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To State Water Resources Control Board

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*Re: January 21, 2026 State Board Meeting, Agenda Item 6;
Consideration and Potential Adoption of Proposed Order Approving the Petition for
Long-Term Transfer Filed by Yuba County Water Agency for Permit 15026
(Application 5632)*

On April 4, 2024, Yuba Water filed a petition for an extension of the Yuba Accord Water Transfer Program, seeking continued authorization to transfer up to 200,000 acre-feet (AF) per year under Water Right Permit 15026 through December 31, 2050 (“Petition”). The Administrative Hearings Office (“AHO”) issued a proposed order, which was provided for public review and comment on December 15, 2025 (“Proposed Order”).

Because the Proposed Order misapplies Water Code sections 1435 and 1736 and fails to include sufficient conditions on the approval of the Petition related to Temporary Urgency Change Orders (“TUCOs”), San Francisco Baykeeper, Restore the Delta, and Golden State Salmon Association, (“Commenters”) request that the State Water Resources Control Board (“Board”) reject the Proposed Order and either remand the it to the AHO for reissuance or issue its own decision. (See Water Code § 1114(c)(2)(D), (E).)

Temporary Urgency Change Petitions and Orders approving them providing for deviations from Bay-Delta Water Quality Control Plan requirements and the requirements of Water Right Decision 1641 (“D-1641”) have become increasingly common, with the Board issuing TUCOs six times in the last twelve years (in 2014, 2015, 2016, 2021, 2022, and 2023). These orders have had profound negative effects on fish and instream beneficial uses of water.

In the Proposed Order, the AHO rejected requests by parties protesting the Petition for conditions limiting the availability of transfers during the issuance of a TUCO, or in the alternative, imposing consequences or mitigation requirements on Yuba Water if it engages in transfers when a TUCO is in effect. The AHO’s determination is inconsistent with the requirements of the Water Code, risks significant harm to fish and wildlife, and is not in the public interest. As such, the Board should reject the Proposed Order and either remand or issue its own decision to correct this error.¹

¹ We limit our comments to the Proposed Order’s analysis of TUCOs. (Proposed Order at pp. 17-18.) This is not meant to represent agreement with the remainder of the Proposed Order’s approval of the Petition. Generally, we find the

First, the Proposed Order’s determination that the standards for approval of the Petition and future issuance of TUCOs are “essentially the same” (Proposed Order at 18) is inconsistent with the Water Code, with the Board’s understanding and use of TUCOs, and California law. Second, the use of TUCOs since 2014 has caused devastating harms to fish and wildlife and other instream beneficial uses in the Sacramento-San Joaquin Delta and San Francisco Bay watershed. Third, allowing water transfers during TUCOs without limitation or consequence allows for windfalls to private water rights holders at the expense of fish and public trust resources in a manner inconsistent with the law and the public interest.

I. The Standards for Consideration of Water Right Petitions, including Transfers, are Not the Same as the Standards for Consideration of Temporary Urgency Change Petitions

The Proposed Order explains its refusal to disallow or condition transfers during the existence of a TUCO for Bay-Delta water quality requirements or D-1641 as appropriate because a TUCO cannot be granted

unless [the Board] find[s] that the proposed change can be made “without unreasonable effect upon fish, wildlife, and other instream beneficial uses.” [citation] This is essentially the same standard that governs [the Board’s] approval of the Petition. (See Wat. Code § 1736 [requiring a finding that a long term transfer would not “unreasonably affect fish, wildlife, or other instream beneficial uses.”].)

(Proposed Order at 18.)

As a result, according to the Proposed Order, “any transfer [the Board] may permit under a future TUCO would evaluate whether the new conditions would ‘unreasonably affect fish, wildlife, or other instream beneficial uses’ under the circumstances and include conditions to ensure the change would not. (Wat. Code § 1736.)” (Proposed Order at 18.) This circular reasoning is arbitrary, is inconsistent with the Board’s own understanding and interpretation of the law regarding TUCOs, and conflicts with California law.

The Proposed Order’s equation of Water Code section 1435 with Water Code section 1736 is based on the inclusion of the nearly identical phrasing requiring reasonableness. This focus on the individual phrases ignores the context of the statutes. While both statutes speak in terms of avoiding unreasonable impacts to fish, wildlife, and instream beneficial uses of water, the context of the statutes requires the analysis of what is “unreasonable” to be different.

Water Code section 1736 governs standards for long-term conduct—here, water transfers through 2050. Given this time scale, what is analyzed necessarily includes a wide range of hydrological conditions and must be found to be reasonable given that breadth. This is in stark contrast to Water Code section 1435 governing issuance of TUCOs. A TUCO can only be granted when the Board determines that there is an “urgent need” for one. (Wat. Code § 1435(b)(1).) An “urgent

positions taken by the protesting parties to be meritorious and the Proposed Order’s rejection of those arguments to be incorrect and inconsistent with the public interest, the reasonable protection of fish and wildlife, and the Board’s public trust obligations.

need” is defined as requiring *both* (a) circumstances where normal operations would necessarily fail to further the constitutional requirement that water be put to beneficial use to the fullest extent possible and not be wasted *and* (b) a conclusion that the water right holder petitioning for the temporary urgency change has been diligent in seeking changes through other, non-emergency, processes. (See Wat. Code § 1435(c).)

By equating the requirements in Water Code section 1736 with those in Water Code section 1435, the Proposed Order ignores the “urgent need” requirement at the core of consideration of TUCOs. It is impossible to have both diligently sought and received approvals of the regular use of water that are constitutionally supported and to need to change those regular uses of water in an emergency based on the same standards. In essence, what is “reasonable” for long-term planning and normal operational conditions is necessarily different than what is “reasonable” in an emergency.

The Board has acted consistent with this difference, including as recently as November 2025. According to the Board, TUCOs are an inappropriate vehicle for long-term planning, illustrating the core difference between the two statutory “reasonableness” standards. As the Board explained in its comments on the Bureau of Reclamation’s proposed “Action 5” for operation of the Central Valley Project, “assuming TUCPs will be requested and granted is inappropriate” given the Board’s stated “legal concerns with this assumption during the [long term operation] processes for the [State Water Project and Central Valley Project.]” (See Board Letter, Re: Action 5 Assumptions and Environmental Compliance, November 10, 2025, at p. 5.) “TUCPs are intended for unforeseen, unplanned, urgent emergency circumstances and assuming a chain of discretionary actions that culminates in a state waiver of its legal authorities is not appropriate for long-term operational planning.” (*Id.*) The Proposed Order’s conclusion that the standards for approval of the Petition and future approval of TUCOs are the same eliminates this distinction and the Board’s long-standing interpretation of the difference between what is normally reasonable and what is reasonable in an emergency.

This difference exists elsewhere in the Water Code and in the Board’s regulatory actions. For example, Water Code section 1058.5 allows for the adoption of emergency regulations during Governor issued proclamations of emergency. These regulations take effect outside of the normal procedural requirements for adoption of regulations and are time-limited, lasting only one year unless extended by the Board based on the continuance of the emergency. (See Wat. Code § 1058.5; Gov. Code 11346.1.)

The Board’s actions under this authority demonstrate the difference between what is normally reasonable and what may be allowed during an emergency. For example, in 2021, the Board issued emergency regulations under these authorities that required curtailments of diversions as well as minimum flows in Mill and Deer Creeks for the protection of salmon and steelhead species. (23 C.C.R. § 876.5 [issued September 2021, repealed September 2023].)² That emergency regulation explained that existing legally approved diversions of water would be constitutionally unreasonable given the circumstances. (*Id.* at 1.) It also explained that the requirements for instream flow that needed to be met during the emergency were “less than otherwise desirable minimum flows for

² A copy of the emergency regulation as issued is available at

https://www.waterboards.ca.gov/drought/mill_deer_creeks/docs/form-400-and-adopted-regulation-text.pdf.

fisheries protection, but have been developed to ensure bare minimum instream flows for migratory passage during the drought emergency, given the extreme nature of the current drought and the drought impacts to these fisheries.” (23 C.C.R. § 876.5(c) [link at p. 2].) According to the Board’s emergency regulation, neither the curtailments nor the minimum flow requirements would be considered to be reasonable under normal circumstances, but in the emergency, both became reasonable.

This distinction is not limited to the Board’s use of TUCOs or to the Water Code—it is one that has long been recognized in California law. The California Environmental Quality Act allows for bypass of certain legal requirements in times of emergency or in response to unforeseen events. (See Pub. Res. Code § 21080(b)(2)-(4).) And “reasonableness”—the touchstone of legal duties under negligence law in California—has long varied based on the existence of emergency circumstances. (See, e.g., *Leo v. Dunham* (1953) 41 Cal.2d 712, 714 [in the context of actual or apparent imminent danger, one “is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments”]; *Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912-13 [applying negligence standard of what is reasonable in an emergency]; see also Judicial Council of California Civil Jury Instructions, CACI 452 “Sudden Emergency” [citing cases].)

Given the context of Water Code sections 1435 and 1736, the Board’s use and description of TUCOs, other provisions of the Water Code dealing with emergencies, the Board’s own understanding of its emergency powers, the Board’s issuance of emergency regulations, and the legal difference between normal and emergency circumstances found in California law more broadly, the Proposed Order’s conclusion that the unreasonableness language in Water Code sections 1435 and 1736 are “essentially the same” is unsupportable and incorrect. As a result, the Proposed Order’s conclusion that no conditions or limits on transfers during a TUCO are necessary or appropriate must be rejected by the Board and revised either by the AHO or by the Board itself.

II. The Use of TUCOs since 2014 in the San Francisco Bay-Delta Watershed has had Devastating Impacts on Fish, Instream Beneficial Uses of Water, and Public Trust Resources

The issuance of a TUCO requires that the Board determine that there will not be unreasonable impacts on fish, wildlife, or instream beneficial uses of water. (Wat. Code § 1435(b)(3).) On the six occasions when the Board has granted TUCOs since 2014 allowing deviation from Bay-Delta water quality requirements and D-1641, it has made such a finding. Despite those findings, and as the Board has acknowledged, the actual consequences have been anything but reasonable.

In 2015 and 2016, the Board and its Executive Director determined that the issuance of TUCOs were unsustainable and leading to extinction of native fish. Then Executive Director Tom Howard admitted, in a February 18, 2015 Board workshop, that his 2014 findings that these actions would not cause unreasonable effects on fish and wildlife “were just wrong.”³

In 2016, the Board issued an order addressing petitions for reconsideration of approval of TUCPs in 2015, which had waived Bay-Delta water quality requirements and had failed to protect salmon from lethal water temperatures below Shasta Dam. In that Order, the Board concluded that:

³ https://www.waterboards.ca.gov/board_info/media/feb2015/swrcb_brdwrkshp021815_1 (at 45- minute mark).

the Executive Director's decisions were reasonable at the time they were made and therefore the petitions for reconsideration should be denied in large part. ***However, the State Water Board also determines that the status quo of the past two years is not sustainable for fish and wildlife and that changes to the drought planning and response process are needed to ensure that fish and wildlife are not unreasonably impacted in the future and to ensure that various species do not go extinct.***

(Corrected Water Rights Order 2015-0043, January 19, 2016, at p. 39 [emphasis added]⁴; see also Board Order Issuing Temporary Urgency Changes, April 4, 2022, at pp. 22-34.⁵) Not only does this demonstrate the harm TUCOs have caused despite findings that they would not, but it makes clear the Board's longstanding position that TUCOs are not a sustainable or appropriate long-term planning or operational guide for water uses in the San Francisco Bay-Delta watershed. Allowing potential transfers during TUCOs because the standards are "essentially the same" is inconsistent with this harm and the Board's positions expressed in these orders.

Given the harm caused by prior approvals of TUCOs despite the Board's determination that they would not have unreasonable impacts on fish and wildlife, the Proposed Order's reliance on the lack of harm caused by future transfers under future TUCOs without addressing those harms must be rejected by the Board and revised either by the AHO or by the Board itself.

III. It is not in the Public Interest to Allow Private Water Agencies to Obtain a Windfall from Selling or Transferring Water During TUCOs at the Expense of Public Trust Resources

The Proposed Order's decision not to prevent, limit, or condition approval of the transfers sought in the Petition in the context future TUCOs is inconsistent with the public interest, both substantively and procedurally. Because the Proposed Order does not adequately explain its rejection of these concerns, and because its determination that such conditions are not "appropriate" is inconsistent with the public interest, the Board should reject and revise this portion of the Order.

Substantively, the record shows that Yuba Water obtains substantial revenue through the transfer and sale of water during droughts, including when TUCOs are in effect. (See South Yuba River Citizens League, Ex. 004 [\$51 million in revenue from 2021 transfers under the Yuba Accord].) These revenues represent a substantial windfall via export of "transfer" water when the export of "non-transfer" water through the State Water Project and Central Valley Project is limited or prohibited due to the effect such exports would have on fish and wildlife. Thus, Yuba Water has been able to earn substantial revenue from taking the actions that TUCOs prevented or limited despite the harms those actions cause to public trust resources.

Allowing these transfers and benefits at the expense of harms to fish, instream uses of water, and public trust resources without restriction, limitation, or mitigation is inconsistent with the public interest. Under the Proposed Order's approach, during times of emergency and drought that

⁴ https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2015/wro2015_0043.pdf

⁵ https://www.waterboards.ca.gov/drought/tucp/docs/2022/20220404_tuco_swrcb.pdf

materially restrict operations of the State Water Project and Central Valley Project, and materially harm native migratory fish, everyone sacrifices *except* water agencies who benefit from water transfers. Allowing concentrated gains at the expense of broad public burdens is the antithesis of the public's interest in the equitable, fair, and reasonable use of public resources.

Procedurally, the Proposed Order acknowledges the problems with TUCOs. (Proposed Order at 18, fn. 10.) And while that process is a creature of statute, not the Board's own choices, the Proposed Order's determination that no restrictions on transfers during TUCOs be adopted furthers reliance on TUCOs and their associated procedural deficiencies in the future. Indeed, the Proposed Order relies on the existence of the ability of parties to challenge TUCOs as a check on any future use of transfers when TUCOs are in effect. (See Proposed Order at 18, citing Wat. Code § 1438.) But the fact that parties may object to a Temporary Urgency Change Petition and that the Board must "promptly consider" those petitions and objections does not solve the problem that consideration of whether to grant a TUCO is made quickly and in an emergency.

Rather than punt consideration of whether transfers are appropriate during TUCOs to a future Board to be considered hastily and without sufficient time to identify appropriate longer-term alternatives, as the Proposed Order does, the Board should reject this procedurally flawed approach and act consistent with its prior determinations that long-term planning and decisions about water use need to account for future potential emergency conditions rather than wait for the emergency to arrive to act. (See Corrected Water Rights Order 2015-0043, January 19, 2016, at p. 39; see also Board, Action 5 Letter, November 10, 2025.)

IV. Conclusion

The Proposed Orders analysis of requested conditions and limitations on transfers under the Yuba Accord Water Transfer Program is inconsistent with the Water Code, the Board's prior determinations and actions, and with the public interest in protection of public trust resources. As a result, the Board must reject the Proposed Order and either remand to the AHO or issue its own decision based on the record.

Respectfully submitted,



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