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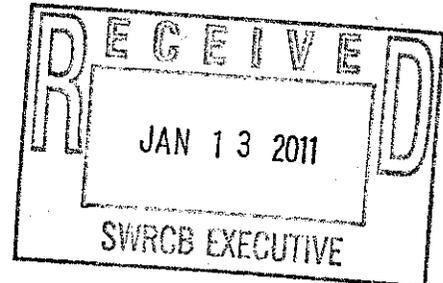
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January 13, 2011

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th floor
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Re: 1/18-19/2011 BOARD MEETING: ITEM 12 REASONABLE USE DOCTRINE

Dear Ms. Townsend:

The San Luis & Delta-Mendota Water Authority (Authority) and Westlands Water District (Westlands) appreciate the opportunity to comment on the Reasonable Use Doctrine and Agricultural Water Use Efficiency Report, released by the Delta Watermaster on or about January 6, 2011 (Reasonable Use Report). The Authority and Westlands do not support and do not believe the State Water Board can accept the Reasonable Use Report for the following six reasons.

The Reasonable Use Report Was Developed Without Any Transparency Or Stakeholder Input

The Authority and Westlands recognize that Water Code section 85230 directs the Delta Watermaster to "submit regular reports to the [State Water Board] and the [Delta Stewardship Council] including, but not limited to, reports on water rights administration, water quality issues, and conveyance operations." That direction, however, does not preclude the Delta Watermaster from developing his reports with transparency and stakeholder input. Indeed, when developing reports, State Water Board practice has been to notice its process and include opportunities for early public participation (i.e., the Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, Final Report on Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem). That practice has reduced

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the risk that reports will contain inaccuracies and allows for more focused proceedings before the State Water Board.

The Reasonable Use Report is Overgeneralized, Loosely Worded and Vague

In many places, the Reasonable Use Report makes assertions, characterizations, or recommendations that are not rigorously crafted or explained, resulting in overgeneralizations and vague or confusing statements. This comment provides some examples, but does not make an exhaustive critique of all problems. For example, the Reasonable Use Report asserts that, in order for the use of water to be reasonable, irrigators must employ specific agricultural water use and delivery practices. (Reasonable Use Report, p. 10.) Although these practices make sense in many areas, the unqualified assertion made in the Reasonable Use Report ignores practical differences that exist in different regions of the State, including the quantity and quality of water available for irrigation, climate, and economic viability of implementing these practices. That omission is important, because:

What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

(*Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567; See also *Environmental Defense Fund v. East Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183, 194.)

Funding And Time Are Needed For Major System Improvements

The Reasonable Use Report proclaims use to be "unreasonable" unless "some or all" of the enumerated water use and delivery practices are employed, without providing any compliance period or condition that funding actually be available. For example, conversion of open conveyance systems to more efficient lined or piped systems to facilitate on demand deliveries requires enormous investments of funding and time for installation, but because the Reasonable Use Report chooses the words "must employ" rather than, for example, "should implement," the report could be read as having predetermined that ongoing use of less efficient systems is a **present** unreasonable use, threatening the water rights of the user without a fair opportunity to implement improvements. Similarly, the phrase indicating that "some or all" of the listed

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measures must be implemented with no explanation of when "some" is sufficient or when "all" would be required is extremely overbroad and vague.

The Specific Recommendations In B. 2, For Example, Are So Vague They Violate Constitutional Protections

Without explanation, the Reasonable Use Report recommends the multi-step process under current law be replaced with a procedure that commences with issuance of a cease and desist order. This approach would eliminate the requirement of any investigation of the facts or a hearing on whether a CDO should issue, and standard due process requirements.

The Reasonable Use Report Does Not Provide Adequate Explanation For Its Focus On Agriculture

The Reasonable Use Report focuses on agriculture because of a belief that: "[s]mall changes in agricultural water use efficiency can produce significant amounts of 'wet' water", and "more efficient use of water . . . increase water flows into the Delta [and] increase Delta outflows. Reducing the amount of agricultural return Delta flow, both upstream of and in the Delta, has important water quality benefits." (Reasonable Use Report, pp. 3, 10.) The Reasonable Use Report presumes more flow and reduced agricultural returns will benefit the Bay-Delta ecosystem. That presumption has no scientific support. Further, the resulting focus in the Reasonable Use Report on agriculture ignores the true scope of the reasonable use doctrine, which applies to all beneficial uses, including municipal, industrial and environmental uses. (*Nat'l Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 749-750.)

As A Matter Of Law, The State Water Board's "Adoption" Of The Reasonable Use Report Would Violate The Administrative Procedure Act

The "recommendations" section of the Reasonable Use Report sets forth requirements for agricultural water users, including the requirement to review water uses and "develop and implement plans" to update water delivery infrastructure. (Reasonable Use Report, p. 15.) If the State Water Board were to adopt the Reasonable Use Report, those requirements could have the force of law and therefore amount to the adoption of regulation. (Govt. Code, § 811.6.) Before the State Water

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Board can do that, the Administrative Procedure Act requires, the State Water Board give the public notice of its proposed regulatory action, (Govt. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it, (Govt. Code, § 11346.2(a), (b)); give interested parties an opportunity to comment on the proposed regulation, (Govt. Code, § 11346.8); respond in writing to public comments, (Govt. Code, §§ 11346.8(a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, (Govt. Code, § 11347.3(b)), which reviews the regulation for consistency with the law, clarity, and necessity. (Govt. Code, §§ 11349.1, 11349.3.) (*Naturist Action Com. v. Department of Parks & Recreation* (2009) 175 Cal. App. 4th 1244, 1250.) Because the State Water Board has not complied with those requirements, if it were to adopt the Reasonable Use Report, such adoption would violate the law. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.)

The Authority and Westlands appreciate the opportunity to comment.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation



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