

**San Luis & Delta-Mendota Water Authority  
Westlands Water District  
San Joaquin River Exchange Contractors Water Authority**

December 13, 2015

**VIA U.S. MAIL and EMAIL**

State Water Resources Control Board  
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Re: Item 7 – Draft Order Denying in Part and Granting in Part Petitions for Reconsideration of and Addressing Objections to the Executive Director’s February 3, 2015 Order and Subsequent Modification to that Order that Approved Temporary Urgency Changes in License and Permit Terms and Conditions for the State Water Project and Central Valley Project

Dear Board Members:

The San Luis & Delta-Mendota Water Authority, Westlands Water District, and San Joaquin River Exchange Contractors Water Authority (collectively “Water Agencies”) appreciate this opportunity to comment on the Draft Order Denying in Part and Granting in Part Petitions for Reconsideration of and Addressing Objections to the Executive Director’s February 3, 2015 Order and subsequent modification to that Order (“Draft Order”). The Water Agencies are informed that the members of the State Water Resources Control Board (“Water Board”) will consider the Draft Order at its meeting, to be held on December 15, 2015. Please note that the Water Agencies’ ability to review and to comment comprehensively on the Draft Order has been constrained by the limited time allowed between the release of the Draft Order on December 7, 2015 and the December 14, 2015 deadline for submission of comments. Seven days is an inadequate period to fully analyze the Draft Order’s potential implications.

The Water Agencies agree that the drought has not ended, and that it is prudent for all interested parties to plan and prepare for how to deal with continued drought in 2016. It is important that all interests work together and share information to that end. We recognize that the Draft Order is an attempt to get a start on early planning for 2016. But there has been little or no advance discussion of the new conditions in the Draft Order. The means chosen to raise these new conditions, in the Draft Order, has the unfortunate consequence of foreclosing direct communication with members of State Water Board, through application of the ex parte communication rules. That forecloses otherwise useful discussions with State Water Board members regarding 2016 operations that would better inform their decisions regarding the approach for 2016 and alternatives. For this reason, and additional reasons explained below, the

Water Agencies urge the State Water Board to remove from the Draft Order the proposed new conditions regarding 2016 operations.

The Water Agencies offer three main comments. First, the Water Agencies agree with many of the findings and conclusions in the Draft Order. For example, with limited exceptions, the Water Agencies agree the changes to water rights permits for the Central Valley Project (“CVP”) and State Water Project (“SWP”), approved by the TUCP Order,<sup>1</sup> in a fourth year of drought, were in the public interest. The Water Agencies agree there was an urgent need for those changes. And, the Water Agencies agree the requested changes would not unreasonably affect fish and wildlife.

There are other the findings and conclusions in the Draft Order with which the Water Agencies disagree. For example, the Water Agencies do not agree that it was within the State Water Board’s authority to dictate the uses of water conserved within the CVP and SWP as a result of the 2015 TUCP Order. The Water Agencies raised this and other objections during the process related to the TUCP Order and reserve those objections in response to the findings and conclusions of the Draft Order relating to reconsideration.

Second, the Water Agencies strongly object to those provisions of the Draft Order that impose new conditions for 2016. (Draft Order at pp. 59-64.) In those provisions, the Draft Order goes beyond the scope of the State Water Board’s authority under the temporary urgency change process established by the Water Code, (*see* Water Code §§ 1435-1442), and would deprive the United States Bureau of Reclamation (“Reclamation”), California Department of Water Resources (“DWR”), and the recipients of CVP and SWP water, of due process regarding the proposed new permit conditions.

The Draft Order purports to renew the TUCP Order. But the temporary urgency change process provided by the Water Code does not contemplate renewal of a temporary change order on the State Water Board’s initiative. The temporary urgency change process is premised upon a “permittee or licensee who has an urgent need” to change a term in its water rights permit or license, and who petitions the State Water Board for a change to address that urgent need. (Water Code § 1435.) Change orders expire “automatically” 180 days after issuance, but can be “renewed.” (Water Code §§ 1440, 1441.) Reclamation and DWR have not petitioned for renewal of the TUCP Order for 2016. They may seek to do so, or file a petition for a new temporary urgency permit change for 2016 operations, but they have not done so yet.

Even assuming the State Water Board could renew a temporary change order absent a request by the permittee or licensee, the Draft Order does not “renew” the TUCP Order. The Draft Order is a new and entirely different order. It does not continue in effect any of the modifications to the CVP and SWP water rights permits conditions relating to Delta outflow, export, and Delta Cross Channel Gate closure requirements, flow requirements, and Western Delta salinity compliance locations provided by the TUCP Order. Rather, under the Draft Order, the water right requirements imposed by Decision 1641 “remain in effect.” (Draft Order at p. 59.)

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<sup>1</sup> By “TUCP Order,” for purposes of this letter we mean the February 3, 2015 Order and subsequent modifications to that order.

Instead of extending existing TUCP Order provisions, the Draft Order would impose new conditions requiring new plans, and would mandate implementation of those plans in 2016. For example, it would require Reclamation to prepare and implement an operations plan that provides for a minimum of 1.6 million acre-feet in storage in Shasta Reservoir, and a minimum of 200,000 acre-feet in storage in Folsom Reservoir, at the end of October 2016. (Draft Order at pp. 61, 63.) In addition, Reclamation and DWR must implement “any changes directed by the Executive Director.” (*Id.*) Any claim by the State Water Board that these new conditions are necessary to support the findings required by Water Code section 1435(b) for a temporary change order could not be supported. Reclamation and DWR have not yet sought any changes for 2016, and the Draft Order would not continue the permit modifications in the TUCP Order. These new conditions are outside the scope of the State Water Board’s authority to resolve the several petitions for reconsideration of the TUCP Order. Hence, the State Water Board cannot lawfully use the petitions for reconsideration of the TUCP Order as a procedure for imposing the new permit conditions on CVP and SWP operations in 2016 that are included in the Draft Order.

The State Water Board of course has ongoing authority and jurisdiction over the water rights permits and licenses for the CVP and SWP. But it must exercise that authority in accordance with law. The expedited and abbreviated process allowed by Water Code section 1435 et seq. for urgently needed temporary permit changes requested by a permittee or licensee is not applicable here. For the new conditions to be imposed by the Draft Order, the State Water Board must first conduct an adjudicative proceeding. Providing due process would not only help protect Reclamation, DWR, and affected water users, but would also improve the quality of the State Water Board’s decision. These parties can bring information and expertise to the State Water Board, to better inform it of the potential consequences of permit changes and available alternatives.

The State Water Board is not following the procedures of an adjudicative proceeding. The Draft Order was made public late in the day on December 7, 2015. The December 15, 2015 meeting at which the Draft Order will be considered for adoption will not be an evidentiary proceeding, and there will be no opportunity present and rebut evidence. The basis for the specific carryover storage levels, 1.6 million acre-feet in Shasta Reservoir and 200,000 acre-feet in Folsom Reservoir, is not well explained in the Draft Order. Whatever evidence the State Water Board relies upon for setting these requirements has not been made available for review and potential rebuttal. The proposed new conditions for carryover storage in Shasta Reservoir and Folsom Reservoir, in particular, may not serve their intended purpose, may have significant adverse environmental impacts, and would likely diminish contract allocations for members of the Authority. Yet, there is no discussion or analysis in the Draft Order of the potential environmental and socioeconomic consequences that would follow from these carryover storage requirements; indeed, it is not apparent that the potential impacts have been analyzed, as is necessary for an informed consideration of whether the changes are in the public interest. The seven days to review and prepare written comments and the few minutes afforded for public comment at the State Water Board meeting are wholly inadequate to allow for proper testing of the staff proposal. Further, much is unknown about the full effect of the Draft Order. It is entirely unknown at this point what other “changes” to the operations plans may be “directed by the Executive Director”, (Draft Order at pp. 61, 63.), or whether and how the Executive Director may “modify” the order. (Draft Order at p. 64.) For these reasons, the current process does not meet requirements for an adjudicative proceeding under the Administrative Procedure Act and the State Water Board’s regulations. (Gov. Code § 11400 et seq.; Cal. Code Regs. tit. 23, §§ 648-648.8.) The required process includes

an “opportunity to present and rebut evidence” and “a statement of the factual and legal basis of the decision.” (Gov. Code § 11425.10(a)(1),(6).) Nor does the current process meet constitutional due process requirements.

In sum, on December 15, the State Water Board cannot lawfully make the changes to the CVP and SWP water rights included in the Draft Order. Neither Reclamation nor DWR has invoked the temporary urgency change procedures to seek changes to the permit conditions governing operations in 2016, and the State Water Board’s process for resolution of the petitions for reconsideration of the TUCP Order does not meet the requirements imposed by law for the adoption of the new permit conditions. The State Water Board should, therefore, delete from the Draft Order those provisions that would extend the TUCP Order and amend the water rights permits of the CVP and SWP for 2016.

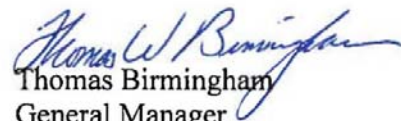
Third, the State Water Board should remove a statement in the Draft Order that could be read to prejudge the outcome of ongoing proceedings regarding the Bay Delta Water Quality Control Plan. At page 42, the Draft Order says: “With regard to the adequacy of the existing water quality objectives and D-1641, the State Water Board agrees that the existing objectives merit review and update and as such the State Water Board is currently in the process of updating the water quality objectives to ensure the reasonable protection of fish and wildlife beneficial uses for review.” Depending upon what is meant by “update,” this could be read to suggest that the State Water Board has already concluded that changes to the objectives are necessary. But the State Water Board has not yet completed its process and made a decision whether to revise any objectives. And, to the extent the State Water Board finds that beneficial uses in the Bay-Delta require greater protections, those additional protections could be reflected in the Bay Delta Water Quality Control Plan’s Program of Implementation rather than through changes to the objectives. For these reasons, the Draft Order should be modified to avoid the perception of prejudging the outcome of ongoing proceedings regarding the Bay Delta Water Quality Control Plan.

Thank you for your consideration of these comments.

Sincerely,



Daniel G. Nelson  
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San Luis & Delta-Mendota Water Authority



Thomas Birmingham  
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Westlands Water District



Steve Chedester  
Executive Director  
San Joaquin River Exchange Contractors Water Authority