State Water Resources Control Board

February 19, 2019

Eileen Sobeck
Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Sobeck,

RE: CITY OF BAKERSFIELD’S PETITIONS FOR RECONSIDERATION OF ORDERS NOS. 03-12-18R-002 AND 03-12-18R-003 FOR MANDATORY CONSOLIDATION: DIVISION OF DRINKING WATER RESPONSE

This letter provides the State Water Resources Control Board (State Water Board), Division of Drinking Water’s (DDW’s) response to the above-noted petitions. DDW is submitting one response to both petitions because the legal and factual issues raised by the City of Bakersfield (City) in its two petitions are substantially similar. DDW has prepared separate administrative records for each consolidation order. As required by your January 4, 2019 letter, DDW will provide this response and the accompanying administrative records electronically to the list of interested persons, as well as to the City.

I. INTRODUCTION

Although more than 98% of California’s drinking water consumers served by public water systems receive drinking water that meets federal and state drinking water standards, 95% of consumers are served by systems with more than 3,300 connections. Those that are served by smaller water systems are less likely to be provided drinking water that meets drinking water standards. For example, the most recent California Safe Drinking Water Plan report indicates that in 2011, 98% of the systems that were not in compliance with the most commonly violated maximum contaminant levels (MCLs or drinking water standards) served less than 10,000 service connections.¹ Most strikingly, small community water systems serving between 15 and 199 service connections represented the group with the largest percentage of non-compliant systems.²

¹ Safe Drinking Water Plan at p. 87. The Safe Water Drinking Plan may be found at https://www.waterboards.ca.gov/publications_forms/publications/legislative/docs/2015/sdwp.pdf.
² Ibid.
Large public water systems are able to meet regulatory requirements more easily than small systems because large systems can absorb costs of necessary upgrades and treatment by spreading them out among their large rate base. For small water systems, achieving compliance with drinking water standards is often difficult because of their inability to take advantage of economies of scale, and the associated revenue streams, available to the larger systems. This makes the small systems less resilient to natural disasters, such as drought and fire, have more difficulty adjusting to regulatory changes, and causes them to struggle to fund infrastructure maintenance and replacement. Although low- or no-interest financing and grants are often available to help cover or offset the capital costs of building treatment facilities, the costs to operate and maintain these facilities is sometimes beyond the technical, managerial, and financial (TMF) capacity of small water systems, particularly those that serve disadvantaged communities. Because of these challenges to the small systems, the Legislature and the State Water Board have been focusing on other tools to address the problems of small systems.

In 2015, the legislature passed Senate Bill 88, which added sections 116680-116684 to the California Health and Safety Code. This new legislation authorized the State Water Board to require certain water systems that consistently fail to provide safe drinking water to consolidate with, or receive an extension of service from, another public water system. Since that time, DDW has been working to fulfill that legislative mandate of consolidating small, disadvantaged water systems with larger systems that can provide, with State Water Board assistance, the water source, infrastructure, staff, and economies of scale that are necessary to consistently provide an adequate supply of safe drinking water. Despite having issued thirteen letters to initiate consolidations, only five have resulted in voluntary consolidations. Only one other mandatory consolidation order has been issued in addition to the two orders issued to the City.

Although the Legislature has provided tools and funding to assist with consolidations, it isn’t always an appropriate solution. Sometimes, there are physical barriers to consolidations. For example, extending pipelines long distances and through difficult terrain can be a significant barrier to consolidations. Other issues, however, are not actual physical impediments, but rather are better characterized as “paper” constraints. These include, for example, rules and regulations related to land use and municipal ordinances that self-limit where a local agency may serve water. Considering the important public policy set forth in Water Code section 106.3 “that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes,” every effort should be made to help water systems overcome those “paper” constraints to consolidation.

As is demonstrated by the administrative record for these two mandatory consolidation orders, there are no physical impediments to the consolidations. The two disadvantaged systems that the City is being ordered to consolidate are located less than a mile away from the City’s distribution system and across a rural highway from the current City limits, along an existing, level roadway. The two small disadvantaged communities have less than 30 service connections combined. Rather, what is holding up the consolidations are the City’s concerns about annexing the area into the City and upgrades to the streets and gutters within Old River Mutual Water Company’s (Old River’s) and South Kern Mutual Water Company (South Kern’s) service areas in order to meet Americans with Disabilities Act requirements, and concerns related to serving water outside of the City limits, in conflict with the City’s municipal ordinances. Although these concerns

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3 Signed by the Governor and chaptered on June 24, 2015.
4 Governor Newsom, in his State of the State Address on February, 12, 2019, identified the lack of safe drinking water as a “moral and medical emergency.” https://www.gov.ca.gov/2019/02/12/state-of-the-state-address/
are legitimate and need to be addressed, what is at issue here is whether these types of problems should be able to be used by water systems to avoid consolidating with smaller water systems that desperately need assistance in order to provide customers with an adequate supply of safe drinking water.

As explained below, the City’s main challenge is that the mandatory consolidation orders fail to address or account for all requirements contained in Health and Safety Code section 116682.\(^5\) Nothing in that section, however, indicates that the consolidation orders themselves need to directly address all requirements. As explained below, the administrative records for each consolidation order show that DDW followed all applicable section 116682 requirements when it required the City to consolidate South Kern and Old River into its service area to provide those communities with an adequate supply of safe drinking water.

II. ARGUMENTS

A. Old River and South Kern Serve Disadvantaged Communities

The City alleges that DDW has not satisfied the primary requirement for an order of consolidation because the orders do not demonstrate that Old River and South Kern serve disadvantaged communities. Having worked with both communities over the last decade to address water quality issues, and knowing firsthand of the limited resources available in those communities, it is clear to DDW staff that these communities are disadvantaged. Moreover, this issue was never raised as a concern by the City during any of the meetings at which consolidation was discussed.

Nonetheless, Self-Help Enterprises conducted two income surveys between December 2018 to January 2019 to document the Median Household Income (MHI) of Old River and South Kern. Based on the January 2019 MHI studies,\(^6\)^7 both water companies meet the definition of a severely disadvantaged community. Old River has a MHI of $40,200 and South Kern has a MHI of $31,669. The California Statewide MHI for 2019 is $53,735 and $40,301 for disadvantaged and severely disadvantaged, respectively. The supplemental evidence submitted by the City on December 28, 2018 used to allege that Old River and South Kern are not disadvantaged communities relies on data for a larger census tract, which includes relatively wealthier areas. Using the data supplied by the City for Kern County, as opposed to data specific for the two communities, skews the outcome, and results in an incorrect conclusion.

B. DDW Met the Statutory Requirements for Notices and Hearings

There are a number of steps that the State Water Board is required to complete prior to ordering a consolidation. Primarily, these steps include outreach to the potentially affected communities, and other local and state government entities, including the local agency formation commission (LAFCO), the Public Utilities Commission, local land use planning authorities, and public water systems in the chain of distribution of the receiving water system.\(^8\) Fundamentally, the purpose of this public outreach is to identify all relevant concerns and ideas so that interested parties,

\(^5\) Health and Safety Code sections 116681 and 116682 were amended by Assembly Bill No. 2501, which was chartered on Sept. 28, 2018 and became effective on January 1, 2019. All references to Health and Safety Code sections 116681 and 116682 contained herein are to the prior version of sections 116681 and 116682 as these versions were in effect at the time the challenged consolidation orders were issued.

\(^6\) Old River Administrative Record, Attachment 32.

\(^7\) South Kern Administrative Record, Attachment 33.

\(^8\) Health and Safety Code section 116682, subd. (b).
including the State Water Board, can consider options for addressing the need for safe drinking water and consider solutions for particular issues. During the initiation of this process, the State Water Board is required to hold at least one public meeting in a place as close as feasible to the affected areas, and to provide a 30-day notice of the meeting within the area to be subsumed and to all the affected local government agencies and drinking water service providers.9

After the initial letters were sent on November 10, 2015 to the City and to Old River and South Kern to allow for voluntarily consolidation, DDW initiated the necessary consultations and discussions for mandatory consolidation pursuant to Health and Safety Code section 116682.10 A number of meetings were held in 2016 and 2017, and included various participants, including Kern County LAFCO and Kern County Environmental Health Department, representatives from Lakeside School and the water companies, the City, DDW and the State Water Board’s Division of Financial Assistance. At all of the meetings, consolidation was discussed, along with obstacles to overcome and other options to consider.

As identified in the administrative record, a public meeting was held on July 10, 2017, at the Lakeside Elementary School cafeteria.11 Because neither Old River nor South Kern has a facility where the public meeting could be held, the meeting was held at the Lakeside Elementary School, which is located near the affected ratepayers, renters and property owners. To prepare for the meeting, DDW staff hand delivered a notice for the public meeting directly to each service connection in Old River and South Kern service areas on June 7, 2017, more than thirty days prior to the meeting.12 These notices were provided in both English and Spanish, the primary languages spoken in the two communities. In addition, the notice of the meeting was provided via email to the City, Kern County LAFCO, the water treatment operator for Old River and South Kern, and Kern County Environmental Health Department. The public notice provided that comments could be received through July 31, 2017 via mail, email or fax.13 Identical notices were issued for the public hearing held on September 7, 2017, as required by Health and Safety Code section 116682, subd. (c), and those notices were sent out and delivered in the same method and manner as those for the July 10, 2017 public meeting.14

The City alleges that the notices were insufficient because they did not specifically use the term “consolidation,” and instead provided that the meetings would discuss “the potential for the City to supply domestic water” to the areas served by the Old River and South Kern. Section 116682 does not require any specific language be used in the public notices. Rather, the main purpose of the notices and meetings, and the standard by which they should be judged, is to provide the residents of the potentially affected communities with an opportunity to be heard. The information provided in the notices was sufficient to provide those that would be affected an opportunity to express concerns regarding the proposed consolidations. In fact, consolidation was discussed at the meeting because the DDW powerpoint presentation included slides on options, including

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9 Id., subd. (b)(9).
10 Old River Administrative Record, Attachments 4, 13, 17, 18; South Kern Administrative Record, Attachments 4, 15, 18, 19.
11 Old River Administrative Record, Attachment 12; South Kern Administrative Record, Attachment 13.
12 Ibid.
13 Ibid.
14 Old River Administrative Record, Attachment 11, South Kern Administrative Record, Attachment 12.
consolidation. Similarly, in its comments, the City addressed the proposed consolidation of the two water systems.

C. The State Water Board Made the Findings Required by Health and Safety Code Section 116682, subd. (d).

As explained below, DDW made all finding required by Health and Safety Code section 116682, subd. (d), within its orders. The City alleges that these findings were insufficient or not adequately supported. Not all support for the findings, however, was needed to be within the order. As described below, the administrative record contains sufficient information to support all of the findings made in the mandatory consolidation orders.

1. The Water Systems Have Consistently Failed to Provide an Adequate Supply of Safe Drinking Water

The City seems to suggest that as long as there is a sufficient supply of drinking water, it does not matter that the drinking water fails to meet drinking water standards. That, however, is inconsistent with a plain reading of section 116682, and with the Legislative intent behind California’s Human Right to Water. Section 116682 empowers the State Water Board to require consolidation where a public water system that serves a disadvantaged community “consistently fails to provide an adequate supply of safe drinking water.” “Consistently fails” is defined in Health and Safety Code section 116881 to mean “a failure to provide an adequate supply of safe drinking water.” Section 116881 further defined “Safe drinking water” as “water that meets all primary and secondary drinking water standards.” This means that where a public water system does not supply drinking water that meets primary and secondary drinking water standards, it is “consistently failing to provide an adequate supply of safe drinking water,” and the State Water Board may require consolidation.

Both Old River and South Kern currently exceed primary drinking water standards. As stated in the consolidation order for South Kern, the water system was issued Compliance Order No. 03-12-18R-005 in October 2016 for exceeding the uranium MCL. DDW also issued Compliance Order No. 03-12-18R-031 to South Kern in July 2018 for exceeding the 1,2,3-Trichloropropane (1,2,3-TCP) MCL. South Kern continues to be out of compliance with both the uranium and 1,2,3-Trichloropropane MCLs based on water quality monitoring. The MCL for uranium is 20 pCi/L and the MCL for 1,2,3-TCP is 0.005 (μg/L).

<table>
<thead>
<tr>
<th>Compliance Period</th>
<th>Sample Date</th>
<th>Uranium (pCi/L)</th>
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<tbody>
<tr>
<td>2016 1st Quarter</td>
<td>03/8/16</td>
<td>20</td>
</tr>
<tr>
<td>2016 2nd Quarter</td>
<td>06/01/16</td>
<td>21</td>
</tr>
<tr>
<td>2016 3rd Quarter</td>
<td>09/7/16</td>
<td>25</td>
</tr>
<tr>
<td>2016 4th Quarter</td>
<td>12/13/16</td>
<td>24</td>
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15 Old River Administrative Record, Attachments 25, 26, 29, 30; South Kern Administrative Record, Attachments 26, 27, 30, 31.
16 Old River Administrative Record, Attachment 14; South Kern Administrative Record, Attachment 14.
17 South Kern Administrative Record, Attachment 20.
18 Id., Attachments 9, 21.
19 Id., Attachments 23, 24.
<table>
<thead>
<tr>
<th>Compliance Period</th>
<th>Sample Date</th>
<th>1,2,3-TCP (µg/L)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018 1st Quarter</td>
<td>01/15/18</td>
<td>0.019</td>
</tr>
<tr>
<td></td>
<td>01/29/18</td>
<td>0.020</td>
</tr>
<tr>
<td>2018 2nd Quarter</td>
<td>04/09/18</td>
<td>0.015</td>
</tr>
<tr>
<td>2018 3rd Quarter</td>
<td>07/20/18</td>
<td>&lt;0.005</td>
</tr>
<tr>
<td>2018 4th Quarter</td>
<td>10/10/18</td>
<td>0.015</td>
</tr>
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Old River was issued Compliance Order No. 03-19-090-045 in May 2009 for exceeding the uranium MCL of 20 pCi/L.\(^\text{20}\) Old River continues to be out of compliance for the uranium MCL based on water quality monitoring.\(^\text{21}\) A summary of the Old River's uranium monitoring results are presented in Table 1.\(^\text{22}\)

<table>
<thead>
<tr>
<th>Compliance Period</th>
<th>Sample Date</th>
<th>Result (pCi/L)</th>
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<tbody>
<tr>
<td>2016 1st Quarter</td>
<td>03/15/16</td>
<td>29</td>
</tr>
<tr>
<td>2016 2nd Quarter</td>
<td>06/07/16</td>
<td>29</td>
</tr>
<tr>
<td>2016 3rd Quarter</td>
<td>09/16/16</td>
<td>31</td>
</tr>
<tr>
<td>2016 4th Quarter</td>
<td>12/13/16</td>
<td>27</td>
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<tr>
<td>2017 1st Quarter</td>
<td>03/06/17</td>
<td>30</td>
</tr>
<tr>
<td>2017 2nd Quarter</td>
<td>06/20/17</td>
<td>26</td>
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<tr>
<td>2017 3rd Quarter</td>
<td>09/14/17</td>
<td>25</td>
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<td>2017 4th Quarter</td>
<td>12/11/17</td>
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<tr>
<td>2018 1st Quarter</td>
<td>03/13/18</td>
<td>29</td>
</tr>
<tr>
<td>2018 2nd Quarter</td>
<td>06/21/18</td>
<td>27</td>
</tr>
<tr>
<td>2018 3rd Quarter</td>
<td>09/04/18</td>
<td>24</td>
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The City believes that DDW’s interpretation of section 116682 would mean that “every water district or system which exceeds an MCL or violates a water quality order would seek consolidation instead of attempting to otherwise address an MCL or other water quality violation.”

\(^{20}\) Old River Administrative Record, Attachment 23.  
\(^{21}\) Id., Attachment 24.  
\(^{22}\) No uranium samples were collected during the fourth quarter of 2018.
As described previously, however, it is primarily the small systems that cannot meet drinking water standards, and for some small water systems, consolidation is the only feasible way to return to compliance. “Alternative water treatment options” that the City believes are more “reasonable, cost-effective, and efficient” are generally not capable of being carried out by small, disadvantaged systems. Even where financing for treatment is available for these systems, the ongoing operation and maintenance costs of the treatment are often too costly and too difficult to consistently manage.

And, more specifically for Old River and South Kern, it has been impossible for the water companies to maintain a sufficient number of active board members to hold meetings and effectively manage the operations of the water systems. These systems, therefore, lack the TMF capacity to operate their water systems, and the drinking water violations are actually only a symptom of larger problems. Even if the issues of uranium and 1,2,3-TCP were addressed, it would likely only be a matter of time before additional problems surfaced due to the water systems’ inadequate TMF.

2. The State Water Board Made All Reasonable Efforts to Negotiate Consolidation

Although the consolidation orders themselves may not have listed out all of the meetings and exchanges that occurred between the City and DDW, the administrative record demonstrates that DDW made all reasonable efforts to negotiate consolidation. Unfortunately, the City and DDW were not able resolve two key issues.

First, the City has taken the position that consolidation must include not only money for upgrades to the South Kern and Old River water system infrastructure, but also money for upgrades to the sidewalks and pedestrian walkways within the service areas to achieve with Americans with Disabilities Act requirements in contemplation of future annexation. DDW explained that it could not pay for these upgrades due to restrictions on its funding programs, and that consolidation should not be contingent upon annexation.23 Importantly, the Legislature amended Health and Safety Code section 116682 to codify that the State Water Board cannot fund such public works or upgrades that are unrelated to the delivery of affordable, safe drinking water.24 Subdivision (h) of 116682 now provides:

The state board shall not, pursuant to this section, fund public works or upgrades unrelated to the delivery of an adequate supply of affordable, safe drinking water, including, but not limited to, the installation of street lights, sidewalks, curbs, and gutters. A local agency’s decision whether to provide these public works or upgrades shall not delay the consolidation or extension of service.

Second, the City requested that the State Water Board fund a $3.5 million-dollar study; however, no application for the study was ever actually submitted. The proposed study described “collecting information on the mutual water companies and the school to: evaluate the cost of construction and benefit of consolidation; evaluate reorganization of restructured water system; analyze all available alternatives and recommend the best option or options to address the ranked problem; prepare preliminary engineering report; and collect information on water wells, treatment facilities, distribution system, maintenance schedules, rates, and customers for each entity.” What the City was requesting was far beyond the scope of what was necessary to determine

23 Old River Administrative Record, Attachment 13; South Kern Administrative Record, Attachment 13.
24 Assembly Bill 2501, supra.
feasibility of the consolidation, and was not something the State Water Board could support considering the limited amount of funds available and the numbers of water systems needing assistance. Although the Division of Financial Assistance was willing to work with the City to create a scope of work that could be funded, the City never pursued an application, though it was encouraged to do so.\(^{25}\)

Additionally, it became clear during discussions with the City that rather than negotiate possible consolidations, the City wanted to continue to discuss options in lieu of consolidation. The City believed that there were treatment options that would be more cost-effective than consolidation. As explained above, however, Old River and South Kern simply do not have adequate TMF to continue as successful public water systems. Neither system has been able to maintain a functioning board, making any option other than consolidation an unlikely long-term solution for these systems. Moreover, Old River and South Kern are too small to be able to effectively spread costs for the operation and maintenance of the treatment amongst the limited number of service connections. While the City uses the fact that South Kern and Old River were unresponsive to outreach as evidence that DDW did not sufficiently negotiate and explore options with them, that fact actually underscores the problem that there are no functioning boards and both water systems are essentially unmanaged. Although an operator has been working for both South Kern and Old River, neither system has anyone in charge to provide direction or management, let alone with which DDW can negotiate.

3. The State Water Board Found Consolidation is Appropriate and Technically and Economically Feasible

The City contends that DDW did not make sufficient findings or provide sufficient evidence that the consolidation was appropriate and technically and economically feasible. DDW set out cost comparisons between extending a pipeline to serve the two communities versus treatment for the two systems in a memorandum dated September 5, 2018,\(^{26}\) and the memo concluded that the option of extending the pipeline was considerably cheaper over the long term. In addition, the consolidation option also addressed all of the issues facing South Kern and Old River, including having adequate TMF capacity to run a public water system, and providing redundancy and storage capacity within the systems for the protection of the residents served. The City, however, reads this section of the law as requiring the comparison of treatment versus consolidation to also consider the costs of annexation. DDW should not, however, have to address the costs of annexation as part of its analysis.

There are, undoubtedly, numerous details and challenges yet to overcome in order to complete these consolidation projects. DDW is committed to working with the City to address all of those issues and is ready to fund all necessary water system infrastructure, including a pipeline and any upgrades of the existing infrastructure. In fact, this is expressly required by Health and Safety Code section 116682, subd. (e). In correspondence dated June 23, 2017, DDW offered the City up to $10 million for other drinking water related projects that could be funded to help offset the City’s concerns about costs that could not be funded by the State Water Board. However, contrary to what the City is asserting, all of those details do not have to be set out in the consolidation orders. Rather, in considering whether a particular consolidation is appropriate and technologically and economically feasible in compliance with section 116682, DDW is only required to determine whether it is physically possible and cost-effective to provide infrastructure to connect the struggling system with the water system with which it is consolidating. In carrying

\(^{25}\) Old River Administrative Record, Attachment 13; South Kern Administrative Record, Attachment 13.

\(^{26}\) Old River Administrative Record, Attachment 9; South Kern Administrative Record, Attachment 8.
out its obligations to implement section 116682, and the State Water Board’s policy regarding the Human Right to Water, DDW is not focused on the issues tangentially related to annexation, such as consistency with municipal codes and annexation requirements, as these issues are capable of being worked out.

4. **DDW Adequately Addressed Concerns Related to Water Rights and Contracts**

The City’s concerns related to water rights and contracts are misplaced and overstated. The estimated water usage for each water system includes an annual water usage of 7 gallons per minute (gpm), maximum day demand (MDD) of 30 gpm and a peak hour of 45 gpm. Therefore, the estimated MDD for both water systems is 60 gpm based on the water usage reported for South Kern in the 2017 electronic Annual Report (eAR) to DDW. This is just a tiny fraction of the City’s overall water supply. The City serves over 44,500 connections and, in addition to its surface water rights, uses significant groundwater from an un adjudicated basin to serve its customers. The MDD calculated from August 2017 provided in the 2017 eAR for the City shows the City’s MDD approximately 65,887 gpm. While there are likely restrictions and complex agreements related to the use of its surface water rights, there can be no doubt that the amount of water at issue is insignificant for the City and that the City has the capacity to use its existing water rights, consistent with its legal obligations, to serve the 30 connections at issue. The City has not presented any credible evidence to show that serving water to these communities can only be done with its surface water rights.

5. **Consolidation is the Most Effective and Cost-Effective Means to Provide South Kern and Old River with an Adequate Supply of Safe Drinking Water**

When considering effectiveness and cost-effectiveness, DDW is required to take a long-term view, considering not just the short-term goals of treating the particular technical issue and the up-front costs, but whether the solutions are going meet the long-term goals of creating sustainable water systems. For example, Health and Safety Code section 116540 requires new systems to demonstrate that they have adequate TMF capability to ensure the delivery of an adequate supply of safe drinking water. Similarly, to avoid the proliferation of more small systems, which are more likely to have problems being resilient to natural disasters and adjusting to new regulations, DDW requires all new proposed drinking water systems to submit a preliminary report comparing the long-term costs of creating its own system versus connecting to an existing system.

It is true that there is state funding available to pay for capital improvements; however, it is unlikely that either Old River or South Kern would be eligible because neither has an active board to apply for the funding on behalf of the system. Similarly, prior to receiving State Water Board funding for capital improvement projects, each water system must provide documentation that the water system has adequate TMF capacity to operate any infrastructure or treatment that is installed. Even if a system could qualify for funding for capital improvements, no funding is available for the operation and maintenance of the system. As described in Finding 3 of the mandatory consolidation orders, there are ongoing operation and maintenance costs of treatment, including replacing and proper disposal of filters, contracting with a treatment operator, and compliance with additional testing and reporting requirements. The burden of spreading these ongoing costs of treatment amongst so few households would make the cost of treatment prohibitive, and there are no loans or grants for those type of costs.

Most importantly, however, is that treatment would not really solve the larger long-term sustainability issues faced by these systems. Old River and South Kern do not have the TMF capacity necessary to continue as a public water system. They have no functioning boards or
governance structures. Even if they could overcome those burdens, there is little doubt that these systems are not sustainable over the long-term. They have no redundancy or storage capacity. The existing wells are more than fifty years old. There are no savings or capital improvement plans to ensure that the systems can replace aging infrastructure. In short, these systems are not sustainable and cannot be reasonably relied upon to provide a consistent source of safe and affordable drinking water to their customers.

The State Water Board is willing and able to provide the City with the financial resources to move the consolidations forward. DDW, however, cannot issue the order with a blank check, especially where, as here, there has not yet been any agreement on the best way to complete the consolidations. In the same way the City feels stymied in its ability to prepare an effective consolidation plan without knowing how much money will be available from the State Water Board for the consolidations, the State Water Board cannot assess funding without agreement on some sort of plan and an application for funding submitted by the City. Although the orders themselves do not address the funding, section 116682(e)(1) makes clear that there are a number of things that are to occur as part of ordering the mandatory consolidation. Logic would dictate that these things do not have to occur as part of a consolidation order; but rather, will occur after the particular order is issued.

6. DDW Met All Requirements of Health and Safety Code Section 116682

The City argues that the orders do not demonstrate that a number of requirements of 116682 were met. All of the requirements were met, however, despite not being specifically addressed in the orders. For example, DDW included and consulted with representatives from Kern County LAFCO and Kern County Environmental Health Department on all the meetings, public meetings and public hearings.\(^{27}\) A representative from Kern County LAFCO and Kern County Environmental Health were present at the January 27, 2016 meeting and December 9, 2016 meeting. Similarly, even though it is not set out in the orders, DDW discussed the proposed consolidations with public water systems in the chain of distribution of the potentially receiving water systems, including California Water Service, when DDW and California Water Service met during their regularly scheduled quarterly meetings at which they discuss ongoing issues. The dates of these meetings were: September 7, 2016; December 6, 2016; May 31, 2017; September 14, 2017; January 30, 2018 and March 12, 2018. Similarly, staff from the State Water Board, Division of Financial Assistance, personally attended meetings on December 9, 2016 and January 16, 2017 in Bakersfield in order provide information about funding opportunities for the proposed consolidations. A follow up letter was sent to the City on June 23, 2017, advising the City about funding opportunities and encouraging the City to submit a funding application. In addition, a special project manager was assigned to work with the City on the funding application and project to evaluate adding the Old River and South Kern service areas to the City’s water system. Ultimately, the City decided not to submit an application.

The City also alleges that DDW failed to obtain the water systems’ written consent for the consolidation. This, however, is a misreading of the requirement for written permission from domestic well owners. Domestic wells are generally understood to serve no more than four connections.\(^{28}\) The provision cited by the City was intended to allow those served by domestic wells to be part of a consolidation too, if they affirmatively agreed. Because DDW does not have

\(^{27}\) Old River Administrative Record, Attachment 31; South Kern Administrative Record, Attachment 32.

\(^{28}\) AB 2501 amended Health and Safety Code section 116681 to define a domestic well as a “groundwater well used to supply water for the domestic needs of an individual residence or a water system that is not a public water system and that has no more than four service connections.”
jurisdiction over domestic wells that serve individual homes, it cannot order domestic well owners to be part of consolidation. If, however, a domestic well owner wanted to be part of the consolidation, domestic well owners needed to provide written consent. Nonetheless, even if one could read the requirement to apply to the water system’s wells, it is highly unlikely that either South Kern or Old River are capable of providing written consent as a legal matter.

As described previously, the record contains evidence that DDW encouraged voluntary consolidations before ordering the mandatory consolidations. Similarly, the record contains several enforcement actions that were taken against Old River and South Kern, with which they have been unable to comply. DDW was also not required to make findings or take any action regarding the rates the City will charge. The direction in section 116682(f)(2) is for the City, not DDW. As part of its consolidation plan, the City will need to address the cost issues.

The allegation that the orders are not consistent with Health and Safety Code section 116680 is also not supported. First, the communities served by Old River and South Kern are located across a rural highway, Taft highway, from the current city limits—just about one mile outside of where the City’s water distribution system currently ends. Second, the consolidations are not intended to encourage disorderly development, but rather address the unorderly development that already occurred long ago when these communities developed outside of the City’s boundaries without adequate drinking water infrastructure.

The City indicated it cannot provide water service to customers located outside the city limits due to a municipal code preventing such service. As a general matter, many jurisdictions have ordinances that limit where water may be served. Local ordinances should not and cannot be used to thwart state laws that are essential to carrying out important public policy objectives such as providing safe drinking water to nearby residents. The City has not stated that it cannot amend or change the local ordinance(s) to comply with the consolidation orders.

Moreover, according to DDW water system distribution files and the City’s website, the City’s water system does supply water to residents and business located in Kern County, outside the City limits. One area identified is the San Lauren Area (north of Rosedale Highway and south of the railroad tracks and Calloway Canal).29 The San Lauren area was previously served by the Fairhaven water system and is now served by the City’s water system.30 The City also provided a notification to the governing bodies (Kern County Board of Supervisors) whose jurisdictions are outside the City limits, concerning a drinking water quality issue in the San Lauren area which was required by State law (Health and Safety Section 116455).31

Additionally, at the meeting on January 27, 2016, the Kern County LAFCO representative indicated that the City could serve customers outside of their City Limits through an extraterritorial service agreement. Similarly, the Kern County LAFCO representative indicated that there would be nothing to prevent an extraterritorial service agreement. In addition, as explained above, there are locations that the City already serves water to customers outside of their limits.

The City also raises concerns that it does not have a legal right to perform maintenance or routine work on a pipeline outside of its jurisdiction, and that any costs of gaining access to the right of way for the pipeline would need to be passed on to ratepayers. The State Water Board agrees that any costs associated with obtaining an easement for the proposed pipeline would need to be

29 Old River Administrative Record, Attachment 35; South Kern Administrative Record, Attachment 36.
30 Old River Administrative Record, Attachment 34; South Kern Administrative Record, Attachment 35.
31 Old River Administrative Record, Attachment 36; South Kern Administrative Record, Attachment 37.
addressed as part of the funding package. In fact, the assessment of alternatives prepared for by the State Water Board includes easements in its assessment of the consolidation alternative. State Water Board policy expressly allows for the reimbursement of costs to acquire an easement that is “confined to the pipelines for which it was acquired” and integral to the project.32

Finally, the City raises concerns regarding how the order would impact its ability to comply with the requirements of the Sustainable Groundwater Management Act (SGMA). The City is concerned that there is no direction or guidance on how it should address domestic water connections and a water supply well outside of its boundaries. Although DDW appreciates that there is uncertainty about how to address areas outside of its groundwater sustainability agency, the fact that South Kern and Old River are not specifically identified as being located in the Kern River Groundwater Sustainability Agency (KRGSA) is based solely on lack of representation within the KRGSA. The City, South Kern, and Old River are all located within the same groundwater basin; however, that basin contains a number of small areas that were not included and for which a separate groundwater sustainability agency (GSA) could be created or the boundaries of KRGSA could be redefined to include Old River and South Kern. Simply put, SGMA does not create an obstacle to the consolidation, and should be able to be addressed within the GSA or at a basin-wide level through the groundwater sustainability plan, as the areas to be consolidated are within the same groundwater basin as the City. Where, as here, the entities to be consolidated are within the same groundwater basin, SGMA should not be used to prevent consolidations. It is important that the GSAs consider and account for the small communities within their basins, and not create artificial barriers to consolidation.

III. Conclusion

Small systems serving disadvantaged communities struggle, and the Legislature has recognized that one way to address the problems of these systems is by requiring consolidations. Consolidations are an important part of the State Water Board’s Human Right to Water policy by making it possible for the small systems to have the redundancy and resources necessary to consistently provide an adequate supply of safe drinking water. The process to get there, however, is not generally easy or simple. The approach set forth by the Legislature attempts to first persuade the water systems to work out the details themselves on a voluntary basis. Only if voluntary consolidation efforts are unsuccessful is the State Water Board allowed to issue a mandatory consolidation order.

This particular situation presents a textbook example of an appropriate use of the State Water Board’s mandatory consolidation order authority. Both Old River and South Kern are small failing water systems which serve severely disadvantaged communities, and which cannot provide a consistent supply of safe drinking water. The City successfully operates a much larger system, and the communities served by Old River and South Kern are located just outside of the city limits. As the record demonstrates, not only is the required consolidations the most cost-effective option, it is clearly the option for providing a consistent and safe supply of drinking water for the customers of Old River and South Kern.

As explained above, the issues raised by the City are essentially “paper” constraints and can be overcome or adequately addressed as the consolidation moves forward. Additionally, despite the

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32 State Water Board, Drinking Water State Revolving Fund Policy, p. 32.
City's allegations to the contrary, DDW complied with all applicable legal requirements when it issued the two consolidation orders.

Sincerely,

Darrin Polhemus
Deputy Director
State Water Resources Control Board, Division of Drinking Water

cc: (all via email)
    Kurt Souza, Assistant Deputy Director, DDW
    Tricia Watham, Regional Chief, DDW
    Caitlin Juarez, Water Resources Engineer, DDW
    Kim Niemeyer, State Water Board, OCC
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