



SENT VIA E-MAIL

April 17, 2014

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Re: Hearing on Reclamation's April 11 Temporary Urgency Change Petition

Dear Executive Director and Members of the Board:

On Tuesday, April 15, 2014, the Executive Director of the State Water Board, Mr. Howard, responded to the San Joaquin Tributaries Authority's ("SJTA") request for a hearing on the United States Bureau of Reclamation's ("Reclamation") April 9, 2014, Temporary Urgency Change Petition (TUCP) concerning water quality objectives at Vernalis.¹ Mr. Howard explained that the State Water Board will be holding a workshop on May 6, 2014 "to allow people to comment on the TUCO and discuss any objections they have."

The SJTA appreciates the State Water Board's willingness to address the public and receive public comment on this matter, but strongly believes that a May 6, 2014 workshop is an insufficient procedure to address this highly controversial policy decision. The scheduled workshop is insufficient for three reasons: (1) May 6, 2014 is far too late for the State Water Board to hold a hearing on this issue; (2) a "workshop" is not a "hearing" and is an inadequate procedure; and (3) certain members of the State Water Board and the Executive Director engaged in ex parte discussions with Reclamation, and should not be involved with the Temporary Urgency Change Order (TUCO) or the proceedings related to the April 9, 2014 TUCP.

¹http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/20140409_reclamation_change_request.pdf

The May 6 Hearing Date is Too Late.

The TUCO approved Reclamation's request to reduce flows during the April 15 to May 15 pulse flow period. (*See* Order Approving Reclamation's April 9, 2014 TUCP, at 4 [hereinafter "April 11 Order"]; 2006 Bay-Delta Plan, at 15.) This means by the time the workshop is held, the April through May pulse flow period will almost be over, and much of the damage from the approval of Reclamation's TUCP will be done. The State Water Board must consider protests and objections while they are still relevant, before injury has occurred.

Further, the delayed hearing date violates the requirement that the State Water Board expedite hearing objections to actions taken pursuant to drought emergency authority. California Code of Regulations (CCR) title 23, section 767, subdivision (a) states, "Any hearing held to consider the taking of action in response to drought emergency conditions shall receive calendar priority over the matters pending hearing before the board." In its April 11 Order, the State Water Board makes clear it is responding to the drought emergency conditions. (April 11 Order, at 1, 2, 4, and 5.) Yet, the State Water Board seeks to skirt the requirements of 23 CCR § 767, by holding a "workshop" instead of a "hearing." The SJTA urges the State Water Board to hold a hearing on this matter as soon as possible.

A "Workshop" is an Inadequate Procedure.

The State Water Board is required to make four findings before issuing a TUCO. (Water Code § 1435(b).) The SJTA objects to the State Water Board's findings that: "the proposed change may be made without injury to any other lawful users of water" (*Id.*, at § 1435(b)(2).); "the proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses" (*Id.*, at § 1435(b)(3).); and "the proposed change is in the public interest." (*Id.*, at § 1435(b)(4).) Currently, these findings are not supported by the Drought Operations Plan, the TUCP, or any other information in the record. The State Water Board must hold a proper hearing on the TUCO so evidence may be presented, and a record be created, in response to this controversial action by the Board. (*See* Government Code § 11513(b) [granting the right to parties to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses, and rebut evidence]; *See also Id.*, at § 11425.10(a)(6) [requiring the decision to be in writing, based on the record, and include a statement of factual and legal basis of the decision].) The Board's desire to hold a workshop instead of a hearing highlights the failure to recognize that there must be evidence supporting proper factual findings, under which the decision is based.

Those Board Members and Staff Who Have Engaged in Ex Parte Discussions with Reclamation Should Not be Involved with the TUCP Proceedings.

Finally, as is discussed in greater detail in the SJTA's objection to the April 9 TUCP, certain members of the State Water Board and the Executive Director engaged in prohibited ex parte discussions prior to the approval of the April 9 TUCP. Due to the ex parte violations, these members must recuse themselves and not take part in any proceedings concerning the April 9 TUCP. Prior to April 9, 2014, the SJTA participated in several conference calls wherein the scope and extent of the proposed TUCP concerning the Vernalis flow objectives was discussed. Board members Felicia Marcus and Dorene D'Adamo, as well as the Board's Executive Director, Tom Howard, were parties to one of these calls. In that conference call, it was stated that State Water Board staff member, Les Grober, was working

with the Department of Water Resources and Reclamation on the development of the April 9 TUCP. It is unclear at this time what the exact scope and extent of these ex parte communications from Reclamation to the State Water Board were. These communications from Reclamation to these State Water Board members and the Executive Director constitute impermissible ex parte communications. (Government Code §§ 11430.10(a) & 11430.70(a); See *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1317; See also Office of Chief Counsel, Ex Parte Questions and Answers (April 25, 2013), at 1.) The ex parte communications disqualify the Executive Director and these State Water Board members from considering and acting upon the April 9 TUCP. (Government Code § 11430.60.) For these reasons, the SJTA believes that the April 11 Order is without force and effect, and Reclamation must continue to meet the Vernalis flow objectives until the Board members qualified to approve the April 9 TUCP do so.

The SJTA urges the State Water Board to hold a hearing instead of a workshop, move the hearing to a date which comports with the requirements of 23 CCR § 767, and have only those members of the State Water Board who are not disqualified act upon the TUCP.

Very truly yours,

O'LAUGHLIN & PARIS LLP



TIM O'LAUGHLIN

TO/tb

cc: SJTA