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May 13, 2014

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Re: May 2, 2014, Revised Order on TUCP and Prior Orders

Dear Mr. Buckman, Mizell, Fujitani, and Ms. Aufdemberg:

The following comments are submitted on behalf of the South Delta Water Agency and are intended as both objections to the May 2, 2014 changes to the Order on the Temporary Urgency Change Petition by DWR and USBR, as well as continued objections to the prior Orders to which SDWA has previously objected to and for which SDWA has requested a hearing.

First and foremost, it must be again stated that the current Order, as well as the previous ones fail to make the necessary finding under Water Code Section 1435(c) that the Petitioners, DWR and USBR have acted with due diligence in seeking these changes through the "normal" process for changes to permits and licenses under Section 1725 et. seq. The failure of DWR and USBR to have acted diligently in seeking these changes through the normal process is fatal to their urgency request, and makes the SWRCB's Order contrary to the clear language of the applicable statute.

As SDWA as stated before, the drought began somewhere between a year and half ago when we experienced a below normal year, and the January 29 TUCP filed by the Petitioner. It

is inconceivable and contrary to logic to think that DWR and USBR could not and should not have filed for changes to their permits no later than by fall or early winter of 2013. All projections at that time indicated an insufficient amount of storage to meet project obligations. This would have allowed a public process to have been undertaken by the SWRCB and all of the involved and affected interests could have participated and cross-examined the DWR, USBR, FWS, DFW and NOAA witnesses. Instead the Petitioners waited literally until the last minute to file the TUCP, thus avoiding the necessity of any sort of public process. The reasons for the "due diligence" requirement are clear and being ignored by the current process. Instead of interested parties being able to participate in the process, they are shoved to the side, denied any hearing and given ineffective "comment periods." This while the SWRCB staff and the guilty DWR and USBR operators and planners (who apparently did not plan at all) make daily decision on how best to ignore and violate current Water Quality Control Plan Objectives for the protection of beneficial uses, permit conditions and California water right priorities. Truly the current process is a black eye on the Boards already tarnished reputation and confirms that the only thing that matters to the SWRCB is maximizing exports at the expense of all other interests.

Although the entire process is clearly and unarguably contrary to the mandates of Section 1435(c), the most current permutation of the Order nicely evidences the reason why the due diligence requirement exists. The current Order (May 2) makes changes (i.e. decreases) to DWR and USBR permit requirements for agricultural water quality protection and fishery flow needs through next November. One must therefore ask what prevent s the SWRCB from requiring the Petitioners to use the "normal" process to seek these longer term changes rather than the urgency process? The Board has known for quite sometime (April 9) that the Petitioners wanted permit changes through November. What is the reason for not considering these changes in a publically noticed hearing? Why can the affected parties not call witnesses and cross-examine DWR/USBR witnesses on the proposed changes? Perhaps such a public effort would show that any water being exported should more correctly be used to meet (or move closer to meeting) the existing standards? Are the non-public discussions between SWRCB staff and exports (who made no plans for a drought) somehow sacrosanct and unassailable? Is there not any chance that the projects which waited until the last minute to avoid the public process might possibly be misleading someone, overstating something or not adequately evaluating something? Why on earth would the SWRCB think that no other party has anything to contribute to the consideration of the changes? DWR and USBR have constantly violated their permit conditions over the years and should not be considered reliable or accurate sources. Recall in 2009 when also seeking urgency changes (again waiting until the very last minute) the projects increased exports from 2000 cfs to 4000 cfs at the time the outflow standard was 11,400 cfs. This left the actual outflow at 7,000 cfs; the projects thus illegally misappropriating approximately one-third of the minimum fishery flow in a drought. In addition, the SWRCB has been notified that the USBR passed out useless and inaccurate information when San Joaquin river interests demanded a meeting on projected flows. Yet with this history of disregard for the facts and the rules, the projects are now in a near real-time "Drought Operations Management" group figuring out each day how to misappropriate additional water while not meeting their obligations. One can only guess how and why the SWRCB can consider this "acting in the best interest of the public."

It is very instructive to note that the SWRCB's Division of Water Rights is currently preparing some sort of "emergency regulations" to address (i.e. shut down most other water right holders) while the Order and its permutations are being cooked. It appears that ***once*** the Order is to the exporters' satisfaction, the Division will ***the***n issue the emergency regulations. The obvious purpose of this is to make sure that any order to shut down superior right holders comes after the projects have siphoned off as much of the minimum fishery flow as possible before having to abide by the export limits for "health and safety." To our knowledge, the SWRCB's stern mandate that exports will only be for health and safety has been somehow lost or misplaced. The projects have not been able to actually identify just what those health and safety needs are specifically, but perhaps someday we will find out. How the exports can continue operation when all superior right holders are shut down will become the most interesting violation of law fought over in the near future.

SDWA's previously raised issues remain unaddressed by the current Order. It appears that those issues have been ignored in order for us to reach the "too late" scenario so deftly used by SWRCB staff. After every water quality standard violation or other permit violation, the SWRCB always wrings its hands and states, "well it's too late now." In this instance, every drop of water (above health and safety needs of course) exported since January 29 (September 2013?) could have been re-introduced into the San Joaquin River and Delta in order to help meet fishery pulse flows, fishery base flows, outflow, western Delta agricultural standards and even help meet southern Delta salinity standards. Imagine, the water produced in the system, stored in project reservoirs or entering the Delta as runoff downstream of those reservoirs used to meet D-1641 and ESA obligations. It is a radical idea, but desperate times require desperate actions.

All of those exports could have been stored in San Luis reservoirs (the permits of which are burdened by D-1641 criteria) and released into the River. Such a released has occurred four times in the past, and accomplished within 6o days of SDWA's prodding of the USBR. In this time of emergency, there is no doubt permitting could have been accomplished and all that water could have been used to meet the standards as well as push the ocean salts back a little farther which would of course incrementally help protect the Delta from future intrusion. That water would have not only helped meet the standards, but also help provide a supply for other users and uses. As the SWRCB knows, **ALL** the fishery water on the San Joaquin is officially "abandoned" once it reaches Vernalis, and thus becomes a supply for all the licensee and pre-1914 right holders who of course are protected by areas of origin laws. Those laws requires the projects to not "directly or indirectly" deprive areas of origin from all the water they need.

Thus requiring the projects to meet (or try to meet) their obligations and the water quality standards would have provided multiple beneficial effects to all interests except exports. Which course of action is best in the "Public Interest" as required by Section 1435 et. seq.? The SWP Final Delivery Reliability Report 2011 contains a Table 6-3 which specifies/estimates the amount of water available under a "Single Dry Year (1977) as being ***302,000 acre feet***. Of course the SWP has exported many times that since last fall, indicating that not only did the projects know their supply was virtually nil if the drought continued, but also that they

intentionally sought to get more water by shorting other superior needs and users. Perhaps this is why the TUCP was filed at the last minute and why the SWRCB does not want to hold a hearing. Once it's "too late" all we can do is hope for what might have been.

However it is not too late. All the water going into San Luis reservoir can still be used to meet San Joaquin fishery pulse and base flow, salinity standards, outflow standards, western Delta agricultural standards and once abandoned meet consumptive use needs in the Delta. So we return to the question: what is more in the public interest, meeting standards and helping fish and wildlife, agricultural and all other beneficial uses in the Delta, or harming all those uses to increase the supply of the parties who are without a supply(?), which parties are obligated to meet those standards. Any rational person would choose the former as being in the public interest. Only an exporter or those under their influence would choose the latter.

The Order's conclusion that it is in the public interest is also flawed because of its misunderstanding of the Bay-Delta process. First, all water that flows out to the ocean is going to some beneficial use. At the very least, any incremental movement of X2 downstream is believed to actually create additional habitat for fish, such habitat being the historic area where many of the Delta related species rear. Why would not additional habitat during a year when minimum fish flows are discarded not be in the public interest. The "balancing" that the water is better used for farming in arid areas than for outflow is unsupported.

Second and just as important, the "balancing" that is necessary in developing (or altering via a non-public process) changes to water quality objectives has already been done. During the hearing leading to D-1641, the involved parties as well as the SWRCB were well and fully aware of the modeling which showed how much water was available under the historic dry and drought periods. That Decision process did not opine that "well these standards are needed except that we will have to change them in a drought." That decision chose the standards after balancing the needs and effects. The trade-off between how much might be exported and how much should go to meeting beneficial use protections was done then. Doing it now is not only unsupportable, it is contrary to law. The CEQA equivalent document for ***D-1641 examined the effects on the environment and on export users***. It did not and could not legally examine these effects during droughts and also include some sort of escape clause that droughts would necessitate changes ***which were not*** therein examined. Otherwise, the CEQA (equivalent) documents would not have been complete or sufficient under the law. Of course the document was complete and sufficient which means the project (the 1995 WQCP) anticipated certain adverse impacts to users of export water resulting from compliance with the water quality obligations. Now that those impacts are before us, DWR and USBR as well as the SWRCB are determined to make sure that those fully examined impacts do not occur, but that additional adverse impacts which were not examined do occur. There is no legal or rational basis for that position.

We hereby incorporate the previous SDWA comment/objection letters of February 11, 2014, March 28, 2014, April 11, 2014, and April 25, 2014 as well as the comments and letters of the Central Delta Water Agency.

SDWA hereby continues to object to the Order on the DWR and USBR TUCP, requests the SWRCB reconsider the Order and its prior permutations and respectfully demands a hearing be scheduled as soon as possible to allow for the presentation, subpoenaing, and cross-examination of witnesses.

Please call me if you have any questions or comments.

Very truly yours,

John Herrick, Esq.