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February 17, 2009
Via Hand Delivery

Arthur G. Baggett
Hearing Officer
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828

Charles R. Hoppin
Hearing Officer
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828

**Re: FEBRUARY 17, 2009 PUBLIC HEARING REGARDING
EMERGENCY DROUGHT CONDITIONS
COUNTY OF SAN JOAQUIN – OPENING STATEMENTS**

Dear Hearing Officers Baggett and Hoppin:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively hereinafter the "County"), we submit the following opening statements at the February 17, 2009 Public Hearing Regarding Emergency Drought Conditions.

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. The status quo is not acceptable.

Delay in Meaningful Action by USBR and DWR

Given the current lack of precipitation this winter season and the prior water year drought, it was most likely not unexpected or unpredictable that DWR and USBR would have difficulty meeting their permit term obligations for February and beyond. If USBR and DWR continue the status quo it is quite predictable that the USBR and DWR will claim they will be unable to meet not just the February Delta outflow objectives, but future obligations including the spring VAMP flows and the summer water quality requirements. Given the Wanger decision and the current pumping limitations, impacts throughout the State will most likely be significant. Serious consideration of this situation and the actions of DWR and USBR by the State Water Board must occur.

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. DWR and USBR's delay in presenting a potential permit condition situation to the State Water Board is not new. This pattern of delay in meeting their permit conditions or to request a relaxation of their permit conditions to the State Water Board must end.

As the State Water Board is aware, DWR and USBR did not meet the southern Delta salinity objectives during the summer of 2007. In response to the violations in 2007 and the continuation of the use of joint points of diversions (JPOD) in violation of DWR and USBR's permit conditions, the State Water Board Executive Director suggested by letter dated November 28, 2007 that USBR and DWR file a change petition ". . . as soon as possible to assure that the matter can be considered prior to any need for JPOD diversions next year."

DWR and USBR did not follow the State Water Board staff's direction and did not file a timely petition for continued diversions in 2008. Rather on June 17, 2008, well into the water delivery season, DWR and USBR filed for an urgency petition to allow JPOD while southern salinity objective violations occurred. DWR and USBR's urgency petition was granted by Order dated July 1, 2008. Two parties filed timely petitions for reconsideration on July 22, 2008 and July 31, 2008. JPOD continued throughout the summer and water quality violations continued as well. No response to the petitions for reconsideration occurred until January 2009 which was after the water delivery season was over and after the effective period of the urgency petition Order had expired.

Now, on February 10, 2009, with 1/3 of the month of February past, and only 4 days of a 14 day period remaining, DWR and USBR file another urgency petition in 2009 regarding the February flow requirements. This establishes a pattern by DWR and USBR to respond to permit condition obligations in such a way that precludes the State Water Board from providing meaningful consideration of these important permit terms and

conditions; thus, allowing the status quo as established by DWR and USBR to continue by default.

The County appreciates that the State Water Board noticed the pending urgency petition and scheduled this hasty public hearing regarding this petition. These are important issues and careful consideration of all interested parties perspectives must occur. Although, the State Water Board cannot provide meaningful guidance for meeting the February flow requirements that have already lapsed, the State Water Board can meaningfully evaluate possible violations and alternatives for potential future permit term violations during this water year. As such the State Water Board must require DWR and USBR to submit a meaningful operations plan on addressing water use during the remainder of this water year regarding all permit condition requirements. The State Water Board must carefully consider the ability for DWR and USBR to meet its permit conditions and require DWR and USBR to comply with state law and its permit terms and conditions.

It is the County's opinion that DWR and USBR did not pursue due diligence in petitioning for the urgency change to modify the terms of their water right permits in 2008 and again not in February of 2009. Let's not let this continue throughout 2009.

San Joaquin River Flows

The hearing notice for today's proceeding identifies as key issue number 8 whether there are "operational modifications or any other actions that could be taken, either as opposed to or in addition to the modifications identified in Key Issues 1 and 2., above." The County asserts that DWR and USBR have failed to take actions which are available to, and within the control of, the parties which would allow them to take reasonable actions to supplement the San Joaquin River Flows and possibly meet the San Joaquin River Flows objectives for the month of February 2009.

As pointed out on numerous occasions by the South Delta Water Agency, there are actions that DWR and USBR could take, including but not limited to recirculation, which would increase the flow on the San Joaquin River without requiring additional releases of fresh water from New Melones Reservoir. Recirculation is a feasible and reasonable alternative that can increase the flow on the San Joaquin River without requiring significant additional fresh water flow.

Implementing recirculation should not be met with reluctance by USBR as recirculation was mandated by Congress in 2004. In meeting the San Joaquin River flow requirements the Bureau must adhere to the Congressional mandates of HR 2828 (Public Law 108-261, signed October 25, 2004) which contains important direction for the Secretary of the Interior and Reclamation regarding operation of New Melones Reservoir. This Congressional mandate could be implemented now, if

the USBR took their permit conditions imposed by the State Water Board seriously.

HR 2828 directed the Secretary of Interior to develop and initiate implementation within one year of enactment of a program to meet all existing water quality standards and objectives for which the Central Valley Project is responsible. The Program is to include recirculation to provide flow, reduce salinity concentrations and reduce the reliance on New Melones Reservoir for meeting water quality and fishery objectives through the use of excess capacity in export pumps and conveyance facilities.

In addition, HR 2828 directs the Secretary of the Interior to update the New Melones operating plan to take into account the actions in HR 2828 that are designed to reduce the reliance on New Melones Reservoir for meeting the water quality and fishery flow objectives. Since adoption in 2004, USBR has neither implemented a meaningful Program within the parameters of HR 2828 nor moved forward with a Revised Plan of Operation for New Melones Reservoir. Doing so could have potentially addressed the permit violations at issue in this proceeding as well as the summer southern Delta salinity objective violations.

The need to implement additional mitigation measures should not be a surprise to DWR or USBR now. DWR and USBR are just choosing not to implement them. The State Water Board needs to make them do so.

Conclusion

The State Water Board must enforce the existing water right permit terms and require DWR and USBR to meaningfully implement these and other measures. Alternatively, 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. In addition, in times of water shortage, California water law is clear. Those holding junior water rights suffer while more senior water rights may continue. In periods of water shortages, these water principles must be applied by the State Water Board. The County desires a solution, not the blatant disregard of the law and the State Water Board decisions and orders. 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.

As the County asserted in its recent January 29, 2008 letter to the State Water Board regarding South Delta Water Agency's Petition For Reconsideration in the matter of Order WR 2008-0029-EXEC which allowed the relaxation of the Southern Delta salinity objectives in 2008, it is too late for the State Water Board to take meaningful action to affect the 2008 season but it is not too late to affect 2009. The State Water

Board needs to meaningfully consider all of USBR and DWR's permit conditions and obligations and take action following a noticed proceeding which allows all interested parties to participate. It is improper to allow DWR and USBR to file untimely urgency petitions in 2009 and to continue to allow DWR and USBR to export water and operate the JPOD in direct violation of the terms and conditions of the underlying permits and D-1641, as well as the Cease and Desist Order (WR 2006-0006).

Very truly yours,



DeeAnne Gillick
Attorney at Law

DMG/ect

cc: Each Member of the Board of Supervisors
David Wooten, County Counsel
T.R. Flinn, Director of Public Works
Thomas M. Gau, Chief Deputy Director
C. Mel Lytle, Ph.D., Water Resources Coordinator
Thomas J. Shephard, Sr.