

CITY AND COUNTY OF SAN FRANCISCO



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Via Electronic and U.S. Mail

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Re: 7/1-2/14 BOARD MEETING (Comments on Agenda Item 5, Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversions to protect senior water rights).

Dear Ms. Townsend:

This office represents the San Francisco Public Utilities Commission ("SFPUC"), operator of the Hetch Hetchy Regional Water System ("RWS"). On behalf of the SFPUC and the City and County of San Francisco ("San Francisco"), we submit the following comments on Agenda Item 5 on the State Water Resource Control Board's ("State Water Board") July 1-2, 2014 Agenda, regarding "Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversions to protect senior water rights" ("Emergency Regulations"). These comments are submitted in accordance with Title 23, California Code of Regulations sections 647.3 and 649, *et seq.* of the State Water Board's regulations.

Although the current drought is severe and unequivocally requires a comprehensive statewide response, San Francisco cautions the State Water Board from hastily adopting and implementing a new legal framework for enforcement of water rights priority that raises a wide array of legal and practical issues. If the State Water Board adopts the Emergency Regulations as proposed, energy and resources better dedicated to ameliorating drought conditions will be needed to address such issues in administrative and court proceedings. Thus, in order to avoid detracting from necessary drought relief efforts, San Francisco urges the State Water Board to reject the Emergency Regulations.¹

¹ Statewide Drought Related Curtailment of Water Diversions Emergency Regulations Digest (referred to below as "Digest"), at p. 9 (wherein the State Water Board notes that "[b]ased on the balance of comments received, there is reason to believe that applying section 878.1 statewide would generate such concern that the energy and resources spent addressing the legal framework of section 878.1 would detract from efforts to ensure that all minimum health and safety needs are met"). San Francisco respectfully submits that the same concern and practical reality applies to the State Water Board's decision to adopt the Emergency Regulations.

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In short, the Emergency Regulations are contrary to law and not supported by substantial evidence in the record. If the State Water Board decides to adopt the Emergency Regulations, its decision would represent an abuse of discretion and be contrary to law.

San Francisco is a member of the San Joaquin Tributaries Authority (“SJTA”) and joins in the SJTA’s comments on the Emergency Regulations and incorporates those comments herein by reference. In addition, San Francisco offers the following additional comments.

I. The Hetch Hetchy Regional Water System.

The RWS provides water for municipal and domestic uses to 2.6 million water users in Tuolumne, Alameda, Santa Clara, San Mateo, and San Francisco counties. The RWS serves 26 wholesale water customers outside San Francisco, in addition to other customers outside the city like the Groveland Community Services District in Tuolumne County. The RWS is the third largest supplier of water for domestic and municipal purposes in California.

The RWS provides water from the Tuolumne River, Alameda Creek, San Mateo Creek, and Pilarcitos Creek watersheds. On average, 85 percent of RWS supplies come from the Tuolumne River watershed. The SFPUC and its customers also have developed groundwater and reclaimed water supplies, and one customer, Alameda County Water District, is a State Water Project contractor. On average, the RWS supplies 55 million gallons per day (“MGD”) to wholesale customers in northern Santa Clara County that are within the service area of the Santa Clara Valley Water District, which in turn obtains water from the Central Valley Project (“CVP”), the State Water Project (“SWP”), and local surface and ground water. As the State Water Board knows, the CVP and SWP reduced deliveries this year to all-time lows, making RWS water supplies an essential component to the continued health and safety of many communities in Alameda and Santa Clara Counties.²

II. Staff’s Goal of Increasing the Efficiency of the Enforcement of Curtailments does not Constitute an Emergency.

An agency cannot create its own crisis in order to declare an emergency. (*Los Osos Valley Associates v. City of San Luis Obispo* (“*Los Osos Valley*”) (1994) 30 Cal. App. 4th 1670, 1681 (drought conditions alone did not constitute an emergency shielding the city from damage claims for subsidence caused by groundwater pumping where city had been aware of the need to conserve water for years and did not require more stringent conservation measures).) Thus, a court need not defer to a legislative determination of emergency where the condition complained of is the result of an agency’s own political choices and delay. (*Id.*) To the contrary, an emergency has long been accepted in California as an unforeseen situation calling for immediate action. (*Sonoma Cnty. Org. etc. Employees v. Cnty. of Sonoma* (“*Sonoma*”) (1991) 1 Cal. App. 4th 267, 276-77 (citations omitted).) “Emergency is not synonymous with expediency, convenience, or best interests . . . and it imports more . . . than merely a general public need.” (*Id.* at 277 (citations omitted) (internal quotation omitted); Gov. Code § 11346.1(b)(2) (explaining that a “finding of emergency based only upon expediency, convenience, best interest, general

² For example, Alameda County Water District requested to purchase 13.55 MGD from the SFPUC this year compared to approximately 9 MGD last year, to make up for the shortfall in SWP supplies it otherwise would have received, while also implementing 25 percent rationing in their service area.

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public need, or speculation, shall not be adequate to demonstrate the existence of an emergency.”.)

In the instant case, the State Water Board issued a notice of potential curtailment on January 17, 2014, but inexplicably waited nearly four months before issuing *any* curtailment notices to post-1914 appropriators under normal procedures.³ The Finding of Emergency in the Emergency Regulations Digest (“Digest”) fails to explain both why the State Water Board waited so long to issue curtailment notices, and why it would have been inadequate to issue curtailment notices under normal procedures in January. (Gov. Code, § 11346.1(b)(2) (*italics added*) (requiring that “[i]f the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations, *the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.*”).)

Primarily citing to the poor water right holder response to the recent post-1914 curtailment notices, the State Water Board now asserts that the Emergency Regulations are necessary for “*timely* and effective implementation of the State’s water right system during the current drought when numerous water diversions require curtailment and enforcement in *a short period of time.*”⁴ Apart from emphasizing that the State Water Board’s existing enforcement tools are “cumbersome and time- and resource- intensive,”⁵ the State Water Board fails to offer any explanation for why it would have been inadequate to issue curtailment notices under normal procedures in January. For example, the State Water Board suggests that the low response rate of 21.4 percent for the curtailment notices issued to date on the Scott River, Russian River, Sacramento River and San Joaquin River watersheds justifies adoption of the Emergency Regulations.⁶ As noted, these curtailment notices were issued approximately one month ago. Presumably the response rate would have been higher if State Water Board staff had been provided an additional four months to follow up with water right holders who had received curtailment notices. But the Emergency Regulations and Digest fail to acknowledge this mistake. Instead, the State Water Board inappropriately points to the low response rate as a limitation on the State Water Board’s enforcement authority and justification for the Emergency Regulations, stating, “[c]urrently, without a regulation, there is no penalty for failure to submit the Curtailment Certification Form.”⁷

³ Digest, at p. 8 (identifying the curtailment notices issued by the State Water Board through June 10, 2014. As explained by the State Water Board, the first curtailment notices were issued on May 16, 2014 to junior water right holders in the Scott River watershed to protect the senior water rights of the U.S. Forest Service. Curtailment notices were subsequently issued on May 27, 2014 and May 29, 2014 to post-1914 water right holders in the Sacramento River and San Joaquin River watersheds, and to water right holders in the Russian River Watershed upstream of the Russian River’s confluence with Dry Creek, with a priority date of February 19, 1954 or later.).

⁴ *Id.* at pp. 1, 5 (*italics added*).

⁵ *Id.* at p. 7.

⁶ *Id.*

⁷ *Id.* at p. 8.

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In fact, apart from reiterating the need for timely implementation of the State's water right system, the State Water Board primarily justifies the need for the Emergency Regulations by stating that "[i]t would be *more efficient* to enforce curtailments under the proposed regulation,"⁸ and by complaining of the delays associated with the standard due process protections, *e.g.*, the right to an evidentiary hearing, required by the State Water Board's existing regulatory framework. Thus, for example, the Digest states,

The process of scheduling and holding full evidentiary hearing on each individual order [requiring diversion to cease] prior to it becoming effective eviscerates any meaningful possibility of ensuring the water in fact reaches the rightful diverters during this drought emergency, and does not serve as an adequate deterrent for others during the curtailment period.⁹

Requirements that ensure individuals receive essential due process protections, such as the basic right to an evidentiary hearing *before* a water right is curtailed, may be inconvenient or even inefficient for staff tasked with enforcing curtailments. But, as noted, staff's goal of increasing the efficiency of the enforcement of curtailments does not constitute an emergency. (*Sonoma*, 1 Cal. App. 4th at 277 (citations omitted); Gov. Code § 11346.1(b)(2).) Although the State Water Board may be dissatisfied with its existing enforcement authority, it has failed to show why the timely exercise of that authority, *e.g.*, by issuing curtailment notices earlier this year, would have been inadequate to accomplish the objectives it now seeks to accomplish through the Emergency Regulations. (Gov. Code § 11346.1(b)(2).) By not providing ample time for enforcement of curtailment notices under normal procedures, the State Water Board has created a problem that it now seeks to impermissibly fix through adoption of the Emergency Regulations. (*Los Osos Valley*, 30 Cal. App. 4th at 1681.)

III. The Emergency Regulations Violate Procedural Due Process.

A. The Emergency Regulations Exceed the Scope of Authority Conferred by Senate Bill 104 and the Water Code by Denying Due Process Rights to Water Right Holders Subject to a Curtailment Order.

The Emergency Regulations exceed the scope of authority conferred by Senate Bill 104 ("SB 104") and the Water Code by denying due process rights to water right holders subject to a curtailment order. "Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code § 11342.1.) The Water Code provides due process to water right holders by requiring hearings before a final enforcement order takes effect. (Water Code §§ 1055(b), 1831(c).) Nothing in SB 104 changed these requirements for the enforcement of an emergency regulation. SB 104 simply authorized the State Water Board to issue a Cease and Desist Order ("CDO") or an Administrative Civil Liability ("ACL") for a violation of an emergency regulation and specified that the applicable fine for a violation of an emergency regulation is \$500 per day in addition to any other applicable civil or criminal penalties. (SB 104, Sec. 10, 12 and 14, adding Water Code §§ 1058.5(d), 1831(d)(4), 1846(a)(2).)

⁸ *Id.* at p. 9 (italics added).

⁹ *Id.* at p. 7.

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As the Digest correctly notes, “before issuing a final enforcement order, the State Water Board must first issue a draft Cease and Desist Order or a proposed ACL. If such enforcement action is proposed, a water right holder is entitled to an evidentiary hearing on all issues before the order takes effect.”¹⁰ However, the Digest suggests that curtailment orders issued under the Emergency Regulations would not be subject to the process requirements of the State Water Board’s existing system of enforcement, and that such curtailment orders would not be subject to a hearing before they became effective, but only, if at all, upon request for reconsideration. For example, the Digest states, “[t]he individualized enforcement-based system of curtailment, *in the absence of a regulation*, is cumbersome and time- and resource-intensive.”¹¹ The Digest further provides,

*As opposed to the State Water Board’s existing authorities that require case-by-case investigations, issuance of a draft order or proposed ACL, and the opportunity for an evidentiary hearing, a violation of the emergency regulations is itself immediately enforceable by administrative civil liability of up to \$500 for each day of violation.”*¹²

Although, the Emergency Regulations provide for the possibility of a hearing on a petition for reconsideration in proposed section 875(f) of Title 23 of the California Code of Regulations, the opportunity for such a hearing is not guaranteed, and a hearing on a petition for reconsideration occurs *after* an Administrative Civil Liability of up to \$500 for each day of violation has gone into effect. (Water Code § 1123 (stating that if the State Water Board grants reconsideration of a decision or order the Board may, in its discretion, allow for an evidentiary hearing).) Further, the State Water Board determines in its own discretion whether to grant reconsideration in the first instance. (Water Code § 1122 (*italics added*) (stating, “[t]he board *may* order a reconsideration of all or part of a decision or order on the board’s own motion or on the filing of a petition of any interested person or entity.”).) Thus, the potential opportunity for a hearing on a petition for reconsideration is not an adequate substitute for an evidentiary hearing on the basis of curtailment *before* a water right holder is curtailed. (*Coe v. Armour Fertilizer Works* (1915) 237 U.S. 413, 424 (explaining that “a hearing granted as a matter of favor or discretion” is not a “substantial substitute for the due process of law that the Constitution requires.”).)

The issuance of a final enforceable curtailment order without an opportunity for a hearing as would be provided, for example, in response to a draft CDO to enforce a curtailment notice under normal procedures, denies water right holders due process protections, as expressly provided under the Water Code, and exceeds the authority delegated to the State Water Board by SB 104. And the possibility of a hearing on a petition for reconsideration is not a “substantial substitute.” (*Id.*) The State Water Board should correct the Emergency Regulations to clarify that a hearing will be held on any proposed curtailment order *before* the order is finalized, and that water users subject to such orders will be afforded full due process protections and rights to hearings as provided for in existing law.

¹⁰ *Id.*

¹¹ *Id.* (*italics added*).

¹² *Id.* at p. 8 (*italics added*); see also *supra* note 8, and accompanying text.

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B. The Emergency Regulations Fail to Provide Adequate Notice.

Because of conflicting and contradictory statements in the Notice of Proposed Emergency Rulemaking (“Notice”) and the Digest, staff have failed to provide adequate notice of whether water right holders would, in fact, be provided an opportunity for an evidentiary hearing regarding the basis of curtailment *before* being curtailed. The Notice of Proposed Emergency Rulemaking states,

Water users would still have an opportunity to request a hearing *before* finalization of the cease and desist order and adoption of an administrative civil liability order, but the scope of the hearing issues could be narrowed substantially due to the regulation.¹³

However, as shown, the Digest explains that in contrast to “existing authorities that require . . . the opportunity for an evidentiary hearing, a violation of the emergency regulations is *itself immediately enforceable* by administrative civil liability of up to \$500 for each day of violation.”¹⁴ Further, as noted, the Digest identifies existing hearing requirements as an impediment to expeditious enforcement that will presumably be modified, if not eliminated, by the Emergency Regulations.

The process of scheduling and holding full evidentiary hearings on each individual order prior to it becoming effective eviscerates any meaningful possibility of ensuring the water in fact reaches the rightful diverters during this drought emergency, and does not serve as an adequate deterrent for others during the curtailment period. *As such, enforcement in the absence of a regulation is incapable of ensuring proper implementation of the water rights seniority system in a timely manner during the current drought.*¹⁵

Thus, although the Notice states that a hearing would be provided to water right holders before being curtailed, the Digest suggests the opposite, by explaining that a violation of the Emergency Regulations is “immediately enforceable” by adoption of an ACL and by emphasizing that evidentiary hearings prior to curtailment would “eviscerate[] any meaningful possibility” of effective enforcement during the drought.¹⁶ Similarly, under the Emergency Regulations, as proposed, the only potential opportunity for a hearing would appear to be on a petition for reconsideration – assuming the State Water Board granted reconsideration and, in its discretion, elected to hold an evidentiary hearing – after a water right holder had already been curtailed.

Because the threshold due process question of whether water right holders would, in fact, have an opportunity for a hearing before being curtailed under the Emergency Regulations is not answered by the notice provided, water right holders “were deprived of the notice which was their due.” (*Memphis Light, Gas & Water Div. v. Craft* (1978) 436 U.S. 1, 14-15 (citations omitted) (internal quotation omitted) (italics added) (stating, “Petitioners’ notification procedure,

¹³ Notice of Proposed Emergency Rulemaking, June 20, 2014, Curtailment of Diversions due to Insufficient Flow for Senior Water Rights, referred to below as “Notice”), at pp. N-2, N-3.

¹⁴ Digest, at p. 8 (italics added).

¹⁵ *Id.* at p. 7 (italics added).

¹⁶ *Id.* at pp. 7-8.

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while adequate to apprise the Crafts of the threat of termination of service, was not reasonably calculated to inform them of the availability of an opportunity to present their objections to their bills. . . . *The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. . . . As no such notice was given respondents . . . they were deprived of the notice which was their due.*")

IV. The State Water Board Must Consider the Possibility that Riparian Seniority is Limited by Prescription.

The Emergency Regulations fail to consider that appropriative water right holders may own prescriptive rights that are prior and superior to downstream riparians. (*Peabody v. Vallejo* (1935) 2 Cal. 2d 351, 374.) For example, in *Meridian, LTD. v. San Francisco* ("Meridian"), the California Supreme Court determined, among other things, that: (1) San Francisco had prescribed against a major riparian on the San Joaquin River; and, (2) for many years prior to 1932 the Modesto Irrigation District and Turlock Irrigation District ("Districts") "intercepted and diverted part of the flow, and for long periods within the irrigation season the entire flow, of the Tuolumne River by means of their dams and other works." ((1939) 13 Cal. 2d 424, 429, 432, 459, opinion amended on denial of reh'g, 13 Cal. 2d 424 (explaining that the riparian right holder commenced the action in May of 1932, and that the Districts' referenced diversions occurred for many years "prior to the commencement of the action."))

Although in the Digest the State Water Board identifies one scenario in which appropriative water rights may be senior to riparian rights, *i.e.*, where an appropriative right predates the patent date of riparian lands, the Digest fails to acknowledge that appropriators may obtain prescriptive rights prior and superior to downstream riparians.

Riparian rights generally have a higher priority of right to natural flows than appropriative rights, and water must be available to fulfill the needs of all riparians before an appropriator may divert. *This is not always the case, however.* An appropriative right predating the patent date of riparian lands has seniority relative to the riparian right.¹⁷

The Emergency Regulations state a default presumption that riparian rights are senior to appropriative water rights unless evidence demonstrates otherwise. As proposed in the Emergency Regulations, Title 23, California Code of Regulations section 875(c)(1) would provide,

In determining whether water is available under a diverter's priority of right and to issue curtailment orders, the Deputy Director for the Division of Water Rights, or her designee, may rely upon:

(1) Relevant available information regarding date of priority, including claims of first use in statements of water diversion and use and other information contained in the Division of Water Rights files. *Absent evidence to the contrary, riparian water rights are presumed senior to appropriative water rights for purposes of curtailments pursuant to this section.* (Italics added.)

¹⁷ *Id.* at pp. 5-6 (italics added).

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As noted, the Digest suggests that senior appropriative water right holders would be denied due process and an opportunity for a hearing regarding the basis for curtailment under the Emergency Regulations, and thus denied or limited in their ability and opportunity to rebut the presumption of riparian seniority.¹⁸ In fact, as explained above, the Digest specifically identifies existing hearing requirements as an impediment to expeditious enforcement that will presumably be substantially modified, if not eliminated, by the Emergency Regulations.¹⁹

Although some appropriative water right holders may be able to efficiently establish that their appropriative right predates the patent date of riparian lands, as *Meridian* illustrates, a determination of whether an appropriator has obtained a prescriptive right that is prior and superior to downstream riparians may require an adjudicative process that includes a detailed, case-specific, factual inquiry of the parties' respective historical uses of the stream. To the extent that the Emergency Regulations may not provide the opportunity for an evidentiary hearing, appropriators, and particularly those with potential prescriptive rights, could be deprived of valuable property rights, *i.e.*, the right to divert and/or store water during the curtailment period, without adequate due process protection. (See *e.g.*, *United States v. State Water Res. Control Bd.* (1986) 182 Cal. App. 3d 82, 101 (explaining, "once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation.") (*Anderson Nat. Bank v. Lueckett* (1944) 321 U.S. 233, 246 (stating, "[t]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."))

V. The State Water Board Cannot Prematurely Curtail Senior Water Right Holders.

The Digest asserts that under the Emergency Regulations State Water Board staff would be able to more accurately focus curtailment investigations, more quickly identify unauthorized diversions, and better "refine future curtailment analyses to reflect actual hydrologic conditions and actual water use."²⁰ Further, the Digest explains that timely compliance by post-1914 water right holders who have already been curtailed is necessary so that the State Water Board can "make appropriate adjustments to curtailments" and "ensure that no water right holder is prematurely curtailed."²¹

Without first curtailing at least some junior water rights it is difficult to determine with precision exactly what rights must be curtailed because, absent a curtailment, there could be:
1) diversions of water by entities that are not entitled to divert under the current hydrologic condition; and 2) no, or limited, diversion of water under senior water rights because of lack of

¹⁸ A further troubling consequence of the presumption in favor of riparians is that an appropriator would have the burden to show the nature and extent of riparians' water rights in order to establish that the appropriator's rights are, in fact, prior and superior.

¹⁹ Digest, at p. 7 (*italics added*).

²⁰ *Id.* at p. 8 (identifying curtailment and reporting compliance issues "under the current authorities" and contending that the Emergency Regulations would solve the referenced problems).

²¹ *Id.* at p. 14.

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availability at their point of diversion. Timely compliance by curtailed water right holders is needed so that the Board can promptly make appropriate adjustments to curtailments, if needed. *Timely responses by water right holders and timely adjustment to Board curtailments ensure that no water right holder is prematurely curtailed*, and that no senior water right holder is injured due to lack of available water because of diversions by a more junior water right.²²

Thus, in the Sacramento-San Joaquin River watersheds the Digest suggests that the State Water Board's first actions will be to use the authority of the Emergency Regulations to compel a higher rate of "[t]imely compliance by curtailed water right holders," *i.e.*, post-1914 water right holders who have already been issued curtailments, in order to determine whether further curtailments, *i.e.*, of senior water right holders, are necessary. As noted, the current response rate to the curtailment notices issued by the State Water Board approximately a month ago is 21.4 percent.²³ Thus, consistent with the State Water Board's own reasoning, the response rate for these junior appropriators would presumably have to significantly improve before the State Water Board would have sufficient information to determine whether curtailment of senior appropriators, *e.g.*, pre-1914 water right holders, and riparians is needed.

San Francisco respectfully submits that this rationale for the State Water Board's Emergency Regulations precludes the State Water Board from issuing curtailment orders to pre-1914 and riparian water right holders until it has taken significantly greater action on post-1914 curtailment compliance. Further, were the State Water Board to issue curtailment orders under the Emergency Regulations to senior appropriators or riparians before curtailing all junior appropriators, then the State Water Board would, in effect, be impermissibly forcing senior water right holders to function as a backstop for noncompliant junior appropriators and illegal diverters, thus violating the law of water rights priority.

VI. Water Right Holders Cannot be Required to Provide Carriage Water to Offset Illegal Diversions, Groundwater Depletion, or Protect Fish and Wildlife.

The Digest states that curtailment orders may be issued in order to provide "carriage water" on top of senior water right holder demand to ensure delivery of that quantity of water to the senior water rights holder.²⁴ The Digest defines "carriage water" to include water needed to make up for losses to evaporation and groundwater, maintain water levels needed to facilitate pumping from a stream, and any other reasonable losses or factors, and notes that such carriage water provides an ancillary fish and wildlife benefit.²⁵ The Digest also recognizes that illegal water diversions and groundwater pumping from hydraulically connected supplies reduce water availability for senior water rights.²⁶ The Digest improperly implies that the State Water Board could curtail appropriators to provide carriage water to mitigate illegal diversions, groundwater

²² *Id.* (italics added).

²³ *Id.* at p. 8.

²⁴ *Id.* at p. 14.

²⁵ *Id.*

²⁶ *Id.* at pp. 13-15.

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depletions or to protect fish and wildlife. A junior water right cannot be curtailed in order to offset illegal diversions or stream depletion caused by another water user or to provide instream flows that are not quantified in the water right or entitlement. (*See Wells A. Hutchins, The California Law of Water Rights*, p. 264 (“The right of the junior appropriator is entitled to protection to its full extent, just as is the right of a prior appropriator.”).)

VII. The Fiscal Impact Analysis Substantially Underestimates Fiscal Impacts.

As a preliminary matter, San Francisco notes that as the Emergency Regulations and Digest, including staff’s Public Agency and Governmental Fiscal Impact Analysis (“Fiscal Impact Analysis”), were issued at the end of the day on Friday, June 20, 2014, with comments originally due on June 26, 2014 at 12 p.m., not nearly enough time was provided to perform a thorough review of staff’s analysis, and the questionable assumptions underlying the analysis. Nonetheless, San Francisco offers the following observations.

A. The Fiscal Impact Analysis Underestimates the Cost of Completing the Required Curtailment Certification Form.

According to staff, the estimated amount of time to complete the required curtailment certification form is 2 hours, at an estimated average cost of \$65 per hour for state and local government agencies, for a total cost of \$130 per certification form.²⁷ Given the significance of the curtailment certification form, not to mention the serious potential repercussions of making a mistake in the completion of the form, the assumption by staff that one analyst would complete the form without conferring with an attorney and senior manager is unrealistic.

B. The Fiscal Impact Analysis Overestimates the Percentage of Municipal Supply Reductions that Can be Replaced by Groundwater Pumping During the Curtailment Period.

The Fiscal Impact Analysis provides that “50 percent of municipal supply reductions can be replaced by groundwater pumping during the curtailment period.”²⁸ The stated assumption appears unrealistically high. For example, San Francisco is a major water supplier for 2.6 million water users yet has no access to groundwater at this time.

C. The Fiscal Impact Analysis Severely Underestimates the Cost of Replacement Surface Water.

Staff estimates the cost of purchasing replacement surface water via transfers at \$500 per acre-foot (“AF”). This is a very low and optimistic price that fails to take into account the substantial transactional costs of water transfers. Further, San Francisco, as other municipal water suppliers, would also incur additional costs to treat and convey purchased water. The Fiscal Impact Analysis does not appear to have accounted for these additional costs.

²⁷ *Id.* at Appendix 10, at p. A10-2.

²⁸ *Id.* at p. A10-6.

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D. The Fiscal Impact Analysis Severely Underestimates the Cost of Implementing Conservation Measures for Agencies, Like those in the Bay Area, that have Already Exhausted Low-Cost, Efficiently Implemented Conservation Devices.

The Fiscal Impact Analysis estimates that municipal water suppliers will incur costs associated with conservation measures needed to address the overall shortage of water available for use in their service territory of \$165/AF. However, San Francisco, like other municipal water agencies in the Bay Area, has already saturated the market with low-cost, efficiently implemented conservation devices. Thus, to achieve savings in the RWS service territory, San Francisco must implement more expensive conservation measures at an average cost of \$860/AF.

VIII. There Are Several Problems with Staff's Approach for Identifying Water Demand on the Tuolumne River.

The Digest states that "[s]upply and demand data may be compared to determine when, and to what priority level, curtailments should occur," and further explains that supply/demand curves prepared by staff are located on the Division of Water Rights webpage.²⁹ Staff's Tuolumne River Watershed Analysis, which includes a supply/demand curve for the Tuolumne River, is available via a link on the referenced webpage.³⁰ In short, there are several problems with the approach that staff intends to use for identifying water demand in the Tuolumne River watershed as the basis for curtailment of senior water right holders on the Tuolumne River under the Emergency Regulations.³¹

IX. The State Water Board Should Not Discount the Importance of Carry Over Storage for Effective Water Supply Planning.

Although the SFPUC agrees with State Water Board staff that the public health and safety exemption should not be included in the Emergency Regulations,³² were the State Water Board to include the exemption, the SFPUC recommends the Board ensure that the exemption contemplates the consequences of meeting public health and safety needs beyond the 270 day period. In the Digest, State Water Board staff indicate that because the Central Valley Project, the State Water Project and the SFPUC have adequate storage in their reservoirs to satisfy residential demand of 50 gallons per capita per day ("gpcd") during the 270 day term of the Emergency Regulations, potential curtailment of these water suppliers' planned diversions to storage will not impact their ability to meet public health and safety needs in their respective service territories.

²⁹ Digest, at p. 13.

³⁰ State Water Resources Control Board, Division of Water Rights, Tuolumne River Watershed Analysis, *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/tuolumne.shtml.

³¹ *Analysis of SWRCB Depiction of Flow Availability Tuolumne River*, Daniel B. Steiner, June 25, 2014, included hereto as Attachment 1.

³² Digest, at p. 9.

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These water suppliers all have adequate storage in their reservoirs such that curtailment of other diversions is not be [sic] needed to deliver a minimum health and safety amount for residential users of 50 gallons per person per day over the 270 day term of the emergency regulation.³³

State Water Board staff's analysis in the Digest suggests that the only criteria that should be used to determine whether a water utility will be able to reliably satisfy public health and safety needs is whether its reservoirs are currently storing the amount of water necessary to satisfy 50 gpcd demand in its service territory for the 270 day term of the Emergency Regulations. However, this short-sighted view of water supply planning fails to consider the need for additional water supply if next year is dry, or worse still, the next two years are dry. Carry over storage is necessary to sustain water utilities through multi-year droughts. For example, it is possible – pursuant to the Raker Act³⁴ and depending on hydrology – that San Francisco would not be able to divert any water into storage next year. Thus, San Francisco would need to primarily rely on carry over storage to supply the RWS service territory throughout the year. In short, staff's analysis does not reflect responsible water supply planning.

X. The Emergency Regulations and Implementation Actions Should Not Be Precedent for Future State Water Board Actions.

If the State Water Board proceeds to adopt the Emergency Regulations despite the objections outlined herein, any findings, orders or decisions taken or made by the State Water Board to implement or enforce the Emergency Regulations should be expressly designated as non-precedential. Pursuant to Government Code section 11425.60(a), “[a] decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.” As Government Code section 11425.60(b) explains: “[a]n agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur.” State Water Board practice is to designate all of its decisions and orders as precedential under Government Code section 11425.60, unless the decision or order says otherwise. (Order WR 96-1, at p. 17, fn. 11.)

In accordance with Government Code section 11425.60, the State Water Board designates decisions and orders as non-precedential whenever they are based on unique circumstances. (See, e.g., Decision 1645.) In the instant case, the Emergency Regulations and any curtailment actions taken to implement the Emergency Regulations are by definition unique circumstances occasioned by the unprecedented drought, and clearly should not be relied upon for a general proposition regarding the State Water Board's non-emergency authority over pre-1914 appropriative and riparian rights. Moreover, any actions or curtailment orders taken by the State Water Board or its delegates under the Emergency Regulations should not be precedential or cited as evidence of the existence or extent of water rights affected by such curtailment orders or other actions.

Thus, if the State Water Board moves forward to adopt the Emergency Regulations, San Francisco recommends the following provision as an additional section 875(g) to Title 23 of the California Code of Regulations:

³³ Digest, at Appendix 10, at p. A10-4.

³⁴ 38 Stat. 242.

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(g) This regulation and any curtailment order issued hereunder shall not be cited or relied upon as authority for, or evidence of, any water right affected by this regulation, and shall not be cited or relied upon as authority for any other action by the Board or its Executive Director, or the Division of Water Rights or the Deputy Director, beyond the limited scope and term of this regulation.

XI. The State Water Board Must Respect Physical Solutions in Any Future Action to Implement the Emergency Regulations.

The State Water Board must respect physical solutions that protect water rights without unnecessarily reducing diversions in any future actions taken to implement the Emergency Regulations. Although, as proposed in the Emergency Regulations, Title 23 of the California Code of Regulations section 878.3 would provide a process to satisfy curtailment with alternative water sharing agreements, the State Water Board must also recognize that physical solutions may exist outside of the proposed curtailment framework and such agreements cannot be impaired or conditioned by the Board. The phrase “physical solution” describes an agreed upon or judicially imposed resolution and is favored as an effective means of resolving complex water problems consistent with the reasonable-use mandate of the California Constitution. (*City of Santa Maria v. Adam* (2012) 211 Cal. App. 4th 266, 287; *Lodi v. East Bay Mun. Utilities Dist.* (1936) 7 Cal.2d 316, 339-341, 344-345; Cal. Const. Art. X, § 2.) State Water Board practice is to respect physical solutions whether judicially crafted, developed by the Board, or agreed upon between the water users involved.

For example, the 1966 Fourth Agreement between San Francisco and the Modesto and Turlock Irrigation Districts (“Districts”) established a “physical solution” that maximizes the beneficial use of water from the Tuolumne River while respecting the priority of the parties’ respective water rights. San Francisco and the Districts operate under a complicated but comprehensive set of agreements, including the Fourth Agreement, that protect the parties’ respective rights to divert. These agreements, together with the Raker Act, allocate 100 percent of the flow that will be available in the Tuolumne River after the effective date of the Emergency Regulations, except water that is bypassed at La Grange Dam pursuant to the obligations of the Districts’ Federal Energy Regulatory Commission license for the Don Pedro Project. All other natural flow in the Tuolumne River during these flow conditions has been prescribed by the SFPUC and the Districts as a result of more than 100 years of operations. Consequently, there is no need to curtail San Francisco’s or the Districts’ diversions under their respective pre-1914 water rights to protect senior pre-1914 or riparian water right holders in the Tuolumne River or San Joaquin River watersheds. Any future curtailment order that may be directed at San Francisco cannot impair San Francisco’s agreements and physical solution with the Districts. San Francisco specifically preserves the right to provide the State Water Board with additional information, evidence and argument that any future curtailment of San Francisco’s water rights to divert from the Tuolumne River is not warranted, justified or constitutional.

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XII. Conclusion

The SFPUC appreciates this opportunity to comment and thanks the State Water Board staff for their efforts.

Very truly yours,

DENNIS J. HERRERA
City Attorney

/s/

Jonathan P. Knapp
Deputy City Attorney

Enclosure

Attachment 1

Memorandum

Subject: Analysis of SWRCB Depiction of Flow Availability
Tuolumne River

From: Daniel B. Steiner

Date: June 25, 2014

1. Introduction

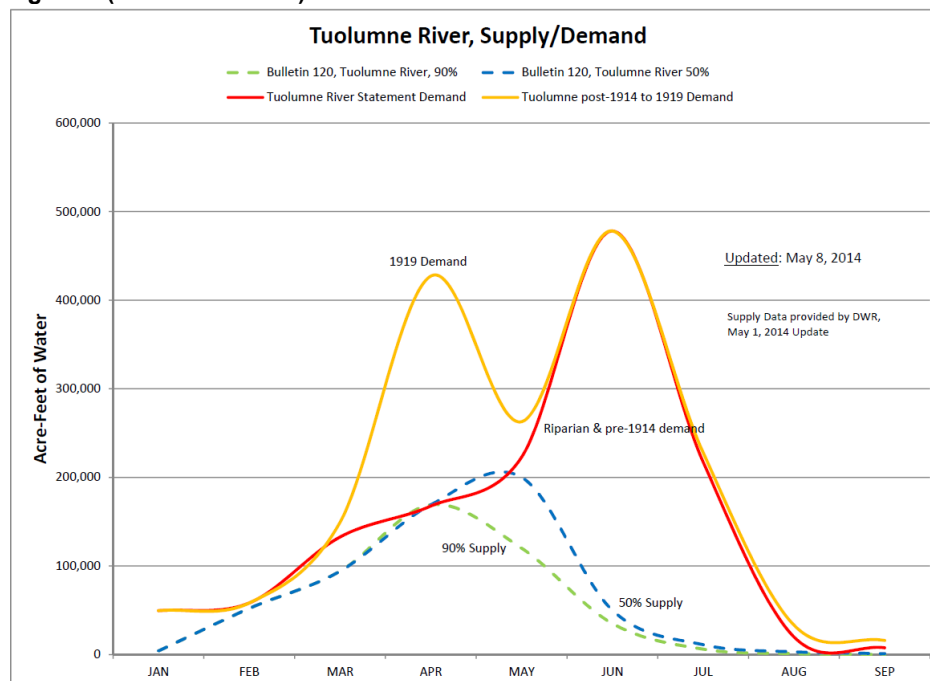
The hydrology of California during 2014 is one of the driest of history, and following two previous years of poor runoff has created dire drought conditions. The State Water Resources Control Board (SWRCB) has already issued notices to certain “junior” right holders to discontinue use, and is currently poised to issue notices to more senior water right holders to stop diverting water if their diversions are downstream of reservoirs releasing stored water and there is no natural flow available for diversion.

As a means to examine water availability in certain California watersheds, SWRCB Staff have been maintaining computations of tributary hydrology in order to project periods when insufficient flow exists within the watersheds to meet all demands, thus triggering the issuance of a notice of curtailment. This memorandum reports on the adequacy of the SWRCB Staff approach to examining water availability.

2. SWRCB Staff Analysis

This report is based on the review of three items: “Tuolumne River, Supply/Demand”, a graphic posted¹ by SWRCB Staff, reported as being updated on May 8, 2014, and shown in Figure 1 below; “Tuolumne River, Daily Full Natural Flow (FNF)”, a graphic posted² by SWRCB Staff, reported as being updated on June 20, 2014, and shown in Figure 2 below; and, a workbook “Tuolumne River.xlsx”, with a last-modified date of April 18, 2014 authored by Brian Coats of SWRCB Staff.

Figure 1 (source: SWRCB)



¹ http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/tuolumne_month.pdf

² http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/tuolumne_day.pdf

Figure 2 (source: SWRCB)

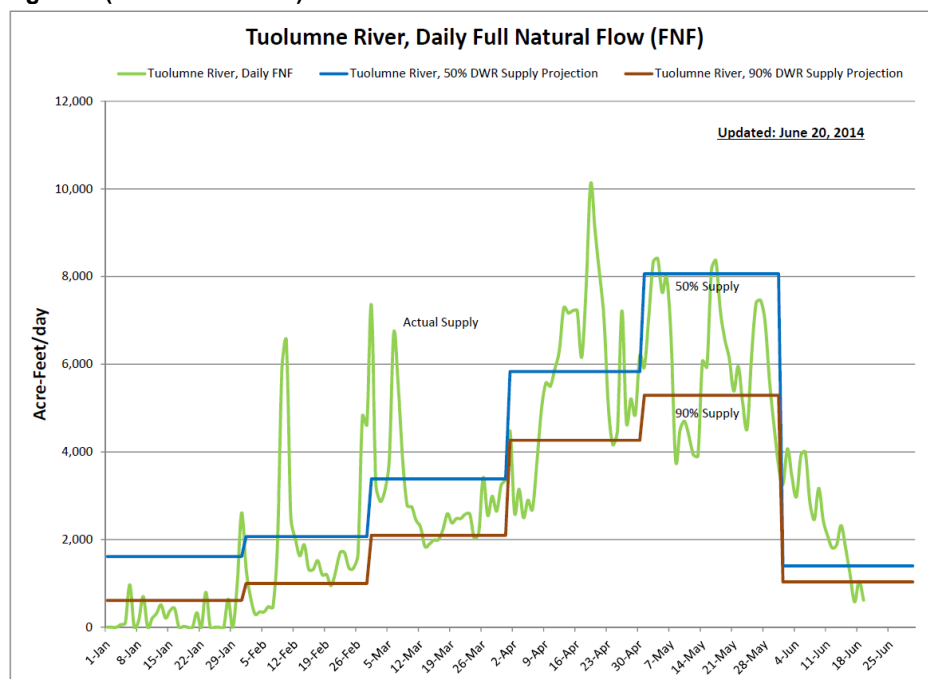


Figure 1 was reportedly constructed to illustrate a comparison between “demands” within the Tuolumne River watershed and “supply” of the watershed. The demands are represented by the two lines noted as “1919 Demand” and “Riparian & pre-1914 demand”. The supply lines in Figure 1 are a representation of the unimpaired runoff³ in the watershed, mirroring the type of data shown in Figure 2. Figure 2 illustrates the computed daily unimpaired flow at a computation point of La Grange Dam, with additional data shown for the DWR estimate of monthly average unimpaired runoff under two statistical levels of probability. The data in Figure 1 have been “smoothed”.

The workbook provided by SWRCB Staff provides support for the computation of the demand lines. SWRCB Staff have categorized its record of water rights within the watershed as falling under Riparian and pre-1914 demand, quantified by Statements of Water Use filed for Calendar Year 2010, and 1919 Demand (post-1914), quantified by reports of appropriative water use for Calendar Year 2012. The quantification of water demand of each water user group consisted of summing the individual volumes of reported water use reported in the Statements and reports for each month. Although confused by the line-smoothing technique used by SWRCB Staff, the 1919 Demand line represents the summation of both components of water use reports. The end use of the computation and illustration embedded in Figure 1 is the identification of the general point in time when watershed unimpaired runoff is insufficient to satisfy all demands and thus suggest curtailment to the water use by certain water users.

There are several problems with SWRCB Staffs’ approach of identifying water demand. SWRCB Staffs’ approach to simply do the math of reported values in the water use reports portrays water demand that does not exist in a practical sense. Although repairing SWRCB Staffs’ interpretation and use of watershed data to be meaningful may result in a similar trigger point-in-time for concern as indicated by its analysis, that similarity may only be the result of circumstantial hydrology this year.

³ While SWRCB Staff refers to the data as “Full Natural Flow”, the more correct definition has typically been unimpaired runoff, as computed by adjusting flow data within the river for impairments, diversions and reservoir evaporation.

3. SWRCB Staff Analysis Contrasted to 2014 Hydrology

The most significant flaw of SWRCB Staffs' analysis is its misinterpretation of data contained in the water use statements and reports. Upon review of the workbook and the results shown in Figure 1, this misinterpretation is easily recognized by the magnitude of the demand identified for April and June. Although my assignment was not to provide an explanation of the development of the Modesto Irrigation District and Turlock Irrigation District (collectively referred to as the "Districts") and the City and County of San Francisco (CCSF) water use statements and reports, practical knowledge of the Districts' and CCSF operations within the watershed will illustrate a different conclusion regarding this year's demands, and thereafter the potential coincidence of supply and demand.

The following graphs illustrate the hydrology of the watershed during 2014. Figure 3 depicts the major storage of the Districts and CCSF since the beginning of the year. CCSF storage has generally decreased (releases greater than inflows) during the early part of the year, began gaining in March and has now begun to decrease within the past week. The Districts' Don Pedro Reservoir storage, as affected by components of unimpaired runoff and CCSF releases, gained storage through mid-April, incurred reductions in storage during late April, and then increased storage during early-May. Since mid-May storage is a downward trend and will remain so through the year. These data can be used to quantify elements of water use portraying diversions to storage or use of previously stored water.

Figure 3

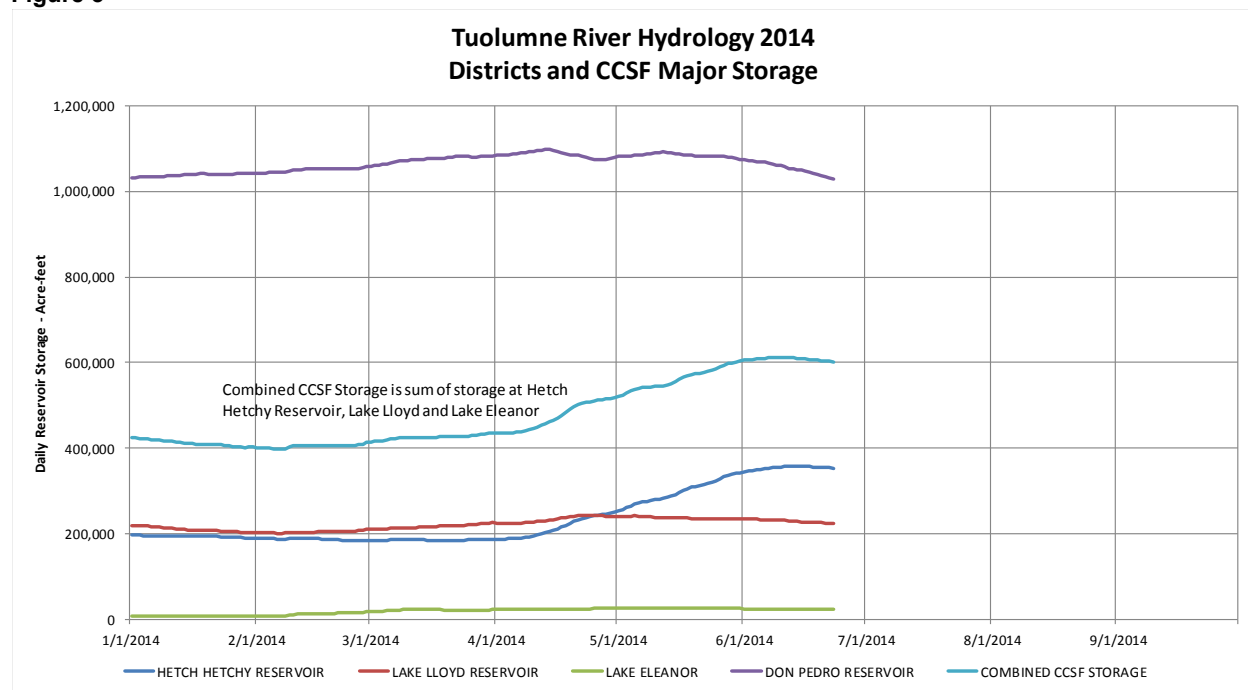


Figure 4 illustrates the combined diversions of the Districts to the Modesto Canal and the Turlock Canal, and the diversions of CCSF to the San Joaquin Pipeline (SJPL). Figure 5 depicts two different elements of watershed flow. The green line depicts computed unimpaired flow of the watershed at a computation point of La Grange Dam. This computation relies upon recent revised data for the watershed. The data illustrated as "CDEC-TLG" is the data set acquired from DWR and thought to be used by SWRCB Staff. The DWR record is comparable to the data set used for this report, but does not include numerous revisions that have occurred to underlying data.

Figure 4 also illustrates the computed inflow to Don Pedro Reservoir as it has been affected by both unimpaired runoff and regulated releases from CCSF. Although the watershed unimpaired flow ultimately establishes the availability of water in the watershed, the inflow to Don Pedro Reservoir directly affects the operation of the Districts' Don Pedro Project.

Figure 4

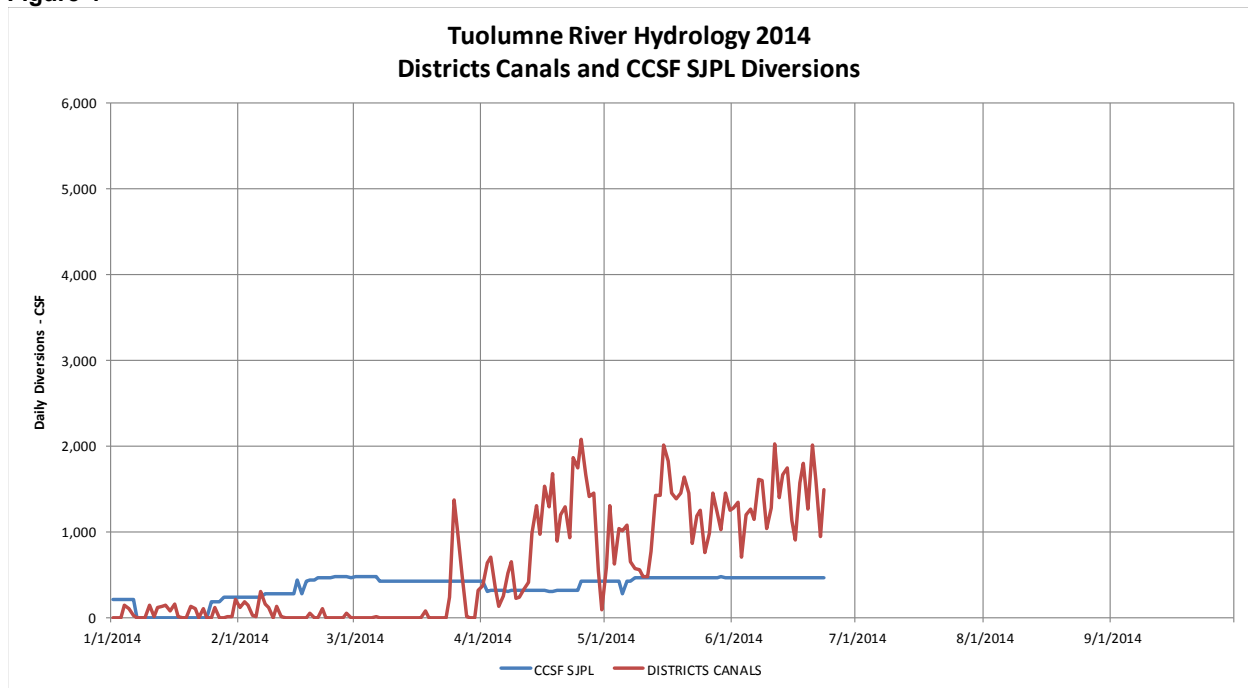


Figure 5

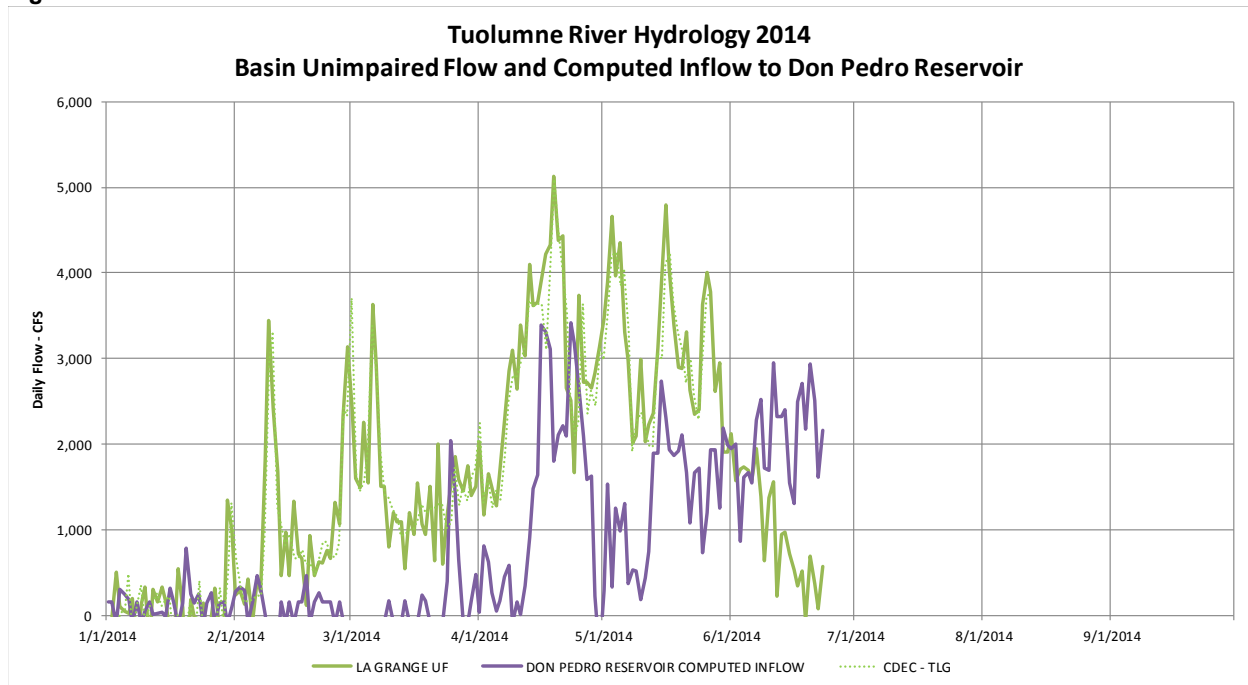
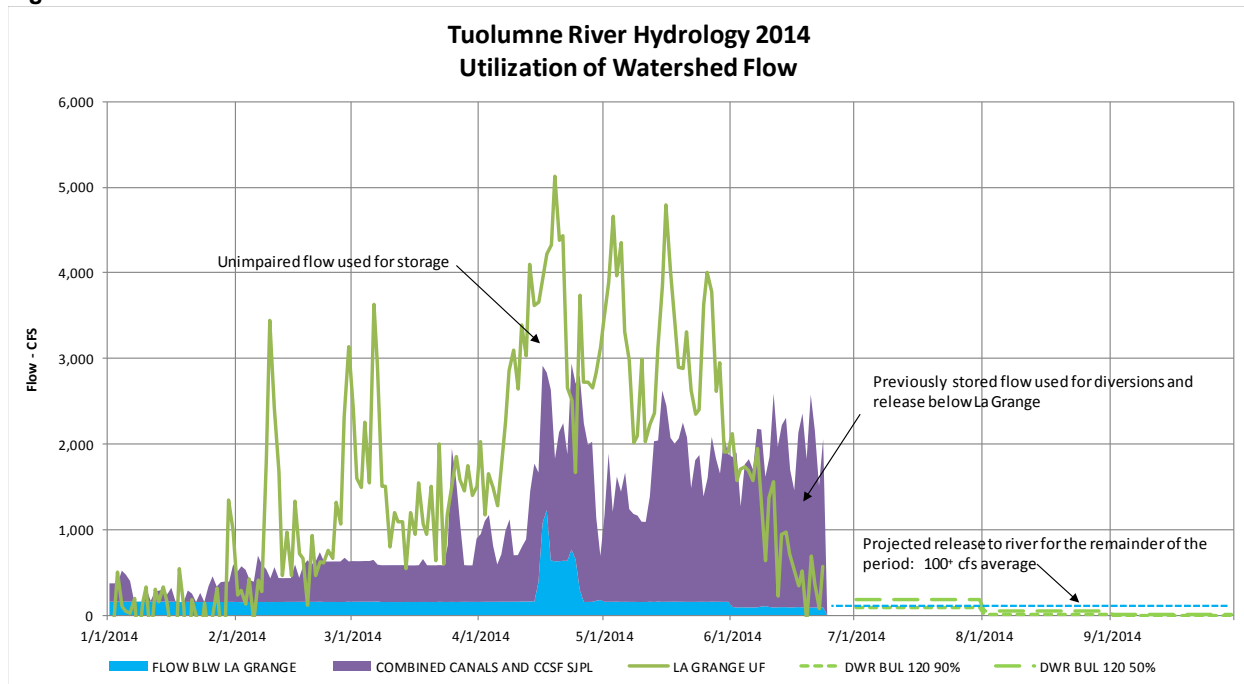


Figure 6 depicts a practical representation of the daily utilization of flow and storage in the watershed. Several elements of hydrology are illustrated. The unimpaired flow of the watershed is shown by the solid green line. During April the unimpaired flow has varied from just over 1,000 cfs to as much as 5,000 cfs. The total volume of unimpaired runoff is computed to be approximately 176,600 acre-feet which is an approximate daily average 2,950 cfs. During this same April, the combined diversions of the Districts and CCSF amounted to 75,000 acre-feet (1,250 cfs) and flow in the river below La Grange Dam amounted to 21,200 acre-feet (350 cfs). The difference between the unimpaired flow and the elements of diversions and releases to the river are accounted by the change in reservoir storage within the watershed, which

was a gain of 79,000 acre-feet (1,325 cfs).⁴ The metric shows that the total amount of water used (demand) in the watershed (175,000 acre-feet) cannot exceed the unimpaired flow (supply) of the watershed (176,000 acre-feet) during a month in which unimpaired flow is stored within the watershed.

Figure 6



This overarching result is different than suggested by the demand illustrated by SWRCB Staff in Figure 1 for April, a Riparian & pre-1914 demand of 167,500 acre-feet (coincidental similarity with supply) and a pre- and post-14 demand of 428,000 acre-feet. A problem that may exist within SWRCB Staffs' direct use of values identified in the water use statements and reports includes apparent "double counting" of water use when diversions are made at one location for one purpose (e.g., municipal or agriculture use), however that same water might have been claimed as a use at another location under a separate statement or report for another purpose (e.g., power generation). Also, to the extent that the water use statements and reports identify water diverted to storage, use of a previous year's values (2010 values in the case of CCSF and 2012 in the case of the Districts) is falsely imaging the demand for the current year. The runoff and Districts/CCSF operation of the current year is not going to be identical to any previous year.

The misconstruction of demand by SWRCB Staff is also illustrated for the month of June. During June the unimpaired flow has varied from just about 2,000 cfs to as low as negligible. The total volume of unimpaired runoff is computed to be approximately 60,200 acre-feet which is an approximate daily average 1,000 cfs. During this same June, the combined diversions of the Districts and CCSF amounted to 110,800 acre-feet (1,860 cfs) and flow in the river below La Grange Dam amounted to 5,600 acre-feet (95 cfs). The difference between the unimpaired flow and the elements of diversions and releases to the river are accounted by the change in reservoir storage within the watershed, which was a draw of 60,900 acre-feet (1,025 cfs).⁵ The metric shows that the total amount of water used (demand) in the watershed (116,400 acre-feet) exceed the unimpaired flow (supply) of the watershed (60,200 acre-feet), with 60,900 acre-feet of demand being met from previously stored water. In this example the SWRCB Staffs' depiction

⁴ There is a slight closure difference when summing the various elements of flow disposition and comparing the sum to unimpaired flow. The difference is due to rounding and the non-inclusion of reservoir evaporation in the disposition elements.

⁵ There is a slight closure difference when summing the various elements of flow disposition and comparing the sum to unimpaired flow. The difference is due to rounding and the non-inclusion of reservoir evaporation in the disposition elements.

of a Riparian & pre-1914, and pre- and post-14 demands being approximately 478,000 acre-feet (about 8,000 cfs) is erroneous.

Additional information shown in Figure 6 includes the projection of unimpaired flow for the remainder of the current water year, as estimated by DWR. The 50% exceedence forecast of unimpaired flow at La Grange Dam is estimated to be 178 cfs for July, 49 cfs for August, and 17 cfs for September. Also shown is the anticipated release to the river for the remainder of the year, estimated to be a little greater than an average 100 cfs.

PROOF OF SERVICE

I, JONATHAN KNAPP, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Suite 418, San Francisco, CA 94102.

On June 27, 2014, I served the following document(s):

June 27, 2014, Letter Re: 7/1-2/14 Board Meeting (Comments on Agenda Item 5, Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversions to protect senior water rights)

on the following persons at the locations specified:

**Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814-0100
E-mail: commentletters@waterboards.ca.gov**

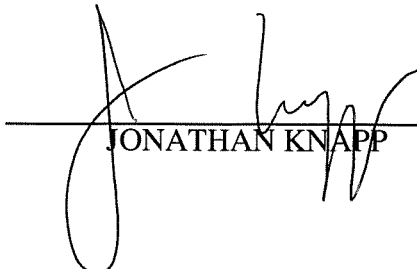
Via E-Mail and U.S. Mail

in the manner indicated below:

- ☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.
- ☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.
- ☒ **BY ELECTRONIC MAIL:** I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted via electronic mail from the electronic address: **jonathan.knapp@sfgov.org**.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed June 27, 2014, at San Francisco, California.



JONATHAN KNAPP