M e m o r a n d u m

Date: March 1, 2021

To: Mr. Alan B. Lilly, Presiding Hearing Officer
State Water Resources Control Board
Administrative Hearings Office

From: **Department of Water Resources**

Subject: Comments on the Draft Proposed Order on the Sacramento County Change Petition

I. INTRODUCTION

The Department of Water Resources (Department) submits these comments on the Administrative Hearings Office's (AHO) January 22, 2021 Draft Proposed Order on the pending petitions of the County of Sacramento and the Sacramento County Water Agency (collectively, Sacramento) to change water rights Licenses 1062 and 4060. The Draft Proposed Order grants Sacramento's petitions to change water right Licenses 1062 and 4060 by adding a new point of diversion, new place of use and new purpose of use to the Licenses. The Proposed Order also amends the Licenses by reducing their maximum authorized diversion rates and annual diversion limits.

The Department has concerns with the Draft Proposed Order. In general, the Proposed Order fails to protect public trust resources at a time when it is generally recognized that more protection is needed. The Department believes the Draft Proposed Order essentially ignores the need to protect public trust resources in this case and instead requires the State Water Resources Control Board (State Water Board or Board) to rely on the Department and the U.S. Bureau of Reclamation (Reclamation) to make up any shortage of water as a result of these changes. The Department believes the AHO has missed an opportunity to draft a proposed order conforming to well established state policy that protects public trust uses and encourages good management of water rights.

The Department is concerned of future use of the precedent if the Draft Proposed Order is not amended. The following comments address specific concerns that all relate in one way or another to the Department's overarching concern that the Draft Proposed Order fails to protect the public trust, and places even greater burden on the already stressed State Water Project (SWP). It should be noted that by failing to protect flows that should otherwise remain in the public trust the Proposed Order has the practical effect of removing additional water from upstream storage and thus complicates the State Water Resources Control Board's own goals of protecting endangered species and the public trust.

II. COMMENTS ON DRAFT PROPOSED ORDER

. The Change Petitions Are Not a Re-initiation of Diversions and Use by Sacramento County

On several occasions, the Draft Proposed Order refers to the change petitions as simply allowing the "County" to "re-initiate diversion and uses" under the water rights Licenses. (See Draft Proposed Order, pp. 45 and 55.) While it is understandable and expedient to refer to the County of Sacramento, Sacramento County Department of Airports and the Sacramento County Water Agency (Water Agency), collectively, as the "County" (we did similar in this Comment Letter), it is disingenuous and incorrect to consider these two agencies as a single entity.[1]

The hearing record is full of statements and actions that demonstrate the County desired to transfer the Licenses to another entity, the Water Agency, and that it would be the Water Agency that would be putting the water under the licenses to beneficial use. There is no evidence, however, that the County ever again intends to put the water to beneficial use.

Put simply, the County and the Water Agency are not the same entities and to conflate them here in order to support the argument that this is a re-initiation of a water right sets dangerous precedence. If a change in place of use, change in purpose of use, change in point of diversion and change in who is putting water to beneficial use is simply a re-initiation of a water right, then all transfers arguably fall into this category. The Department is concerned that without further clarification as to why the AHO considers this a re-initiation of a water right, then other entities will be able to bypass the water rights application process by simply attaching their names to stale water rights and calling it a re-initiation of a water right.

The distinction is important because it allows the AHO to avoid having to state why it is proposing a different decision than the one the State Water Board made in Order WR 2014-0021 (*Millview Order*). In the *Millview Order*, the Board found the transfer of ownership to be an important factor in deciding to revoke the license:

> "If the State Board did not revoke the license, it would essentially allow Millview to initiate a new water right with a much earlier priority than could be obtained by following the proper procedures for obtain[sic] a new water right. This would be unfair to junior appropriators who have been relying on availability of water after the Mill closed, and to water users who followed proper procedures for obtaining a water right." (*Millview Order* at 17.)

The Draft Proposed Order avoids the above precedent by referring to the circumstances here as a re-initiation of a water right; but it is not. Here, as in the

[1] See *Vanoni v. County of Sonoma* (1974) 40 Cal.Ap .3d 743, 748-749 [holding that a water district remained a separate legal entity from a county, even though the county and district shared common boundaries, governing boards, citizens and taxable property, and the water district was performing functions traditionally performed by counties.].

context of the *Millview Order*, there is a transfer of ownership, whereby a new entity (i.e., the Water Agency) will be putting water to beneficial use under the Licenses – and trying to do so after the water under the Licenses has not been put to beneficial use for greater than five years.

The Department asks that the AHO clarify why it believes the policy consideration provided in the *Millview Order* is not applicable here. The AHO should clearly state in the Proposed Order the evidence relied on when the Proposed Order states that the change petitions will allow the "County" to re-initiate its water rights, as opposed to viewing the change petitions as allowing a transfer of ownership of water rights from the County of Sacramento to the Water Agency. Without such clarification, the Department is concerned that all permanent transfers of stale water rights could be argued to be a re-initiation of a water right, which, in turn, has implications on what additional requirements should and can be placed on the water rights.

For example, framing the change petitions as simply a re-initiation of the underlying water rights seems to allow the AHO to summarily conclude that the circumstances at issue here do not justify applying Term 91. (See Draft Proposed Order at 54-55.) In addition, the Draft Proposed Order indicates that granting the petitions is not seen as improperly infringing on SWP water rights because the petitions are allowing the "County" to re-initiate its senior (to SWP) appropriative rights. (See Draft Proposed Order 44-45.) The Department wonders if the AHO accurately viewed the change petitions as a transfer of ownership to nullify forfeiture, whether that accurate view would change the policy and legal conclusions in the Draft Proposed Order. At the very least, the Department asks for clarification as to why the AHO views this case as a re-initiation of water rights in order to limit the implications of any final order.

B. The Draft Proposed Order Fails to Follow the State Water Board's Own Reasoning and Rationale Found in the *Millview Order*.

The Draft Proposed Order presents an overview of past Board orders and, from those orders, summarizes factors that the Board has considered in license-revocation proceedings. The Proposed Order then applies those factors to the facts of this proceeding. The conclusion regarding license-revocation issues then attempts to distinguish the facts in this proceeding from those found in the *Millview Order*. This attempt to distinguish the *Millview Order* accurately recognizes that out of all the past Board orders regarding license-revocation, the *Millview Order* presents a very similar situation as found here and, thus, should be accorded particular attention.

The Department notes that in distinguishing the present case from the *Millview Order* the AHO creates confusion by outlining additional factors that the Board is to consider in a revocation proceeding. In addition to the five factors listed in section 4.2.5, one must apparently add 1) whether the Division of Water Rights (Division) participates in the hearing, 2) whether the California Environmental Quality Act has been diligently complied with, and 3) whether historical diversions were a substantial portion of the maximum authorized amounts under the particular water right. The Department highlights that notwithstanding the AHO's efforts to cull common factors from past Board orders, in order to distinguish its order from the *Millview Order*, the decision

regarding revocation appears to be based on much more than the five factors stated in the Proposed Order. Or, at least, it appears the AHO did not think the five factors were sufficient to distinguish the decision in the *Millview Order* from what is being proposed in the Proposed Order.

As stated above, the Department agrees that the *Millview Order* requires special attention here. Similar to the facts found in this case, the *Millview Order* dealt with a license that had not been relied on for at least five years, there was a transfer of ownership, water could not be put to beneficial use under the license without a change petition, the new proposed use was for municipal purposes, it was requested that the State Water Board utilize the last accurate and reliable information to preserve a portion of the license, and the unused water helped meet instream minimum flows for public trust resources protection. In fact, the only consideration missing from the *Millview Order* that sets it apart from here is the State Water Board did not determine whether there was a conflicting claim. Beside that issue, the facts, rationale and conclusions presented in the *Millview Order* are very applicable here and should be consistently applied.

Instead, the Draft Proposed Order attempts to distinguish the *Millview Order* by applying three additional factors mentioned above. The first factor addresses the Division's absence from this proceeding, apparently signifying to the AHO that revocation is not warranted. It is inappropriate to consider the Division's absence as a distinguishing factor for two reasons. First, the Division's participation or absence has nothing to do with whether water has been put to beneficial use under the Licenses at issue here. In fact, the record demonstrates the Division knew and believed that the Licenses were not being used, even suggesting voluntary revocation. (See Exh. Sac County 32.) Second, by bringing the Division's absence up as a distinguishing fact, the Department is left to presume that the AHO interprets the absence as a factor that does not support revocation. This interpretation assumes facts not in the record. The only explanation in the record that goes to why the Division did not participate came from one of Sacramento's witnesses. When asked why the Division was not pursuing revocation, Mr. Rowe stated that the Division neither had the time nor the resources to pursue revocation. (Hearing Recording 1:57:30-1:58:52.) Even if the AHO administrative rules allowed hearsay to be used as the sole support for a fact, lack of resources on the part of the Division does not address the merits of forfeiture and thus should not be a factor that nullifies forfeiture.

The second factor addresses the obstacles to approval of a change petition present in the *Millview Order*. While CEQA compliance was recognized as an obstacle, the State Water Board also stated that the fact Division staff had concerns regarding the status of the license was also an obstacle to approval of a change. (*Millview Order* at 13.) Ultimately, the State Water Board concludes that "neither the filing of a change petition nor any delays before it is approved or disapproved prevents a licensee from diverting and using water in accordance with the terms and conditions of the license as they read without the proposed change." (*Ibid*.) The Draft Proposed Order's focus on CEQA compliance is not matched in the *Millview Order* and should not be considered an important distinguishing factor when deciding whether to apply the *Millview Order's* rationale here.

The third distinguishing factor raises the issue that diversions under the license at issue in the *Millview Order* were substantially less than the maximum authorized amount while diversions under the Licenses here were substantial portions of the maximum authorized amount. The Department, quite honestly, does not know how to respond to this. One initial response is, "so what?" The Draft Proposed Order provides no rationale or precedence as to why the ratio of historical diversions to maximum authorized amount has any bearing on whether a license should be revoked. The subjectivity and novelty of this factor leads the Department to believe that the AHO was looking for anything to help avoid considering the *Millview Order* as precedent here.

The unfortunate result of the extraordinary attempt to distinguish the *Millview Order* and not concluding in a similar way is that the Department is left to conclude that there is no objective standard one can rely on when arguing that the State Water Board can and should revoke a license. One positive takeaway, however, is that future entities can be advised that if the Division does not participate in a revocation hearing before the AHO, then it is likely not worth the effort to pursue such an argument.

C. The Department's Legitimate Concerns Regarding Interference with Its Conditioned Water Rights Should Be Considered an Injury.

In considering whether approval of the change petitions will cause an injury to other legal users of water, the Draft Proposed Order concludes that essentially the Department has no right to the water at issue and thus the SWP water rights will not be improperly infringed on. (Draft Proposed Order at 43.) In making this conclusion, the Proposed Order misunderstands the basis of the Department's claim of injury and, again, is inconsistent with conclusions made in the *Millview Order*.

While the Department appreciates the conclusion that a conflicting claim[2] was present during the period of nonuse under the Licenses, the Department disagrees that the reasoning for the conclusion is consistent with Order WR 2016-0001 (*Morongo Order*). (See Draft Proposed Order at 39.) The Draft Proposed Order states that when considering whether to revoke a license, "the Board should consider claims to the water the licensee could have diverted by . . . licenses that used the water to help implement terms in their permits or licenses for protection of public trust uses or to meet other regulatory requirements. (See Order WR 2016-0001, p. 18.)" (Draft Proposed Order at 39.) The Proposed Order then concludes that "[b]ecause DWR and Reclamation used much of the water that could have been diverted under Licenses 1062 and 4060 to meet the Delta outflow and water quality requirements in their water-right permits, we conclude that a conflicting claim was present..... " (*Ibid*.)

The above rationale both misunderstands the Department's argument and misstates the situations that can give rise to a conflicting claim as put forward in the *Morongo*

[2] The Department maintains the argument that the State Water Board is not required to find a conflicting claim when deciding to revoke a license and believes the Draft Proposed Order would benefit from recognizing the State Water Board has discretion on whether to apply the rule or not in revocation proceedings.

Order. Describing what may be considered a conflicting claim, the *Morongo Order* states:

> "In addition, the *Millview* court recognized that conflicting claims are not limited to a new appropriation and beneficial use by another appropriator. Other situations can give rise to a conflicting claim and support a finding of forfeiture. One scenario involves the need for water to remain instream to protect public trust uses." (*Morongo Order* at 18.)

The above statements make a distinction between the appropriation and use by another appropriator and the need for water to remain instream to protect public trust uses. The Draft Proposed Order, on the other hand, conflates the two situations when it concludes that the State Water Board should consider whether another user relied on unused water to help meet terms in their permits or licenses.

With all due respect to Reclamation, for the periods of time the Department is concerned with use by the County of Sacramento, the Department did not use the water that could have been diverted under the Licenses; public trust resources used the water. During the period of injury identified by the Department, the Department does not use unregulated flow, it accounts for it. If there is insufficient unregulated flow to meet water quality objectives intended to protect public trust uses, then the Department releases stored water to help meet those objectives.

By conflating the two different scenarios outlined in the *Morongo Decision*, the Draft Proposed Order effectuates a slight of hand approach that avoids having to make the policy argument for why it is appropriate to take water away from public trust resources, especially at this time, and avoids seriously considering whether approval of the change petitions injures the SWP water rights. The approach results in the Draft Proposed Order summarily dismissing both of these important considerations by arguing that, yes, the Department used the water to meet its permits requirements, but it never had a <u>right</u> to that water so it is okay to allow that water to be used under the Licenses again. It should be noted that by failing to protect these flows for the public trust the Proposed Order has the practical effect of removing additional water from upstream storage and thus complicates the State Water Board's own goals of protecting endangered species and the public trust.

Getting back to what the State Water Board should really be considering, the Department argues that the analysis must consider whether the unused water is needed to remain instream to protect public trust uses. Given the fact that during balanced conditions all unregulated flow is needed to meet public trust needs and the State Water Board's own statements that the current flow regime is insufficient to protect public trust uses, the evidence here demonstrates that the need for water to remain instream is sufficient to present a conflicting claim. Once concluding that the need to protect public trust uses is itself the conflicting claim, the State Water Board must then decide whether to take water away from the public trust uses and allow the water to once again be diverted under the Licenses. In making this decision, the State Water Board should consider the needs of the public trust. The Draft Proposed Order

avoided making this decision and going through the necessary consideration by inappropriately concluding that the Department was the one using the water.

In addition, starting with the premise that the unused water under the licenses needs to remain instream to protect public trust uses, especially during balanced conditions, taking that water away by granting the change petitions results in injury to the Department. The Department agrees that it does not have a right to the unused water under the Licenses when that water is needed for protection of the public trust; it does, however, have a right to its stored water. Granting the change petitions does not take away water the Department had no right to use, as the Draft Proposed Order concludes, it requires the Department to release more stored water it absolutely has the right to use, which is an injury.

The State Water Board itself recognized this legitimate concern in the *Millview Order*. As described in that order:

> "SCWA manages the Russian River system with releases of water from Lake Mendocino reservoir storage which often controls river flows, especially throughout most of the summer and fall. When tributary stream flows are low, SCWA releases water previously stored in Lake Mendocino and Lake Sonoma to supplement the natural flows in the Russian River, and to provide flows for water supply, recreation, and aquatic habitat. (Citation omitted.) The CDDW is very concerned that the Russian River fishery has already experienced deleterious effects from water diversions and cannot withstand additional water diversions, especially during low-flow periods. (Citation omitted.) Because of the low-flow conditions of the Russian River and the status of anadromous fish dependent on adequate instream flows, the CDFW believes that the revocation of License 5763 will be in the public's best interest overall. (Citation omitted.) SCWA and CDFW raise *legitimate concerns* regarding interference with SCWA's conditioned water rights, which require the maintenance of instream minimum flows in the Russian River for public trust resources protection. (emphasis added)" (*Millview Order* at 16.)

Replace a few words and entities (e.g., the Department for SCWA, Sacramento River for Russian River, Oroville for Lake Mendocino and Lake Sonoma, and, perhaps, State Water Board for CDFW) and the above absolutely applies to the current situation. While the State Water Board chose to revoke the license at issue in the *Millview Order* and thus did not need to get to an injury analysis, the Department wonders how the State Water Board could find SCWA had legitimate concerns regarding interference with its water rights in the context of the *Millview Order*, but the Department does not have the same legitimate concerns here.

The inconsistency raised above is the result of the Draft Proposed Order's mischaracterization of what gives rise to a competing claim and misunderstanding that the Department used the unused water under the Licenses to meet its permit terms. The Department believes that correcting the mischaracterization and misunderstanding in the Draft Proposed Order will lead to conclusions that are consistent with past State Water Board decisions.

D. Revoking the Licenses During Periods When Term 91 Is in Effect Will Protect Public Trust Uses and The Department's Legitimate Concerns.

The Department reiterates its argument that the State Water Board should revoke the Licenses during the periods when Term 91 is in effect. As noted above, the Draft Proposed Order concludes that there is a conflicting claim present during the periods of nonuse, but mischaracterizes that conflicting claim as the Department and Reclamation using the water to help meet the Delta outflow and water quality permit requirements. Again, the correct characterization is that the non-used water is needed to meet instream needs to protect public trust uses. This is especially true when non-regulated flow is insufficient to meet the Delta outflow and water quality requirements designed to protect public trust resources. Taking water away from public trust uses during these balanced conditions will, in turn, require the Department to release more of its stored water, to which it has a legitimate concern.

The Department believes the best way to protect public trust uses and the Department's conditioned water rights is for the State Water Board to partially revoke the Licenses during the periods when Term 91 is in effect. The Department reiterates this approach as it was not discussed at all in the Draft Proposed Order and, thus, the Department is unsure whether it was even considered.

E. The Draft Proposed Order Does Not Encourage Prudence or "Good Husbandry" of Water Rights.

The Draft Proposed Order concludes that there are three factors that do not support revoking the Licenses: Sacramento County has definite plans for future use, the County diligently pursued the change petitions and the need for the change petitions arose due to factors beyond Sacramento's control. (See Draft Proposed Order at 40.) Based on these three factors, and the attempt to distinguish the *Millview Order*, the Proposed Order concludes that the State Water Board should not revoke the Licenses.

The way the Draft Proposed Order breaks the revocation discussion out into separate factors and only focuses on whether each factor was met or not, lulls one into focusing on the trees while missing the forest. The Draft Proposed Order contains no discussion on the relative weight one should give to each factor or fully describes how each these three factors were met. In essence the revocation factor test put forward in the Draft Proposed Order provides no standard; it instead provides a checklist, where presumably the decision to revoke or not is dependent on how many checks favor revocation and how many do not.

The approach taken in the Draft Proposed Order unfortunately loses sight of holding Sacramento to a standard that the State Water Board itself has stated. According to Decision 1247, in deciding whether to hold an entity accountable for non-use, the State Water Board should consider circumstances in which "a prudent man following the dictates of good husbandry, either could not or should not be expected to use the water during the interim." (Decision 1247 at 4-5.) The record in this case demonstrates

that Sacramento did not practice "good husbandry" of the Licenses. The lack of reporting, lack of knowledge regarding use under the Licenses, lack of maintenance of the diversion facilities, and lack of any action to maintain the licenses until 6-8 years after use under the Licenses ended demonstrates a real apathy toward the Licenses and their value.

Likewise, the record demonstrates that Sacramento planned to end agricultural practices on the current places of use as early as 2001. (See Draft Proposed Order at 5.) Since the leases expired in 2007, Sacramento had at least five years to plan out what it was going to do with the Licenses once agricultural practices ceased. The record contains no evidence Sacramento took any action other than a pump inspection in 2008 to put the water under the Licenses to beneficial use until it filed the change petitions in 2014. In fact, there is no evidence that Sacramento acted with any care or thought of the future with regard to the Licenses until the State Water Board staff suggested voluntary revocation. Sacramento did not meet the standard of a "prudent man" with regard to the Licenses.

Sacramento's actions should be viewed as an attempt to nullify forfeiture as opposed to prudence and good husbandry of water rights. The Draft Proposed Order, by concluding against revocation and approving the change petitions, will encourage entities to sit on water rights and wait for the State Water Board to do something before making any attempt to put water to beneficial use. The Department does not view the Draft Proposed Order as supporting good water management in the State.

F. Section 794(a)(1) of Title 23 of the California Code of Regulations Requires Information of the Presumed Use Under Licenses and Permits to Avoid Injury.

The Department is concerned with the Draft Proposed Order's rejection of our argument regarding California Code of Regulations, title 23, section 794, subdivision (a)(1). In a footnote, the Proposed Order states:

> "This regulation requires a change petition to include information about the amounts of water that would have been diverted and used in the absence of the proposed changes. This regulation does not alter the rule stated in the *tate ter Resources Control Board* Cases that the Board should apply the "no injury" rule in Water Code section 1702 to determine the effects of proposed changes on the rights of the other water users. (emphasis in original)" (Draft Proposed Order at 45, fn 32.)

The Department's interpretation of the position put forward in the Draft Proposed Order is that as long as a change does not initiate a new water right (i.e., increase the amount, season of diversion or source of water as outlined in the permit or license), then there can be no injury to junior appropriators because they do not have a right to

[3] The Department, however, is not arguing that Sacramento did not act prudently with regard to how it manages the lands surrounding the airport. Sacramento is not a bad actor in this case; it just has other interests than managing the Licenses and putting water to beneficial use.

that water. If the Department correctly understands the position, then the Department strongly disagrees with it.

The Department absolutely has the right to claim injury if the petitioned changes will increase the consumptive use under the Licenses. As stated in the *tate Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 740, "a change may be made in the place, as well as in the mode and objectives of the use, *if the quantity of water used is not increased*, and the change is not to the prejudice of others. (emphasis added)" The real inquiry, then, is what is the baseline to ascertain whether the quantity of water used is increased as a result of the petitioned changes.

The Department's first response is that when a license ceases to be used for a period of five or more years, then the right to change or transfer that license should cease as well. To allow otherwise allows an entity to reach back into a time and circumstances that no longer exist to develop the amount to be transferred. This prejudices other legal users of water because it ignores the true baseline of no use and, without accurate records of diversion and use, places the risk of an increase use of the water on downstream and junior appropriators.

The purpose and language of section 794(a)(1) is consistent with the position that if a water right is not being used, then it should not be allowed to be changed or transferred to the prejudice of others. Section 794(a)(1) requires information about the amounts of water that would have been diverted and used in the absence of the petitioned changes in order to protect against injury. Otherwise, why ask for the information and just allow the petitioned change to include the maximum amount allowed for under the permit or license.

Instead of focusing on what water the Department has a right to, the Draft Proposed Order should have focused on what diversions and use Sacramento should be able to claim based on the language of section 794(a)(1). Importantly, the language does not ask for what has been diverted and used or what is allowed under the permit or license; it asks for what *would be* diverted and used in the absence of the petitioned change. The language presumes that use is currently occurring under the licenses and is forward looking.

Section 794(a)(1)'s language does not make sense when diversion and use under a license has ceased. For example, what amounts would have been allowed should Sacramento had pursued a shorter-term transfer? In that context, the requirement is to provide what would have been diverted and used "during the period for which the change is requested[.]". Given the circumstances, the Department argues that Sacramento would not have been allowed to pursue a short-term change because of its lack of use. If this is the case in the short-term context, it should be the same in the long-term context.

The above discussion is intended to demonstrate that the appropriate response to non-use under a license is revocation; it is not to allow a permanent transfer of the license to a new point of diversion, new place of use, new purpose of use and new entity. To do so, would, as in the words of the *Millview Order*, allow the Water Agency

to "initiate a new water right with a much earlier priority than could be obtained by following the proper procedures for obtain[sic] a new water right." (*Millview Order* at 17.)

III. CONCLUSION

As detailed above, the Department believes the Draft Proposed Order misses an opportunity to protect public trust uses and encourage good management of water rights. There are also issues with the Proposed Order that, in the opinion of the Department, set negative precedent on 1) whether a license can be changed and transferred when there is no use and 2) how injury is determined from petitioned changes. The Department thus asks that the Draft Proposed Order be amended in accordance with the above comments.

Sincerely,

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