, 2023. The TUCP requested, and the TUCO approved, waiver of the Port Chicago flow requirement ("Port Chicago Trigger") of Water Rights Decision 1641 (D-1641) in February and March 2023.

CSPA, C-WIN, and AquAlliance timely submitted a protest and objection to the TUCP on February 23, 2023. CSPA also joined NRDC et al.'s petition for reconsideration of the TUCO, filed on March 6, 2023. The instant petition for reconsideration incorporates by reference, and supplements, NRDC et al.'s March 6, 2023 petition for reconsideration.

On March 9, 2023, the State Water Board's Executive Director modified the TUCO, requiring DWR and Reclamation to comply with the requirements of the Port Chicago Trigger for 11 days in March 2023. This partial rescission, in combination with 2023 hydrology, solves the immediate problem of Port Chicago flows in 2023. However, it does not address the lack of diligence on the part of the Board, DWR, and Reclamation in their collective failure to establish operational rules for the SWP and CVP in dry years and dry year sequences. This need for such rules has begged for an answer since at least 2007-2009. CSPA et al. thus also timely petitions the State Water Board for reconsideration of the Executive Director's March 9, 2023 Order modifying her February 21, 2023 Order Approving Temporary Urgency Change Petition.

*CSPA et al. petition for reconsideration
February 21, 2023 TUCO, March 9, 2023 Modified TUCO*

CSPA et al. file this petition for reconsideration, not only to dispute the Board's findings in the February 21, 2021 TUCO, and in the March 9, 2023 Modified TUCO, but also, in substantial part, to compel the Board to address on a proactive and forward-going basis SWP and CVP operations in dry years and droughts.

Please contact me if you have any questions.

Respectfully submitted,



Executive Director
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**BEFORE THE
STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

**In the Matter February and March 2023 Delta Operations Pursuant to
Water Rights Decision 1641**

**PETITION FOR RECONSIDERATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
CALIFORNIA WATER IMPACT NETWORK, AND AQUALLIANCE
OF THE STATE WATER RESOURCES CONTROL BOARD'S
FEBRUARY 21, 2023 ORDER APPROVING TEMPORARY URGENCY CHANGE
PETITION OF THE DEPARTMENT OF WATER RESOURCES AND THE BUREAU
OF RECLAMATION, AND OF
THE STATE WATER RESOURCES CONTROL BOARD'S
MARCH 9, 2023 ORDER MODIFYING AN ORDER THAT APPROVED TEMPORARY
URGENCY CHANGES TO WATER RIGHT LICENSE AND PERMIT TERMS
RELATING TO DELTA WATER QUALITY OBJECTIVES**

Pursuant to sections 1122 and 1126 of the California Water Code, section 769 of title 23 of the California Code of Regulations, the California Sportfishing Protection Alliance, the California Water Impact Network, and AquAlliance (collectively, CSPA et al.) hereby petition the California State Water Resources Control Board (State Water Board or Board) for reconsideration of the Order Approving Temporary Urgency Change Petition (TUCO) for the Delta operations of the State Water Project (SWP) and the Central Valley Project (CVP), issued by the Executive Director of the State Water Resources Control Board on February 21, 2023. The California Department of Water Resources (DWR) and the US Bureau of Reclamation (Reclamation) submitted their Temporary Urgency Change Petition (2023 TUCP) to the State Water Board on February 13, 2023. The TUCP requested, and the TUCO approved, waiver of the Port Chicago flow requirement (“Port Chicago Trigger”) of Water Rights Decision 1641 (D-1641) throughout the months of February and March 2023.

CSPA et al. also hereby petition the State Water Board for reconsideration of the Order Modifying an Order that Approved Temporary Urgency Changes to Water Right License and

Permit Terms Relating to Delta Water Quality Objectives (Modified TUCO), issued by the Executive Director of the State Water Resources Control Board on March 9, 2023.

Executive Summary

CSPA et al. is a coalition of public interest, non-governmental resource conservation organizations that seek to protect the fisheries, habitat, water quality, and water resources of California, with much of their efforts focused in the Central Valley's Bay-Delta watershed. In issuing the TUCO, the State Water Board harmed fishery resources that CSPA et al. seek to protect as part of their organizational missions.

The TUCO caused unreasonable effects to fish and wildlife, was contrary to law, was not in the public interest, and was not preceded by due diligence on the part of DWR, Reclamation, and the State Water Board. CSPA, C-WIN, and AquAlliance timely submitted a Protest and Objection to the TUCP on February 23, 2023.¹ CSPA also joined NRDC et al.'s petition for reconsideration of the TUCO filed on March 6, 2023. The instant petition for reconsideration incorporates by reference, and supplements, NRDC et al.'s March 6, 2023 petition for reconsideration.²

On March 9, 2023, the State Water Board's Executive Director modified the TUCO, requiring DWR and Reclamation to comply with the requirements of the Port Chicago Trigger for 11 days in March 2023. This partial rescission, in combination with 2023 hydrology, solved the immediate problem of Port Chicago flows in 2023. However, it does not address the lack of

¹ CSPA et al.'s February 23, 2023 Protest and Objection is posted on the Board's TUCP webpage at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/20230223-cspa-et-al-objection-tuco.pdf.

² NRDC et al. March 6, 2023 Petition for Reconsideration of the TUCO is available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/nrdc-et-al-petition-for-reconsideration-of-2023-tucp-approval-3-6-23.pdf and https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/nrdc-et-al-appendix-wops-package-final-feb-2023.pdf

diligence on the part of the Board, DWR, and Reclamation in their collective failure to establish operational rules for the SWP and CVP in dry years and dry year sequences. This need for such rules has begged for an answer since at least 2007-2009.

1. Name and address of the petitioners. (23 Cal. Code Regs., § 769(a)(1))

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2. The specific board action of which petitioner requests reconsideration. (23 Cal. Code Regs., § 769(a)(2))

CSPA et al requests that the State Water Board reconsider and rescind the Board’s Executive Director’s February 21, 2023 Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives, In the Matter of Specified License and Permits of the Department of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project (TUCO). The TUCO responded to a Temporary Urgency Change Petition (TUCP) for the Delta operations of the State Water Project (SWP) and the Central Valley Project (CVP). The California Department of Water Resources (DWR) and the US Bureau of Reclamation (Reclamation) submitted their Temporary Urgency Change Petition (2023 TUCP) to the State Water Resources Control Board (State Water Board or Board) on February 13, 2023. The TUCP requested, and the TUCO approved, waiver of the Port Chicago flow requirement (“Port Chicago Trigger”) of Water Rights Decision 1641 (D-1641) in February and March 2023.

CSPA et al. also requests that the Board reconsider and rescind the Board’s Executive Director’s March 9, 2023 Order Modifying an Order that Approved Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives.

3. The date on which the order or decision was made by the board. (23 Cal. Code Regs., § 769(a)(3))

The Executive Director of the State Water Board issued the Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives on February 21, 2023. The Executive Director of the State Water Board issued the Order Modifying an Order that Approved Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives on March 9, 2023.

4. The reason the action was inappropriate or improper. (23 Cal. Code Regs., § 769(a)(4))

As explained in detail in the Memorandum of and Authorities attached hereto, the TUCO and the Modified TUCO are inappropriate and improper because:

- They are contrary to law.
 - They are arbitrary and capricious and are not supported by substantial evidence.
 - They fail to provide a reasoned explanation of decisions based on evidence in the record.
 - They violate Water Code § 1435(c). Neither the DWR and Reclamation, nor the Board, exercised diligence in, respectively, requesting the TUCP and issuing the TUCO approving the TUCP.
 - They fail to support findings of no unreasonable effects of fish and wildlife with substantial evidence and fail to consider conflicting evidence.
 - They violate the public trust doctrine.
 - They violate the July 17, 2020 Settlement Agreement between CSPA et al. and the State Water Board that resolved CSPA et al.'s lawsuit relating to drought issues in 2014 and 2015.
 - They violate Article X, Section 2 of the California Constitution (Water Code § 275), which prohibits the unreasonable use of water.
 - They violate the Clean Water Act because they have the effect of nullifying the applicable water quality objectives and standards without the concurrence of the US Environmental Protection Agency.
- They do not serve the public interest.

5. The specific action which petitioner requests. (23 Cal. Code Regs., § 769(a)(5))

CSPA et al. requests that the State Water Board reconsider and rescind the February 21, 2023 TUCO and the March 9, 2023 Modified TUCO, and issue a new Order acknowledging the errors of the Executive Director in issuing the TUCO and the Modified TUCO.

CSPA et al. further requests that the State Water Board exercise the diligence that DWR and Reclamation, as well as the Board, have failed to exercise in serially relying on TUCPs during dry year sequences. CSPA et al. requests that the State Water Board initiate and complete, with appropriate public input, a proceeding to establish rules and requirements for the

operations of the SWP and CVP that will reduce or eliminate the use of temporary urgency changes in dry and critically dry years, and in sequences of such years. Such rules and requirements must consider reductions in deliveries to all classes of SWP and CVP contractors in single dry and critically dry years.

6. A statement that copies of the petition and any accompanying materials have been sent to all interested parties. (23 Cal. Code Regs., § 769(a)(6))

Electronic copies of this Petition, and all materials submitted with this Petition, have been sent to the following:

Regional Solicitor's Office, c/o Amy Aufdemberge: Amy.Aufdemberge@sol.doi.gov

Bureau of Reclamation, c/o Kristin White: knwhite@usbr.gov

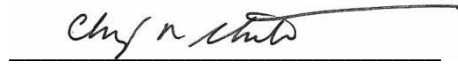
Department of Water Resources, c/o James Mizell: James.Mizell@water.ca.gov

Conclusion

For the reasons set forth above, in the Statement of Points and Authorities that follows, and in CSPA et al.'s February 23, 2023 Protest and Objection, CSPA et al. requests that the State Water Resources Control Board grant reconsideration of the Executive Director's February 21, 2023 Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives (TUCO) and the Executive Director's March 9, 2023 Order Modifying an Order that Approved Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives (Modified TUCO).

Dated March 23, 2023.

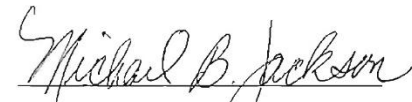
Respectfully submitted,



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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

A petition for reconsideration must state “the reason the action was inappropriate or improper.” (Cal. Code Regs., title 23, § 769, subd. (a)(4). As described below, the Executive Director’s TUCO and Modified TUCO are inappropriate and improper because:

- They are contrary to law.
 - They are arbitrary and capricious and are not supported by substantial evidence.
 - They fail to provide a reasoned explanation of decisions based on evidence in the record.
 - They violate Water Code § 1435(c). Neither the DWR and Reclamation, nor the Board, exercised diligence in, respectively, requesting the TUCP and issuing the TUCO approving the TUCP.
 - They fail to support findings of no unreasonable effects of fish and wildlife with substantial evidence and fail to consider conflicting evidence.
 - They violate the public trust doctrine.
 - They violate the July 17, 2020 Settlement Agreement between CSPA et al. and the State Water Board that resolved CSPA et al.’s lawsuit relating to drought issues in 2014 and 2015.
 - They violate Article X, Section 2 of the California Constitution (Water Code § 275), which prohibits the unreasonable use of water.
 - They violate the Clean Water Act because they have the effect of nullifying the applicable water quality objectives and standards without the concurrence of the US Environmental Protection Agency.
- They do not serve the public interest.

II. The Executive Director’s TUCO and Modified TUCO are contrary to law.

A. DWR and Reclamation failed to exercise diligence as required by Water Code § 1435(c), and the State Water Board was complicit in this failure.

DWR and Reclamation’s TUCP makes no showing of the purported benefits of the TUCP to anything other than south-of-Delta water supply. The TUCP claims without support benefits to cold water pools for salmon and steelhead, instream conditions for fish and wildlife, water quality, carryover storage, or health and safety water supplies. Indeed, there are no such

benefits. The TUCO, for its part, does not require any such showing, simply reciting the benefits alleged.³

DWR and Reclamation have made no evident progress in determining how the SWP and CVP can comply with flow and water quality requirements in dry year sequences. Stated differently, they have no plan and have taken no evident action to provide future water supply reliability for fish and wildlife. Not only do they continue to serially rely on TUCPs in dry year sequences, they have now extended reliance on TUCPs to wetter water years.

The Board has been the handmaiden of this failure. The TUCO is only the latest instance of the Board's passive acceptance of DWR and Reclamation's absence of drought planning. For at least a decade, the State Water Board has promised a plan to deal with SWP and CVP operations in droughts and dry year sequences. Yet the State Water Board is no closer to a plan today than it was during the 2013-2015 drought. Purportedly, the Board is to include such a plan in the update of the Bay-Delta Plan. However, the Bay-Delta Plan grinds on through process, stalled by the effort to supplant it with "Voluntary Agreements" that DWR, Reclamation, and SWP and CVP contractors have taken the lead in at once promoting and delaying.

Nor did DWR or Reclamation address the absence of a long-term drought plan with an interim plan. In 2020, neither DWR, nor Reclamation, nor the Board lifted a finger to limit SWP and CVP water deliveries to better assure the ability of the SWP and the CVP to meet regulatory requirements for the Delta, or elsewhere, in 2021 or thereafter, in the event that 2021 and 2022 were dry. And dry they were. Nonetheless, in 2021, DWR and Reclamation, with Board approval, over-delivered water to settlement and exchange contractors, while operating under a

³ TUCO, p. 2.

TUCP for Delta operations and with inadequate storage conditions and water temperature protections in the Sacramento and American rivers.

Bluntly, the 2023 TUCP and TUCO rewarded DWR and Reclamation's lack of diligence in planning for drought and their reliance on TUCPs to augment water supply at the expense of fish and wildlife and other public trust resources.

The TUCO's failure to evaluate the lack of diligence by DWR and Reclamation in justifying the TUCP's purported benefits, and in DWR and Reclamation's lack of planning and action to avoid the need for TUCPs over the time period 2020-2022, in addition to 2023, is arbitrary and capricious and contrary to law.

Because the Modified TUCO does not correct these deficiencies, but rather affirms the propriety of the TUCO when issued and dismisses its urgency only due to changed hydrology, the Modified TUCO is arbitrary and capricious and is not supported by substantial evidence.

B. In issuing the TUCO, the Executive Director failed to conduct independent analysis of the effects of the TUCP on fish and wildlife and thus failed to support its findings with substantial evidence.

The requirement that agency decisions be supported by substantial evidence requires both that the evidence relied on be credible and that it be weighed against other competing credible evidence. An agency cannot simply rely on part of the record while ignoring other parts of the record that offer opposing evidence.

In addition, in issuing a decision, an agency must "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community vs. County of Los Angeles* (1974) 11 Cal.3d 506, 515).

As explained in the Protest and Objection of CSPA et al., the TUCO assumes that there will be only “incremental changes”⁴ in the TUCP’s effects on fish and wildlife. This conclusion relies on a perfunctory two-page letter from the California Department of Fish and Wildlife, which states: “CDFW agrees with DWR and Reclamation’s assessment that impacts to fish and wildlife resources from the proposed changes would be no more than incremental, and we do not have additional information to add to the biological review.”⁵

The TUCO does not conduct independent analysis. The TUCO does not address the competing evidence presented by CSPA et al. For example, the TUCO does not address the cascading effects of dry year sequences on fish and wildlife and the consequent need for recovery in wetter water years. The TUCO does not address the failure of fish to recover since the TUCPs in 2014 and 2015. The TUCO does not address the extremely fragile condition of fisheries in the Delta and the Central Valley, and their inability to endure more adversity. The TUCO does not address the improved survival of juvenile salmon migrating into the Delta during winter and spring high flow events and the consequent importance of high flows to move them through the Delta.

In addition, the TUCO does not explain how acknowledged adverse effects on fish and wildlife do not, in the analysis of the Executive Director, rise to the level of unreasonable effects. For example, both the TUCP and the TUCO acknowledge that X2 will move eastward because of the implementation of the TUCP. CSPA et al.’s Protest and Objection presented figures showing that longfin smelt had already moved eastward between January 17 and February 1,

⁴ TUCO, p. 31.

⁵ Feb. 13, 2023 letter from Brooke Jacobs, Chief, Water Branch, CDFW to Diane Riddle, op. cit., p. 2. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2023/cdfwletter-re-wy2023-tucp-2-13-23.pdf.

2023. Yet the TUCO does not offer a reasoned analysis of why such movement is acceptable, stating only that there are water supply benefits to granting the TUCP.

Because the TUCO does not conduct independent analysis of the effects of the TUCP on fish and wildlife, does not consider competing evidence, and does not offer a reasoned explanation for its findings, the TUCO's finding that the TUCP will not have unreasonable effects on fish and wildlife is arbitrary and capricious and not supported by substantial evidence.

Because the Modified TUCO does not correct these deficiencies, but rather affirms the propriety of the TUCO when issued and dismisses its urgency only due to changed hydrology, the Modified TUCO is arbitrary and capricious and is not supported by substantial evidence.

C. The TUCO and Modified TUCO violate the Public Trust Doctrine and the Board's 2020 Settlement with CSPA et al.

Public trust law requires agencies "to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible," and to "avoid or minimize any harm to those interests." It requires that public trust resources be protected to the extent feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446-447).

The TUCO makes no findings as to feasibility of improved public trust resource protection. Instead, the TUCO ignores the general public interest in protection of public trust resources (*Id.*) and affirms that any consideration of such feasibility is *a priori* not in the public interest:

Public trust uses include navigation, commerce, fishing, recreation, and the preservation of fish and wildlife habitat. Disapproving the TUCP to avoid the potential impacts of the proposed change on fish and wildlife is not considered to be in the public interest for the reasons given in sections 6.2, 6.4, and 6.6 of this Order.⁶

⁶ TUCO, p. 32.

This lawyer's trick substitutes definition for analysis. It simply affirms as a foregone conclusion the public interest in reallocating water, whose purpose is protection of public trust resources, to south-of-Delta exports, without even discussing, let alone weighing, the competing public interest in resource protection.

Simply mentioning the resources protected under the public trust doctrine does not convey the right to so blithely dismiss their feasible protection.

In its 2020 Settlement Agreement with CSPA et al., as cited *supra*, the Board agreed, when considering TUCPs, to make “[a]n express determination whether protecting public trust resources through conditions of approval would be feasible and in the public interest, taking into consideration all relevant factors ... The State Water Board shall explain its findings and describe the *specific factors it balanced* in making its determination.”⁷ In response, the TUCP simply makes an affirmation that it will not “adversely affect” and that it would be “protective of” public trust resources.⁸

For its part, the Board in the TUCO makes no attempt to show *how* it balanced competing demands. It does not describe the “specific factors” the Board balanced. It describes, rather, the specific factors the Board *did not* balance. Indeed, *it doesn't balance any public trust factors at all*. It simply describes its conclusion that public trust resources don't matter.

The failure of the TUCO to conduct a public trust analysis violates the Public Trust Doctrine. The failure of the TUCO to describe the specific factors the Board balanced violates the Board's 2020 Settlement Agreement with CSPA et al.

⁷ CSPA et al. – State Water Board Settlement, *supra*, p. 3. Emphasis added.

⁸ TUCP, p. 1-13.

Because the Modified TUCO does not correct these deficiencies, but rather affirms the propriety of the TUCO when issued and dismisses its urgency only due to changed hydrology, the Modified TUCO violates the Public Trust Doctrine and the Board's 2020 Settlement Agreement with CSPA et al.

D. The TUCO and Modified TUCO violate Article X, Section 2 of the California Constitution (Water Code § 275), which prohibits the unreasonable use of water.

It is not a reasonable use of water to reallocate water from fisheries protection to south-of-Delta exports in February of a water year that has been wet to date. D-1641, for all its many faults, provides in the Port Chicago flow requirement a designed early season fisheries benefit when hydrology to date has been wet. D-1641 sunsets the Port Chicago flow requirement if later season hydrology turns dry.

Because the Modified TUCO does not correct these deficiencies, but rather affirms the propriety of the TUCO when issued and dismisses its urgency only due to changed hydrology, the Modified TUCO violates Article X, Section 2 of the California Constitution (Water Code § 275).

E. The TUCO and Modified TUCO violate the Clean Water Act.

The TUCP and TUCO violate the requirements of the federal Clean Water Act, because they have the effect of nullifying the applicable water quality objectives and standards without the concurrence of the US Environmental Protection Agency. The Board has previously argued that its implementation decisions do not alter the established standard, and thus, even if the Board fails to enforce the standard, it has complied with the Clean Water Act.⁹ Thus the Board would elevate the illusion of compliance with the Clean Water Act over the reality of loosened

⁹ See Water Rights Order 2022-0095, pp. 57-58.

standards and backsliding. The TUCP and TUCO contravene the federal Clean Water Act by arbitrarily weakening criteria without following mandated processes and ignoring federally promulgated water quality criteria.

Because the Modified TUCO does not correct these deficiencies, but rather affirms the propriety of the TUCO when issued and dismisses its urgency only due to changed hydrology, the Modified TUCO violates the Clean Water Act

III. The TUCO and Modified TUCO are not in the public interest.

The State Water Board had a chance in 2020, 2021, and 2022 to set the State of California in a new direction in preparing for and managing drought. However, the TUCO and Modified TUCO pick up the bloody threads of the State Water Board's failed response to drought in 2014 and 2015, and in 2020-2022, reacting instead of being proactive, failing to enforce its policies and legal mandates, and rewarding Reclamation and DWR, rather than holding them accountable, for over-delivering water in 2020 and 2021. None of this is in the public interest.

Droughts are predictable. They are likely to become more severe under a changing climate, and will probably be more frequent. The public interest requires that the State Water Board plan for droughts and require water users to manage water to meet competing needs in sequences of dry years. As became abundantly clear in 2021, drought management must begin in any single dry year; the fisheries disasters in 2021 began with the over-delivery of water to SWP and CVP contractors in 2020.

The public interest also demands that the State Water Board require flows in the wetter water years that are adequate to allow the recovery of fisheries and other aspects of the aquatic

ecosystem at a level that will sustain them through the bad years. The 2023 TUCP and TUCO abjectly failed to meet this obvious imperative.

The overallocation of the State's water resources is inherently an unreasonable use of water. It cannot be in the public interest. The TUCO perpetuates that overallocation by treating drought as anomalous and treating it once again as a one-off, not as a symptom of the need for Reclamation and DWR to systemically change the way they do business.

It is not in the public interest to push fish species closer to the brink of extinction with every new drought sequence, but that is exactly what the TUCO did. It gratuitously rubbed salt in the open wound of fisheries failures in 2021 and 2022.

The TUCP promotes, and the TUCO supports, a strategy of "when in doubt, divert." That strategy is not in the public interest. The natural world is hemorrhaging, and it cannot shoulder all the risk. It is not in the public interest to deprive already decimated fisheries of already inadequate flow protections. It is not in the public interest to deliver all water "conserved" by weakening fisheries protections to unspecified SWP and CVP contractors. It is not in the public interest to transfer management of water taken from fish and wildlife to the complete discretion of the managers of DWR and Reclamation.

It is not in the public interest for the TUCO to substitute reporting and monitoring for actions to protect fish and wildlife resources. While as a general matter transparency has value, transparency regarding bad decisions does not make those decisions good decisions.

The extreme risk aversion of the TUCP and TUCO is also not in the public interest. For all of its many defects, D-1641 seeks to provide fish and wildlife with a share of the early season benefits of wet weather. The Port Chicago Trigger times out if conditions turn dry in subsequent

months. That adjustment is baked into D-1641. It is not in the public interest to gut the early season fishery protections of D-1641 and completely rewrite its risk calculus *ad hoc*.

It is never in the public interest for a regulator to pale before its responsibilities. The public interest demands a State Water Board that follows the law and enforces the law. The public interest also demands that the State Water Board own up to and correct its mistakes, rather than allowing them to be diluted and forgotten.

In this latter regard, the Modified TUCO is an unacceptable deflection. “The concern articulated in the TUCP that dry conditions would persist” *never supported* an “urgent need to change Delta outflow requirements.”¹⁰ Changing hydrology simply made the “concern” facially untenable.

Leaving the Modified TUCO uncorrected would set an important and harmful precedent. Since hydrologic conditions can turn dry at almost any point in California, it would establish the arguable presumption of an urgent need to increase water exports or other diversions at any time other than when water flowed in the Delta (or elsewhere) beyond the ability of the SWP and CVP to divert it. It would also subject the requirements of the Bay-Delta Water Quality Control Plan then in effect¹¹ to an active, real-time process of modification by the Executive Director or the State Water Board.

Temporary urgency change petitions are by their nature supposed to be temporary and urgent. Leaving the Modified TUCO intact and uncorrected would improperly further erode the boundaries of applicable water law away from regulatory certainty towards permanent *ad hoc* governance.

¹⁰ Modified TUCO, p. 14.

¹¹ Presently implemented by D-1641.

IV. Conclusion

The TUCO is arbitrary and capricious, is not supported by substantial evidence, violates the public trust and reasonable use doctrines, violates the Clean Water Act, and is not in the public interest.

The Modified TUCO compounds the errors of the TUCO and establishes a dangerous precedent that could diminish the rule of law in favor of permanent *ad hoc* regulation of the SWP and CVP.

The State Water Board should reconsider and rescind the TUCO and Modified TUCO, and issue a new Order that corrects the deficiencies described herein.

The State Water Board should also commence a proceeding, with appropriate public input, to establish rules and requirements for the operations of the SWP and CVP that will reduce or eliminate the use of temporary urgency changes in dry and critically dry years, and in sequences of such years.

DECLARATION OF CHRIS SHUTES

Pursuant to section 769 of title 23 of the California Code of Regulations, I declare under penalty of perjury under the laws of the State of California that the new facts and evidence cited in this petition that were not previously presented to the State Water Resources Control Board constitutes information that postdates CSPA et al.'s February 23, 2023 Protest and Objection of DWR and Reclamation's TUCP:

- NRDC et al, Notice of Petition for Reconsideration of the State Water Resources Control Board's February 21, 2023 Approval of the Temporary Urgency Change Petition (March 6, 2023)
- Executive Director of the State Water Board, Order Modifying an Order that Approved Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives (March 9, 2023)

This information could not have been produced with reasonable diligence by Petitioners because it was not yet in existence at the time of the CSPA's Protest and Objection.

Date: March 23, 2023



Chris Shutes