

CENTRAL DELTA WATER AGENCY

235 East Weber Avenue • P.O. Box 1461 • Stockton, CA 95201
Phone (209) 465-5883 • Fax (209) 465-3956



DIRECTORS
George Biagi, Jr.
Rudy Mussi
Edward Zuckerman

COUNSEL
Dante John Nomellini
Dante John Nomellini, Jr.

May 19, 2014

Via email (commentletters@waterboards.ca.gov)
and U.S. Mail

Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Items 12 and 13 SWRCB Meeting May 20-21, 2014
Drought-Related Emergency Regulations for Curtailment and
Workshop Regarding Curtailments in the
Sacramento-San Joaquin Delta Watershed

Dear Chair Marcus:

Thank you for the opportunity to comment as to the above matters.

We continue to be very concerned that the drought actions to date and much of what is proposed go beyond those justified pursuant to the emergency proclamations of the Governor.

Emergency actions justifiable to protect the true health and safety needs of people do not support regulatory actions to reallocate water contrary to the water right priorities, statutory priorities, water quality objectives and public trust.

There is clear evidence showing that actions of the SWRCB have strongly favored exports of water from the Delta to serve urban and agricultural interests to the south. The 2014 temporary urgency changes and actions in 2013 are the most recent. The broad authority granted to the Executive Director both as to regulating and granting temporary urgency changes and directing enforcement presents a serious conflict of interest.

Emergency Regulations

Emergency regulations which eliminate the due process associated with a hearing in

advance of an imposition of a penalty are particularly onerous. The complexity of water rights and the wide range of differing physical conditions and impacts necessitate a more problem specific approach.

Water Code Section 1058.5 which is cited as the basis for emergency regulations appears to be directed at wasteful actions and more importantly requires that the regulation is responding to “conditions which exist, or are threatened in a critically dry year immediately preceded by two or more consecutive dry or critically dry years.”

The April 8, 2014 Central Valley Project and State Water Project Drought Operations Plan and Operational Forecast April 1, 2014 through November 15, 2014 at page 3 explains:

“Three years have passed since sufficient rain and snow fell on California to classify the year as ‘wet’. In 2012, precipitation was below average, and 2013 was classified as dry. So far, 2014 has proven abnormally dry and will be classified as critically dry.”

Bulletin 120 shows 2012 for the Sacramento Valley classified as “Below Normal.” For the San Joaquin Valley the classification for 2012 is “Dry”.

The current drought conditions were not unexpected and have been anticipated in the water year classifications and critical year relaxations of water quality objectives encompassed in SWRCB Decision 1641 and in the planning for the SWP and CVP extending back to the 1940’s. It was always recognized that continuing development of water storage projects would be necessary to generate surplus water to serve the increasing demand of water project contractors while at the same time meeting senior water rights requirements for the Delta and other Watersheds of Origin, salinity control and the public trust. The SWP plan to develop by the year 2000 sufficient water storage projects in the North Coast watersheds so as to supplement Delta water supplies by 5 million acre feet per year was critical to provide the necessary surplus water to serve the drought needs of the project contractors who now are being unlawfully favored by the TUCs. The suggestion that the current drought conditions were beyond the expectation of the water year classifications and critical year water quality relaxations in the current Water Quality Control Board Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary is not supportable. The Water Quality Objectives were adopted in 1995. The historical records of hydrology used for planning the SWP and CVP extended at least back to about 1917-18 and certainly included 1977. The date of the Governor’s Proclamation Suspending WC 13247 was April 25, 2014.

The Northern Sierra Precipitation: 8-Station Index presented by DWR on May 6, 2014 was well above 1976-77 referred to as the “2nd Driest” year and reservoir storage for Shasta, Oroville, Folsom and Trinity was well above 1976-77. DWR Delivery Reliability Reports extending back to about 2003 all show the limited ability of the SWP to export water in a year

like 1977. Table B-6 SWP water delivery from the Delta for Study 4 from the State Water Project Delivery Reliability Report 2005 shows for a year like 1977 SWP delivery from the Delta of Table A water at 159,000 AF and Article 21 water at 0 AF. The Modeling Assumptions in such report included meeting the D-1641 "Delta Outflow Index (Flow and Salinity) and the Delta Cross Channel Gate Operation". The water year classification in D-1641 uses a weighted formula which takes into consideration the index for the prior year and was intended to address water years drier than 1977 and certainly those wetter than 1977.

We oppose the currently proposed use of emergency regulatory authority in the above-referenced actions.

The minimum flow requirements for various tributaries requires a more open and deliberative process affording meaningful due process to all parties. The current crises merits a negotiated solution with funding for acquisition of desired water rather than a regulatory taking.

As to Alternatives in Item 13, the SWP and CVP have the affirmative obligation to provide salinity control and an adequate water supply for the Delta. Additionally, no water is to be exported from the Delta unless the Delta is first provided an adequate supply. See Water Code Section 12200 et seq. D-1641 sets maintenance of specific water quality objectives as a condition of the SWP and CVP permits and licenses. The critical year relaxations in such objectives were developed to address conditions such as the current drought.

The broad imposition of Term 91 is unfair in that it allows the projects to use unregulated flow including natural flow which is not surplus to the needs of the Delta and other areas of origin to meet the project obligations. The enforcement of Term 91 where conditions have been accepted by the permittees, although perhaps unfairly imposed, is not objected to at the present time.

Alternative One which provides curtailment to protect senior water users and previously stored water releases to meet Delta Water Quality and Flow requirements should not allow an exception for SWP and CVP stored water unless it is assured that the D-1641 Water Quality and Flow objectives are and will for the foreseeable future be met.

The project water right settlement agreements and other agreements are based on the priority of project water permits and licenses. They are not necessarily the true reflection of senior water right entitlement and are therefore subject to the conditions and obligations of the projects.

Water stored under circumstances where the Delta water quality and flow objectives were not being met or where it appeared that such could not be met due to other project actions are the result of illegal diversions and should be reserved solely to meet the present and future Delta

water quality and flow objectives.

Health and safety should be limited to the real needs of people and should not extend to other municipal needs.

The water held in storage south of the Delta which was diverted without compliance with the Delta standards should not be applied to other uses unless it is clear that Delta requirements will in the foreseeable future be met. The use for true health and safety should be limited to situations where no other reasonable alternative is available.

Respectfully submitted,



Dante John Nomellini
Manager and Co-Counsel