



February 22, 2023

Arvin Chi
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Ray Sahlberg
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825-1898

Transmitted via email to: Arvin.Chi@waterboards.ca.gov; RSahlberg@usbr.gov;

RE: Protest and Objections to Temporary Urgency Change Petition for Permitted Applications 234, 1465, 5638 and Licensed Application 23

Dear Mr. Chi and Mr. Sahlberg:

On behalf of the Natural Resources Defense Council and the Bay Institute, we are writing to formally protest and object to the Temporary Urgency Change Petition filed by the U.S. Bureau of Reclamation for Permitted Applications 234, 1465, 5638 and Licensed Application 23 (“TUCP”). The TUCP as proposed is inconsistent with the Stipulation of Settlement to restore the San Joaquin River, section 5937 of the Fish and Game Code, and the Public Trust. We therefore request that the Board reject or condition the TUCP as proposed herein.

As you know, NRDC and the Bay Institute are parties to the Stipulation of Settlement with the U.S. Bureau of Reclamation and Friant Water Authority to restore the San Joaquin River. The Stipulation of Settlement identified the minimum Restoration Flows that were necessary to be released and protected downstream in order to comply with section 5937 of the Fish and Game Code, which includes minimum releases from Friant Dam in a wet year that are greater than 1,000 cfs from March 1 to June 30, resulting in flows past Sack Dam greater than 1,000 cfs from March 16 to June 30. *See* Stipulation of Settlement, Exhibit B; SWRCB 2013 Order Approving 1707 permit at 12. The Stipulation of Settlement also explicitly anticipated that greater instream flows would occur during flood releases, which were expected to benefit salmon and the restoration of the river without impacting water supply to the Friant Division contractors. *See* Stipulation of Settlement ¶ 13(d).

However, as a result of seepage limitations and other constraints, Restoration Flows have been limited to no more than 300 cfs below Sack Dam since 2016,¹ resulting in the Restoration

¹ In 2018, State and federal agencies committed in the Funding Constrained Framework to increase capacity to release Restoration Flows, anticipating increasing instream flow capacity

Program failing to release the minimum flows required by the Settlement to comply with section 5937 of the Fish and Game Code. As a result of these unreasonable seepage limitations, according to accounting by the Bureau of Reclamation, less than half of the required Restoration Flows have been released to the river since the Settlement was first implemented in 2010.

The TUCP proposes to allow unspecified amounts of increased water diversions from Mendota Pool whenever flows below Sack Dam are greater than 300 cfs. While we appreciate that this proposal does not dewater the San Joaquin River during flood operations – which we note would be a patently unreasonable result, but sadly has been actively contemplated by Reclamation during prior flood releases– the TUCP would result in flows in the San Joaquin River that are far less than the minimum flows that the parties agreed were necessary to comply with section 5937 of the Fish and Game Code:

Date	Stipulation of Settlement, Default Schedule² (Exhibit B), Release of Restoration Flows from Friant Dam (Wet Water Year Type)	Stipulation of Settlement, Default Schedule (Exhibit B) Restoration Flows Below Sack Dam (Wet Water Year Type)	TUCP’s Proposed Minimum Flows below Sack Dam
March 1-15	500 cfs	285 cfs	300 cfs
March 16-31	1,500 cfs	1,225 cfs	300 cfs
April 1-15	2,500 cfs	2,180 cfs	300 cfs
April 16-30	4,000 cfs	3,655 cfs	300 cfs
May 1 – June 30	2,000 cfs	1,650 cfs	300 cfs

below Sack Dam to 700 cfs by 2017 and 1,500 cfs by 2021, as well as committing to seepage actions and levee improvements to enable release of 2,500 cfs below Sack Dam by 2024. *See, e.g., 2018 Funding Constrained Framework at Table ES-1, available online at:*

https://www.restoresjr.net/?wpfb_dl=2163; U.S. Bureau of Reclamation 2016, Final Environmental Assessment for Delivery and Use of Unreleased San Joaquin River Restoration Flows, at Table 2-2, available online at:

https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=25059. The acquisition of seepage easements and other actions to address seepage, none of which are required by State law or are enforceable against the federal government under the Settlement Act, have cost federal taxpayers at least \$70 million, and are anticipated to cost as much as \$200 million.

According to state and federal agencies several years ago, “Seepage Management costs continue to be the SJRRP’s single largest obligation and expenditure as of the end of FY 2016.” Funding Constrained Framework at 2-9.

² The Stipulation of Settlement provides the Restoration Administrator with the authority to modify the default flow schedule to shape flow releases and shift the timing of releases, with limitations on such flexibility. *See* Stipulation of Settlement, Exhibit B. However, because the Restoration Administrator’s flow schedule is unreasonably constrained by these seepage limits, the approved flow schedule “Provides maximum flow to the river (limited by seepage constraints below Sack Dam) through May 28.” *See* Approved Restoration Flow Recommendation at 1.

And instead of flood releases resulting in greater flows in the San Joaquin River than the minimum flows required by Exhibit B, as contemplated in the Stipulation of Settlement, the TUCP would result in flows that are less than 10 percent of the flows below Sack Dam called for under the Stipulation of Settlement. In addition, because of these unreasonable seepage constraints, the Restoration Administrator anticipates that far more than half of the Restoration Flow allocation will not be released to the river this year; the approved Restoration Flow recommendation calls for releasing approximately 185,000 acre feet of water to the river, and **not releasing** approximately 380,000 acre feet of water that was called for under the Settlement. See Approved Restoration Flow Recommendation at 3. These seepage limitations also resulted in Reclamation reducing releases of Restoration Flows to less than 300 cfs below Sack Dam after the cessation of flood releases. While we appreciate that the river has not been completely dewatered this year as a result of flood operations, these seepage limitations are unreasonable under section 2, Article X of the State Constitution and are resulting in ongoing violations of section 5937 of the Fish and Game Code.

Reducing flows in the San Joaquin River compared to the flows identified in Exhibit B to the Stipulation of Settlement is likely to substantially reduce the survival of juvenile spring-run Chinook salmon outmigrating to the ocean, thereby impairing the Restoration Goal of the Settlement. Approval of the TUCP would also authorize instream flows in the San Joaquin River during a wet year that violate section 5937 of the Fish and Game Code, the Public Trust, and the Stipulation of Settlement.

Therefore, we request that the State Water Resources Control Board deny the TUCP, or at a minimum impose a term and condition on the TUCP that only allows additional diversions of water from Mendota Pool when flows below Sack Dam exceed the minimum default Restoration Flow schedule for the applicable water year type (currently a wet year).³ Approval of the TUCP without such a condition would be inconsistent with section 5937 of the Fish and Game Code and the Board's obligations under the Public Trust.

Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Gary Bobker
The Bay Institute

³ We recognize due to that the lack of progress in improving levees in the Restoration Area, channel capacity for non-flood flows is limited to 1,210 cfs in Reach 2B of the San Joaquin River. However, because this TUCP relates to capture of water released during flood operations, we expect that this capacity limitation is inapplicable.