FARELLA BRAUN + MARTEL LLP

PAUL P. "SKIP" SPAULDING, III
sspaulding@fbm.com
D 415.954.4918

September 16, 2014

Via Fax Transmission (916-341-5620) & E-mail (commentletters@waterboards.ca.gov)

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comments on Proposed Order Taking Action on Petitions for Reconsideration of and Addressing Objections to the Executive Director's January 31, 2014 Order that Approved Temporary Urgency Changes in License and Permit Terms and Conditions for the State Water Project and Central Valley Project and Subsequent Modifications to That Order

Dear Ms. Townsend:

Farella Braun + Martel and attorney Jennifer T. Buckman hereby submit the following comments and objections on behalf of Friant Water Authority and its member agencies (collectively "Friant") regarding the Proposed Order on Petitions for Reconsideration and Objections to January 31, 2014 (including modifications) Order on Delta Temporary Urgency Changes ("Proposed Order"), pursuant to the September 3, 2014 notice of the State Water Resources Control Board ("State Board" or "SWRCB"). Farella represents Friant Water Authority and Ms. Buckman represents both Friant Water Authority and its member agencies.

In brief, Friant requests that the State Board: (1) reject the Proposed Order; (2) grant Friant's Petitions for Reconsideration in their entirety and set aside the underlying Executive Director decisions; (3) set an evidentiary hearing at the earliest possible time to consider the underlying Temporary Urgency Change Petitions and related Orders; and (4) adopt all of Friant's comments and objections to the underlying Temporary Urgency Change Petitions and related Orders and enter a revised order incorporating them in full. The factual and legal grounds for this relief are set forth in detail below.

I. INTRODUCTION

Friant has been actively involved in the State Board's ongoing drought-related activities throughout 2014. In particular, Friant has submitted three letters of protest and objection to, or in the alternative Petitions for Reconsideration of, the Order Approving a Temporary Urgency

Change In License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives In Response To Drought Conditions (With Modifications Dated February 7, 2014, February 28, 2014, March 18, 2014, April 9, 2014, April 11, 2014, April 18, 2014 and May 2, 2014) (collectively "TUCP Orders"), which were issued in response to a series of Temporary Urgency Change Petitions ("TUCPs") jointly filed by the California Department of Water Resources ("DWR") and the United States Bureau of Reclamation ("Reclamation").[1]

Unfortunately, Friant's protests, objections and Petitions for Reconsideration have been ignored until now. The State Board has abdicated its responsibility to consider and take action on the many important issues that have arisen during this critical drought year. Instead, for nine months, the Board let its Executive Director make a series of important decisions beyond his authority adversely affecting the water supply for millions of Californians, including the irrigation and municipal and industrial water needs of Friant Water Authority and its member agencies and the livelihoods of the many communities and family farmers who depend on this water.

This situation is even more egregious because, by failing to take any action at the Board level, the State Board has allowed its staff, without proper delegation of authority and without following evidentiary and other procedural protections for stakeholders like Friant, to make incredibly broad, impactful and flawed decisions that that adversely affect Friant's legally protected rights. The Proposed Order drafted by staff is essentially designed to confer the Board's after-the-fact approval of all actions that its staff has taken over the last nine months. However, contrary to the text of the Proposed Order, the Executive Director's actions were not taken in conformance with law, are not in the public interest and have caused severe injury to Friant. Moreover, far from being moot, both the drought and the injuries caused by State Board staff decisions are continuing as the drought continues into the fall and next year. Indeed, at present, hundreds of homes within the Friant Service Area are completely without any water service at all, and thousands of rural schools are also in danger of losing the water supplies they depend upon to serve their students, many of whom are low-income.

In short, the Proposed Order is wholly lacking in merit from procedural, legal and policy viewpoints. The underlying TUCP Orders are fatally tainted by irregularity in the underlying proceedings, are not supported by substantial evidence and contain many errors of law, all of which violate the Board's governing regulations. Accordingly, the State Board should refuse to adopt the Proposed Order, set aside the underlying decisions and immediately schedule an evidentiary hearing on all issues raised by Friant.

[1] Friant's submissions are dated March 2, 2014, April 28, 2014 and May 13, 2014 and are expressly referred to in the Proposed Order.

II. BACKGROUND FACTS

A. Summary of Salient Facts

As you are well aware, California has been experiencing critically dry conditions for many months. As a result, and pursuant to the specific terms of the SWRCB's prior orders, much of the water pumped from the Delta in 2014 and delivered into San Luis Reservoir has been natural and abandoned flows from storms, rather than water released from storage in reservoirs.

Reclamation holds the senior water rights to pump natural and abandoned flows from the Delta. Applications 9363 and 9364 have priority dates of August 2, 1938, and authorize the United States to divert directly from the Delta up to 10,000 cfs to provide, among other things, a substitute water supply to be delivered through the Delta Mendota Canal. Application 9368 also has a priority date of August 2, 1938, and it authorizes the United States to divert 4000 cfs from Old River at the Tracy Pumping Plant for irrigation and domestic purposes on up to 320,000 acres in the central and western portions of the San Joaquin Valley.

The State Water Project ("SWP") permits for diverting water from the Delta have priority dates of August 24, 1951 (Application 14443), and March 15, 1957 (Application 17512). These are junior to the Central Valley Project's ("CVP") Delta water rights – by more than a decade.

This year, for the first time in the 60+ year history of the CVP, Reclamation has not provided the required amount of substitute water supply to satisfy the demands of the Exchange Contractors, who hold the prior water rights on the San Joaquin River, because: (1) the State Board and/or the National Marine Fisheries Service ("NMFS") has ordered Reclamation not to deliver water stored behind Shasta Dam consistent with its contractual obligations to the Exchange Contractors, but rather to retain it for future unspecified uses by unknown persons, despite the terms of Reclamation's permits and contractual duties; and (2) DWR has insisted that half of the water pumped from the Delta be provided to its junior contractors, even though the senior water rights of the Exchange Contractors have not yet been satisfied. As a result of these decisions, on May 13, 2014, Reclamation announced that it would open the gates of Friant Dam, and release water down the San Joaquin River for use by the Exchange Contractors. The Friant Division users, who have planted their orchards and vineyards, and built their cities, in dependence on the reliability of the water behind the dam they paid for, have been and continue to be deprived of their CVP water supply.

Because California water law follows the prior appropriation doctrine, the seniority of the water rights associated with the Friant Division has meant that these supplies have historically been the most reliable supplies developed by either the CVP or the SWP. The usurpation of those senior water rights this year has deprived Friant of all of its surface water supply. This has had and will continue to have devastating effects on the 15,000 small family farmers of the Friant Division, since over 70% of the Friant Division service area is dedicated to permanent plantings that will die without a water supply, and many of the Friant Districts have little to no access to groundwater supplies.

Moreover, as the State Board is well aware, the permits issued to Reclamation for the Friant Division also include municipal and industrial purposes, and the Friant Division contractors include the City of Fresno, the State's fifth-largest city. When the water that rightfully should have gone to Friant was wrongfully diverted to junior appropriators, many communities were left without any surface water supplies. Since the Friant Division is a conjunctive use system, this has had the predictable result of causing hundreds of well failures. For example, the Columbine Elementary School, one of the M&I uses served by Friant, received no CVP water this year. It has been forced to rely exclusively on wells to continue to serve its students, over 50% of whom are low-income students who qualify for meal service (the sanitary preparation of which, obviously, requires water). One of those wells failed during the summer session and emergency water had to be used to ensure that the students would be able to use the toilets. The school drilled the remaining well deeper and banned all outdoor water use, but it is not clear that this well will last through the school year. This is just one example of the hundreds of people who have been deprived of the ability to obtain sufficient water for their most basic needs as a result of not honoring the seniority of the Friant Division water rights.

The economic damages that will result from the SWRCB's failure to enforce the CVP's senior water rights certainly will be severe, as groundwater alone cannot supply all the needs of the San Joaquin Valley, and the strain of this burden may well cause the agricultural economy to buckle. **But even more fundamentally, unless the State Board reverses the course set by its Executive Director and follows the law, hundreds of homes and thousands of people within the Friant Service Area will continue to be left without any water supply to their homes, schools, and businesses.**

B. History of These Proceedings

On January 31, 2014, in response to the original TUCP and without giving notice to affected parties or conducting any type of hearing, State Board staff issued an Order to amend the Bay-Delta Water Quality Control Plan that was approved and adopted under D-1641. The Executive Director's Order: (1) reduced the amount of Delta outflow that would otherwise be required under D-1641 from 4500 cfs to 3000 cfs; (2) restricted CVP and SWP export pumping in the Delta to 1500 cfs for use for "public health and safety"; and (3) required DWR and Reclamation to keep all water "conserved" by virtue of the order "in storage for use later in the year for purposes of maintaining water supplies, improving water quality, or protecting flows for fisheries." Essentially, the January 31 Order gave 6000 acre-feet per day to the Delta and restricted all of the CVP and SWP water users to 3000 acre-feet per day.

Almost immediately after the Executive Director issued the Order, Friant and other CVP contractors contacted State Board staff and began lodging objections to the improper attempt by SWRCB staff to override the Congressionally authorized irrigation purposes of the CVP via an amendment to a water quality control plan. Moreover, it was subsequently acknowledged that the "health and safety" limitation had not been needed for most major municipal water suppliers, since they had adequate supplies to deliver water to serve their customers during this drought. Unfortunately, the rural communities of the Friant Division, and their reliance on CVP supplies, were utterly ignored during this calculus. While the State Board staff acknowledged that some

smaller communities that had no adequate backup water supply, they seemingly forgot that the San Joaquin Valley includes numerous small rural communities.

The February 7, 2014 Order clarified that DWR and Reclamation would be required to comply with D-1641 during storm events, and that their pumping could be increased over 1500 cfs only when there were natural or abandoned flows in the Delta, or there was transfer water being moved.

From February 1 to June 30, D-1641 establishes a Delta outflow range from 7100 to 29,200 cfs. This range is desired to move the location of X2, which is water of a certain specified salinity level that is viewed as providing suitable habitat for the Delta smelt, an endangered species of fish. Although the smelt is a fish, biologists say it is not a good swimmer, and therefore D-1641 required high levels of outflow to keep the smelt from becoming entrained in the water export pumps and killed. However, this year's operations proved the fallacy of relying exclusively on D-1641's numeric outflow standards in the absence of credible scientific data of harm to smelt: throughout the period established, smelt reportedly were not present near the export pumps and were not being entrained or killed. The February 28, 2014 Order continued the adjusted Delta outflow level of 3000 cfs through the end of March. This was better than the disproportionately high outflow range set in D-1641, but it is still not clear that these flows were needed or even contributed any benefit to smelt.

The March 18 Order indicates that it was intended to allow the CVP and SWP to take advantage of the storm events that had occurred in order to move more water south of the Delta where it was most needed. The March 18 Order permitted exports of natural and abandoned flows up to the Export Limits contained in Table 3 of D-1641, when precipitation and runoff events occurred that allowed the DCC Gates to be closed and the projects were in compliance with the flow or salinity requirements included in footnote 10 of Table 3 in D-1641. Unfortunately, though, the CVP and SWP actually lost water as a result of this action because the National Marine Fisheries Service and the United States Fish and Wildlife Service demanded a "payback" for the increased pumping during the storm events. According to the CVP contractors' calculations, the volume of water lost through foregone pumping demanded by the fishery agencies exceeded the volume that was captured and moved to San Luis Reservoir during and following the brief storm events in March. The March 18 Order also removed the "health and safety" restriction on CVP and SWP water use.

On April 8, Reclamation and DWR prepared a Drought Operations Plan ("DOP"). Unfortunately, the DOP was based on a hydrological forecast from March, so it did not include any of the gains from the March storms and was a month out of date even when it was issued. For this reason, the SWRCB's April 9 Order merely extended the Delta outflow modifications of the March 18 Order into April, and noted that a comprehensive update to the Order would be issued in the near future to address other parts of the Drought Operations Plan, once DWR and Reclamation updated it to reflect existing conditions.

The April 11 Order required Reclamation, from April 11 through June, to provide minimum San Joaquin River flows at Vernalis of no less than 700 cfs on a 3-day average until

the start of a 31-day pulse flow period occurring during April and May. This Order required Reclamation to make extensive releases from New Melones to meet standards at Vernalis, but did not allow Reclamation to capture any of the water that would be released from storage and export it for use south-of-Delta.

The April 18 Order allowed for exports of 100% of the 3-day average of San Joaquin River flows at Vernalis or 1500 cfs – whichever is greater. According to the Order, it was intended to allow both Reclamation, which was releasing this water from storage and pumping it through its own pumping facilities, and DWR, which was doing neither, to capture this water for export south-of-Delta. It was not clear why the Order allowed a junior water user – the SWP – to share this water when Reclamation's permits are senior to DWR's and the needs of Reclamation's water users had not been satisfied.

On May 2, 2014, just 4 days after the prior April 28 deadline for filing protests, SWRCB staff issued another modification to the Order on the Temporary Urgency Change Petitions. The May 2 modified Order approved changes to Delta Outflows during May and July, changes to the Western Delta EC requirement, and changes to the Sacramento River flow requirements.

The May 2 Order incorrectly stated that it "ensure[s] the protection of prior water rights" and that "modifications to the Order have been made where appropriate." These statements are wrong because: (1) the Order allows the usurpation by junior water users of rights which have been adjudicated and held to be senior; (2) California law requires all water users to follow, and the SWRCB to uphold, the law of prior appropriation; and (3) the SWRCB staff have not modified these orders to require Reclamation and DWR to follow the prior appropriation doctrine. Instead, through these TUCP Orders, they have, approved a series of drought operations plans that violate fundamental principles of California water law and the CVP permits as they have been interpreted by the courts.

On May 13, 2014, without any prior discussions with the affected Friant Division contractors, Reclamation issued press releases announcing its update to the DOP and its choice to allocate water to junior water rights holders such as the refuges even though the senior water rights have not been satisfied.

Friant actively participated in commenting on, objecting to and challenging this series of TUCP Orders. Friant filed separate protests, objections and petitions for reconsideration on March 2, April 28 and May 13, 2014 (collectively "Friant Petitions"). Friant also incorporated into the Friant Petitions the objections, comments and legal arguments of certain other parties. These Friant Petitions include all of the arguments set forth herein and are specifically incorporated by reference into these comments in their entirety.

The State Board made no response of any kind to Friant's Petitions. Until the Proposed Order was released on September 3, neither the Board's governing body nor Board staff provided any written responses to any of Friant's protests or objections. Additionally, at no time has the State Board conducted any adjudicatory hearing related to any of these proceedings, nor

has it made any findings, apart from the Executive Director's TUCP Orders, relating to the water rights priorities thereby affected.

III. COMMENTS AND OBJECTIONS

A. These TUCP Proceedings Have Been Rife With Procedural Irregularities and With Abuses Of Discretion and Rulings That Have Prevented Fair Hearings.

To date, the State Board has not taken any direct action to address the issues raised in the TUCPs and their impact on water exports and water rights throughout the state. Faced with one of the most significant water issues the Board has ever faced, and one that has drawn national, if not international, attention, the Board has essentially abdicated any and all responsibility to its Executive Director and staff. All of the TUCP Orders have been issued by the Executive Director, and at no time has any stakeholder been afforded the opportunity for an adjudicative hearing, even though the TUCP Orders have the effect of overturning the prior appropriation doctrine and depriving the Friant Division contractors of their property rights.

1. The State Board has Abdicated its Responsibility and the Executive Director Has Acted Outside His Authority.

At the outset, it should be noted that there is no Water Code section authorizing the State Board to amend D-1641 on the basis of a TUCP. Rather, the TUCP process is reserved for other, specifically enumerated activities. Thus, it appears that there is no legal basis for the process the State Board and its staff have chosen to employ this year.

Nor does the Proposed Order cite any valid legal basis to support this process. In Section 4.6.2 of the Proposed Order, the SWRCB relies on Resolutions 2012-0029 and 2012-0061 to support its position that the Executive Director had delegated authority to act on the TUCPs. However, neither of these resolutions provides the Executive Director with the power to control any and all proceedings and decisions relating to a TUCP without any action whatsoever from the State Board itself or one of its individual Board members.

Section 2.2 of Resolution 2012-0029, cited in the Proposed Order as authority, delegates to **the Board members individually** the authority to act on a TUCP, including holding a hearing on a petition and making preliminary findings required to act on a TUCP. In no way can it be read to confer this same authority on the Executive Director, who is not a Board member. The Proposed Order attempts to cure this deficiency by pointing to Section 4.4.1, which states that the Deputy Director must refer objections to TUCPs to the Executive Director "for action under section 2.2." The SWRCB argues that this text, read in conjunction with Section 2.2, confers authority on the Executive Director to act on TUCPs and related protests, objections and petitions.

The claim that "for action" somehow confers on the Executive Director the ability to take action under Section 2.2 *himself*, when Section 2.2 is clearly limited only to actions *individual*

Board members may take, lacks any foundation no matter how you read Resolution 2012-0029. Rather, a simple and clear reading of Section 2.2 and Section 4.4.1 together establishes that the action the Executive Director must take is to refer the matter to the SWRCB or one of its individual members for action. There is no support for the Proposed Order's reading that two words – "for action" – delegate to the Executive Director authority that is specifically delegated only to individual SWRCB members. Furthermore, California Code of Regulations, title 23, Section 806, which addresses "Notification of and Objections to Temporary Urgency Changes," specifically states that "[a]ny objections to a temporary urgency change petition ***will be heard by the board*** . . . ." 23 C.C.R. § 806(c) (emphasis added); *see also* 23 C.C.R. § 804(c) ("The **board** shall give **prompt** consideration to any objection [to a temporary chance due to transfer or exchange of water or water rights]") (emphasis added).

Nor does Resolution 2012-0061 confer such authority – indeed, it establishes that the Executive Director *lacks* the authority he has purported to assert in these TUCPs. Resolution 2012-0061 identifies what authority is delegated to the Executive Director. However, the authority to act on a TUCP, including related protests, objections and petitions, is nowhere to be found. The fact that such is not among the list of actions the Executive Director is *precluded* from taking does not establish that the authority is therefore assumed, as such would be an absurd result. For instance, the authority to act on petitions from RWQCB actions is not specifically precluded, but no one would argue that the Executive Director has such authority. In sum, the Proposed Order illegally attempts to create delegated authority where none exists.

2. No Timely Responses, Nor Any Hearing, Were Provided in Response to Any of the Objections, Protests and/or Petitions or the Issues Raised Therein.

Additionally, the SWRCB failed to provide timely responses to objections, protests and petitions, and failed to conduct any sort of evidentiary hearing or create a similar opportunity to be heard, thereby depriving the Friant contractors of their due process rights and leaving Friant in a position where no record is created and no clarity on its rights and obligations was provided.

The Proposed Order addresses the "timely response" issue in a legally insufficient manner by assuring the reader that "the Executive Director reviewed and considered incoming objections." Proposed Order, at 45. Since there is no record of what was considered and how it influenced the TUCP decisions, this is impossible to verify. The fact that minor changes were supposedly made to subsequent TUCP Orders in light of protests, objections and petitions does not cure the fact that *no response* was provided to the great majority of the concerns submitted to the SWRCB. Specifically, not a single response was provided to Friant's Petitions dated March 2, April 28 and May 13 until September 3, when the Proposed Order was released for public comment, and *none* of Friant's concerns have been rendered moot, as discussed below.

Similarly, the Proposed Order brushes aside the fact that not a single hearing occurred during this entire TUCP process, despite the extremely high stakes involved and the requests from Friant and others to be heard on these important issues. To claim that no party was deprived of its property interests is to ignore the fact that long-standing contractual rights were

obliterated without any adjudicative hearing, leaving Friant and its members without any CVP water. Insofar as the TUCP Orders have the effect of overturning the prior appropriation doctrine and depriving Friant Division contractors of their property rights, the contractors were required to be afforded the right to an adjudicative hearing. None was provided.

It is noteworthy that neither the Governor's Executive Order B-21-13 nor the January 17, 2014 Emergency Proclamation authorized or directed the State Board to disregard the procedural requirements identified above. In fact, both documents directed the State Board, with no mention of the Executive Director, to take actions on covered petitions. Moreover, the Emergency Proclamation directed the State Board (not the Executive Director) to "consider" (not automatically adopt) the modification of release limitations and diversion requirements. Accordingly, the Proposed Order's apparent attempt to justify the Board's failure to take action or to observe the required evidentiary hearing and related requirements because of the emergency needs and directives set forth in these documents has no basis whatsoever and is therefore unsupported by substantial evidence.

The State Board ignored its legal responsibilities, improperly delegated its authority, and generally stayed completely out of the picture while the biggest water crisis to hit California in recent memory unfolded. For nine months, parties who had properly and timely submitted protests, objections and petitions were left in the dark and went unheard, with no record being created, while their property rights were taken and their property interests impacted. These procedural errors constitute "irregularity in the proceedings" as identified in Cal. Code Regs., Tit. 23, § 768 and they prevented the Friant Division contractors from receiving a fair hearing. These errors are not properly, completely or accurately addressed in the Proposed Order, and for that reason the Proposed Order should be rejected in its entirety.

B. The Proposed Order Fails to Properly Address the Substantive Issues Presented in Various Protest Letters and Petitions For Reconsideration.

1. The Proposed Order's Attempt to Avoid Addressing Key Issues Because They Are Supposedly Moot Defies Applicable Law and Cannot Be Sustained.

The Proposed Order drafted by staff attempts to avoid any administrative or judicial review of the Executive Director's decisions on the basis that those decisions are unreviewable because they are supposedly moot. However, staff has made a fundamental legal error: under California law, these decisions are not moot and they are also fully justiciable because the drought is continuing (as the Proposed Order concedes) and these issues are fully capable of repetition.

Under California law, "a case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief." *Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation*, 136 Cal. App. 4th 1049, 1069 (2006); *see also Simi Corp. v. Garamendi*, 109 Cal. App. 4th 1496, 1503 (2003). Here, however, a decision by the State Board to refuse to adopt the Proposed Order and provide Friant with a hearing on the issues

raised herein would have both practical effect and provide Friant (and others) with effective relief. For instance, it would provide Friant with an opportunity to be heard, providing relief in the form of due process. Additionally, it would prevent the adoption of a Proposed Order which effectively dismisses all of Friant's concerns and prevents the Friant Division from receiving its CVP allocation.

Even if the State Board agreed with its staff that certain (or all) of Friant's concerns are moot, this is clearly a case where a mootness exception would apply. It is well settled that, where an issue of public importance is capable of repetition yet avoiding review, it is not considered moot and is subject to judicial review. *See Gonzalez v. Munoz*, 156 Cal. App. 4th 413 (2007); *Hammond v. Agran*, 76 Cal. App. 4th 1181 (1999) (dispensing with mootness contention involving election statutes merely because election had already occurred). That is, if a matter is of general public interest and is likely to recur in the future," resolution of the issue is appropriate "even though an event occurring during its pendency would normally render the matter moot." *Californians for Alternatives to Toxics*, 136 Cal. App. 4th at 1069; *see also Rawls v. Zamora*, 107 Cal. App. 4th 1110, 1113 (2003).

In *Californians for Alternatives to Toxics*, the trial court found that plaintiff's mandamus claims, which contended that the Department of Pesticide Regulation abused its discretion in renewing without reevaluating certain pesticides, were moot because the annual renewal of pesticides moots challenges to the previous year's renewal decisions. *Id*. at 1069. The Court of Appeal reversed, holding that "[t]his case raises important issues of public policy that are likely to recur, yet will evade review because of the cyclical nature of the renewal process." *Id*. Courts in other cases, where there is or may be an annual renewal or evaluation of an issue, have found that actions are not moot under the mootness exceptions. *See City of Sacramento v. State Water Resources Control Bd.*, 2 Cal. App. 4th 960 (1992) (no mootness where annual review of pesticide plans will continue); *Di Giorgio Fruit Corp. v. Department of Employment*, 56 Cal. 2d 54, 58 (1961) ("The very shortness of the harvest season would preclude appellate review in mandate proceedings if the end of each season were treated as rendering the appeals moot").

Here, the fact that there may have been modifications to the TUCP Orders or rainfall that increased the available amount of water cannot render Friant's protests and petitions moot, because as the SWRCB concedes, the drought condition is *ongoing*, and the same or similar situation will need to be addressed next year. Just like the situations in the cases cited above, it now appears highly likely that the SWRCB will have to undergo continuous review of its TUCP Orders and DOP during the upcoming year. Thus this is precisely the situation where a claim is capable of repetition, i.e., in every drought year, and with every new TUCP Order, yet evading review, i.e., after a rainfall. The SWRCB cannot on the one hand use the fact that the drought is ongoing as a basis for the TUCP Orders, and on the other hand claim that the injuries to Friant and others are moot. Additionally, and as discussed at length above, the Friant Division was neither impacted by the rainfall nor helped by the TUCP Order modifications – it still did not receive its CVP allocation.

2. The Proposed Order Does Not Serve The Public Interest.

In Section 4.1 and accompanying footnote 6, the Proposed Order gives short shrift to Friant's (and others') argument that the TUCP Orders do not best serve the public interest. Indeed, the Proposed Order primarily reiterates the fact that California is in a drought and that the drought is ongoing. The Proposed Order strongly implies that, given the existence of the drought and the divergence of views on how to proceed, the Executive Director has full authority to allocate water as he sees fit in his discretion throughout the drought period. The concerns of Friant are relegated to a footnote and dismissed summarily without explanation of the underlying statutory factors because the Executive Director supposedly "appropriately balanced" the public interest factors. This approach fails to provide substantial evidence to support the Executive Director's public interest determinations.

As Friant's Petitions reflect, the determination of what level and type of appropriation is in the public interest requires balancing of multiple factors. *See, e.g., National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 447 (1983); *Environmental Defense Fund v. E. Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 198 (1980) (Water Code includes hearing requirements and judicial review procedures "to assure that board action under these sections properly balances the rights of the appropriator with the needs of the public"). The TUCP Orders fail to even take the public interest into consideration, much less make the required balancing. And the Proposed Order does no better.

The practical effect of the TUCP Orders and actions taken under them has been to cut off the Friant contractors' CVP water supply entirely. Depriving the Friant Division of its entire CVP water supply is already resulting in catastrophic loss. Reclamation's permits to divert water at the Delta to serve the Exchange Contractors have the most senior priority dates of any of the permits issued for CVP or SWP exports. The satisfaction of the obligation to provide this substitute water supply to the Exchange Contractors is what allows Reclamation to develop water for delivery to the Friant Division. The economy and fabric of the Friant Division has developed in reliance on these highly reliable water supplies. More than half of Friant's Service Area is in permanent plantings, and the percentage is even higher in the Class 1 districts. The TUCP Orders diverted exports that were properly claimed by the CVP to the State Water Project, thereby reducing Friant Division CVP supplies to zero. There is no evidence in the record to show that any consideration at all was given to how this decision would impact the rural communities that rely upon the Friant supplies. Indeed, the record is devoid of evidence that any of these facts were considered in a public interest "balancing".

Without performing the balancing that is required (following notice and a hearing, and due consideration and weighing of the evidence), the TUCP Orders threaten the social and economic fabric of the entire Friant Division. These public interest factors must be taken into consideration and weighed against other competing factors, including the need to maintain water quality in the Delta. Unfortunately, however, the TUCP Orders and the Proposed Order do not contain any evidence (and certainly not "substantial evidence") that the State Board has even taken any of these public interest factors into consideration, and it certainly makes no attempt to balance them.

3. The TUCP Orders Have Caused and Will Continue to Cause Significant Injury To Friant And Its Member Agencies.

As noted in each of Friant's Petitions, the Friant Division contractors hold contracts that entitle them to CVP supplies developed on the San Joaquin River after satisfaction of the Exchange Contractors' senior water rights. Article 3(n) of each of the contracts between Reclamation and each Friant Division long-term contractor reflects this arrangement:

> (n) The rights of the Contractor under this Contract are subject to the terms of the contract for exchange waters, dated July 27, 1939, between the United States and the San Joaquin and Kings River Canal and Irrigation Company, Incorporated, et al., (hereinafter referred to as the Exchange Contractors), Contract No. llr-1144, as amended. The United States agrees that it will not deliver to the Exchange Contractors thereunder waters of the San Joaquin River unless and until required by the terms of said contract, **and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it** from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller and Lux Water Rights (Contract llr-1145, dated July 27, 1939) (emphasis added).

Under this contract provision, Reclamation has contractually bound itself not to "voluntarily and knowingly" render itself unable to deliver water to the Exchange Contractors such that the Friant Division contractors' rights are compromised. To the extent that the DOP and the TUCP Orders allow delivery of water to junior water rights holders such as the wildlife refuges and the SWP contractors before Reclamation has satisfied the Exchange Contractors' senior water rights, they deprive the Friant Division of the entirety of its CVP water supplies and critically injure the Friant contractors' legally protected contract rights.

In Sections 4.3 and 4.5.2-4.5.4 of the Proposed Order, the SWRCB claims that the export limitations in the DOP and TUCP Orders "did not and will not result in injury," because any such claim is now moot "[d]ue to precipitation events and the modifications to the TUCP Order." And even if not moot, the Proposed Order states, the limits were necessary *because of potential future drought and dry conditions*. In other words, the language of the Proposed Order directly contradicts itself – on the one hand, it claims there is no injury because those claims are moot, but then concedes that the limits are necessary because the drought is an ongoing problem that will extend into the future. For the reasons explained above, this mootness argument is legally incorrect.

The alternative argument made in the Proposed Order appears to be that, because DWR and Reclamation were limited by the TUCP Orders in the amount of water they could allocate, the various contractors (including Friant) were not injured because there was no available water for them to have – in other words, no invasion of a legally protected interest. However, this

circular logic is fatally flawed. DWR and Reclamation filed the TUCP to change their permit rights under water quality decision D-1641. It cannot be that they are then absolved from complying with long-standing contractual rights of others because the State Board imposed limitations they sought to have placed on their ability to deliver water. Under the above-quoted provision of the contracts, Reclamation has contractually bound itself not to "voluntarily and knowingly" render itself unable to deliver water to the Exchange Contractors such that the Friant Division contractors' rights are compromised. The Proposed Order ignores this fact and attempts to circumvent the legally protected interests of Friant and others by ordering that these limitations be followed.

The Proposed Order also attempts to disregard the injury to Friant by claiming that these water supply limitations are only "a temporary condition" which was supposedly lawfully imposed by the Executive Director. (Proposed Order, at 22.) Of course, the limitations were not "lawfully imposed" for the procedural reasons set forth above. However, leaving this problem aside, the temporary nature of the condition does not lessen the nature or extent of the injury to Friant – which has been severe and has already left hundreds of homes without water service and thousands of schools at risk of losing their water supplies. Since these conditions were imposed by the State Board during essentially the only time during 2014 when the water was available and was needed by Friant and its member agencies (and the many rural communities and family farmers who depend on it), it may have been temporarily imposed. But depriving Friant Division contractors of their senior CVP water rights had the effect of crippling the conjunctive use system and overburdening the groundwater to the point where hundreds of wells have failed and people have been deprived of the water necessary to serve their most basic needs. No mistake can be made here: the State Board's inaction has created severe, permanent and lasting damage in the San Joaquin Valley.

4. A Definition of "Health and Safety" Must Be Included in Any TUCP Orders Using This Term.

In its Petitions, Friant contended that the "health and safety" condition needed to be defined and should include, at a minimum, deliveries to Friant Division Class 1 contractors that provide necessary water supplies to rural communities. In response, the Proposed Order, at Section 4.5.3, claims that "a more detailed or expansive definition of the term 'health and safety' is not warranted for purposes of interpreting and implementing the TUCP Order." This assertion misses the point. To date, the term "health and safety" has gone completely undefined. The issue is not that a more expansive definition is needed (though the definition that is eventually proposed should be expansive), it is that *no definition* has been provided in the TUCP Orders. *Some* definition of "health and safety" must be provided, if SWRCB staff intend to require future drought operations plans to "prioritize" "health and safety" uses, notwithstanding the prior appropriation doctrine. It is an abuse of discretion and legal error not to define such a critical term.

5. Friant's Water Rights Priority Positions Cannot Be Brushed Aside Based on Technicalities.

Section 4.5.4 of the Proposed Order purports to address Friant's well-supported position that the TUCP Orders and DOP do not respect water rights priorities. In reality, however, this section merely "punts" on addressing the argument based on technicalities. In fact, the underlying TUCP Orders contain legal errors arising from the Executive Director's mishandling of this issue and they also are not supported by substantial evidence.

The Proposed Order claims that, because the export limit contained in the Orders was a valid condition of the SWRCB's approval of Reclamation's TUCP, it has nothing to do with available water supply, and therefore the prior appropriation doctrine is inapplicable. This is inaccurate and irrelevant. The TUCP sought to modify D-1641, which is a water quality standard. The entire reason for Reclamation and DWR to file the TUCP was a lack of water availability, and under the very case approving D-1641, the Court of Appeal directed that the State Board must adhere to water rights priority when assigning responsibility for meeting water quality standards. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 729 & n. 21 (2006).

Thus, the State Board unquestionably has the obligation to consider how the revised water quality standards will be met, and in doing so, it *must* take account of the doctrine of prior appropriation. *Id.* Under that doctrine, a TUCP changing a water quality control standard cannot have the effect of authorizing a junior diverter, including DWR, to take water when senior water rights have not been fulfilled. *See id.* Despite the clear legal obligation of Reclamation to protect its senior water rights holders, and the clear legal duty of the State Board to uphold and enforce California's water rights priorities when determining responsibility for meeting a water quality standard, both the TUCP jointly filed by Reclamation and DWR and the TUCP Orders abrogate this priority.

With respect to the DOP, the Proposed Order misconstrues Friant's argument. It is not that "the TUCP Order violates water right priorities because the Order purported to approve the DOP," but instead that the Orders, insofar as they give force and effect to the DOP, violate water rights priorities. The TUCP, TUCP Orders and DOP are interconnected, with the TUCP requesting a change, the TUCP Orders giving force to that change and the DOP providing a supposed means to comply with the TUCP Orders. The Proposed Order approves the Orders and implicitly approved the DOP, thereby allowing the junior State Water Project to subvert the CVP's priority. Yet the Proposed Order refuses to address Friant's argument that the Orders and DOP violate water right priorities merely because it has misconstrued Friant's argument. The water rights priority argument, which was fully set out in Friant's April 28, 2014 Petition, simply must be addressed before any order denying Friant's Petition can be considered.

This is one of the most severe droughts this State has ever experienced. The prior appropriation doctrine is the primary means by which the State has determined to allocate water in times of shortage. The State Board is the entity charged with enforcing California's water rights laws – and yet the Order indicates that State Board is unwilling to ensure that the Orders

comply with the prior appropriation doctrine. Even the case approving D-1641 itself – the very decision that is being amended through these Orders – directs that the State Board must consider water rights priorities when assigning responsibility for meeting water quality standards. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 729 & n. 21 (2006). Determining how California's water will be allocated during this drought is quite possibly the most important task the State Board will ever be called to act upon, and its failure to carry out its statutorily mandated duties is unprecedented – particularly to the people within the Friant Division who have been left *without any water supply at all for their homes and schools* due to the Board's failure to undertake its obligations and ensure that junior water users do not usurp the rights held by seniors.

IV. REQUESTED RELIEF

For the foregoing reasons, Friant requests that the State Board: (1) reject the Proposed Order; (2) grant Friant's Petitions for Reconsideration in their entirety and set aside the underlying Executive Director decisions; (3) set an evidentiary hearing at the earliest possible time to consider the underlying Temporary Urgency Change Petitions and related Orders; and (4) adopt all of Friant's comments and objections to the underlying Temporary Urgency Change Petitions and related Orders and enter a revised order incorporating them in full.

Additionally, to address of the procedural defects that Friant describes herein, in similar future proceedings, Friant requests that the evidentiary hearing include discussion and determination of (1) the authority of the Executive Director to undertake the actions that were done with respect to the TUCPs and TUCP Orders, and (2) the procedural and substantive complaints described herein and in Friant's other submissions.

Sincerely,

Paul P. "Skip" Spaulding, III, Esq.
Farella Braun + Martel LLP
Attorneys for Friant Water Authority

Jennifer T. Buckman, Esq.
Attorney for Friant Water Authority and
its Member Agencies

PPS:aeb