



O'Laughlin & Paris LLP

Attorneys at Law

SENT VIA EMAIL



September 16, 2014

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Commentletters@waterboards.ca.gov

Re: **Proposed Order Taking Action on Petitions for Reconsideration of and Addressing Objections to the Executive Director's January 31, 2014 Order**

Dear Ms. Townsend:

The San Joaquin Tributaries Authority ("SJTA") appreciates that the State Water Resources Control Board ("State Water Board") is addressing the Petitions for Reconsideration. The SJTA believes the Draft Order Denying Petitions for Reconsideration and Addressing Objections in the Matter of Specified License and Permits of the Department of Water Resources ("DWR") and the United States Bureau of Reclamation ("Reclamation") for the State Water Project and Central Valley Project ("Draft Order") includes important legal and factual determinations that may shape future water quality control objective processes. For this reason, the SJTA requests the Draft Order be clarified and revised as described below.

Section 4.6.1:

The SJTA understands that Water Code section 13247 was lifted this year by the Governor's drought emergency declaration and the State Water Board interprets this action as a reprieve from the requirement that the State Water Board fully implement the water quality objectives. However, the Draft Order's narrow focus on whether implementation is necessary this year misses the larger point made in the SJTA comments.

The larger point is that the State Water Board must account for sequential dry years when setting water quality objectives to avoid the need for emergency action and Temporary Urgency Change Petitions ("TUCP") in the future. The TUCP provides Reclamation with relief from meeting the existing Vernalis pulse flow. However, the Vernalis pulse flow has not been met since the conclusion of the

2617 K Street, Suite 100
Sacramento, California 95816
(916) 993-3962
(916) 993-3688-fax

117 Meyers Street, Suite 110
Chico, California 95928
(530) 899-9755
(530) 899-1367-fax

Mailing Address:
Post Office Box 9259
Chico, California 95927

Vernalis Adaptive Management Program; the failure to comply has not been limited to just this year. The State Water Board must set water quality objectives that are achievable in all years, which means it must consider relief from stringent objectives in sequential dry years.

Further, the State Water Board must consider climate change and its impact on the varied and extreme hydrology of California when setting water quality objectives. This year would be categorized as “critical” in D-1641. However, the category of critical is broad and is not adequate to address years, like this one: a critical year that has followed a sequence of several dry years. As the State Water Board undertakes its review of water quality objectives in the Bay-Delta Plan, the SJTA requests the State Water Board perform the required evaluation and balancing of beneficial uses to set achievable flows in sequential dry year periods. This planning will benefit all parties and limit the need for emergency actions that make last-minute changes to water quality objectives in place to protect beneficial uses of water.

Section 2.6:

The SJTA requests the State Water Board clarify the language in the first paragraph on page 11. The finding in the first sentence of that paragraph concludes the TUCP causes no injury to other lawful users of water. The finding is vague and ambiguous for several reasons.

First, it appears the finding is based on an assumption that all water claims made in Statements of Diversion and Use from 2010 amount to valid water rights. This assumption is not supported; a claim to hold a water right does not make the claimant a legal user of water. The State Water Board has previously recognized the limitations of using Statements of Diversion and Use and should not continue to rely on claims instead of validated rights. (“A Statement is not a confirmed water right; it is simply a statement made by the person or organization who diverted and used the water. Division of Water Rights staff do not analyze the contents of a Statement or research the legal water rights’ status of the diverter at the time of receipt. Staff determines if all the information has been filled out and the Statement is accepted as complete or returned as incomplete.” Water rights, Statement of Water Diversion and Use Program.)

Second, the Draft Order’s position on the protection of stored water released to meet water quality objectives is not clear. On page 11, the Draft Order correctly states that water released from storage for re-diversion is protected and cannot be diverted by downstream water users. However, the Draft Order continues on to conclude the TUCP will not injure legal users of water because “DWR and Reclamation would continue to meet modified flow requirements, and adequate flows were expected to remain in the system.” (Draft Order, at 11.)

The sentence implies that stored water released to meet a water quality objective is “abandoned” or otherwise available for appropriation. The general premise that water released or bypassed to meet water quality objectives is abandoned is not correct or consistent with the law. This is a very important legal issue and it reveals the tension between water rights and water quality.

If the purpose of a water quality objective is to protect a consumptive use of water, the water released or bypassed should be protected until such consumptive use is satisfied. However, to the extent that a water quality objective protects a non-consumptive use of water, the release or bypass of water to meet

such an objective cannot be viewed as an abandonment of water. Rather, the party releasing or bypassing water would continue to control the water to the point of compliance and may use the water in any lawful manner after the water has met the water quality objective.

The TUCP should be revised to clarify the extent to which water released by DWR and Reclamation is protected from lawful diversions in the Delta. This revision should consider the terms of D-1641 and the beneficial uses protected by the water quality objectives; it should not assume that any water released to meet water quality objectives is abandoned.

Section 4.4:

The Draft Order states that the full San Joaquin River flows may not provide a benefit due to temperature concerns. (Draft Order, at 32.) The Draft Order goes on to state temperatures were projected to be “too high” later in the season. (*Id.*) The SJTA requests the Executive Director provide specific temperatures that are considered to be “too high” and the scientific support for this conclusion. In addition, the SJTA requests the Draft Order be revised to include an analysis of whether water temperatures would have been acceptable had D-1641 flow objectives been met.

[Insert recipient]

[Recipient mailing address]

Very truly yours,

O’LAUGHLIN & PARIS LLP



TIM O’LAUGHLIN

TO/tb

cc: San Joaquin Tributaries Authority