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**Via First Class Mail & Email**

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**RE: Demand Letter and Notice of Intent to Sue re Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives**

Dear Chair Esquivel, Executive Director Sobeck:

We write on behalf of our clients, California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance, to demand that the State Water Resources Control Board (hereafter the “Board”) immediately rescind its February 21, 2023 Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives, attached hereto as **Exhibit A** (hereafter the “Order”). The Order is an unlawful abuse of the temporary urgency change statute, which should be reserved for exigent situations where water is scarce, and need is great. The present Order, however, was issued after significant rain and snow fall greatly exceeding annual averages. (**Exhibit A** at pp. 7-10.) Flooding, damage to public trust resources, including the Delta smelt and salmon species, and the unlawful take of species listed under the California Endangered Species Act (“CESA”) are all probable results of this misguided Order. The Order, furthermore, is a clear violation of the settlement agreement entered into between our clients and the Board in litigation challenging the Board’s repeated and unlawful use of temporary use change orders. For these reasons, and as discussed more fully below, the Order is unlawful and must be rescinded by the Board. If the Order is not rescinded within 10 days, our clients will file suit in Superior Court seeking a writ of mandate requiring the Board to do so.

**I. The TUCO is Arbitrary, Capricious, and an Abuse of Discretion.**

It's clear from the face of the Order that there is no urgent need to suspend critical water quality objectives. Significantly above average rain and snowfall occurred, and continues to occur, both prior to and following the issuance of the Order, exceeding annual averages in every geographic area. (**Exhibit A** at pp. 7-10.) The Order also points to forecasts indicating that water

year 2023 will be “Wet (50 percent exceedance) or Above Normal (90 percent exceedance)” for the Sacramento and San Joaquin Valleys. (**Exhibit A** at pp. 11-12.)

The projections and trends highlighted in the Order are borne out by data following the Order. Since the Order, however, the Drought Monitor data has been revised to show that over 50% of California is now experiencing either no drought or only “abnormally dry” conditions; areas with these conditions include the entire Bay Area, all coastal counties, the entire San Joaquin Basin, and most of the Tulare Basin.<sup>1</sup>

Ignoring these facts, the Petitioner claims in amazingly broad terms that:

[T]here is an urgent need for the proposed change as extreme weather conditions are “a new reality that challenges DWR and Reclamation’s ability to balance Project operations while storing as much water as possible,”... “[m]aintaining water storage is critical should the recent dry conditions continue.”

(**Exhibit A** at p. 4.) Extreme weather conditions resulting from climate change have existed and have been recognized far prior to the issuance of the Order, and in no way can be claimed “urgent” in the middle of an above average water year. If the “new reality” of climate change is sufficient to constitute urgent need at any time, this loophole would swallow the rule.

## **II. The TUCO Violates the CSPA, C-WIN, and AquAlliance Settlement Agreement, and the Public Trust Doctrine.**

In August 2015, our clients filed a petition for writ of mandate against the Board alleging pattern and practice violations of the Clean Water act and Public Trust Doctrine stemming from the Board’s repeated and unlawful use of temporary urgency change orders. In July 2020, the Board and our clients entered into an agreement settling the lawsuit (hereafter the “Agreement”), attached hereto as **Exhibit B**. The Order violates the Agreement. As part of the Agreement, the Board agreed that in reviewing any temporary urgency change petition (“TUCP”), the Board’s Public Trust Doctrine analysis would include “[a]n express determination whether protecting public trust resources through conditions of approval would be feasible.” **Exhibit B** at 3. The State Water Board has a legal duty to protect the Public Trust “whenever feasible.” *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446 (1983). The Order fails to do this in any way. Indeed, the underlying TUCP does not propose any reduction in SWP and CVP, exports from the Delta or reductions in allocations to their contractors, even though the TUCP admits that reducing exports and reducing the SWP’s and CVP’s water supply allocations would eliminate the need for this TUCP. *See* TUCP at 2-2. The CVP and SWP have announced water supply allocations to their contractors totaling millions of acre feet of water this year, and the SWP allocations may increase. Feather River Settlement Contractors, Sacramento River Settlement Contractors, San Joaquin River Exchange Contractors, CVP Stanislaus River Contractors, and Friant Division Contractors, will all have a 100% allocation in 2023. The Board’s failure to even *consider* reducing these allocations before approving the TUCO constitute a gross violation of law and the settlement agreement.

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<sup>1</sup> <https://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?CA>

### **III. The TUCO and Executive Order Violate CEQA and the Government Code.**

The Governor's suspension of environmental review under the California Environmental Quality Act ("CEQA") is similarly misguided, and illegal. The Order will potentially result in a wide array of significant environmental effects that require CEQA review, which impacts must be minimized or avoided. *See, e.g.*, CEQA Guidelines §§ 15002(f), 15021(a). The Board details potentially significant impacts resulting from the Order to Delta Smelt, Longfin Smelt, Chinook Salmon species, Central Valley Steelhead, and Green Sturgeon. (**Exhibit A** at pp. 18-25.) Authorizing the urgency changes in a time of excess precipitation and snow pack also risks catastrophic flooding, which the Order completely ignores. The Governor's declaration promotes that this diverted water may be used for unspecified groundwater recharge projects raising significant environmental and equitable concerns. All of these impacts must undergo full environmental review pursuant to CEQA, including the development of an Environmental Impact Report.

The emergency exemption to CEQA review is "extremely narrow," and clearly inapplicable here. An emergency does not include ongoing hazardous conditions, unless there is a specific event or occurrence that poses a "clear and imminent danger, demanding immediate action." (*Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal. App. 3d 1104, 111-12; *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal. App. 4th 1257, 1267-69; *Los Osos Valley Ass'n v. City of San Luis Obispo* (1994) 30 Cal. App. 4th 1670, 1682). Here, above average rainfall, combined with improved drought conditions, hardly constitutes an imminent danger demanding immediate action. Similarly, historic droughts, climate variability and extreme weather conditions are an ongoing and known phenomenon, and do not constitute a specific event or "occurrence" sufficient to constitute an emergency. California's changing climate is well established, and the Board should have long ago undertaken environmental review of its water quality and allocation decisions. Instead, the Board has illegally operated under a permanent emergency condition now for well over a decade.

Similarly, there are no circumstances warranting or supporting the existence of a "state of emergency" pursuant to Gov. Code §§ 8567, 8571, or 8627. The Governor's emergency proclamation at Executive Order N-3-23 mirrors much of the same rationale underlying the Order. Ostensibly relying on drought as the basis of the claimed state of emergency, the proclamation simultaneously states, "in January 2023, the State experienced one of the wettest three-week periods on record, yielding a snowpack that was at 205 percent of average on February 1, 2023..." As noted above, drought conditions have only *improved* since the proclamation was issued. More egregiously, the proclamation relies on hydrologic uncertainty and variability resulting from climate change as justification for the claimed state of emergency. Again, uncertain and/or extreme weather patterns resulting from climate change have been recognized for years and are not a new emergency phenomenon. Permitting these effects to support a claim for a state of emergency would allow for such a proclamation any time and in perpetuity. Finally, where drought conditions are and continue to improve, and where any future climate extremes and/or variability are by their very nature uncertain, neither the proclamation nor the current conditions on the ground satisfy the definition of a state of emergency which require that

conditions exist of “disaster or of extreme peril to the safety of persons and property.” Gov. Code § 8558.

**IV. The TUCO Violates the California Endangered Species Act.**

It is also well established that California State agencies fall within CESA’s definition of the term “person” at Fish & Game Code § 2080 and are therefore prohibited from approving take of an endangered or threatened species listed under the CESA without permit coverage. (*See Watershed Enforcers v. Department of Water Resources* (2010) 185 Cal.App.4th 969, 983.) The Order, however, explicitly approves the take of listed longfin smelt, delta smelt, and salmonids, noting that the terms of the TUCO would require modification of Petitioners’ existing take permits, but acknowledging that no such permit modifications have been approved. (**Exhibit A** at 31.) Thus, the TUCO was approved in direct contravention of the CESA, and any take resulting from the Order will subject the Board to liability under CESA.

**V. Conclusion**

Despite the Board repeatedly finding that existing water quality objectives fail to protect fish and wildlife in the Delta, and that prior TUCOs worsened extinction threats, the Board chose *again to weaken* regulatory standards, at a time when surface water is in abundance. Our clients demand that the Order is rescinded within 10 days, or will be forced file suit in Superior Court seeking a writ of mandate requiring the Board to do so. We will make ourselves available to discuss this letter for the next 10 days.

Thank you for your consideration of these critical concerns.

Respectfully,



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