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VIA E-MAIL

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Re: **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** (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)

Dear State Water Resources Control Board Members and Agency Staff:

The State Water Contractors ("SWC") on its own behalf and on behalf of its member agencies, submit the following comments in response to the 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, as modified on February 7, 2014 (hereafter, "Order").

The Order is a response to unprecedented hydrological conditions now facing California, and it recognizes that the existing water quality objectives do not account for the current extremely dry conditions and the impact on beneficial uses. When it adopted the Bay-Delta objectives, the State Water Resources Control Board ("Water Board") considered "the beneficial uses of water (municipal and industrial, agricultural, and fish and wildlife) based on a set of assumptions about the State's water supply, including the expected



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variability of this water supply.” (Order, p. 4.) The Order acknowledges the “[f]low and salinity objectives in the Bay-Delta Plan and D-1641 were developed based on historic hydrologic conditions” and the “magnitude of the current drought was not considered in establishing the Bay-Delta objectives or in the terms and conditions contained in D-1641.” (Order, pp. 2, 4.)

The SWC appreciates the swift actions the Department of Water Resources (“DWR”), the Bureau of Reclamation (“Reclamation”), and the Water Board have taken in an effort to mitigate the drought’s impacts and to conserve limited water supplies. The Order provides necessary adjustments to water right conditions for the State Water Project (“SWP”) and Central Valley Project (“CVP”), to help ensure that the State’s scarce water supply is managed to maximize and protect beneficial use with appropriate balances among the various beneficial uses. This water year’s extreme conditions necessitate adjustments to the Projects’ water right terms and conditions, to ensure reasonable and maximum beneficial use of a very finite water supply.

The SWC appreciates the Water Board’s willingness to take swift action. However, more is required. In particular, the Order should be modified to further enhance opportunities to improve water supply south of the Delta. The record dry conditions this year require policy decisions determining the most critical needs for water, and identifying water management actions that can be taken to meet those most critical needs under conditions not considered when the existing objectives were established. The existing objectives should not be the benchmark for allocating water among beneficial uses in this extraordinary year. To best serve the public interest, the SWP should be allowed to take maximum advantage of every reasonable opportunity to capture water available in the Delta for export pumping. The Order limits allowable export pumping and deliveries to pumping for “health and safety” purposes and needs but does not define that term. The Water Board should do so, to clarify both the application and legal and factual basis for the Order. Further, we request that Water Board remove the 1,500 cfs limitation on export pumping in Condition 1.b. of the Order. Finally, we request that the Water Board remove Condition 2 of the Order, which reinstates Delta Outflow and DCC gate closure requirements when precipitation events temporarily allow compliance.

Additional actions by the Water Board and other agencies will likely be necessary as we go through the year, as the drought’s impacts become more widespread and more severe, and impacts that may not even be anticipated today occur. It will require flexibility and adaptation, as conditions change and opportunities arise, to fulfill the fundamental state policy established in Water Code section 100 that the water resources of the State shall be put to beneficial use to the fullest extent of which they are capable, in the interest of the people, and for the public welfare.¹ The SWC acknowledges the difficult challenges the drought creates, and urges the Water Board to continue to take all necessary actions to mitigate the drought’s impacts on beneficial uses. The SWC offer the following comments:

1. Existing Conditions In SWP’s Service Area Are Dire

Many local public agencies that are SWC members face alarming water supply conditions in their service areas, and there is no relief in sight for the foreseeable future. The member agencies hold contracts to receive water from the SWP but for the 2014 water year, all SWP contractors have

¹ To balance competing beneficial water uses, the Water Board should “be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.” (Cal. Water Code § 1254.)

received an initial zero percent allocation.² The SWP contractors have suffered low contract allocations for many years preceding this drought, including a 65 percent or less allocation in the 6 out of the last 7 years.³

The severe drought impacts communities that rely on the SWP as a water supply source. Extensive crop fallowing is expected for many SWP member agencies, with negative impacts on local economies. Groundwater basins, which are already declining in many areas, will be overtaxed as communities increase groundwater pumping to meet the water needs of people and crops. These impacts must be considered by the Water Board when deciding how to best protect beneficial use of water and serve the public interest.

2. The Water Board Must Define “Health and Safety Purposes And Needs” And Must Justify Any Limitations On SWP Export Operations Arising From That Definition

Condition 1.b limits allowable export pumping to “the minimum pumping levels required for health and safety purposes” and specifies that “[d]eliveries to “SWP and CVP export contractors shall also be limited to health and safety needs.” (Order at pp. 13-14.) Hence, the scope of these terms in application is critical to the effect of the Order. Yet what is encompassed within “health and safety” is not defined in the Order. Furthermore, during the workshops held by the Water Board, the board members were unclear about what was included in the health and safety calculation.

A very narrow definition could greatly restrict allowable exports, while a broad definition would not. Defining the scope of “health and safety” purposes and needs is essential not only to understanding application of the Order, but also to evaluating the factual and legal basis for the restrictions imposed by the Order. For example, a narrow definition may bring the Order into conflict with contractual obligations, conflicts that will fundamentally interfere with the SWP’s ability to operate.

A narrow definition may also conflict with the Governor’s Emergency Declaration and Executive Order. The Emergency Declaration recognized a broad range of drought impacts forming the basis for an emergency, including impacts to agriculture. Paragraph 8 of the Executive Order directed that water be conserved upstream “to protect cold water pools for salmon and steelhead, maintain water supply, and improve water quality.” The SWC fears that although the Project’s water supply is allowed to be used for all Project purposes, the Water Board may decide that agricultural uses are not “health and safety purposes and needs”, and will prohibit deliveries of SWP water for agricultural use. There is precedent for allowing water for health and safety purposes to include agricultural use. In 2007 the U.S. District Court in *NRDC v. Kempthorne* found that risks to human health and safety include: “Adverse effects on agriculture, including but not limited to, loss of jobs, increased groundwater pumping, fallowed land, and land subsidence.” *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 91968, 35-37, 58-60 (E.D. Cal. Dec. 14, 2007).

² On January 31st, 2014, DWR announced that all SWP contractors will receive a zero percent allocation of their contractual entitlements. (<http://www.water.ca.gov/swpao/docs/notices/14-02.pdf>)

³ See Notices regarding SWP contract allocations, available at <http://www.water.ca.gov/swpao/notices.cfm>.

A narrow definition may also be used to preclude SWP member agencies that have conserved other water supplies through prior water management measures, from taking water. This interpretation would fail to consider that certain service areas in SWC member agencies may have to blend SWP water with local sources. It would also fail to account for the fact that some SWC member agencies in turn furnish water to multiple public water suppliers, some of which have other water supplies and others that do not.

3. It Is Critical To Move Available Water South of the Delta

It is critical that the Water Board allow, and the Projects take, every opportunity to mitigate drought impacts. South-of-Delta contractors have been and will continue to be disproportionately impacted by limited water supplies and regulatory restrictions on export pumping. To protect south-of-Delta beneficial uses, it is imperative that the Water Board consider and look to optimize opportunities to allow for export pumping. For example, when rain events occur and boost surface flows, increased export pumping should be allowed, to capture what limited water is available. At this point, every available acre-foot of water has value and can help to mitigate the impacts to the communities that depend on the Projects for their water supply.

The Order does not allow the Projects to take full advantage of opportunities that may be presented by storm events. The Order sets the maximum exports at 1,500 cfs. (Order, pp. 13-14.) In their February 14, 2014, Report to SWRCB on Export Amounts to Maintain Health and Safety During Drought (“Report”), DWR and Reclamation stated they believe that “ultimately the minimum health and safety export level at any one time will be a range and that 1,500 cfs is a reasonable cap on that range.” (Report, p. 3.) The SWC does not agree that 1,500 cfs should be a cap on export pumping. The 1,500 cfs number does not reflect water needs in the current extreme drought conditions and may not be essential to protect listed fish species. For example, the biological opinions applicable to Project operations allow pumping greater than 1,500 cfs, depending, for example, upon distribution of protected fish within the Delta. The Water Board should not set 1,500 cfs as a hard limit on allowable exports, and should instead maintain flexibility to respond to changing conditions and needs, in an effort to assist the Water Board in its decision-making in this unprecedented time.

4. Condition 2 Of the Order Should Be Removed So That More Available Water Can Be Moved South of the Delta

The SWC requests that the Water Board remove Condition 2. Condition 2 requires the Projects to comply with D-1641’s Delta Outflow and DCC Gate Closure requirements when precipitation events occur that enable the Projects to meet those requirements. (Order, p. 14.) While it does allow the project pumping to exceed 1,500 cfs to pump natural and abandoned flow available after meeting those requirements, Condition 2 reduces the volume of water that otherwise could be pumped. Requiring compliance with the Delta Outflow and DCC Gate Closure requirements this year is not in the public interest, given the very limited water supplies available to support beneficial uses.

Condition 2 is essentially seeking to obtain a highly uncertain benefit for fish and wildlife from what will be very temporary compliance with the Delta Outflow and DCC Gate Closure requirements. This uncertain benefit comes at the cost of the certain and easily quantifiable loss of water supply for beneficial uses, or additional water storage south of the Delta.

5. Curtailment Notices Should Be Issued

The Water Board should issue Water Diversion Curtailment Notices to prevent diversions that are unsupported by water rights under the current hydrological conditions. The Order states that “[f]ollowing persistent dry hydrologic conditions, the Board plans to issue Water Diversion Curtailment Notices to water right holders in water short areas in the near future.” (Order, p. 4.) The SWC urges the Water Board to issue such Curtailment Notices and begin actions to enforce the notices as soon as possible. In these hydrological conditions, there is very little, if any, “natural flow” to support appropriative and riparian water rights and it is likely that many diversions are relying on the Projects’ release of stored water. (See Order, p. 8 [describing how unprecedented “depletions” on the Sacramento River and Feather River systems are resulting in further reductions in the Projects’ storage to meet water quality objectives].) In addition to Curtailment Notices, the Water Board should increase enforcement actions to ensure water is available for its intended and authorized uses.

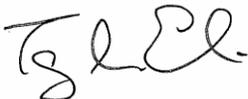
6. Additional Actions Are Likely To Be Needed

Finally, SWC asks that the Water Board remain aware of the likelihood that additional future adjustments to the Projects’ water right conditions will be necessary to respond to drought conditions. The Order requires a minimum Delta outflow level of 3,000 cfs during February and states that “[f]urther changes to Delta Outflows for the remainder of the season may be requested.” (Order, p. 11.) Such “further changes” to Delta Outflows will likely be necessary. In addition, “future requests for temporary changes could include requests for possible modifications of other water quality objectives found in D-1641 Table 1 ‘Municipal and Industrial Beneficial Uses,’ Table 2 ‘Agricultural Beneficial Uses,’ and Table 3 ‘Fish and Wildlife Beneficial Uses.’” (Order, p. 6.)

As the Water Board is considering future actions it is critical that those actions be consistent with California water law and water rights priorities. Furthermore, as the Water Board considers additional actions it must carefully consider its jurisdiction and authority.

The SWC appreciates the swift actions of the Water Board, DWR and Reclamation to mitigate the drought’s impacts and conserve scarce water supplies. SWC has concerns regarding the Order, as discussed above. The severe hydrological conditions present challenges for the entire State and the Water Board has the important responsibility to determine what is reasonable and in the public interest when so little water is available to support beneficial uses. In striking that balance, we ask that the Water Board give appropriate weight to the needs of the communities served by the SWP.

Sincerely,



Terry Erlewine
General Manager