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**VIA E-MAIL**

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814  
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Re: Proposed Order Taking Action on Petitions for Reconsideration of and Addressing Objections to the Executive Director's January 31, 2014 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 (Proposed Order)

Dear Ms. Townsend:

This letter is in response to the proposed order, circulated on September 3, 2014, which takes action on petitions for reconsideration of and addresses objections to the State Water Board Executive Director's January 31, 2014 Order, and subsequent modifications to that Order, that conditionally approved a Temporary Urgency Change Petition (TUCP) to modify the conditions of the water right permits for the Department of Water Resources' State Water Project and the water right license and permits for the United States Bureau of Reclamation's Central Valley Project (Proposed Order). We submit this letter on behalf of the San Luis & Delta-Mendota Water Authority and Westlands Water District.

The San Luis & Delta-Mendota Water Authority urged the Board's reconsideration of its January 31, 2014 order, including as amended, on the basis that it was not supported by substantial evidence, contained errors in law, and the restrictions it imposed on export pumping were not in the public interest. Essentially, the Authority and Westlands insist that, in the current extraordinary drought conditions, the well-established need for and benefits of allowing the use of that water south of the Delta outweighs the competing and uncertain environmental benefit of more outflow. In the Proposed Order, the Board finds that the balance it struck was in the public interest. We respectfully disagree. The Board could and should have allowed more pumping than it did. Going forward, we ask that the Board remain open to giving greater weight to the water needs of farms and communities, especially if drought conditions continue into 2015. The Authority and Westlands object to the continued imposition of the 1,500 cfs cap on pumping in Conditions 1 and 2 of the Proposed Order as unsupported and contrary to the public interest.



The Board must take particular care that the Proposed Order, including Conditions 1 and 2, does not actually worsen the water supply circumstances for Central Valley Project water contractors through either direct or indirect restrictions on the volume of exports. To make a change in the Central Valley Project water rights permits pursuant to the TUCP, the Board must find that “[t]he proposed change may be made without injury to any other lawful user of water.” (Wat. Code, § 1435(b)(2).) As Central Valley Project contractors, the member agencies of the San Luis & Delta-Mendota Water Authority, including Westlands, are lawful users of the water involved, and are protected by the “no injury” rule applying to amendments to water rights permits. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 797-805 [applying the no injury rule in Water Code section 1702, and holding CVP contractors are “legal users of the water involved” in changes to CVP water rights permits].)

To ensure compliance with the no injury rule, the Board should be clear in its Proposed Order that none of the changes to the Central Valley Project permits it adopts may reduce the volume of water available to Central Valley Project contractors below the volume they would have received absent the permit amendments. A paragraph that begins at page 21 and carries on to page 22 of the Proposed Order is ambiguous on this point, and should be clarified before the order is finalized. The paragraph says “[i]rrespective of the terms of their contracts, the contractors do not have a legally protected interest in more water than DWR and Reclamation are authorized to deliver consistent with the conditions of their water right permits.” (Proposed Order at 22.) It goes on: “the export limitation is a temporary condition of DWR’s and Reclamation’s permits and license, which was lawfully imposed pursuant to the Water Code provisions governing temporary urgency changes. During periods when the modified export limitation is operative, DWR and Reclamation must comply with the limitation, and the contractors are not entitled to more water than DWR and Reclamation can deliver consistent with the limitation. Therefore, any reduction in contract deliveries caused by the modified export limitation did not and will not result in injury to the contractors.” (*Id.*) This passage might be read to mean that because Reclamation and DWR are subject to the conditions in their water rights permits as modified, there can be no injury to contractors from any changes. If that is the intent, the reasoning is flawed.

Whether a permit change would cause injury to contractors is a threshold question. If it would, then the permit change would be unlawful, and cannot be made. To make a temporary urgency change, the Board must find that “[t]he proposed change may be made without injury to any other lawful user of water.” (Wat. Code, § 1435(b)(2).) The Board cannot make that finding if a change in the water rights permits will cause a reduction in contract deliveries to Central Valley Project contractors compared to the deliveries they would have received under their contracts absent the change. (*State Water Resources Control Board Cases, supra*, 136 Cal.App.4th at p. 805.) That is, a change in permit terms that reduces contract deliveries compared to what they would otherwise have been would not be “lawfully imposed,” because it would violate the no injury rule. The Proposed Order should be revised to clarify that the permit


Jeanine Townsend, Clerk to the Board  
September 16, 2014  
Page 3

changes it adopts neither require nor authorize changes to Central Valley Project operations that would reduce water deliveries to Central Valley Project contractors.

Thank you for your consideration of these comments.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation



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