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December 11, 2015

By email to commentletters@waterboards.ca.gov



SWRCB Board Members
c/o Jeanine Townsend, Clerk of the Board
Cal EPA Headquarters
1001 I Street, 24th Floor
Sacramento CA 95812-0100

Re: Comments Urging Denial of SWRCB Agenda Item 7, "Consideration of an Proposed Order Granting in Part and Denying in Part the Petitions for Reconsideration of the Executive Director's February 3, 2015 Order that Approved Temporary Urgency Changes..."

Dear Board Members:

Western Canal Water District ("District"¹) urges you to not adopt the above referenced item. The District is concerned with increasing SWRCB efforts to dictate the operations of CVP and SWP facilities and inevitable redirected impacts and unintended consequences stemming from these efforts.

North-of-Delta CVP and SWP facilities are operated in an integrated, coordinated manner. The staffs at DWR and Reclamation have decades of experience operating the Projects and in balancing the multiple beneficial uses reliant on Project facilities. The Proposed Order would substitute this extensive experience with the SWRCB's judgment concerning 2016 Project operations. The Proposed Order would also require these integrated facilities to be operated out of balance and in a manner that will very likely result in injury to other lawful users of water, including the District, and have unreasonable effects on fish and wildlife.

The Proposed Order requires Reclamation to prepare and implement a plan of operations that provides for a minimum end-of-October 2016 carryover storage volume in Shasta Reservoir of at least 1.6 million acre-feet and in Folsom Reservoir of at least 200,000 acre-feet. Rendering CVP facilities and operations largely inflexible means that greater responsibility for maintaining Delta water quality, providing supply for in-basin uses, and responding to unforeseen conditions falls on Lake Oroville and the Feather River. For example, had these requirements been imposed in 2015, the end-of-October storage levels in Lake Oroville would have been approximately

¹ The District holds an Agreement on Diversion of Water from the Feather River with the State of California dated January 17, 1986, copies of which are located in the files of the SWRCB.



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250,000 acre-feet lower or approximately 750,000 acre-feet of remaining volume², which is far below the point at which releases from Oroville are limited to not more than 2,000 cfs through a partially functioning river valve.

Rendering CVP operations largely inflexible coupled with potentially overextending Lake Oroville also risks causing significant unreasonable fish and wildlife effects. The Feather River provides habitat to a variety of protected fish species and diversions from the Feather River provide habitat and food resources for migrating birds and the protected Giant Garter Snake. Maintaining suitable water quality levels in the Delta are necessary for innumerable fish and wildlife species as well as diversions for consumptive uses. These various uses all rely on viable upstream Project facilities and are put into jeopardy by the Proposed Order.

The Proposed Order involves high-stakes tradeoffs. It seeks to protect discrete uses and water needs at the expense of potentially significant injury to other legal water users and catastrophic environmental injury, including losing control of Delta water quality. The Proposed Order concerning petitions for reconsideration to the 2015 TUCP documents is not the appropriate vehicle to discuss these weighty issues that have such far-reaching and potentially catastrophic consequences.

Finally, as outlined in the attached Exhibit, the Proposed Order and the manner in which it is recommended by staff, is inconsistent with applicable law. For all these reasons, the District urges the Board to not adopt the Proposed Order.

Very truly yours,

WESTERN CANAL WATER DISTRICT

By: 
TED TRIMBLE, General Manager

Encl.

cc: Dustin C. Cooper
Minasian, Meith, Soares, Sexton & Cooper LLP

² On October 31, 2015, Shasta storage was approximately 1.4 million acre-feet (approximately 200,000 acre-feet below 1.6 million acre-feet); Folsom storage was approximately 148,200 acre-feet (approximately 52,800 acre-feet below 200,000 acre-feet); and Oroville storage was approximately 1,006,530 acre-feet.

Exhibit in Support of Comments Urging Denial of SWRCB Agenda Item 7

On February 3, 2015, the Executive Director of the State Water Resources Control Board (SWRCB) issued an order responding to temporary urgency change petitions (TUCPs) filed by the Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) (collectively, Change Petitioners). The Executive Director modified the February 3, 2015 order on March 5, April 6, and July 3, 2015 (collectively, Urgency Orders). The July 3 modification purported to renew the February order through December 30, 2015.

In response to the Urgency Orders, a number of interested parties (collectively, Reconsideration Petitioners) petitioned for reconsideration of the Urgency Orders. Although the 90-day statutory period for the SWRCB to rule upon the reconsideration petitions has long-since passed, and although the changes instituted by the Urgency Orders are no longer in effect, the SWRCB is now purporting to act on the petitions for reconsideration in the proposed Order Denying in Part and Granting in Part Petitions for Reconsideration and Addressing Objections (Proposed Order). Despite the Proposed Order's entry on the meeting agenda describing it as an action on the petitions for reconsideration, the Proposed Order is in fact an unauthorized *sua sponte* modification and renewal of the Urgency Orders (or, in the alternative, is an unauthorized *sua sponte* imposition of a new Urgency Order for 2016 operations) and suffers from numerous other legal deficiencies. The Proposed Order is inconsistent with applicable law and must not be adopted by the SWRCB.

I. The Proposed Order Would Cause Injury to Other Lawful Users of Water

The Proposed Order avers that, in compliance with Water Code section 1435(b)(2), the changes made by the Urgency Orders were accomplished without injury to any other lawful user of water. However, the Proposed Order does not deny that components of the Urgency Orders described as "conditions of approval" would or did injure other lawful users of water. These so-called "conditions of approval" included restrictions on exports and on the use of water conserved through the changes and included a requirement to prepare and implement a temperature management plan (TMP). The TMP reduced releases from Keswick Dam and

placed a greater burden on Lake Oroville to meet Delta water quality requirements, ultimately causing injury to holders of water rights senior to the projects by reducing water available to the senior rights holders. These injuries continue to this date, so their full extent cannot yet be determined. The Proposed Order, like the underlying Urgency Orders, contains changes (conditions) that will injure other lawful users of water resulting from mandatory carryover storage requirements for Shasta and Folsom reservoirs.

The Proposed Order states that "Water Code section 1435 requires certain findings to be made with respect to the changes proposed by a temporary, urgency change petition, *not with respect to any conditions of approval.*" (Proposed Order at p. 50. Emphasis added.) That is a misreading of the statute and relies upon a distinction without a difference. The statute requires the SWRCB, prior to issuing a change order pursuant to this chapter, to find that "the proposed change may be made without injury to any other lawful user of water." (Wat. Code § 1435(b)(2).) The "proposed change" that must be evaluated refers to all the changes contained in "the change order." There is no distinction to be made between changes contained in urgency orders, whether they were proposed by the petitioners in their TUCPs or by the SWRCB as "conditions of approval." The inquiry concerns whether the urgency change order itself, as a whole ("the proposed change"), would cause the impermissible results. All of the changes proposed in the Urgency Orders being reviewed pursuant to section 1435 must comport with the findings required by subdivision (b). Deeming certain changes "conditions of approval," rather than a change requested by the petitioner, does not authorize the SWRCB, through the Urgency Orders, to injure other lawful users of water.

The Proposed Order simply concludes that, here, the other lawful users of water are entitled to no more water than will be made available pursuant to the changes instituted under the Urgency Orders (be it the changes requested by petitioners or changes imposed by the SWRCB as "conditions of approval"). This logic is conclusory and circular. The findings required by section 1435(b) are illusory if effects of the proposed changes are excluded from the analysis of whether those same changes will injure other users.

Continuing with the circular logic, the Proposed Order argues that the Executive Director had authority to impose conditions of approval on the changes requested by the Change Petitioners in order to make the findings required by section 1435(b). However, the Proposed Order ignores the fact that the conditions imposed by the Executive Director allegedly to make the finding required by 1435(b)(3) necessarily prevent the making of the finding required by 1435(b)(2). In imposing conditions to protect fish and wildlife, other lawful users of water were and will be injured; because other lawful users of water were and will be injured, the finding required by section 1435(b)(2) cannot be made.

The finding required by subdivision (b)(4) independently requires that conditions of approval not injure legal users of water. Prior to approving a TUCP, the SWRCB must find that the change is in the public interest, which in turn requires "findings to support change order conditions . . . may be made without injury to any other lawful user of the water, . . ." (Wat. Code § 1435(b)(4).) The Proposed Order is not in the public interest because the approval conditions and other changes injure other lawful users of water.

The Proposed Order at page 50 purports to claim that the SWRCB can injure water right holders through conditions of approval because "Project contractors do not have a legally protected interest in more water than Reclamation and DWR can deliver consistent with the conditions in their water right permits." (Citing Order WR 2014-0029, pp. 21-22 and *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th at p. 806, fn. 54.) The Order and discussion in the *SWRCB Cases* relies on *O'Neill v. United States* (9th Cir. 1995) 50 F.3d 677, a case involving congressional directive, the Central Valley Improvement Act, to provide more water for fish and wildlife purposes, to the consternation of Westlands Water District. Here, in contrast, there is no congressional directive and the contract of the commenting party does not include a term with the same effect as Article 11 of Westland's contract, which absolves Reclamation of liability. The case does not support the proposition put forth by SWRCB staff in the Proposed Order.

No matter what title they are given, changes contained in an urgency order may not injure other lawful users of water or result in an effective breach of the various settlement contracts and

diversion agreements of senior water right holders. The changes contained in the Proposed Order would injure other users and potentially result in breach of these supply contracts, so they may not be implemented.

II. The Proposed Order's New Mandatory Carryover Storage Requirements for Shasta and Folsom are Arbitrary and Capricious

The Proposed Order provides no justification for the required carryover storage levels that would be imposed on Folsom and Shasta, aside from the nebulous claim that a "margin of safety" to protect fish and wildlife interests is desirable. It provides no explanation for why carryover targets are required for some upstream facilities, but not others, or how these margins of safety will avoid unreasonable fish and wildlife effects in downstream locations, including in the Delta, that rely on releases from viable upstream reservoirs. Even if a margin of safety for some, but not all, Project reservoirs to protect certain beneficial uses were desirable, the SWRCB cannot arbitrarily choose and impose unexplained operational limitations on the complex, interconnected infrastructure of statewide importance that is the CVP and SWP, to the likely detriment of all beneficial uses that rely on CVP and SWP water.

The Proposed Order includes some cursory discussion of carryover levels in the reservoirs in October 2015, but fails to explain exactly how those specific levels failed to serve the fish and wildlife needs in 2015, how they will be adequate in 2016, and how the SWRCB determined that the end-of-October 2016 imposed targets would serve those needs without injury to other lawful users of water. Although the SWRCB has some notion that "more is better" when it comes to holding water in storage, that is an insufficient basis upon which to constrain operational parameters and injure water right holders. The Proposed Order implies that there is some scientific basis for the 2016 targets, stating that it is requiring "a margin of safety for fish and wildlife that is specifically informed by information from the fisheries agencies on what measures are needed to reasonably protect fish and wildlife during another drought," (Proposed Order at p. 39), but it fails to identify or discuss what information, if any, was provided by the fisheries agencies that resulted in the 200,000 and 1.6 million acre-foot figures that would be

imposed by the Proposed Order. Given that the mandated carryover targets are not supported by substantial evidence, the findings are arbitrary and capricious and should be rejected.

III. Evidentiary Hearings Must Be Held Before Imposing a Change in Water Rights as Contained in the Proposed Order

The operational requirements that restrict the use of project water contained in the Proposed Order amount to de facto changes to the terms and conditions of Reclamation's and DWR's water rights, which may not be imposed absent compliance with the necessary procedural requirements, including notice and an evidentiary hearing, as required pursuant to state and federal constitutional law. It is unclear what asserted legal authority allows the SWRCB to offer a *sua sponte* modification to DWR's and Reclamation's water rights (see Section IV, below). However, if styled as "public trust" or to "prevent waste and unreasonable use," Reclamation's and DWR's water rights provide that such exercise of power must be preceded by "notice to all affected parties and opportunity for hearing." (See, e.g., Application 5630 (Permit 16478), Paragraph 29). Whatever the claimed authority, the state and federal constitutions require due process, including notice and opportunity to be heard and to challenge the evidence forming the basis of the Proposed Order. This constitutionally required minimum level of pre-decisional due process is lacking in this case.

IV. The SWRCB Lacks Authority to Renew Urgency Orders *Sua Sponte*

An order on petitions for reconsideration is not an opportunity to renew, *sua sponte*, the no-longer-active Urgency Orders or to modify the Urgency Orders to impose unrequested changes on DWR's and Reclamation's future operations. The Proposed Order purports to renew the July 3, 2015, modification to the February 3, 2015, Urgency Order⁶ which is set to expire on December 30, 2015⁶ for an additional 180 days. The SWRCB lacks authority to renew the Urgency Orders without a request to do so from DWR, Reclamation, or both.

Section 1441 of the Water Code states, "Requests for renewal shall be processed in the manner provided by this chapter except that the permittee or licensee shall not be required to file

duplicate maps, drawings, or other data if they were furnished with the original petition.ö This chapterö refers to Water Code sections 1435-1442, which governs temporary urgency changes. There is no provision in that chapter for the SWRCB or its staff to request or impose a temporary urgency change; the only process described requires the öpermittee or licenseeö to öpetition forö the change. (Wat. Code § 1435(a).) *After* the permittee or licensee petitions for the change, öthe board may issue a conditional, temporary change order.ö (*Id.*) Therefore, the process for a request for renewal of an urgency order requires, first, a request from the permittee or licensee öin the manner provided for inö Water Code section 1435. Only after the permittee or licensee has submitted a renewal request does the SWRCB then have discretionary authority to decide whether or not to renew an urgency order, just as the SWRCB lacks discretionary authority to *issue* an urgency order before the permittee or licensee petitions for one.

Because neither DWR nor Reclamation requested that the Urgency Orders be renewed, the SWRCB has no authority to renew them *sua sponte*, and the SWRCB certainly lacks authority to renew the Urgency Orders under the guise of ruling upon now-moot petitions for reconsideration.

V. The SWRCB Lacks Authority to Rule upon Moot Issues in an Order on Reconsideration

Having waited until öall of the changes [imposed under the Urgency Orders] are no longer in effectö (Proposed Order at p. 25) and admitting that issues raised in the petitions for reconsideration were now moot (Proposed Order at pp. 26, 28), the SWRCB cannot now issue a decision on reconsideration that purports to rule upon the now-moot reconsideration petitions in an effort to impose new, unrequested temporary urgency changes on the Change Petitionersö 2016 operations. Without an ongoing controversy, the SWRCB lacks authority to rule upon moot issues.

VI. The SWRCB Lacks Authority to Impose, as a Condition of Renewal of the Urgency Orders, Operational Requirements that are Outside the Scope of the 180-Day Renewal

Even if the SWRCB had authority to renew the Urgency Orders on its own volition, which it did not, it could not impose as a condition of renewal operational requirements that are outside the scope of the time-limited renewal. A properly requested and granted renewal of an urgency orders is only valid for a period of no more than 180 days from the date of renewal. (Wat. Code § 1441.) The Proposed Order itself states that it will expire on June 12, 2016. (Proposed Order at p. 59.) However, the Proposed Order contains specific carryover requirements that have an effective date of October 31, 2016. (Proposed Order at pp. 61, 63 (requiring specific "minimum end of October storage level[s]" for Shasta and Folsom reservoirs). The time-limited scope of the purported *sua sponte* renewal of the Urgency Orders precludes the SWRCB from imposing within the renewed Urgency Orders requirements that will apply only after the renewal will have expired.

VII. The Agenda Language for the SWRCB's Consideration of this Sua Sponte Renewal of the Urgency Orders Violates the Bagley-Keene Act

The agenda item under which the SWRCB will consider renewing the July 3, 2015, modification to the Urgency Orders is inadequate to comply with the requirements of the Bagley-Keene Act (Gov. Code § 11120 *et seq.*). The agenda item for this matter on the SWRCB's initially released and first revised agendas for the SWRCB's December 15th and 17th meeting read:

Consideration of an [sic] proposed Order taking action on Petitions for Reconsideration of the Executive Director's February 3, 2015 Order Approving in Part and Denying in Part a Temporary Urgency Changes in License and Permit Terms and Conditions for the State Water Project and Central Valley Project and Subsequent Modifications to That Order.

The agenda item for this matter on the second and third revised agendas was slightly modified to read:

Consideration of an [sic] proposed Order granting In Part and Denying In Part the Petitions for Reconsideration of the Executive Director's February 3, 2015 Order that approved Temporary Urgency Changes in License And Permit Terms and Conditions for the State Water Project and Central Valley Project and Subsequent Modifications to that Order.

Neither version of the agenda item complies with the Bagley-Keene Act because it does not adequately describe the actual proposed action to be taken. That act requires that an agenda must describe the "items of business to be transacted or discussed" at the meeting. (Gov. Code § 11125(b).) Neither iteration of the agenda language gives any notice that the SWRCB would consider modifying or renewing for 180 days the Urgency Orders, nor did it give notice that it would consider imposing new operational requirements for 2016 CVP operations, including carryover storage requirements for Folsom and Shasta, which were not within the scope of any of the Urgency Orders. The agenda description may have alerted the approximately 10 petitioning parties (see Proposed Order p. 24) that action was proposed to be taken on their petitions for reconsideration. However, many more parties would be interested and concerned with the actual proposed action to be taken to dictate CVP operations in 2016 (and in turn interconnected SWP operations in 2016). This failure of notice prejudiced the Change Petitioners, Reconsideration Petitioners, and many other potentially interested parties because they were left with no notice of the actual proposed action to be taken and had inadequate time to prepare objections and responses related to the 180-day renewal and the imposition of 2016 operational constraints.

VIII. The SWRCB's Executive Director Lacked Authority to Issue the Underlying Urgency Orders and Modifications Thereto

The underlying Urgency Orders were issued by the SWRCB's Executive Director. The Proposed Order avers that the SWRCB's statutory authority to approve and modify Urgency Orders was properly delegated to the SWRCB's Executive Director. (Proposed Order at p. 21.) The Proposed Order states that the delegation was accomplished via SWRCB Resolution Nos. 2012-0029 and 2012-0061. (*Id.*) Neither of those resolutions authorized the Executive Director to approve or modify the Urgency Orders.

Resolution 2012-0061, despite the Proposed Order's protests to the contrary, is a delegation of authority to individual members of the SWRCB and to the Deputy Director for Water Rights, and contains no delegation to the Executive Director. Section 4.4.1 delegates to the Deputy Director authority to act on TUCPs and requests to renew urgency orders. Under section 4.4.1, if any objections are received, the Deputy Director "shall refer the matter to the Executive Director for action under section 2.2." Section 2.2, in turn, is a delegation *for individual board members* to act on TUCPs and requests to renew urgency orders. The reference to section 2.2 in section 4.4.1 assuredly does not act as an implicit delegation of authority to the Executive Director. A plain reading of the resolution would require the Executive Director, upon referral by the Deputy Director pursuant to section 4.4.1, to present the matter to a SWRCB member for action. Nothing in Resolution 2012-0061 explicitly or impliedly delegates authority to the Executive Director to act on TUCPs or to renew urgency orders. The SWRCB could have, but did not, clearly delegate such authority to the Executive Director. Had it done so, the delegation would have been through a clear delegation to the Executive Director, not by oblique reference to section 2.2 of Resolution 2012-0061, which only delegates authorities to individual board members.

Nor does Resolution 2012-0029 delegate to the Executive Director authority to act on TUCPs and urgency orders. The Proposed Order argues that the Executive Director is generally delegated authority to "conduct and supervise the activities of the State Water Board." (Proposed Order at p. 55.) However, that "delegation" is so broad and so vague as to be ineffectual. An appointed, publicly accountable body such as the SWRCB may not simply delegate *all* of its power and authority, without limitation, to an unaccountable staff member. Generally, delegations of authority must be sufficiently definite to provide directives of conduct in exercising the delegation. (E.g., *In re Marks* (1969) 71 Cal.2d 31.) Clearly, a delegation of all of the administrative body's authority to a single staff member is insufficiently definite to be valid. Because the underlying Urgency Orders are void for lack of valid delegation to the Executive Director, the SWRCB's potential action to renew these void Urgency Orders are similarly invalid.