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June 30, 2014

Ms. Felicia Marcus, Chair
State of California - State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Re: July 1-2, 2014 Board Meeting
Comment to Agenda Item 5, Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversions to protect senior water rights

The Modesto Irrigation District (MID) appreciates this opportunity to submit the following comments to the State Water Resource Control Board's (Board) Agenda Item 5, Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversions to protect senior water rights.

As brief background, MID has been party to a historical partnership on the Tuolumne River among MID, the Turlock Irrigation District (TID) and the City and County of San Francisco (CCSF) since 1913. MID and TID (Districts) were organized in 1887 and jointly own some of the oldest water rights in California. Subsequent federal legislation, referred to as the "Raker Act," granted CCSF the right to divert and store water upstream of the Districts' diversion point, La Grange Dam. The Raker Act requires CCSF to ensure that certain amounts of water are delivered downstream to the Districts at certain times of the year to protect the Districts' senior water rights.

As both stewards to, and the most senior water right holders on, the Tuolumne River, the Districts and CCSF have developed a working partnership and physical solution to water supply on the Tuolumne that has effectively served irrigation, domestic and environmental needs through numerous water supply situations. Over the years the Districts and CCSF partnered in the construction of the Don Pedro project and entered into a series of agreements setting forth, among other things, how CCSF could operate its project, meet its water delivery obligations, serve environmental objectives and protect the Districts' senior water rights. This included the currently operative Fourth Agreement under which CCSF may pre-deliver water to the Districts when it is available, an arrangement sometimes referred to as the "water bank". This partnership has lasted over 100 years and has brought prosperity and stability to the communities which the partners serve.

MID is a member of the San Joaquin Tributaries Authority (SJTA) and supports and joins in the comments on Agenda Item 5 submitted to the Board by the SJTA. MID likewise supports and joins in the comments submitted by CCSF. MID also offers the following comments for the Board's consideration.

Curtailment of Post-1914 Water Rights Must Be Completed Before the Board Considers
Curtailment of Any Pre-1914 and/or Riparian Water Right Holder

The proposed emergency regulations greatly, and unlawfully, expand the Board's authority over pre-1914 and riparian water right holders and unlawfully remove due process protections from curtailed water right holders.

The Board states the emergency regulations are needed "to greatly increase timely compliance with and effective enforcement of the reporting requirements" of the Board issued post-1914 curtailment orders because, by late May 2014, less than 20% of curtailed post-1914 water right holders had responded with their certifications of compliance. (Board Informative Digest, p.7) Under the Board's existing authority and with appropriate Board time and effort, compliance can be increased, as evidenced by the fact that compliance reached approximately 32% by the close of June 2014.

MID strongly believes that the Board should first invest its efforts to verify or compel compliance from the approximately 70% of curtailed post-1914 water right holders that the Board determines have not yet complied with the Board's existing curtailment orders, before issuing new curtailment regulations or orders. The expansion of the Board's authority in these proposed emergency regulations is puzzling when the Board has not invested any effort into compelling compliance, other than to passively await certification. The Board's efforts to communicate with curtailed water right holders is especially important because, as other commenters have better described, individual water right holders may have physically complied with the Board's curtailment order but may not have understood that they were also required to send the Board a certification of compliance.

Prior to adopting expansive new emergency powers in the proposed regulation, the Board must expend ordinary efforts to discover the most basic information to inform its proposed enforcement activities. Ordinary Board inquiries that may provide useful information include, Have the non-responsive water right holders been contacted to explain the lack of certification? If it is Board policy to only send notices to one water right holder per diversion, no matter how many water right holders divert from that location, has the Board verified that all water right holders received the curtailment notice listing all of their obligations? Does the Board know the difference between a water right holder that did not submit a certification versus a water right holder that did not comply with the curtailment order? Also, which senior water right holder is being harmed by a diverter's failure to curtail as ordered and by what quantity of water? The

Board's nominal or non-existent efforts to discover the answers to these questions reflects the more appropriate next steps for the Board to take and not the emergency regulations that have been proposed.

Furthermore, MID notes that the Board is conducting investigations to confirm physical compliance with curtailment certifications that have already been filed. In fact, two Board enforcement staff conducted such an investigation to report on whether the Districts were in fact acknowledging the drought and the existing post-1914 curtailment order. The Board has sufficient resources to verify compliance by parties who *submitted* compliance certifications. The Board's request for a large expansion of enforcement authority under the proposed regulations is unnecessary and cannot credibly be based on arguments that the Board does not have sufficient resources to verify compliance by parties who *haven't submitted* compliance certifications.

MID urges simplicity here: the Board should use the same procedure to verify the compliance of diverters that have not yet submitted compliance certifications as it has already used to verify the accuracy of certifications actually filed with the Board on a timely basis. Respectfully, the Board's enforcement problem appears as much a failure to effectively develop, adopt and communicate its curtailment orders or to follow up on such orders once issued as a failure of water right holder compliance.

In short, the Board must, at a minimum, identify who is non-compliant, how much water is missing from the system because of this non-compliance, and who is the senior water right holder being protected. Without this fundamental information, the Board's adoption of this drastically expanded enforcement authority, which as explained more fully by the SJTA and CCSF removes all due process protections, will constitute nothing more than a naked attempt to use the current drought as an opportunity to expand its authority to senior water right holders. The Board should focus its efforts on verifying compliance with the May 2014 post-1914 curtailment orders before considering adoption of additional regulations as a prelude to curtailing senior water rights.

The Board Must Stop Illegal Diversions Before Considering Curtailment of Pre-1914 and/or Riparian Water Right Holders

Likewise the Board should first use its existing authority and resources to meet its current obligations to identify and stop illegal diversions in the Delta. It achieves little to prevent senior water right holders from taking their water if that water is only destined to be illegally diverted by others downstream. The Board has not invested any significant effort to curtail long-standing illegal diversions in the Delta, including those that the SJTA has specifically identified to the Board. As is true with regard to post-1914 water right holders that presumably have not complied with the curtailment orders, the Board must invest the necessary effort to curtail these

illegal diverters before the Board seeks an immense expansion of its authority and/or before the Board continues to insist that recognized water right holders curtail their otherwise lawful use of water.

The Board's intention to deprive water from lawful water right holders, notably without any due process protections, in order to protect as-yet-unidentified senior water right holders, while simultaneously failing to expend reasonable regulatory efforts to stop known illegal diverters who are certain to benefit after lawful water right holders stop diverting, contravenes law, common sense and basic fairness.

As Drafted, the Proposed Emergency Regulations Contain No Provisions Assuring Consistent Implementation

The Board has not provided any criteria to explain the triggers to curtailment under these emergency regulations or the methodology of their administration. Consistency in administering these regulations will be key, both for the regulations' legitimacy and for water operators' ability to continue providing critical water service to their customers.

The Board has failed to provide any specific metrics to identify what exactly will trigger the emergency curtailment and to whom will it be directed. Thus, the proposed emergency regulations leave unbridled discretion to Board staff in issuing curtailment orders without fair, equitable and legal foundation.

For example, expected metrics would describe the quantity of water required to meet the senior claim as well as the quantity accounted for by curtailing more junior diverters; the scope of the watershed within which the Board will compare water right seniority. Other important foundational questions include, who has not complied with a prior curtailment order, and under what circumstances will the Board grant a rehearing of its curtailment orders as well as which legal standards shall apply at the rehearing. Fundamental metrics and basic situational data are necessary in order to justify and administer the proposed emergency regulations. They must be defined for the Board and water right holders before the proposed emergency regulations are considered.

Also, assuming that the Deputy Executive Director and/or Executive Director are, notwithstanding the problems with this approach as identified in the SJTA's comments, empowered to exercise their pure discretion to implement the proposed regulations on a case-by-case basis, what will be the bases for such determinations? Again by way of example only, the Board should clarify the watershed within which they will compare seniority; the measurement criteria and methodology they will use to determine who will be curtailed and for whose benefit specifically; and any necessary logistics for water right holders to review the Board's clarification materials as soon as possible. The Board must publish the measurement criteria and

methodologies that will be used to administer the proposed emergency regulations *prior* to their consideration and possible adoption.

The Proposed Emergency Regulations Must Be Revised to Address the Duration of the Regulations

The proposed emergency regulations do not contemplate how or under what conditions the curtailments can be suspended or terminated. The Board's lack of specificity in the proposed emergency regulations concerning their duration is a critical barrier to their lawful or effective administration.

Other comments have sufficiently addressed the Board's inability to lift curtailments in order of seniority, which is required by law and directly contradicts the purported goal of the proposed emergency regulations. Moreover, lawfully administering water rights by seniority is simply downright complicated; and the wider the net is cast in the initial curtailment orders, the more complicated it becomes. This is an excellent reason alone to ensure that the metrics discussed above are applied on a river watershed basis, and not more broadly.

Also missing from the proposed emergency regulations are opportunity-driven "off-ramps" to curtailment such as rainstorm events. Should the Board choose to adopt the proposed emergency regulations, the Board must create procedures for senior water right holders to confidently divert water into storage during any and all rainfall events. MID's ability to pull itself out of the grasp of a fourth consecutive dry-year rests in its ability to independently and actively manage its water system, which is efficiently operated on a real time basis. MID urges the Board to include an effective and efficient mechanism in the proposed regulations for water operators to capitalize on any water storage benefits that nature is compassionate enough to provide.

The Proposed Emergency Regulations Do Not Create Any "New Water" In the System.

Further adding to water right holder uncertainty and confusion about the proposed emergency regulations is that they will not create any new water in the system. Inflows into reservoirs are, or very soon will be, less than or equal to the outflows. (See CCSF Comment re D. Steiner report.) Therefore, all the water being diverted in the system will soon be previously stored water and not subject to any curtailment orders. MID, with its partners on the Tuolumne River, already have an agreement that includes water supply management as well as voluntary environmental flow releases greater than the flow releases mandated by the Federal Energy Regulatory Commission. In short, MID and its partners have already planned for local needs, to include irrigation, municipal and environmental uses and are exemplary of local water purveyors who work together to meet local and regional water supply and environmental needs.

MID's concern is that the Board intends to disrupt these long standing, well-planned arrangements with untested, ambiguous and hastily proposed emergency regulations that serve absolutely no legitimate or useful purpose. The Board must be clear about its intentions towards senior water right holders and follow through on its numerous assertions, both written and verbal, that local solutions and operators are most effective at meeting local water supply needs.

MID thanks the Board for this opportunity to comment.