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Felicia Marcus, Chair  
and Members and Staff

[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

State Water Resources Control Board of the State of California  
P. O. Box 100  
Sacramento, California 95812

Re: Comments on proposed adoption of Emergency Regulations

Ladies and Gentlemen of the Board:

The San Joaquin River Exchange Contractors Water Authority (Central California Irrigation District, San Luis Canal Company, Columbia Canal Company, Firebaugh Canal Water District), Western Canal Water District, Richvale Irrigation District, Butte Water District, Sutter Extension Water District, Plumas Mutual Water Company, Reclamation District No. 1004, Nevada Irrigation District and South Feather Water and Power Agency submit the following comments asking that the proposed Emergency Regulations not be adopted or submitted to the Office of Administrative Law for the following reasons:

- I. **Governor Browns' two Drought Declarations did not authorize or direct your Board to attempt to avoid constitutional and judicial requirements of due process. No law or emergency declaration authorizes the SWRCB to exercise condemnation powers in accordance with existing law to take water from otherwise reasonable uses to favor a deemed more important use.**

Nothing in the Governor's Drought Declarations directs condemnation or taking of property rights in water for public purposes you deem to be more important. Nothing in those Drought Declarations or legislative authorization provided money for the temporary condemnation or taking of water for "health and safety" or for fishery purposes. Nor did the Drought Declarations authorize establishment without hearings and fact-finding of a higher seniority of water right called "health and safety" water. There is no exemption

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from CEQA or functional equivalents of CEQA processes. This Board would have to make findings under CEQA for its own declaration of “emergency.”

**II. “Cumbersome” or “due process and compliance with Court direction”:  
Which side do your Board Members wish to be on?**

Your staff states as a basis for these regulations that the Staff finds the conduct of hearings and taking of official actions based on evidence to be “cumbersome.” Stare at the following argument in support of the Regulations included in your Staff Report, since it will become the announcement of your reason for proceeding:

“For the State Board to take an enforcement action, each illegal diversion may be investigated and charged separately and water right holders may request a full evidentiary hearing that is then subject to de novo review in the superior court system. As such the current system is cumbersome...”

The Federal and State Constitutions provide a very quick way to take property of citizens if a more necessary public use is found to exist: A resolution of necessity, a deposit of the estimated damages, and a Order of Immediate Possession. The founding fathers in requiring due process understood power-hungry governmental officials’ concern about “cumbersome” processes and poorly-conceived attempts by claiming emergency conditions:

The California Constitution and Federal Constitution each require that a taking of interests in property (be it real property or personal property) of government be accompanied with due process and reasonable compensation. “Rights of any nature in water” (CCP §1240.110) are included within that power. A resolution of necessity can be adopted for a necessary, or in the case of a public entity-held water right, a more necessary use of property held by a public Agency pursuant to CCP §1240.650 and CCP §1245.210. On a 2/3 vote of your Board or of the California Department of Fish and Wildlife or Department of Commerce in regard to fishery flows, condemnation can occur and immediate possession be obtained either for a short- or long term.

We intentionally omit the numerous cases that confirm that “taking” of water falls within the Constitutional protections and the numerous cases pointing out that a hearing and determination of the taking must occur in advance because you will not read the cases. If you adopt the idea that an emergency exists and the only solution to the emergency is to subvert the United States’ and California Constitution’s requirements of

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due process, you are not likely to pay much attention to the contents of reasoned opinions. Instead, we offer the following:

“You have your personal reputations of public service. Read the following description of the liability of public agencies who undertake actions to pay the damages, attorneys fees and expert witness fees of the parties denied due process, and ask how you will explain those awards to the Governor who appointed you and to those in the media examining your performance. Will you state that the alternatives of due process were ‘cumbersome’?”

**III. “Health and Safety” is not a super senior water right, and Municipal and Domestic use does obtain first priority to water use in a fashion to deny pre-1914 water rights users and Riparian water users of water.**

The proposed regulations misunderstand California law in regard to domestic and municipal use. This misunderstanding may be an intentional attempt to create a picture of an emergency in terms of availability of water for domestic consumption.

First, the priority for domestic use (not municipal use) found in Section 106 and Section 1460 of the Water Code is simply a priority applied between post-1914 water right holders. It is a priority that does not take away or reduce pre-1914 or riparian water rights. Water Code Section 1460 states:

“The application for a permit by a municipality for the use of water by the municipality or the inhabitants thereof for domestic purposes shall be considered first in right in right, irrespective of whether it is first in time.”

This simply means that regardless of the order of applying and receiving permits, domestic use of water shall be considered to have a priority of at least 1914.

Note that “municipal use” or some broad concept of use for industry, manufacturing or recreational purposes is not included in the definitions. If you believe that the Deputy Director should have authority to control diversions or storage and to exercise eminent domain powers to deny agricultural users water in favor of domestic users, the regulations proposed do not remind her that directives to preserve water for domestic use do not permit any commercial or industrial activity use.

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The SWRCB exercising condemnation authority over otherwise reasonable uses of water because of a need to protect some general health and safety superior use is pure inverse condemnation with no conditional procedural protections.

Water Code Section 1245 further makes clear that any claim of prior right for health and safety for municipality uses is accompanied by the duty to pay all direct and indirect damages to those having rights to use the water or those within the disrupted community impacted by the new orders. Finally, farm workers will have a remedy! Section 1245 is rarely used because domestic and municipal water users recognize the extreme jeopardy it places them in to assert any claim of priority in a watershed. Section 1245 states:

“Every municipal corporation of this State,...who enters any watershed, or any lands, streams or waters in the watershed for the purpose of acquiring or increasing a water supply...for the purpose of supplying the needs of any municipal corporation...with water...shall be liable to all persons...whose property, business trade, profession or occupation is within or conducted within the watershed...for all damage suffered or sustained by them either directly or indirectly because of...the taking of...water from such watershed to and for use by or in any such municipal corporation.”

The State Board in adopting these regulations is espousing the idea that “health and safety” justifies restricting or preventing exercise of water rights, notwithstanding the effects of the reduced diversions on more senior water rights. The State Board would be acting as the agent or representative in attempting to preserve water for municipality use and will become responsible for those damages. In fact, the SWRCB will be launching a rural urban war unnecessarily because any urban use for domestic purposes can easily condemn water needed and the SWRCB can pay those damages.

**IV. The idea that the Deputy Director can determine a valid existing water right may not be exercised because it is an unreasonable use of water, without a hearing and evidentiary record, either because of the public trust doctrine or because of health and safety concerns without a evidentiary determination is setting the SWRCB on a course to distract from all reasonable efforts during the drought.**

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1. Deer Creek, Mill Creek and Antelope Creek unveil a fundamental defect in the assumption that simply asserting public trust uses extinguishes any inverse condemnation damage claims arising from prohibiting the diversion of water to maintain minimum fish flows. *Summa v. California* (U.S. Supreme Court) establishes that on Mexican Land Grant land which includes these areas of use in Tehama County, a public trust reservation for fishery or other use may not be asserted.

Further, there is a Superior Court Judgment which this Board has not applied to have changed on some theory that the fishery is entitled to a minimum flow of water. When a Court takes jurisdiction of the determination of rights to water, it is contempt of Court to not apply to the Court for different standards.

2. In regard to other streams and rivers that your broad emergency regulations would apply to, whether the fishery minimum flows or some presumed need to maintain storage for future health and safety uses is conceived by the Deputy Director at the direction of the Board as the goal, unreasonable use cannot be determined without a full evidentiary hearing because the Courts have said this repeatedly. The Board will therefore be attempting to exercise eminent domain powers without due process to obtain the use of the water for a purpose the Board values more.

In *In Re Forni* 54 Cal.App.3d 750 at 754, the Court stated: "The question of reasonable use or reasonable method of use of water constitutes a factual issue." Also *Joslin* 67 Cal. 2d at 139, and *Gin Chow* at 217 Cal. at 706. In *IID I*, 186 Cal.App.3d at 1165, citing the Board's own duty to exercise adjudicatory and regulatory fundings for the state in the field of water resources, the Court stated: "Hearing requirements and judicial review procedures are established to assure that Board action under these sections properly balances the rights of the appropriator with the need of the public."; *IID I*, 186 Cal.App.3d at 1167-68.

3. Before these regulations are advanced, there should be some direction from the Legislature or the Governor that they intend the Board and its Deputy Director to move California from a system of rights to water to a system in which there is only authority to use water based upon the last pronouncement of the Deputy Director of his or her view of the most important purpose of use or the person or party to be rewarded with the most reliable supply. Generally, authority of this nature must be provided by the parties making the laws. *Youngstown Sheet and Tube Co v. Sawyer* 343 U.S. 579 (1952); *Yakus v. United States* 321 U.S. 414 (1944). The Governor's Drought Declaration conceives of this authority. To take vested senior water rights and allocate those waters to others use or other types of uses because the SWRCB values those uses more is so far beyond any authority granted the SWRCB it will distract all water planning efforts for a

