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Via e-Mail (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: State Water Board Meeting May 20-21, 2014
Comments on Agenda Items 12 (Proposed Resolution Regarding Drought-Related Emergency Regulations for Curtailment of Diversions) and 13 (Workshop Regarding Options for Drought-Related Curtailments of Post-1914 Water Rights in the Sacramento-San Joaquin River Delta Watershed)

Dear Chair Marcus:

We respectfully submit these comments regarding the above-referenced agenda items on behalf of the Northern California Water Association and the water users identified in Attachment 1 (collectively "NCWA"). NCWA's responses to the "Issues for Discussion at the Workshop" are set forth in Section III of this letter.

Summary of Comments

NCWA appreciates the steps taken by the State Water Board to mitigate the effects of the drought. The drought has created a sense of urgency among regulators and others to act on water issues. But in the complex area of California water law and policy the desire to act must be tempered by deliberation, a thorough understanding of consequences and a public process that inspires confidence in the integrity of the decision-making process.

The proposed emergency regulation for Mill/Deer/Antelope Creeks (Agenda item 12) and certain of the proposals for curtailing water use in the Sacramento-San Joaquin River Delta (Delta) Watershed (Agenda item 13) would radically change how water is allocated during periods of drought in California. Since statehood, the rule of priority has been California's principal mechanism for allocating water during times of shortage. In *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, the California Supreme Court was called upon to decide whether a physical solution adopted in the context of a groundwater adjudication could disregard water right priorities in order to apportion water rights on an "equitable" basis. In a unanimous decision, the Supreme Court rejected the argument that considerations of "equity" could justify

subverting the rule of priority. The Supreme Court sent a strong message regarding the rule of priority: "[W]ater right priority has long been *the central principle in California water law*" and the "corollary of this rule is that an equitable physical solution *must* preserve water right priorities to the extent those priorities do not lead to unreasonable use." *Id.* at 1243 [emphasis added]. Six years later, the Third District Court of Appeal cited this decision to emphasize that the State Water Board has an affirmative obligation to make "*[e]very effort* . . . to respect and enforce the rule of priority." *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 966 ("*EID*") (emphasis added).

In past droughts the State Board has respected the rule of priority. It has applied Term 91 to those post-1914 water rights that are subject to that term and, in critically dry years, it has issued notices of curtailment for all post-1914 appropriative water rights. (The State Water Board issued such notices in 1977, 1988, 1991, 1992 and 1994.) This approach has enabled water users to understand the "rules of the road" and has brought certainty to the administration of water rights during times of drought. Water was allocated based on the rule of priority and junior rightholders were free (as they are today) to supplement their water supplies from alternate sources of supply, such as groundwater wells, purchased water, or rediversion of earlier storage and through voluntary, market-based water transfers.

It appears that the State Water Board has determined that there is not adequate water available to meet the water supply requirements of post-1914 appropriative water rights in the Delta Watershed and that the State Water Board may move forward with the issuance of curtailment notices for post-1914 appropriative rights in the Delta Watershed, consistent with past practice. Assuming this occurs, then consistent with the State Water Board's past practice, the notices should expressly exclude from the curtailment order water users that are diverting pursuant to water right settlement contracts including, without limitation, Sacramento River Settlement Contractors, Feather River Settlement Contractors, Yuba County Water Agency Member Units, water users within the North Delta Water Agency, and the San Joaquin River Exchange Contractors, or other contracts under which the Bureau of Reclamation or the Department of Water Resources have obligations to protect contractors from injury due to exports.

The proposals now before the State Water Board radically depart from past practices. For example, the proposed emergency regulation for Mill/Deer/Antelope Creeks (Agenda item 12) would categorically declare diversions from the affected watersheds "unreasonable" when stream flows fall below certain thresholds, without regard for the individual facts and circumstances of each diversion. Such a categorical declaration would violate the well-established principle that what is a reasonable use or reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case. It would also violate the procedural due process rights of the affected parties. The proposed regulation would set an unconstitutional and dangerous precedent for categorical determinations of "unreasonable" use in other factual contexts.

If the State Water Board believes that violations of the constitutional requirement of reasonable use or the public trust doctrine are occurring on Mill/Deer/Antelope Creeks (or anywhere else), the proper course of action is to initiate a targeted enforcement proceeding against those water users that have allegedly violated these legal requirements. The State Water Board has ample legal authority to initiate such proceedings, as discussed further in this letter. In addition, the National Marine Fisheries Service (NMFS) has enforcement authority under Section 9 of the Endangered Species Act. 16 U.S.C. § 1538; *cf. United States v. Glenn-Colusa Irr. Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (NMFS enforcement action against GCID). The targeted water users will be entitled to have their "day in court," *i.e.,* an evidentiary hearing, and the State Water Board may then determine what enforcement action, if any, is warranted based on the evidentiary record.

Several of the options identified for curtailment of post-1914 water rights in the Delta Watershed (Agenda item 13) would utilize the emergency regulation mechanism to subvert the rule of priority and avoid due process protections. Option 1 would utilize existing mechanisms for water right curtailment. There is no evidence that the current system, which involves the issuance of notices of curtailment based on priority groups, is not working. Option 1 would be acceptable to NCWA, as long as it is limited to post-1914 rights. NCWA and its members are eager to work collaboratively with State Water Board staff to collect, analyze and refine available data to inform this process.

Options 2, 3 and 4 would rely on the adoption of emergency regulations to curtail water rights under various scenarios. While all of the latter options are of concern to NCWA, Option 3 is particularly troubling because it would add a permit term or license condition similar to existing Term 91 to all post-1914 water rights in the Delta Watershed. In effect, such a term would require all post-1914 water rights to curtail diversions in order to meet Bay-Delta water quality objectives, thereby pre-judging the entire Bay-Delta water right process. The determination of whether senior water right holders have any responsibility to meet Bay-Delta water quality objectives is a complex matter and the State Water Board's own prior orders make clear that an evidentiary hearing is required before any such responsibility can be assigned.

NCWA is deeply concerned about the use of emergency regulations to address water right curtailment issues. Administrative expediency does not justify deviation from established due process protections and the basic tenets of California water law. Moreover, many of the factual assumptions that underlie the proposed emergency regulations have not been adequately tested through a fact-finding process. The State Water Board should move forward in a manner that is consistent with past practices and established tenets of law.

I. Agenda Item 12: The Proposed Emergency Regulation Would Be Unlawful.

The State Water Board is considering the adoption of a proposed regulation (Section 878.1) that would restrict a large number of existing uses based on a sweeping determination that each and every one of those uses is "unreasonable." Such blanket regulations are not constitutional when

they broadly and uniformly affect groups of vested rights holders without specific and particularized findings as to how those individual rights are exercised. *See State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 750 ("[A]s repeated on innumerable occasions, what is reasonable use or reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case"); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 219 Cal.2d 489, 531. Decisions affecting existing rights are quasi-judicial and require the procedural protections of notice, a hearing, the opportunity to present evidence, and individualized findings. *See In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339, 348-349; *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723.

Here, the State Water Board would only make (thinly supported) findings regarding the minimum flows required in the three named tributaries. Although the staff report cites several studies regarding the state of threatened or endangered salmonids in the Central Valley generally, its primary basis for selecting the minimum flows in the proposed regulations is contained in just three pages (Attachments 11 and 12). The staff report does not contain any findings about specific individual uses, their relative priority dates, or to what extent each use poses a risk to salmonid populations. Until it does so in a quasi-judicial proceeding, the State Water Board may not curtail vested water rights solely on the basis of generalized findings. By sweeping a large number of water users within the scope of a single binding determination, based on scant evidence of the *aggregate* impact of their uses, the State Water Board is curtailing lawful diverters without making a defensible determination of unreasonable use as to any single user. To the extent the State Water Board believes that violations of the constitutional requirement of reasonable use or the public trust doctrine is occurring on any of the subject tributaries, the proper course of action is to initiate a targeted enforcement proceeding against those water users that have allegedly violated these legal requirements. The targeted water users will be entitled to have their "day in court" in the form of an evidentiary hearing and the State Water Board can determine what actions, if any, are warranted based on the evidentiary record.

The State Water Board's claimed authority for promulgating the emergency regulations—Water Code section 1058.5—only authorizes it "to require curtailment of diversions when water is not available *under the diverter's priority of right*." (Emphasis added.) Far from making "every effort" to enforce the rule of priority, Section 878.1 would subvert California's water right priority system in at least two ways. First, as discussed above, the regulation would categorically declare diversions from the affected watersheds to be "unreasonable" when stream flows fall below certain thresholds, without regard for the individual facts and circumstances of each diversion. *See* Cal. Code Regs. tit. 23, § 877 [proposed]. Second, by equating municipal and industrial (M&I) uses with human health and safety, the regulation would effectively elevate junior M&I uses above other, more senior uses. By default, Section 878.1 would make diversions within Antelope, Deer and Mill Creeks "unreasonable" when stream flows are below the new minimum floors, thereby prohibiting such diversions. But the regulation would

authorize "limited diversions ... outside the order of priority"[1] if they meet the definition of "minimum health and safety needs." Although existing law defines minimum health and safety needs according to the water needed for "human consumption, cooking and sanitation," (Water Code § 106.3; Cal. Code Regs., tit. 23, § 697(b)), the proposed regulation would define that term much more broadly. Section 878.1 would define "minimum health and safety needs" to include "municipal supplies" generally, not just those necessary for human consumption, cooking and sanitation. Thus, there is nothing "minimal" about the alleged "minimum health and safety" diversions that section 878.1 would authorize.

When the State Water Board has reason to believe that unreasonable use of water *is already occurring*, it has three procedural options for preventing such use, all of which are adjudicative. The first option is to bring a judicial action to enjoin the unreasonable use. *Cf. People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743. This authority derives from the fact that Article X, Section 2 is "self-executing"; any person or agency, including the State Water Board, may bring an action to enjoin unreasonable use. *See Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 198-200. The second option is to commence a quasi-adjudicative proceeding pursuant to Water Code section 275. Such a proceeding names the water users that will be affected, and the outcome is an enforceable State Water Board decision or order binding the parties. The third option is to issue a cease and desist order, the violation of which subjects the water user to administrative civil liability. *See* Water Code § 1845. Water Code section 1831(d) authorizes the State Water Board to issue cease and desist orders to enforce section 1052's prohibition against unauthorized diversions. (Section 100 provides that the right to use water does not extend to waste or unreasonable use. Thus, the unreasonable use of water qualifies as an "unauthorized use" under section 1052.)

What these three procedures have in common is that they each provide affected users with notice and the opportunity for a hearing. *See, e.g.*, Water Code § 1831(c). Such hearings are a crucial due process check on agency action. They allow the water user to scrutinize the State Water Board's alleged basis for the unreasonable use determination as well as present their own contrary evidence before a neutral decision maker. By contrast, the emergency regulations that the State Water Board has proposed here provide no such opportunity.

Adoption of Section 878.1 would establish a dangerous precedent. It would take the State Water Board down the dual paths of categorical determinations of unreasonable use and the re-prioritizing of water rights. Moreover, it would trigger takings litigation that would not facilitate, in any way, voluntary arrangements to mitigate the effects of the current drought. Proposed Section 878.1 reflects a radical departure from the historical administration of water rights in California. It must be rejected.

[1] SWRCB findings re: 878.1.

II. Agenda Item 13: The State Water Board Should Continue Its Past Practice of Addressing Water Right Curtailments During Droughts Through the Application of Term 91 and the Issuance of Curtailment Notices Based on Water Right Priorities.

The staff report accompanying Agenda Item 13 identifies four options for curtailing post-1914 water rights in the Delta Watershed: (1) Curtailments to protect senior rights and stored water releases based on reported water use under existing authorities; (2) Curtailment to protect senior rights and stored water releases based on reported water use through emergency regulations; (3) Curtailment based on a "Term 91 Approach" requiring diverters in addition to Reclamation and DWR to bypass flows to provide for Delta outflows and water quality requirements; and (4) Curtailments based on the adoption of a "Term 91-like emergency regulation" requiring Reclamation and DWR to meet Delta outflow requirements without contributions from other diverters.

NCWA supports Option 1, which is essentially the historical practice of the State Water Board, as long as it is limited to post-1914 appropriative rights. Option 1 should be limited to post-1914 rights because the State Water Board does not have sufficient information to determine the relative priorities of pre-1914 appropriative rights or riparian rights. Also, while riparian rights normally have priority over appropriative rights, an appropriative right is "superior to the right of a riparian owner who subsequently obtains title to public land from the government." (*Pleasant Valley Canal Co. v. Borror (1998) 61 Cal.App.4th 742, 774.*) Moreover, under certain circumstances, it may not be reasonable for riparians to claim priorities against upstream appropriative rights. For these reasons, it would be improper for the State Water Board to issue a notice requiring curtailments of all diversions under pre-1914 appropriative rights to protect supplies for riparian rights.

NCWA objects to Options 2, 3 and 4 because the use of emergency regulations in this context would violate due process and substantive protections of California water law. As discussed below, NCWA is particularly troubled by Option 3 which would impose obligations to meet Bay-Delta water quality objectives on all post-1914 water rights without an evidentiary hearing.

A. The State Board Lacks Authority to Adopt an Emergency Regulation That Adds a Permit or License Condition Similar to Existing Term 91 to All Post-1914 Water Rights in the Delta Watershed (Option 3).

The "Term 91" approach to Delta watershed curtailments that the State Water Board is considering presents a serious and unlawful conflict with the rule of priority. The State Water Board agenda and accompanying documents indicate that, under this proposal, the State Water Board would expand Term 91 to *all* post-1914 appropriators in the Delta watershed. Doing so would prohibit all such rightholders from diverting water when the CVP and SWP are releasing stored water to meet Delta water quality requirements. Because there are times when the projects release stored water *and* some natural/abandoned flow still exists in the watershed, this proposal would subvert the rule of priority by prohibiting many lawful water users from

diverting even when their priorities would give them the right to divert natural or abandoned flows. In other words, applying Term 91 to *all* permitted water rights in the Delta watershed would improperly force senior water rights to share the CVP and SWP's responsibility for meeting Bay-Delta water quality objectives, as set forth in the Water Quality Control Plan.

In 2000, the State Water Board was about to commence an administrative proceeding, known as the Phase 8 water right hearing, to determine the responsibility of water users within the Sacramento Valley to meet Bay-Delta water quality objectives. At the urging of a broad coalition of water users and state and federal agencies (including NCWA, the State Water Contractors and the California Department of Water Resources), the State Water Board initially stayed and subsequently dismissed the Phase 8 hearing, and instead allowed a settlement of the Phase 8 water right issues.[2] In its decision not to hold the Phase 8 hearing the State Board observed:

> In the absence of a hearing, the SWRCB could not place responsibility for meeting the [Bay-Delta] objectives on a party or parties other than the DWR and the USBR. Accordingly, the most reasonable approach is to retain the existing responsibilities to meet the objectives until the SWRCB is able to complete a hearing and make a decision after the hearing. (WR 2001-05 at p. 6.)

The determination of whether senior water right holders have any responsibility to meet Bay-Delta water quality objectives is a complex matter. If the State Water Board decides to take up this matter at some future date, its own prior orders make it clear that an evidentiary hearing will be required. The State Water Board lacks authority to assign responsibility to meet Bay-Delta water quality objectives to senior water right holders through the broadened application of Term 91 through the adoption of an emergency regulation. Before assigning such responsibility the State Water Board would first be required to undertake a comprehensive determination of the responsibility of other water users (including the state and federal projects), to meet those objectives. Due process considerations and basic tenets of California water right law preclude the State Water Board from apportioning Bay-Delta responsibility in the piecemeal and essentially arbitrary fashion proposed here.

As the Third District Court of Appeal found in *El Dorado Irrigation District v. State Water Resources Control Board*, the State Water Board cannot disregard priorities without "substantial

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[2] From July 1, 1998, through December 21, 1999, the State Board conducted Phases 1 through 7 of the Bay-Delta Water Rights Hearing. On December 29, 1999, the State Board adopted Decision 1641, determining some of the responsibilities for meeting the objectives in the 1995 Bay-Delta Water Quality Control Plan, and resolving other related issues. Thereafter, the State Board issued a hearing notice for Phase 8 of the Bay-Delta Water Rights Hearing, to determine the responsibilities of the water right holders within the watersheds of the Sacramento, Calaveras and Cosumnes Rivers to meet flow-dependent objectives in the 1995 Bay-Delta Plan. Pursuant to State Board Orders WR 2001-05 and WR 2002-0012, however, Phase 8 was stayed and ultimately dismissed.

justification." 142 Cal.App.4th 937, 967 n. 21. "[W]hen the Board seeks to ensure that water quality objectives are met in order to enforce the rule against unreasonable use and the public trust doctrine, ... the subversion of a water right priority is justified *only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.*" *Id.* at 967 (emphasis added). In *El Dorado*, the court found that Term 91 "simply functions to protect the projects by relieving them of some of the responsibility for meeting Delta water quality objectives that otherwise would fall on them. ... *[T]he Board's interest in protecting the projects' stored water for export does not trump the rule of priority.*" *Id.* at 967-68, 969 (emphasis added).

B. Options 2 and 4 Should Likewise Be Rejected.

Option 2 would adopt an emergency regulation requiring curtailment of diversions "unless those diversions are needed for minimum health and safety purposes or other critical purposes and alternative water supplies are not available." Thus, Option 2 would have the effect of placing diversions needed for "minimum health and safety purposes" (as broadly defined in the regulation) ahead of diversions needed for irrigation or other uses regardless of water right priority. Option 2 would violate the rule of priority and constitute a taking of senior water rights and is therefore unconstitutional and otherwise unlawful. As noted above, the State Water Board's claimed authority for promulgating the emergency regulations—Water Code section 1058.5—only authorizes it "to require curtailment of diversions when water is not available *under the diverter's priority of right.*" The State Water Board has made no such showing here.

Option 4 would adopt a "Term 91-like emergency regulation" but instead of curtailing diversions of natural flows needed to meet Delta Outflows and other Delta water quality requirements, those flows would remain the responsibility of the CVP and SWP. Current water rights with Term 91 would still be curtailed under the existing formula. The key question regarding Option 4 is: why is it needed? Existing orders of the State Water Board require the CVP and SWP to meet Delta water quality requirements. Term 91 is already applicable to water rights containing that term. Option 4 would require the entire process of adoption of an emergency regulation with no net gain. In light of the concerns raised above concerning the use of emergency regulations for water right curtailment purposes, Option 4 should be rejected.

III. Issues for Discussion at the Workshop

1. Which curtailment option would be most effective and enforceable?

Option 1, which is consistent with past practices, would be most effective and enforceable, as long as it is limited to post-1914 appropriative rights. As discussed in detail above, the other options have significant legal and practical infirmities. Additionally, Term 91 notices were issued last week, which will operate in tandem with the curtailment notices. As stated earlier, we support Option 1 and encourage the SWRCB to move forward in this manner.

2. Are there any other curtailment options that should be considered?

No. The historical practice of issuing curtailment notices has worked relatively well. There is no evidence of widespread violation of curtailment notices.

3. How can human health and safety needs be addressed under the various approaches to curtailments?

Initially there needs to be a clear understanding of what "minimum human health and safety needs" means. The definition suggested by staff appears, at best, to be arbitrary and lacking in evidentiary support. Once properly defined, human health and safety needs must be addressed within the parameters of the water right system including the rule of priority. As has occurred in the past during times of shortage the needs of municipal and industrial water users can and should be addressed through voluntary, market-based water transfers.

4. How can the State Water Board ensure that Delta needs will be met? The needs of fish and wildlife? The needs to maintain adequate end of month storage levels?

The State Water Board should continue to monitor and, if necessary, require the CVP and SWP to continue to take actions to implement the Bay-Delta Water Quality Control Plan. In addition, the CVP and SWP will be required to comply with the current Biological Opinions governing project operations. There is no evidence that the needs of fish and wildlife are not being met during the current drought. Nor is there evidence that adequate end of month storage levels are not being maintained. If the State Water Board desires to conduct additional fact-finding on these issues it should conduct an evidentiary hearing so that all interested parties have an opportunity to be heard.

To the extent the Board believes that violations of the constitutional requirement of reasonable use or the public trust doctrine are occurring, the proper course of action is to initiate a targeted enforcement proceeding against those water users that have allegedly violated these legal requirements. The targeted water users will be entitled to have their "day in court" in the form of an evidentiary hearing and the State Water Board can then determine what enforcement actions, if any, are warranted based on the evidentiary record. NMFS also has the option of bringing an enforcement proceeding under Section 9 of the Endangered Species Act.

5. How can voluntary water-sharing agreements be accommodated? What criteria should be used to determine whether voluntary agreements are viable alternatives to mandatory curtailments?

Voluntary water-sharing agreements, by definition, are based on voluntary arrangements. Voluntary water transfers have historically been highly successful mechanisms for re-allocating water during periods of drought. The State Water Board should, as a matter of policy, encourage the use of voluntary water transfers as the principal mechanism for re-allocating water during

periods of drought. It should also encourage other voluntary arrangements for avoiding harm to water users and the environment.

6. Which curtailment option would be most responsive to changing conditions?

Option 1 is the most effective curtailment option and would be most responsive to changing conditions, as long as it is limited to post-1914 rights. If necessary, the State Water Board may engage in additional fact-finding through evidentiary hearings.

IV. Conclusion

For the reasons stated, NCWA respectfully urges the State Water Board not to adopt the proposed emergency regulation for Mill/Deer/Antelope Creeks. NCWA further urges the Board to adopt Option 1 and reject the adoption of emergency regulations governing water right curtailments.

Very truly yours,

DOWNEY BRAND LLP

Kevin M. O'Brien

KMO:bc

cc: State Water Resources Control Board Members:
Frances Spivy-Weber, Vice-Chair
Tam M. Dudoc
Dorene D'Adamo
Steven Moore

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ATTACHMENT 1:

Signatories to Comment Letter

Byron-Bethany Irrigation District
Calaveras County Water District
El Dorado County Water Agency
El Dorado Water & Power Authority
Glenn-Colusa Irrigation District
Meridian Farms Mutual Water Company
Natomas Central Mutual Water Company
North Delta Water Agency
Pelger Mutual Water Company
Princeton Codora Glenn Irrigation District
Provident Irrigation District
Reclamation District No.108
River Garden Farms Company
South Sutter Water District
Stevinson Water District
Sutter Extension Water District
Sutter Mutual Water Company