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March 12, 2015

Via email transmission to commentletters@waterboards.ca.gov

State Water Resources Control Board
1101 I Street
Sacramento, CA 95814

Re: March 17-18 Meeting of the State Water Resources Control Board; Consideration of a proposed Resolution to update and readopt a drought-related emergency regulation for curtailment of diversions due to insufficient flow for specific fisheries

Members of the Board:

The proposed 2015 Emergency Regulations for Curtailment of Diversions Due to Insufficient Flow for Specific Fisheries are unnecessary and should not be adopted for Mill Creek or Antelope Creek. Los Molinos Mutual Water Company (Los Molinos), the Watermaster on lower Mill Creek, has worked collaboratively with the California Department of Fish and Wildlife (CDFW), the National Marine Fisheries Service (NMFS), and other organizations for decades in support of salmonids on Mill and Antelope Creeks. Last year, Los Molinos entered into agreements with both CDFW and NMFS, in addition to earlier agreements already in place, specifically for the purpose of providing additional water for fish. Nevertheless, both Mill and Antelope were included in the State Water Resources Control Board's (SWRCB) 2014 emergency regulatory action affecting the three Tehama County streams, even though Los Molinos had already agreed to provide the requested flows.

This year, Los Molinos again intends to enter into voluntary cooperative agreements, but Mill and Antelope Creeks are again being included in the proposed regulations. This year, the proposed agreements and emergency regulations request Los Molinos to give up even more water, without any scientific justification for why more water is needed this year than was used in last year's "very successful"¹ base and pulse flow programs on these two creeks.

¹ See NMFS Technical Memorandum re: Minimum Protection Flows for Listed Salmonids during the 2015 California Drought for Mill, Deer, and Antelope Creeks in the California Central Valley, Feb. 2, 2015, at p. 2 (2014's prescribed pulse flow events were "very successful").

Even more troubling is the rushed nature of both this year’s proposed voluntary agreements and of this year’s emergency regulations. There was nothing to prevent the SWRCB or CDFW from working diligently over the past year—with stakeholders—to amend, renegotiate, and reenact the voluntary agreements or the emergency regulations that were used last year. Instead, CDFW waited until the end of January to open discussions on new voluntary agreements, and continued to impose new terms and to change provisions into March. Similarly, the SWRCB let the existing emergency regulations lapse before declaring a “new” emergency requiring “new” emergency regulations. In cases where an agency wishes to extend emergency regulations beyond the statutory time limit—here, 270 days—the proper process is to engage in traditional rulemaking, with attendant opportunities to be heard, close scrutiny of the proposals, and other due process protections.² In order to circumvent the robust procedural protections that come with formal rulemaking, the SWRCB has instead declared that a new set of emergency regulations must be passed immediately, *with less than two weeks’ notice* to affected water rights holders. The cause of the “emergency,” though, is only the SWRCB’s and CDFW’s failure to take timely and diligent action to address the ongoing drought situation.

A well-thought out plan, developed with diverters rather than imposed upon them, and developed in a transparent fashion in accordance with legal requirements of due process, including evidentiary hearings, would be much more effective than this disjointed, rushed process that was developed with little or no long-term planning or foresight. Because of the procedural deficiencies in the development of these emergency regulations, and because the proposed regulations are completely unnecessary on Mill and Antelope Creeks due to voluntary agreements, this Board should reject the proposed emergency regulations.

Respectfully submitted,

MINASIAN, MEITH, SOARES,
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By:



PETER C. HARMAN
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Company

² Government Code § 11346.1(e).