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Felicia Marcus, Chair

State Water Resources Control Board

c/o Clerk of the Board

Via Electronic Mail: commentletters@waterboards.ca.gov

Re: 7/1-2/14 Board Meeting Item 5 – Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversion to protect senior water rights. Comments provided for inclusion in the Record of Proceedings.

Dear Chair Marcus:

We respectfully submit these comments on behalf of our clients with riparian and pre-1914 appropriative rights including, but not limited to, Delta Farms Reclamation District No. 2030, Zuckerman-Mandeville, Inc., and Heritage Farms Co., Inc., and clients with previously curtailed appropriative rights who are or will be relying on the exception to curtailment for Minimum Health & Safety Needs to continue providing water to consumers.

GENERAL COMMENTS REGARDING CURTAILMENT OF RIPARIAN & PRE-1914 SENIOR RIGHTS.

Constitutional Authority to Curtail Riparian (Senior) Rights. The Board's authority to curtail senior rights (riparian) under the California Constitution rests solely in the doctrine of reasonableness, and the power to curtail unreasonable uses of water. Whether a use of water is reasonable or unreasonable is a question of fact determined on a case-by-case basis (citations omitted). The wholesale curtailment of riparian diversions without reference to the reasonableness of the specifics and a thorough analysis of each use being curtailed is unconstitutional on its face. Curtailing senior rights but continuing to deliver water under junior rights (i.e. contracts) is likely an unconstitutional taking of property through inverse condemnation (as further explained later herein). Using riparian diversions to irrigate farms and fields is presumptively not an unreasonable use of water, even as against interests as profound as the Public Trust. If the Board elects to curtail senior diversion rights, it must do so on a basis of that particular use being unreasonable. Not all uses of riparian diversions are the same. Some are more efficient than others. Irrigation by flooding, as opposed to more efficient methods such as micro-sprinklers and drip irrigation must be considered and reasonably differentiated. If water supplies are limited, then curtailment and allocation, to be reasonable, must take into account the relative efficiency of use and allow farmers and other water users to arrange their irrigation practices to maximize efficiency and minimize waste. Curtailment without regard to the reasonableness or unreasonableness of the intended use of diverted water as compared to diversions which will still be permitted notwithstanding curtailment is unconstitutional in California. The proposed regulations must embrace the foregoing concepts and reject wholesale curtailments of senior rights without fact specific determinations conducted in an advocacy proceeding where the affected parties have the right to appear and be heard.

Lack of Evidence That Curtailment Increases Availability of Water. A good portion of water diverted for farm irrigation is returned to the source of diversion along with seepage flows. The only water used and theoretically consumed is water actually used by a growing crop (consumptive use). The gross amount diverted is not the amount used by crops, and much of the diverted amount returns to the source as drainage effluent. Curtailing agricultural diversions will result in fallowed fields being allowed to be overgrown with weeds and other vegetative growth which will consume as much, if not more, water than properly irrigated crops. Without scientific proof that curtailment will increase available water supplies vs. allowing crop irrigation to continue, the Board should refrain from curtailing riparian diversions for agricultural purposes. Now that junior water rights have been curtailed, it is possible to measure and evaluate the effects of such curtailment on available water supplies. An example is Bouldin Island in the San Joaquin Delta, which, as a result of curtailment, has been fallowed and will experience overgrowth of weeds and native vegetation, which will in turn consume water (even though not irrigated) in amounts likely equal to the amount that a planted crop would consume. Curtailment decisions should be based on science – not mere conjecture, and the proposed regulations should require factual determinations that proposed curtailment will in fact conserve water. The regulations, as proposed, do not contain such a requirement.

Curtailment By Priority Of Right. The stated object of the Board is to engage in curtailment to “protect” senior water rights. The most senior rights are riparian. Beneficial uses within the realm of riparian diversions are, in the case of agricultural production, presumptively reasonable. Any scheme of curtailment must be based on the priority of rights from the most junior to the most senior. If any water is supplied to anyone during a period of curtailment, it must be supplied to the most senior holders – the riparian diverters. Within the category of riparian diversions, differentiation based on reasonableness of use should be considered and evaluated after all rights junior to riparian rights have been fully curtailed, and not merely curtailed on a wholesale basis. Rights that are junior to riparian rights should be curtailed, if at all, in the same manner and subject to the same factual scrutiny to determine “unreasonableness.”

Economic Impacts – Health & Safety. An actual curtailment of riparian diversions would have direct and collateral impacts of vast proportion and scope. Many curtailed farmers will go broke, be forced into bankruptcy and their lenders could be forced to foreclose on collateral, sustaining high losses as a result. Farm workers will be unemployed, wreaking havoc on their lives and the lives of their families as well as state and county assistance programs and drain tax revenues. Local communities in the areas of curtailment will be severely impacted at the merchant and tax revenue levels. The reclamation districts that depend on assessments or fees and charges to fund levee maintenance and drainage works will experience severe revenue shortfalls when landowners are unable to pay district charges and assessments. Such curtailments will thus directly and indirectly affect the lives and health and safety of numerous persons – not just unemployed farm workers and their families. Those least able to survive the effects of curtailment will be the most heavily affected. Thus, the proposed regulations must create a framework to extend curtailment exceptions to mitigate health and safety issues that are not as immediate as having water to drink, but just as important. Continuing to provide water to holders of rights junior to riparian holders while dramatically impacting large segments of the population through curtailment of senior rights is abhorrent and should not be permitted. Any curtailment in an environment where there is insufficient water to

“go around” must allocate all water fairly to spread the “pain” in a non-discriminatory and rational manner while respecting the relative priority of water rights holders. A far better plan would be to postpone curtailment until current crops have been harvested, then wait to see what the Winter holds in terms of moisture, and then and only then curtail diversions prior to the planting of next year’s crops if Winter rains and snow are again inadequate.

Compensated Takings. If “A” loses his or her water for the benefit of “B,” and if “B” has a right junior to “A,” then “A” has a right to be compensated. To the extent that the adopted regulations tax “A’s” senior water rights for the benefit of “B,” then a system of compensation for “A” and those similarly situated should be initiated as part of such regulations.

Determination of Level of Fines & Penalties. No information has been disseminated to explain the level (amount) of penalties and fines for violating curtailment orders set forth in the proposed regulations. There must be a reasonable relationship between the amount of fines and penalties and the value of water improperly diverted. If adopted in their present form, do the regulations stand for the proposition that an acre foot of water is worth \$2,500.00? Will that be the amount to be paid as damages for inverse condemnation if a claimant succeeds with such a claim?

The Sacramento-San Joaquin Delta Is Unique. The “Delta” is unique and the proposed regulations fail to take that uniqueness into account. As a tidal basin connected to the Pacific Ocean, there is always natural flow in the tidal areas of the Delta. While salt levels may increase to a point that farmers may not want to irrigate their crops, those decisions are personal to the affected farmers, and their right to divert cannot be curtailed on the basis that there is no natural flow. Clearly there is. It is established law in California that natural flow commingled with stored, released water can still be diverted by riparian takers who cannot be prevented from exercising their rights. Moreover, viewed on a “net” basis, farmers in the Delta use only that portion of water diverted that is required and used by the crops grown. Excess water and water from seepage is returned to the Delta by drainage pumps. Curtailment decisions based on gross diversions as opposed to actual consumptive use are unreasonable per se.

Curtailment Prior to Installing Salinity Barriers. For some time, the installation of salinity barriers to retard salt intrusion during times of low river flows has been discussed and contemplated, yet no such barriers are in place. Apparently the reduction in flows is not deemed sufficient to warrant the construction and placement of such barriers. No curtailment should occur until the proposed salinity barriers are in place.

Curtailment By Hierarchy of Crop Type And Value. Assuming, arguendo, that there is not enough water available for all crops and agricultural uses, and within the framework of determining the unreasonableness of a particular diversion, differentiation must occur as between types of crops (i.e. annual vs. permanent) and the value of the crop. The point here is to manage losses to minimize them. Losing a vineyard, orchard or other permanent crop has far greater financial and long-term consequences than losing an annual crop such as corn, alfalfa, or wheat. In addition crop insurance provides a source of damage mitigation for annual crops and can replace and offset a portion of losses for annual crops – including annual production from permanent crops, but would not offset or mitigate the complete loss of a vineyard or orchard in its entirety due to the death of trees and vines for lack of water. Thus, in an environment where there is insufficient water for all crops, and

some crops are covered by crop insurance but the value of vineyards and orchards is not, intelligent distinctions must be weighed and decisions made in a manner to keep uncompensated losses to a minimum and to spread losses as fairly as possible. Accordingly, the Board should consider establishing a prioritization or hierarchy of curtailment based on maximum mitigation of damages within each category and priority of water rights together with financial assistance grants to curtailed farmers to assist with the purchase of crop insurance. The purpose here is to minimize aggregate direct and collateral damages to farmers, communities, farm workers and their families, and to recognize that losing one year's crop is significantly different from losing a vineyard or orchard. This issue bears directly on the reasonableness of diversions and any findings of unreasonableness – which, as argued previously – is the only basis upon which the State may lawfully impair senior water rights. It is absurd (and illegal) to proceed with curtailment without providing both a lawful procedural mechanism to differentiate, analyze and make suitable findings as to the reasonableness or unreasonableness of diversions within a due process environment and as part of a regulatory framework - the express purpose of which is to minimize and mitigate damages in gross and over time resulting from curtailment.

“Stored Water” Is A Fiction. Virtually all water now in storage or ever put into storage is riparian water. Water is water, and, in the absence of dams and reservoirs, all water placed into storage was taken from a riparian source and “transmogrified” through legal fictions into “stored water.” For years, the State and Federal government projects have exported far more water from the Delta than legally allowed under the Delta Protection Act and other statutory limitations intended to maintain Delta water quality and adequate quantities. Water unlawfully exported from the Delta must be replaced for the benefit of those from whom it was taken – particularly in times of shortage in the Delta. There is no shortage of water at this time in Southern California. Reservoirs in Southern California hold far more water on a percentage of capacity basis than their Northern counterparts due to illegal diversions from the Delta. This imbalance must be corrected now and the pain of curtailment must be shared by all – not some. “Stored” water released to maintain fish flows must be made available to Delta and other Northern California diverters to offset the damage done by years of illegal diversions to Southern California water storage projects, and all exports must be curtailed if even a drop of water is taken from Delta diverters. Using the concept of maintaining fish flows as a smokescreen to permit continued exports from the Delta in direct violation of the Delta Protection Act and other applicable statutes and regulations must itself be curtailed.

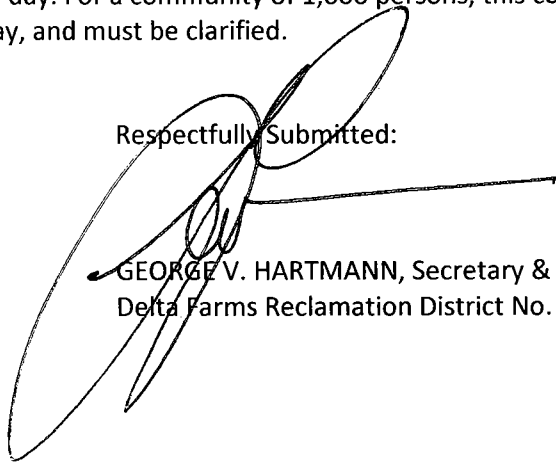
Inverse Condemnation. To the extent the Board proceeds with wholesale curtailment of senior rights without due process (i.e. delegation of curtailment authority to staff in the absence of fact-based determinations of “unreasonableness” on a diversion-specific basis), and continues to supply water to junior right holders and/or on a contract basis, the Board will have exposed the State to massive potential liabilities for inverse condemnation. If the State, by its conduct, injures one class of citizens for the benefit of another class, inverse condemnation has occurred. While water rights are “qualified” in the sense of being dependent upon reasonableness of use, wholesale curtailment of reasonableness-dependent rights without adequate regulatory procedures mandating diversion-specific factual determinations of reasonableness of each and every diversion erases the conditional features of the curtailed right. It is not enough to merely allege that a right is qualified or conditional and thus not subject to ordinary doctrines of taking by inverse condemnation. The qualification or condition is fact specific and process dependent. Taking the qualified right without

first determining the unreasonableness of use of that right while benefitting others not similarly situated is inverse condemnation. Wholesale curtailment without adequate due process and without adequate determinations of unreasonableness on a case-by-case basis will lead to wholesale inverse condemnation liability for the State of epic proportions that will make the Paterno judgment damage awarded seem tiny by comparison.

COMMENTS RE: HEALTH & SAFETY NEEDS PROPOSED REGULATIONS:

As proposed, draft regulation no. 878.1 (c)(1) – Minimum Health & Safety Needs – is confusing. Specifically, the wording “Diversion for domestic and municipal use under any valid basis of right, of less than 50 gallons per person, per day, and not exceeding 10 acre-feet per year of storage or 4,500 gallons per day of direct diversion,...” makes it appear that the limit of 50 gallons per person, per day, is limited to 4,500 gallons per day. The apparent intended meaning is that storage is limited to 10 acre feet per year or 4,500 gallons per day (diverted to storage), but the use of the disjunctive word “or” after the word storage could mean that water diverted not for storage but for Health & Safety needs is limited to 4,500 gallons per day. For a community of 1,000 persons, this could be read to mean 4.5 gallons per person per day, and must be clarified.

Respectfully Submitted:



GEORGE V. HARTMANN, Secretary & Counsel
Delta Farms Reclamation District No. 2030