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Hon. E. Joaquin Esquivel, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Comment Letter: 2021 TUCP-TMP Reconsideration

Dear Chair Esquivel:

This letter transmits our comments on the Draft Reconsideration Order (Draft Order) released by the State Water Resources Control Board in December 2021, concerning its approval of the Temporary Urgency Change Petition by the California Department of Water Resources and the United States Bureau of Reclamation.

The Draft Order as written is unacceptable. We incorporate by reference comments of NRDC, The Bay Institute, San Francisco Baykeeper, Restore the Delta, and Defenders of Wildlife (submitted this date) into this letter. We agree with them that the Water Board's Order states conclusions that are not based on actual findings contained in the Order. Please align the conclusions with the findings NRDC et al have identified to have a morally just and ecologically reasonable Draft Order before adopting it.

Restore the Delta is frustrated with the State Water Board's continuing divergence between its words and deeds regarding Bay-Delta matters. The Board acknowledges:

In the long-term, the State Water Board has acknowledged that currently implemented flow and water quality requirements in D-1641 and the Bay-Delta Plan need to be strengthened based on current scientific information regarding the needs of fisheries and other instream beneficial uses.¹

This statement gently discloses that the State Water Board has let fester problems of the Bay-Delta Estuary and upstream rivers and watersheds during the time that D-1641

¹ State Water Resources Control Board, Draft Reconsideration Order, issued 15 December 2021, p. 46.

and the Bay-Delta Plan have been in effect, the last 22 years. There was the Pelagic Organism Decline that came into focus just a few years after adoption of D-1641 when numerous and widespread aquatic species native to the Delta underwent dramatic population crashes in the wake of the new water quality objectives. Then came droughts in 2007 to 2009, then 2012 through 2016, and now 2020-2021 and potentially beyond. In their wake and Board inaction to establish more protective water quality and flow objectives, Delta smelt now register an abundance of zero in two consecutive years of longitudinal estuary surveys of Delta fish life. Winter-run Chinook salmon are pushed closer than ever to the brink of extinction by unsuccessful attempts by the Bureau of Reclamation to manage the cold water pool to protect salmon eggs, fry, juveniles and smolts. Spring-run salmon are also closer to the precipice of extinction than ever as a result of commodified water management that privileges the claims of senior water right holders—the various Settlement and Exchange Contractors with first claims on reservoir supplies in Central Valley Project and State Water Project reservoirs—over their regulatory obligations under the California Constitution (Article X, Section 2), the state and federal Clean Water Acts, the public trust doctrine, and the coequal goals of the 2009 Sacramento-San Joaquin Delta Reform Act, among other applicable laws.

The Water Board has slow-walked correction of these problems by bifurcating its approach to updating the Bay-Delta Plan, and by repeatedly choosing the needs of exporters over in-Delta beneficial uses and letting its 2008 organizational work plan be overwhelmed by drought emergencies. The Board lost focus on updating the Bay-Delta plans whose ostensible purposes include protecting all Bay-Delta beneficial uses by applying protective water quality, flow, and water system operational objectives protective of those beneficial uses—and doing so, regardless of what part of the climate/hydrologic cycle California may be in.

Repetition of good intentions followed by destructive water management decisions strongly indicates that the Water Board engages in behavioral pattern and practice failures at protecting the public trust resources of California in the Delta and upholding reasonable water uses, methods of water use, and reasonable methods of diversion.

These beneficial uses include protecting fish and wildlife, rare and endangered species, estuarine beneficial uses, with agricultural, municipal/industrial, and contact and non-contact water recreation. More recently, the Water Board has approved new beneficial use designations for subsistence fishing, Indian tribal subsistence fishing, and tribal cultural resources—particularly the cosmological and community significance of Chinook salmon runs to several northern California Indian Tribes. Restore the Delta has documented these beneficial uses as they relate to the Delta in our case against the proposed California WaterFix project and in our 2018 report, *The Fate of the Delta*.²

² Barbara Barrigan-Parrilla, Nora Kovaleski, Mariah Looney, and Tim Stroshane, *The Fate of the Delta: Impacts of Proposed Water Projects and Plans on Delta Environmental Justice Communities*, 2018, Chapter 2; accessible at <https://www.restorethedelta.org/thefateofthedelta/>

Second, on page 40 in its December 2021 Draft Order, the Board defined “legal [or lawful] users of water” to justify privileging of propertied water users over non-propertied. We do not believe any relevant definition of this phrase is provided in the California Water Code. More importantly, the Order’s authors picked this nit to avoid addressing a much larger issue: why do Petitioners DWR and the Bureau and the Water Board narrowly privilege potential harms or injuries primarily to propertied water right holders rather than a more inclusive reading that would embrace concerns of Delta environmental justice and other communities, given numerous water quality concerns rife with the TUCP? The Order’s argument on this point implicitly and improperly rejects such concerns about the TUCP. The Board must do better.

The Board has long-used the unique water rights of the federal Central Valley Project and the State Water Project to implement water quality objectives in **both** temporary urgency change petitions as well as D-1641 and the Bay-Delta Plan. The projects’ water rights are unique for two reasons: First, the scale and operation of their facilities have Delta and watershed-wide hydrologic, ecologic, economic, and environmental justice impacts. Second, because of the projects’ scale of impact, the Board has historically conditioned their water rights with quasi-legislated water quality objectives from the Bay-Delta Plan and D-1641 and maintained continuing jurisdiction accordingly. Thus, these particular water rights play a dual role: they not only govern operations of the projects, those operations must achieve full compliance with the Bay-Delta Plan and D-1641 on behalf of all water right holders in the Delta watershed. Accordingly, water right change petitions concerning the CVP and SWP must of necessity address not only injury to other water right holders, but violations of water quality objectives that harm beneficial users of water. In this instance, waiving or relaxing water quality objectives under TUCPs will by definition undo protections for non-propertied beneficial users and therefore harm them; this is what TUCPs pertaining to these particular water rights propose to cause, and therefore exclusion of harms (i.e., injuries) to beneficial users by the Water Board is unreasonable and an abuse of agency discretion.

Because of the dual role of these water rights, it is logical and reasonable that the phrase “legal users of water” include both propertied and non-propertied water users and their protection from harms stemming from any type of change petition. This was applied by the hearing officers during the 2016-2018 California WaterFix water right change petition proceeding. Board rejection of this understanding on page 40 of the Draft Order is improper sophistry, and does not make realities of waiving water quality objectives go away, realities like spreading harmful algal blooms, threatening extinction of native fish, and increasing Delta salinity. By defining away non-propertied beneficial users of water like environmental justice communities, your recent racial diversity, equity, and inclusion resolution becomes empty words when the Board addresses water rights of the CVP and SWP.

Finally, there are less well-recognized beneficial uses (that is, ones not officially designated by the State Water Board) not yet accounted for by any TUCP work done by either Petitioners or the Water Board. As inequality has increased in our society, the Delta is not exempt from the epidemic not only of the coronavirus but of people losing their stable jobs and homes in recent years. In 2019, the San Joaquin County Point in Time count identified 921 unhoused residents. Since then, due to events like the pandemic and affordable housing crisis, that number has grown tremendously to approximately 5,000, a dramatic increase. A more exact figure awaits completion of this year's Point in Time count conducted by our local colleagues, and is currently underway. Whole communities of unhoused residents are forced to move from encampment to encampment. More and more, they migrate toward Delta water ways to set up camp. Living along the waterways puts these individuals at a higher danger of being exposed to HABs than others in our community and this must not be overlooked by the DWR, USBR, or the Water Boards.

In addition, we will be working on an effort coordinated by our partner organizations to implement trash collection programs led by the unhoused in coming months. Prioritization of accountability for local government agencies regarding water quality conditions and trash associated with encampments for the unhoused is welcomed assistance.

Please revise your Draft Reconsideration Order to align your conclusions with the facts the Order describes. Please include non-propertied legal beneficial users of water in your accounting of injuries and harms, don't erase them. Thank you for the opportunity to comment on the Draft Reconsideration Order. We welcome questions about our views on this matter.

Sincerely,



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