



NCWA
Northern California Water Association



*To advance the economic, social and environmental sustainability of Northern California
by enhancing and preserving the water rights, supplies and water quality.*

March 16, 2015

Ms. Felicia Marcus, Chair
Members of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Agenda Item 8 (March 17 Board Meeting) – Tributary Regulations for Fisheries

Dear Chair Marcus and Members of the Board:

We are compelled to again express our concern and disappointment with the manner in which the State Water Resources Control Board (SWRCB) is approaching regulations on three tributaries to the Sacramento River (Agenda item 8). The proposed regulations do not accurately reflect the way water is managed in a reasonable and beneficial manner in this area and the regulations are unnecessary, as there have been various flow agreements to benefit salmon that worked well last year.

Counsel for the Sacramento Valley last year (May 19, 2014) provided detailed comments on the proposed regulations for these three tributaries. We again reiterate these comments, which are attached for convenience.

Additionally, on November 13, 2014 we provided comments to the SWRCB on *Drought Planning in the Sacramento Valley: Recommendations for 2015*. In general, we acknowledged and expressed our appreciation for the various efforts by the SWRCB in 2014 to help California and its water suppliers during a challenging year. One notable exception was our comments on the tributary regulation process, which provided:

“We were very disappointed with the way the emergency regulations emerged for the three tributaries in the Sacramento Valley, including Mill, Deer and Antelope Creeks. As we stated in our May 19 comments to the SWRCB, we believe that a categorical declaration and sweeping determinations that every diversion along a waterbody is per se unreasonable is not constitutional, is not a particularly thoughtful approach to serving beneficial purposes and will not be effective in the long-term to meet beneficial purposes in the region. There are flow arrangements on nearly every watercourse in the Sacramento Valley, which are all focused upon instream flows while maintaining other uses of water (see attached). We encourage the SWRCB, in cases where it believes there

are specific needs, to engage the leaders in the watershed to develop solutions to meet those needs. When necessary, the SWRCB could pursue targeted enforcement proceedings against water users who have allegedly violated these legal requirements. The SWRCB could also encourage parties to work with the fishery agencies to develop physical improvements, such as deepened channels, as a first option before reallocating water. In addition, we believe that, where the SWRCB takes action to implement what it believes are necessary streamflows for sensitive fish to the significant detriment of water users, the SWRCB, along with the resource agencies, correspondingly accepts a heightened responsibility to ensure that the relevant fish are actually present in the affected areas and to not apply the curtailments when those fish are not present.”

Since last year, the passage of Proposition 1 now provides new opportunities for further collaboration on these three tributaries to develop physical solutions on the ground that could include improved infrastructure and flows that will benefit fish and the other reasonable beneficial uses along these creeks. These projects will integrate well with the larger salmon recovery program that is now underway throughout the Sacramento Valley. We encourage the SWRCB to change course and--rather than declaring water management unreasonable without any basis--instead help facilitate the important efforts necessary to manage water for various beneficial uses along these three tributaries.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'David J. Guy', with a stylized, looping flourish at the end.

President
David J. Guy

cc: Tom Howard
Michael Lauffer



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Drought Planning in the Sacramento Valley: Recommendations for 2015 November 13, 2014

The Northern California Water Association (NCWA) and Sacramento Valley Water Users appreciate the various efforts that have been made to help California and its water suppliers during these dry years. The administration adapted quickly in its approach to the drought this year, including: 1) the Central Valley Project (CVP)/State Water Project (SWP) Drought Operations Plan, 2) the related Temporary Urgency Change Permit (TUCP), and 3) following the priority system for water rights, including issuing curtailment notices and orders for post-1914 water rights. These operations and institutional approaches have been instrumental in providing water this year for various beneficial purposes in the Sacramento Valley--including cities and rural communities, farms, fish and birds--based on available water supplies and water right priority. While the actions in 2014 were reactive to the dry conditions, we encourage the administration to make more proactive decisions as we enter 2015.

The ongoing drought has cost the Sacramento Valley hundreds of millions of dollars in lost farm production, diminished wildlife habitat and reduced urban water supplies. The water leaders in the Sacramento Valley met in January 2013 for a strategic session on planning for future droughts. Since that time, our drought team has been actively working to ensure water supplies for all these beneficial purposes in the Sacramento Valley, including meeting with State Water Resources Control Board (SWRCB) members and staff many times this year to work through the complex issues facing the Sacramento Valley.

Although we are still working with SWRCB staff on providing fall and winter water for waterfowl and rice decomposition, we are primarily focusing on planning for 2015 operations. In this regard, our August 20, 2014 letter to the SWRCB expressed our appreciation for the SWRCB's inclusion of paragraph 22 in SWRCB Resolution 2014-0031. Our letter also reiterated our desire to immediately work with the SWRCB to learn from the past several years, to develop strategies that will help provide water consistent with the water rights priority system for various beneficial purposes in the Sacramento Valley in 2015, and to better prepare for future dry years.

In planning for dry years, it is important to fully recognize and understand the water management dynamic in the Sacramento Valley and how the water resources managers provide water for various beneficial purposes, including cities and rural communities, farms, fish, birds and recreation. The ability to use surface water in the Sacramento Valley is essential to supply these various beneficial purposes. Surface supplies are also critical to sustainable groundwater management in the Sacramento Valley, including groundwater recharge opportunities and lessening the demand on groundwater pumping. Importantly, in 2014, water supplies were available for these beneficial purposes by honoring and following the priority system for

California water rights, including the various contracts that provide the foundation for water management in the Sacramento Valley and throughout California.

As the administration and SWRCB plan for 2015 and future dry years, we urge the SWRCB to consider the following:

A. CVP/SWP Operations Plan

The operations of the Central Valley Project (CVP) and State Water Project (SWP) are important to the Sacramento Valley and are a key foundation for water management decisions throughout the region and state. The water agencies in the Sacramento Valley and their technical consultants are modeling various operations for 2015 to assist the federal and state agencies in operational scenarios for the projects. Although the process started slowly for the 2014 water year, it is important to recognize that the Drought Operations Plan, while not perfect, was generally accurate and provided water suppliers and the SWRCB with sound information necessary to make water management decisions and provide reliable water supplies this year. In the Sacramento Valley, the water managed as part of CVP and SWP served triple duty (fish, farms and birds), while water was also available for various purposes downstream and in the Delta. The attached documents show 2014 operations in the Sacramento Valley.

As we are already planning for the 2015 water year and future dry years, we offer the following thoughts on how to make this coordination with the CVP and SWP more effective. These proposed actions follow a similar path outlined in Jay Lund's "Drought Curtailment of Water Rights – Problems and Technical Solutions," pages 4-5.

1. **Facilitate Earlier Coordination Among Sister Agencies.** SWRCB staff should immediately begin meeting with the project operators to better understand how the projects can perform under different hydrologies. The SWRCB's revised order WR 2014-0029 provides specific dates for the project operators to submit their updated operations plan to the SWRCB Executive Director. Here, it is important that the sister agencies respect their roles and responsibilities. In our view, the project operators, with some initial, timely, direction from the SWRCB as described below, have the expertise and experience to develop a sound operations plan for 2015 that will work for the Sacramento Valley.
2. **Provide Direction on TUCP.** As part of this earlier communication, the SWRCB should provide some early information on potential standards to the project operators on the requirements expected in 2015, including:
 - a. outflow requirements;
 - b. export provisions in a Temporary Urgency Change Permit (TUCP); and
 - c. depletions in the Delta and assumed water use for delta diverters (if any).

We believe in-Delta operations in 2014 were inefficient and could be improved. This in turn affected upstream storage supplies, as additional water released from storage was depleted in the Delta for various purposes that we believe was unnecessary and, in some cases, unauthorized. As the SWRCB considers its 2015 priorities, we encourage it to

focus on more efficient use of water in the Delta.

3. **Develop Rationale Sacramento River Temperature Requirements.** With respect to the process for setting temperature requirements, we sent a letter on December 12, 2013 requesting a water supplier representative on the Sacramento River Temperature Task Group (SRTTG). This is still a closed process that needs to be broadened to include suppliers managing water in the Sacramento Valley. SWRCB staff has reported that operational decisions are not made in the SRTTG and are instead elevated to an “operations group” that is separate and apart from Board Orders 90-05 and 91-1. The Sacramento River Settlement Contractors (Contractors) are requesting to participate in the “operations group” since decisions made by the project operators or the SWRCB could directly affect the Contractors’ water supplies, diversions, and water rights. The Contractors will be working with MBK to develop temperature models that will help operate the system this year in a more real time manner. We are also working closely with the Nature Conservancy, American Rivers and Golden Gate Salmon, who will also provide valuable counsel to the SWRCB.

Water agencies in the Sacramento Valley coordinated with the CVP and SWP operators in 2014 to meet temperature requirements and flow targets. Under WR 2014-0029, Reclamation will provide a temperature management plan for the Sacramento River starting on January 15. It will be critical that we move toward real time management based on temperatures in the Sacramento River; otherwise, too much water is lost from storage that does not benefit the intended purposes. Again, last year, the water agencies on the Sacramento River worked with the project operators and the fishery agencies to voluntarily change the timing of water diversions to benefit salmon and meet various beneficial purposes. Similar coordination would bring great value to the temperature management process.

4. **Explore Physical Solutions.** In hindsight, it appears to us that the barriers in the Delta would have helped with the Delta inefficiency discussed above, and could have preserved more water in storage. We encourage the SWRCB to first perform an analysis of how much water the barriers would have preserved in storage. With the benefit of this analysis, the SWRCB should further explore barriers with the Projects and other physical options to use water more efficiently and save water, and the SWRCB should be poised to help with the approval process. This includes better understanding any concerns by Delta water users and the necessary efforts to avoid these impacts.

B. Curtailment Process

Based on our experiences in the Sacramento Valley this year, we provide the following thoughts on the curtailment process in future years.

1. **Follow the Priority System.** We appreciate the SWRCB’s commitment in 2014 to the water right priority system and making decisions based on water availability. For 2015 and future years, we encourage the SWRCB to follow the same approach in Water Code §1058.5 and implement a process “to require curtailment of diversions when water is not available under the diverter’s priority of right...” From our perspective, this approach is orderly, will avoid chaos associated with other approaches, and will work well for the Sacramento Valley, particularly if the SWRCB is able to develop a sound water

availability analysis that truly reflects the Sacramento Valley, as discussed in more detail below. On the other hand, the process to order curtailments on Deer Creek, which focused on waste and unreasonable use, is in our view, neither an effective or particularly thoughtful way to proceed with water allocations in the Sacramento Valley. We believe there is a better way to provide fishery flows, as we discuss below.

2. **Refine the Water Availability Analysis.** MBK Engineers and Steve Grinnell have been working with SWRCB staff to align the water availability curves with actual and projected water supplies and demands in the Sacramento Valley. This alignment is central to an effective curtailment process. As we understand it, the SWRCB relies on information from DWR's Bulletin 120 forecast, which during normal years appears consistent with hydrology, mainly since more data exists in these year types. However, for 2014, we saw that the runoff forecasts prepared by DWR uses historical averages for depletions and diversions instead of actual data and delivery schedules which resulted in under-predicting actual runoff and flows.

The October 15, 2014 MBK letter on dry year reports and the Marc Van Camp Declaration for the July 2, 2014 workshop are very helpful in framing these issues. As the SWRCB paragraph 22 suggests, "the primary objective is to improve the State Water Board's and the water users' confidence in the technical tools and analysis that will be used for making determinations on water availability relative to water rights priority." We look forward to further discussions to improve the accuracy of the SWRCB's analysis, particularly improvements in the estimates of the demands in the system so that the SWRCB's demand estimates recognize monthly variations in demands, avoid double counting the same demands, and do not include demands for non-consumptive uses. With these improvements, the SWRCB's demand estimates will hopefully have enough precision so the SWRCB can curtail specific tranches of water rights (i.e., 1976 to 2014) in future years without blanket curtailment notices.

3. **Appropriate Timing.** The SWRCB sent a notice to water right holders on January 17, 2014 that curtailments could be expected if dry conditions continue. Although water right holders did not like receiving this notice, it provided advance warning to help people plan for the year. (If appropriate in 2015, we encourage a similar notice.) As the year developed, however, the SWRCB was slow in sending the notices for curtailment, waiting until May 27, 2014. This delay occurred despite our group providing technical information that supported such curtailments earlier in the year. Appropriate timing of curtailments is essential for planning in the Sacramento Valley. Additionally, if the Board is considering limiting diversions in the delta, notices should be sent to those water right holders or claimants at the same time.
4. **Health and Safety.** In our view, the abstract manner in which the SWRCB attempted to address public health and safety issues in 2014—such as through the allowance for Delta pumping in the CVP/SWP temporary urgency orders—increased tension among water users and impeded productive discussions about possible transfers without providing any real benefits to water suppliers. As a helpful starting point, the SWRCB, working with its sister agencies, should identify communities truly at risk for water supplies, both short-term and long term. Strategies for assuring water for these communities, most of which are not reliant on the CVP, SWP or other agency supplies, will be dependent upon each situation and can then be appropriately tailored. Adhering to the water right priority

system is critical to these efforts and the SWRCB should identify its authorities for meeting these needs. As an example, the SWRCB was considering setting storage targets in Lake Shasta, a CVP facility, and considering deliveries water from Shasta to communities not within the CVP place of use, yet no discussion occurred about how legally the Board would accomplish this. If such actions are being considered for 2015, the Board staff should be notifying the CVP and SWP operators and their respective users of the authorities the Board is considering. Absent trumping existing water rights, project operations, and contracts, the SWRCB should allow for voluntary water transfers to meet the potential shortages that may exist.

5. **Protection of Water Releases from Storage.** Term 91 was imposed on May 18 this year and appeared to be very effective in the Sacramento Valley. We encourage the SWRCB to continue to use a real time system with respect to Term 91.
6. **Fully Utilize Complaint Process.** We appreciate the SWRCB developing its complaint process that is available on the website at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/complaints/index.shtml. This process is very important for several reasons. First, it provides a public process to raise legitimate complaints for actions that affect senior water rights. Second, it allows the SWRCB more flexibility in administering the curtailment process, by relying on senior water right holders to raise issues rather than anticipating every water right that could possibly be affected by water use in the system. We encourage the SWRCB to rely upon this program and more visibly announce the website and the opportunities to file a complaint. The SWRCB should also consider more traditional methods (such as the newspaper) of announcing this process for complaints in more remote areas of the state.
7. **Flexible Process to Lift Curtailments.** We appreciate the SWRCB's flexibility in establishing a process to temporarily lift curtailments this fall based on storm events, including a real time on-line system. We also support the long-term lifting (that could have started on November 1) for this year and in future years, as detailed in the October 15 and October 31, 2014 MBK letters. The SWRCB should recognize the importance of lifting the curtailments to facilitate storage of water after the significant reduction in irrigation demand by direct diversion. The fact that water right holders of storage projects, including the CVP and SWP, must comply with all terms and conditions of their water rights, including minimum instream flow, together with the rapid change in water availability and the complaint process, should help the lifting of curtailments during this time period.
8. **Tributary Regulations.** We were very disappointed with the way the emergency regulations emerged for the three tributaries in the Sacramento Valley, including Mill, Deer and Antelope Creeks. As we stated in our May 19 comments to the SWRCB, we believe that a categorical declaration and sweeping determinations that every diversion along a waterbody is per se unreasonable is not constitutional, is not a particularly thoughtful approach to serving beneficial purposes and will not be effective in the long-term to meet beneficial purposes in the region. There are flow arrangements on nearly every watercourse in the Sacramento Valley, which are all focused upon instream flows while maintaining other uses of water (see attached). We encourage the SWRCB, in cases where it believes there are specific needs, to engage the leaders in the watershed to develop solutions to meet those needs. When necessary, the SWRCB could pursue

targeted enforcement proceedings against water users who have allegedly violated these legal requirements. The SWRCB could also encourage parties to work with the fishery agencies to develop physical improvements, such as deepened channels, as a first option before reallocating water. In addition, we believe that, where the SWRCB takes action to implement what it believes are necessary streamflows for sensitive fish to the significant detriment of water users, the SWRCB, along with the resource agencies, correspondingly accepts a heightened responsibility to ensure that the relevant fish are actually present in the affected areas and to not apply the curtailments when those fish are not present.

9. **Delta Water.** The recent correspondence and workshop on water use in the Delta raised many important issues before the SWRCB. With respect to the Sacramento Valley, it is important to note that the Department of Water Resources (DWR), under its contract with the North Delta Water Agency (NDWA), has an obligation to provide water supplies for various water users in the North Delta. For other Delta water users south of the NDWA, the SWRCB has consistently found that water rights on the Sacramento River system should not be curtailed for those southern Delta water users' benefit, given the SWRCB's determination of the source of those users' water rights. (See e.g., Order WR-89-8.). We encourage the Delta Watermaster, working with the SWRCB staff, to develop a focused enforcement strategy for water rights that addresses these issues in a narrow and defensible manner. The SWRCB January 1978 report also provides several recommendations that are still salient today and should be considered by the SWRCB.

C. Enforcement

We have been very surprised by the lack of SWRCB enforcement in 2014 against non-reporting and possibly illegal diversions of water. The sanctity of the SWRCB water rights process is dependent upon aggressive enforcement with appropriate due process. The stated purpose of the emergency regulations for post-1914 water rights was a more effective ability to enforce—yet there has been no or little enforcement as a result. Within the water suppliers we represent, there were many water right holders who fully complied with the SWRCB process to curtail water rights in 2014, which had significant economic and environmental consequences for them and their area. To the extent other water right holders have not complied with the SWRCB's notices and orders, we encourage the SWRCB to pursue more aggressive investigations and enforcement.

D. Transfers

The SWRCB has generally done a good job in approving water transfer petitions over the past several years, which we have acknowledged. On the other hand, the SWRCB has not relied upon water transfers as part of its drought strategy in a very effective manner. For the past several droughts, transfers have served as a very effective tool to fill the gaps between supplies and demands in a non-confrontational manner that works within the SWRCB priority system. In our view, the SWRCB, by encouraging and facilitating transfers, can help achieve many of its objectives that it seems to be pursuing through health and safety and safe drinking water policies.

Thank you for the opportunity to provide these thoughts. The Sacramento Valley water resources managers and counsel look forward to discussing these issues in more detail with you. Please call David Guy at 916.442.8333 if you have any questions or thoughts.

Managing the Central Valley Project in the Sacramento Valley for Multiple Purposes and Benefits

May 2014

The Bureau of Reclamation (Reclamation), in consultation with the National Marine Fisheries Service (NMFS) and the State Water Resources Control Board (SWRCB), can operate the Central Valley Project (CVP) this year to serve multiple benefits (fish, farms and birds) in the Sacramento Valley; to provide water for various Delta purposes, and plan for next year's carryover storage, even if the next year is dry. This effort also requires close coordination with the Sacramento River Settlement Contractors (SRSC) to maximize the efficient operation of the CVP.

Current Hydrology

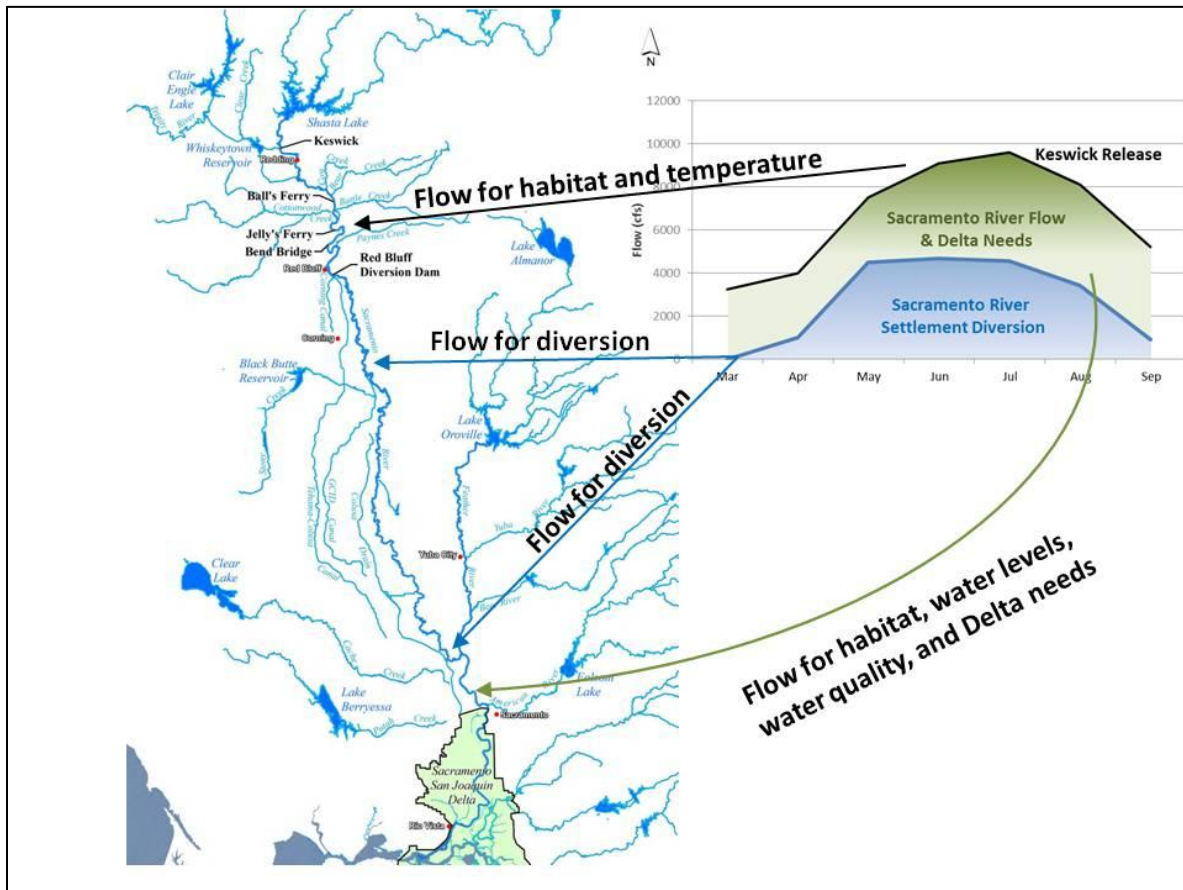
The storage in Lake Shasta is more than 2.4 million acre-feet (May 5), which is 53 percent of capacity, with additional inflow for the water year (through September 2014) projected to be approximately 1,250,000 acre-feet. Based on conservative estimates, there is enough water available this year under Reclamation's operational plan to meet the various needs described below, plus plan for next year if dry.

Water Serves Triple Duty in the Sacramento Valley

As the diagram below shows, water released from Shasta Lake will serve triple duty:

- 1) Below Keswick Dam, water will be released for temperature control for the winter-run salmon rearing in the upper mainstem of the Sacramento River. This satisfies the Sacramento Valley requirements in the (NMFS salmon Biological Opinion and SWRCB Orders 90-5 and 91-01. These releases also reflect the priority that the fishery agencies are placing on salmon for this year. Once water serves this first purpose, it continues to flow downstream, then;
- 2) A portion of the released water is diverted by the SRSC's for use by farms and habitat in the Sacramento Valley. These districts and agencies will have their supplies reduced by 25 percent under their contracts this year. The districts will explore creative ways to maximize this water within the districts and agencies, they will work with Reclamation and fishery agencies to schedule water for the benefit of fish and birds, and they will work with neighbors to help provide water supplies during this challenging year. Most importantly, the SRSC's will re-time their diversions and operations to align diversions with fishery releases to maximize the efficient operation of the CVP. Along with the SRSC diversions;

- 3) Water will be diverted for the Pacific Flyway and other bird habitat. Ricelands with the SRSC's service areas will be farmed to provide fall and winter food sources for the Pacific Flyway. Glenn-Colusa Irrigation District (GCID) will also deliver water to the three National Wildlife Refuges: Delevan, Sacramento and Colusa. The water thus serves millions of birds along the Pacific Flyway.

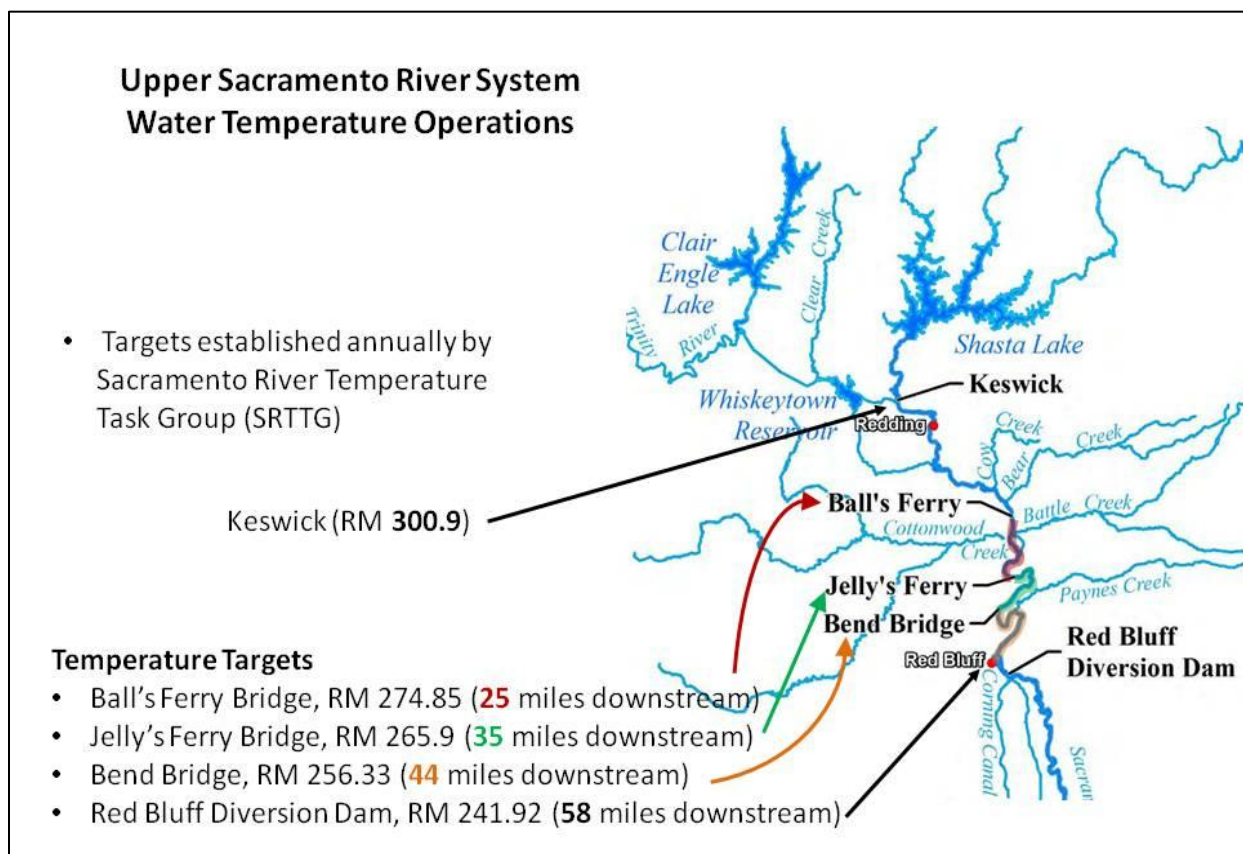


Water Flows into the Delta for Beneficial Purposes

During the summer months water is released from Shasta Lake to meet temperature requirements for salmonids in the Sacramento River above Red Bluff. A portion of this water is then diverted for various beneficial uses within the Sacramento Valley as described above. The water that is not diverted for beneficial uses within the Sacramento Valley flows into the Delta, where it will serve various beneficial purposes including salinity control, fisheries, in-delta needs, and other water uses under projects purposes as authorized by the SWRCB. Additionally, recognizing the water supply challenges in other parts of the state, including areas of the San Joaquin Valley that have no surface supplies, the SRSC's will forbear a small part of their overall water supplies to help meet these other demands for water. In return, the SRSC's will use the revenues from the forbearance to invest in local water supply infrastructure to provide water for fish, birds and farms.

Carryover Storage for Next Year

Under this operations scenario, there will be significant water in Lake Shasta at the end of the water year on September 30, 2014. With a base flow in the upper Sacramento River system above Lake Shasta of approximately 180,000 acre-feet per month (even without any precipitation in the fall and winter next year), and an operational commitment by Reclamation, NMFS, and the SRSC, there is a real opportunity to refill Lake Shasta with significant storage going into the 2015 water year. Reclamation and the Department of Water Resources (DWR) have estimated 1,100,000 acre-feet of storage in Lake Shasta at the end of the water year, which they have determined is adequate for health and safety supplies for both this year and 2015.



If you have any questions, please call Thad Bettner, Glenn-Colusa Irrigation District General Manager (530.934.8881) or Lewis Bair, Reclamation District General Manager (530.437.2221).

May 6, 2014

Managing the State Water Project in the Sacramento Valley for Multiple Purposes and Benefits

May 2014

The Department of Water Resources (DWR) can operate the State Water Project (SWP) this year to serve multiple benefits (fish, farms and birds) in the Sacramento Valley; to provide water for various Delta purposes, and plan for next year's carryover storage, even if the next year is dry. This effort also requires close coordination with the Feather River Settlement Contractors (FRSC), whose water uses predated the SWP, to maximize the efficient operation of the SWP.

Current Hydrology

The storage in Lake Oroville is 1.87 million acre-feet (May 5), which is approximately 53% of capacity, with additional inflow for the remainder of the water year (through September) projected to be approximately 483,000 acre-feet. Based on conservative estimates, there is enough water available this year under DWR's operational plan to meet the various needs described below, plus plan for next year if dry.

Water Serves Triple Duty in the Sacramento Valley

As the diagram below shows, water released from Lake Oroville will serve triple duty:

- 1) A portion of the water is diverted from the Thermalito Afterbay by the FRSC for use by farms and habitat in the Sacramento Valley. Additional water is diverted by FRSC's further downstream. The districts will explore creative ways to maximize this water within the districts and agencies, they will work with DWR to schedule water for the benefit of the SWP and fish and birds, and they will work with neighbors to help provide water supplies during this challenging year.
- 2) Below Oroville, water is released for temperature control for salmon rearing in the Feather River. This satisfies the requirements in the 1983 DWR/California Department of Fish and Wildlife Agreement, the Federal Energy Regulatory Commission (FERC) license and the State Water Resources Control Board WQ 2010-0016. These releases also reflect the priority that the fishery agencies are placing on salmon for this year. Additionally, FRSC's and others have facilitated dam removals, installed fish screens and ladders as well as other fish passage improvements on nearby Butte Creek, which has contributed to a successful spring-run salmon program.

- 3) Water will be diverted for the Pacific Flyway and other bird habitat. Ricelands within the FRSC's service areas will be farmed to provide important food sources for the Pacific Flyway. Overall, rice provides nearly 60 percent of the food for millions of migrating ducks and geese each winter. In addition to the delivery of water during the irrigation season, this habitat is also dependent upon the delivery of water in the fall to harvested rice fields, managed wetlands and National Wildlife Refuges and State Wildlife Areas. As examples, Biggs-West Gridley Water District delivers water to Gray Lodge Wildlife Area, Sutter Extension Water District delivers water to the Sutter National Wildlife Refuge, and Richvale Irrigation District and Western Canal Water District (WCWD) provide water for wetlands in the Upper Butte Basin Wildlife Area. The water thus serves millions of birds along the Pacific Flyway, which are viewable on the WCWD webcam at: <http://westerncanal.com/wildlife-rice-farming-webcam/>.

Water Flows into the Delta for Beneficial Purposes

All of the water released from Lake Oroville and not diverted by the FRSC's or delivered to refuges and wildlife areas in the Sacramento Valley, as described above, is available to serve various beneficial purposes downstream including the Delta. This includes salinity control, fisheries, in-delta needs, and other water uses under projects purposes as authorized by the SWRCB. Additionally, recognizing the water supply challenges in other parts of the state, including areas of the San Joaquin Valley that have no surface supplies, the FRSC's will forbear a small part of their overall water supplies to help meet these other demands for water. In return, the FRSC's will use the revenues from the forbearance to invest in local water supply infrastructure and to contain costs for landowners.

Carryover Storage for Next Year

Under the operations scenario, DWR and the Bureau of Reclamation have estimated 1,000,000 acre-feet of storage in Lake Oroville at the end of the water year, which they have publicly determined is adequate for health and safety supplies for both this year and 2015.

Regional Management Plan

As part of their ongoing efforts for progressive water management, the FRSC's are developing a Feather River Regional Agricultural Water Management Plan. This will include an inventory of surface water and groundwater supplies and uses and, through water balance analyses, will characterize the interaction between irrigated lands and underlying groundwater systems. It will also include analysis of opportunities to enhance regional water management and monitoring among the water agencies, as well

as specific actions that the suppliers could take to enhance water management and monitoring both within their service areas and, collectively, within the region.

If you have any questions, please call Ted Trimble, Western Canal Water District General Manager (530.342.5083); Donnie Stinnett, Joint Water Districts Watermaster (530.846.3307); or Nicole Van Vleck, Garden Highway Mutual Water Company (530.674.2837).

May 6, 2014

Re-managing the Flow

The major rivers and streams of the Sacramento Valley provide essential pathways for spawning salmon and steelhead. Flow agreements to benefit these fish are on every major watercourse in the Sacramento Valley.



Trinity and Shasta Lakes are important sources of cold water storage. Timing the release of this cold water into the rivers is vital if spawning fish are to thrive.

Trinity Lake

Shasta Lake

Whiskeytown Reservoir

Keswick Reservoir

Sacramento River Tributaries

Various flow agreements benefit spring run salmon.

Feather River

A water quality certification adopted in 2010 provides for specific flow and temperature requirements to accommodate spawning salmon and steelhead.

Lake Oroville

New Bullards Bar Reservoir

Yuba River

In 2008, the Yuba River Accord increased the streamflow requirements over previous levels, which benefits fish while insuring sufficient water supplies for irrigation and municipal uses.

Folsom Lake

Clear Creek

In May and June, water is pulsed into Clear Creek to attract Spring-run salmon from the Sacramento River. From June through October, water released from Whiskeytown Reservoir keeps water temperatures cool.

Sacramento River below Keswick Dam

In 1960, flow objectives were established for the protection of fish and wildlife. In 1990 and 1991 this policy was modified requiring more cold water when warmer temperatures would be harmful to fish.

Sacramento River at Wilkins Slough

The Rivers and Harbors Act of 1935 mandated a specific flow rate at Wilkins Slough be maintained. The primary goals at that time were navigation and flood control. In 1992, Congress made protection of fish and wildlife a secondary goal and this requirement was updated in 2009.

American River below Nimbus Dam

In 2000, the Flow Management Standard was developed, which established minimum flow standards to improve the conditions for fall-run Chinook salmon and steelhead. Additionally, releases are adjusted to maintain sufficiently low water temperatures for steelhead rearing in summer and Chinook spawning in the fall.

NCWA
Northern California Water Association

For more details visit www.norcalwater.org/efficient-water-management/instream-flows/

May 19, 2014

Via e-Mail (commentletters@waterboards.ca.gov) and U.S. Mail

Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

**Re: State Water Board Meeting May 20-21, 2014
Comments on Agenda Items 12 (Proposed Resolution Regarding Drought-Related
Emergency Regulations for Curtailment of Diversions) and 13 (Workshop
Regarding Options for Drought-Related Curtailments of Post-1914 Water Rights in
the Sacramento-San Joaquin River Delta Watershed)**

Dear Chair Marcus:

We respectfully submit these comments regarding the above-referenced agenda items on behalf of the Northern California Water Association and the water users identified in Attachment 1 (collectively "NCWA"). NCWA's responses to the "Issues for Discussion at the Workshop" are set forth in Section III of this letter.

Summary of Comments

NCWA appreciates the steps taken by the State Water Board to mitigate the effects of the drought. The drought has created a sense of urgency among regulators and others to act on water issues. But in the complex area of California water law and policy the desire to act must be tempered by deliberation, a thorough understanding of consequences and a public process that inspires confidence in the integrity of the decision-making process.

The proposed emergency regulation for Mill/Deer/Antelope Creeks (Agenda item 12) and certain of the proposals for curtailing water use in the Sacramento-San Joaquin River Delta (Delta) Watershed (Agenda item 13) would radically change how water is allocated during periods of drought in California. Since statehood, the rule of priority has been California's principal mechanism for allocating water during times of shortage. In *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, the California Supreme Court was called upon to decide whether a physical solution adopted in the context of a groundwater adjudication could disregard water right priorities in order to apportion water rights on an "equitable" basis. In a unanimous decision, the Supreme Court rejected the argument that considerations of "equity" could justify

subverting the rule of priority. The Supreme Court sent a strong message regarding the rule of priority: “[W]ater right priority has long been *the central principle in California water law*” and the “corollary of this rule is that an equitable physical solution *must* preserve water right priorities to the extent those priorities do not lead to unreasonable use.” *Id.* at 1243 [emphasis added]. Six years later, the Third District Court of Appeal cited this decision to emphasize that the State Water Board has an affirmative obligation to make “[e]very effort . . . to respect and enforce the rule of priority.” *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 966 (“*EID*”) (emphasis added).

In past droughts the State Board has respected the rule of priority. It has applied Term 91 to those post-1914 water rights that are subject to that term and, in critically dry years, it has issued notices of curtailment for all post-1914 appropriative water rights. (The State Water Board issued such notices in 1977, 1988, 1991, 1992 and 1994.) This approach has enabled water users to understand the “rules of the road” and has brought certainty to the administration of water rights during times of drought. Water was allocated based on the rule of priority and junior rightholders were free (as they are today) to supplement their water supplies from alternate sources of supply, such as groundwater wells, purchased water, or redirection of earlier storage and through voluntary, market-based water transfers.

It appears that the State Water Board has determined that there is not adequate water available to meet the water supply requirements of post-1914 appropriative water rights in the Delta Watershed and that the State Water Board may move forward with the issuance of curtailment notices for post-1914 appropriative rights in the Delta Watershed, consistent with past practice. Assuming this occurs, then consistent with the State Water Board’s past practice, the notices should expressly exclude from the curtailment order water users that are diverting pursuant to water right settlement contracts including, without limitation, Sacramento River Settlement Contractors, Feather River Settlement Contractors, Yuba County Water Agency Member Units, water users within the North Delta Water Agency, and the San Joaquin River Exchange Contractors, or other contracts under which the Bureau of Reclamation or the Department of Water Resources have obligations to protect contractors from injury due to exports.

The proposals now before the State Water Board radically depart from past practices. For example, the proposed emergency regulation for Mill/Deer/Antelope Creeks (Agenda item 12) would categorically declare diversions from the affected watersheds “unreasonable” when stream flows fall below certain thresholds, without regard for the individual facts and circumstances of each diversion. Such a categorical declaration would violate the well-established principle that what is a reasonable use or reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case. It would also violate the procedural due process rights of the affected parties. The proposed regulation would set an unconstitutional and dangerous precedent for categorical determinations of “unreasonable” use in other factual contexts.

If the State Water Board believes that violations of the constitutional requirement of reasonable use or the public trust doctrine are occurring on Mill/Deer/Antelope Creeks (or anywhere else), the proper course of action is to initiate a targeted enforcement proceeding against those water users that have allegedly violated these legal requirements. The State Water Board has ample legal authority to initiate such proceedings, as discussed further in this letter. In addition, the National Marine Fisheries Service (NMFS) has enforcement authority under Section 9 of the Endangered Species Act, 16 U.S.C. § 1538; *cf. United States v. Glenn-Colusa Irr. Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (NMFS enforcement action against GCID). The targeted water users will be entitled to have their “day in court,” *i.e.*, an evidentiary hearing, and the State Water Board may then determine what enforcement action, if any, is warranted based on the evidentiary record.

Several of the options identified for curtailment of post-1914 water rights in the Delta Watershed (Agenda item 13) would utilize the emergency regulation mechanism to subvert the rule of priority and avoid due process protections. Option 1 would utilize existing mechanisms for water right curtailment. There is no evidence that the current system, which involves the issuance of notices of curtailment based on priority groups, is not working. Option 1 would be acceptable to NCWA, as long as it is limited to post-1914 rights. NCWA and its members are eager to work collaboratively with State Water Board staff to collect, analyze and refine available data to inform this process.

Options 2, 3 and 4 would rely on the adoption of emergency regulations to curtail water rights under various scenarios. While all of the latter options are of concern to NCWA, Option 3 is particularly troubling because it would add a permit term or license condition similar to existing Term 91 to all post-1914 water rights in the Delta Watershed. In effect, such a term would require all post-1914 water rights to curtail diversions in order to meet Bay-Delta water quality objectives, thereby pre-judging the entire Bay-Delta water right process. The determination of whether senior water right holders have any responsibility to meet Bay-Delta water quality objectives is a complex matter and the State Water Board’s own prior orders make clear that an evidentiary hearing is required before any such responsibility can be assigned.

NCWA is deeply concerned about the use of emergency regulations to address water right curtailment issues. Administrative expediency does not justify deviation from established due process protections and the basic tenets of California water law. Moreover, many of the factual assumptions that underlie the proposed emergency regulations have not been adequately tested through a fact-finding process. The State Water Board should move forward in a manner that is consistent with past practices and established tenets of law.

I. Agenda Item 12: The Proposed Emergency Regulation Would Be Unlawful.

The State Water Board is considering the adoption of a proposed regulation (Section 878.1) that would restrict a large number of existing uses based on a sweeping determination that each and every one of those uses is “unreasonable.” Such blanket regulations are not constitutional when

they broadly and uniformly affect groups of vested rights holders without specific and particularized findings as to how those individual rights are exercised. *See State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 750 (“[A]s repeated on innumerable occasions, what is reasonable use or reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case”); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 219 Cal.2d 489, 531. Decisions affecting existing rights are quasi-judicial and require the procedural protections of notice, a hearing, the opportunity to present evidence, and individualized findings. *See In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339, 348-349; *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723.

Here, the State Water Board would only make (thinly supported) findings regarding the minimum flows required in the three named tributaries. Although the staff report cites several studies regarding the state of threatened or endangered salmonids in the Central Valley generally, its primary basis for selecting the minimum flows in the proposed regulations is contained in just three pages (Attachments 11 and 12). The staff report does not contain any findings about specific individual uses, their relative priority dates, or to what extent each use poses a risk to salmonid populations. Until it does so in a quasi-judicial proceeding, the State Water Board may not curtail vested water rights solely on the basis of generalized findings. By sweeping a large number of water users within the scope of a single binding determination, based on scant evidence of the *aggregate* impact of their uses, the State Water Board is curtailing lawful diverters without making a defensible determination of unreasonable use as to any single user. To the extent the State Water Board believes that violations of the constitutional requirement of reasonable use or the public trust doctrine is occurring on any of the subject tributaries, the proper course of action is to initiate a targeted enforcement proceeding against those water users that have allegedly violated these legal requirements. The targeted water users will be entitled to have their “day in court” in the form of an evidentiary hearing and the State Water Board can determine what actions, if any, are warranted based on the evidentiary record.

The State Water Board’s claimed authority for promulgating the emergency regulations—Water Code section 1058.5—only authorizes it “to require curtailment of diversions when water is not available *under the diverter’s priority of right*.” (Emphasis added.) Far from making “every effort” to enforce the rule of priority, Section 878.1 would subvert California’s water right priority system in at least two ways. First, as discussed above, the regulation would categorically declare diversions from the affected watersheds to be “unreasonable” when stream flows fall below certain thresholds, without regard for the individual facts and circumstances of each diversion. *See* Cal. Code Regs. tit. 23, § 877 [proposed]. Second, by equating municipal and industrial (M&I) uses with human health and safety, the regulation would effectively elevate junior M&I uses above other, more senior uses. By default, Section 878.1 would make diversions within Antelope, Deer and Mill Creeks “unreasonable” when stream flows are below the new minimum floors, thereby prohibiting such diversions. But the regulation would

authorize “limited diversions ... outside the order of priority”¹ if they meet the definition of “minimum health and safety needs.” Although existing law defines minimum health and safety needs according to the water needed for “human consumption, cooking and sanitation,” (Water Code § 106.3; Cal. Code Regs., tit. 23, § 697(b)), the proposed regulation would define that term much more broadly. Section 878.1 would define “minimum health and safety needs” to include “municipal supplies” generally, not just those necessary for human consumption, cooking and sanitation. Thus, there is nothing “minimal” about the alleged “minimum health and safety” diversions that section 878.1 would authorize.

When the State Water Board has reason to believe that unreasonable use of water *is already occurring*, it has three procedural options for preventing such use, all of which are adjudicative. The first option is to bring a judicial action to enjoin the unreasonable use. *Cf. People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743. This authority derives from the fact that Article X, Section 2 is “self-executing”; any person or agency, including the State Water Board, may bring an action to enjoin unreasonable use. *See Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 198-200. The second option is to commence a quasi-adjudicative proceeding pursuant to Water Code section 275. Such a proceeding names the water users that will be affected, and the outcome is an enforceable State Water Board decision or order binding the parties. The third option is to issue a cease and desist order, the violation of which subjects the water user to administrative civil liability. *See Water Code § 1845.* Water Code section 1831(d) authorizes the State Water Board to issue cease and desist orders to enforce section 1052’s prohibition against unauthorized diversions. (Section 100 provides that the right to use water does not extend to waste or unreasonable use. Thus, the unreasonable use of water qualifies as an “unauthorized use” under section 1052.)

What these three procedures have in common is that they each provide affected users with notice and the opportunity for a hearing. *See, e.g., Water Code § 1831(c).* Such hearings are a crucial due process check on agency action. They allow the water user to scrutinize the State Water Board’s alleged basis for the unreasonable use determination as well as present their own contrary evidence before a neutral decision maker. By contrast, the emergency regulations that the State Water Board has proposed here provide no such opportunity.

Adoption of Section 878.1 would establish a dangerous precedent. It would take the State Water Board down the dual paths of categorical determinations of unreasonable use and the re-prioritizing of water rights. Moreover, it would trigger takings litigation that would not facilitate, in any way, voluntary arrangements to mitigate the effects of the current drought. Proposed Section 878.1 reflects a radical departure from the historical administration of water rights in California. It must be rejected.

¹ SWRCB findings re: 878.1.

II. Agenda Item 13: The State Water Board Should Continue Its Past Practice of Addressing Water Right Curtailments During Droughts Through the Application of Term 91 and the Issuance of Curtailment Notices Based on Water Right Priorities.

The staff report accompanying Agenda Item 13 identifies four options for curtailing post-1914 water rights in the Delta Watershed: (1) Curtailments to protect senior rights and stored water releases based on reported water use under existing authorities; (2) Curtailment to protect senior rights and stored water releases based on reported water use through emergency regulations; (3) Curtailment based on a “Term 91 Approach” requiring diverters in addition to Reclamation and DWR to bypass flows to provide for Delta outflows and water quality requirements; and (4) Curtailments based on the adoption of a “Term 91-like emergency regulation” requiring Reclamation and DWR to meet Delta outflow requirements without contributions from other diverters.

NCWA supports Option 1, which is essentially the historical practice of the State Water Board, as long as it is limited to post-1914 appropriative rights. Option 1 should be limited to post-1914 rights because the State Water Board does not have sufficient information to determine the relative priorities of pre-1914 appropriative rights or riparian rights. Also, while riparian rights normally have priority over appropriative rights, an appropriative right is “superior to the right of a riparian owner who subsequently obtains title to public land from the government.” (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774.) Moreover, under certain circumstances, it may not be reasonable for riparians to claim priorities against upstream appropriative rights. For these reasons, it would be improper for the State Water Board to issue a notice requiring curtailments of all diversions under pre-1914 appropriative rights to protect supplies for riparian rights.

NCWA objects to Options 2, 3 and 4 because the use of emergency regulations in this context would violate due process and substantive protections of California water law. As discussed below, NCWA is particularly troubled by Option 3 which would impose obligations to meet Bay-Delta water quality objectives on all post-1914 water rights without an evidentiary hearing.

A. The State Board Lacks Authority to Adopt an Emergency Regulation That Adds a Permit or License Condition Similar to Existing Term 91 to All Post-1914 Water Rights in the Delta Watershed (Option 3).

The “Term 91” approach to Delta watershed curtailments that the State Water Board is considering presents a serious and unlawful conflict with the rule of priority. The State Water Board agenda and accompanying documents indicate that, under this proposal, the State Water Board would expand Term 91 to *all* post-1914 appropriators in the Delta watershed. Doing so would prohibit all such rightholders from diverting water when the CVP and SWP are releasing stored water to meet Delta water quality requirements. Because there are times when the projects release stored water *and* some natural/abandoned flow still exists in the watershed, this proposal would subvert the rule of priority by prohibiting many lawful water users from

diverting even when their priorities would give them the right to divert natural or abandoned flows. In other words, applying Term 91 to *all* permitted water rights in the Delta watershed would improperly force senior water rights to share the CVP and SWP's responsibility for meeting Bay-Delta water quality objectives, as set forth in the Water Quality Control Plan.

In 2000, the State Water Board was about to commence an administrative proceeding, known as the Phase 8 water right hearing, to determine the responsibility of water users within the Sacramento Valley to meet Bay-Delta water quality objectives. At the urging of a broad coalition of water users and state and federal agencies (including NCWA, the State Water Contractors and the California Department of Water Resources), the State Water Board initially stayed and subsequently dismissed the Phase 8 hearing, and instead allowed a settlement of the Phase 8 water right issues.² In its decision not to hold the Phase 8 hearing the State Board observed:

In the absence of a hearing, the SWRCB could not place responsibility for meeting the [Bay-Delta] objectives on a party or parties other than the DWR and the USBR. Accordingly, the most reasonable approach is to retain the existing responsibilities to meet the objectives until the SWRCB is able to complete a hearing and make a decision after the hearing. (WR 2001-05 at p. 6.)

The determination of whether senior water right holders have any responsibility to meet Bay-Delta water quality objectives is a complex matter. If the State Water Board decides to take up this matter at some future date, its own prior orders make it clear that an evidentiary hearing will be required. The State Water Board lacks authority to assign responsibility to meet Bay-Delta water quality objectives to senior water right holders through the broadened application of Term 91 through the adoption of an emergency regulation. Before assigning such responsibility the State Water Board would first be required to undertake a comprehensive determination of the responsibility of other water users (including the state and federal projects), to meet those objectives. Due process considerations and basic tenets of California water right law preclude the State Water Board from apportioning Bay-Delta responsibility in the piecemeal and essentially arbitrary fashion proposed here.

As the Third District Court of Appeal found in *El Dorado Irrigation District v. State Water Resources Control Board*, the State Water Board cannot disregard priorities without "substantial

² From July 1, 1998, through December 21, 1999, the State Board conducted Phases 1 through 7 of the Bay-Delta Water Rights Hearing. On December 29, 1999, the State Board adopted Decision 1641, determining some of the responsibilities for meeting the objectives in the 1995 Bay-Delta Water Quality Control Plan, and resolving other related issues. Thereafter, the State Board issued a hearing notice for Phase 8 of the Bay-Delta Water Rights Hearing, to determine the responsibilities of the water right holders within the watersheds of the Sacramento, Calaveras and Cosumnes Rivers to meet flow-dependent objectives in the 1995 Bay-Delta Plan. Pursuant to State Board Orders WR 2001-05 and WR 2002-0012, however, Phase 8 was stayed and ultimately dismissed.

justification.” 142 Cal.App.4th 937, 967 n. 21. “[W]hen the Board seeks to ensure that water quality objectives are met in order to enforce the rule against unreasonable use and the public trust doctrine, ... the subversion of a water right priority is justified *only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.*” *Id.* at 967 (emphasis added). In *El Dorado*, the court found that Term 91 “simply functions to protect the projects by relieving them of some of the responsibility for meeting Delta water quality objectives that otherwise would fall on them. ... [T]he Board’s interest in protecting the projects’ stored water for export does not trump the rule of priority.” *Id.* at 967-68, 969 (emphasis added).

B. Options 2 and 4 Should Likewise Be Rejected.

Option 2 would adopt an emergency regulation requiring curtailment of diversions “unless those diversions are needed for minimum health and safety purposes or other critical purposes and alternative water supplies are not available.” Thus, Option 2 would have the effect of placing diversions needed for “minimum health and safety purposes” (as broadly defined in the regulation) ahead of diversions needed for irrigation or other uses regardless of water right priority. Option 2 would violate the rule of priority and constitute a taking of senior water rights and is therefore unconstitutional and otherwise unlawful. As noted above, the State Water Board’s claimed authority for promulgating the emergency regulations—Water Code section 1058.5—only authorizes it “to require curtailment of diversions when water is not available *under the diverter’s priority of right.*” The State Water Board has made no such showing here.

Option 4 would adopt a “Term 91-like emergency regulation” but instead of curtailing diversions of natural flows needed to meet Delta Outflows and other Delta water quality requirements, those flows would remain the responsibility of the CVP and SWP. Current water rights with Term 91 would still be curtailed under the existing formula. The key question regarding Option 4 is: why is it needed? Existing orders of the State Water Board require the CVP and SWP to meet Delta water quality requirements. Term 91 is already applicable to water rights containing that term. Option 4 would require the entire process of adoption of an emergency regulation with no net gain. In light of the concerns raised above concerning the use of emergency regulations for water right curtailment purposes, Option 4 should be rejected.

III. Issues for Discussion at the Workshop

1. Which curtailment option would be most effective and enforceable?

Option 1, which is consistent with past practices, would be most effective and enforceable, as long as it is limited to post-1914 appropriative rights. As discussed in detail above, the other options have significant legal and practical infirmities. Additionally, Term 91 notices were issued last week, which will operate in tandem with the curtailment notices. As stated earlier, we support Option 1 and encourage the SWRCB to move forward in this manner.

2. Are there any other curtailment options that should be considered?

No. The historical practice of issuing curtailment notices has worked relatively well. There is no evidence of widespread violation of curtailment notices.

3. How can human health and safety needs be addressed under the various approaches to curtailments?

Initially there needs to be a clear understanding of what “minimum human health and safety needs” means. The definition suggested by staff appears, at best, to be arbitrary and lacking in evidentiary support. Once properly defined, human health and safety needs must be addressed within the parameters of the water right system including the rule of priority. As has occurred in the past during times of shortage the needs of municipal and industrial water users can and should be addressed through voluntary, market-based water transfers.

4. How can the State Water Board ensure that Delta needs will be met? The needs of fish and wildlife? The needs to maintain adequate end of month storage levels?

The State Water Board should continue to monitor and, if necessary, require the CVP and SWP to continue to take actions to implement the Bay-Delta Water Quality Control Plan. In addition, the CVP and SWP will be required to comply with the current Biological Opinions governing project operations. There is no evidence that the needs of fish and wildlife are not being met during the current drought. Nor is there evidence that adequate end of month storage levels are not being maintained. If the State Water Board desires to conduct additional fact-finding on these issues it should conduct an evidentiary hearing so that all interested parties have an opportunity to be heard.

To the extent the Board believes that violations of the constitutional requirement of reasonable use or the public trust doctrine are occurring, the proper course of action is to initiate a targeted enforcement proceeding against those water users that have allegedly violated these legal requirements. The targeted water users will be entitled to have their “day in court” in the form of an evidentiary hearing and the State Water Board can then determine what enforcement actions, if any, are warranted based on the evidentiary record. NMFS also has the option of bringing an enforcement proceeding under Section 9 of the Endangered Species Act.

5. How can voluntary water-sharing agreements be accommodated? What criteria should be used to determine whether voluntary agreements are viable alternatives to mandatory curtailments?

Voluntary water-sharing agreements, by definition, are based on voluntary arrangements. Voluntary water transfers have historically been highly successful mechanisms for re-allocating water during periods of drought. The State Water Board should, as a matter of policy, encourage the use of voluntary water transfers as the principal mechanism for re-allocating water during

periods of drought. It should also encourage other voluntary arrangements for avoiding harm to water users and the environment.

6. Which curtailment option would be most responsive to changing conditions?

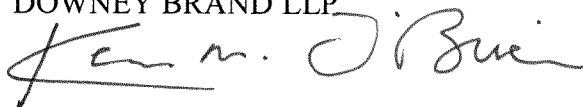
Option 1 is the most effective curtailment option and would be most responsive to changing conditions, as long as it is limited to post-1914 rights. If necessary, the State Water Board may engage in additional fact-finding through evidentiary hearings.

IV. Conclusion

For the reasons stated, NCWA respectfully urges the State Water Board not to adopt the proposed emergency regulation for Mill/Deer/Antelope Creeks. NCWA further urges the Board to adopt Option 1 and reject the adoption of emergency regulations governing water right curtailments.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien

KMO:bc

cc: State Water Resources Control Board Members:
Frances Spivy-Weber, Vice-Chair
Tam M. Dudoc
Dorene D'Adamo
Steven Moore

Tom Howard, Executive Director,

Michael Lauffer, Chief Counsel

ATTACHMENT 1:

Signatories to Comment Letter

Byron-Bethany Irrigation District
Calaveras County Water District
El Dorado County Water Agency
El Dorado Water & Power Authority
Glenn-Colusa Irrigation District
Meridian Farms Mutual Water Company
Natomas Central Mutual Water Company
North Delta Water Agency
Pelger Mutual Water Company

Princeton Codora Glenn Irrigation District
Provident Irrigation District
Reclamation District No.108
River Garden Farms Company
South Sutter Water District
Stevinson Water District
Sutter Extension Water District
Sutter Mutual Water Company