SOUTH DELTA WATER AGENCY

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February 13, 2015

VIA E-MAILthomas.howard@waterboards.ca.gov

State Water Resources Control Board
c/o Thomas Howard, Executive Director
1001 "I" Street
Sacramento, CA 95814

Re: February 3, 2015 Order Approving Temporary Urgency Change Petition of DWR and USBR

Dear Mr. Howard:

The following are the comments of the South Delta Water Agency to the above referenced Order issued by you as Executive Director. SDWA opposes the Order and requests that the State Water Resources Control Board, either on its own or through the powers assigned to you revoke the Order and instead conduct an evidentiary hearing on the issues contained in the Order and on how the USBR and DWR shall operate the CVP and SWP during the ongoing drought.

The Order suffers from a number of factual, legal and policy errors which are addressed in more specifics below. Most importantly, (I) it fails to provide any meaningful public input by denying interested parties the ability to see, comment on or dispute the underlying facts on which it is based, (ii) it is contrary to the expressed duties of the SWRCB, (iii) it attempts to insure some level of exports at a time when there is no supply for export, (iv) the TUCP is an inappropriate end-run around the normal process by which permittees can secure temporary changes to their permits and improperly avoids the ex parte communication prohibition which controls the normal process, (v) the Order condones the use of water for export purposes when such water is legally required to be used for other beneficial uses, and (vi) it adversely harms the

beneficial uses to be protected by the operative Bay-Delta Water Quality Control Plan and the Water Rights Decision D-1641 which implements that decision.

The irony of this current situation should not go unmentioned. Almost exactly one year ago the SWRCB was faced with a similar set of conditions. DWR and USBR stated they had insufficient storage to meet the minimum requirements of their permits, but proposed to continue exports while failing to meet those requirements. Insufficient water was available to provide minimum flows to protect fishery beneficial uses and agricultural beneficial uses as mandated by DWR and USBR permits. The SWRCB approved a temporary urgency change petition (with seven subsequent changes thereto) outside the public purview. Nearly all other interested parties complained about the lack of public process and sought an evidentiary hearing, which hearing was denied. The SWRCB Board members all stated publically that such important issues as drought planning and drought operations should be dealt within a more deliberate and timely manner and the public should be able to participate in a meaningful way.

Notwithstanding this, DWR and USBR waited and waited as the drought continued and did not file a "regular" temporary change petition. Rather, for the third time, a few days before the outflow standard was scheduled to become operative, DWR and USBR file a last minute Urgency Change Petition. The notion that the regulator of water rights and water quality would acquiesce and participate in such a complete lack of drought planning raises issues which cannot be addressed by the Board itself. There can be no excuse at this late date for not wanting to, and requiring the projects to subject themselves to critical review and cross-examination; all the while the projects blindly stumble their way through the drought pretending to know what they are doing, how they should do it, and what priorities exist when the water supply is so severely limited. DWR and USBR's unthinking obedience to their customers is only slightly less embarrassing than the SWRCB's inexplicable efforts to protect exports at the expense of all other beneficial uses. The Board's unswerving efforts to "share the burden" of the drought by maximizing exports is contrary to their statutory obligations. It is extremely unfortunate that the supply of water is insufficient to meet exporter needs. However, in a year where the supply is 3-8 MAF short of area of origin needs, the notion that there is any supply for exports is unsupportable. Given the extreme situation of the fisheries, any decrease in minimum fishery flows in order to provide export supply can only be described as an intentional effort to hasten the extinction of certain species.

<u>The Order Again Ignores the Mandates of Water Code Section 1425 (c).</u>

As stated numerous times over the past seven years, the SWRCB is ignoring Section 1425 of the Water Code. That section states in pertinent part: "except that the Board shall not find an applicant's need to be urgent if the board in its judgment concludes , if applicable, that the applicant has not exercised due diligence either (1) in making application for a permit

pursuant to provisions of this division other than this chapter, or (2) in pursuing that application to permit." "Other provisions of the division," including Chapter 10.5 deal with temporary changes in permit conditions under non-urgency situations.

The purpose of the condition in section 1425 is to make sure that applicants/permittees do not avoid the strict requirements and public process of the "normal" process by waiting until the last minute to file the petition. The Urgency process is meant to deal with emergencies which are unavoidable or unforeseen. They cannot be meant to address re-occurring, expected conditions. Both the Board and staff are aware of the numerous drought related statements by DWR, USBR, Brown Administration, and Board members themselves over the past two years. Those statements include such things as "even with 'normal' rainfall next year we will still be in a drought," or "should it not rain enough next year we may lose control of the Delta." With such statements (asserting obvious facts) it cannot be argued that DWR, USBR and SWRCB did not know as of September 2014 (if not earlier) that the projects would likely not be able to meet their various permit obligations in 2015.

If all of these parties feared our current, dire conditions five months ago, there can be no excuse for not requiring the projects to file a petition under the normal process to make changes to a permit. Such a process would have required an evidentiary hearing on the various aspects, facts and proposed operations. This would have allowed the public to participate in the process and we would not have rely on undisclosed "facts" and arguments used by DWR and USBR to support their petition.

This is no mere mental exercise (as expounded on below) but a necessary part of the process. Projections of storage, inflows, exports, fishery and superior right needs, are all part and parcel of any decision to relax project mandates contained in permits. How one change might affect another or how one requirement may not be "balanced" away are the very core of the public process which flows from any change petition.

Worse yet, the Urgency process, by never having a noticed hearing does not include any of the pesky ex parte prohibitions. Thus, DWR and USBR can actually negotiate the terms and conditions of the urgency change petition with SWRCB staff and Board members without fear of breaching ex parte rules. It is of course unknown the degree to which SWRCB staff or Board members participated in this most recent Urgency Change Petition. However, we know from last year that Board staff was involved, and as part of the drought management team, continued this practice before, during and after the seven requests for additional changes to last year's Urgency Order. It is clear the SWRCB believes that this sort of hands-on, intimate involvement is necessary for real-time management. However, we believe it is the antithesis of a regulator's duties. The entity which makes the rules and (hypothetically) enforces the rules should not be in constant contact with the regulated and jointly seeking how to maximize the benefits to the

regulated. The recent disclosure of the Public Utilities Commission relationship with PG&E should cause everyone to take pause.

As we have complained in the past, this lack of separation between regulator and regulated also raises serious concerns regarding lobbying laws. Although virtually none of the counsel representing interested parties (except counsel for SDWA and CDWA) are registered lobbyists who report their activities to the Fair Political Practices Commission, it would appear that virtually all of the communications between such counsel and the Board and staff are indeed lobbying within the definition of Section 18238.5 9 (and other sections) of the California Code of Regulations. By having a public process with ex parte rules in place, these sorts of problems can be avoided.

The Public is Unable to Critique the Facts Behind the Order.

As referenced above, the public is completely unaware of and cannot get access to the data underlying the TUCP or the Order. Although we get summaries via the Order and the TUCP, the essential data remains undisclosed.

The TUCP sought changes to DWR and USBR permits to address the shortage of water in the drought. The projects asserted that a lack of storage and insufficient precipitation would mean there was an inability for the projects to meet their permit obligations and there would be severe impacts to their contractors. Somewhere in that undisclosed data and modeling projections were numbers which either supported the projects' requests or conflicted with them.

Absent a public disclosure and an evidentiary hearing we cannot answer even the most simple of questions. Did the storage in the main CVP and SWP reservoirs allow for the projects to meet some obligations and not others? By how much? How much water would be saved by relaxing outflow or agricultural water quality obligations? Would that saved water increase fishery protections at later times. Would that saved water provide a meaningful improvement in later times or be significant? Would a decrease in exports beyond that requested in the TUCP provide enough water to meet future obligations this year? Does additional outflow above and beyond minimum requirements provide any "make-up" benefit to fisheries which were shorted prior to that time? Can exports be used to supplement in-Delta water needs?

These are not hypothetical questions, but go to the very heart of any proposed change petition which seeks to relax minimum water quality standards. The petitioners DWR and USBR cannot be expected to adequately present or defend other parties' interests when they are constantly at odds with those other parties. In addition, the project's main concern of maximizing exports is at odds with their other statutory and regulatory duties to protect and enhance fish and wildlife, and to benefit other water uses. We saw in a previous year how the

USBR biologists represented to the Board under oath that relaxation of an interior Delta water quality standard would preserve supply for later-in-th-year cold water needs. Then, under cross-examination those same biologists had to admit that they had not considered increasing cold water supplies by decreasing exports; and, they had not determined that the saved water would actually increase the length of the river to be protected by the cold water pool.

It is clear that numerous options, conditions and suggestions can only be presented and explored when the public can access the underlying data and cross-examine the proponents of the petition for change. It is also clear that the fishery agencies have abandoned their responsibilities to protect fish when they agree to decrease previously set standards for flows while acquiescing to continued exports.

There is no Supply of Water for Exports.

SDWA has previously provided the SWRCB with the bar charts from the Weber Foundation Studies prepared in anticipation of the construction and operation of the CVP and SWP. Those charts indicate that in a repetition of the 1928-34 drought the Sacramento-San Joaquin watersheds produce approximately 17.6 MAF annually. They also estimate that in-basin, non-export needs during the same time are approximately 25.6 MAF annually. This means that under 55+ year old data, the entire system is approximately 8 MAF short in each year of an extreme 6-year drought. These number of course need updating and the assumptions about fishery needs are certainly incorrect. However, whatever the actual or updated numbers may be, it is clear that in such drought times the area of origin and superior needs are millions of acre feet short of supply. Under any rational evaluation there is virtually no "surplus" water and the thus no water for export.

The SWRCB (as well as USBR and DWR) approaches this scenario by turning a blind eye to it. The SWRCB has two false views of its duties. The first is that it is face with an impossible situation under the governing rules. Even if this were the case (which it is not) the solution is not to ignore the rules, rather it is to obey the rules until changed. It is telling that SWRCB personnel write about how certain laws and priorities must be changed while at the same time failing to apply the rules they disdain. More importantly, the SWRCB does not face an impossible challenge. The "impossibility" arises from the Board's misunderstanding of the rules themselves.

At some point political pressures have lead to Board t think it must try to maximize export supplies and balance other beneficial uses to do so. This position results from a misunderstanding of the relevant statutes. Although Water Code Section 13241 provides criteria under which the Board may "balance" various factors in deciding what water quality objectives

to set, that balancing ends once the objectives are set and applied through the water rights process.

Instead, the Board seems to think, and even makes statements that during the drought, they are trying to balance the various needs given the shortages of water. Such a second or continuing balancing finds no support anywhere in the law. The factors balanced in the determination of water quality standards are what determine what is later mandated in permits and licenses. The water quality process contains no "escape clause" or "poverty clause." Once set and once mandated by permit/license terms and conditions, the water quality standards are required. There is no legal authority whereby the SWRCB can later ease permit conditions because the permittee would have less water if forced to comply with its permits. In this case the public went through hundreds of hours to determine what standards to set, then hundreds of hours implementing the standards all supported by extensive environmental documents. None of the supporting analysis included any sort of analysis that periodically not meeting the standards is "okay" or getting more water than planned is "better."

In spite of this the SWRCB continues to attempt to "split the baby" so that everyone gets something rather than some get nothing. Everyone is forced to share the burden; a keen misunderstanding of the Solomon story. Splitting the baby was a cruel and ridiculous option meant to find the real parent. It was not a solution to opposing claims. "When everyone is complaining we must be on the right tract" countless Board members intone when they are not following the law. To the contrary, when some parties are satisfied and others not, that means the Board has ruled and one party's claim is correct and the other's not. The Board is not a mediator trying to give each side something. The Board is a judge charged with enforcing the rules; rules meant to protect fisheries and apply water right priorities

Thus when DWR and USBR operate for 40-60 years and ***yet have no plan whereby they can meet minimum fishery standards in the first year of a drought*** (then the second, then the third), it is not the Board's job to find them water or to allow them to take water needed for permit mandates. The Board should not agree to temporary changes, it should enforce the rules. These are not random, ill-conceived rules, they are the deliberate and specific mandates of the Legislature and the Board's own water quality process. If DWR and USBR can't meet an outflow developed 15 years ago but still want to export at rates of 1500 to 4000+ cfs while not meeting the outflow, the Board is obligated to deny such an upside down proposal.

The temporary alteration of permit terms and conditions is not a method by which we will solve our water shortage problem. In fact it only delays any solution. If it turns out that we have spent billions of dollars to build and operate giant export projects which destroy the fisheries and environment, cannot be operated to provide for dry times, and have virtually no export water

supply in many years something radical must change. Squeezing a few hundreds of thousands of acre feet here and there from fishery needs so exporters can get 8% instead of 5% of their supply is meaningless excepting in that it will probably push certain fish to extinction.

It is the Board's obligation to apply the rules whether there is a surplus of supply or a severe drought. What would the Board do if the fishery agencies sought an urgency change to increase outflow above the standard or if Delta farmers sought to increase their diversion amounts during a drought to flush out the CVP salts in the area?

The Order Sets Bad Precedent for Future Water Quality Planning.

As referenced above hundreds if not thousands of hours and millions of dollars were expended to develop and adopt the current water quality objectives for the Delta and in applying those objectives to certain water right holders. The Board is currently trying to undertake a review of those objectives and will likely change some through an equally lengthy and costly process; the impetus of which is to provide further protections to fish and wildlife given that fishery populations have plummeted during the current Control Plan's effective time frame.

The Order, like the similar ones adopted over the past few years have regularly, though temporarily made substantial changes to the objectives by relaxing the permits of DWR and USBR. Thus, instead of a deliberate, public process we have now substituted a truncated, non-public process for determining what fisheries need over long time frames. In the current ongoing review process we will be unable to evaluate whether or not the minimum flows of the current plan were sufficient because each time they were applicable the SWRCB failed to enforce them or require them to be met. What will the next plan contain? Will it do an CEQA-equivalent evaluation but opine that under drought conditions the objectives will not be enforced or met? Will it evaluate the effect on species not fully protected when regular droughts occur? Will it balance unknown future conditions so that exports get something even they cannot meet minimum fishery protections? These questions highlight the unworkable situation we find ourselves in when Water Quality Control Plan Objectives are cast aside because those without a water supply are in a drought.

The DWR/USBR TUCP and Order Creates an Illegal Preference for Exports.

It is understandable that the Board and staff have serious concerns about the complete lack of supply available for export interests. It is not reasonable for the SWRCB and staff to seek out ways to secure a supply for exports. Exports were promised to be, and on paper are only allowed to be of water that is not needed for in-basin, area of origin needs. One need only read

Water Code Sections 11460 et. seq., 12200 et. seq. or the myriad of materials continued in the documents authorizing the SWP and CVP.

The Board itself applied (nearly) all of the obligations contained in D-1641 to all of the Bureau and DWR permits associated with their Delta operations. Some of those permits apply to San Luis reservoir. Hence, the obligations for outflow and southern Delta water quality are conditions to the operation of San Luis reservoir. Notwithstanding this, the CVP and SWP have pumped as much water as possible into San Luis since last summer/late fall. The TUCP and Order give us no indication how much water was put in San Luis, but CDEC can easily provide the answer.

If the projects cannot meet X2/outflow as of February 1, 2015, why is not San Luis water subject to release to meet this obligation? Is there some rule, regulation or statute which makes San Luis water exempt from such use? Is there any sort of legal principle which overcomes the San Luis permit condition which mandates meeting this standard or other standards? Is there some reason why the SWRCB or its staff will not mention much less consider such use of San Luis water?

We certainly know that the exporters and the projects are loathe to use previously exported water to meet permit obligations, but their preference is not based on any legal protection. The critical needs of the exporters are certainly strong reasons for their position but of course those needs have no affect on the mandate to meet the objectives. Why then does the SWRCB adopt this position? Surely the fishery agencies would want to meet X2 with previously stored Sacramento River water rather than not meet X2.

We all understand the preferences of the exporters but no one has come up with a reason why their preferences somehow over ride the permit conditions. The Board must learn to wean itself off the demands of the exporters. Decreasing fishery protections while allowing exports is no solution to the dilemma of insufficient water. The only legacy from such a policy will be the extinction of Delta fish.

<u>The Order Does not Contain Enough Information to Determine if Other Users will be Harmed</u>.

Decreasing X2 or other objectives alters the salinity of various regions of the Delta, especially the southern Delta. When X2 advances east (as allowed under the Order) it results in more ocean salt intruding on flood tides which injects more salt into the cross Delta flow. More salt in the cross Delta flow means that there is less dilution of CVP salts in the southern Delta when the tide mixes cross Delta flow with the water trapped in the south Delta. At the same

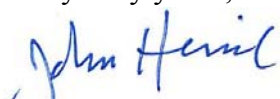
time, all four southern Deltas objectives are being violated , which means there is an inordinate amount of salt in the area already, and the tidally introduced "dilution" is both less, and less effective. The only possible result is that water quality will deteriorate. This effect, and certainly the magnitude of it are wholly ignored by the TUCP and the Order. Similar effects will occur in other areas, but they too are ignored.

Of course the SWRCB, DWR and USBR have no interest in enforcing the southern Delta water quality objectives. The violations have been the norm for the past two years even though the recent "all four violated at once" is the exception and not the rule. These standards are so universally ignored that the TUCP and Order don't even deign to mention them as compliance and enforcement are anathema to the projects as well as the SWRCB. Everyone assumes (read had decided) the standard will change (relax) and so the southern Delta farmers deserve no protection.[1]

However, the impacts to southern Delta farmers are real and measurable and should not be ignored. Changes in the flows and salinity will cause effects in the area; effect which have not been analyzed. Further the accumulation of salt in the area may have significant effects on native and transient fish as they move through and in the area; none of which is mentioned much less examined.

For the above reasons and those set forth in SDWA and CDWA's comments submitted last year in response to the Urgency Change Orders issued in 2014, we request the Order be voided and a hearing set to allow the public to participate in the examination of how CVP and SWP permits might or might not be altered.

Very truly yours,



JOHN HERRICK, ESQ.

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[1] SDWA will be submitting a Leaching Report in the next few weeks. The Report indicates that contrary to the SWRCB staff analysis, adequate leaching in the area does not occur with 0.7 EC water. The staff analysis calculated adequate leaching does occurs but was based on a calculation using assumed applied water quality and tile drain water quality. The tile drain water includes very saline groundwater and is not mostly excess applied water making the calculation meaningless. Once the Leaching Report is submitted there will be no scientific basis upon which to relax the standards.

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