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5 *Attorneys for San Luis & Delta-Mendota Water*
6 *Authority*

7
8 BEFORE THE
9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of Specified License and Permits
of the Department of Water Resources and
11 U.S. Bureau of Reclamation for the State
Water Project and Central Valley Project

**NOTICE OF PETITION AND PETITION
FOR RECONSIDERATION OF ORDER
APPROVING A TEMPORARY
URGENCY CHANGE IN LICENSE AND
PERMIT TERMS AND CONDITIONS
REQUIRING COMPLIANCE WITH
DELTA WATER QUALITY
OBJECTIVES IN RESPONSE TO
DROUGHT CONDITIONS (WITH
MODIFICATIONS DATED FEBRUARY 7,
2014)**

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17 NOTICE IS HEREBY GIVEN that, pursuant to sections 1122 and 1126 of the California
18 Water code and title 23, sections 768 and 769 of the California Code of Regulations, the San Luis &
19 Delta-Mendota Water Authority ("Water Authority"), acting for and on behalf of its member agencies,
20 requests that the State Water Resources Control Board ("Water Board") reconsider and modify the
21 Order Approving a Temporary Urgency Change in License and Permit Terms and Conditions
22 Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (with
23 Modifications Dated February 7, 2014), issued on February 7, 2014 ("Order").

24 The address for the Water Authority is P.O. Box 2157, 842 6th Street, Los Banos, CA 93635.

25 The Water Authority asserts (1) the Order is not supported by substantial evidence, and (2) the
26 Order contains errors in law. As set forth in the accompanying memorandum, incorporated by
27 reference herein, this Petition requests that the Order be reconsidered and modified to ensure that all
28 relevant evidence is considered and that any future order is supported by substantial evidence, applies

1 the law, and makes findings consistent with the evidence.

2 This Petition is based on this notice and petition for reconsideration, the memorandum of
3 points and authorities filed in support thereof, the pleadings and papers on file herein, and upon such
4 other matters as may be presented to the Water Board at the hearing, if a hearing is scheduled.

5 The notice and petition and the supporting memorandum have been served on all interested
6 parties listed in the attachment to the proof of service.

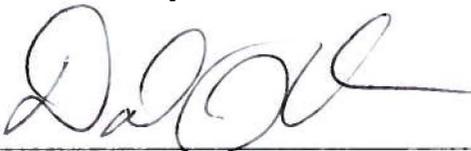
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8 Dated: February 28, 2014.

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

9

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By: 

11

Daniel J. O'Hanlon
Attorneys for San Luis & Delta-Mendota Water
Authority

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On February 28, 2014, I served true copies of the following document(s) described as **NOTICE OF PETITION AND PETITION FOR RECONSIDERATION OF ORDER APPROVING A TEMPORARY URGENCY CHANGE IN LICENSE AND PERMIT TERMS AND CONDITIONS REQUIRING COMPLIANCE WITH DELTA WATER QUALITY OBJECTIVES IN RESPONSE TO DROUGHT CONDITIONS (WITH MODIFICATIONS DATED FEBRUARY 7, 2014)** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address *twhitman@kmtg.com* to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 28, 2014, at Sacramento, California.



Terri Whitman

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SERVICE LIST

**In the Matter of Specified License and Permits of the Department of Water Resources and
U.S. Bureau of Reclamation for the State Water Project and Central Valley Project**

State Water Resources Control Board
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10 In the Matter of Specified License and Permits
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**MEMORANDUM OF POINTS AND
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PETITION FOR RECONSIDERATION
OF ORDER APPROVING A
TEMPORARY URGENCY CHANGE IN
LICENSE AND PERMIT TERMS AND
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QUALITY OBJECTIVES IN RESPONSE
TO DROUGHT CONDITIONS (WITH
MODIFICATIONS DATED FEBRUARY 7,
2014)**

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17 **I. INTRODUCTION**

18 The San Luis & Delta-Mendota Water Authority (“Water Authority”), acting for and on behalf
19 of its member agencies, submits the following Memorandum of Points and Authorities in Support of
20 Petition for Reconsideration of Order Approving a Temporary Urgency Change in License and Permit
21 Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to
22 Drought Conditions (with Modifications Dated February 7, 2014) (“Order”). The Order should be
23 reconsidered and modified for three reasons. First, the Order limits export pumping to “health and
24 safety purposes” and deliveries to “health and safety needs” but it does not define “health and safety.”
25 It should do so. Second, the State Water Resources Control Board (“Water Board”) should reconsider
26 and modify the Order because Condition 1.b and Condition 2 are not supported by substantial
27 evidence. The Order does not reflect sufficient evidence to support a finding by the Water Board that
28 exports should be capped at 1,500 cfs or that the Central Valley Project (“CVP”) and State Water

1 Project (“SWP”) (together, the “Projects”) should be required to comply with the Delta Outflow and
2 Delta Cross Channel (“DCC”) Gate Closure requirements of D-1641 when precipitation events occur
3 that enable the Projects to meet those requirements. Third, the Order contains an error in law. By
4 precluding the CVP from exporting more than 1,500 cfs or moving available water south of the Delta
5 during and following precipitation events, the Order prevents compliance with federal law. The Order
6 is additionally contrary to law to the extent it requires actions that are not in the public interest, does
7 not ensure the beneficial use of water to the fullest extent, and does not protect the public interest.

8 This water year’s extreme conditions necessitate adjustments to water right terms and
9 conditions to ensure reasonable and maximum beneficial use of the dwindling water supply. The
10 current Order does not allow the CVP to do that, and instead may interfere with its purposes under
11 federal law and contractual arrangements fundamental to its operations. Accordingly, the Water
12 Authority petitions for reconsideration of the Order in the hopes that the Water Board will modify the
13 Order given these circumstances.

14 **II. STATEMENT OF FACTS**

15 On January 29, 2014, the Department of Water Resources (“DWR”) and the United States
16 Bureau of Reclamation (“Reclamation”) jointly filed a Temporary Urgency Change Petition
17 (“TUCP”) pursuant to Water Code section 1435 et seq., to temporarily modify requirements in their
18 water right permits and license for the SWP and CVP. On January 31, 2014, the Executive Director of
19 the Water Board, acting under delegated authority, issued an order approving the TUCP (“Order”)
20 pursuant to Water Code section 1438(a), which allows the Water Board to issue a temporary change
21 order in advance of public noticing requirements. On January 31, 2014, the Water Board issued a
22 Notice regarding the TUCP and the Order (“Notice”). The Notice stated that objections and
23 comments regarding the Order must be received by the Water Board no later than 12 noon, on March
24 3, 2014.

25 On February 7, 2014, the Executive Director of the Water Board made modifications to the
26 Order and issued a revised Order. On February 18 and 19, 2014, the Water Board held a workshop to
27 discuss drought activities and actions. At the non-evidentiary workshop, the public had an opportunity
28 to comment on the TUCP and the revised Order.

1 **III. LEGAL STANDARD**

2 The Water Authority petitions the Water Board for reconsideration of the Order pursuant to
3 California Water Code sections 1122 and 1126 and sections 768 and 769 to title 23 of the California
4 Code of Regulations. “The board may order a reconsideration of all or part of a decision or order . . .
5 on the filing of a petition of any interested person or entity.” (Wat. Code, § 1122.) This petition is
6 based upon the following two legal grounds: (1) “[t]he decision or order is not supported by
7 substantial evidence;” and (2) “[e]rror in law.” (23 C.C.R. § 768(b), (d).)

8 **IV. DISCUSSION**

9 **A. The Water Board Should Reconsider And Modify The Order**

10 In the Order, the Water Board recognizes that requiring compliance with certain D-1641 water
11 quality objectives under the extreme drought conditions prevailing in 2014 is not in the public interest.
12 The Order provides some necessary adjustments to water right conditions for the Projects, to help
13 ensure that the State’s scarce water supply is managed to maximize and protect beneficial use.
14 However, more is required. The Order should be modified to further enhance opportunities to
15 improve water supply south-of-the-Delta. This water year requires policy decisions identifying the
16 most critical needs for water, and how water can be preserved for meeting those most critical needs
17 under conditions not accounted for when the existing objectives were established. The existing
18 objectives should not be the benchmark for allocating water among beneficial uses in this
19 extraordinary year. To best serve the public interest, the SWP and CVP should be allowed to take
20 maximum advantage of every reasonable opportunity to capture water available in the Delta for export
21 pumping. To allow this, we request the Water Board remove the 1,500 cfs limitation on export
22 pumping in Condition 1.b of the Order. We further request that the Water Board remove Condition 2
23 of the Order, which reinstates Delta Outflow and DCC gate closure requirements when precipitation
24 events temporarily allow compliance. In addition, the Water Board should define “health and safety”
25 purposes and needs, to the extent that limits export pumping. The Water Board must also address the
26 factual and legal justification for whatever scope it adopts.

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1 **B. The Order Is Not Supported By Substantial Evidence And Contains Errors In**
2 **Law**

3 **1. The 1,500 cfs Cap In Condition 1.b Is Not Supported By Substantial**
4 **Evidence And Its Inclusion In The Order Is An Error In Law**

5 In Condition 1.b, the Order sets “the combined maximum SWP and CVP export rate for SWP
6 and CVP contractors at the Harvey O. Banks and C.W. ‘Bill’ Jones pumping plants . . . [at] no greater
7 than the minimum pumping levels required for health and safety purposes and . . . no greater than
8 1,500 cfs on a 3-day running average. Deliveries to SWP and CVP export contractors from the SWP
9 and CVP shall also be limited to health and safety needs.” (Order, at pp. 13-14.) The 1,500 cfs cap in
10 Condition 1.b is not supported by substantial evidence. Moreover, its inclusion in the Order is an
11 error in law because it precludes the CVP from operating in compliance with federal law and is
12 contrary to the public interest.

13 First, the Order does not contain any support for the 1,500 cfs cap in Condition 1.b. As an
14 initial matter, the Order does not even define what is meant by “health and safety needs.” This term
15 has no statutory definition, it may be interpreted broadly or narrowly; the Water Board must explain
16 what is included in this category. Additionally, the Order does not contain or reference any
17 evidentiary support for capping exports at 1,500 cfs. The 1,500 cfs cap does not reflect an assessment
18 of water needs in the current extreme drought conditions. Nor is it essential to protect listed fish
19 species; the biological opinions applicable to export pumping allow pumping in excess of 1,500 cfs,
20 depending for example upon the distribution of protected fish within the Delta. Instead of using the
21 1,500 cfs as a hard limit on allowable exports, the Water Board should rely upon the existing
22 biological opinions and prevailing water quality conditions at the export pumps in the South Delta to
23 act as the limit on export pumping. Because the 1,500 cfs cap in Condition 1.b is not supported by
24 substantial evidence, it must be removed from the Order.

25 Second, including the 1,500 cfs export cap in the Order unlawfully precludes the Projects from
26 operating in compliance with federal law and is contrary to the public interest. Federal law requires
27 the CVP be used to satisfy multiple purposes to achieve the broadest public benefit for the entire
28 Central Valley. The Rivers & Harbors Act of 1937 stated the original purposes for creating the CVP:

 Improving navigation, regulating the flow of the San Joaquin River and

1 the Sacramento River, controlling floods, providing for storage and for
2 the delivery of the stored waters thereof, for the reclamation of arid and
3 semi-arid lands and lands of Indian reservations, and other beneficial
4 uses and for the generation and sale of electric energy . . .

5 (Rivers and Harbors Act of August 26, 1937, Pub. L. 75-392, 50 Stat. 844, 850 (1937).) The CVP's
6 purposes have been expanded to include "mitigation, protection, and restoration of fish and wildlife"
7 on par with irrigation (see *San Luis & Delta-Mendota Water Auth. v. U.S.* (9th Cir. 2012) 672 F.3d
8 676, 683-84), but legislation has not restricted Reclamation's discretion to balance all competing
9 interests and to determine how best to comply with statutory requirements and contractual obligations.
10 (See *Westlands Water Dist. v. U.S.* (E.D. Cal. 2001) 153 F. Supp. 2d 1133, 1144 ["[Reclamation] has
11 contractual authority and administrative discretion over how it provides water service among the
12 CVP's water and power-users, and how it picks its priorities among them"].) Precluding Reclamation
13 from exporting water other than to meet health and safety needs will unlawfully render Reclamation
14 unable to meet statutory requirements (see, e.g., CVPIA, § 3406(d)) and contractual obligations.

15 Including the 1,500 cfs in Condition 1.b is also an error in law because it is not in the public
16 interest. "As a matter of state policy, water resources are to be used 'to the fullest extent . . . capable'
17 (§ 100) with development undertaken 'for the greatest public benefit' (§ 105)." (*United States v. State*
18 *Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 103.) Because "the allocation of CVP water is a
19 zero-sum game[,] . . . if Project yield is used for one purpose, it reduces the available water for other
20 purposes." (*San Luis & Delta-Mendota Water Authority v. U.S.*, 672 F.3d at 702.) What is in the
21 public interest is broader than what is necessary to meet health and safety needs. For example, it is in
22 the public interest to deliver water to address as many as possible of the negative impacts from
23 drought, like impacts from increased groundwater pumping (e.g. land subsidence, groundwater
24 overdraft, increased energy usage, and negative water quality impacts), irretrievable resources losses,
25 air pollution, economic impacts, and sociological impacts. (See *Consol. Smelt Cases* (E.D. Cal. 2011)
26 812 F. Supp. 2d 1133, 1187; *Consol. Salmonid Cases* (E.D. Cal. 2010) 713 F. Supp. 2d 1116, 1151
27 [describing negative impacts from water shortage].) By including a 1,500 cfs cap on exports that
28 precludes action in the public interest, the Order includes an error in law.

1 **2. Condition 2 Is Not Supported by Substantial Evidence**

2 The Water Board should eliminate Condition 2 of the Order because Condition 2 is not
3 supported by substantial evidence. Condition 2 provides:

4 During the effective period of this Order, if precipitation events occur
5 that enable DWR and Reclamation to comply with the Delta Outflow
6 and DCC Gate Closure requirements contained in Table 3 of D-1641,
7 then D-1641 requirements shall be operative, except that any SWP and
8 CVP exports greater than 1500 cfs shall be limited to natural or
9 abandoned flow, or transfers as specified in condition 1b.

10 (Order, at p. 14.) Condition 2 is not supported by substantial evidence because the Order fails to
11 explain the basis or rationale for requiring the Projects to comply with the Delta Outflow and DCC
12 Gate Closure requirements following a precipitation event during the current extreme drought.

13 Condition 2 is contrary to the Order’s finding that there is an urgent need for relief from the
14 Delta Outflow and DCC Gate Closure requirements. The Order found that “[a]n urgent need exists
15 for changes in the Petitioners’ requirement to meet specified Delta Outflows, Export Limits and Delta
16 Cross Channel Gate Closure objectives included in D-1641.” (Order, at p. 8.) The Order found that
17 “low initial storage and historically dry conditions experienced in the last 12 months, since January
18 2013, have resulted in significant reductions in water supplies and will likely lead to critical water
19 shortages in 2014.” (*Id.*) These findings support providing relief from Delta Outflow and DCC Gate
20 Closure requirements to protect and ensure sufficient water supplies, not reinstating them for whatever
21 brief periods flows are adequate in the Delta.

22 Condition 2 is also contrary to the Order’s finding that relief from those requirements is in the
23 public interest. The Order found that “[i]t is in the public interest to preserve [stored] water supplies
24 for [North of Delta, in-Delta, and South-of-Delta] beneficial uses when hydrologic circumstances
25 cause severe reductions to water supplies.” (Order, at p. 12.) The Order also found that “[t]he
26 changes, or temporary modifications, authorized in this Order will make the best use of a limited
27 water supply in the near term.” (*Id.*) These findings provide that it is the public interest to allow
28 water to be stored and conserved to support beneficial uses.

 Condition 2 is contrary to all these findings because it requires the Projects to automatically
default back to complying with D-1641 requirements, despite the continuing need to capture and

1 preserve critical water supplies. The Order fails to explain how a single precipitation event alters the
2 urgent need to provide relief from the Delta Outflow and DCC Gate Closure requirements.

3 Requiring compliance with the Delta Outflow and DCC Gate Closure requirements following
4 a precipitation event is not in the public interest, given the very limited water supplies available to
5 support beneficial uses. The potential water benefits of meeting Delta Outflow are outweighed by the
6 potential water costs. Having to meet Delta Outflow requirements may reduce the volume of water
7 below what otherwise could be pumped by the Projects and held in South-of-Delta storage. Condition
8 2 should be removed because it potentially creates lost opportunities to capture what limited water is
9 available in the Delta.

10 The Order acknowledges the extreme hydrological conditions and how little water is available
11 to support beneficial uses. Under Condition 2, the Projects must meet Delta Outflow requirements,
12 despite the continuing urgent need to capture, store, and preserve water supplies to support beneficial
13 uses of water. The Order fails to provide substantial evidence to support Condition 2 because it fails
14 to explain why meeting Delta Outflow requirements is in the public interest or how Condition 2 will
15 ensure that the water resources of the State are put to maximum beneficial use. There is no substantial
16 evidence to support the conclusion that it is in the public interest to allow available water to reach the
17 ocean, rather than reach the CVP's south-of-Delta reservoirs or the communities that rely on the
18 Projects for water supply. The Water Board should remove Condition 2 to ensure the public interest is
19 served and that limited water supplies are available to support the maximum number of beneficial
20 uses.

21 **V. CONCLUSION**

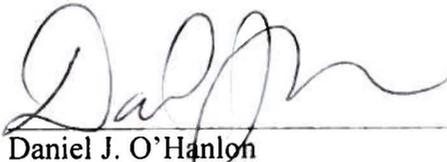
22 Based on the foregoing, the Water Authority respectfully requests the Water Board reconsider
23 and modify its Order Approving a Temporary Urgency Change in License and Permit Terms and
24 Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought
25 Conditions (with Modifications Dated February 7, 2014).

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Dated: February 28, 2014.

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By: 
Daniel J. O'Hanlon
Attorneys for San Luis & Delta-Mendota Water
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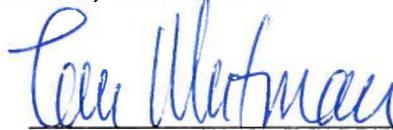
On February 28, 2014, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR RECONSIDERATION OF ORDER APPROVING A TEMPORARY URGENCY CHANGE IN LICENSE AND PERMIT TERMS AND CONDITIONS REQUIRING COMPLIANCE WITH DELTA WATER QUALITY OBJECTIVES IN RESPONSE TO DROUGHT CONDITIONS (WITH MODIFICATIONS DATED FEBRUARY 7, 2014)** on the interested parties in this action as follows:

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