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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING REGARDING EMERGENCY DROUGHT CONDITIONS REGARDING DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION TEMPORARY URGENCY PETITION February 17, 2009 continued February 18, 2009	))))))))	**CLOSING STATEMENT** **COUNTY OF SAN JOAQUIN**

The County of San Joaquin and San Joaquin County Flood Control and Water Conservation District (collectively hereinafter "County") hereby submits this Closing Statement in the hearing regarding the above referenced matter.

The County recognizes that California is experiencing unique and challenging hydrologic conditions. The current condition of lack of precipitation following a prior drought year is problematic and results in water shortages. Addressing these water shortages requires making tough decisions and adopting unique solutions. The State Water Board must require the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) to take serious, meaningful actions to meet their water right permit condition requirements. Any changes to their permit conditions need to be made by the State Water Board, not the permittees, based on substantial evidence and following a reasoned decision. The status quo or urgent and after the fact decisions, is not acceptable.

Urgency of Petition

The County appreciates the State Water Boards quick public hearing on this matter. However, the hearing testimony indicated that an urgency no longer exists which would allow the proper granting of Petitioners' DWR and USBR requests. The urgency no longer exists, not because of actions by the State Water Board, which held a public hearing within 7 days of receiving the Petition, nor by the interested parties desire to hold a public hearing, but due to the Petitioners timeliness of filing their Petition combined with the current factual situation. Given these facts the current Petition request is moot.

The hearing testimony on February 17, 2009 by the DWR representative indicated that by the end of January it was apparent that the X2 February permit conditions would not be met. Unfortunately, due to DWR and USBR's request to the State Water Board on February 10, 2009, regarding a requirement that is to be met from February 1 through February 14, it is quite difficult for the State Water Board to take any meaningful action regarding the X2 permit condition.

The State Water Board just issued an Order on February 17, 2009 presenting the State Water Board's position on mootness and whether proceedings should be dismissed because it is moot. The State Water Board's February 17, 2009 Order regarding the Petitions for Reconsideration of Order WR 2008-0029-EXEC indicates that "Ordinarily, a proceeding that is moot should be dismissed unless it presents substantial and continuing public interest that is 'capable of repetition, yet evading review.' (Citations omitted.)" Order at p. 11. This issue, the X2 February standards and the unique hydrology presented by the Petitioners related to February requirements will be different from any other potential petition to reoccur this year. There has been no evidence submitted to support a longer period of noncompliance and the Bureau's Biologist indicated in testimony that harm to the affected fish species is one of degree that must be evaluated based on the circumstances. A decision on this record could not properly apply to a different factual situation not presented at this hearing.

Such a hearing and consideration by the State Water Board might be proper, but that is not what is before the State Water Board in this Petition and a ruling on this matter could not be applied to these future factual situations.

In addition, both DWR and the USBR's witnesses testified on February 17, 2009 it is likely and the departments are considering the need for additional temporary urgency petitions to relieve future permit conditions. This potential violations from the Petitioners' permit conditions need to be presented to the State Water Board in a timely manner for the State Water Board to consider, based on the evidence presented, whether it is consistent with State law and supportable by substantial evidence to change the Permittees permit conditions. The State Water Board should direct the Petitioners to present these anticipated and possible situations that will result in potential permit condition violations now so that reasonable consideration can be made by the State Water Board before a proper State Water Board decision becomes moot.

On February 17, 2009 DWR's witness, John Leahigh, as well as USBR's witness, Ronald Millingen, testified that determining the X2 requirements and obligations is difficult and requires applying a complex set of rules and standards. In addition, the Petitioners assert that this year was a unique water year that just triggered additional water requirements. Perhaps the complex standard and variable conditions need to be modified to be more predictable and workable in the real world. This would be based on practical applications, not known at the time of D 1641 when the standard was developed. However, that is not the Petition currently presented by the Petitioners.

Public Interest Determination is to be by State Water Board

The Petitioners allege public interest facts that should be considered to support their Petition. These may be proper public interest considerations. However, the balancing of the public interest considerations is the responsibility of the State Water Board. (Wat. Code 1435.) Under state law it is not to be a determination by the Permitees to determine which conditions to comply with and

which conditions to violate, especially since the Petitioners are vested stakeholders who have contractual obligations to deliver water which influences Petitioner's determination of which permit standards for which they will comply.

In addition the Petitioners made a determination based on Petitioners' perspective of public policy interests. This is according to what the Petitioners, who have a vested interest, deem to be reasonable and within the public interest. This allowed and continued minimal exports and even included an increase to exports. See CDWA/SDWA/SJC Exhibit 1Cwhich indicates on February 11, 2009 exports increased by 1400 cfs and Delta outflow decreased by approximately 1300 cfs. DWR's witness agreed on cross examination by Mr. Nomellini that if water wasn't exported by the pumps then that water would be available to flow out of the Delta and influence Delta outflow. Under California law, the State Water Board is the responsibility to weigh the public interest and determine if based on substantial evidence a permit condition can be modified. If such, then continued water deliveries might occur, but this requires a decision by the State Water Board.

Water quality violations also occurring

In addition, the Petitioners have failed to present to the State Water Board, or notify the State Water Board to our knowledge, that the Petitioners are also operating and receiving water under their permits while other permit term violations are occurring. CDWA/SDWA SJC Exhibit 1E indicates that since January 12, 2009 and continuing every day thereafter until February 12, which was the last available information at the time this Exhibit was prepared, the Petitioners are violating the 30 day running average of 1.0 EC at OLD River new Tracy. In addition Exhibit 1E indicates that the Old River new Middle River standard was violated from February 5-12. Again the Petitioners are determining that it is within their best interest arguably based on public interest to violate this permit condition as well and during this time Permittess continue to pump export water. The Permittees

permits require that they comply with these permit terms. The State Water Board, not the Permitees, should be determining if compliance with these terms are required.

Conclusion

DWR and USBR indeed have significant responsibilities in supplying large quantities of municipal and agricultural water, but these responsibilities do not excuse them from complying with the law. Consistent with State water law, DWR and USBR should not be receiving water pursuant to their water right permits while these flow and water quality objectives are being violated. Alternatively, a careful determination by the State Water Board based on substantial evidence needs to be made. Not a hasty decision due to the Petitioners lack of planning to address their obligations or potential obligations.

Dated: February 18, 2009

Respectfully Submitted,

NEUMILLER & BEARDSLEE
A Professional Corporation

By: _____
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