

July 31, 2015

Via Electronic Mail and U.S. Mail

Thomas Howard
Executive Director
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
Tom.Howard@waterboards.ca.gov

Re: Objections to July 3, 2015 Order Conditionally Approving A Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives in Response to Drought Conditions

Dear Mr. Howard:

In accordance with California Water Code section 1438(d), the Northern California Water Association (NCWA) and the Sacramento River Settlement Contractors identified on the attached Exhibit 1 (collectively, NCWA), respectfully submit these objections to the July 3, 2015 Order Conditionally Approving A Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives in Response to Drought Conditions (Order).

NCWA recognizes the severity of the current drought, and remains committed to working with the State Water Resources Control Board (SWRCB), the U.S. Bureau of Reclamation (Reclamation), and state and federal fish and wildlife agencies to mitigate the effects of the drought. In fact, the Sacramento River Settlement Contractors (SRS Contractors), in collaboration with NCWA, have taken extraordinary measures this year to address the challenges posed by the drought. These measures include, but are not limited to, almost daily coordination of diversions among the SRS Contractors that divert upstream of Wilkins Slough, responsible beneficial use of groundwater to assist with maintaining adequate Sacramento River flows, and collaboration with state and federal fishery agencies to monitor fishery conditions on the Sacramento River. In addition, we have appreciated the open communication between you and your staff, and NCWA, to understand the dynamics on the Sacramento River system this year and to work through these issues

Against this cooperative backdrop, NCWA has identified certain legal issues concerning some of the conditions in the Order and the SWRCB's increasing direct-management of the operations of the Central Valley Project (CVP). These concerns are explained in detail below.

1. The Order Is Inconsistent With Water Code Section 1435

A condition in the Order requires Reclamation to implement the Sacramento River Temperature Management Plan (Temperature Plan or Plan) as revised and formulated by the Executive Director and the staffs of the federal and state agencies. Specifically, the Order provides: “Reclamation shall implement the Sacramento River Temperature Management Plan with any change required by the Executive Director.” (Order, ¶ 6(a), p. 28.) The Order includes the following flow requirements from the current version of the Temperature Plan: base releases from Keswick Dam of 7,250 cubic feet per second (cfs) in June, July, and August; 6,500 cfs in September; and 5,000 cfs in October. Actual operations, including the Keswick releases, however, are subject to a “real-time monitoring and decision making process that includes representatives from the relevant federal and State agencies. This decision making process may yield adjustments to base operation depending on real-time conditions on the ground.” (*Ibid.*) Reclamation must also update the Plan “immediately . . . as conditions change or upon the request of the fisheries agencies or Executive Director or his designee.” (Order, p. 29.)

NCWA recognizes the seriousness of the current drought, and the need for temperature control in the Sacramento River to protect winter-run Chinook salmon. In fact, as noted above, the SRS Contractors have taken extraordinary actions this year to improve temperature conditions in the Sacramento River. NCWA also recognizes the need to update information and to manage operations in response to new information in order to preserve cold-water storage in Shasta Reservoir. The terms of the Order, however, go far beyond requiring Reclamation to optimize scarce cold-water resources for the fall months. Condition 6 of the Order grants the Executive Director the supervisory role to manage CVP operations on the Sacramento River outside of the statutory water rights change process. Further, as demonstrated in the last several weeks, the Temperature Plan has become the document that controls Sacramento River operations. The manner in which this condition has been¹ and likely will continue to be implemented violates Water Code section 1435.

Section 1435 authorizes the SWRCB to act on petitions from permittees or licensees that have an “urgent need” to change a “point of diversion, place of use, or purpose of use” from the terms specified in a permit or license.² (Wat. Code, § 1435(a).) The SWRCB may issue a conditional, temporary change order on such a petition. Prior to issuing the order, the SWRCB (or its designee) must make specific findings that (1) the permittee has an urgent need to make the proposed change; (2) the proposed change may be made without injury to any other lawful

¹ The immediately prior April 6, 2015 iteration of the TUCP order (April 6 Order) included a very similar condition, which required Reclamation to update the Temperature Plan and to “implement the plan with any changes required by the Executive Director.” (April 6 Order, ¶ 6(c), p. 42.)

² Indeed, from the outset, the SWRCB has operated beyond the ambit of section 1435 because the orders are not authorizing any such change to a point of diversion, place of use, or purpose of use as allowed by statute.

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user of water; (3) the proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses; and (4) the proposed change is in the public interest. (*Id.*, § 1435(b).) In addition, any change order condition must be supported by these findings. (*Id.*, § 1435(b)(4).)

Thus, any condition in an order on Reclamation and Department of Water Resources' (DWR) temporary urgency change petition must be supported by findings required under Water Code section 1435. In addition, all such findings must be supported by evidence. (Code Civ. Proc., § 1094.5(b).) In making the finding that the authorized changes would not injure any other lawful user of water, the July 3 Order explains that, "approval of the proposed changes does not affect the Petitioners' obligation to curtail their diversions of natural and abandoned flows to the extent necessary to protect senior water right holders, or to meet any independent contractual obligations that the Petitioners may have." (July 3 Order at § 5.3, emphasis added.) However, this finding is not supported by any evidence and is dependent on subsequent approvals occurring outside of the public process for changes to Reclamation's water rights.

As revealed by the SWRCB handling of the Temperature Plan, it is evident that the SWRCB is bypassing the procedural requirement to make findings supported by evidence by imposing conditions affecting CVP operations in the Temperature Plan, rather than through the TUCP order. In particular, the Order requires Reclamation to "implement the Sacramento River Temperature Management Plan with any changes required by the Executive Director." (July 3 Order at ¶ 6.a, p. 28, emphasis added.) Allowing the Executive Director to impose changes to the Sacramento River Temperature Management Plan without making any findings regarding injury to other lawful users of water violates Water Code section 1435, and could undermine the finding that the July 3 Order does not affect Reclamation's obligation to meet its independent contractual obligations, such as the Sacramento River Settlement Contracts.

As demonstrated by the Executive Director's actions to suspend approval of the Temperature Plan on May 29, 2015, and approving a revised Temperature Plan on July 7, 2015, the Executive Director is controlling CVP operations without the analysis required by Water Code section 1435. For example, the findings in the Order do not explicitly address reduced releases from Keswick Dam. Instead, the "changes conditionally approved" in the Order are listed on page 19, and they do not refer to reduced Keswick releases.³

It is unlikely that the SWRCB would be able to make the findings to support a condition in the TUCP order that requires reduced releases from Keswick Dam. First, a requirement to

³ Similarly, the Order does not discuss or include findings related to the operational requirement contained in the Executive Director's July 7 letter that end of September storage in Folsom Reservoir cannot drop below 120,000 acre-feet. The omission is likely a function of timing, but this operational requirement could affect water users that rely on Oroville Reservoir, and result in other stressors on the water supply system.

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reduce Keswick releases could cause injury to lawful users of water—water right holders on the Sacramento River whose rights are senior to the CVP. When Reclamation reduces Keswick releases to 7,250 cfs in July, Reclamation struggles greatly to meet its obligations under the Sacramento River Settlement Contracts.⁴ The prior operations plan represented a substantial management challenge to the SRS Contractors. The new, revised flow requirements represent an additional 20% reduction from the previous plan. These water users are entitled to divert 75% of their contract supplies in Critical Years under the terms of their Sacramento River Settlement Contracts. Any further reductions to Keswick releases will very likely cause injury to these senior water right holders on the Sacramento River. In this way, the finding of the July 3 Order that the proposed changes do not affect “independent contractual obligations” would not be supported by the evidence.

Second, reducing Keswick releases to 7,250 cfs will likely have unreasonable effects on fish and wildlife in the Sacramento Valley later in the year. As NCWA has explained in earlier correspondence to the SWRCB, rice acreage creates wetland habitat and food resources for waterfowl and other protected species in the Pacific Flyway. Reduced releases in the summer months results in less planted acreage to create habitat for waterfowl and species like the protected garter snake. Reduced releases in the fall and winter months affect diversions needed to flood rice acreage and create and maintain wetlands for migrating waterfowl. These adverse effects on waterfowl and other species in the Sacramento Valley have not been considered in discussions regarding the Temperature Plan, which are solely focused on fisheries and minimizing temperature impacts to winter-run Chinook salmon.

Third, reduced Keswick releases affect the public interest in more ways than is being considered as part of the approval process for the Temperature Plan. For example, the SRS Contractors have planned to transfer twice the amount of water as in 2014 to provide water supplies needed in other areas of the state. The revised flow requirements severely limit the operational flexibility that allows these water transfers to occur.

To summarize, NCWA and the SRS Contractors do not object to a Temperature Plan generally as a condition in the Order. However, by requiring that a Temperature Plan that must be approved and revised in accordance with the Executive Director’s requests, and modified in real-time based on a process run by the “relevant federal and State agencies,” the SWRCB has circumvented the requirements of Water Code section 1435.

⁴ The SRS Contractors are waters users on the Sacramento River, with water rights that are senior to Reclamation’s permits and licenses for the CVP. Both “Base Supply” and “Project Water,” as those terms are used in the Settlement Contracts, are directly tied to the SRS Contractors’ pre-existing rights. As such, the “no injury” rule encompasses the SRS Contractors’ diversions, and the SWRCB must find that a condition in a change order will not cause any “injury” to the SRS Contractors’ diversions from the Sacramento River. (*State Water Resource Control Bd. Cases* (2006) 136 Cal.App.4th 674, 738, 743.)

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2. The July 3 Order Carries Forward Legal Deficiencies of Prior Orders

In the February 3, 2015 version of the TUCP order (February 3 Order), the Executive Director included the following condition:

DWR and Reclamation shall calculate and maintain a record of the amount of water conserved through the changes authorized by this Order, as well as a record of where that water was conserved, and shall submit such records on a monthly basis to the State Water Board and fisheries agencies within 20 working days after the first day of the following month. **The use of such water shall be determined by the Executive Director or his representative, taking into consideration input from DWR, Reclamation, the fishery agencies, and other interested persons.** (February 3 Order, p. 23, emphasis added.)

NCWA submitted a comment letter to the SWRCB dated February 13, 2015, explaining that the above-highlighted language suggests the Executive Director may reallocate water that would otherwise be released to meet Delta water quality standards. The state and federal water projects operate under a complicated set of laws and regulations that govern when water is released to satisfy downstream water rights; maintain adequate water quality; generate hydropower; protect the environment; and for other recognized beneficial uses. All decisions regarding storing and releasing water from California's reservoirs must comply with applicable laws, and the Executive Director is not authorized to create a separate pool of "conserved" water that is not subject to prior rights and other legally entitled existing demands. NCWA was pleased when that objectionable emboldened language was deleted from the March 3, 2015 version of the TUCP order, bringing this provision in line with applicable state and federal law governing water rights.

Unfortunately, the same problem with the February 3 Order has recurred in the July 3 Order. Although the July 3 Order does not include the highlighted language quoted above, the ability of the Executive Director to require changes to the Temperature Plan has the same effect. Pursuant to Condition 3 in the July 3 Order, all water conserved as a result of the approval of the temporary urgency change petition shall be used in accordance with the Temperature Plan. Condition 6 of the Order allows the Executive Director to require changes to that Plan, and under the Order, actual operations may deviate from the Plan based on a real-time decision making process that includes representatives from multiple agencies. Taken together, the Order grants the Executive Director the power—through his control over the Temperature Plan—to reallocate water that would otherwise be released to satisfy prior rights. This is unlawful for the same reasons articulated in NCWA's February 13, 2015 correspondence to the SWRCB.

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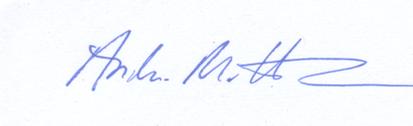
3. Conclusion

NCWA and the SRS Contractors recognize the severity of the current drought, and remain committed to working with the SWRCB, Reclamation, and state and federal fish and wildlife agencies to mitigate the effects of the drought. But in responding to the current drought emergency the SWRCB may not discard the procedural protections established under Water Code section 1435 or, more broadly, constitutional due process protections.

We appreciate the SWRCB's consideration of these objections. Please do not hesitate to contact us if you have any questions.

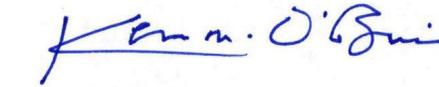
Respectfully submitted,

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Livestock Company

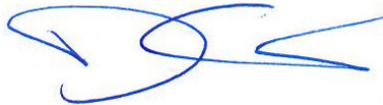
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EXHIBIT 1

SACRAMENTO RIVER SETTLEMENT CONTRACTORS

ANDERSON-COTTONWOOD IRRIGATION DISTRICT
CARTER MUTUAL WATER COMPANY
CITY OF REDDING
CONAWAY PRESERVATION GROUP, LLC
DAVID AND ALICE TE VELDE TRUST
GLENN-COLUSA IRRIGATION DISTRICT
HOWALD FARMS, INC.
MAXWELL IRRIGATION DISTRICT
MERIDIAN FARMS WATER COMPANY
NATOMAS CENTRAL MUTUAL WATER COMPANY
OJI BROTHERS FARMS, INC.
OJI FAMILY PARTNERSHIP
PACIFIC REALTY ASSOCIATES, LP (M&T Chico Ranch)
PELGER MUTUAL WATER COMPANY
PLEASANT GROVE-VERONA MUTUAL WATER COMPANY
PRINCETON-CODORA-GLENN IRRIGATION DISTRICT
PROVIDENT IRRIGATION DISTRICT
RECLAMATION DISTRICT NO. 108
RECLAMATION DISTRICT NO. 1004
RICHTER, HENRY D., ET AL.
RIVER GARDEN FARMS COMPANY
SUTTER MUTUAL WATER COMPANY
TISDALE IRRIGATION AND DRAINAGE COMPANY
WINDSWEPT LAND AND LIVESTOCK COMPANY