

SOUTH DELTA WATER AGENCY

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March 28, 2014

Via e-mail thoward@waterboards.ca.gov

Mr. Thomas Howard, Executive Director
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812

Re: March 18, 2014, Order Modifying an Order that Approved a
Temporary Urgency Change in License and Permit Terms and
Conditions Requiring Compliance with Delta Water
Quality Objectives in Response to Drought Conditions

Dear Mr. Howard:

These comments are to the March 18, 2014, Order Modifying an Order That Approved a Temporary Urgency Change petition by the Department of Water Resources and the Bureau of Reclamation, which original Order was modified on February 7, 2014 and again on February 28, 2014.

The March 18, 2014 Order, like those before it contain no evaluation by the SWRCB of the requirements of Water Code Section 1435(c) which deals with the "diligence" of the Petitioners. An urgency change cannot be granted unless the Board determines that the petitioner exercised due diligence in both seeking a temporary change petition under the "non-urgency" provisions of the Code (e.g., Section 1726) and pursuing such a petition.

It is clear that neither DWR or USBR sought a temporary change other than the Urgency petition they submitted on January 29, 2014. It is equally clear that storage, inflows, precipitation and forecasts indicated well before January 2014 that drought conditions existed and that the projects would be unable to comply with some if not most of their Delta-related obligations under D-1641 and their permits. The workshop conducted by the SWRCB on (after) the Urgency Order clearly showed that as early as last spring, the projects forecasted dire conditions, including extremely low storage levels for 2014. At worst, in the fall of 2013, the projects knew (as conceded at the workshop) that absent a wet winter they would be unable to meet some of their obligations. Thus, the complete failure of the projects to plan ahead (both as to operations and as to seeking relief from permit requirements) precludes the granting of any urgency petition. The Order again states/concludes that there is an urgent need, but unless the SWRCB can find that the projects were diligent in getting the change through the normal process, an urgency order cannot be issued.

As stated at the workshop, the reason for the "diligence" requirement is that the "normal" process allows for a hearing, testimony and cross-examination, while the urgency process is conducted outside of the public's purview, with no notice, no chance to comment, and no hearing. In fact, DWR, USBR and SWRCB were specifically asked to notify various other third parties when any urgency petition was filed, and for a copy of same. None of those three parties complied; instead we were informed that no such notice was required. We understand what the requirements under Section 1435 are, but cannot understand why the regulator would not let interested parties know of such an urgency petition given the significant impacts resulting from non-compliance with D-1641 in the bottom of the worst drought on record. One would think the SWRCB would encourage input to such an important issue, not prevent participation.

This becomes even more relevant for two reasons. The first is that the current Order is periodically being changed, each time without any public input, in a sort of ongoing back room negotiation to constantly alter the criteria and mandates of D-1641 and the project permits. That such a process of near constant rule making and water right adjustments could be acceptable much less practiced by the SWRCB is truly remarkable. Second, the Bureau will shortly be filing another urgency petition this time to alter (at least) some of its San Joaquin River water quality obligations just days before those obligations become effective. This issue will be dealt with in a separate letter, but it bears noting here that there is no possible scenario under which the Bureau has not known for months that it would be unable to meet both the fish flow requirements or the salinity requirements; both of which are now, or were recently violated without comment or action. Even the Vernalis salinity standard, the only one of the four south Delta standards given notice was violated without even notice by the SWRCB. The idea that the Bureau can again wait until the last minute for relief suggests they know the SWRCB will grant the petition. This conclusion should raise numerous and serious questions.

The current, March 18 new (or revised) Order is for the purpose of allowing the non-compliant projects to squeeze even more export water out of the system while still violating numerous permit requirements. Specifically, the Order allows the projects to export water for purposes above and beyond "health and safety" needs (the limitation on exports in the original January 31 Order) as long as they are in compliance with Footnote 10 of Table 3 of D-1641, but they do not have to comply with Table 4; all dealing with outflow mandates. This change is to allow the projects to get even more water for export due to the fortuitous rain events of February which increased runoff below the rim dams and thus increased river flows into the Delta.

The logic of the changes falls apart upon examination. The projects have no water in storage to meet virtually any level of export needs, allocations being generally zero for contractors. The projects also do not have any water in storage to meet all of their obligations for critical year fishery or other water quality needs, much less future needs. When rainfall events increase flows into the Delta, they provide the additional water needed to meet those critical year water quality needs, which have a priority over exports. This most recent change to the urgency Order seeks to not meet the critical year water quality needs, but divides the "new/extra" inflow among water quality obligations and export desires as if they have equal priority. In practice, this means that the SWRCB has decided to "re-balance" various and conflicting needs to make changes to D-1641. That Water Right order, conducted over 80 days, with numerous witnesses and cross-examination itself was the basis for the SWRCB to weigh the evidence, review the record and balance the needs as allowed and required by law. The Order, through a non-public process now "re-balances" the D-1641 conclusions and finds that critical year needs for fish and other beneficial uses dependent on water quality are entitled to less water than under D-1641 and

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export desires are entitled to more. Based on what, one might ask? Apparently it is based on the desire for a small increase in water supply for those who have no water supply this year.

The magnitude of this process and of these conclusions cannot be understated. We are all aware of the severity of the drought and of the extreme impacts being visited on those dependent on exports for their supply. However, these issues were addressed and resolved in the D-1641 process. Until a new Water Quality Control Plan is proposed and new objectives adopted, there can be no legal method by which the SWRCB "adjusts" the obligations of the projects as applied through their permits. The SWRCB presumably thinks it is "helping" during this drought, but it is doing the very opposite. The "re-balancing" of needs and water allocations insures that the fisheries will not get the protection they needed in critical years, which may ultimately make the protections in other years meaningless and futile. All at a time when many Delta-related species are at historic levels.

Additionally, the "extra" outflow (which might perhaps meet the Table 4 amounts) would have the effect of increasing the amounts in the Delta pool, which of course pushes ocean salts farther west. This additional pool of protection would determine how soon and to what extent ocean salts would intrude in later months if and when the projects are not able to fully control the intrusion. Hence, allowing the export of this water which (to some degree) would provide additional Delta protections is once again the same old practice of "operate to maximize export benefits with no regard for the future;" the principle which lead us to this disastrous situation.

These and other issues would be covered in a public process where all parties could participate and test the exporter world view. Under the urgency process only the agencies who operated and regulated us into this situation participate. Clearly the latter do not consider issues such as the one raised immediately above.

It is important to note that during the original Order and now under the most recent modification thereto, it appears the projects have violated the inflow/export ratio during March while taking advantage of this latest change to the Order. I do not believe any of the Orders relaxed that standard. Similarly, D-1641 requires the project to be in compliance with federal and state ESA law. I doubt I am up-to-date on this topic given the recent court rulings, but it appears that such things as the Old/Middle River reverse flow mandates have too been violated.

It is equally important to note that there is no remedy to all of this. Apparently the public can object to the Orders, which may or may not result in a hearing before the SWRCB, but such hearing would certainly occur well after the damage is done by allowing additional exports.

In summary, SDWA objects to (i) the ongoing non-public process that considers and then alters D-1641 requirements; (ii) any changes in project permits which increase exports; and (iii) the SWRCB's continued failure to enforce the existing rules, regulations and laws. It was made clear to us at the workshop that once curtailment notices are sent, the SWRCB expects to have a significant number of enforcement personnel seeking out who might not be complying (and of course starting with in-Delta farmers). At the same time, the SWRCB not only authorizes, but cooperates with the projects to get excused from compliance so that they made avoid operating under their permits. The Board would never grant an urgency petition to a local diverter to violate the conditions of his/her license, but it encourages and condones such by DWR and

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USBR. I encourage you and the Board to correct this situation and enforce the rules against the projects.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John Herrick", written in a cursive style.

JOHN HERRICK

cc (via e-mail):

Ms. Dorene D'Adamo, Board Member
Ms. Frances Spivey-Weber, Vice Chair
Ms. Felicia Marcus, Chair
Mr. Steven Moore, Board Member
Ms. Tam Doduc, Board Member
Dante J. Nomellini, Esq.
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