

**PROTEST, OBJECTION, AND IN THE ALTERNATIVE,
PETITION FOR RECONSIDERATION OF
TEMPORARY URGENCY CHANGE ORDER
ADOPTED FEBRUARY 3, 2015**

1 TO THE STATE WATER RESOURCES CONTROL BOARD:

2 1. The San Joaquin River Exchange Contractors Water Authority, Central
3 California Irrigation District, San Luis Canal Company, Columbia Canal Company and
4 Firebaugh Canal Water District hereby Protest and Object, and in the alternative, Petition
5 for Reconsideration of the Temporary Urgency Change Order to the Petition of the
6 United States Bureau of Reclamation for the Central Valley Project and Department of
7 Water Resources entered February 3, 2015 on the following bases:

8 A. The conditions of the order will operate to the injury of the Petitioners as
9 lawful users of water;

10 B. The conditions of the order will operate to the injury of and have an
11 unreasonable effect upon fish and wildlife;

12 C. The conditions of the order are not in the public interest;

13 D. The order and the proceedings in execution and issuance of the order are
14 not in accordance with law and the order may be continued in effect only if the Board
15 convenes a hearing to modify the Water Quality Control Plan and indicates its intend to
16 include the order or amended order as an amendment of the Water Quality Control Plan;
17 and,

18 E. Such further grounds and evidence as shall be presented by other parties
19 protesting the rejection of the proposed increased pumping standards and Delta Gate
20 Closure conditions hereafter, including the attached Authorities.

21 The objecting and protesting parties and parties seeking reconsideration request
22 that the Urgency Order as amended be immediately amended as follows:

23 1. The requested Interim Pumping Level specified in Paragraph 1(d)
24 should be modified to specify that when NDOI is at least 5,500 cfs, the minimum
25 pumping level may be increased up to 3,500 cfs as requested in the original Petition.

26 2. Paragraph 3 of the Order purports to allow the creation of a new
27 stored water right in the form of a conservation account created by the Urgency Order
28 “savings” which only the Executive Officer of the Board may determine the use of.
29 There is no authority for such an expropriation of water rights or amendment of water
30 rights of the CVP and SWP. This paragraph should be removed. Without due process
31 and payment of compensation for use of the storage facilities of those Projects, this
32 portion of the Order is unlawful.

33 If such amendment is not ordered as requested above, a hearing is requested to
34 consider the objections and protests of this Party and all other parties. Notice of this
35 Protest and Objection, and in the alternative, the Petition for Reconsideration, has been
36 served by mail upon Reclamation and the Department of Water Resources for the SWP
37 and all commenting parties known to Protestants.

38 Dated: February 13, 2015

MINASIAN, MEITH,
39 SOARES, SEXTON & COOPER LLP

40 By: /s/ Paul R. Minasian
41 PAUL R. MINASIAN
42 For San Joaquin River Exchange Contractors Water
43 Authority, Central California Irrigation District, San
44 Luis Canal Company, Columbia Canal Company and
45 Firebaugh Canal Water District

46 **I. Summary of Protest / Request for Reconsideration**

47 1. An improper process greatly increases the chance that the wrong decision
48 will be made. The power of the SWRCB Board members to delegate decisions to the
49 Executive Officer was argued to be justified in 2014 on the basis that speed was required
50 and the Board had adopted two Resolutions in 2012 which together could be interpreted
51 as providing for delegation of the power to decide to the State Board Staff. We again
52 point out that such delegation is not authorized by the Water Code. Under the law, the
53 Board is to decide, not Board staff. More important, the conduct of a short hearing by the
54 Board Members would maximize the chance that all facts and evidence would be properly
55 considered and provide permanent alterations and flexibility in the Water Quality Control
56 Plan that would address exactly the conditions being encountered.

57 2. The danger posed by competing and uncoordinated governmental
58 authorities is evidenced by this factual circumstance. This Board should modify its Water
59 Quality Control Plan to reflect the need to balance uses and availability but not piecemeal
60 and not through its staff. The *Consolidated Delta Case* (2006) made clear the procedure
61 to be utilized and specifically rejected the argument that it was appropriate for the
62 SWRCB to purport to order water right holders how to operate their pumps and storage
63 under a water right to avoid hearings and achieve a defacto change in a water quality
64 control plan. The explanation given in 2014 and again in 2015 that an Urgency Order
65 only changes the Projects' obligation stated in their water rights to meet water quality
66 control plan requirements is a fiction the danger of which can be seen clearly by this

67 example. Here, the environmental agencies agreed that the exercise of the Projects' water
68 rights in a certain manner and changes in the WQCP requirements for Delta outflow were
69 reasonable. The order of the Executive Director rejecting this consensus plan in 2015 and
70 directing that the Projects be operated in a different fashion and create a storage account
71 to be administered according to an undisclosed plan of the SWRCB demonstrates that the
72 SWRCB is jostling to control the steering wheels of the CVP and SWP rather than
73 exercising its proper legal role of establishing and adjusting water quality and flow
74 standards after evidentiary hearings.

75 If a disciplined and narrow hearing is conducted, your Executive Director and the
76 Board Members would have the opportunity to ask questions and present evidence to
77 compare the alternative of the rejection of the three (3) governmental fishery agencies'
78 concurrence with the CVP and SWP that increased pumping and export of CVP and SWP
79 water should be permitted. The alternative benefit to fisheries by rejection of the CVP,
80 SWP and four (4) fish agencies' plan can be examined and the benefits and detriments of
81 a drought adjustment of water quality standards judged. Instead, the SWRCB appears to
82 be attempting to wrestle for control of the Projects' steering wheels through its
83 "conservation accounts."

84 3. An Urgency Order which rejects a consensus proposal permitting more
85 export pumping and which creates a SWRCB conserved water account must have an
86 evidentiary basis. If on a given day the difference is credited to a SWRCB conserved
87 water account, how will the SWRCB use that water for fishery benefits which will

88 provide superior benefits to the fishery? When will more cold water be releasable from the
89 SWRCB “account,” and is the released water from the SWRCB account to go to the ocean in
90 excess of the 4,000 cfs, and if so, at what time? The SWP and CVP and coordinating fishery
91 agencies have provided their plan for February and March, so what is the plan of the SWRCB?
92 Is it to simply carry over more water in storage? Why is that better for fishery resources?

93 **II. Authorities**

94 **A. The Board is the decisionmaker, and that authority may not be**
95 **delegated to the Executive Officer or Deputy Director.**

96 Water Code Section 183 states:

97 . . . Any hearing or investigation by the Board may be
98 conducted by any member upon authorization of the Board,
99 and he shall have the powers granted to the Board by this
100 section, but any final action of the Board shall be taken by a
101 majority of all the members of the Board at a meeting duly
102 called and held . . . (Emphasis added.)

103 There is no provision for delegation of the authority to make decisions to
104 employees of the Board because Water Code § 175 provides for the separate educational
105 and work experience of the Board members and all disciplines are to be used in requiring
106 votes of at least three (3) Board members to approve or disapprove a matter.

107 The Board attempted in its ruling on Petitions for Reconsideration during the 2014
108 flurry of Urgency Orders to explain why the Board could adopt Resolutions delegating
109 authority to the Executive Officer or Deputy Director. However, these explanations do
110 not point to any statute providing authority to persons not appointed by the Governor and

111 members of the Board to decide matters, and a convoluted reading of two resolutions of
112 the SWRCB itself which conflict in their very terms and directly violate Water Code §
113 183 is not “authority” for ignoring the requirements of Water Code § 183. September 24,
114 2014 Order on Reconsideration, 4.6.2, pages 42-43. (See discussion in subsection B.
115 hereafter.)

116 It may be contended that now that the Board is convened, what harm can arise
117 from orders adopted by the Executive Director to respond to an emergency? The harm is
118 that without process there are no standards, and the issue becomes whether the Board will
119 support its staff. In an emergency condition such as 2015, the proper issue is how to best
120 balance reasonable use of water resources . . . not how to save face within a governmental
121 agency.

122 In 2014 the SWRCB purported to establish a coordination process in regard to
123 operational questions through your Drought Management Operations Committee. Here,
124 that Committee considered and concurred on operational changes needed to balance uses
125 and maintain basic water needs in the form of the proposed increased pumping. What
126 motivated your Executive Director to disregard and undermine that process is really
127 unknown from his explanation in the Urgency Order discussion, because the process was
128 rejected. Did the Executive Director get information from another agency? Did he detect
129 something in the real time monitoring of the Delta fishery that others did not see?

130 The need for speed is secondary to the need for public and water user confidence
131 in a process . . . whether we like the ultimate outcome or not. A brief hearing of the

132 Board would preserve the process . . . and public confidence. However, acts contrary to
133 law do not provide that foundation.

134 **B. The Board should not concern itself with “backing its staff.” This**
135 **Order is legally void. The Board should act. This Order should be**
136 **rescinded because it was not adopted by a Board Member or by the**
137 **Deputy Director of Water Rights, even under the terms of your**
138 **delegation resolutions. The Executive Director is not a person**
139 **delegated to exercise this power under the Board Rules or under Water**
140 **Code § 183 which requires the Board to act.**

141 Resolution 2012-0029 delegates to the Deputy Director of Water Rights – not the
142 Executive Director – the authority to act on petitions for temporary urgency changes (Res.
143 2012-0029 at ¶ 4.4.1) or to a Member of the State Board who may so act. Mr. Howard
144 had no authority to act, and therefore the order is void.

145 The delegation of Res. 2012-0029 further states:

146 If the State Water Board receives any objections to a petition
147 for a temporary urgency change, the Deputy Director shall
148 refer the matter to the Executive Director for action under
149 section 2.2. (*Id.*)

150 “[A]ction under section 2.2” appears to mean action *by an individual member of the*

151 *Board*. Section 2.2 delegates to individual Board members the authority to:

152 Act on a petition or request for renewal of a conditional
153 temporary urgency change pursuant to chapter 6.6
154 (commencing with section 1435) of part 2 of division 2 of the
155 Water Code. This delegation includes the authority to:

156 2.2.1. Hold a hearing on any petition or request for renewal
157 made pursuant to chapter 6.6.

158 2.2.2. Make the findings required by chapter 6.6 as conditions
159 precedent to the issuance or renewal of a temporary change
160 order.

161 2.2.3. Make any findings required by CEQA as conditions
162 precedent to the issuance or renewal of a temporary change
163 order. (Res. 2012-0029 at ¶ 2.2.)

164 It appears that a referral by the Deputy Director to the Executive Director is meant
165 to put the contested petition before a member of the Board, since nowhere does the
166 delegation allow the Executive Director to act in the place of an individual Board
167 Member. The Resolution does not include a delegation to the Executive Director to take
168 the actions described in Section 2.2.

169 In 2014, the Executive Director specifically cited ¶ 4.4.1 as the authority for
170 issuing the Urgency Order. He stated that “Resolution 2012-0029 delegates to the Board
171 Members individually *and to the Executive Director* the authority to hold a hearing, if
172 necessary, and act on a temporary urgency change petition.” (Revised Urgency Order at
173 7. Emphasis added.) Presumably, the 2015 Order is adopted under the same
174 interpretation.

175 The Executive Director apparently believes that the directive to the Deputy
176 Director to “refer” a contested petition for a temporary urgency means adding words such
177 as “to the Executive Director for action under section 2.2” was an implied delegation of
178 authority to the Executive Director to act on the contested petition in the place of a Board
179 member. However, ¶ 2.2 is a delegation of authority to *individual Board members*. It is
180 unlikely that a Court will conclude the resolution contained an implied delegation to the

181 Executive Director of such an important duty: The resolution is titled “Delegation of
182 Authority to State Water Resources Control Board Members Individually and to the
183 Deputy Director for Water Rights.” (Emphasis added.) Nowhere does the resolution
184 purport to delegate any authority to the Executive Director, and such an interpretation
185 would be counter Water Code § 183.

186 This Urgency Order should be amended and adopted by the Board on an interim
187 basis, and the Board should immediately schedule a narrow and price hearing to adopt the
188 consensus plan for February and March of 2015 as a part of the Water Quality Control
189 Plan.

190 **C. The San Joaquin River Exchange Contractors have standing as legal**
191 **users of water and are entitled to the procedural and substantive**
192 **protections of the “no-injury” rule of the California Water Code as**
193 **legal users of water as well as members of the public protected by the**
194 **public interest.**

195 If the SWRCB questions whether Protestant San Joaquin River Exchange
196 Contractors Water Authority, who are entitled under the Second Amended Exchange
197 Contract to receive water from the CVP or in certain circumstances from their water
198 rights on the San Joaquin River, are legal users of water with standing to insist upon the
199 proper process of the SWRCB regarding Project operations, the decision in the *Bay Delta*
200 *Consolidated Cases* 136 Cal.App.4th 674 (2006) conclusively establishes their standing.
201 Justice Robie declared:

202 If the permit holder seeks the Board’s permission to change
203 the purpose of use that provided the basis for the acquisition
204 of its permit in the first place, there is no reason the persons
205 who, through contracts with the permit holder, actually put
206 the water to the beneficial use sought to be changed should be
207 precluded from asserting to the Board that the change will
208 operate to the injury of their rights, simply because those
209 rights derive from a contract. (Page 70.)
210

211 **D. The Board’s attempt to create additional water right operating**
212 **conditions upon the use of stored or diverted water through an**
213 **Urgency change in Water Quality Plan standards is void. Section 1435**
214 **provides no such authority. Judge Robie in the State Water Resources**
215 **Control Board cases (136 Cal.App.4th (2006)) prescribed the means for**
216 **making temporary changes in a Water Quality Control Plan.**
217 **Reasonable conservation and operations of the CVP and SWP should**
218 **continue while the Board considers meritorious changes in a Water**
219 **Quality Control Plan that has proven by repeated events not to be**
220 **sufficiently flexible in drought conditions.**

221 The Decision in the *SWRCB Consolidated cases*, 136 Cal.App.4th 674 (2006),
222 included a challenge to the SWRCB Order to change through water rights Decision 1641
223 the terms of the 1995 Bay Delta Water Quality Control Objectives in order to
224 “accommodate” the Vernalis Adaptive Management Plan. The Court’s Decision rejected
225 a water right order as a means of modifying a Water Quality Control Plan. This Urgency
226 Order is unlawful for this very reason. Whether labeled as an “experiment” or a “delayed
227 implementation” of a Water Quality Control Plan, the Board has no authority to change
228 the Water Quality Control Plan requirements except in accordance with the Court’s ruling
229 in that case found at page 233-4, which states:

230 . . . such an alteration could be accomplished only through a
231 properly noticed and conducted regulatory proceeding. (See
232 §13244.) . . . The trial court’s decision rests on the conclusion
233 (with which we agree) that when a water quality control plan
234 calls for a particular flow objective to be achieved by
235 allocating responsibility to meet that objective in a water
236 rights proceeding, and the plan does *not* provide for any
237 alternate, experimental flow objective to be met on an interim
238 basis, the decision in that water rights proceeding must fully
239 implement the flow objective provided for in the plan. The
240 guiding principle is that the Board’s power to act in a water
241 rights proceeding commenced to implement a water quality
242 control plan is constrained by the terms of the plan it is
243 implementing.

244 The State Water Resources Control Board argued on pages 31 through 32 of the
245 SWRCB Consolidated Case decision that it had the power under its broad water right
246 authority and could implement changes affecting water quality by conditioning or altering
247 water right terms and conditions. The Court of Appeal rejected the SWRCB contention
248 and the procedure the SWRCB was attempting to implement and is again attempting to
249 use in this instance:

250 In conclusion, we agree with the trial court that by adopting
251 the San Joaquin River Agreement flow regime in lieu of the
252 Vernalis pulse flow objective in Decision 1641, even on a
253 temporary basis, the Board failed to fully implement the 1995
254 Bay-Delta Plan and instead accomplished a de facto
255 amendment of that plan without complying with the
256 procedural requirements for amending a Water Quality
257 Control Plan. In so acting, the Board failed to proceed in the
258 manner required by law and thus abused its discretion.

259 It may seem anomalous that a protest and request for reconsideration is being made
260 by legal users of water who could benefit from the reduction in Delta outflow and

261 increased pumping. However, an Urgency Action which is an unlawful alteration to a
262 Water Quality Control Plan, even though it may conserve some water in this serious dry
263 period, may also perpetrate a serious and wasteful error and supporting the myth that fish
264 species benefit from throwing more water at them at all times and reducing export
265 pumping. In fact, under these hydrologic circumstances, measures including reduction in
266 Delta outflow, increased pumping for export at various stage levels, and the alteration of
267 Delta Gate operations is all required, reasonable and in accordance with public interest,
268 but the error and fault is in the SWRCB attempting to again limit Delta export pumping,
269 thinking this improves fishery conditions in February/March and conditioning the saving
270 of water in NDOI upon the SWRCB taking title to and having a right to direct the use of
271 any “savings” for an imagined purpose under the control of the Executive Officer in
272 Paragraph 3 of the Urgency Order.

273 An emergency does not grant the Board authority to provide for restrictions upon
274 deliveries of stored water or direct diversion of water rights granted to the Projects until
275 and unless the water rights are taken from the Projects or modified prospectively. If the
276 Board wishes to expropriate storage capacity or a right to water, it must use the statutory
277 authority for such actions. Water Code § 1775 (joint use and occupancy of facilities).
278 The Governor can order the acquisition of control of the SWP and perhaps even the
279 Federal CVP if he is convinced the SWRCB staff can do a better job, but he has not done
280 so.

281 The origin of the problem of the WQCP, NDOI and pumping amounts demonstrate
282 the solution. After the 2006 *Delta Consolidated Case*, the SWRCB amended the Water

283 Quality Control Plan. It gave the Executive Director authority to vary the 7,100 cfs but
284 constrained the Staff judgment to certain runoff indexes and amounts which are simply
285 not present in the current drought low-flow conditions after two years of draining storage
286 for perceived fishery benefits. As to the Delta Gate closure terms, no authority was given
287 in the Water Quality Control Plan to vary from closure in the period December through
288 May. In 2006, many parties commented and recommended more flexibility, but the
289 atmosphere and erroneous presumption that the Endangered Species Acts and the edicts
290 under biological opinions in some way preempt California water authority prevailed
291 among the SWRCB staff and resulted in adoption of the WQCP. The 2015 consensus
292 agreement of the Federal and State fishery agencies with the rejected elements of the
293 Urgency Order is a clear indication that the WQCP needs to be amended permanently to
294 deal with drought conditions.

295 The authority to provide flexibility in the Water Quality Control Plan can be
296 gained by the Board if they wish to hold an evidentiary hearing to include variability in
297 that Plan, but there is nothing in the Temporary Urgency Petition relating to water rights
298 permits which allows that proceeding to be utilized to short cut the process or use the
299 process as the SWRCB staff has done here to attempt to take over capacity and operation
300 of the Federal and State water supply projects and storage in Paragraph 3 of the Order.

301 The SWRCB itself can notice proposed changes in the water rights of the State and
302 Federal Projects (here at Paragraph 3, that water be changed from under the SWP or CVP
303 rights to the SWRCB rights, and may not be released from storage except apparently for
304 fishery flows and regulation of water temperature for fish according to a yet-to-be-

305 disclosed SWRCB plan). This urgency petition does not open all CVP and SWP water
306 rights to new conditions and requirements or to wholesale orders transferring judgment of
307 the operations of the Projects to the SWRCB staff. If that is the desire of the Board, the
308 basic requirements of due process under the Federal and State Constitutions require that a
309 Petition be filed by the SWRCB staff, who apparently have new priorities and plans for
310 both stored and diverted water currently subject to water rights granted to those Projects
311 and their legal users providing notice and an opportunity to protest. *Morgan v. United*
312 *States* (1936) 298 US 468; 565 S.Ct. 906, 908; 80 L.Ed. 1288; *Morgan v. United States*
313 (1938) 304 US 1; 585 S.Ct. 373; 82 L.Ed. 1129.

314 To further reinforce the failure to comply with due process requirements, 23 CCR
315 780(a) allows continuing authority over water rights but states that "...no action will be
316 taken pursuant to this paragraph unless the Board determines, after notice to affected
317 parties...". After providing for those due process procedures, if the Board revokes the
318 Projects' current authority to store water or use water both North and South of the Delta
319 and instead orders that the SWRCB controls a quantity of water which must be stored by
320 the Projects in certain circumstances, the Board may elevate and implement its conception
321 of the highest and best use of water or reasonable water use . . . after compensating for the
322 use of facilities and the damages caused thereby, if any, and allowing us to understand
323 their "plan" for that water.

324 23 CCR 791(e) may be cited for authority for the Urgency Order to include terms
325 relating to water rights of the Projects. However, the section does not excuse due process
326 notice to legal users of water rights (required by 23 USC 780 and 782), the right to a

327 hearing, and the identification of the party requesting the change in the water rights.
328 Here, if the SWRCB staff wishes to petition for changes in the water rights, a hearing can
329 be held.

330 **III. Conclusion**

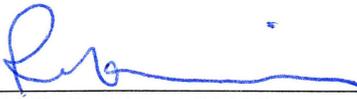
331 Attempts made to save face are destructive to governmental systems and order.
332 This Board should declare that the Temporary Urgency Order is rescinded and cancelled
333 and adopt its own interim order approving the consensus plan until a hearing can be
334 conducted on changes to the Water Quality Control Plan. The Board should then convene
335 a brief and focused hearing and decide whether the approved interim increased procedure
336 and Delta Gate closure procedures proposed by the Projects and concurring fishery and
337 wildlife agencies and approved by its own Drought Management Operations Committee
338 is a reasonable modification of the Water Quality Control Plan in drought-type conditions
339 in all circumstances.

340 The Board should rescind and cancel Paragraph 3 which purports to expropriate
341 for the SWRCB control and title “water conserved” by the drought changes in the WQCP.

342 Dated: February 13, 2015

Respectfully submitted,

343 MINASIAN, MEITH,
344 SOARES, SEXTON & COOPER, LLP

345 By: 
346 PAUL R. MINASIAN
347 For San Joaquin River Exchange Contractors Water
348 Authority, Central California Irrigation District, San
349 Luis Canal Company, Columbia Canal Company and
350 Firebaugh Canal Water District

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PROOF OF SERVICE

I, Denise M. Dehart, declare,

I am employed by the law firm of MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP. My business address is 1681 Bird Street, Post Office Box 1679, Oroville, California 95965-1679. I am over the age of 18 years and not a party to this action.

On February 13, 2015, I served the following document(s) set forth below in the manner indicated:

() **Service by Mail (Deposit):** By enclosing a copy in an envelope addressed as shown below and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

(X) **Electronic Transmission on Service Date:** By electronically mailing to the person named below, at the email address indicated on the attached Service List. No return transmission was received this date indicating that the email transmission did not transmit properly to the recipient.

Document Served: PROTEST, OBJECTION, AND IN THE ALTERNATIVE, PETITION FOR RECONSIDERATION OF TEMPORARY URGENCY CHANGE ORDER ADOPTED FEBRUARY 3, 2015

Persons Served:

For the United States Department of the Interior, Bureau of Reclamation:
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on February 13, 2015, at Oroville, California.

/s/ Denise M. Dehart
DENISE M. DEHART