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June 14, 2012



VIA ELECTRONIC MAIL

Mr. Charles Hoppin, Chair
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-0100

Re: **6/19/2012 BOARD MEETING** (Agenda Item 3: Consideration of a Proposed Resolution to Amend Resolution No. 2011-0005 to Allow California Environmental Quality Act Cost Recovery Authority to be Used for Water Quality Certification-Related Actions)

Dear Mr. Hoppin:

We write to request that the State Water Resources Control Board (SWRCB) not modify and expand Resolution No. 2011-0005 as proposed in the resolution identified as Agenda Item No. 3 in the June 19, 2012 Board Meeting Agenda. We further request that this item be pulled from the June 19, 2012 consent agenda so that interested parties can meet with SWRCB staff to better understand the purpose of the proposed resolution and to discuss its potential implications. The proposed resolution raises significant policy issues and would appear to create undisclosed financial and legal liabilities for the SWRCB. We do not believe these potential liabilities are adequately portrayed in the proposed resolution and accompanying staff report.

Resolution No. 2011-0005, adopted by the SWRCB on February 1, 2011, authorizes the Executive Director to utilize funds in the Water Rights Fund, up to \$1 million per year, to hire environmental consultants for California Environmental Quality Act (CEQA) activities related to water right applications and petitions where the State Water Board is the lead agency. The Resolution authorizes the Executive Director to contract directly with CEQA consultants and to pay the costs of the consultants' work directly from the Water Rights Fund. The Resolution further authorizes the SWRCB to pursue "cost recovery" from the water right applicant or petitioner to reimburse the Water Rights Fund for those costs. The proposed resolution before the SWRCB on June 19, 2012 would extend the authorization in Resolution No. 2011-0005 to allow funding and cost recovery for CEQA related activities associated with the SWRCB's

issuance of water quality certifications. This extended authorization would be implemented by amending the existing reimbursement contract with the Department of General Services (DGS), or by entering into new contracts with DGS.

The proposed amendment to Resolution No. 2011-0005 raises a number of policy, legal and financial issues. The proposed amendment would allow the SWRCB to incur up to one million dollars of contractor cost liability for CEQA-related work, without any involvement or input from the water quality certification applicant who would ultimately be responsible for reimbursing those costs. The stated rationale for the proposed resolution is to reduce or avoid unnecessary delays in the processing of water quality certification applications; however, it is likely that the resolution would have just the opposite effect. In addition, the resolution would have a significant financial impact on the SWRCB, as it would expose the SWRCB to new financial and legal risks.

- The proposed resolution sets up the likelihood of disputes between the SWRCB and water quality certification applicants, to the extent there may be disagreement with the scope and need for certain studies or analyses, the costs incurred for such studies, etc. As proposed, the applicant may not have any idea of the studies undertaken or the costs incurred until after the work is done, and may object to such studies and costs. For example, the applicant may already have performed a study or analysis, or the Federal Energy Regulatory Commission may already have addressed a study issue, etc. The proposed resolution creates the potential for reimbursement disputes and litigation over the reasonableness of the CEQA work and the costs thereof.
- For investor owned utilities that must justify its expenditures to the Public Utilities Commission, the proposed resolution may present significant financial uncertainties and complexities in the recovery of these reimbursement costs.
- The SWRCB's current practice for funding the preparation of CEQA documents is not perfect, but it functions just as well as the proposed resolution without the legal and financial risks to the SWRCB. The current practice involves the applicant entering into a three-party Memorandum of Understanding ("MOU") with the SWRCB and a CEQA consultant, whereby the applicant is responsible for contracting with the consultant and paying the costs of developing the CEQA document, and the SWRCB is responsible for directing the consultant's work. The proposed resolution would shift the contracting and payment responsibilities to the SWRCB, thereby increasing the likelihood of administrative delays, increasing the SWRCB's workload, and increasing the SWRCB's legal and financial risk associated with the consultant contract.
- The proposed resolution relies on the CEQA Guidelines, 14 C.C.R. § 15045(a), as the authority for seeking reimbursement of costs from an applicant. The proposed resolution does not reference any other statutory authorization for the SWRCB to levy such charges,

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nor are we aware of any such authority. As a general proposition, CEQA does not create any independent legal authority for agencies to levy fees or charges to carry out CEQA requirements; in carrying out its CEQA obligations, an agency must exercise authorities and powers conferred on it by other laws. See, e.g., *San Francisco for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1525. As such, there are potential issues about the legal implications of the proposed resolution.

For the reasons stated above, we request that the above referenced item be pulled from the June 19, 2012 Board Meeting agenda. To the extent the item warrants further discussion, in light of the above stated issues, we recommend that interested parties be given the opportunity to discuss the matter with SWRCB staff so that its purpose and implications are better understood by those that might be affected.

Very truly yours,



Robert E. Donlan