

## PROTEST- PETITION

This form may also be used for objections

### PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT CHANGE

APPLICATION See attachment OR TRANSFER ON  
PERMIT 16478, 16479 LICENSE 16481, 16483, 11715, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12726, 12722, 12723, 12725, 12728, 12727, 12860, 15735, 16597, 20245, 16600  
OF USBR/DWR

I (We) have carefully read the notice (state name):

Doug Obeeji

Address, email address and phone number of protestant or authorized agent:

NRDC, 11 Sutter Street, 20<sup>th</sup> Floor, San Francisco, CA 94104

dobeji@nrdc.org 415.875.6100

Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

**Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS (Prior right protests should be completed in the section below):**

- the proposed action will not be within the State Water Resources Control Board's jurisdiction
- not best serve the public interest
- be contrary to law
- have an adverse environmental impact

State facts which support the foregoing allegations

See attachment

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

See attachment

**Protest based on INJURY TO PRIOR RIGHTS:**

To the best of my (our) information and belief the proposed change or transfer will result in injury as follows: \_\_\_\_\_

Protestant claims a right to the use of water from the source from which petitioner is diverting, or proposes to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative or riparian right):: \_\_\_\_\_

List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree). \_\_\_\_\_

Where is your diversion point located? \_\_\_ 1/4 of \_\_\_ 1/4 of Section \_\_\_\_\_, T \_\_\_\_\_, R \_\_\_\_\_, \_\_\_ B&M

If new point of diversion is being requested, is your point of diversion downstream from petitioner's proposed point of diversion? \_\_\_\_\_

The extent of present and past use of water by protestant or his predecessors in interest is as follows:

- a. Source \_\_\_\_\_
- b. Approximate date first use made \_\_\_\_\_
- c. Amount used (list units) \_\_\_\_\_
- d. Diversion season \_\_\_\_\_
- e. Purpose(s) of use \_\_\_\_\_

Under what conditions may this protest be disregarded and dismissed? \_\_\_\_\_

**All protests must be signed by the protestant or authorized representative:**

Signed: Don Oleg Date: 2-13-15

**All protests must be served on the petitioner.** Provide the date served and method of service used:

Service via email 2-13-15



February 12, 2015

Rich Satkowski  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

*Sent via email to [Rich.Satkowski@waterboards.ca.gov](mailto:Rich.Satkowski@waterboards.ca.gov)*

**RE: Objections to TUCP Order Issued February 3, 2015**

Dear Mr. Satkowski:

On behalf of the Natural Resources Defense Council, which has more than 1 million members and activists, 250,000 of whom live in California, I am writing to renew and supplement our protest and objections dated January 27, 2015. The Executive Director's Order on Temporary Urgency Change Petition issued February 3, 2015 ("TUCP Order") appropriately demonstrates that the TUCP<sup>1</sup> will result in unreasonable effects on fish and wildlife and is not in the public interest, absent modification. In the TUCP, Reclamation and DWR propose to **worsen** conditions for fish and wildlife in the Bay-Delta as compared to last year's operations, despite the fact that drought and TUCPs approved last year caused unreasonable effects on fish and wildlife (as demonstrated by the alarming decline of numerous fish species over the past year as a result of drought and management decisions), and despite the increased water supply allocations already announced by DWR for 2015.

The drought is harming communities around the state: farmers and fishermen, urban residents and rural communities, fish and wildlife. We recognize that the drought is forcing very difficult choices with respect to our state's scarce water resources. For these reasons, NRDC did not

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<sup>1</sup> The petition was filed for Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation for the Central Valley Project.

object to three of the four proposed elements of the TUCP; we have not objected to the relaxation of Delta outflow requirements, Vernalis inflow requirements, or DCC gate operations in the TUCP and TUCP Order. However, the proposed increase in water exports from the Delta under the TUCP when the CVP and SWP are not meeting the outflow requirements of Water Rights Decision 1641 (“D-1641”) will cause unreasonable impacts on fish and wildlife and is not in the public interest, as we discuss further below.

Therefore, NRDC urges the Board to uphold the TUCP Order with respect to operations in the month of February, and consistent with our earlier protest and objections, modify the TUCP Order for March and limit exports to 1,500 cfs in the month of March unless the requirements of Decision 1641 are met.<sup>2</sup>

### **The TUCP, Absent Modification, Will Cause Unreasonable Effects on Fish and Wildlife**

As noted above, the TUCP proposes to **worsen** conditions for fish this year as compared to the TUCPs approved last year, by substantially reducing Delta outflow and increasing exports as compared to last year’s operations. Yet in hindsight, it is abundantly clear that the TUCPs approved last year resulted in unreasonable effects on fish and wildlife, including:

- **Winter run Chinook salmon:** NMFS and CDFW have estimated that last year’s eggs and juvenile fish suffered 95% mortality, as a result of lethal water temperatures in the Sacramento River, with CDFW concluding that, “Based on this data, it is the Northern Region’s opinion that a collapse of the 2014 winter-run brood year may have occurred.”
- **Spring run Chinook salmon:** The agencies have reported that 2014 escapement of spring run Chinook salmon is down more than 50% compared to 2013 ((23,696 vs 9,680), that 0 of the 200 acoustically tagged wild spring run Chinook salmon from Mill and Battle Creek survived their migration to the Delta last year, and that extremely few spring run Chinook salmon have been observed migrating past Red Bluff Diversion Dam this year.
- **Fall run Chinook salmon:** Significant mortality of fish spawning in the Sacramento River due to high water temperatures and redd dewatering.
- **Delta Smelt:** CDFW has reported that the 2014 Fall Midwater Trawl resulted in a delta smelt abundance estimate of 9, the lowest ever recorded.
- **Longfin Smelt:** CDFW has reported that the 2014 Fall Midwater Trawl resulted in a longfin smelt abundance estimate of 16, the second lowest ever recorded.

These devastating impacts were not solely the result of drought – they are also a result of operations of the water projects and other diversions from the system. While DWR has reported that relaxation of Delta outflow standards in 2014 resulted in more than 450,000 acre feet of water conserved in upstream reservoirs, and the TUCP orders made clear that such relaxations

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<sup>2</sup> In addition, we strongly support conditions 3-6 of the TUCP Order regarding data collection and reporting, and temperature modeling and operational forecasts.

were intended to protect cold water for salmon, the projects wholly failed to provide adequate cold water below Shasta dam, as evidenced by the near total loss of spawning salmonids below Shasta in 2014.

Yet despite the alarming declines in fish populations as a result of drought and the TUCPs approved last year, DWR and Reclamation propose to make conditions worse for fish and wildlife in 2015, and are currently proposing to operate outside of the range of applicable ESA and CESA requirements, despite acknowledging that such operations will worsen impacts on threatened and endangered fish that are currently in or near the Delta. In light of these existing impacts to already severely depleted populations and the lessons learned from last year, approval of the TUCP would clearly result in unreasonable impacts to fish and wildlife.

The TUCP Order correctly observes that the State Water Resources Control Board's standard is not identical to the minimum requirements of the California Endangered Species Act and federal Endangered Species Act. TUCP Order at 17. Not only does the Water Code impose a higher standard of protection on the SWRCB, it also requires the Board to consider the impacts on non-listed species, including the commercially important fall run Chinook salmon. As we noted in our earlier protest and objections, in 1995 the Board determined that the minimum outflow requirements of the Bay Delta Water Quality Control Plan were necessary for the reasonable protection of fish and wildlife. Since that time, numerous scientific reviews and agency comments have reaffirmed the critical importance of increasing Delta outflow in the February to June period in order to protect and restore the health of the Delta and its fish and wildlife resources, including:

- The SWRCB's 2010 Public Trust Flows Report;
- The California Department of Fish and Wildlife's 2010 Instream Flow Recommendations; and,
- Comments submitted by CDFW, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and various NGOs (including NRDC and our partners) in 2012 to the SWRCB as part of Phase 2 of the update of the Bay Delta Water Quality Control Plan.

The Board concluded in 2010 that, "the best available science suggests that current flows are insufficient to protect public trust resources." We strongly concur.

Recent research has only further solidified those findings. For instance, recent research also indicates that spring outflow likely has substantial effects on delta smelt abundance; the MAST report (see especially pages 47-49 and Chapter 9) indicates that spring outflow is likely to have significant effects on delta smelt abundance and recruitment. For instance, Chapter 9 of the MAST Report analyzes new quantitative modeling of the impacts of spring and fall outflow on Delta smelt abundance and recruitment, and states that,

We found that recruitment of larvae from adults was linearly related to spring X2 for the entire available time series (2003-2013, Fig.82a and Table 9).... In the current POD regime, larval recruitment from parental stock appears to be highest when flows through and out of the Delta are high and the interface between fresh and brackish water is located to the west (i.e. low X2), although it can occasionally also be high at lower flows, as was the case in 2013.

MAST Report at 156. The Report also concludes that, “Overall, these preliminary findings suggest that abundance of the larval to early juvenile life stages of Delta Smelt may respond quite strongly to spring and prior fall outflow conditions.” *Id.* at 160. The graphs on page 161 of the MAST Report suggest very low delta smelt recruitment under higher X2 values like those proposed in the TUCP. Taken together, the MAST report provides additional scientific evidence that very low outflow conditions like those under the TUCP are likely to cause significant harm to Delta smelt.

Importantly, these and other scientific reviews and peer reviewed publications demonstrate not only that Delta outflow substantially affects the abundance of numerous fish species, with higher abundance at higher spring outflows, but also that outflow drives or affects many other ecosystem processes, including:

- Recruitment of invasive clams and the magnitude of effect of clam grazing on pelagic food supply (Thompson et al 2012);
- Likelihood of successful invasions by exotic species (Winder et al 2011; Cloern and Jassby 2012);
- Transport of phytoplankton to the Delta (*see* Kimmerer and Thompson 2014).

Despite this abundant scientific evidence, the TUCP would substantially reduce Delta outflow in February and March, even when natural flows and minimum reservoir releases would otherwise meet the outflow requirements of D-1641. As we noted in our prior protest and objections, the TUCP:

would allow the CVP/SWP to violate D-1641 outflow requirements when there is sufficient natural flow to do so (e.g., without increased reservoir releases) while still providing minimum 1,500 cfs export pumping to meet critical health and safety needs. As an example, suppose that combined NDOI and exports amounts to 9,000 cfs: the CVP/SWP could meet a 7,100 cfs monthly outflow standard and still export 1,900 cfs under the approach taken in last year’s orders on temporary urgency change petitions, but under the proposal in the TUCP they could reduce outflow to 5,500 cfs and export 3,500 cfs. In other words, under the TUCP, CVP and SWP exports would directly cause the failure to meet a 7,100 cfs outflow requirement, the minimum required under critically dry water year types.

NRDC Protest and Objections at 2. Granting the TUCP without modification is likely to result in substantially lower outflow during February and March, which the agencies acknowledge will

cause increased harm to fish and wildlife species, including but not limited to species listed under CESA and the ESA. Importantly, the adverse effects of the TUCP as proposed are not limited to increased entrainment, and given the requirements of existing biological opinions, the larger impact is likely to be the general degradation of the Delta through reduced outflow (which adversely affects the health of the estuary and subsequent abundance of numerous fish species).

The TUCP Order also appropriately concludes that relaxing the export and outflow requirements of D-1641 may not result in improved management of reservoir storage necessary to protect upstream salmon. TUCP Order at 15-16, 18. Indeed, operations in 2014 demonstrate that relaxing Delta outflow requirements may not result in any benefits to upstream water temperatures; despite DWR's report that relaxing outflow requirements conserved approximately 450,000 acre feet of water that would otherwise have been released, Shasta dam ran out of cold water in August, causing 95% mortality of endangered winter run Chinook salmon, and excessively high mortality of spring run and fall run spawning and rearing below the dam. Even assuming, *arguendo*, that relaxing the outflow requirement will result in improved upstream temperature management, the export modifications sought in the TUCP do nothing to improve upstream temperature management and cannot be justified on that basis.

For the month of February, NRDC recommends that the Board uphold the TUCP Order to ensure that CVP/SWP exports do not substantially increase and reduce Delta outflow. However, for the month of March, we strongly urge the Board to limit exports to 1,500 cfs unless outflow complies with Decision 1641. Footnote 10 of Table 3 of the Water Quality Control Plan allows for relaxation of the outflow requirements for March if the February 8 River Index is less than 500,000 acre feet.<sup>3</sup> If the February 8 River Index is higher than 500,000 acre feet, Table 4 of the Water Quality Control Plan requires additional outflow beyond the 7,100 cfs minimum. Given the recent storms in Northern California, it is extremely likely that the 8 River Index for February will trigger the increased outflow requirements of Table 4 and Decision 1641. The CVP and SWP should have to meet these requirements if exports are to be increased beyond 1,500 cfs. To be clear, NRDC has not protested the relaxation of the Delta outflow standard in the TUCP, and our modifications to the export requirements of the TUCP and TUCP order would not require additional reservoir releases or otherwise impact reservoir storage and the cold water pool. However, it does ensure that minimum outflow requirements of D-1641 are met before exports are increased, and generally results in higher Delta outflow even when the minimum outflow requirements of D-1641 are not met.

### **The TUCP is Not in the Public Interest**

In addition to causing unreasonable effects on fish and wildlife, granting the TUCP is not in the public interest. Water supply and reservoir storage have all improved as compared to this time

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<sup>3</sup> "If the best available estimate of the Eight River Index for February is less than 500 TAF, the standard may be further relaxed in March upon the request of the DWR and the USBR, subject to the approval of the Executive Director of the SWRCB."

last year. Drought conditions clearly continue, and for that reason we have not opposed most of the elements of the TUCP. However, increased exports sought under the TUCP do not conserve upstream storage or otherwise provide environmental benefits to salmon, nor is it required to meet public health and safety needs. Moreover, the substantial improvement in reservoir storage and water supply allocations (without modification of D-1641 requirements) this year, in contrast to the dramatic declines in fishery resources, demonstrates that the public interest weighs against further relaxing environmental protections for the fishery resources of the Bay-Delta.

For instance, DWR has already announced a 15% allocation for State Water Project Contractors for 2015 (whereas the allocation in 2014 was 5%). The January 21, 2015 allocation forecasts for the State Water Project predict a 17-23% SWP Allocation likely under Dry conditions (90% exceedance) with full compliance with the biological opinions and D-1641, and a 27-39% SWP allocation under Average conditions (50% exceedance) with full compliance with the biological opinions and D-1641. Should the state experience average hydrologic conditions for the rest of the year, DWR predicts that inflow to Shasta Dam would exceed 4 million acre feet, which the Sacramento River Settlement Contractors have stated would result in a 100% allocation.<sup>4</sup>

Because water supply conditions have improved as compared to 2014, fishery resources have substantially declined as a result of 2014 operations and drought conditions, and the increase in Delta exports will not conserve storage or meet health and safety requirements, the public interest weighs against further relaxations of the requirements of Decision 1641.

### **Conclusion**

Maintaining minimal environmental protections are always important, but that is particularly true during drought conditions. The drought and efforts to relax environmental protections are likely to result in declining populations of fish and wildlife, which is also likely to result in future constraints on water supply.

The Bay Delta Water Quality Control Plan includes specific hydrologic triggers to relax or increase Delta outflow requirements. The triggers for relaxing outflow requirements for March under D-1641 are almost certain not to be met; instead, under D-1641, February's 8 River Index is likely to require many days of Delta outflow greater than 11,200 cfs. Yet the TUCP Order would allow for increased exports when outflow is greater than 7,100 cfs, instead of requiring

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<sup>4</sup> We also note that storage in Northern California reservoirs is also far improved as compared to this date last year, with substantially higher storage in Shasta, Oroville, Folsom and San Luis reservoirs (more than 1.8 million acre feet more water in storage today than this date last year in these four reservoirs). Recent storms in February increased upstream storage in Shasta, Oroville and Folsom more than 625,000 acre feet between February 1 and February 11. On the other hand, storage is still below average in most reservoirs and the snowpack is still a tiny fraction of average. But the increased upstream reservoir storage compared to last year suggests improved water supply and increased likelihood of meeting upstream temperature requirements for salmon.

*NRDC Objections to TUCP Order dated February 3, 2015  
February 13, 2015*

meeting these additional outflow days that are so critical to the health of the Delta ecosystem. Reclamation and DWR's right to store and divert water is dependent upon meeting the obligations of their water rights under D-1641, including the requirements of Table 3 of the Bay Delta Water Quality Control Plan. It is manifestly unjust that the CVP and SWP would seek to enforce their water rights but fail to live up to their responsibilities under those same water rights.

Numerous state and federal agencies – including the SWRCB – independent scientific reviews, and NGOs have concluded that the best available science demonstrates that D-1641 is inadequate to protect public trust fishery resources, and that greater winter/spring outflow is one element that is required for reasonable protection of fish and wildlife resources. Yet instead of providing the same protections as last year's operations – which resulted in unreasonable impacts to fish and wildlife – or meeting the requirements of D-1641, the TUCP proposes to worsen environmental conditions for the public trust fishery resources in the Bay-Delta.

Finally, waiving environmental standards to increase water supply at the expense of the environment sets a very dangerous precedent with respect to the Bay Delta Conservation Plan.<sup>5</sup> As the comments on the DEIS/DEIR make abundantly clear, the environmental community, sport and commercial fishing organizations, and numerous other stakeholders are already skeptical that a new facility would be operated responsibly and according to the rules. Waiving the rules during the drought, in order to increase water exports at the expense of the environment, greatly damages any trust that a new facility would be operated responsibly.

Thank you for consideration of our views.

Sincerely,



Doug Obegi  
Senior Attorney

cc: James Mizell, Department of Water Resources, [James.Mizell@water.ca.gov](mailto:James.Mizell@water.ca.gov);  
Amy Aufdemberge, Regional Solicitor's Office, [Amy.Aufdemberge@sol.doi.gov](mailto:Amy.Aufdemberge@sol.doi.gov)

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<sup>5</sup> The High Outflow Scenario of BDCP, the only operational scenario that federal agencies have indicated may be permissible based on the best available science, would result in similar or lower CVP/SWP exports during dry and critically dry years than today.