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December 11, 2015

Via email transmission

TO: Board Members
State Water Resources Control Board

commentletters@waterboards.ca.gov

Re: San Joaquin River Exchange Contractors Water Authority's
Comments to Agenda Item 7, SWRCB Division of Water Rights Meeting
December 15, 2015

Ladies and Gentlemen:

This office on behalf of the San Joaquin River Exchange Contractors Water Authority submits the following comments in regard to Item 7 of the State Water Resources Control Board's Board Agenda, Division of Water Rights, Meeting Session December 15, 2015, and specifically requests that the action to extend and amend the terms of the Temporary Urgency Order be rejected:

Summary of Comments:

1. The Board should not include language in its order purporting to order minimum storage levels in Shasta or Folsom on October 1, 2016, purporting to extend the TUCP. If the Board is embarrassed by the fact that it has not held evidentiary hearings for two (2) years regarding drought conditions and measures and the obviously defective Water Quality Control Plan, it should not now attempt without an evidentiary hearing to devise Board orders which require certain CVP operations without considering the whole plan. The proper solution is for the Board to be engaged after it has held evidentiary hearings for the 2016 potential operations. The proposed order allows SWRCB staff, by private discussions with Board Members – not open hearings – and without testing

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through evidence and due process, one aspect of operations to the exclusion of broad considerations of salinity control, SWP operations, fishery protection in downstream areas, and other uses of water.

2. A “margin of safety” is a catchy phrase and sounds good, but done in the wrong way through this proposed order potentially places all responsibility for water quality releases on the State Project and Lake Oroville, potentially endangers Contra Costa citizens’ water supply, and ignores the Coordinated Operating Agreement. It is unrealistic and dangerous to earmark 1.6 million ac/ft of stored water as not usable in 2016 (in 1977, the reasonable use of storage to maintain water quality and all reasonable uses, including fishery uses, required that only approximately one-half that amount, or 700,000 acre feet, remain in storage in Shasta on October 1, 1977). The proposed order denies use of Folsom’s operational flexibility for immediate protection of salinity threats to the Contra Costa citizens and to protect both Delta fisheries, water quality, and other reasonable uses.

If the SWRCB staff has a better plan for 2016 operations, give notice that water rights of the CVP are to be amended to conform to that plan and hold an evidentiary hearing. Ignoring the realities of operational requirements of complex water systems creates unnecessary danger, not safety. If the operational yield of the CVP is to be reduced to provide a “margin of safety” by expropriating storage capacity, the Board should hold an evidentiary hearing to consider all of the risks and potential benefits of such an order instead of attempting to mandate these conditions in five (5) working days with no evidentiary proceeding.

3. There are many legal and procedural reasons why this proposed order is not proper, and those reasons are set forth in the attachment and our previous filings. We summarize those reasons in the attachment; however, the Board needs to reject the above additions to its order and bring itself into a prompt and time-limited evidentiary hearing if drought conditions persist and if requested to do so because the SWP and CVP cannot comply with all water quality flow requirements. Suggestions from the SWRCB staff of “good ideas” behind closed doors regarding how the Projects should operate and what just one population of fish need is not lawful, nor even a scientifically accurate process.


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Please consider this letter as a demand that if the Board adopts the portions of the proposed order terms Paragraphs 1 through 6, that that action must be rescinded and canceled as void within 30 days from adoption because the action is in violation of the Open Meeting Law.

Very truly yours,

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

By: 
PAUL R. MINASIAN, ESQ.
On behalf of the
SAN JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER AUTHORITY

PRM:dd
Attachment
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LEGAL REASONS WHY THE

ORDER OF RECONSIDERATION IS NOT APPROPRIATE

December 11, 2015

1. **In order for a Temporary Urgency Permit to be modified and its conditions extended, a petition or statement is required from the DWR and CVP stating that continuance of those terms is reasonably required.** There has been no such request or statement for renewal through 2016. The order is invalid and void.

Authorities: Water Code section 1435, and discussion in Petition for Reconsideration.

2. **This order purports to extend the Executive Officer's TUCP Order of February 5, 2015, but the Board purports to amend that Order and add other terms to the CVP permits without published or mailed notice.** Water Code section 1438 requires publication and notice and requires that the Board send a notice of the proposed changes and any proposed conditions to all interested persons before acting. No such notice has been given. Water Code section 1438(f) indicates that a failure to follow the proper procedures invalidates the Urgency Order "extension." Your reputations as Board Members willing to violate their basic due process requirements of the Constitution are at stake.

3. **The Board purported to delegate the authority for the February 3, 2015 TUCP Order to the Executive Officer who acted.** If the Board wishes to revoke that delegation and commence a new TUCP upon petition of the CVP and DWR itself, the Board could then legally consider the storage level issues. However, there is no authority for the Board to act as the Executive Officer in amending the Executive Officer's Urgency Order and to use an unrequested extension of that Urgency Order as a device to wrest control of the CVP water right exercise...without due process, including consideration of evidence and a hearing.

Authorities: Water Code section 1425(d) provides authority to delegate any or all functions of the Temporary Urgency Order process. Discussion of the statutory limitation upon delegation to the Executive Officer is contained in the Petitions to Reconsider filed by the San Joaquin River Exchange Contractors Water Authority regarding the February, 2014 and February, 2015 TUCP Orders as to why delegation under Resolution 12-029 to the Executive Officer or one Board Member is binding until the Resolution is rescinded is incorporated herein by this reference. Here, the further defect is if the Board wishes to enter a new term or condition in an Urgency Order issued by an Executive Officer, the Board itself must give notice and take the preparatory procedural steps set forth in Water Code section 1438. No such notice has been given.

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4. The Open Meeting Law (Brown Act) has not been complied with.

There is nothing in the Agenda Notice referring to amending the terms of the February 3, 2015 Executive Officer's Order or any of the subsequent amended TUCP terms. A public official who uses the ex parte communication rules and then fails to comply with the Agenda and notice requirements of the Brown Act is subject to serious public offense charges and risks a label of a public official willing to violate basic due process standards: the Board Members will be in violation of Government Code section 54959 (Brown Act) because the Members know or have reason to know of the violation. This is a misdemeanor violation of the law. Section 54954.2 requires that an agenda be posted 72 hours in advance and specify the item of business. This Agenda does not divulge the purposes of extending and issuing new TUCP terms. Attorney fees are awardable in actions brought to enforce compliance with the Brown Act, and Court Orders will also nullify the actions taken.

It will be more embarrassing if the order is adopted, the Board is then required to rescind it, the Board is then required to give the proper notices and convene a hearing for the Board to withdraw its delegation to the Executive Officer, and finally, for the Board to itself (instead of the Executive Officer) adopt a new TUCP in January or February (if the CVP and DWR request one) after a hearing and an evidentiary record is developed.

4. All other objections to the proceedings, terms and actions contained within the challenged TUCP and Amendments contained within the San Joaquin River Exchange Contractors Water Authority's Petition for Reconsideration and the comments and authorities submitted by the Feather River Joint Districts are restated and incorporated herein as if set forth in full.

The better alternative is to vote not to act upon the portions of the order relating to the TUCP other than to deny reconsideration.