(12/15/16) Board Meeting- Item 7
TUCP
Deadline: 12/14/15 by 9:00 am

SOUTH DELTA WATER AGENCY

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12-14-15
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December 14, 2015

Via E-Mail commentletters@waterboards.ca.gov
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Re: **12/15 & 17/15 BOARDMEETING; Item 7. Consideration of an proposed Order granting In Part and Denying In Part the Petitions for Reconsideration of the Executive Director's February 3, 2015 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 Sir/Madam:

The South Delta Water Agency submits the following comments to the above mentioned Draft Order.

First and foremost it must be noted that the complete failure of the Department of Water Resources and the Bureau of Reclamation to plan for and operate the SWP and CVP to meet their permit conditions over multiple years has resulted in the further degradation of the Sacramento-San Joaquin Delta and has brought numerous fish species to the brink of destruction. The projects preference to maximize exports each year without regard to future permit obligations is the direct cause of the disappearing fisheries and the constant degradation of the estuary.

However, the SWRCB's bears the same if not more responsibility. For every other water user, the Board spends much of its limited funds in efforts to bring them to heal while at the same time granting every "urgency change" requested by the projects in order to make sure they can squeeze every unavailable drop of water from the system to supply exports. Where other right holders are charged with administrative civil liability fines or subject to cease and desist orders, the projects can simply wait until the very last minute before some permit obligation kicks in and then get "urgency" relief from that obligation. The notion that the projects can totally fail to meet their obligations over a four-year period without sanction is beyond the ken of rational beings.

For four years the Board has been asked to set public hearing where evidence can be submitted and tested in order to address the projects' inability to meet their obligations. These requests fall upon deaf ears while staff (12 times in the last two years) determines every few weeks or so that the projects are again faced with "unforeseeable events" justifying fundamental changes in Delta operations and protections. The SWRCB plods on seemingly incapable of taking pause to consider its actions; which actions are the incremental dismemberment of the basic protections for the Delta. Fish on the verge of extinction are "balanced" against the need to get a few hundred thousand acre feet of water to exporters who have no drought year supply. The SWRCB bargains away the few remaining fish in order to squeeze out a pittance of water to supply 1/100th of the insatiable export demand.

Then, when virtually the entire water community complains that the Board's actions are not working, illegal and ill-conceived, the Board drafts this Order wherein it confirms that all of its TUCP orders, which fundamentally changed the protections in the Delta had "no" consequences. Lessening fishery protections while fish go extinct "do not unreasonably affect fish." Changing water quality standards "does not injure" those protected by the water quality standards. The water community stares in disbelief as if forced to watch a looped film where the same thing happens over and over and over. There is no hope, no avenue for input, no possibility for change; only the uncaring destruction as the unthinking bureaucracy crushes everything in its way.

1. The Draft Order tries to confirm that the SWRCB actively participating in the planning and operation of the projects was reasonable and appropriate in order to "prevent catastrophic impacts to fish and wildlife." This novel approach is an effort to make sure that the SWRCB need never enforce the permit conditions of the projects. DWR and USBR for the past three years have waited until literally the very last moment to petition for urgency changes to their permits because after having exported significant amounts of water they find themselves unable to meet their permit conditions. Creating "real-time" review by SWRCB staff and fishery agency reps to "find out how" the projects can best operate with limited storage" is the inappropriate substitute for initiating an enforcement action against the projects for simply not planning ahead and scamming the system. If the Board had enforced the permit conditions three years ago, the penalties and regulatory mandates on the projects would have forced them adjust their planning and operations to accomplish what the 12 TUCP's have failed to do. Imagine some other water permittee storing and consuming every drop of water it could and then at the very last minute claiming it could not meet its downstream flow obligations? Would the SWRCB sit down with them to help them operate through that "difficult" time or would it initiate a CDO proceeding and punish the violator?

The SWRCB has not acted properly in this emergency and has not helped protect beneficial uses during the drought. Every drop of water exported into San Luis Reservoir was available to meet San Joaquin fishery flows, Delta outflow and most Delta salinity standards. The permits for San Luis include the obligations to meet all of these standards. By not holding a public hearing, the Board conveniently avoids having to address this issue, making the project

water exported in fall and early winter exempt from the project obligations. This in turn justifies the projects last minute TUCP requests.

The obvious problem is that the Board is justifying continued exports under a false premise. When water quality plans/standards are set under Sections 13240 et seq. the Board is required to "balance" certain needs in order that full protection of some beneficial needs does not unacceptably affect others. When those plans/standards are applied to water right holders, a second level of balancing is allowed such that implementation does not result in a water right holder losing all benefits under those rights. Each of these two processes included CEQA level analysis of the impacts, including modeling of meeting the standards during multi-year droughts. When the projects seek these urgency changes, there is no "balancing" required or allowed. When an emergency arises, changes can be made only if they do not affect other users, do not affect fish and wildlife and are in the public interest.

Exporters without a drought year supply cannot be "balanced" against the needs of near extinct fish or against those protected by water quality standards. There is nothing to balance. We may agree that during droughts the largest impacts are to exporters reliant upon water surplus to other areas, but that does not give those exporters any sort of new right or new priority of right. They have no supply. When the SWRCB 'balances" their needs with other needs it simply redraws water priority laws based on some "share the burden" personal belief.

2. The Draft Order finds that no other water user can be injured by the numerous TUCP orders because no one is entitled to any water that would not be present under natural conditions, citing the *State Water Resources Control Board Cases*, 136 Cal. App. 4th, 674. However, that case does not support the assertions made in the Draft Order.

In *SWRCB Cases* the court cites the Board itself stating that if upstream diverters varied direct diversions such that it altered return flows downstream it could indeed injure downstream water right holders. Although finding in that case that the subject changes would not cause injury, the court and the SWRCB noted that once those upstream flows reached a certain point (Vernalis) they were available to other right holders. (*SWRCB Cases* at 777). Thus such changes would cause injury even though those flows might not be there under "natural" conditions.

The court in the *SWRCB Cases* did opine on how downstream users could not require upstream releases of previously stored water (for downstream *consumptive uses*), but that does not preclude downstream injury when upstream operators alter their operations. As applicable here, the Draft Order asserts that in-Delta water users cannot complain about changes in salinity (resulting from the TUCP Orders) because those in-Delta users are not entitled to any water quality other than what would be present in pre-project, drought conditions. This is the opposite of what the court held in the *SWRCB Cases*. First, the SWRCB never made any calculation as to what water quality would occur after granting the TUCP's or what quality would exist at the time absent the projects. It therefore does not know that in-Deltas users are better or worse off. Secondly and more important, on pages 778-779 of the *SWRCB Cases* the court discusses how or

if changes in water quality might cause harm. In that case, the changes would have degraded water quality, but because the USBR was obligated to meet the Vernalis salinity standard, the court concluded there would be no injury because whatever changes occurred because of the permit changes, the USBR would still provide the protection by meeting the standard.

In this case not only was the purported guarantor of the water quality standard the party seeking the permit changes that would adversely affect water quality, but before, during and after the important aspects of the TUCP orders (see DWR/USBR monthly Reports of Salinity Level in Southern Delta) the Bureau failed to meet the water quality standards in the southern Delta! When the SWRCB justifies its actions by claiming southern Delta users cannot be damaged by a failure to meet the water quality standards it is acting directly contrary to the language in the *SWRCB Cases* and in fact propounding an absurdity. If something that causes the violation of a water quality standard is not injuring those protected by that standard the Water Code has no meaning.

This is no small matter. In this Draft Order dealing with TUCP's during a drought, the SWRCB is trying to create new law regarding injury to legal users in an effort to affect ongoing administrative and judicial matters. Such an effort is inappropriate at the very least.

3. The SWRCB continues to ignore the requirement of the urgency statutes that mandates a finding that the applicant has been diligent in seeking a "normal" change in its permit before granting an urgency change. Although the TUCP's and this Draft Order purport to deal with this issue, the treatment is in fact lacking. It is understood by all that the drought does in fact constitute an emergency. However, the projects constant avoidance of this problem is a clear indication they are not trying to address their problem through normal change petition processes. The excuse of the drought may have been appropriate once during the onset of the drought, but constant complaints that "unforeseeable" circumstances during a four year drought are meaningless and insulting. The SWRCB is fully aware that the DWR and USBR could and should have sought a "normal" permit change which would have necessitated a public evidentiary hearing. Instead, the SWRCB colluded with the projects ahead of time before the urgency petitions were filed. This was done to make sure the public could not test either the projects' plans and operations or the SWRCB's notions of protecting exports at all costs.

The SWRCB should not adopt the Draft Petition and should immediately schedule a hearing on the issues contained in the various TUCP's. The Central Delta Water Agency joins in these comments.

Very truly yours,

JOHN HERRICK, ESQ.