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Via Email Only:

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Re: TUCP 2015 Comments

The San Joaquin Tributaries Authority (“SJTA”) provides the following comments on the Order Approving in Part and Denying in Part a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (“Order”). The SJTA understands that the State Water Resources Control Board (“State Water Board”) must take action during drought times and supports relief from the water quality objectives. However, as reflected in the comments below, the SJTA believes that such relief must be provided under existing rules of law and addressed in future planning efforts.

I. Dry Year Planning

The Order states that the approval of the Temporary Urgency Change Petition (“TUCP”) is necessary, in part, because in D-1641 and the Bay Delta Plan did not consider extreme dry conditions. (Order, at 3.) As the TUCP process has shown, it is imperative that the State Water Board consider extreme dry conditions in planning and developing water quality objectives in the Bay Delta Plan. The SJTA requests the State Water Board affirmatively state in the Order that it will consider consecutive dry year relief in the Plan’s Phase 1 process and, to the extent appropriate, include consecutive dry year relief in any objectives it adopts.

II. Effect on Future Curtailment and/or Unreasonable Use Action

The SJTA understands that the extreme dry conditions warrant action by the State Water Board and it supports providing relief from the Bay Delta objectives. However, the relief from meeting the Bay Delta Plan provided in the Order will limit future actions of the State Water Board. For example, the State Water Board may not grant relief to DWR and USBR now and later determine the diversion of water by other legal, and in some cases more senior water rights holders are unreasonable due to the impact of those diversions on fish and wildlife. In addition, to the extent water quality flows would have provided water supply to downstream senior water right holders, the relief provided by the Order will limit the State Water Board's ability to curtail upstream water users to release water that otherwise would have been provided by water quality objective flows.

III. Injury to Other Legal Water Users

The Order determines that the relief it provides will not injure any other lawful user of water. (Order, at 16.) This section of the Order is unclear and potentially contradictory. Specifically, the State Water Board's position regarding the ability to divert water released to meet water quality objectives remains unclear. The Order states: "*Riparian and appropriative water right holders with rights to divert water below Project reservoirs only are entitled to divert natural and abandoned flows; they are not entitled to divert water previously stored or imported by the Projected that is released for use downstream.*" This statement would be instructive if it were clear whether the State Water Board believes flows released to meet water quality objectives are abandoned or set aside for downstream use. However, the State Water Board does not provide such guidance; which means this statement continues to allow diversion for those who believe water quality releases to be abandoned, while simultaneously prohibiting the same diversion for those who think water quality releases are for use downstream.

The lack of clarity on this point is unfortunate; much of the controversy regarding export releases and Delta diversions would be resolved if water quality flows were more clearly described as to objectives and the specific location where/if they are considered abandoned. The SJTA encourages the State Water Board to make a determination or legal finding regarding the status of water released to meet water quality objectives – specifically whether the State Water Board considers this water abandoned or released with the intent to continue to exercise control over the water for other beneficial uses.

In addition, the section on injury does not consider the potential regulation by fishery agencies pursuant to the Endangered Species Act. The Order does not bind the California Department of Fish and Wildlife or federal fish agencies. To the extent these agencies disagree with the Order's conclusion that the Order does not injure fish and wildlife, these agencies could take action against a third party for diversions that result in alleged take or violation of California Fish and Game Code section 5937. The Order does not analyze this potential exposure and injury.

IV. Delegation to Executive Director

As the Order itself concedes, the approval of the TUCP amounts to a revision of water quality objectives and the Bay Delta Plan. The revision of water quality objectives requires rigorous environmental review, a separate implementation process, and once adopted an obligation that the objectives must be implemented. The SJTA understands the State Water Board believes the Governor's Drought Proclamation exempts the State Water Board from the requirement that adopted water quality objectives must be implemented. The SJTA does not agree with this interpretation. However, even if the State Water Board was exempted from the implementation requirement, this exemption does not allow the State Water Board to delegate the adoption of new water quality objectives to the Executive Director. The amendment of the Bay Delta Plan is a significant action; one that must be reviewed and decided upon by the State Water Board as a whole.

In addition, the delegation far exceeds the State Water Board's authority to delegate actions to the Executive Director. Section 8 of Resolution 2012-0061, which delegates authority to the Executive Director, does not confer the authority to approve a temporary urgency change order. Section 8 states, "[t]he Executive Director may amend, modify, rescind, or revoke any permit, license, certificate, waste discharge requirements, decision, or order if an appellate court opinion published in the official reports establishes that the State Water Board has a ministerial duty to do so." [Emphasis added.] Thus, the Executive Director may only amend a permit if it is a ministerial duty. As the Order indicates, the determination of approving the TUCP required significant weighing, balancing, and decision-making – which is beyond ministerial and beyond the duties delegated to the Executive Director.

Very truly yours,

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